Revisiting K.A.Abbas v. UOI[1]

"Censorship is to art as lynching is to justice."
— Henry Louis Gates Jr.

Fundamental rights are embodied in Part III of the Constitution. They are the lofty ideals which have been enshrined in the Constitution. Freedom of speech and expression is one of the important fundamental rights. In India, freedom of press is embodied in Article 19(1)(a) only. We don't have a specific article dedicated to it. In Indian Express Newspapers(P) Ltd v.UOI[2] , the Supreme Court has observed that freedom of press has not been used in Article 19 but is comprehended within Article 19 (1)(a). In Tata Press Ltd. V MTNL[3], it has been held that freedom of speech and expression includes right to receive information about any event, happening or incident. With the changing times, we find a change in the values and morals of the society. The freedom guaranteed under Article 19(1)(a) can be curbed only on the grounds specified in Article 19 (2). They are the reasonable restrictions .One of the grounds /restrictions on which the freedom of speech and expression could be curbed is 'public order and morality.' Long ago, in the landmark judgement of K.A.Abbas v. UOI[4], the Hon'ble Supreme Court had upheld the constitutionality of film censorship, especially when such thing was inapplicable to the print media. The apex court had drawn a distinction between film and print media. The Court had held that the motion picture affects the impressionistic minds of children more than the print media. However, today the times have changed. We have come a long way from the times of print media. Today print, electronic and social media are the newer medium of expression. And interestingly, each media is governed by a different type of bodies, some of which are even self regulatory bodies. Now, the question that arises is, in the present era, how far is the film censorship constitutional? This paper shall attempt to examine this.

II. Pre Censorship in India

As far as the press is concerned, the law is clear that pre-censorship is invalid and unconstitutional. If later it is found that anything that is published is attracting Art. 19 (2), a case can be filed .However; the fundamental right to publish without prior scrutiny exists for the print and the electronic media. Unlike this, films, another form of expression (artistic) attract pre censorship.

III. Film Censorship and the Law

Constitutional Provisions

Art. 19 (1) a: All citizens shall have the right to freedom of speech and expression.

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[2] AIR 1962SC305
[3] (1995)5 SCC139
[4] AIR 1971SC481

(2) Nothing in sub clause (a) of clause (1) shall affect the operation of any existing law, or prevent the State from making any law, in so far as such law imposes reasonable restrictions on the exercise of the right conferred by the said sub clause 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 in relation to contempt of court, defamation or incitement to an offence.

Motion pictures have also been regarded as a form of speech and expression in India. So far censorship of films in India is concerned; the power of legislation is vested with the Parliament according to Entry 60 [19] of the Union List of the Schedule VII under the Constitution. However, the States can also make laws on cinemas under Entry 33 [20] of the Sate List but subject to the provision of the central legislation.

Film Censorship is regulated under the Cinematograph Act of 1952, as amended in 1983 and the Cinematograph (Certification) Rules, 1983. Recently, in 2013, and earlier in 2010, attempts were made to introduce the Cinematograph Bill. The Act was enacted to provide for the certification of cinematograph films for exhibition and for regulating their exhibition. This statute established the Board of Film Censors, which later became the Board of Film Certification, (the "Film Board").

The brief scheme of the statute is as follows. It empowers the Central Government to constitute a Censor Board consisting of up to 25 members for the purpose of sanctioning films for public exhibition. **Section 4 (1)** requires every film scheduled for public screening to obtain a certificate from the Film Board. After examination of a film, either the Board sanctions the film for restricted or unrestricted public exhibition; or directs to carry out necessary modifications; or refuse to sanction the film for public exhibition. **Section 5B (1)** declares that a film shall not be certified if it violates certain provisions. Sub-section 2 empowers the Central Government to issue necessary guidelines in this regard. The decisions of the Board are appealable in the Appellate Tribunal.

The Central Government is vested with revisional powers under Section 6(1) to call for the record of any proceeding in relation to any film at any stage, except a matter of appeal pending before the Tribunal, to give necessary order and the Board must dispose of the matter in conformity with such order. The proviso to this section enabled the Government not to disclose any fact in this respect which it considered to be against public interest. Penalties are also prescribed for contravention of the requirements of the Act. Under Part III, which deals with licensing for exhibition, section 13 empowers the Central Government or the Local Authority to suspend exhibition of a film in a UT/State or part of it where it may likely to cause breach of peace.

The Cinematograph (Certification) Rules 1983 have been framed under Section 8 of the Act. The Rules

deals in the procedural details of Board, the Examining Committee, Revising Committee, the Tribunal and related matters. It may be stated in this regard, under Rule 11, it specifically imposes a duty on the Board to assess public reactions to films. This may be by holding symposia or seminars of film critics, film writers, community leaders and persons engaged in the film industry and also by undertaking local or national surveys to study the impact of films on the public mind.

The body's primary function is to assign each film to one of the four categories:-

U- Unrestricted public exhibition

UA- Unrestricted public exhibition (with a word of caution that Parental discretion required for children below 12 years

S- Restricted to any special class of persons (for example: doctors)

IV. K.A.ABBAS Verdict

In this case, the petitioner challenged the constitutionality of Cinematograph Act, 1952 and the Rules made thereunder. The petitioner's film, Tale of Four Cities, was denied 'U' Certificate. The Court distinguished films from any other form of expression as:

"… it has been almost universally recognised that the treatment of motion pictures must be different from that of other forms of art and expression. This arises from the instant appeal of the motion picture, its versatility, realism (often surrealism), and its coordination of the visual and aural senses. The art of the cameraman, with trick photography, vista vision and three dimensional representation thrown in, has made the cinema picture more true to life than even the theatre or indeed any other form of representative art. The motion picture is able to stir up emotions more deeply than any other product of art. Its effect particularly on children and adolescents is very great since their immaturity makes them more willingly suspend their disbelief than mature men and women. They also remember the action in the picture and try to emulate or imitate what they have seen."

Justice Hidaytullah has delivered a unanimous verdict in the 1970s in the Abbas'case and has upheld the validity of the Cinematograph Act, 1952. The Supreme Court had held that pre censorship for films was constitutionally valid and well within the ambit of Article 19 (2). However, the censorship should not be exercised to lay unreasonable restriction on freedom of speech and expression.

V. Post K.A.Abbas Scenario

Although much water has flown since then, we still see, the Censor Board, as it is popularly known, applying its scissors every now and then. Be it the question of release of Da Vinci Code or the latest film 'Mersal' which is said to have some scenes on demonetization. So, the question is, today do we really need a film certification board which exercises censorship powers?

In a criminal case, Shankar v. State of T.N[5], where the convict is said to have been deeply influenced by the depiction of crimes in films, the court commented on the impact of TV:

In the last decade mass media has grown worldwide to be larger, more influential and more powerful. The TV media is most powerful. The constraints that are applicable to film media equally apply to TV media also and authorities concerned must exercise proper discretion in selecting the films to be telecast…

In the case of Hero Cup[6], the Supreme Court has once again stated that there is a difference between the movie and electronic medium and the two cannot be equated. Also, the apex court has reiterated in favour of the need of subjecting the films to prior restraint. It had stated as under:

Though the movie enjoys the guarantee under Article 19 (1)(a), there is now significant difference between the movie and other modes of communication. Movie motivates thoughts and assures a high degree of attention and retention. In view of the scientific improvements in photography and production, the present movie is a powerful means of communication. It has much potential for evil as it has for good. With these qualities and since it caters for mass audience who are generally not selective about what they watch, the movie cannot be equated with other modes of communication. It cannot be allowed to function in a free market place just as does the newspapers or magazines. Censorship by prior restraint is not only desirable but also necessary.[7]

VI. Electronic Media, Social Media and Regulatory Bodies

Cable Television Network (Regulation) Act, 1995

The Act provides for mandatory registration of all cable operators.[8] The Act confines itself to the regulation of cable operators and does not extend to broadcasters, with the result that the broadcasters remain unaccountable under this legislation."[9] The most important shortcoming of The Cable television Network (Regulation) Act, 1995 is, this Act does not empower to take action against TV channels or broadcasters. The power extended only to action against cable operators. Also, it is important to note that this Act does not apply the doctrine of prior restraint.

Programme Code and Advertising Code

[5] (1994)4 SCC478
[6] (1995)2 SCC 161
[7] (1995)2 SCC 194, Para 15
[8] Ss.3 and 4, Cable Television Networks (Regulation) Act, 1995. Under S. 2(aa), 'Cable operator' is defined as ''any person who provides cable service through a cable television network or otherwise controls or is responsible for the management and operation of a cable television network."
[9] The Downlinking Guidelines issued by the Ministry of Information and Broadcasting of India in 2005 sought to bind broadcasters to certain provisions of the Cable Television Network (Regulation) Act, 1995, namely the Programme Code and the Advertising Code.

The Cable television Network (Regulation) Act, 1995 brought into force a Programme Code and Advertising Code in respect of programmes and advertisements transmitted by cable operators.[10] The Advertising Code provides that goods and services advertised shall not suffer from any defect or deficiency under the Consumer Protection Act, 1986.[11] The Programme Code prescribes that no programme should be carried in the cable service which contravenes the provisions of the Cinematograph Act, 1953 and in particular, programmes not suitable for unrestricted public exhibition. [12] Later, broadcasting and cable services came under the purview of TRAI Act, 1997.

Information Technology Act, 2000

S.67 of Information Technology Act, 2000 deals with 'publishing of information which is obscene in electronic form.' The section seeks to punish, whoever publishes or transmits or causes to be published in electronic format any material which is lascivious or appeals to the prurient interest or if its effect is such as to tend to deprave and corrupt persons who are likely, having regard to all relevant circumstances, to read, see or hear the matter contained or embodied in it.

A plain reading of S. 67 of Information Technology Act, 2000, makes it clear that the scope of this section comes into picture after the publication or transmission; which means the impugned material is not subject to prior scrutiny.

Broadcasting Services Regulation Bill, 2006

This Bill provided for the Centre to prescribe guidelines and norms to evaluate and certify content.

News Broadcasters Association (NBA)- Code of Ethics and Broadcasting Standards

The Code of NBA, an association representing private TV news and current affairs broadcasters, provides broad principles accepted by the members of NBA as practice and procedures that would help journalist and electronic media adhere to highest standards of public service and integrity.

VII. Media Regulation: Position in other countries

Cuba: regulated

Internet available only at government controlled "access points." Activity Online is monitored through IP blocking, keyword filtering and browsing history checking. Only pro-government users may upload content.

[10] Ss.5 and 6. Cable Television Networks (Regulation) Act, 1995
[11] Cable Television Network Rules, 1994,Rule 7(2)(viii)
[12] Rule 6(I)(o), Cable Television Network Rules, 1994

North Korea: Government Control

All websites are under government control. About 4% of the population has Internet access.

Saudi Arabia: Regulated

Around 400,000 sites have been blocked, including any that discuss political, social or religious topics incompatible with the Islamic beliefs of the monarchy.

Iran: **Controlled**

Bloggers must register at the Ministry of Art and Culture. Those that express opposition to the mullahs who run the country are harassed and jailed.

China: **Rigid Censorship**

China has the most rigid censorship program in the world. The government filters searches, block sites and erases "inconvenient" content, rerouting search terms on Taiwan independence or the Tiananmen Square massacre to items favorable to the Communist Party.

United States: Internet Regulated

The First Amendment to the United States Constitution protects the freedom of speech and expression against all levels of government censorship. This protection extends to cyberspace and thus there is relatively minimal governmental technical filtering of online content in the United States. However, due to complex legal and private mandates, the internet is nonetheless regulated.

The United States has no federal agency charged with either permitting or restricting the exhibition of motion pictures. Most instances of films being banned are via ordinances or proclamations by city or state governments.[13]

United Kingdom

British citizens have a negative right to freedom of expression under the common law[14]. In 1998, the United Kingdom incorporated the European Convention, and the guarantee of freedom of expression it contains in Article 10, into its domestic law under the Human Rights Act. However, there is a broad sweep of exceptions including threatening or abusive words or behaviour intending or likely to cause harassment,

[13] Wittern-Keller, Laura. Freedom of the Screen: Legal Challenges to State Film Censorship. University Press of Kentucky, 2008.

[14] *Klug, Francesca (1996). Starmer, Keir; Weir, Stuart, eds. The Three Pillars of Liberty: Political Rights and Freedoms in the United Kingdom. The Democratic Audit of the United Kingdom. Routledge. p. 165. ISBN 978-041509642-3.*

alarm or distress or cause a breach of the peace (which has been used to prohibit racist speech targeted at individuals)[15]

Internet

Freedom of expression and protection of privacy over the Internet is guaranteed by UK law. Nonetheless, over the last few years there has been a shift toward increased surveillance and police measures. Nevertheless, in 2010 the OpenNet Initiative (ONI) found no evidence of technical filtering in the political, social, conflict/security, or Internet tools areas. The U.K. openly blocks child pornography Web sites, for which ONI does not test. [16]

In 2013, the then Prime Minister David Cameron had announced that Pornography will be blocked by default to most households in the UK unless they choose to receive it.[17] The prime minister also told how warning pages will pop up if people try to access illegal content to spell out more explicitly the consequences of their actions. He had said

'We are not prescribing how the ISPs should contact their customers – it's up to them to find their own technological solutions. 'But however they do it, there will be no escaping this decision, no "remind me later" and then it never gets done. 'And they will ensure it is an adult making the choice. If adults don't want these filters – that's their decision.'

Video games

The introduction of controversial video games featuring photo-realistic images, such as *Mortal Kombat* and *Night Trap*, led to calls from the tabloid press for games to fall under the Video Recordings Act. The UK games publisher trade body ELSPA responded by introducing a voluntary age rating system in 1994. The ELSPA ratings were succeeded by PEG Iin 2003.

Nevertheless, although games are generally exempt from the Video Recordings Act, those depicting sexual content, or gross violence towards people or animals, must still be submitted to the BBFC for consideration.

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15 Hensley, Thomas R. (2001). The Boundaries of Freedom of Expression & Order in American Democracy. Kent State University Press. p. 153.

Jump up^ Klug 1996, pp. 175–179

Jump up^ Public Order Act 1986

16 "Country report: United Kingdom", OpenNet Initiative, 18 December 2010

17 http://metro.co.uk/2013/07/21/david-cameron-online-porn-will-be-blocked-by-default-3891620/

BBFC ratings are legally binding, and British law imposes stiff penalties on retailers who sell to under-aged customers. However, the Act was discovered in August 2009 to be unenforceable.[18]

VII. Suggestions

- Films should not be subjected to any kind of censorship or certification.
- The Films must be brought at par with other forms of media as far as prior restraint is concerned.
- CBFC should be scrapped.

VIII. Conclusion

When cinema first came to India in the early 20th century, it caused the ruling British a few headaches. The "excitable natives", according to the English press, were going to be subjected to provocations that they were entirely unfit to handle. The chastity of white women would come under severe threat if the Indians were allowed were allowed a free rein in the cinema theatres, with all the verisimilitude of the silver screen before them. Consequently, more than fifty regulations were drawn up to regulate and control the exhibition of films in India. With the advent of Independence, one would have thought that such arguments would have been driven out of the country along with the British. Instead, they were largely replicated in the 1952 Cinematograph Act, the newly minted Indian Parliament's legislation for dealing with the cinema.

Television media is self regulated .News Broadcasting Standards Association. Today new forms of media have emerged. In India, we do not follow the doctrine of pre censorship for the media. The film has to be presented before the CBFC, which reserves the rights of certification of the film for viewing and also banning the screening of the film. This seems be clear violation of Article 14 because the electronic media is not subjected to pre censorship.

This doctrine has been upheld by the Hon'ble Supreme Court in several judgments. Now, the principle, that pre censorship for the films is not violative of Art. 14 was good in the K.A. Abbas' case days. But, is it still good, especially, when the new age media is here to stay. Is it not discriminatory that films are subjected to pre-censorship and electronic and social media is not?

The journey between Abbas verdict and to the present day has been too long. India of the 21st century is completely different from the India of 1970s.Today the medium of expression have widened and the contention that film is a powerful tool of expression … can equally be true for the electronic media. Also,

[18] Loophole over DVD age rating law, BBC News, 25 August 2009

there has been a demographical shift and the younger generation is exposed to many things which the younger generation of the 1970s was unaware about.

Two fundamental questions need to be answered today. First, can we and should we regulate the media. If yes, to what extent. And secondly, should we continue to have film censorship in the internet age where all other content is not subjected to pre censorship. The author strongly argues that film censorship is discriminatory and is violative of Art. 14 of the Constitution and it is high time that the K.A.Abbas verdict be given a relook.