A Socio-Legal Perspective of the Cinematograph Act, 1952

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I. INTRODUCTION

In India, the exhibition of films is governed by the Cinematograph Act, 1952. This Act, preceded by an Act of 1918, provides for the process of certification of films for public exhibition. It also provides for the licensing and regulation of cinemas. The Cinematograph Act, 1952 provides for the constitution of the Central Board of Film Certification (CBFC), consisting of a Chairman and other members for the purpose of sanctioning films for public exhibition. The number of members may range between 12 and 25. The Chairman and members are appointed by the Central Government and enjoy office at the pleasure of the Central Government. Neither do they have security of tenure, nor are qualifications for their appointment specified. Advisory panels may be established at regional centres consisting of "persons qualified in the opinion of the Central Government to judge the effect of films on the public." This is rather a nebulous qualification. A person desiring to exhibit a film is required to make an application to the Board in the manner prescribed under the rules.

The most important Act regulating the film industry is the Cinematograph Act, 1952, which has led to the establishment of CBFC. As per this Act, a film can be exhibited in India only after it has been certified by the CBFC. The importer of films should comply with the provisions of all applicable Indian laws governing the distribution and exhibition of films and would have to obtain a certificate for public exhibition from the CBFC which was set up under the Cinematograph Act of 1952. When Indian films are exported abroad, they have to go through the certification process in countries which have a censorship board. Presently, India does not have any agreement with countries having a censorship board, whereby a film certified in India will not have to obtain a separate certification in the foreign country. The Indian government is considering the possibilities of signing such an agreement with Australia.[1]

The Act allows the censorship of films and lays down the mechanism for such censorship. Films can only be exhibited in India after it has been certified by the CBFC. The Cinematograph (Certification) Rules, 1983 lays down the rules and regulations for certification of films by the Board. After examining the film, the Board may give one of the following grades to the film or may refuse to sanction the film for public exhibition. The grades

[1] Mukherjee, Arpita (2003) : Audio-visual policies and international trade: The case of India, HWWA-Report, No. 227, Hamburg Institute of International Economics (HWWA), Hamburg

are as follows:

I. U– for universal viewership or unrestricted public exhibition.

II. UA– for restricted viewership. Children below 12 years can see the film accompaniedby their parents.

III. A– for adult viewership.

IV. S– for restricted viewership, for only certain sections of the society.

The Cinematograph Act has been amended several times, in1953, 1957, 1959, 1960, 1973, 1981 and 1984.

A film is examined by an Examining Committee appointed by the Regional Officer to whom the application is delivered, in accordance with the Guidelines for Certification of Films for Public Exhibition under Section 5-B of the Act. The Examining Committee comprises of members of the Advisory Panel and an Examining Officer. Thereafter, the Chairman may, of his own motion or on the request of the applicant, refer the application to the Revising Committee constituted by the Chairman himself and comprising of members of the Board or of the Advisory Panels. The guidelines based on which the film is to be examined are broadly in consonance with Article 19(2) of the Constitution under which reasonable restrictions may be imposed in the interests of the sovereignty and integrity of India, the security of the State, friendly relations with foreign States, public order, decency or morality or where there is defamation, contempt of court or the likelihood of incitement of an offence. Upon examination, the film may be sanctioned for unrestricted public exhibition with a "U" certificate. Alternatively, the film may be sanctioned for unrestricted public exhibition with the endorsement that children below the age of 12 years may be permitted to see the film after consideration by their parents or guardians ("UA" certificate), or for restricted public exhibition confined to adults ("A" certificate), or for public exhibition restricted to members of any profession or class or persons ("S" certificate). Usually, the courts would be slow to interfere with a certificate granted to a film. A certificate under the Cinematograph Act, 1952 raises a rebuttable presumption which can be negated by positive evidence. But the grant of a certificate does not automatically bar prosecution under the Indian Penal Code, 1860 (IPC).

Official accounts claim that Indian film industry is the largest in the world producing over a thousand films in a year screened over 13,000 cinema halls in the country. Every three months an audience as large as the country's entire population flocks to the cinema halls. Notwithstanding the industry's gigantic volume, so long one makes stereotype commercially viable movies with only songs and dance sequences and follow common formulas of entertainment – there is no harm; but the moment, one dares to speak out the truth against the State articulating his opinion on any sensitive or serious matter through his films or documentaries, which may not be palatable to certain power holders; he is swimming into troubled waters. There is ample possibility of facing censor

scissors or political ban.[2]

While several films like 'Water', 'Final Solution', 'War and Peace' and many more ran into serious trouble with the CBFC as they were restrained in the name of 'public interest', other films like 'The Da Vinci Code' and 'Deshdrohi' (Traitor) had to fight political censorship even after Censor Board's approval. These are in no way stray incidents but almost a systematic trend in India. Apparently, those incidents may be pooh-poohed as political gimmicks or other trifles, but there is a much deeper aspect involved – subjugation of freedom of speech and expression.

II. RESEARCH OBJECTIVES

i. To analyse the social impact of the Cinematograph Act, 1952.

ii. To assess the constitutionality of the Cinematograph Act, 1952, with special reference to K.A. Abbas VS Union of India.

iii. To examine the inter-relationship between the film industry and Competition Law.

III. RESEARCH METHODOLOGY

The research methodology followed is doctrinal, descriptive and analytical. For this purpose, reliance has been placed on journals, articles, research papers, treaties, government documents, case laws and blogs.

IV. RESEARCH QUESTIONS

- What is the social impact of the Cinematograph Act, 1952 in India? Whether censorship is a social boon or a bane?
- Whether censorship of films under the Cinematograph Act, 1952 intra vires? What are the ramifications of K.A. Abbas VS Union of India?
- How does Competition Law shape the Indian film industry?

V. REVIEW OF LITERATURE

Political Censorship And Indian Cinematographic Laws: A Functionalist-Liberal Analysis

- Arpan Banerjee[3]

This Article represents a modest endeavour to contextually study Indian cinematographic legislation. The

[2]Sarkar, S., 'RIGHT TO FREE SPEECH IN A CENSORED DEMOCRACY', Available at https://www.law.du.edu/documents/sports-and-entertainment-law-journal/issues/07/right.pdf, Last seen on 23/03/2019 at 02:55 PM

[3]Arpan Banerjee, Political Censorship and Indian Cinematographic Laws: A Functionalist-Liberal Analysis, 2 Drexel L. Rev. 557 (2010), Content downloaded/printed from HeinOnline, Sat Mar 16 09:14:19 2019

Article examines the political censorship of Indian cinema amid a wider historical milieu. The author argues that certain colonial and statist traces in Indian cinematographic laws have enabled political censorship to take place. Proceeding along functionalist liberal lines, I assert three arguments against the political censorship of films in India: it (1) impedes "political accountability," (2) is vitiated by more liberal television laws, and (3)harms the Indian film industry's global diversification ambitions. He thus submits that Indian cinematographic laws should be remodeled to conform to a more liberal framework that reduces state intervention.

Parts II, III, and IV of his Article build a jurisprudential foundation for his arguments. He validates the application of functionalist liberal reasoning, which is an essentially Western notion, in an Indian context. He analyses how Indian political leaders were influenced by Western liberal thought, and how such ideas found their way into the Indian Constitution. In Part II, he frames a working definition of the term "political censorship." In Part III, he introduces the free speech theories of John Stuart Mill and Alexander Meikle john. In Part IV, he contrasts Western liberal ideas on speech and expression with Hindu and modern Indian viewpoints.

Parts V and VIII deal with the legal aspects of the Article. In Part V, he provides an overview of the British establishment's legal response to the arrival of cinema. He comments on how, back in India, the British Empire was trying to stifle the Indian freedom movement through repressive press laws. He then discusses the measures taken to regulate cinematic content in India during these turbulent times. In Part VI, he evaluates post-colonial developments in relation to film censorship. He introduces the topic by recollecting debates surrounding the birth of Article 19 of the Indian Constitution, which conferred on all citizens the right to freedom of speech. He then explains the existing law and procedure governing film censorship in India. He also mentions a few noteworthy examples of political censorship in post-Raj India and summarizes the recommendations of a government-appointed committee which suggested changes to the censorship mechanism. In Part VII, he discusses case law on film censorship. He begins by arguing that judicial attitudes towards political criticism have become more liberal since India became independent. He submits that the judiciary has generally ruled in favour of filmmakers in cases concerning political criticism. Part VIII consolidates the case for reforming Indian cinematographic laws.

VI. THE SOCIAL OUTLOOK OF THE CINEMATOGRAPH ACT IN INDIA

The cinematograph reached Indian shores in 1896, a few months after its British debut. In British India, the Cinematograph Act of 1918 was the first law devoted specifically to film censorship.[4]

[4] Ibid

However, grievances burgeoned about a perceived laxity towards moral censorship. Much of this criticism had to do with a belief that Hollywood films tended to lower the prestige of the white race in the eyes of Indians. An article in a British newspaper complained that images of scantily-clad actresses and of "Charlie Chaplin squirting in offending people with soda-syphons" were making it "difficult for the Britisher in India to keep up his dignity." The article caught the attention of the then Secretary of State for India, who sought details of the censorship system. These criticisms culminated in the formation of the Indian Cinematograph Committee (ICC) in 1927.

Entry 60 of the Union List reads, "Sanctioning of cinematograph films for exhibition."In the Assembly, 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."The Cinematograph (Amendment) Act of 1949 made two changes to the Act of 1918. First, the regional Boards were replaced by the Central Board of Film Censors (Central Censor Board), a censorship authority headquartered in Bombay.[5] Second, the British practice of issuing "U" and "A" certificates was adopted.[6] 'The Cinematograph Act of 1952 (Cinematograph Act) finally repealed the Act of 1918.[7] Today, the Cinematograph Act continues to be the main statute governing film censorship. The Cinematograph (Amendment) Act of 1981 renamed the Central Censor Board as the Central Board of Film Certification (CBFC)[8], which proved to be only a token change[9]. Section 4 of the Cinematograph Act requires all films to be submitted to the CBFC for certification, while Section 7 provides criminal penalties for non-compliance with Section 4. Therefore, uncertified films essentially cannot be legally released in India.

All the members of the CBFC are appointed by the union government under Section 3 of the Cinematograph Act, and are often serving bureaucrats. Section 22 of the Cinematograph Act solves the problem of a shortage of censors by empowering larger Advisory Panels to certify films in conjunction with the CBFC.

Rules 22 through 26 of the Cinematograph (Certification) Rules of 1983 delineate the censorship procedure followed by the CBFC.

Section 5B of the Cinematograph Act specifies the groundson which films shall be denied certification by the CBFC.

[5]Khosla Committee Report
[6] Ibid
[7] Ibid
[8] See Adarsh VS Union of India, (1990) AIR (AP) 100
[9]SomeswarBhowmik, Politics of Film Censorship: Limits of Tolerance, 37 ECON. & POL. WKLY. 3574, 3577 (2002)

VII. CENSORSHIP- A SOCIAL BOON OR A SOCIAL BANE?

The case of Anand Patwardhan VS CBFC[10] was one of a number of cases arising during the first-ever five-year reign of a BJP-led government (between 1998 and 2003). An examining committee asked for six cuts in the award-winning filmmaker Anand Patwardhan's documentary Jang AurAman (War and Peace). On appeal, a revising committee made matters worse by seeking fifteen more cuts. The film criticized the BJP government's decision to test nuclear weapons. The many contentious scenes included a scene criticizing the BJP's defence policy, a scene showing a low-caste Buddhist leader criticizing upper-caste Hindus, and clips of a sting operation showing the involvement of a senior BJP politician in a defence scandal. The last objection was laughable, as the incident had been widely reported in the media.[11] The CBFC also conveniently overlooked Patwardhan's reference to another defence scandal involving the INC.[12]The FCAT reduced the number of cuts to two, but the Bombay High Court held that Patwardhan did not have to make any cuts at all and that the film should be certified as "U." The Court remarked, "It is high time that the persons in authority realise the significance of freedom of speech and expression rather than make and allow such attempts to stifle it." Echoing the Mill-Meikle john tradition, Judge Gokhale said that citizens ought to have the right to "fully and fearlessly" express a counter-view.

The Cinematograph Act is riddled with colonial and statist traces that encourage political censorship. These anachronisms are incompatible with the spirit of the Indian Constitution, which was inspired by the Western liberal belief that political speech must not be suppressed. Indian courts, by adopting the functionalist-liberal ideology of Mill and Meikle john, have emphasized the need to allow free and frank criticism of the state-the "counter-view," as the Bombay High Court described it in Anand Patwardhan's case. Political censorship not only restricts the artistic freedom of Indian filmmakers, but also inhibits their chances of catering to international audiences that would pay to watch political films about other countries.[13]

VIII. CONSTITUTIONAL VALIDITY OF FILM CENSORSHIP IN INDIA: THE LEGAL PERSPECTIVE

Despite the claim of some of its proponents to the contrary, it is well established that film censorship in India is one of the strictest in the world. Nevertheless, it was only up until recently that commentators, both within and

[10](2003) 5 Born.C.R. 58.

[11] See Harish Khare, "Expose on Defense Deal" Puts NDA Govt. in a Spot, THE HINDU (New Delhi), Mar. 14, 2001, available at http://www.hinduonnet.com/2001/03/14/stories/01140001.htm; see also Aniruddha Bahal& Mathew Samuel, Operation West End, TEHELKA, http://www.tehelka.com/home/20041009/operationwe/investigationl.htm (chronicling a sting operation by journalists to sell non-existent military technology to the Indian defence establishment)

[12] See Supra 5

[13]Boray, Sameer, Depiction of Disabilities in Movies: Disability Portrayal in the Media Through the Eyes of Bollywood and Hollywood (September 17, 2011). Available at SSRN: https://ssrn.com/abstract=1943108, Last seen on 16/03/2019 at 07:35 PM

without the government, and the courts have begun to seriously question both the wisdom and the constitutionality of the prevailing scheme for film censorship in India. It is imperative that India, grappling with the problems and alternatives posed by increased modernization, chart a proper course between the scylla of heavy-handed censorship and the charibdis of unlimited license of expression.[14]

The advent of motion pictures in India began with an exhibition of the Lumiere cinematograph in 1896 in Bombay. With the increasing popularity of the film medium, cinema halls were constructed in the major cities, and travelling showmen brought the new form of entertainment to many of the rural areas around the turn of the century. The films exhibited during this initial period were exclusively of foreign origin, but in December of 1912 the first film to be made in India, "Rajah Harischandra", was shown in Bombay. Although the vast majority of motion pictures publicly exhibited in India during this time continued to be of foreign origin, the popularity and influence of the film generated a substantial expansion of the indigenous motion picture industry. Film censorship in a formal sense, however did not come into being until the passage of the Cinematograph Act of 1918.

With respect to the licensing of cinema houses, the primary concern of the Act was the limited one of ensuring the safety of persons attending the exhibition of films. With respect to the certification of films, however, it delegated broad discretionary powers to the Boards of Censors, who had the authority to merely designate a film as "suitable" or "unsuitable" for public exhibition as they so determined. Moreover, the Act failed to provide guidelines for the benefit of the certifying authorities regarding the nature of uncertifiable films.

The first noteworthy change in Indian film censorship procedure after Independence transpired in 1948 when the Board of Film Censors in Bombay and Madras each published a so-called "Production Code", which set forth a list of suggestions to motion picture producers for guidance in the production of feature films. The Code was purportedly drawn up with a view to ensuring that the cinema plays its proper role in the building of a healthy national life. The Bombay Home Minister, who had agitated for a measure such as a Production Code, further suggested that film scripts be submitted to the censorship authorities prior to the production. Undoubtedly recognising the insidious and veiled implications of these attempts at direct and indirect censorship, the film industry responded by rejecting outright the proposal for prior submission of scripts and by according only tacit recognition to the suggestions of the Production Code.

The following year, however, witnessed several legislative modifications of the then existing administrative structure and nature of film censorship, which had been framed under the provisions of the 1918 Cinematograph Act. The first measure, the Cinematograph (Amendment) Act of 1949, created two categories

[14] Boyd, B. (1972). FILM CENSORSHIP IN INDIA: A "REASONABLE RESTRICTION" ON FREEDOM OF SPEECH AND EXPRESSION. Journal of the Indian Law Institute, 14(4), 501-561. Retrieved from http://www.jstor.org/stable/43950156

of censorships certificate in place of the previous "suitable for public exhibition" classification: an "A" certificate which restricted the film to adults above the age of 18 years; and a "U" certificate which meant the film was "suitable for unrestricted public exhibition." This was the first use of an age classification system for film censorship in India. The Act further provided that if a person was aggrieved by a decision of the censor board in granting an "A" certificate to his film he could, within 30 days, appeal to the provincial government, which then had the option of rejecting the appeal, or, on further consideration, issuing a "U" certificate in place of the "A" one.[15]

The 1952 Act provides that the Central Government shall establish a Board of Film Censors, consisting of a salaried chairman and not more than nine other members appointed by the Central Government. The precise terms and conditions of service of these latter members are not specified in the Act itself, but rather are to be supplied by supplementary legislation. To this end, the Act empowers the Central Government to promulgate rules which delineate, inter alia, the exact number of the members of the board, the procedure for examining and certifying films, the appointment of subordinate boards and officers, the conditions which may be imposed on a film certificate, and the manner of appealing from the decision of the censor board.

The final decision with respect to the certification of a film is valid throughout India for a period of 10 years, at the end of which time it may be renewed without further examination. Notwithstanding this, the Central Government, on its own initiative, may direct that:

a. A film already certified by the board be uncertified
b. A "U" certificate be altered to an "A" certificate
c. The exhibition of a film be suspended for a period up to two months, during which time it will be deemed to be an uncertified film.

The Cinematograph Act sets forth the principal tenet which should guide the censorship authorities in certifying films for public exhibition. Because Section 5B(1) of the Act is merely a general restatement of Article 19(2) of the Indian Constitution, the Act further provides that the Central Government may issue directions delineating more fully the principles of film censorship.

Unlike the First Amendment to the US Constitution, which unequivocally declares: "Congress shall make no law . . . abridging the freedom of speech, or of the press";[16]constitutional guarantee of free speech in India is somewhat restricted. Article 19(1)(a) of the Constitution of India promises right to free speech and expression to all the citizens.[17]However, 'reasonable restriction' can be imposed on the enjoyment of this freedom by the

[15] Ibid
[16] U.S. CONST. amend. I.
[17]INDIA CONST. art.19, cl. 1. Protection of certain rights regarding freedom of speech, etc. – All citizens shall have

State under clause 2 of Article 19 on certain grounds, i.e., the interests of the sovereignty and integrity of India, the security of the State, friendly relations with foreign States, public order, decency or morality, or in relation to contempt of court, defamation or incitement to an offense. Additionally, freedoms under Article 19 of the Constitution can be suspended during the Emergency by virtue of Article 359.[18]The Constitution does not specifically speak about any medium of communication. The jurisprudence that has developed through case laws in this respect has encompassed the press, motion pictures, advertisements etc. within its fold. So far censorship of films in India is concerned, the power of legislation is vested with the Parliament under Entry 60[19] of the Union List (or List I)[20]of the Schedule VII of the Constitution. The States are also empowered to make laws on cinemas under Entry 33[21] of the State List (or List II)[22]but subject to the provision of the central legislation. The prime legislation in this respect is the Cinematograph Act, 1952 and the Cinematograph (Certification) Rules, 1983.[23]

Probably, the most important case regarding the problem dealt herein is the case of S. Rangarajan VS P. Jagjivan Ram.[24]In the instant case, the decision of the Madras High Court which revoked the 'U-Certificate' issued to a Tamil film called 'Ore OruGramathile' (In One Village), was challenged through an appeal before the Supreme Court. In the meantime, the film had already won National Award. The film criticized the reservation policy in jobs as such policy is based on caste and was unfair to the Brahmins[25]. It was argued through the film that economic backwardness and not the caste should be the criterion. The High Court had held that the reaction to the film in Tamil Nadu is bound to be volatile considering the fact that a large number of people in Tamil Nadu have suffered for centuries. Certain remarks were also made against Dr. B.R. Ambedkar[26] and several Tamil personalities. The Supreme Court overruled the High Court decision and upheld

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the right – (a) to freedom of speech and expression;
(b) to assemble peaceably and without arms;
(c) to form associations or unions;
(d) to move freely throughout the territory of India;
(e) to reside and settle in any part of the territory of India; and
[(f) to acquire, hold and dispose property] [This has been deleted by the Constitution (Forty-Second Amendment) Act, 1976. Though right to property ceased to be a fundamental right but remained as a constitutional right under Art. 300A]
(g) to practise any profession, or to carry on any occupation, trade or business.

[18] According to this provision, where a Proclamation of Emergency is in operation, the President may by order suspend the right to move any court for the enforcement of the rights conferred by Article 19 (and certain other fundamental rights) and all proceedings pending in any court for the enforcement of such rights shall remain suspended for the period during which the Proclamation is in force or for such shorter period as may be specified in the order

[19] Sanctioning of cinematograph films for exhibition

[20] Consists of subject matters in which the Central Government is empowered to legislate

[21] Theatres and dramatic performances; cinemas subject to the provisions of entry 60 of List I

[22] Consists of subject matters in which the State Government is empowered to legislate

[23] Supra 2

[24] (1989) 2 S.C.C. 574

[25] Caste wise they occupy the highest strata of the Indian society

[26] He is considered as the vanguard of Dalit (people belonging to the lowest strata of the society) against social oppression

the freedom of speech and expression.

Judicial pronouncements make it crystal clear that as far as motion pictures are concerned, the higher courts in India have zealously guarded the freedom of speech and expression and have shown optimum judicial activism. They have refused to scrap any movie without any compelling reason for restriction and which are not based on vague or unreasonable apprehensions. Yet, this jurisprudence has at times travelled back and forth as it did in case of 'Black Friday'. In case of 'Fanna', the Supreme Court actually diluted its own precedent enunciated in the Rangarajan case where it obligated the State to take necessary preventive measures pro-actively against any untoward incident that might take place with screening of any such movies. Instead, this time it approached the matter from the opposite end, where the theatre owners were asked to seek protection from the Government, only then the State has a duty to oblige. Besides, it did not pull up the Gujarat Government for its failure to enforce the release of the film by either providing adequate security or any assurance to do so. Similar incidents were witnessed in case of other films, including 'Chand Bujh Gaya' where the Chief Minister of Gujarat was alleged to have threatened the distributors and movie hall owners not to screen the movie.[27]In fact, being well aware of such failure or apathy of the State the theatre owners in Gujarat did not venture out to screen 'Parzania'. Recent non-release of 'Deshdrohi' in Maharastra reasserts the existence of the typical trend.

IX. RAMIFICATIONS OF K.A. ABBAS VS UNION OF INDIA[28]

Given the above development of film censorship in India, this paper will now focus upon the constitutional infirmities which appear to be inherent in the present system. As an initial point of departure, it shall consider the implications of the Supreme Court decision in K.A. Abbas VS Union of India with respect to continued legal validity of the film censorship operation.

K.A. Abbas, a noted journalist, playwright, film producer, and former member of the 1968 Enquiry Committee on Film Censorship, produced in 1968 a short documentary film entitled a "Tale of Four Cities", in which he sought to contrast, by way of social statement, the self-indulgent life of the rich in Calcutta, Bombay, Madras and Delhi with the squalor and destitution of the labouring masses who helped to construct the imposing residences, factories and other industrial complexes utilized by the rich. The film goes on to explore the theme of the exploitation of women by men, focussing on several realistic scenes dealing with prostitution. Initially, there is a one-minute shot scanning the "Cages" or the red light district in Bombay and showing the prostitutes in short dresses standing outside the brothels. The scene shifts to one of the prostitutes shutting a window behind which it is implied that she will entertain her customer, then a shot of the hands of a woman holding

[27] See "Chand Bujh Gaya" fades out in India!, YAHOO! INDIA NEWS, Mar. 22, 2005, http://in.news.yahoo.com/050310/139/2k3zf.html
[28] AIR 1971 SC 481

some currency notes which are snatched away by a male hand, implying the pimp. The sequence ends on a symbolic note with the prostitute imagining her room as a cage and then dreaming of her life before she had embarked on a life of hustling.[29]

Abbas applied to the Board of Film Censors for a "U" certificate, permitting unrestricted exhibition of the film, but was informed by the regional officer that the Examining Committee had provisionally concluded that the film should be restricted to adults. The revising committee concurred in this result, whereupon Abbas, after exchanging correspondence with the board, appealed to the Central Government. The government decided to grant a "U" certificate provided that the scenes in the red light district were deleted from the film. Abbas then brought a suit, alleging that:

a) The pre-censorship exercised by the film censors violated the fundamental right to the freedom of speech and expression;

b) Even if pre-censorship was a legitimate restraint, it must be exercised on the basis of definite principles which preclude arbitrary action;

c) There must be a reasonable fixed time limit for the decision of the film censors;

d) Final appeal in the process should lie to a court of law and not the Central Government.

The court in Abbas reasoned that pre-censorship of films is constitutionally justified on the basis of the following syllogism:

- Pre-censorship or prior restraint is merely one aspect of censorship in general.
- Censorship in the interests of decency and morality etc. is constitutionally valid in India under Article 19(2) of the Constitution.
- Therefore, pre-censorship is also constitutionally valid.

A second major premise of the court's opinion in the Abbas case was that motion pictures should be treated differently and more rigorously censored than other forms of art and expression. "This arises," the court said, "from the instant appeal of the motion picture, its versatility, realism…and its co-ordination of the visual and aural senses." While it is undeniably true that motion pictures do influence sensory awareness in ways that may be different from other media of expression, the salient issue is whether their capacity for altering thinking and behaviour is so vastly different and more effective than other media of communication that they should be subject to more stringent legal restrictions. Even assuming films do possess such a capacity, a second question

[29] Supra 14

arises as to whether effectiveness should be a relevant consideration in adjudging the permissible bounds of expression that will be tolerated in a particular society.[30]

Even assuming the Film Code was administered in a procedurally "reasonable manner", it still could be held unconstitutional on the ground that its substantive rules were "unreasonable restrictions" on freedom of speech and expression under Article 19(2). In Abbas, the court held that the censorship rules were not unconstitutionally 'void for vagueness', and, without really delving into the matter, further suggested that the directives were not "unreasonable restrictions". The court did comment, however, on the lack of any directions which would tend to promote and preserve artistic expression, suggesting that the government adopt some of the principles formulated in relation to obscene books in Ranjit D. Udeshi VS State of Maharashtra[31]. But in retrospect the court's analysis seems particularly unsatisfying if only for its incompleteness of analysis.

Some mention should be made of the court's suggestion in Abbas that the censorship authorities adopt the principles of censorship of literature formulated in Ranjit D. Udeshi VS State of Maharashtra. It is not clear, however, from the Abbas opinion whether the court was suggesting that obscenity becomes one of the standards of film censorship although it is one of the principles mentioned in the opinion. To adopt obscenity as the single criterion for adjudging permissible expression in motion pictures as is done in the United States would alleviate many of the problems that attend an exhaustive set of directions such as one encounters in the present code: inflexibility, arbitrariness, etc. On the other hand, a detailed code serves to delimit the boundaries of a censor's subjective discretion, which is itself an important consideration in preserving civil liberties.

X. The Tryst Between Competition Law And The Film Industry: Crossing Paths

Cinema is now the most prominent forum for individuals to exercise their right to freedom of expression. People around the world rely on this medium not only for sharing their opinions and views with others, but also as a major source of information about politics and current affairs. Individuals' freedom of expression and right to information, however, is currently under threat of cartelization and abuse of dominant position in the film industry. The dominant enterprises have a huge role in deciding what people see through the process of distribution by directly or indirectly sale or purchase price of tickets or through tie-in agreements. Smaller entities have very little say over the distribution process and must simply accept it if they want to use the medium. Although in theory, they can simply refrain from using this medium, this is often not possible – the

[30] Ibid
[31] AIR 1965 SC 881

ubiquity of cinema and the hold cinema has over the market compared to other media, means there often aren't viable alternatives for the service or space to disseminate and receive information that they provide.[32]

Competition is the branch of the law that is in charge of protecting consumer welfare by means of ensuring the proper functioning of free, open and fair markets. Consumer welfare looks at consumers' 'well-being', based on the benefit they derive from being able to purchase in the market a high volume of goods and services that are of a good quality, a wide variety, and at a competitive price. The ultimate goal of competition rules is to protect and maximize this benefit. Quantity, price, quality, variety, or, in other terms, choice and innovation, are the commonly used parameters by which consumer welfare is normally measured. Competition law also aims to protect the competitive structure of the market: to keep markets open to new entrants, and fair. To make it a place where companies compete on merits and consumers have choice. This implies, for example, prohibiting companies from making agreements on price and market share, or, for companies that have high level of market power, preventing them from being able to exploit consumers or competitors by imposing commercial clauses that are unfair.

There are many mechanisms by which competition law protects the level playing field in the market and the welfare of consumers. Among the most important, competition law prohibits companies enjoying a dominant position in a market from abuse of that position to impose on consumers abusive trading conditions that the company would not have the ability to dictate in a free market. Competition law usually provides for the imposition of financial penalties on companies abusing their dominant position in the market and entitles consumers seek damages from those companies. This abuse directly or indirectly, imposes unfair or discriminatory condition in purchase or sale of goods or service or price in purchase or sale (including predatory price) of goods or service. The effect of the abuse is a substantial reduction of the welfare of consumers, measured in terms of their actual enjoyment of freedom of expression on these platforms. Competition law therefore has a crucial role to play in the protection of free speech on this medium.

In January 2012, Rajkamal Films, an Indian production and distribution company, released Vishwaroopam, a spy thriller set in Afghanistan and the United States.[33]

The film's content had been controversial. It was initially banned in one state but there was also a dispute as to the manner of its distribution that had wider implications for the Indian entertainment industry.The company wanted to simultaneously release its film through Direct-to-Home television networks as well as through

[32] 'How can competition law help to secure freedom of expression on social media?', Available at https://www.article19.org/resources/how-can-competition-law-help-to-secure-freedom-of-expression-on-social-media/, Last seen on 23/03/2019 at 02:34 PM

[33] Kumar, V. & Singh, P., 'Competition law and the entertainment industry in India: a case of overreach?', Available at https://www.eastasiaforum.org/2013/03/01/competition-law-and-the-entertainment-industry-in-india-a-case-of-overreach/, Last seen on 23/03/2019 at 02:34 PM

cinemas, and the Tamil Nadu Theatre Owners' Association threatened to boycott the film. In response, Rajkamal Films approached the Competition Commission of India for a ruling on the Association for restraint of trade[34].

In the early 1990s, the Narasimha Rao government began to restrict the state's involvement in the economy and to rework economic regulations. But it took until 2002 for the Monopolies and Restrictive Trade Practices Act 1969, one of the key acts in need of revision, to be replaced by the Competition Act. While the competition legislation and related regulations are still a work in progress, as evident from several amendments since 2007, including the recent review of the Act set up by the Government, the opening up of the economy is increasing demand for regulatory intervention. The entertainment industry in particular is testing the limits of the Competition Act.

For instance, the Karnataka Film Chamber of Commerce's, which banned the dubbing of films and serials made in other languages into Kannada, and restricted the number of screens available in Karnataka for films of languages other than Kannada. This case has also gone to the Commission, who will have to decide whether Kannada-speakers have the right to watch a film of their choice or whether non-governmental organisations should have the right to pre-empt consumer choice on the grounds of a threat to language and culture. But this is not a novel case. The Commission has over the last two years decided a number of similar complaints filed by major film distributors against regional film industry organisations.

It can be argued that irrespective of quality, the film industries of widely spoken languages could exploit economies of scale and scope and overwhelm other film industries. But there are four reasons why bans and other related restrictive practices might not be the best way to preserve languages threatened by market forces:

- The loss of the languages of smaller groups is not inevitable. Tamil, Telugu, and, more recently, Bhojpuri film industries have successfully resisted the pressure of other languages and also have made inroads in regions where those languages are not widely spoken.
- Films that do not cater to the cultural tastes and linguistic preferences of the audience will lose patronage even in absence of a ban.
- The ban in Karnataka allows vested interests to pursue purely material objectives while claiming to protect a culture and language 'under siege'.
- Last but not the least such bans are akin to cultural policing.[35]

[34] In re: Raaj Kamal Film International Informant VS M/s Tamil Nadu Theatre Owners Association (CCI Case No. 01 of 2013)
[35] Supra 33

So bans are not the answer. But a careful examination of this issue also limits the applicability of competition laws to the entertainment industry, at least insofar as they affect issues of culture and language. There are a number of reasons for this:

- Cultural or linguistic diversity is an end in itself and cannot be traded with any other objective.
- The loss of culture and language could be irreversible and its consequences more widely distributed compared to the loss to society when an uncompetitive manufacturer of bicycles goes out of business.
- The products of the entertainment industry are arguably singular goods, whereas the Commission operates within the conventional framework of the economics of non-singular goods.
- The Commission does not have the know-how to assess the non-market consequences of market competition.
- Finally, the market argument focuses on short-term individual consumer welfare and efficiency, whereas the cultural argument focuses on long-term community welfare effects, which may not be immediately apparent.

Unfortunately, until now the Commission has not taken into account these factors while adjudicating disputes involving restrictive trade practices of film industry organisations of smaller languages.

On 31 October 2017, the Competition Commission of India (CCI) passed cease and desist orders against certain national and regional trade associations of film artists and producers for engaging in practices of controlling/limiting the supply of services and market sharing[36]. Such acts have been held to be in contravention of Sections 3(3)(b) and 3(3)(c) read with Section 3(1) of the Competition Act, 2002.

Mr.Vipul Shah (Informant), a producer of films, filed an information against Artists' Associations, comprising the All India Film Employees Confederation, Federation of Western India Cine Employees (FWICE) and its affiliated associations[37], as well as Producers' Associations, comprising the Indian Motion Picture Producers Association, the Film and Television Producers Guild of India, and the Indian Film and Television Producers Council (Artists' Associations and Producers' Associations are collectively referred to as the Opposite Parties). The information alleged a contravention of provisions of the Competition Act on the grounds that:

[36]ShriVipul A. Shah VS All India Film Employee Confederation & Others (CCI Case No. 19 of 2014)

[37] Eastern India Motion Picture Association (EIMPA), Northern India Motion Pictures Association (NIMPA), The South Indian Film Chamber of Commerce (SIFCC), Western India Motion Picture and Television Sound Engineers' Association, Film Studios Setting and Allied Mazdoor Union, Association of Cine & TV/ AD Production Executives, Association of Film and Video Editors, Association of Cine and TV Art Directors and Costume Designers, Association of Voice Artistes, Cine and TV Artistes' Association, Cine Costume, Make-up Artiste and Hair Dressers Association, Cine Singers' Association, Cine Musicians' Association, Cine Agents Combine, Cine Dancers' Association, Cine Still Photographers' Association, Indian Film Dance Directors Association, Junior Artistes' Association, Movie Stunt Artiste's Association, Music Composers' Association of India, Movies Action Dummy Effect Association, Film Writers Association, Western India Cinematographers' Association.

- FWICE and Producers' Associations had entered into a memorandum of understanding on 1 October 2010 (MoU) whereby inter alia:
- Producers could only engage with artists that were members of the Artists' Associations. Further, producers were restricted from engaging with non-members (Clause 6).
- Wages or rates of the members of the Artists' Association, and the facilities to be provided to them, were fixed per the terms of the MoU.
- A vigilance committee was constituted to ensure compliance with the provisions of the MoU (Clause 18).
- Further, if producers hired non-members, there were instances of the Artists' Associations stalling shoots, levying penalties and issuing non-cooperative directives.
- Additionally, the Artists' Associations had passed certain resolutions which, inter alia, laid down the ratio in which artists were to be hired by the producers (e.g., on the basis of region). For instance, they stipulated that if a film was being shot in Mumbai and the dance director/ fight master was from Bengal, Chennai or Hyderabad, the producer would have to engage 70% dancers/ fighters from Mumbai and the rest (30%) per the producer's choice. (Restrictive Resolutions)[38]

The CCI found a prima facie case against the Opposite Parties and mandated the Director General (DG) to investigate the alleged contravention of Section 3 of the Competition Act. Subsequent to its investigation, the DG concluded that the Artists' Associations (except EIMPA, NIMPA and SIFCC, since they were not signatories to the MoU) and the Producers' Associations had contravened the provisions of Sections 3(3)(a), 3(3)(b) and 3(3)(c) of the Competition Act.

In respect to the contravention of the provisions of Sections 3(3)(a), 3(3)(b) and 3(3)(c) of the Competition Act, the CCI's findings have been set out below:

Exercise of jurisdiction by the CCI:

- ✓ Exemption of trade unions from the provisions of the Competition Act- Since Section 18 of the Trade Unions Act, 1926 (TU Act) granted immunity to trade unions from suits or other legal proceedings in any Civil Court, and the Supreme Court in CCI VSSAIL[39] had conclusively determined the CCI to be only an expert body, therefore, Section 18 of the TU Act did not preclude the application of the Competition Act. Further, it was noted that unlike the Monopolies and Restrictive Trade Practices Act,

[38]Sakle, A. &Budholia, B., 'CCI Reprimands Film Industry Trade Unions For Engaging In Anti-Competitive Behaviour', Available at http://www.mondaq.com/india/x/646224/Antitrust+Competition/CCI+Reprimands+Film+Industry+Trade+Unions+for+Engaging+in+AntiCompetitive+Behaviour, Last seen on 23/03/2019 at 02:31 PM

[39] (2010) 10 SCC 744

1969, the Competition Act did not expressly exempt trade unions from its provisions. Pertinently, this observation is in line with the Supreme Court's recent decision in the Co-ordination Committee case[40], where it had been observed that a body, while backing the cause of enterprises, could not be considered to be exempt from scrutiny under Section 3 by merely giving it a cloak of trade unionism.

- ✓ Classification of the instant information as an industrial dispute- Section 2(k) of the Industrial Disputes Act, 1947 defined industrial disputes in terms of matters that pertained to employment or non-employment or the terms of employment or with the conditions of labour. Therefore, matters such as exclusive member to member engagement covered under the MoU did not affect conditions of labour or terms of employment, but rather affected the supply of services in the market, thereby, falling within the purview of the Competition Act.

Applicability of Section 3(3) of the Competition Act:

- ✓ Trade unions as association of enterprises- Section 3 of the Competition Act applies not only to enterprises but also to association of enterprises and association of persons. The CCI by relying on the Supreme Court's dicta in the Co-ordination Committee case, noted that since each of the artists provided services in return for remuneration, they were engaged in economic activity and were enterprises, consequently, making the trade union an association of enterprises. Lastly, it was observed that in any event, the Opposite Parties would be considered to be an association of persons and resultantly, amenable to Section 3 of the Competition Act.
- ✓ MoU as a horizontal agreement- While the Opposite Parties, as trade unions, were themselves not engaged in any activity as part of the production or supply chain, the MoU was observed to be a horizontal agreement by the CCI, given that the Opposite Parties signed the MoU as representative of entities operating in the same market.

Violation of Section 3(3) of the Competition Act:

- ✓ Exclusivity and Monitoring Condition- The CCI observed that Clauses 6 and 18 of the MoU were in the nature of limiting the supply and distribution of films on account of (i) the mandatory requirement under the MoU to obtain a no objection certification from the trade associations availing the services of the non-members; and (ii) restricting the producers to provide/avail only those services that were specifically permitted under the MoU. Therefore, these practices were held to be in violation of Section 3(3)(b) of the Competition Act.

[40] Competition Commission of India VS Co-ordination Committee of Artists and Technicians of W.B. Film and Television and Others (AIR 2017 SC 1449)

- ✓ Fixing of Wages, Extra Shifts, etc- The CCI observed that Clause 8 of the MoU, which related to fixation of wages, payment for extra shifts, etc, could have the effect of fixation of prices when read with Clause 6 of the MoU. However, given that wages and increment were also conditions of labour, they could fall within the realm of legitimate trade union activity. Therefore, this was not held to be in contravention of Section 3(3) of the Competition Act.
- ✓ Restrictive Resolutions-The CCI observed that the Restrictive Resolutions, inter alia, had the effect of (i) forcing the producers to hire workers in the aforementioned ratio regardless of workers having the required skills; (ii) limiting and controlling the provision of services; and (iii) allotting services on the basis of geographical area. Accordingly, the Restrictive Resolutions were held to be in contravention of Sections 3(3)(b) and 3(3)(c) of the Competition Act.

In terms of penalty, the CCI, after considering various factors such as the existence of the practices covered under the MoU since 1966 as a mechanism for resolving disputes; members of some of the associations being daily wage workers; and only two clauses being violative of the Competition Act, noted that issuance of cease and desist orders would be sufficient to meet the ends of justice. Further, the CCI affirmed the DG's finding in relation to EIMPA, NIMPA and SIFCC and did not issue any orders against them on grounds of them not being signatories to the MoU.

In this decision, the CCI has taken the opportunity to re-emphasise its position re anti-competitive exclusivity. While determining the position of trade unions, the CCI also reiterated the evolving undertone of substance over form (as previously affirmed by the Supreme Court in its examination of an enterprise in the Co-ordination Committee case) and conclusively determined that trade unions are not immune from antitrust scrutiny. Interestingly, the CCI construed Section 3(3) of the Competition Act in its true spirit, by observing that while trade unions themselves directly did not form part of the production chain, an agreement amongst two trade unions could nonetheless be a horizontal agreement, given that these bodies acted as representatives of their constituent members operating in the market.

XI. CONCLUSION& SUGGESTIONS

Censoring movies in the name of maintaining public peace, respecting emotions of people and similar reasons are simply ridiculous. It may give wrong message to the public through indirect interpretation. It is always the best that the viewers themselves watch it and form their own opinion. General public in a country like ours may be devoid of proper education but not always of common sense. It is groups with tampered prejudices who

deliberately distort the subject matter and mislead other people to serve their own purposes. Conversely, no group takes the role of a proper guide.[41]

The power to impose restrictions is not the power which is available for exercise in an arbitrary manner or for the purpose of promoting the interest of those in power or suppressing dissent. While we enthusiastically profess right to information,[42] we cannot sit back and ban films and thus, censor information. If artists, playwrights and film makers of India are to exercise their right to free speech appropriately, the utmost necessity is to do away with the restrictive clauses under Article 19(2). If at all, any limiting line is to be drawn in the extreme cases, it shall be left to the judiciary on which the country has reposed enormous faith since inception. Also, the judiciary has to surge off the recent hiccups and deliver consistently upholding the right as it had done all through. In case any unlawful means is adopted by any person(s) to stop screening of films, the Government has to ensure that law and order is maintained by taking appropriate actions against the person concerned. It is also bound to take necessary preventive measures. Otherwise, it should be held for contempt of court.

On a whole, the test for allowing restrictions upon free speech should strive to be somewhat more stringent. Legal restraints upon individual freedom of speech should only be tolerated where they are absolutely necessary to prevent infliction of actual harm. Therefore, it can be aptly concluded, if democracy has to evolve, that screening of films and documentaries can never be denied for reasons based on mere speculation because banning motion pictures is equivalent to banning the right of freedom of speech and expression. Some developments regarding the topic are encouraging indeed; nevertheless, we have greater heights to scale.

Modern cinema is a mirror to the society. The modern day movies are not restricted to the romance of the Golden Era, but it has revamped its frontiers to the truth and reality of the state be it about politics, state of women, and the taboos existing in the society or the actualities from which generally the leaders shrug off their responsibilities.[43]

However the law governing the movies is still age old, In India there is no harm when one makes commercially viable movies with only songs and dance sequences, however, things contrastingly differ, moment one dares to speak out the truth in the society, expressing his opinion on any sensitive issues through movie.

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[41] Supra 2

[42] In India, the Right to Information Act, 2005, No. 22 of 2005, has been a path-breaking piece of legislation, which has been instrumental to empower citizens of the country in bringing out important and useful information of various types relating to the State which were so far considered 'confidential'. The mechanism provided under the statute is used extensively throughout the country by social activists, civil society groups, and common men alike.

[43]Borkar, S., 'Modern Day Law for the Modern Indian Cinema (Indian Cinematograph Bill, 2018 {Insights , Highlights, Proposals, Drawback, Analysis})', Available at http://www.mondaq.com/india/x/778618/broadcasting+film+television+radio/Modern+Day+Law+for+the+Modern+Indian+Cinema+Indian+Cinematograph+Bill+2018+Insights+Highlights+Proposals+Drawback+Analysis, Last seen on 23/03/2019 at 03:39 PM

One needs to understand, a film, show, novel or a book is a creation of art. An artist has his own freedom to convey what needs be in a way which is not denied in law and such restrictions are not perused by suggestion to crucify the rights of expressive mind. History of mankind records that there have been numerous creators who expressed their contemplations as indicated by the decision of their words, expressions, articulations and furthermore make characters which may appear to be totally different than a conventional man would think about. On similar plane a film can also be expressive and inciting the conscious or the sub-conscious musings of the watcher. If there be any impediment, it must be according to the resolution in law.

Despite of a lot of precedents in favour of artistic expression, filmmakers in India still face criticism and their nationalism is questioned time and again. The reason behind is our age old law. Films in India are governed by Cinematograph Act 1952. Under the said law, government has an overriding control over the CBFC's decisions. This power of the government has often been used against films. Owing to which films, these films have been facing cuts, mutes and bans sometimes to an extent that the film loses its essence, for the reasons that CBFC knows the best. "Fanney Khan", "Lipstick under My Burkha", "The Accidental PM" are few recent names that have borne the brunt recently.

The choice for India with respect to the censorship of films is not, as the Khosla Committee has suggested, between a swing towards "irresponsible hedonism" or remaining tied to "the shackles of Victorian prudery". On the contrary, if the courts and concerned legislators begin to realize that keeping sex under cover only leads to an over-emphasis of the subject and that greater latitude for speech and expression in films and other media will create a more favourable climate for rational modernization, then it seems likely that we will witness in India a particularly unique evolution in legal concepts relating to film censorship- one which neither wholly forsakes the traditional values nor fetters the incremental advances in realistic artistic expression which is the concomitant of good motion pictures. The "reasonable restriction" clause of the Constitution requires nothing else.[44]

[44] Supra 14

XII. BIBLIOGRAPHY

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