

OTT Platforms and Religious Sentiments: An Analysis from the Perspective of Content Regulation

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Introduction.

In the past, barring cinema, television and theater served as the primary audio-visual media. However, advancements in technology over the past couple of decades have ensured that one may now access a wide variety of such content from the comfort of one's own home, chief amongst these being Over The Top streaming services.¹ Streaming services have more freedom to publish whatever they want than conventional media, which is constrained by demographics, censorship, and the box office. If the viewer has the required device along with a consistent internet connection, the streaming service provides a viewing experience of the best visual and audio quality.² This has been the primary cause for the many creative and business changes that have come about in the entertainment industry.³ From the humble radio as the only method of distributing information to the television, and the now popular

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¹ Ria Patnaik, Reema Shah, Upendra More, Rise of OTT platforms: effect of the C-19 pandemic, 18 (7) PJA 2277-2287 (2021).

² E Sundaravel, N Elangovan, Emergence, and future of over-the-top (OTT) video services in India: analytical research, 8 (2) IJBMSR 489-499 (2020).

³ Kavita Sharma, Emmanuel Elioth Lulandala, OTT platforms resilience to Covid-19-a study of business strategies and consumer media consumption in India, 31 (1) IJOA 63-90 (2023).

OTT platforms, one may view their favorite content on their handheld devices.⁴

The first OTT network in India was established in 2008 and named BIGFlix by Reliance.⁵ OTT platforms have developed into feasible distribution channels for news, entertainment, etc. Particularly during the Covid 19 pandemic when all the theaters were closed, widespread use of OTT platforms became the norm.⁶ These platforms even witnessed the release of many a movie,⁷ and people started turning to these services with increased interest.⁸ However, due to the lack of pre-censorship on these platforms, much unlawful content was spread and a number of malpractices were observed to have been committed.⁹ Although many people use over-the-top platforms because they are convenient, possess a wide variety of content, and offer many other benefits, one of the major disadvantages of OTT platforms is that there is no pre-censorship or content regulation.¹⁰ Since OTT platforms are not subject to censorship, they frequently publish material that is controversial. The number of over-the-top customers in India is increasing at a rapid pace. India is also one of the world's biggest innovators in the digital space, with most of these developments occurring in the last five years. Due to the fact that the content of OTT platforms are not controlled, obscene and religiously

⁴ Sony Varghese, Selvin Chinnaiah, Is OTT industry a disruption to movie theater industry? 25 (2) AMSJ 1-12 (2021).

⁵ Tripti Kumari, A study on growth of over the top (OTT) video services in India, 3 (9) IJLRHSS 68-73 (2020)

⁶ Navasangeet Saini, Usage of OTT Platforms during COVID-19 Lockdown: Trends, Rationale and implications, 17 (8) JAE 4212-4222 (2020).

⁷ Garima Gupta, Komal Singharia, Consumption of OTT media streaming in COVID-19 lockdown: insights from PLS analysis, 25 (1) JSP 36-46 (2021).

⁸ PC Revati Devaki, S Dinesh Babu, The future of over-the-top platforms after covid-19 pandemic, 25 (6), ARSCB 11307-11313 (2021).

⁹ Mr. Kuldeep Kumar, Rachana Gangwar, Necessity of OTT Regulation in Indian Context, 2 (2) BCJMR 78-90 (2022)

¹⁰ Pratibha Maurya, OTT platforms in India: Regulation of Content and Gaps, 1 ETTIL 150 (2018)

offensive material have been routinely transmitted, resulting in several legal disputes. There have been numerous lawsuits filed recently alleging that OTT platforms are releasing content that is offensive to people's religious beliefs. The Tandav case is an illustration of such cases.¹¹ The web series **Tandav**, which had some material that offended Hindu religious sentiments, was made available on Amazon Prime. However in this case, as in numerous other instances, courts have observed that there is no provision in the Censorship Law that specifically mentions OTT platforms. Therefore the only means of content monitoring is the Self-Regulation Code which now applies to OTT networks¹². However, there is disagreement regarding how effectively this regulates these Over-the-Top platforms and offers responses to the problems that result from it. Because, in accordance with this code, these platforms' intermediaries will determine what content can be made available. No other body exists to monitor or regulate it.¹³ The Self-Regulatory Code provides these platforms with their own internal regulatory framework and there is no other authority to supervise it because of this the contents of OTT platforms are not adequately regulated and no regulatory authority has been created.¹⁴ We have many cases in which courts have clearly said that The Cinematograph Act and the censorship will not apply to OTT platforms to regulate content released in it as they have laws and regulations for that. In *Mahendra Singh Dhoni v. Yerraguntla Shyamsundar*¹⁵, a bench consisting of Justices Dipak Misra, A. M. Khanwilkar, and M. M. Shantanagoudar and

¹¹ *Aparna Purohit V. State of Uttar Pradesh*, 2021 SCC Online All 179.

¹² Chawla, M.G. and Buch, N., 2023. Regulation Of Web-Based Entertainment In India: Evaluating Self-Regulation Over Censorship As A Mechanism For Regulating Ott Platforms. *Journal of Namibian Studies: History Politics Culture*, 36, pp.134-155.

¹³ *M Rahul, S DineshBabu, A comparative study on ott platform censorship and policies in India*, 25 (6) ARSCB 11160-11167 (2021).

¹⁴ *Mr. Kuldeep Kumar, Rachana Gangwar, Necessity of OTT Regulation in Indian Context*, 2 (2) BCJMR 78-90 (2022)

¹⁵ AIR 2017 SC (Criminal) 1163

cautioned all social media to conduct routine inspections otherwise, it will be necessary to issue an order prohibiting all such websites. However, the court reiterated that insults to religion that are spoken carelessly or without any desire to offend that class's religious sensibilities should not be considered to have caused religious harm. In the instant case a cricket player, Mr. M.S. Dhoni could be seen dressed as Lord Vishnu, carrying a shoe in one hand which led to him facing charges of insulting Hindu religious sensibilities.

Protection of religious rights under Indian Constitution.

In addition to being known as the nation that is the land of spiritual beliefs, culture, and philosophical thinking, India has been the birthplace of a significant number of faiths. It is entirely a question of choice and belief as to how 'Religion' is perceived by each individual. Part III of our Indian Constitution provides and guarantees a number of basic rights. Freedom of belief is one of them, and it is guaranteed by Articles of the Indian Constitution. Every citizen of India has the freedom to practice the belief they choose because India is a secular country¹⁶ as held in many cases¹⁷ and it is a basic feature¹⁸ of the Indian Constitution. Every citizen has the freedom and right to teach, practice, and spread the faith of his or her choice. This privilege offers the chance to share it with everyone without worrying about government interference. It is also implicit in the right that it be practiced legally within the boundaries of the country at large. Articles 25 through 28 of the Indian Constitution enumerate the various rights to freedom of religion.

¹⁶ 42nd Amendment (1976), The Indian Constitution.

¹⁷ S.R Bommai V. Union of India, AIR 1994 SCC 1.

¹⁸ Kesavananda Bharati V. State of Kerala, AIR 1973 SC 1461.

Rights of the intermediaries:

The law further considers the rights of the intermediaries in the form of freedom of speech and expression¹⁹, freedom of occupation, trade and business²⁰. It should also be noted that those rights are not absolute but may be restricted by making laws as per reasonable restriction clauses which provides any person to revert against any act of OTT platforms if they hurt religious feelings.

Under the provisions of Article 19, both parliament and state legislature can make laws to reasonably restricts the fundamental rights of freedom of speech and expression²¹ and freedom of occupation, trade and business²². The platforms have right under Article 19(1)(a) and 19(1)(g) to release any content and material but in accordance with the existing laws, regulations and guidelines and those rights are also not absolute so, legislature can control them on the basis of reasonable restriction on grounds like protecting the interest of general public which impliedly includes religious sensitive matters hence, OTT platforms are not allowed to show or release any content against to any religion.

Other relevant laws:

There are many laws²³ in India which controls the content released on OTT platforms especially Indian Penal Code, 1860²⁴ which makes an act illegal

¹⁹ Article 19 (1) (a), The Indian Constitution, 1950.

²⁰ Article 19 (1) (g), The Indian Constitution, 1950.

²¹ Article 19 (2), The Indian Constitution, 1950.

²² Article 19 (6), The Indian Constitution, 1950.

²³ See, Indian Penal Code 1860, The Indecent Representation of Women (Prohibition) Act, 1986, POCSO, 2012.

²⁴ Section 295, The Indian Penal Code, 1860.

and a criminal offense if it violates the religious rights of a person. For instance, hate speech and causing conflicts between religions is punishable under the Indian Penal Code.

Indian Penal Code

Section 295- Injuring or defiling a place of worship with intent to insult the religion of any class.

This provision lays down that whoever destroys, damages or defiles any place of worship, or any object held sacred by any class of persons with the intention of thereby insulting the religion of any class of persons or with the knowledge that any class of persons is likely to consider such destruction, damage or defilement as an insult to their religion, shall be punishable with imprisonment of either description for a term which may extend to two years, or with fine, or with both.²⁵

Section 295 A- Deliberate and malicious acts, intended to outrage religious feelings of any class by insulting its religion or religious beliefs.

This particular provision of Indian Penal Code makes it illegal to outrage or hurt religious feelings of people of India. The deliberate and malicious intention to outrage the religious feelings of any class, by words, either spoken or written, or by signs or by visible representations or otherwise, insults or attempts to insult the religion or the religious beliefs of that class, is punishable under this provision with imprisonment of three years.²⁶

²⁵ Section 295, The Indian Penal Code, 1860.

²⁶ Section 295 A, The Indian Penal Code, 1860.

Section 298- Uttering, words, etc., with deliberate intent to wound the religious feelings of any person.

This section punishes all those who deliberately say or utter any words which hurts the religious sentiments of people and says that whoever, with the deliberate intention of wounding the religious feelings of any person, utters any word or makes any sound in the hearing of that person or makes any gesture in the sight of that person or places, any object in the sight of that person, shall be punished with imprisonment of either description for a term which may extend to one year, or with fine, or with both.²⁷

Section 153A- This section punishes all those acts whether done online or offline which causes enmity between 2 or more religions. This section says that, promoting enmity between different groups on grounds of religion, race, place of birth, residence, language, etc., and doing acts prejudicial to maintenance of harmony.

The Acts covered under this provision include, promoting disharmony or feelings of enmity, hatred or ill-will between different religious, racial, language or regional groups or castes or communities on the grounds of religion, race, place of birth, residence, language, caste or community or any other ground whatsoever, disharmony; committing any act prejudicial to the maintenance of harmony between different religious, racial, language or regional groups or castes or communities; organizes any exercise, movement, drill or other similar activity intending that the participants in such activity shall use or be trained to use criminal force or violence.²⁸

²⁷ Section 298, The Indian Penal Code, 1860.

²⁸ Section 153 A, The Indian Penal Code, 1860.

Section 153 B²⁹- This section punishes those acts which cause religious, racial or linguistic controversies. And this section says that, Imputations, assertions prejudicial to national-integration.³⁰

Information Technology Act:

The provisions under the Information Technology Act prohibit publishing of content which is offensive and may cause religious controversies. But the embedded provisions does not directly talk about the prohibition of religious or sensitive content; it rather lays down that over the top platforms should not broadcast such contents as are prohibited from being published and the list of prohibited content includes religious & sensitive matters.

Section 66A: Punishment for publishing or transmitting material containing sexually explicit acts, etc., in electronic form.

Section 66A outlines the penalties for sending offensive messages via communication services, etc. Any person who repeatedly uses a computer resource or a communication device to send information that is offensive or information that he knows to be false with the intent to annoy, inconvenience, danger, obstruction, insult, harm, criminal intimidation, enmity, hatred, or ill will. Only communication services like social media are used in this part. In accordance with this clause, a violation is punishable by up to three years in prison and a fine.³¹ This section may be interpreted as prohibiting all the over the top platforms from publishing any content against any religion.

²⁹ Section 153 B, The Indian Penal Code, 1860

³⁰ Section 505 (3), The Indian Penal Code, 1860.

³¹ Section 66A, Information Technology Act, 2000

Judicial interpretation on content regulation.

Every person in India enjoys the freedom of speech and expression,³² which includes the right to voice their opinions in public on any topic, including social problems. Therefore, alteration of the creator's material may have an effect on that creator's freedom. However, many cases have been filed regarding unregulated content on such platforms having caused many controversies including issues related to the religious sentiments and beliefs. When these matters were discussed in the various forums certain observations and opinions related to content regulation have been expressed by the judiciary.

On January 15, 2021, an episode of the online series "Tandav" was made available on Amazon Prime Video. Many claimed that some of the content went against the sacred sentiments of Hindus. The creators of the show apologized sincerely and removed a number of offensive sequences. Many FIRs were subsequently filed against the film's creators, producers, and directors as well as the Head of India Originals at Amazon Seller Services Pvt. Ltd, as some people were clearly not satisfied with the response. While denying anticipatory bail to the accused, the Allahabad High Court observed “... *had not been vigilant and has acted irresponsibly making her open to criminal prosecution in permitting streaming of a movie which is against the fundamental rights of the majority of citizens of this country...*”.(Aparna Purohit V. State of Uttar Pradesh, 2021³³)

India's OTT platforms were allegedly the target of censorship and legal action as a result of this conflict. The Information Technology Rules, 2021³⁴ were

³² Article 19 (1) (g), The Indian Constitution, 1950

³³ Aparna Purohit V. State of Uttar Pradesh, 2021 SCC Online All 179.

³⁴ Information Technology (Intermediary Guidelines and Digital Media Code) Rules, 2021.

developed by the government to regulate OTT platforms and digital news sources after this case hit the headlines. The court had also opined that the development of an efficient system to control these platforms was absolutely necessary.

In a case brought against the web series *Ashram*³⁵ streaming on the platform called MX Player, Bollywood producer and director Prakash Jha and actor Bobby Deol were served notices from the Jodhpur District and Session court in Rajasthan. Advocate Khush Khandelwal, who filed the case, claimed he did so because the web series depicted Hindu gurus as rapists and drug dealers. He asserted that this hurt Hindus' religious feelings. Khandelwal added that after failing to submit a FIR under the provisions of IPC³⁶ to the Kudi police station, he made the decision to initiate a lawsuit.

The creators of *Mirzapur* were charged with defaming Uttar Pradesh and portraying *Mirzapur* in a negative way more than a year ago. The complaint identified Ritesh Sidhwani, Farhan Akhtar, and Bhaumik Gondaliya as producers of the film *Mirzapur*. The Supreme Court eventually dismissed the lawsuit against *Mirzapur*'s creators on the ground that the web series was just fiction and nothing else³⁷.

*Bombay Begums*³⁸ on Netflix has drawn criticism from the NCPCR³⁹. Additionally, it has requested that Netflix stop broadcasting the web series. The material shows children engaging in sexual activity on television and

³⁵ Ms. Kritika Sharma, *Emerging Gender Role and Hate Speech Representation in Indian Web Series OTT Media Content*, 8(11) JETIR 158-173 (2021).

³⁶ Section 295, *The Indian Penal Code*, 1860.

³⁷ *Ritesh Sidhwani and Another V. State of Uttar Pradesh*, Cr Ms. WP 851-2021

³⁸ Ms. Kritika Sharma, *Emerging Gender Role and Hate Speech Representation in Indian Web Series OTT Media Content*, 8(11) JETIR 158-173 (2021).

³⁹ National Commission for the Protection of Children's Rights.

shows child exploitation with an emphasis on drug and alcohol use. In a number of circumstances, we witness adolescents using drugs and having casual sexual relations. Menopause, me-too, sex, motherhood, and infidelity are also included in the narrative. With scenes of passionate kissing and minor concerns related to adolescence and puberty, the visual depiction of the story is bold. According to the organization for children's rights, the show's themes could lead to child maltreatment and exploitation. Additionally, NCPCR sent a notice to the online streaming service, requesting a thorough report on the measures it had taken.

In *Justice for Rights Foundation V. Union of India*,⁴⁰ a PIL was filed to seek regulations governing online platforms and the content they transmit. Additionally, it was determined that because there are already provisions under the IT Act, a writ of mandamus or another similar type of writ could not be issued to the respondents ordering them to make rules or regulations governing online platforms and the broadcasts made on those platforms. The PIL sought to ensure that OTT platforms should remove all illegal content. The judge decided that a writ of mandamus cannot be issued. If there is a problem, they must prefer an action in accordance with the IT Act.⁴¹ The petition was dismissed by the court. On appeal to the Supreme Court in the form of an SLP⁴² petitioner has argued that majority of OTT platforms are publishing the contents which has abusive language, material which are sexually explicit and pornographic in nature and they are also releasing the contents which objectifies women which are criminal in nature and punishable under the provisions of IPC and under other laws. So, after this

⁴⁰ *Justice for Rights Foundation V. Union of India*, WP(C) 11164/2018.

⁴¹ Sections 67A, 67B, 67C, 69, 79, The Information Technology Act, 2002.

⁴² SLP (C) No.10937/2019.

case The Government filed an affidavit notifying the DCCC after the Supreme Court issued a notice to them.

In *Shreya Singhal V. Union of India*⁴³ the court held that user-generated content cannot be censored online, but many actions can be taken against the publishing of such illegal contents under the provisions of IT Act. These provisions empower the government to regulate intermediaries including OTT platforms.

In the case of *Nikhil Bhalla V. Union of India*⁴⁴, invoking the use of derogatory language against former prime minister Rajiv Gandhi, a petition was brought in the Delhi High Court against Netflix and Phantom. Three "offensive" comments (including subtitles) and two "offensive" scenes against the previous prime minister and his family were also called for to be deleted in the petition. In addition, the petition charged that the programme "inaccurately depicts historical events of the nation, including the Bofors case, the case of Shah Bano, the case of Babri Masjid, and communal riots. A rule-making procedure for OTT media service providers was requested by the petitioner in an appeal to the court. Eventually the Petition was dismissed on the grounds that the IT Act and the Information Technology (Intermediaries Guidelines) Rules, 2011 were sufficient to tackle any objectionable content on such platforms..

In *Un-canned Media V. Ministry of Information and Broadcasting & Ors*, the petition was dismissed by the court on the grounds that the existing IT Act provisions and rules were adequate for the situation at hand and did not call for the issuance of a writ of mandamus or rules for the regulation of content. The Court went on to say that people had the right to express their views

⁴³ *Shreya Singhal V. Union of India*, (2015) SC 0329.

⁴⁴ *Nikhil Bhalla V. Union of India*, WP(C) 7123, 2018.

regardless whether they were correct or incorrect. Further the court opined that actors could not be held accountable for acting out their characters.⁴⁵

The question of whether the transmission or broadcast of any movies, television shows or other multimedia content via the internet will fall under the definition of ‘cinematograph’ under the definition given in the Cinematograph Act, 1952,⁴⁶ was raised in the case of Padmanabh Shankar v. Union of India⁴⁷. OTT services like Netflix, Amazon Prime, and Hotstar were the respondents. The petitioner claimed that because the Information Technology Act of 2000⁴⁸ stipulates that intermediaries are exempted from liability if they do not have the power to choose or alter the content they transmit, online streaming platforms are ineligible for the protection offered to intermediaries under that provision. The petitioners argued that because intermediaries have agreements with content producers, they are free to choose which content they distribute. Thus, OTT networks need to be held accountable. They can regulate what is broadcasted by using their online video streaming platform. Therefore, the Defendants are not entitled to security under the safe harbor provision of the Information Technology Act of 2000.⁴⁹ The petitioner requested that the Cinematograph Act of 1952 be applied to content broadcast through online platforms and also to set up a regulating authority to regulate such content in this appeal. In addition, the petitioner asked the court to mandate that the CBFC serve as the certification body for all online content to be shown on the internet until another authority is established and to issue orders requiring video streaming services to first

⁴⁵ Un-canned Media V. Ministry of Information and Broadcasting & Ors, (2016), W.P (C) No. 10724/2016, (India).

⁴⁶ Clause (c) of Section 2 of the Cinematograph Act, 1952.

⁴⁷ Padmanabh Shanka v. Union of India, WP 6050, 2019

⁴⁸ Section 79, The Information Technology Act, 2000

⁴⁹ Ibid.

obtain a certificate from the CBFC before broadcasting or transmitting content.

The respondent's legal counsel claimed that the respondents have a self-regulatory code for online content providers that acts as a remedial tool in opposition to this petition. The lawyer also claimed that the petitioner's complaints and concerns had been addressed by the Information Technology Act, 2000,⁵⁰ and that its sections superseded those of the provisions of Indian Penal Code. According to the division bench, "under the conception of the internet and its operation, the exhibition of movies, television shows, and other material may amount to the transfer of information based on a request by the person using it."

In a similar PIL, *Divya Ganesh Prasad Gontia V. Union of India*⁵¹, In response to the controversy related to AltBalaji's streaming of the show "Gandi Baat," which the petitioner argued was offensive to women and contained nudity, violence, and vulgar language which is a punishable criminal act under IPC, 1860.⁵² The petitioner asked for the establishment of an independent body to pre-screen and regulate the content on the platforms. The Cinematograph Act, the Indian Penal Code, The Indecent Representation of Women (Prohibition) Act, and the Information Technology Act were all mentioned in the demand for action against obscene, nudist, and vulgar contents broadcast on these platforms.

The Maatr foundation submitted a petition before the Madhya Pradesh High Court⁵³ regarding the regulation of content streaming on OTT platforms. The

⁵⁰ Section 79, The Information Technology Act, 2000.

⁵¹ *Divya Ganeshprasad Gontia V. Union of India*, PIL NO 127/2018 HC Bombay

⁵² Section 354, The Indian Penal Code, 1860.

⁵³ *Maatr Foundation Through Shruti Bajaj V. Union of India and Others*, WP-18801-2019.

basis of the petitioner's argument was that the content on OTT platform was obscene, unregulated, uncertified, sexually explicit, vulgar, and constitutionally restricted. The petitioner claimed that these content providers' objectification and insulting representations of women violate their fundamental right to exist in dignity. The petitioner claims that companies that offer online broadcasting services serve as intermediaries for violations of the Information Technology Act's provisions. Additionally, they asserted that the offensive, obscenity-containing content on these platforms breaches certain provisions of the Indian Penal Code, the Indecent Representation of Women (Prohibition) Act, and various articles of the Indian Constitution. In an attempt to regulate the uncensored, unapproved, or unregulated material, the High Court recently sent notices to these platforms.

In *Life Insurance Corporation of India v. Prof. Manubhai D. Shah*⁵⁴ in this instance, the defendant claimed that preventing the documentary's broadcast would violate its creators' right to free speech and expression⁵⁵ because they have the authority to do so. When the necessity of regulation is emphasized, it is critical to categorize the contents in a reasonable manner, with movies and other media being categorized based on age and parental controls present to stop kids from watching inappropriate media. It was claimed in this instance that preventing the documentary's broadcast would infringe on the creators' freedom of expression because they have the legal right to do so. When the necessity of regulation is emphasized, it is essential to categorize the contents in a reasonable manner, with movies and other media being categorized based on age and parental controls present to stop kids from watching inappropriate media. UK and Australia have different mechanisms

⁵⁴ *Life Insurance Corporation of India V. Prof. Manubhai D Shah* (1993), AIR 171.

⁵⁵ Article 19 (1) (a), The Indian Constitution, 1950.

with the streaming service to ensure that its material is regulated without infringing on the creators' right to free speech. In the current digital era, it is obvious that a self-regulatory body cannot effectively manage online content, necessitating the need for an effective, impartial regulatory body.⁵⁶

In the *Udta Punjab* controversy⁵⁷ the court held that the Central Board Film Certification generally does not have any responsibility of regulating OTT platforms because it is not empowered to do so. Former Chief Justice of Delhi High court, said that in spite of the power given to the CBFC to regulate the content of films it fails to regulate the contents released on OTT platforms and cannot do anything because it does not have any statutory power.⁵⁸

In *MySpace Incorporation V. Super Cassettes Industries Limited*⁵⁹ Since OTT platforms offer customers on-demand access to video content, web series, and other films, the Delhi High Court ruled that they come under the definition of "intermediaries" and are therefore subject to the provisions of IT Act and Self-Regulatory Code. The list provided by the intermediary rule provides some contents which cannot be stored, displayed, or uploaded in OTT platforms. If it has been posted, it needs to be removed in 36 hours. This list includes the prohibition of publishing any content which is against any religion, its practices or beliefs or any content which is hurting religious feelings.

⁵⁶ Forum R Patel & Purvi Pokhariyal, *Freedom of Speech and Expression With Special Reference to Freedom of Press* 10(2) GNLU JL Dev & Pol, 102, 2020.

⁵⁷ *Phantom Films Pvt. Ltd. V. The Central Board for Film Certification*, 2016 SCC Online Bombay 3862

⁵⁸ AP Shah, *The most precious of all freedoms*, *The Hindu*, (25 November 2011) <http://www.thehindu.com/opinion/op-ed/the-most-precious-of-allfreedoms/article2656995>

⁵⁹ *MySpace Inc. V. Super Cassettes Industries Ltd*, (2016) Del. SCC 6382: (2017) 236 DLT 478 (DB)

The need for content regulation.

It is of the utmost importance to uphold the quality of the material on well-known OTT services like Netflix, Amazon Prime Video, and Disney Hotstar, which have been discussed in relation to content regulation, as there are more viewers for those platforms.⁶⁰ As seen above, numerous public interest litigations⁶¹ have been filed in favor of the establishment of an independent body to regulate OTT platforms on the grounds that the online media platforms contain material that is unregulated and uncertified for public consumption.⁶² This has been identified as the main concern in relation to shows like Paatal Lok, Taandav, Mirzapur, etc. where it was alleged that these programmes included scenes that seemed offensive to specific communities.⁶³ That the content on OTT platforms are not regulated has become a big matter of debate from the past few years. Especially as regards whether OTT platforms have to be brought under censorship laws or not. One argument contends that OTT platforms' content must be subject to censorship laws, while another contends that a self-regulatory code is sufficient. Additionally, the Information Technology Act of 2000 and the Indian Penal Code of 1860 both contain provisions that address the regulation and operation of OTT platforms in India.⁶⁴ Many believe that in reality, OTT platform content is unregulated even after having a self-regulatory code.⁶⁵

⁶⁰ Michael Perry, *Interpretivism, Freedom of Expression, and Equal Protection*, 42, *Ohio St LJ*, 261, 1981.

⁶¹ *Justice for Rights Foundation V. Union of India*, WP(C) 11164/2018.

⁶² Ms. Philomina, Dr. Tahmeena Nigar Sultana, *Impact of OTT Platforms on Adolescents: A Case Study of Karnataka Review of Literature*, 27 *IOSR-JHSS*, 57-64, 2022.

⁶³ Robert Dawkin, *Online Liberty: Freedom of Expression in the Information Age*, 10(1) *Dalhousie J Legal Studies* 102 (2001).

⁶⁴ Evelyn Mary Aswad, *The Future of Freedom of expression Online*, 17 (1) *Duke L & Tech Rev* 26 (2018).

⁶⁵ Aleena Maria Moncy, *Censorship of OTT Platforms: Freedom of Speech and Expression*, 2 *Jus Corpus L.J.* 497 (2022).

There are a few laws in India that deal with the regulation of OTT platforms, but none of them specifically address the regulation of contents. In *Padmanabh Shankar V. Union of India*,⁶⁶ The court ruled that the contents of OTT platforms cannot be considered public exhibition and should not be subject to censorship laws. Also in *Shreya Singhal V. Union of India*,⁶⁷ the Supreme Court ruled that user-generated content that is published online cannot be censored because such material is not covered by censorship laws.

However, the question of who will regulate OTT contents and if there is no pre-censorship these platforms will come up with many contents which are against religious feelings and moral values. And this is creating a big problem to society as they are causing communal controversies. As far now there is no authority to regulate contents of OTT platforms but they have a self-regulation mechanism which is not efficient to control contents released.

Offensive Content

Since the definition of ‘offensive content’ varies from person to person, what one person finds offensive may not be offensive to another. It is up to the regulatory bodies to properly codify what can be published on OTT platforms and what is not offensive⁶⁸ in order to avoid the freedom of speech and expression⁶⁹ being needlessly sacrificed because of the overly sensitive audience. It is incorrect to characterize all material that is controversial as offensive. A rule or appropriate authority should exist to define what content

⁶⁶ *Padmanabh Shanka v. Union of India*, WP 6050, 2019.

⁶⁷ *Shreya Singhal V. Union of India*, (2025) SC 0329

⁶⁸ Proposed regulation of OTT platforms and digital content in India: Implications and the way ahead’ (Lexquest, January 2021) <https://lexquest.in/wp-content/uploads/2021/01/Proposed-regulation-of-OTT-platforms-and-digital-content-in-India-_Implications-and-the-Way-Ahead.pdf> (last visited Feb 22, 2023).

⁶⁹ Article 19 (1) (g), The Indian Constitution, 1950.

is offensive. Additionally, there is no accurate definition of the term "obscene".⁷⁰ What was deemed offensive a few decades ago might not be today, and what is offensive today might not be offensive material tomorrow. Additionally, this varies from nation to nation. It is especially important to handle religious content cautiously since not doing so carries the risk of causing communal conflict and upsetting the peace in society. It depends on the interpretation and opinion of a person.⁷¹

The Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Guideline of 2021, Information Technology Rules, 2011 and the IT Act

Information Technology Rules, 2011

The due diligence requirements for the intermediary are outlined in the 2011 Rule of Information Technology (Intermediary Guidelines) Rules.

Rule 3: Establishing due diligence guidelines for intermediaries to follow as they carry out their responsibilities, such as publishing rules and regulations, privacy policies, and user agreements for access to or use of the intermediary's computer resources. The due investigation requirement for the intermediary is outlined in Rules, 2011. The rules mandate that the intermediaries publicize their user agreement, privacy policies, and rules and regulations. These terms and conditions, or user agreement, prohibit the user from posting any material that is gravely harmful, harassing, defamatory, obscene, pornographic, libelous, obscene, pornographic, paedophilic, defamatory, invasive of

⁷⁰ Ms. Kritika Sharma, Emerging Gender Role and Hate Speech Representation in Indian Web Series OTT Media Content, 8 (11) JETIR 158-173 (2021).

⁷¹ Shruti Sundar Ray, 'Explained: What is the measure of 'obscenity' in India?' The Indian Express (Kolkata, 12 November 2020) <<https://indianexpress.com/article/explained/explained-milind-soman-obscenity-in-india-6998750/>> (last visited Feb 22, 2023).

another's privacy, hateful, or racially, ethnically objectionable, disparaging, relating to or encouraging money laundering or gambling, harm minors in any way, impersonate another person, belongs to another person and to which the user does not have any right to or violates any law among other things.

Rule 3 (4): A notice-and-takedown system is established by Rule 3(4), and the intermediary is required to remove any of the aforementioned material from its computer system within 36 hours of discovering it, whether it learns of it on its own or learns of it from a third party. However, the Ministry of Communication and Information Technology has since clarified the requirement to remove content within 36 hours to mean that the intermediary should respond to or acknowledge the complaint within 36 hours of receiving it and should take appropriate action.⁷²

After the Justice for Rights Foundation V. Union of India⁷³ to better regulate and control audio-visual content on OTT platforms, the Mobile and Internet Association of India created a document under the code name "Code of Best Practices for Online Curated Content Providers." As a result, OTT video streaming platforms adopted the "Self-Regulation Model" in 2019. It stops OTT video platforms from publishing content that is declared illegal by Indian courts. Such content is of a nature that disrespects the national anthem, offends religious sensitivities, encourages violence against states or terrorists, or depicts children engaging in sex acts. 2019 saw the signing of the self-regulatory and self-censorship mechanism by a number of OTT firms in order to continue operating in India. The "Code of Best Practices for Online Curated Content Providers" was published by IAMAI and DCCC. According to this,

⁷² Rule 3 (4), The Information Technology Rules, 2011

⁷³ Justice for Rights Foundation V. Union of India, WP(C) 11164/2018.

it has been correctly stated that no content that offends religious sensibilities should be shown on over-the-top platforms. Because there were no definite rules defined, the government did not approve the code of conduct developed by the OTT platform through the IAMAI and DCCC. The MIB⁷⁴ is now in charge of the network. The Self-Regulation Mechanism was developed by MIB. Despite having an IT Act,⁷⁵ there is no pre-censorship, so it is insufficient to control the contents published on OTT platforms. The IT Act's provisions⁷⁶ regarding the function, obligations, and liabilities of intermediaries are also unclear and ambiguous. Therefore, the Supreme Court recommended that the government create laws and regulations governing the obligations of intermediaries.

After the Thandav case,⁷⁷ the Supreme Court noted that the OTT platform provisions of the IT Act lacked teeth and advised the government to develop appropriate rules and guidelines. Before creating this Self-Regulatory Mechanism,⁷⁸ the Ministry of Information and Broadcasting held multiple discussions in Delhi, Chennai, and Bombay. While creating this self-regulatory rule, the ministry also looked at the legal systems in Singapore, Australia, and the United States. A three-tiered guideline from 2021 called Information Technology (Intermediary Guidelines and Digital Media Ethics Code) heavily depends on self-regulatory activity.⁷⁹ Now, OTT networks are governed by the Self-Regulatory Code. The online content managers who are the signatories to this agreement are obligated to follow certain guidelines. In

⁷⁴ Ministry of Information and Broadcasting.

⁷⁵ The Information Technology Act, 2000.

⁷⁶ Section 69, The Information Technology Act, 2000.

⁷⁷ *Aparna Purohit V. State of Uttar Pradesh*, 2021 SCC Online All 179.

⁷⁸ Himi Singla, *Self-Regulation by Over-the-Top Platforms: A Study in Context of Video Streaming Services in India*, 3 (4) *IJLMH* 1626-1639 (2020).

⁷⁹ Sabreen Hussain, Sridattha Charan, *Content Regulation and Censorship of Online Curated Content Providers in India*, 3 (2) *IJLMH* 506-523 (2020).

relation to the material that is being offered, this code aims to protect consumers' interests. The guidelines and standards set forth in the policy must be followed by all signatories. The Self-Regulatory Code applies to all Indian-based online content producers who produce information. According to this code, its members have to make "reasonable efforts in good faith."⁸⁰ It is unclear how far these principles are acknowledged and adhered to. Is a question because there is no one in charge of keeping an eye on it. However, OTT networks prefer self-regulation and reject any other form of control.⁸¹

The Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Guideline of 2021.

The self-regulatory code provides a list of contents that cannot be published on OTT platforms including content offending religious sensibilities. Hence, OTT platforms are prohibited to show any material which is against any religion and their practices or beliefs and feelings.

- Nothing that disrespects the nation should ever be published.
- No material that shows contempt for the national anthem and flag should be published.
- Nothing that offends religious sensibilities should be exposed.
- Any publication or public display of child pornography is prohibited.
- Nothing that is against national law or order is allowed to be broadcast.
- Over the top platforms are not allowed to broadcast anything which shows terrorism.

⁸⁰ Dr. Rohini Honap, *Harnessing And Tightening the Legal Noose around The Media And OTT Platforms*, Volume I, Issues II, Multi disciplinary Journal, 1-6, 2022.

⁸¹ Illili Jakha Khujumi, Sumaya Adbisamad Mohamed, Kuldeep Singh, Shatabdi Sharma, Anurag Baruah, *OTT And Censorship: An Analytical Study*, 7 (4), JSSHR 36-44 (2022).

Clause II (A) (c) of the Code states that when publishing the actions, beliefs, practices, or viewpoints of any racial or religious group, a publisher should exercise caution and prudence and consider the multiracial and multireligious aspects of India.

And also, Rule 3(1)(d) says that in case any content mentioned as prohibited has been published then, within 36 hours of receiving the complaint the intermediary should take action against it otherwise it is violation of provisions of The Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Guideline of 2021.

Non application of censorship laws to OTT platforms

OTTs are an important and crucial component of the entertainment media. Conventional regulatory frameworks are not applicable to these platforms. There is no clause in the Cinematograph Act that mentions OTT platforms. Furthermore, the courts have frequently ruled that OTT sites cannot be placed under its purview. In addition, lawsuits against OTT platforms cannot be brought under any other legislation when the Information Technology Act, 2000, which includes specific clauses that include them under its purview, is in effect.⁸² The OTT platforms are a significant and vital component in the internet value chain. It should be noted that OTT innovation has ultimately led to a richer and more diverse internet. This has indirectly sparked customer demand for broadband internet access, which is an essential component for network operators to update and eventually extend the networks. Any attempts to impose new or additional regulations on this specific field must be carefully considered because doing so would surely damage business, economic growth, investment, and stability.

⁸² Justice for Rights Foundation V. Union of India, WP(C) 11164/2018.

The Supreme Court issued a suo-motu writ petition in the *In Re: Prajwala Case*⁸³ and ruled that the Government of India is authorized to create the necessary regulations to impose restrictions on social media and OTT, where obscene content is on the rise. Likewise, the Supreme Court stated in the Poonawalla case⁸⁴ that the government should have the maximum amount of freedom to suppress the dissemination of messages, media, and OTT platforms that promote turmoil and violence of any kind including contents hurting religious sentiments. Post Tandav case,⁸⁵ the Supreme Court noted that the OTT platform sections of the IT Act lacked teeth, and advised the government to establish appropriate norms and guidelines. So, the government has to ensure some form of control over the content released on over the top platforms in order to mitigate potential law and order problems in society and maintain peace.

Conclusion

The introduction of new laws and regulations is a positive development for a society like India, where there is a compelling need to create strategies for resolving problems primarily resulting from the use of technology.⁸⁶ A positive move was taken with the Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021, especially in regards to OTT regulation, content removal, and fake news and contents hurting religious sentiments. However, things didn't turn out as they ought to have, especially in relation to content regulation.⁸⁷ The freedom of speech,

⁸³ 2018 SC 775.

⁸⁴ Tehseen S. Poonawalla V. Union of India, 2018 SC 1639.

⁸⁵ Aparna Purohit V. State of Uttar Pradesh, 2021 SCC Online All 179.

⁸⁶ Sonali Srivastav, Shikha Rai, Alternate Entertainment or Shifting Discourse: A Narrative Analysis of Popular Web Series in India, 7 (1) IJMIL 242-254 (2022).

⁸⁷ Smith Mehta, D Bondy Valdovinos Kaye, Media Censorship: Obscuring autocracy and Hindutva-ideology in Indian governance, 14 (3) JCCC 524-528 (2021).

expression,⁸⁸ and freedom of trade and occupation⁸⁹ are all guaranteed by the Constitution of India, but they are not without restrictions.⁹⁰ As a result, censorship laws or other specific laws may be used to control content.⁹¹ OTT platforms are not location-specific, which makes it all the more challenging with respect to jurisdictional issues. Another significant feature of note with respect to OTT platforms is the ability to be used both domestically and internationally. In light of the distinctiveness of OTT platforms, it is currently fair to assume that the rules to keep a check on and maintain balance also need to be specially designed. OTT platforms are embracing self-regulation but are not ready to be governed by censorship laws.⁹²

⁸⁸ Article 19 (1) (a), The Indian Constitution, 1950.

⁸⁹ Article 19 (1) (g), The Indian Constitution, 1950.

⁹⁰ Article 19 (2), 19 (6), The Indian Constitution, 1950.

⁹¹ Riya Hotchandani, "Freedom of Expression in the Digital Age: Regulation of Over-The-Top (OTP) Platforms", 2 *AJACLA*, 113, 113-126 (2022).

⁹² Ankit, *Over the Top Platform 'Regulations': Is an Abuse of Fundamental Rights*, 5 *INT'L J.L. MGMT. & HUMAN.* 1036 (2022).