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# PRE-CENSORSHIP AND OTT PLATFORMS - LEGAL AND CONSTITUTIONAL PERSPECTIVE

- Pallavi Pawar <sup>1</sup>

## ABSTRACT

As OTT platforms rise in popularity, the legal and constitutional battle over pre-censorship is emerging as a significant issue in balancing freedom of speech and expression with content regulation. Pre-censorship dates back to the British rule in India when it was used to suppress revolutionary ideas. Post gaining independence and after the adoption of the Indian constitution, freedom of speech and expression was guaranteed under Article 19(1)(a), but subject to reasonable restrictions under Article 19(2). In landmark cases like *K.A. Abbas v. Union of India* (1970), the restrictive nature and constitutionality of pre-censorship were challenged and upheld, but with the condition that it should not unduly infringe upon free speech. With the rise of OTT platforms, the traditional concept of pre-censorship has been questioned. These platforms prioritize artistic and creative freedom which has led to a decline in pre-censorship practices. Currently, OTT platforms in India operate with minimal pre-censorship, relying on self-regulation and mandatory content guidelines. This has led to debates on the need for content regulation to prevent harmful or inappropriate material while balancing freedom of expression. The core issue is whether traditional pre-censorship is suitable for regulating digital media without infringing upon constitutional rights. A new regulatory approach is required to address the challenges posed by digital media. This paper aims to explore the tensions between pre-censorship and OTT platforms and propose a reformed regulatory framework that protects constitutional freedoms while ensuring content regulation.

**Keywords:** OTT platforms, Pre-censorship, Freedom of speech and expression, Content regulation, Artistic freedom, Regulatory framework

## INTRODUCTION

In India, Freedom of press is implied from freedom of speech and expression guaranteed by the constitution under Article 19(1)(a). Freedom of press is crucial in a democratic society and

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<sup>1</sup> Student at DES Shri. Navalmal Firodia Law College, Savitribai Phule Pune University

maintaining a free and independent press is essential for a vibrant democracy as it ensures that diverse voices and perspectives can be heard without undue interference. Freedom of press includes freedom over pre-censorship.

Censorship is any alteration or suppression of content that is perceived to be objectionable. When such censorship is carried out before the content materializes i.e. before the information is printed or broadcast it is called pre-censorship.<sup>2</sup>

Though there is a freedom of press it's not howsoever absolute and is subject to reasonable restrictions. Pre censorship has long been used in India to regulate media content aimed at preventing harmful material from reaching the public. Later these practices were challenged arguing that they infringed upon the fundamental right to freedom of speech and expression enshrined in the Constitution.

Media plays a crucial role in providing information and entertainment to the public, offering insights that might otherwise remain hidden. With the rise of Over the Top (OTT) platforms like Netflix, Jio Hotstar, Spotify, Amazon Prime Video etc, viewers now have access to a vast array of content from movies to web series right at their fingertips.

However, the rise of OTT has sparked discussions about the need for regulation and censorship. While the government seeks to impose guidelines to control content on these platforms, there are differing opinions on whether this is necessary. Some argue that censorship is essential to prevent the spread of harmful or offensive content, while others believe it could infringe on creative expression and artistic freedom.

## **HISTORY OF PRE-CENSORSHIP**

Pre censorship, the practice of reviewing and controlling media content before it is published or broadcast has its historical roots across various cultures and legal systems. In India, the practice dates back to colonial times when the British government implemented stringent measures to control and suppress dissenting voices.

During the British Rule, pre-censorship was employed to stifle nationalist and anti-colonial sentiments, it was used as an abuse of power to limit the circulation of revolutionary ideas.

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<sup>2</sup> Vidhi, *The Scope of Pre-Censorship in OTT Media Services— Current Regulatory Regime and Controversies*, VIDHI, <https://vidhi.org/the-scope-of-pre-censorship-in-ott-media-services-current-regulatory-regime-and-controversies/>

The British authorities used it to censor newspapers and publications that criticized colonial policies or incited unrest, aiming to maintain control and prevent the spread of revolutionary ideas.

After India gained independence in 1947, the newly established democratic government inherited and adapted some of these practices. Pre-censorship continued to be used though the focus shifted to maintaining public order and national security.

## CONSTITUTIONAL PERSPECTIVE

The Indian Constitution, adopted in 1950, guarantees freedom of speech and expression under Article 19(1)(a), but this right is subject to reasonable restrictions under Article 19(2), which includes considerations of sovereignty, integrity, and public order.

In India, there have been instances of pre-censorship of films. In 1970, the Supreme Court upheld the practice of pre-censorship, stating that it falls under the reasonable restrictions allowed by Article 19(2) of the Constitution, especially for maintaining public order. However, the Court has also ruled differently in some cases. For example, In *Viacom 18 Media Pvt Ltd. v. Union of India*, (2018) 1 SCC 761 the Court ruled against banning the film *Padmaavat*. The Gujarat and Rajasthan governments had tried to block the film citing public order concerns, even though the film had already been cleared by the Central Board of Film Certification. The Court emphasized that once the Censor Board approves a film, state governments cannot impose a ban as artistic expression is a vital part of free speech under Article 19(1)(a).

In *K.A. Abbas v. Union of India* (1970) the issue of censorship in film and the balance between freedom of speech and the state's authority to regulate content was addressed.

It was held by the supreme court that Censorship of films including prior restraint is justified under the Constitution. The Supreme Court upheld the constitutionality of pre censorship of films, but noted that such regulation must be reasonable and not excessive. The judgment established that while pre censorship could be justified, it should not unduly infringe upon the freedom of speech and expression.

The Court did not accept the distinction between prior censorship and censorship in general and considered both to be governed by the standards of reasonable restrictions within Article 19(2) of the Indian Constitution.

The Constitution recognized that freedom of speech and expression was not an unrestricted right and therefore, reasonable restrictions could be imposed. The absence of the word 'reasonable' in the Cinematograph Act was considered inconclusive in this regard. Prior

censorship was permitted under the Constitution for public order or tranquillity. The Court referred to the guardianship role of the Courts as the legal protector of citizens in preserving public interest.<sup>3</sup>

The landmark case of *Indian express newspapers v. Union of India* (1985) challenged pre-censorship laws and argued that they were inconsistent with the constitutional guarantees of free speech. The supreme court ruled that while some regulation is permissible, pre censorship is a severe restriction and should be avoided unless absolutely necessary.<sup>4</sup>

## RECENT SCENARIO

In recent years, the traditional concept of pre-censorship has faced scrutiny with the rise of digital media and OTT platforms. These platforms operate largely outside the purview of pre-existing regulatory frameworks, leading to debates on whether traditional censorship practices should be adapted or replaced to address the complexities of the digital age.

Overall, the history of pre-censorship reflects a tension between state control and individual freedoms, with ongoing debates about how best to balance these interests.

## RISE OF OTT IN INDIA

OTT platforms began gaining popularity in the late 2000s, with BigFlix launching in 2008 and other platforms like Zee TV and Sony Liv following suit in 2013. The competitiveness expanded significantly with the arrival of Disney+ Hotstar in 2015 and Netflix in 2016. These platforms are not only affordable compared to traditional cinema but also offer diverse content across various languages and genres.

In the 2018, the OTT market saw a global rise of 24% with the steepest growth was recorded from the Asia-Pacific region. India along with the rest of the world has also in the past recent years witnessed recurring debate regarding the regulation of content published on OTT platforms.<sup>5</sup>

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<sup>3</sup> 1971 AIR 481

<sup>4</sup> 1986 AIR 515

<sup>5</sup> Axita Shrivastava, *Regulation of Over The Top Platform in India: A Brief Overview*, VII, RLR, ISSN: 2321-3787, (2023)

The COVID-19 pandemic accelerated the growth of OTT services, as many people turned to these platforms for entertainment during lockdowns when theatres were closed. This shift highlighted the convenience and affordability of watching films and series from home. During this time, OTT platforms became a vital source of entertainment, generating significant viewership and revenue for producers.

## **NEED FOR CENSORSHIP OF OTT**

One of the reasons for the success of OTT is the creative freedom they provide to content creators. Artists can explore complex narratives and tackle unconventional topics that mainstream media often avoids. This freedom allows for innovative storytelling that resonates with diverse audiences.

However, this openness also brings challenges. Concerns about ethical responsibilities and potential social impacts arise, especially given the global reach of digital content. Censorship remains a pressing issue, driven by worries about political agendas and cultural sensitivities. Finding a balance between protecting societal values and fostering creative expression is crucial and requires a deep understanding of the legal frameworks that govern OTT content.

## **REGULATORY FRAMEWORK & LEGAL PERSPECTIVE**

OTT platforms have become more accessible with constant stream of new content with a need to regulate content which can be harmful or inappropriate. OTT platforms in India currently operate with minimal pre censorship. The regulation for OTT content has been evolving. There exist different regulatory frameworks like self-regulation, mandatory content guidelines that platforms have to adhere to etc. but do not impose pre censorship.

In India, OTT platforms like Netflix and Amazon Prime don't need pre-screening or certification for their content, unlike films that require approval from the Central Board of Film Certification. The regulation for OTT content falls under the Ministry of Information and Broadcasting (MIB) and is guided by the Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021.

These rules set a code of ethics and a complaint process for OTT platforms. They require platforms to self-classify their content into categories like U (Universal), U/A 7+, U/A 13+, U/A 16+, and A (Adult), and to implement parental controls for content rated U/A 13+ and above.

If users have complaints about specific content, they can use the platform's grievance redressal system, which must include a designated grievance officer. If a complainant is unsatisfied with the response, they can escalate the issue to the Digital Media Content Regulatory Council (DMCRC), which can impose penalties or even suspend a platform for non-compliance.

Recent legislative developments, such as the Consumer Protection Act of 2019 and the Consumer Protection (E-commerce) Rules of 2020, have also contributed to the regulatory landscape concerning OTT services. The upcoming enactment of the Digital Personal Data Protection Act in 2023, along with the proposed Digital India Act, will further strengthen this regulatory framework.

The rationale for refraining from introducing supplementary regulations, notably in the form of telecommunications licensing, stems from the comprehensiveness of the existing framework. The introduction of such additional regulations could result in unnecessary redundancy, create uncertainty in the business environment, and potentially impede innovation and economic progress.

It is essential to recognize that traditional justifications for licensing, which primarily involve managing limited resources, do not apply to OTTs. OTTs function as internet-based applications independently of resource constraints. Concerns related to competition, consumer protection, and data privacy can effectively be addressed through existing sector-specific laws and regulatory bodies.

The Competition Commission of India (CCI) shares the perspective that crafting a separate regulatory framework for OTTs is redundant and could hinder technological advancement. Therefore, it advocates for avoiding excessive regulation in this domain.<sup>6</sup>

Even though OTT platforms have the capacity to influence the Indian audience watching content on these platforms, there is currently no legal provision for pre-censorship of such content in India. This raises valid questions about whether OTT media content should be subject to a pre-censorship system similar to films, or whether a more relaxed approach should be adopted to encourage creative freedom and artistic expression on these platforms.

## **FREEDOM VS REGULATION**

Striking a balance between artistic freedom and censorship is essential. Too much freedom without censorship could result in inappropriate or harmful content and excessive censorship

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<sup>6</sup> ADIF, <https://blog.adif.in/p/ott-regulation-in-india-a-comprehensive>, (last visited Oct, 16<sup>th</sup> 2024)

might hold back creativity and limit free expression. The debate between censorship and artistic freedom started in the 1970s when the Supreme Court first addressed the issue of pre-censorship of films and its relationship to the fundamental right of free speech and expression under Article 19(1)(a) of the Constitution.

A filmmaker's artistic freedom is not absolute in India and is subject to restrictions. The Courts have interpreted Article 19(2) to allow censorship on content that threatens India's sovereignty, security, or integrity, or is defamatory etc. The Censor Board of Film Certification (CBFC) is responsible for censoring such content.

In print, it may manifest as restrictions on the publication of certain stories or viewpoints, often leading to self-censorship among journalists concerned about legal repercussions or government backlash. This can stifle critical reporting and diminish the media's role in holding power accountable. In contrast, pre censorship in films typically involves regulatory bodies reviewing content before it is released, which can lead to cuts or alterations that may compromise the artistic integrity of the work. While both forms of censorship aim to control what is disseminated to the public, they operate in distinct contexts and have different implications for creative expression and public discourse.

With the advent of technology and low footfall in theatres in the pandemic world, filmmakers have adopted the OTT Platforms as their favourite medium for release of motion pictures and web-series. This shift can be said to have a major relief for the filmmakers as it is not mandatory for procuring CBFC certification for making movies available on OTT Platforms. With the rising popularity of OTT Platforms and social media which can be said to have been unregulated by law for a certain timeframe, led to the enactment of *Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021* ("**Guidelines**").<sup>7</sup> These rules established a framework for self-regulation of OTT platforms, requiring content classification and a grievance redressal mechanism.

It marked a significant shift towards regulating digital content, setting the stage for potential pre censorship mechanisms in the future. Thus, it is not the case any longer that the content on OTT Platforms is unregulated as such content has to mandatorily comply with the Guidelines.

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<sup>7</sup> LEXOLOGY, <https://www.lexology.com/library/detail.aspx?g=956c409e-0b5b-4a41-96ac-b045669449cd>, (last visited Oct, 16<sup>th</sup> 2024)



There are no strict laws regulating OTT platforms in India, but the Internet and Mobile Association of India has introduced a self-regulatory code called “The Code of Best Practices for Online Curated Content Providers.”

While the Information & Broadcasting Ministry (“Ministry”) is responsible for content on television and print industry, they have not yet prescribed any specific law for content regulation on online services. In the absence of any regulatory framework, each platform regulates itself. In the wake of such a situation, the Digital Entertainment Committee of the Internet & Mobile Association of India (“IAMAI”) released “Universal Self-Regulation Code for Online Curated Content Providers” on September 4, 2020 (“Code”) superseding the codes issued in January 2019 and February 2020. This code includes major platforms like Netflix, Amazon Prime, and others. Its goal is to balance freedom of speech with responsible content.<sup>8</sup>

Key principles of the code include, no disrespect to the national flag or emblem, Prohibition of child pornography, avoiding content that incites violence or outrages religious sentiments, No promotion of terrorism etc. To support these principles, the code suggests, age-based content classification, clear content descriptors for viewers and optional parental control features.

While this initiative is positive, it has shortcomings. There are no penalties for non-compliance, and each platform must handle complaints independently, which can be biased. An independent body, the Digital Curated Content Complaint Council (DCCCC), was created to address these issues, but not all platforms have embraced it.

Controversies continue, as seen with shows like *Paatal Lok* and *Jamtara*, which faced backlash for using caste slurs and offending communities. A petition regarding explicit content is pending in the Delhi High Court.

A survey revealed that 57% of people support censorship on OTT platforms. While the self-regulatory code is a good start, it needs stronger enforcement to be effective without stifling creativity.<sup>9</sup>

Recently the Supreme Court of India dismissed a petition seeking the establishment of an autonomous body to regulate content on OTT platforms. The bench, led by Chief Justice DY

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<sup>8</sup> MONDAQ, <https://www.mondaq.com/india/broadcasting-film-tv-radio/1029992/self-regulation-for-online-curated-content-providers>, (last visited Oct, 16<sup>th</sup> 2024)

<sup>9</sup>Vidhi, *The Scope of Pre-Censorship in OTT Media Services— Current Regulatory Regime and Controversies*, VIDHI, <https://vidhi.org/the-scope-of-pre-censorship-in-ott-media-services-current-regulatory-regime-and-controversies/>

Chandrachud, stated that this issue falls under policy matters requiring stakeholder consultation, not judicial intervention.

The petition argued for a Central Board for Regulation and Monitoring of Online Video Contents (CBRMOV) to oversee OTT content, citing concerns about self-regulation's ineffectiveness. The petitioners referenced specific content, claiming it distorted historical events and promoted harmful narratives.

While the petitioners pointed out the lack of a regulatory body like the Central Board of Film Certification (CBFC) for films, the court emphasized that the existing IT Rules 2021 were intended for self-regulation. The court refused the petitioners' request to approach the concerned ministry, highlighting the need for genuine PILs over policy discussions.

The petitioners mentioned the Netflix series 'IC 814: The Kandahar Hijack'. It said the series, claimed to be based on real-life events, allegedly attempted to rewrite history and downplayed the severity of terrorism, while subtly glorifying the actions of the hijackers. It vilified the Hindu community and promoted a harmful agenda, noted the PIL. It said while the Central Board of Film Certification (CBFC) regulated films under the Cinematograph Act, there was no similar statutory body to monitor the OTT content. The OTT platforms were bound only by self-regulation, which has proven ineffective, leading to the unchecked release of controversial content.<sup>10</sup>

Pre-censorship may not be the most suitable method for regulating OTT platforms due to several reasons. OTT platforms feature a vast and continuously evolving array of content that makes pre-censorship impractical. The sheer volume and rapid upload of content make it difficult for traditional pre censorship processes to keep pace. OTT platforms operate on a global scale, often transcending national borders. Implementing pre-censorship would be challenging due to jurisdictional issues and the difficulty of enforcing local regulations internationally.

Pre-censorship could infringe on freedom of speech and expression, which are protected under constitutional rights. OTT platforms, with their emphasis on user-generated content and diverse programming, might face significant legal and ethical challenges if subjected to strict pre-

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<sup>10</sup> INDIALEGAL, [https://indialegallive.com/constitutional-law-news/courts-news/supreme-court-moots-live-streaming-of-all-hearings/#google\\_vignette](https://indialegallive.com/constitutional-law-news/courts-news/supreme-court-moots-live-streaming-of-all-hearings/#google_vignette), (last visited Oct, 17<sup>th</sup> 2024)

ensorship. Many OTT platforms have adopted self-regulatory measures, such as content ratings and parental controls, to manage content responsibly. These systems are designed to provide viewers with control over what they watch while respecting their freedom of choice. Instead of pre-censorship, a more flexible and adaptive regulatory approach might be more effective. This could include post-publication reviews, content moderation practices, and clear guidelines to address specific issues like harmful content while still respecting free speech.

Overall, while regulation is important to ensure content safety and appropriateness, pre-censorship may not be the best fit for the dynamic and diverse environment of OTT platforms.

## CONCLUSION

The rise of OTT platforms in India has sparked an important conversation about the balance between freedom of expression and the need for content regulation. While pre-censorship has historical roots and aims to protect public interest, its application to modern digital platforms poses significant challenges. The rapid pace of content creation and the global nature of OTT services makes traditional censorship methods impractical and potentially harmful to artistic freedom. As we've seen, current regulatory frameworks emphasize self-regulation and content classification, allowing platforms to manage their offerings while respecting user choice. Instead of imposing strict pre-censorship, a more flexible approach focusing on post-publication reviews and clear guidelines may better address concerns about harmful content without infringing on constitutional rights. Ultimately, the goal should be to create an environment where creative expression thrives alongside responsible content management, ensuring that diverse voices can be heard while also protecting societal values. A reformed regulatory framework that balances these interests is essential for navigating the complexities of the digital age.

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