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Right to Free Speech in a Censored Democracy

RIGHT TO FREE SPEECH IN A CENSORED DEMOCRACY

*Subhradipta Sarkar**

'I disapprove of what you say, but I will defend to the death your right to say it.' – Voltaire

I. INTRODUCTION

Official accounts claim that Indian film industry is the largest in the world producing over a thousand films in a year screened over 13,000 cinema halls in the country. Every three months an audience as large as the country's entire population flocks to the cinema halls.¹ Notwithstanding the industry's gigantic volume, so long one makes stereotype commercially viable movies with only songs and dance sequences and follow common formulas of entertainment – there is no harm; but the moment, one dares to speak out the truth against the State articulating his opinion on any sensitive or serious matter through his films or documentaries, which may not be palatable to certain power holders; he is swimming into troubled waters. There is ample possibility of facing censor scissors or political ban.

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

Freedom of speech and expression is the concept of being able to express oneself freely whether through words of mouth, literature, art, or any other medium of communication. It is often regarded as an integral concept in modern liberal democracies. On the other hand, censorship represents denial of freedom of speech, of expression and of information. Despite the fact that the Constitution of India does not expressly mention motion pictures as a medium of speech and

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¹ Central Board of Film Certification Home Page, <http://www.cbfcindia.tn.nic.in/> (last visited Aug. 21, 2008).

expression, they have been so accepted through various court decisions. Films in India have been censored on the grounds of obscenity, sex and violence; but this paper does not intend to venture into those areas, rather it explores elsewhere where films have been banned or targeted in the name of maintaining public order; respecting beliefs, sentiments and traditions; or for criticizing the State on certain issues. The paper does not endeavor to go into the intricacies of the problems; instead, it limits itself to testify the legality of censorship in the light of the freedom of speech and expression. In this pursuit, it presents some controversies of the recent times, highlights certain judgments and relevant legal provisions. Although the paper concludes such censorship as illegal and arbitrary, it also attempts to find a way out for ensuring better protection of free speech as far as motion pictures in India are concerned.

II. LEGACY OF THE 'BAN' STORY

In 2008, *Maharashtra Navnirman Sena* (MNS, Maharashtra Reconstruction Army), spearheaded by Raj Thackeray, unleashed unprecedented violence to push back the poor North Indian economic migrants (largely from the States of Uttar Pradesh and Bihar) from Maharashtra, especially from Mumbai, reasoning that they have seized the employment opportunities of the Marathis (residents of Maharashtra) and have caused unemployment problem. Hence, they should be repatriated to their home States, if necessary, by force. The State Government of Maharashtra had been almost a mute spectator to this regionalism until it spilled over and invited strong notice from the Central Home Ministry. Finally, the State Home Department registered 54 criminal cases against Thackeray for rioting, assault, damage to properties, provoking hatred among different communities, etc. Even so, Thackeray managed to get bail in all the cases.² When Kamal Khan tried to capture the plight of those migrants in his film 'Deshdrohi', otherwise callous State Government immediately banned the movie for two months acting on the report of the police that if the film is released in the same format it may lead to 'law and order' problem in the State.³

The Bombay High Court had cleared the screening of the film on the ground that the State's ban on its release was based on 'extraneous grounds'. Yet the film was not released in the State. Finally, after the matter reached the Supreme Court. The apex court also cleared the movie for screening in the State. The court refused to agree with the contention of the Maharashtra Government, that if the film was screened it would lead to a law and order problem.⁴ Nonetheless, the most unfortunate part is that the fight of the producer is far from over. The film, scheduled to be screened in nearly 70 theatres across the State, could not be released as police

² See Lyla Bavadam, *Hate campaign*, FRONTLINE, Nov. 21, 2008, at 24, 24-26.

³ *Fears of MNS backlash prompted 'Deshdrohi' ban*, EXPRESSINDIA.COM, Nov. 13, 2008, <http://www.expressindia.com/latest-news/Fears-of-MNS-backlash-prompted-Deshdrohi-ban/385263/>.

⁴ *SC rejects Maharashtra plea, clears Deshdrohi*, THE INDIAN EXPRESS, Jan. 24, 2009, available at <http://www.indianexpress.com/news/sc-rejects-maharashtra-plea-clears-deshdrohi/414640/>.

refused to provide protection to theatre owners who have been allegedly receiving threats from MNS.⁵ The state of affairs continues till date.

Based on a true story and made in the backdrop of 2002 Gujarat pogrom,⁶ ‘Parzania’ revolves around a Parsi family, with parents and two kids, in Ahmedabad in Gujarat. The family is caught in the midst of the religious madness, and suffers. While the girl, Shernaz manages to flee; the boy, Parzan is nowhere to be found. The family waits for Parzan. The film ends with a photograph of Azhar, a real boy still missing since the Gujarat riots, in the hope that the film may help his parents, the director Rahul Dholakia’s friends, to get some news of him. In 2007, at the 53rd National Film Awards,⁷ Dholakia was named as the Best Director for this film. Icing on the cake was Sarika to be adjudged the best actress in recognition of her performance in the same film.⁸ The film with such a strong message should be screened as widely as possible. Unfortunately, that’s not the scenario in India. In fact, Dholakia had strong apprehension on the uncertainty in clearing off the film by the Board. He made the film in English and not in any Indian language so that he could at least get the film released abroad.⁹ His fears were justified when the Censor Board took a long time for clearance. Problems did not desert him even with Censor Board’s certificate. After a positive nod from the Censor Board, *Bajrang Dal* (Army of Hanuman)¹⁰ with the tacit support of the ruling *Bharatiya Janata Party* (BJP, Indian People’s Party)¹¹ Government in the State of Gujarat slapped a political ban on the movie in Gujarat – the place where the film matters the most. Fearing *Bajrang Dal*’s threat, the multiplex owners were unwilling to release the movie on the scheduled date in Gujarat. Of course, they cited that it was ‘commercially nonviable’. The Government pleaded ignorance about the reasons for the film not being released and washed off their hands.¹² Such censorship resembles Paul O’Higgins’

⁵ *Despite SC nod, ‘Deshdrohi’ fails to hit Maha theatres*, THE FINANCIAL EXPRESS, Jan. 23, 2009, available at <http://www.financialexpress.com/news/despite-sc-nod-deshdrohi-fails-to-hit-maha-theatres/414435/>.

⁶ On February 27, 2002, 59 Hindus were charred to death when the Sabarmati Express train at Godhra (Gujarat) was set on fire. In reaction to that incident, what followed in Gujarat was unprecedented in the communal history of the country since the Partition in 1947. Some 2500 Muslims were murdered; hundreds of women raped and thousands were rendered homeless. See generally Dionne Bunsha, *Five years after Godhra and the pogrom*, THE HINDU, Feb. 28, 2007, available at <http://www.hindu.com/2007/02/28/stories/2007022802811000.htm>.

⁷ This is conferred every year by the Directorate of Film Festival of the Government of India.

⁸ *53rd National Film Awards announced*, THE TIMES OF INDIA, Aug. 7, 2007, available at http://timesofindia.indiatimes.com/India/53rd_National_Film_Awards_announced/articleshow/2263261.cms.

⁹ *Parzania director: 2006’s National award winner?*, REDIFF.COM, Aug. 30, 2006, <http://ia.rediff.com/movies/2006/aug/30rahul.htm> (interview with Rahul Dholakia).

¹⁰ It is perceived as a radical Hindutava force.

¹¹ This was the key political party in the National Democratic Alliance (NDA) coalition Government, which was in power at the Centre for a full term during 1999 – 2004 under the Prime Ministership of Atal Behari Vajpayee before the present United Progressive Alliance led by Congress party. See generally *Bharatiya Janata Party*, WIKIPEDIA.ORG, http://en.wikipedia.org/wiki/Bharatiya_Janata_Party (last visited Mar. 2, 2008).

¹² Tanvir A Siddiqui, *Bad business, say theatres, no Parzania in Gujarat today*, THE INDIAN EXPRESS, Jan. 26, 2007, available at <http://www.indianexpress.com/story/21792.html>.

‘subterranean censorship’, where an individual or institution uses power set aside for another purpose to impose censorship without direct government involvement.¹³

It is not long back, when in 2006, incidents of vociferous protests of many Christian communities against screening of ‘The Da Vinci Code’ dominated the press and media for quite some time. The storyline of the film invited ire of various religious, political and radical groups who viewed it as ‘blasphemous’ and ‘offensive’.¹⁴ The Hollywood creation, based on the bestselling 2003 novel by author Dan Brown was gradually banned by seven State Governments¹⁵ in their respective territories after being cleared by the Censor Board. The reason cited by almost all the Governments was that the movie might hurt the ‘religious sentiments’ of the people of the minority community; hence, disturb the ‘peace and tranquility in the State’.¹⁶ When this was the scenario in India, curiously, apart from few hiccups and protests, the movie was released with a bang in most of the Christian countries in the West on May 18, 2006.¹⁷ In spite of the fact that the novel is on sale (both genuine and pirated copies) in India since its publication, there was a huge outcry in many States of India by the Christian organizations to ban the film from screening in India for the perceived anti-Christian message. Following special screenings for various Catholic leaders and the Information and Broadcasting Minister, Priya

¹³ DARREN J. O’BYRNE, HUMAN RIGHTS – AN INTRODUCTION 107 (Pearson Education Limited 2003).

¹⁴ *Da Vinci film protests stepped up*, BBC NEWS, May 16, 2006, <http://news.bbc.co.uk/1/hi/entertainment/4987116.stm>.

¹⁵ The seven states are: Goa, Kerala, Meghalaya, Nagaland, Tamil Nadu, Andhra Pradesh and Punjab.

¹⁶ *E.g.*, the State Government of Andhra Pradesh by the impugned order [G.O.Rt.No.1012, Home (General. A) Department, dated 01.06.2006] in purported exercise of the powers conferred under Section.8 of Andhra Pradesh Cinemas Regulation Act, 1955, No. 4 of 1955, suspended the exhibition of ‘The Da Vinci Code’ in English, Telugu and other languages in the entire State, with effect from the publication of the notification. The reasons recorded for the above decision as set out in the impugned notification are:

Government have received representations from various Minority Organizations, in general and Christian organizations, in particular, requesting the Government to impose ban on exhibition of the movie ‘The Da Vinci Code’ to be released in the State of Andhra Pradesh on 2nd June, 2006. The ban should be from 2nd June 2006 onwards. They contended that the screening of the movie will not only offend religious sentiments but lead to demonstrations, disturb peace and tranquility in the State. The reports from the Government agencies indicate that some Christian groups may take recourse to agitational activities if the film is released and that untoward incidents may take place.

Government after taking into consideration of the reports, complaints from Minority Community, particularly Christian Community regarding ‘The Da Vinci Code’ have come into conclusion that exhibition of the film ‘The Da Vinci Code’ is likely to cause breach of peace and hurt religious sentiments of Muslim and Christian Community, which may lead to demonstrations, disturb peace and tranquility in the State.

¹⁷ *See Punjab ban for Da Vinci Code film*, BBC NEWS, May 25, 2006, http://news.bbc.co.uk/1/hi/world/south_asia/5017498.stm.

Ranjan Dasmunshi, the Censor Board finally gave the film an 'A' certification and cleared it. But the Board forced the distributor, Sony Pictures to insert a 15-second legal disclaimer card¹⁸ both at the beginning and at the end stating that the movie was purely a tale of fiction.¹⁹

In some places the Muslims also joined hands in the protests. The storyline was alleged to be to hurt the 'religious sentiments' of the Muslims as well!²⁰ Meanwhile, two Public Interest Litigations were filed before the Supreme Court of India seeking for a complete ban not only on the movie but on the novel as well. Fortunately, the Court rejected the petitions.²¹ Afterwards other High Courts also quashed the ban in the respective States.²²

Exercising right to free speech, otherwise, by film personalities may impact their films. Massive controversy stirred up following Aamir Khan's comments in support of the displaced people in Gujarat due to the Sardar Sarovar dam Project.²³ Immediately, the BJP *Yuva Morcha* (Youth Wing) orchestrated a ban on his film, 'Rang De Basanti' (Paint it Saffron) in the State. Nevertheless, it already ran into troubled waters because the story featured corrupt politicians involved in deals to buy low quality fighter planes which resulted in frequent crashes. The film was only cleared after a positive nod from the Defence Minister, Pranab Mukherjee and the three chiefs of the defence forces after viewing the film on the invitation from the Board.²⁴

The same political party also called for a ban on Aamir Khan's next film 'Fanaa' (Annihilation), in Gujarat, before its release. Noted Bollywood²⁵ filmmaker, Mahesh Bhatt filed a petition before the Supreme Court seeking for direction to the Government of Gujarat to take appropriate steps for peaceful screening of the film in the State.²⁶ As a matter of fact, Khan did not say anything about the dam. He only reiterated what the Supreme Court rulings have stated time and again.

¹⁸ The card reads: "The characters and incidents portrayed and the names herein are fictitious, and any similarity to the name, character or history of any person is entirely coincidental and unintentional."

¹⁹ Monica Chadha, *Indian censors win Da Vinci fight*, BBC NEWS, May 24, 2006, http://news.bbc.co.uk/1/hi/world/south_asia/5011314.stm.

²⁰ See *Muslims join Da Vinci criticism*, BBC NEWS, May 16, 2006, http://news.bbc.co.uk/1/hi/world/south_asia/4985370.stm.

²¹ See *India court blocks Da Vinci ban*, BBC NEWS, June 13, 2006, <http://news.bbc.co.uk/2/hi/entertainment/5074578.stm>.

²² See *infra* part IV, sec. B.

²³ The Sardar Sarovar Project built across the river Narmada in Gujarat is undisputedly the most controversial dam project in the country. *Narmada Bachao Andolan (NBA)* (Save Narmada Movement) led by Medha Patkar is a non governmental organization involved with the issue for more than two decades from now. Aamir Khan, shared the common objective with NBA and wanted those displaced by the Narmada dam to be rehabilitated. This stirred a massive political debate. Consequently, the films of Aamir Khan were targeted. See generally Dionne Bunsha, *Heights of intolerance*, FRONTLINE, June 16, 2006, at 108.

²⁴ Ruchi Gupta, *Rang De Basanti comes out all clear from Super censors*, YAHOO! INDIA NEWS, Jan. 27, 2006, <http://in.news.yahoo.com/060111/139/61yjl.html>.

²⁵ A metaphor used for the Bombay (now Mumbai) film world.

²⁶ See *Fanna in Gujarat cinemas: Bhatt seeks SC direction*, INTERNATIONAL REPORTER, June 1, 2006, <http://www.internationalreporter.com/news/read.php?id=1567>.

Unfortunately, the Supreme Court dismissed Bhatt's petition but added that the Gujarat Government was duty bound to provide security for the hall owners if they sought police protection. Finally, it was released in only one theatre in Jamnagar in Gujarat.²⁷

'Water', a 2005 movie by Deepa Mehta which is set in 1938 examines the plight of impoverished widows at a temple in Varanasi, ran into controversy with the Hindu fundamentalists. Mehta originally intended to direct 'Water' in February, 2000 but before filming had begun, some 2,000 protesters spearheaded by a coalition of Hindu extremists aligned with the BJP (then ruling party at the Centre) destroyed the main film set and even gave death threats to Mehta.²⁸ Eventually the film was shot secretly with a different cast in Sri Lanka, under the title 'River Moon' in 2003. The film was premiered at the 2005 Toronto International Film Festival and earned wide international recognition, but unfortunately was put on hold in India. Finally, it was released in India on March 9, 2007 – seven long years after the project actually started.²⁹

Mehta's other films also attracted hostility from Hindu fundamentalists who have always objected to her topics. 'Fire' (1996) and '1947: Earth' (1998) – the two other films in the trilogy with 'Water', also brought her into conflict with these forces. The former deals with a lesbian relationship between two married women, the latter was set in Lahore in the time period directly before and during the partition of India in 1947, depicting how once unified group of friends of mixed religion becomes divided and tragedy ensues. The extreme right-wing party, *Shiv Sena* (Army of Lord Shiva) organized demonstrations, forcing the closure of several Bombay and New Delhi cinemas where 'Fire' was shown. Members of the organization vandalized several movie halls. The film had to be withdrawn from cinemas, pending another censorship review, but later re-released uncut.³⁰ The fundamentalists also denounced 'Earth' and demanded the government to ban the film.³¹

The Gujarat violence energized the film fraternity in India to come up with a number of movies. In the three years following the incident, more than 22 short films and documentaries projecting

²⁷ M.G. Srinath, 'Fanaa' a Hit Movie Despite Protests, *WORLDPRESS.ORG*, June 13, 2006, <http://www.worldpress.org/Asia/2380.cfm>.

²⁸ Jasmine Yuen-Carrucan, *The Politics of Deepa Mehta's Water*, *BRIGHT LIGHTS FILM J.*, <http://www.brightlightsfilm.com/28/water.html>.

²⁹ *Water (2005 film)*, *Wikipedia.org*, available at [http://en.wikipedia.org/wiki/Water_\(2005_film\)](http://en.wikipedia.org/wiki/Water_(2005_film)) (last visited Feb. 27, 2008). See generally *Hindu widow film enrages fundamentalists*, *N.Y. TIMES*, May 3, 2006, available at <http://www.nytimes.com/2006/05/03/world/asia/03iht-web.0503india.html?scp=5&sq=water%20film%20india&st=cse>

³⁰ See generally Richard Phillips, *One of this century's human tragedies, as witnessed by a child*, *WORLD SOCIALIST WEB SITE*, Jul. 21, 1999, <http://www.wsws.org/articles/1999/jul1999/sff6-j21.shtml> (Film review of '1947: Earth').

³¹ See generally *Deepa Mehta speaks out against Hindu extremist campaign to stop her film*, *WORLD SOCIALIST WEB SITE*, Feb. 15, 2000, <http://www.wsws.org/articles/2000/feb2000/meht-f15.shtml> (An interview of Mehta by Richard Phillips).

the communal riots were produced.³² Not surprisingly, many of them ran into conflict with the Censor Board because of the controversial subject matter. One such film was Rakesh Sharma's 'Final Solution', a study of the politics of hate. In spite of international accolades, the film was banned in India by the Censor Board for several months stating that "State security is jeopardized and public order is endangered if this film is shown".³³ The ban was finally lifted in October, 2004 after a sustained campaign.³⁴

On the same context, Faaiz Anwar's film 'Chand Bujh Gaya' (The Moon Has Been Eclipsed) depicted a love story of a young couple -a Hindu boy and a Muslim girl - whose lives are torn apart in the riots. The Censor Board refused to certify the film because it is full of gory visuals of violence and that certain characters have definite resemblance to real life personalities and it was still a live issue by then, thus inciting communal violence. Later the Bombay High Court quashed the order of the Board. Consequently, it was released in 2005 after waging a 3 year long war.³⁵ The court also rescued another documentary film 'Aakrosh' (Cry of Anguish) (2003) which brought out the agony and anguish of victims of communal riots.³⁶

In 2002, the film 'War and Peace', created by Anand Patwardhan, focusing on the dangers of nuclear war in the Indian sub-continent, was asked by the Board to make 21 cuts before it was allowed to have the certificate for release.³⁷ The debate finally reached the court and the Mumbai High Court ordered the Censor Board to issue a 'U' certificate without imposing cuts or making additions to the footage.³⁸

In 1999, orchestrated by Tamil Nadu's *Dravida Munetra Kazhagam* (DMK, Dravidian Progress Federation) Government, a coalition partner in then BJP-led NDA government, the police arrested two men for holding a preview of the documentary, 'Death of a River' to writers, journalists and intellectuals. The film dealt with the police massacre of striking Manjulai tea estate workers at the Thamiraparani River which resulted in killing of 17 people.³⁹

'Black Friday' (2004), directed by Anurag Kashyap, encountered a peculiar situation and that too after being cleared from all hurdles. The film tries to recreate the events and the intense feelings

³² Rupam Jain Nair, *Film-makers hit rewind button, cut to Godhra*, EXPRESSINDIA.COM, Feb. 28, 2005, <http://cities.expressindia.com/fullstory.php?newsid=119337>.

³³ See *India bans religious riot movie*, BBC NEWS, Aug. 6, 2004, <http://news.bbc.co.uk/1/hi/entertainment/film/3542340.stm>.

³⁴ Final Solution, <http://www.rakeshfilm.com/finalsolution.htm>.

³⁵ See *infra* part IV, sec. B for the Court's judgment.

³⁶ See *infra* note 109 and accompanying text for the Court's judgment.

³⁷ Press Release, Icarus Films, See 21 cuts demanded by Censor Board on "War and Peace" (Aug. 24, 2002), <http://www.icarusfilms.com/new2002/wandp3.html>.

³⁸ See *infra* note 108 and accompanying text for the Court's judgment.

³⁹ Ram Kumar, *Arrests made in India over screening of film on the Manjulai massacre*, WORLD SOCIALIST WEB SITE, Dec. 30, 1999, <http://www.wsws.org/articles/1999/dec1999/tami-d30.shtml>.

that followed the infamous 1993 Bombay blasts.⁴⁰ It was granted censorship certificate on the condition that the makers would insert a disclaimer right at the beginning of the screening of the movie that it was based on a book and did not impute any innocence or guilt on any of the personalities depicted in the film.⁴¹ When it was due to be released in December 2004, one of the accused in the bomb blasts case, Mushtaq Moosa Tarani, tried by the designated court under the Terrorists and Disruptive Activities (Prevention) Act (TADA), 1987, No. 28 of 1987, filed a petition before the Bombay High Court challenging the release of the film. He contended that the film, based on a book by journalist S. Hussein Zaidi,⁴² gave the perception that it was the authentic version of the events and this could bias the public opinion. The argument was upheld by the High Court and later on by the Supreme Court. Hence the release of the film was stalled. Finally, after the TADA court delivered its judgment in December 2006 and found the petitioner guilty, the film was released in India on February 9, 2007.⁴³ In the meantime, it had already received a lot of critical acclaim at film festivals abroad. The irony is that the book on which the film was based was in open market since its publication in 2002.⁴⁴

The list of the films is not exhaustive but only a tip of the iceberg. There are numerous such instances where films got into trouble dealing with themes which are thought-provoking. However, the phenomenon is not new altogether. Only few recent films have been cited above to show the present nature and extent of the problem. Past films have also been targets of community and government ire. Many years back in the 1970s, two films – ‘Aandhi’ (The Storm) and ‘Kissa Kursi Kaa’ (A Tale of Throne) were perceived to have depicted the life story of the then-Prime Minister Indira Gandhi, for which they suffered similar fate. The latter was denied a censor certificate and the former was withdrawn from the cinema halls. ‘Aandhi’ was re-released a few weeks later when Gandhi herself cleared it after consulting some critics.⁴⁵ In contrast, ‘Kissa Kursi Kaa’ turned out to be the most controversial film ever made in the history of Indian cinema. The film was accused of scathing criticism of the functioning of the Central Government under Gandhi. The film reel was burnt by the then ruling party minister and the film had to be re-shot.⁴⁶ In fact, national film industry had a torrid time during Emergency⁴⁷ in

⁴⁰ It is widely believed that in retaliation of the destruction of the historic Babri Mosque in 1992, there was a series of 13 bomb explosions that took place in Bombay on March 12, 1993. The coordinated attacks were the most destructive bomb explosions in Indian history leaving 257 civilian fatalities and 713 injuries officially. *See generally* 1993 Bombay bombings, Wikipedia.org, http://en.wikipedia.org/wiki/1993_Mumbai_bombings (last visited Jul. 20, 2008); 1993: Bombay hit by devastating bombs, BBC NEWS, http://news.bbc.co.uk/onthisday/hi/dates/stories/march/12/newsid_4272000/4272943.stm (last visited Jan. 4, 2010).

⁴¹ *See* Rakesh Bhatnagar, *SC to consider lifting ban on Black Friday*, THE TIMES OF INDIA, Jan. 28, 2005, available at <http://timesofindia.indiatimes.com/article/show/1003972.cms>.

⁴² The original name was same as the book: ‘Black Friday – The True Story of the Bombay blasts’.

⁴³ *See* *Feb release for Black Friday*, THE TELEGRAPH, Jan. 12, 2007, available at http://www.telegraphindia.com/1070112/asp/nation/story_7251115.asp.

⁴⁴ *Id.*

⁴⁵ Srinath, *supra* note 27.

⁴⁶ A case was registered and the Sessions Court, Delhi found the accused guilty. However, the Supreme Court overruled the decision. *See generally* V.C. Shukla v. State (Delhi Administration), A.I.R. 1980 S.C. 1382.

1970s invoked by Gandhi's Congress Government. The industry was put under intense pressure to aid the Government's propaganda campaigns. Film makers and artists who refused to cooperate were blacklisted, and films were denied exhibition certificates by the Censor Board.⁴⁸

Although Emergency days are long over, the film fraternity in India is yet to breathe easy. In 1994, the Government of India was in the process of formulating new guidelines for the film producers seeking not only to eliminate vulgarity and violence in films but also denigration of ministers and public officers. Fortunately, it got nowhere. But it has not stemmed such efforts. Recently, the Mumbai unit of the *Bahujan Samaj Party* (BSP)⁴⁹ has sent a note to the Indian Motion Picture Producers' Association and the Indian Film Directors' Association asking them to get in touch with the party for permission before they make any film on either the BSP founder, Kanshi Ram or the Uttar Pradesh Chief Minister, Mayawati. If such a claim is made and no permission in fact is accorded, opposition would be justified.⁵⁰

All those incidents reflect the despotic and arbitrary nature of the authorities, various groups or political parties and their die-hard efforts to curb the freedom of speech and expression through films which fell out of their taste. The filmmakers, to exercise one of the most coveted right, had to depend either upon the whims and fancies of those elements or to fight prolonged legal battles with great deal of uncertainty.

III. HISTORICAL DEVELOPMENT OF FREE SPEECH

The right to free speech is one of the most celebrated as well as vigorously guarded civil liberties from any sort of governmental intrusion. The voyage to safeguard free speech did not have an abrupt beginning with the Constitution of India. In the era of India's struggle for independence from the British rule, right to free speech was given enormous importance by the national leadership. Rigorous campaigns were organized to ensure the freedom of press against several repressive laws.⁵¹ Political trends and groups otherwise critical of each other and often at opposite ends of political and ideological spectrum vigorously defended each others' civil rights. The Moderates defended the Extremist leader Bal Gangadhar Rao Tilak's right to speak and write what he liked. Further, the Karachi Convention of the Congress in 1931, passed a resolution on Fundamental Rights which, *inter alia*, guaranteed right of free expression of

⁴⁷ A proclamation of Emergency was issued under the provisions of the Constitution in December 1971, as a result of Indo-Pakistan war on the ground of 'external aggression'. While the 1971 proclamation was still effective, another proclamation was issued on June 26, 1975 on the ground of 'internal disturbance' threatening the security of the country. Both the proclamations were finally revoked in March 1977. See generally VENKAT IYER, STATES OF EMERGENCY: THE INDIAN EXPERIENCE (Butterworths 2000).

⁴⁸ MADHAVI GORADIA DIVAN, FACETS OF MEDIA LAW 46 (Eastern Book Company 2006).

⁴⁹ The bastion of BSP is the State of Uttar Pradesh. It claims to represent 'Bahujans' or the oppressed classes.

⁵⁰ A.G. Noorani, *Films and Free Speech*, 43(18) ECON. & POL. WEEKLY 11, 11 – 12, (2008).

⁵¹ See generally DIVAN, *supra* note 48, at 292-307.

opinion through speech and Press.⁵² Such an illustrious history ensured that freedom of expression became a fundamental right in the Constitution.

To understand the scope of right to free speech as embodied in the Constitution, it is pertinent to explore the debates that took place at the Constituent Assembly (hereinafter *Assembly*),⁵³ which was formed to draft the Constitution of India. To assist the Assembly, several sub-committees were set up on different subjects, which were obliged to report to the Assembly. One such sub-committee was Fundamental Rights Sub-Committee. There was little disagreement among the members on principles, what disagreement there was centered primarily on the classic predicament of the degree to which personal liberty should be infringed to secure governmental stability and public peace, of how conditional the statement of a right should be.⁵⁴ About the need to circumscribe the basic freedoms of speech, assembly, association, etc., was no easy agreement. The issue was always delicate and explosive question of freedom versus State security and, to a lesser extent, of liberty versus license in individual freedom. The political unrest, communal riots engulfed the new-born nation in such an unprecedented manner that it paved the way for the introduction of limitation of rights and even their suspension in times of Emergency when the security of the nation or part of it was threatened, in the draft document on Fundamental Rights.⁵⁵

As far as the Draft Constitution is concerned, Article 13⁵⁶ was analogous to Article 19⁵⁷ of the present Constitution. Several members of the Assembly's Drafting Committee vouched for more authority in the hands of the legislature on the restriction of those freedoms while some other professed a very liberal view calling for the deletion of all the restrictive clauses under Article 13(2) to (6). After grueling debate among the members, Article 13(2) as a restrictive clause on free speech was finally passed (and adopted as Article 19(2) in the Constitution), which declared that the freedom of speech and expression shall not affect "the operation of any existing law, in so far as it relates to, or prevent the State from making any law on matters concerning libel, slander, defamation, contempt of court, any matter offending decency and morality, or undermines the security of or tends to overthrow, the State".⁵⁸ To comprehend the backdrop of this clause, it is relevant to demonstrate some parts of the fascinating debate. Initially, one of the grounds proposed under Article 13(2) was 'sedition' but it was not finally approved. Advocating for the deletion of the same, K.M. Munshi, Member of the Drafting Committee, opined:

⁵² BIPAN CHANDRA ET AL., *INDIA AFTER INDEPENDENCE: 1947 – 2000* 22 (Penguin Books 2000) (1999).

⁵³ It was convened on December 9, 1946.

⁵⁴ See GRANVILLE AUSTIN, *THE INDIAN CONSTITUTION: CORNERSTONE OF A NATION* 61-63 (Oxford University Press 1999) (1966).

⁵⁵ See *id.* at 69-71.

⁵⁶ Article 13(1) embodied several freedoms regarding speech and expression, peaceful assembly, form associations, move and reside in any part of the nation, etc.

⁵⁷ See *infra* note 74.

⁵⁸ 7 CONSTITUTIONAL ASSEMBLY DEBATES (C.A.D.) at 786.

Our notorious Section 124A⁵⁹ of Penal Code⁶⁰ was sometimes construed so widely that I remember in a case a criticism of a District Magistrate was urged to be covered by Section 124A. *But public opinion has changed considerably since and now that we have a democratic Government, a line must be drawn between criticism of Government which should be welcome and incitement which would undermine the security or order on which civilized life is based, or which is calculated to overthrow the State.* Therefore the word ‘sedition’ has been omitted. *As a matter of fact the essence of Democracy is criticism of Government.* The party system which necessarily involves an advocacy of replacement of one Government by another is its only bulwark; the advocacy of different system of government should be welcome because that gives vitality to a democracy.⁶¹ (Emphasis added)

Among the other members who vehemently opposed the adoption of the restrictive clauses was Sardar Hukum Singh. He argued that freedoms enshrined in Article 13(1) gave protection to the individual against coercive force of the State, if they stood by themselves. But the restrictions appeared “to take away the very soul out of those protective clauses”.⁶² He argued that the rights under Article 13(1) could not be alienated by individual, even voluntarily. He was disillusioned by the fact that the freedoms had been made so precarious and entirely left at the mercy of the legislature, which is “nothing beyond one political party” and hence, drew inferences from other civilized countries in favour of greater scope of judicial review.⁶³

Another member, Mahboob Ali Baig went ahead to compare the situation with the German Constitution under Adolf Hitler, where Fundamental Rights were subjected to the provisions of law made by the legislature. *“This means the citizens could only enjoy those rights which the legislature would give them, permit them from time to time. That cuts at the very root of Fundamental Rights and the Fundamental Rights cease to be fundamental.”*⁶⁴

Finally, the proposed amendment to delete those restrictions failed to get consensus. Many members were of the opinion that full freedom did not mean that it was unrestricted. So, freedom of speech would not mean to speak out at one’s own will. “Freedom by its nature implies

⁵⁹ INDIA PEN. CODE sec. 124A Sedition. —Whoever, by words, either spoken or written, or by signs, or by visible representation, or otherwise, brings or attempts to bring into hatred or contempt, or excites or attempts to excite disaffection towards, the Government established by law in India, shall be punished with imprisonment for life, to which fine may be added, or with imprisonment which may extend to three years, to which fine may be added, or with fine.

⁶⁰ INDIA PEN. CODE, 1860, No. 45 of 1860, is the principal criminal law in India till date.

⁶¹ 7 C.A.D., at 731.

⁶² *Id.* at 732.

⁶³ *Id.* at 732-33.

⁶⁴ *Id.* at 728 (emphasis added).

limitations and restrictions.”⁶⁵ The political unrest, communal riots in different parts of the country also worked as a catalyst in the argument and paved the way not only for the introduction of the limitation clauses during normal times but suspension of them altogether during Emergency. However, in each of the Clauses (3) to (6) of Article 13, ‘restriction’ was qualified by insertion of the word ‘reasonable’ preceding it. Thus, liberty had scored a triumph over bureaucracy’s desire for maximum security. The Constitution placed a major restriction on the scope of legislative competence which has led the judiciary to review the reasonableness of the restrictions imposed on the rights. Thus the Indian judges acquired the same power in relation to those freedoms which the American judges generally enjoy under the ‘due process of law’ clause.⁶⁶ Surprisingly, for reasons unexplained, similar insertion was not carried out in relation to Article 13(2). Hence, the scope of judicial review remained limited in case of freedom of speech and expression compared to its counterparts. This was remedied a year later when the First Amendment⁶⁷ to the Constitution was passed in June, 1951 and given retrospective effect after much deliberation and debate in the Parliament. This amendment along with the Sixteenth Amendment⁶⁸ in 1963 modified the grounds of the original Article 19(2) to bring it to the present shape and form.⁶⁹

Unfortunately, the liberal line of the thought professed by some of the members was not only defeated in the Assembly, after more than five decades, the National Commission to Review the Working of the Constitution (NCRWC)⁷⁰ failed to show any such innovation. The NCRWC recommended to include “the freedom of press and other media, the freedom to hold opinions and to seek, receive and impart information and ideas” under Article 19(1)(a);⁷¹ it also proposed to amend Article 19(2) by inserting further restriction on the ground of “preventing disclosure of information received in confidence except when required in public interest”.⁷²

IV. LEGAL POSITION OF CENSORSHIP IN INDIA

A. Statutory law

Unlike the First Amendment to the US Constitution, which unequivocally declares: “Congress shall make no law . . . abridging the freedom of speech, or of the press”;⁷³ constitutional

⁶⁵ *Id.* at 767-68 (Opinion of Algu Rai Shastri).

⁶⁶ See generally AUSTIN, *supra* note 54, at 71-74.

⁶⁷ Constitution (First Amendment) Act, 1951.

⁶⁸ Constitution (Sixteenth Amendment) Act, 1963.

⁶⁹ See GRANVILLE AUSTIN, WORKING A DEMOCRATIC CONSTITUTION: A HISTORY OF THE INDIAN EXPERIENCE 40-53 (Oxford University Press 1999).

⁷⁰ It was constituted during the regime of the NDA Government under the chairmanship of Justice M.N. Venkatachaliah, former Chief Justice of India.

⁷¹ This provision guarantees the citizens of India freedom of speech and expression.

⁷² 1 REPORT OF NATIONAL COMMISSION TO REVIEW THE WORKING OF THE CONSTITUTION 60-61 (2002).

⁷³ U.S. CONST. amend. I.

guarantee of free speech in India is somewhat restricted. Article 19(1)(a) of the Constitution of India promises right to free speech and expression to all the citizens.⁷⁴ However, ‘reasonable restriction’ can be imposed on the enjoyment of this freedom by the State under clause 2 of Article 19 on certain grounds, i.e., the interests of the sovereignty and integrity of India, the security of the State, friendly relations with foreign States, public order, decency or morality, or in relation to contempt of court, defamation or incitement to an offense. Additionally, freedoms under Article 19 of the Constitution can be suspended during the Emergency by virtue of Article 359.⁷⁵ The Constitution does not specifically speak about any medium of communication. The jurisprudence that has developed through case laws in this respect has encompassed the press, motion pictures, advertisements etc. within its fold. So far censorship of films in India is concerned, the power of legislation is vested with the Parliament under Entry 60⁷⁶ of the Union List (or List I)⁷⁷ of the Schedule VII of the Constitution. The States are also empowered to make laws on cinemas under Entry 33⁷⁸ of the State List (or List II)⁷⁹ but subject to the provision of the central legislation. The prime legislation in this respect is the Cinematograph Act, 1952, No. 37 of 1952, (hereinafter *1952 Act*) and the Cinematograph (Certification) Rules, 1983, Gen. S.R. 381(E) (hereinafter *Rules*).

The 1952 Act was enacted to provide for the certification of cinematograph films for exhibition and for regulating their exhibition. The brief scheme of the statute is as follows. It empowers the Central Government to constitute a Censor Board consisting of members, numbering between 12 and 25, for the purpose of sanctioning films for public exhibition. After examination of a film, the Board either 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 5-B(1) provides the grounds for the restriction for public exhibition which is in consonance with

⁷⁴ INDIA CONST. art. 19, cl. 1. Protection of certain rights regarding freedom of speech, etc. – All citizens shall have the right – (a) to freedom of speech and expression; (b) to assemble peaceably and without arms; (c) to form associations or unions; (d) to move freely throughout the territory of India; (e) to reside and settle in any part of the territory of India; and [(f) to acquire, hold and dispose property] [This has been deleted by the Constitution (Forty-Second Amendment) Act, 1976. Though right to property ceased to be a fundamental right but remained as a constitutional right under Art. 300A]

(g) to practise any profession, or to carry on any occupation, trade or business.

⁷⁵ According to this provision, where a Proclamation of Emergency is in operation, the President may by order suspend the right to move any court for the enforcement of the rights conferred by Article 19 (and certain other fundamental rights) and all proceedings pending in any court for the enforcement of such rights shall remain suspended for the period during which the Proclamation is in force or for such shorter period as may be specified in the order.

⁷⁶ Sanctioning of cinematograph films for exhibition.

⁷⁷ Consists of subject matters in which the Central Government is empowered to legislate.

⁷⁸ Theatres and dramatic performances; cinemas subject to the provisions of entry 60 of List I.

⁷⁹ Consists of subject matters in which the State Government is empowered to legislate.

Article 19(2) of the Constitution. Section 5-B(2) empowers the Central Government to devise necessary guidelines in this regard.⁸⁰ The party concerned is given an opportunity to represent his views on the subject before the Board arrives at its decision on censorship. Earlier the appeals from the orders of the Board were preferred before the Central Government. Subsequently, in 1974 by an amendment⁸¹ to the Act the appellate jurisdiction of the Central Government was transferred to an independent Film Certification Appellate Tribunal (FCAT). Such tribunal is competent to hear appeals from the Board.⁸² It shall consist of a Chairman and maximum of 4 other members. The Chairman shall be a retired or qualified to become a Judge of a High Court. Other members, in the opinion of the Central Government, shall be qualified to judge the effect of films on the public.⁸³ However, the Cinematograph (Amendment) Act, 1981, No. 49 of 1981, substantially amended the Act to diminish the powers of the FCAT.⁸⁴ The Central Government is now vested with revisional powers under Section 6(1), even of its own motion, to call for the record of any proceeding before the Board or FCAT in relation to any film at any stage, *except* a matter of appeal pending before the FCAT, to give necessary order and the Board must dispose it off in conformity with such order. The second proviso to this section enabled the Government not to disclose any fact in this respect which it considers to be against public interest. Penalties are also prescribed for contravention of the requirements of the Act. Under Part III of the 1952 Act, which deals with licensing for exhibition, section 13 empowers the Central Government or the Local Authority to suspend exhibition of a film in a Union Territory, as a whole or part of it, or a district of a State, as the case may be, where it may likely to cause breach of peace. The 1952 Act also provides for the establishment of Advisory panels by the Central Government at regional offices consisting of persons qualified to judge the effect of the films on the public.⁸⁵

The Rules have been framed under Section 8 of the 1952 Act. The Rules deal with the procedural details of Board, the Examining Committee, Revising Committee, the FCAT and related matters. It may be stated in this regard that under Rule 11, it specifically imposes a duty on the Board to assess public reactions to films. This may be done by holding symposia or seminars of film critics, film writers, community leaders and persons associated with the film industry, and also by undertaking local or national surveys to study the impact of films in the public mind.

B. Judicial Intervention

Over the years, the Supreme Court and the High Courts through various judgments have contributed immensely in safeguarding the rights of the people of India. Right of free speech and

⁸⁰ The guidelines were revised in the year 1991. *See generally* Central Board of Film Certification Guidelines, <http://www.cbfcindia.tn.nic.in/guidelinespage1.htm>.

⁸¹ The Cinematograph (Amendment) Act, 1974, No. 27, Acts of Parliament, 1974.

⁸² 1952 Act sec. 5-C.

⁸³ 1952 Act sec. 5-D.

⁸⁴ *See* M.P. JAIN & S.N. JAIN, PRINCIPLES OF ADMINISTRATIVE LAW 428-29 (Wadhwa and Company 2007) (1971).

⁸⁵ 1952 Act sec. 5.

expression through motion pictures, is no exception. In this section, some of the important judgments related to films and documentaries, including few telecasted as television serials, are critically examined to assess the impact of the judiciary.

For the first time before the Supreme Court the constitutionality of censorship under the 1952 Act along with the Rules framed under it was challenged in the case of *K.A. Abbas v. Union of India*.⁸⁶ The Supreme Court upheld the constitutionality within the ambit of Article 19(2) of the Constitution and added that films have to be treated separately from other forms of art and expression because a motion picture is “able to stir up emotions more deeply than any other product of art”.⁸⁷ At the same time it cautioned that it should be “in the interests of society”.⁸⁸ “*If the regulations venture into something which goes beyond this legitimate opening to restrictions, they can be questioned on the ground that a legitimate power is being abused.*”⁸⁹

Probably, the most important case regarding the problem dealt herein is the case of *S. Rangarajan v. P. Jagjivan Ram*.⁹⁰ In the instant case, the decision of the Madras High Court which revoked the ‘U-Certificate’ issued to a Tamil film called ‘Ore Oru Gramathile’ (In One Village), was challenged through an appeal before the Supreme Court. In the meantime, the film had already won National Award. The film criticized the reservation policy in jobs as such policy is based on caste and was unfair to the Brahmins⁹¹. It was argued through the film that economic backwardness and not the caste should be the criterion. The High Court had held that the reaction to the film in Tamil Nadu is bound to be volatile considering the fact that a large number of people in Tamil Nadu have suffered for centuries. Certain remarks were also made against Dr. B.R. Ambedkar⁹² and several Tamil personalities. The Supreme Court overruled the High Court decision and upheld the freedom of speech and expression. It stated:⁹³

The democracy is a Government by the people via open discussion. The democratic form of government itself demands its citizens an active and intelligent participation in the affairs of the community. The public discussion with people participation is a basic feature and a rational process of democracy which distinguishes it from all other forms of government. The democracy can neither work nor prosper unless people go out to share their views. The truth is that public discussion on issues relating to administration has positive value.

⁸⁶ A.I.R. 1971 S.C. 481.

⁸⁷ *Id.* at 489.

⁸⁸ *Id.* at 495.

⁸⁹ *Id.* (emphasis added).

⁹⁰ (1989) 2 S.C.C. 574.

⁹¹ Caste wise they occupy the highest strata of the Indian society.

⁹² He is considered as the vanguard of Dalit (people belonging to the lowest strata of the society) against social oppression.

⁹³ *S. Rangarajan v. P. Jagjivan Ram*, (1989) 2 S.C.C. 574, 592.

The Court went on to add:

Movie is the legitimate and the most important medium in which issues of general concern can be treated. The producer may project his own message which the others may not approve of it. But he has a right to ‘think out’ and put the counter appeals to reason. It is a part of a democratic give-and-take to which no one could complain. The State cannot prevent open discussion and open expression, however, hateful to its policies.⁹⁴

In doing so, the Court did acknowledge to have a compromise between the interest of freedom of expression and social interests. Censorship is permitted only on the grounds envisaged under Article 19(2) and the standard of judging a film to be applied by the Board or courts should be that of “an ordinary man of common sense and prudence and not that of an out of the ordinary or hypersensitive man”.⁹⁵ It went on to observe that the anticipated danger should not be remote, conjectural or far fetched but should have proximate and direct nexus with the expression and equivalent of a “spark in a powder keg”.⁹⁶ The Court criticized the State and emphasized that freedom of expression cannot be suppressed on account of threat of demonstration and processions or threats of violence. “*It is the duty of the State to protect the freedom of expression since it is a liberty guaranteed against the State. The State cannot plead its inability to handle the hostile audience problem.*”⁹⁷

There is no separate censorship required for television serials or films as they are telecasted only if they are certified by the Board. An incident came up concerning a television serial ‘Tamas’ (Darkness) which depicted the Hindu-Muslim and Sikh-Muslim tension before the partition of India.⁹⁸ Appeal was preferred before the Supreme Court against the judgment of Bombay High Court (which allowed the screening of the serial) in *Ramesh v. Union of India*⁹⁹ to restrain the screening of the serial as it was violative of Section 5B of the 1952 Act. It was alleged by the petitioner that the screening of the serial on *Doordarshan* (the State television network) would be against public order and it was likely to incite the people to indulge in the commission of the offences. The Supreme Court affirmed the High Court decision and dismissed the petition. Commenting on the reaction of the average men, the Court held that the average person would learn from the mistakes of the past and perhaps not commit those mistakes again. They concurred with the High Court that “. . . [I]lliterates are not devoid of common sense . . . [and] . .

⁹⁴ *Id.* at 593.

⁹⁵ *Id.* at 586.

⁹⁶ *Id.* at 595-96.

⁹⁷ *Id.* at 598-99 (emphasis added).

⁹⁸ It was based on a book written by Bhisham Sahni.

⁹⁹ (1988) 1 S.C.C. 668.

. [a]wareness in proper light is a first step towards that realization”.¹⁰⁰ Incidentally, the serial was given ‘U’ certificate by the Board.

In *Sree Raghavendra Films v. Government of Andhra Pradesh*,¹⁰¹ the exhibition of the film ‘Bombay’ in its Telugu (the official language in the State of Andhra Pradesh) version was suspended in exercise of the powers u/Sec.8(1) of the A.P. Cinemas Regulation Act,1955,¹⁰² despite being certified by the Censor Board for unrestricted exhibition. The suspension was imposed citing the cause that it may hurt sentiments of certain communities. The Court discovered that the authorities who passed the impugned order did not even watch the movie! Hence, the Court quashed the order as being arbitrary and not based on proper material.

In another case, *Doordarshan* refused to telecast a documentary film on the Bhopal Gas Disaster titled ‘Beyond Genocide’, in spite of the fact that the film won Golden Lotus award, being the best non-feature film of 1987 and was granted ‘U’ certificate by the Censor Board. The matter came before the Supreme Court in the case of *Life Insurance Corporation of India v. Prof. Mamubhai D. Shah*.¹⁰³ The reasons cited by *Doordarshan* were *inter alia*, the political parties had been raising various questions concerning the tragedy, and the claims for compensation by victims were *sub judice*. Upholding the freedom of speech and rejecting the abovementioned arguments, the Court held: “. . . Merely because it is critical of the State Government . . . is no reason to deny selection and publication of the film. So also pendency of claims for compensation does not render the topic *sub-judice* so as to shut out the entire film from the community.”¹⁰⁴ The Court made it clear that subject to Article 19(2), a citizen has a right to publish, circulate and disseminate his views to mould public opinion on vital issues of national importance. Hence, any attempt to thwart or deny the same would offend Art. 19(1)(a). Under such circumstances, the “burden would, therefore, heavily lie on the authorities that seek to impose them to show that the restrictions are reasonable and permissible in law”.¹⁰⁵

Award winning documentary film, ‘In Memory of Friends’ by Anand Patwardhan about the violence and terrorism in Punjab, though granted ‘U’ certificate by the Censor Board, was rejected by *Doordarshan* reasoning that if such documentary is shown to people, it would create communal hatred and may lead to further violence. The Bombay High Court quashed the order emphasizing: “Everyone has a fundamental right to form his own opinion on any issue or general concern. He can form and inform by any legitimate means.”¹⁰⁶

¹⁰⁰ *Id.* at 679.

¹⁰¹ 1995 (2) A.L.D. 81.

¹⁰² Same provision was invoked to ban ‘The Da Vinci Code’ in the State of Andhra Pradesh.

¹⁰³ A.I.R. 1993 S.C. 171.

¹⁰⁴ *Id.* at 186-87.

¹⁰⁵ *Id.* at 186.

¹⁰⁶ Anand Patwardhan v. Union of India, A.I.R. 1997 Bom. 25, 32.

In case of ‘War and Peace’, Patwardhan appealed before the FCAT against the decision of the Board.¹⁰⁷ The FCAT viewed the film and directed issuance of ‘U’ Certificate, provided that Patwardhan carried out two cuts and one addition as per its order. He challenged the order before the Bombay High Court. In its conclusion, the High Court was very candid to hold that the cuts recommended by FCAT were merely to harass the petitioner. Regarding addition, the Court observed that it must be left to the discretion of the filmmaker.¹⁰⁸

As already acquainted with the fact that many of the movies on Gujarat riots ran into controversy with the Censor Board, they required the Court’s assistance to see the light of the day. Allowing the film, ‘Aakrosh’, the Bombay High Court aptly reasoned that riots were a part of history by then and hence:

. . . [W]hen the hour of conflict is over it may be necessary to understand and analyze the reason for strife. We should not forget that the present state of things is the consequence of the past; and it is natural to inquire as to the sources of the good we enjoy or for the evils we suffer.¹⁰⁹

In another case, while overruling the FCAT’s order to censor the movie, ‘Chand Bujh Gaya’, the Bombay High Court in *F.A. Picture International v. Central Board of Film Certification*¹¹⁰ opined: “*Censorship in a free society can be tolerated within the narrowest possible confines and strictly within the limits which are contemplated in a constitutional order.*”¹¹¹ (Emphasis added)

It strongly criticized the role of the concerned authorities:

. . . The view of the censor does no credit to the maturity of a democratic society by making an assumption that people would be led to disharmony by a free and open display of a cinematographic theme. The certifying authority and the Tribunal were palpably in error in rejecting the film on the ground that it had characters which bear a resemblance to real life personalities. The constitutional protection under Article 19(1)(a) that a film maker enjoys is not conditioned on the premise that he must depict something which is not true to life. The choice is entirely his.¹¹²

In *Da Vinci* controversy as well, the Supreme Court rejected the writ petition by the *All India Christians Welfare Association* seeking a ban on the movie on the ground that it hurt the

¹⁰⁷ Press Release, Icarus Films, *supra* note 37.

¹⁰⁸ Anand Patwardhan v. Cent. Bd. of Film Certification, 2004 (1) MAH. L.J. 856.

¹⁰⁹ Ramesh Pimple v. Cent. Bd. of Film Certification, 2004 (3) MAH L.J. 746, 750.

¹¹⁰ A.I.R. 2005 Bom. 145.

¹¹¹ *Id.* at 148.

¹¹² *Id.* at 150.

religious sentiments of Christians. The court found no point of objection when the Censor Board and the Central Government has given a green signal. It also held that that no predominantly Christian country had banned the film and there has been no definite reason forwarded by the petitioners to ban the movie in India.¹¹³ In the States of Andhra Pradesh,¹¹⁴ Kerala¹¹⁵ and Tamil Nadu,¹¹⁶ the respective High Courts quashed the bans imposed by the State Governments and also imposed costs on the governments. Upholding the right to freedom of speech and expression, the Courts found the act of Governments ‘irrational’ and ‘unconstitutional’. They were of the opinion that the bans were imposed mechanically due to the veto of a few sections of people who objected rather than arriving at a decision based on informed satisfaction.

In all those cases of *Da Vinci*, it was alleged that the film violated *inter alia*, Article 25 of the Constitution with respect to the Christian community.¹¹⁷ Particularly in the case of Tamil Nadu, the Madras High Court was of the opinion that for a harmonious interpretation of Articles 25 and 19, it is clear from a reading of those provisions that the rights under Article 25 are subject to the other provisions of Part III; which means they are subject to Article 19(1). It was also not clear before the court how the exhibition of the film will interfere with anyone’s freedom of conscience or the right to profess, practise and propagate a particular religion. Moreover, the Court expressed that under no circumstances ‘blasphemy’ is a ground under Article 19(2). The reasoning makes greater sense when no empirical evidence across the world has also proved the right to freedom of religion is better served, or protected with or through blasphemy laws.¹¹⁸

Another interesting aspect of this phenomenon is that irrespective of the effect of the movies, there is often a call for a total ban without exploring any other possibilities. The Supreme Court in *State of Gujarat v Mirzapur Moti Kureshi Kassab Jamat*¹¹⁹ stated that a total prohibition under Article 19(2) to (6) must also satisfy the test that a lesser alternative would be inadequate.

The aspect of right of the viewers with regard to freedom of information has not gone unnoticed by the Courts. Freedom of information is, of course, inseparable from freedom of speech. If a speaker cannot express a view, then hearer cannot receive information. In the case of *Secretary*,

¹¹³ *Court rejects petitions seeking ban on film*, THE HINDU, June 13, 2006, available at <http://www.hindu.com/2006/06/13/stories/2006061314410100.htm>.

¹¹⁴ *Lakshmi Genesh Films v. Gov’t of Andhra Pradesh*, 2006 (4) A.L.D. 374.

¹¹⁵ *Kerala HC declines to ban The Da Vinci Code*, THE TIMES OF INDIA, May 25, 2006, available at <http://timesofindia.indiatimes.com/articleshow/1568062.cms>.

¹¹⁶ *Sony Pictures Releasing of India Ltd. v. State of Tamil Nadu*, (2006) 3 M.L.J. 289.

¹¹⁷ INDIA CONST. art. 25. cl. 1. Freedom of conscience and free profession, practice and propagation of religion. – Subject to public order, morality and health and to the other provisions of this Part, all persons are equally entitled to freedom of conscience and the right freely to profess, practise and propagate religion..

¹¹⁸ See Agnes Callamard, *Freedom of speech and offence: why blasphemy laws are not the appropriate response*, 18 EQUAL VOICES 7, 9-10 (2006), available at <http://eumc.europa.eu/eumc/material/pub/ev/ev18/ev-18.pdf>.

¹¹⁹ (2005) 8 S.C.C. 534.

Ministry of I & B v. Cricket Association of Bengal,¹²⁰ it was held by the Supreme Court that freedom of speech and expression includes “right to acquire information and to disseminate it to public at large”. Hence, Article 19(1)(a) also includes the right of viewers. Further, in *Indian Express Newspapers (Bombay) Pvt. Ltd. v. Union of India*,¹²¹ it was held by the Supreme Court that the people have a right to be informed of the developments that take place in a democratic process.

Finally, it is important to note that in the case of *Union of India v K.M. Shankarappa*,¹²² the Supreme Court disapproved of the Government retaining powers by enacting Section 6(1) of the 1952 Act and declared it *ultra vires* the Constitution. It held:

. . . The Government has chosen to establish a quasi-judicial body which has been given the powers, inter alia, to decide the effect of the film on the public. Once a quasi-judicial body like the Appellate Tribunal [FCAT], consisting of a retired Judge of a High Court or a person qualified to be a Judge of a High Court and other experts in the field, gives its decision that decision would be final and binding so far as the executive and the Government is concerned. . . . The executive has to obey judicial orders. *Thus, Section 6(1) is a travesty of the rule of law which is one of the basic structures of the Constitution. . . . The Executive cannot sit in an appeal or review or revise a judicial order.*¹²³ (Emphasis added)

It emphasized that the only way to nullify the Court order would be through appropriate legislation. Otherwise, “. . . the Government may apply to the Tribunal itself for a review, if circumstances so warrant. But the Government would be bound by the ultimate decision of the Tribunal.”¹²⁴

On the apprehension of law and order problem, the Court reminded the Government about their duty:

. . . In any democratic society there are bound to be divergent views. Merely because a small section of the society has a different view from that as taken by the Tribunal, and choose to express their views by unlawful means would be no ground for the Executive to review or revise a decision of the Tribunal. In such a case, the clear duty of the Government is to ensure that law and order is

¹²⁰ (1995) 2 S.C.C. 161.

¹²¹ A.I.R. 1986 S.C. 515.

¹²² (2001) 1 S.C.C. 582.

¹²³ *Id.* at 585.

¹²⁴ *Id.*

maintained by taking appropriate actions against persons who choose to breach the law.¹²⁵

C. International Law and its Significance to India

Provision on freedom of speech and expression is also enshrined under Article 19 of the Universal Declaration of Human Rights (UDHR)¹²⁶ as well as the International Covenant of Civil and Political Rights (ICCPR)¹²⁷. Article 19(2) of the ICCPR states that such freedom is not only limited to “impart information and ideas of all kinds”, but also freedom to “seek” and “receive” them “regardless of frontiers” and in whatever medium, “either orally, in writing or in print, in the form of art, or through any other media of his choice”. Often freedom of expression is considered as a cornerstone right – one that enables other rights to be protected and exercised.¹²⁸ As in India, this right is not absolute in almost all the countries; States always prohibit certain types of expressions. According to the General Comments on Article 19 by the Human Rights Committee, so far as restrictions on free speech and expression are concerned, they are required to conform to two conditions: they must be provided by law and necessary for legitimate purposes. Such purposes include protection of the rights and reputations of others, the protection of national security and public order and morals.¹²⁹ When a State party imposes certain restrictions on the exercise of freedom of expression, it may not put in jeopardy the right itself. It is the interplay between the principle of freedom of expression and such limitations and restrictions which determines the actual scope of the individual’s right.¹³⁰ The only duty of the States in the context of restricting freedom of expression is to prohibit by law “[a]ny advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence. . . .”¹³¹ Thus, it can be concluded that a State should ensure to make all possible effort to guarantee right to the freedom of speech and expression. It is applicable in case of motion pictures as well and hence, if at all, censorship or restriction is imposed, it should meet the three-part test set out in Article 19 of the ICCPR i.e. (a) it is provided by law; (b) it pursues a legitimate aim; and (c) it is necessary in a democratic society.¹³²

Incidentally, India is a party to the UDHR and has ratified the ICCPR. International treaties are not self-executing in case of India. For the successful implementation of international laws in the domestic legal system, they have to be transformed in to domestic law enacted by a legislative

¹²⁵ *Id.* at 585-86.

¹²⁶ G.A. Res. 217A, at 71, U.N. GAOR, 3rd Sess., 1st plen. mtg., U.N. Doc. A/810 (Dec. 12, 1948).

¹²⁷ G.A. Res. 2200A (XXI), 21 U.N. GAOR Supp. No. 16 at 52, U.N. Doc. A/6316, 999 U.N.T.S. 171 (Mar. 23, 1976).

¹²⁸ See Callamard, *supra* note 118, at 7-8.

¹²⁹ See ICCPR art. 19, para 3.

¹³⁰ CCPR General Comment No. 10: Freedom of expression (Art. 19), 19th Sess., (June 29, 1983), available at <http://www.unhchr.ch/tbs/doc.nsf/0/2bb2f14bf558182ac12563ed0048df17?Opendocument>.

¹³¹ ICCPR art. 20, para 2.

¹³² Callamard, *supra* note 118, at 11.

act of the Parliament.¹³³ Nevertheless, the Supreme Court of India has made commendable efforts in respecting the provisions of the international instruments. The Supreme Court in the case of *Vishaka v. State of Rajasthan*¹³⁴ observed that the applicability of the UDHR and principles thereof may have to be read, if need be, into the domestic jurisprudence. The Court also summed up the implications of international law through the following words:

Any International Convention not inconsistent with the fundamental rights [enshrined in the Constitution of India] and in harmony with its spirit must be read into these provisions to enlarge the meaning and content thereof, to promote the object of the constitutional guarantee. This is implicit from Art.51(c)¹³⁵ and the enabling power of Parliament to enact laws for implementing the international conventions and norms by virtue of Art.253 with Entry 14¹³⁶ of the Union List in the Seventh Schedule of the Constitution.¹³⁷

Various provisions of the ICCPR have also been referred to in several judgments of the Supreme Court. In fact, with respect to the international human rights law in *Apparel Export Promotion v A.K. Chopra*,¹³⁸ the Supreme Court clarified: “In cases involving violation of human rights, the courts must remain forever alive to the international instruments and conventions and apply the same to a given case where there is no inconsistency between the international norms and the domestic law occupying the field.”¹³⁹

The message of the international instruments, such as the UDHR and the ICCPR, which directs all the State parties to take appropriate measures to prevent human right violations, is loud and clear. Besides, the safeguards regarding the freedom of speech and expression, as visualized under the international human rights law have a significant legal bearing on India’s commitment towards the same.

¹³³ INDIA CONST. art. 253. Legislation for giving effect to international agreements. – Notwithstanding anything in the foregoing provisions of this Chapter, Parliament has power to make any law for the whole or any part of the territory of India for implementing any treaty, agreement or convention with any other country or countries or any decision made at any international conference, association or other body.

¹³⁴ A.I.R. 1997 S.C. 3011.

¹³⁵ INDIA CONST. art. 51. Promotion of international peace and security.— The State shall endeavour to . . . (c) foster respect for international law and treaty obligations in the dealings of organized peoples with one another . . . This is a provision under Part IV of the Constitution, which are the ‘Directive Principles of the State Policy’ and not directly enforceable by the Courts unlike the ‘Fundamental Rights’ under Part III. However, they have been considered to be fundamental in the governance of the country and complementary to the Fundamental Rights by numerous judgments of the Supreme Court.

¹³⁶ Entering into treaties and agreements and implementation of treaties and agreements with foreign countries and implementing of treaties, agreements and conventions with foreign countries.

¹³⁷ *Vishaka v. State of Rajasthan*, A.I.R. 1997 S.C. 3011, 3014.

¹³⁸ (1999) 1 S.C.C. 759.

¹³⁹ *Id.* at 776.

V. FALLACY OF CENSORSHIP

The section on judicial pronouncements makes it crystal clear that as far as motion pictures are concerned, the higher courts in India have zealously guarded the freedom of speech and expression and have shown optimum judicial activism. They have refused to scrap any movie without any compelling reason for restriction and which are not based on vague or unreasonable apprehensions. Yet, this jurisprudence has at times traveled back and forth as it did in case of 'Black Friday'. In case of 'Fanna', the Supreme Court actually diluted its own precedent enunciated in the *Rangarajan* case where it obligated the State to take necessary preventive measures pro-actively against any untoward incident that might take place with screening of any such movies. Instead, this time it approached the matter from the opposite end, where the theatre owners were asked to seek protection from the Government, only then the State has a duty to oblige. Besides, it did not pull up the Gujarat Government for its failure to enforce the release of the film by either providing adequate security or any assurance to do so. Similar incidents were witnessed in case of other films, including 'Chand Bujh Gaya' where the Chief Minister of Gujarat was alleged to have threatened the distributors and movie hall owners not to screen the movie.¹⁴⁰ In fact, being well aware of such failure or apathy of the State the theatre owners in Gujarat did not venture out to screen 'Parzania'.¹⁴¹ Recent non-release of 'Deshdrohi' in Maharashtra reasserts the existence of the typical trend.

In a democratic country everyone has a right to communicate his views on different affairs. Millions of views are circulated throughout the nation every day by different means. Many of them are not approved by majority of the Indians. But does that mean that those should be scrapped? Or do the authors have to knock the doors of the courts on every occasion if their opinions fail to satisfy a billion population? Movie is a legitimate and one of the most important medium through which general problems can be addressed. Moreover, they are not openly screened for everyone. It is available to only those people who are willing to buy tickets, go to the theatres and watch them. Unwilling people can always choose to stay away from the movies. The *Sree Raghavendra Films* case brings out the unfortunate truth as to how judgments on restraining movies are passed on without any material basis in this country. It would be not surprising if such is the order of the day instead being an exception. A film maker has a right to disseminate his own views which the others may not approve of but that does not deter his right to express himself and give shape through his creations. Neither all expressions of the opposing view point nor the expressions which do not find the approval of those exercising power of the State can be regarded as harmful to the State or public order.

One of the great defenders of free speech, Ronald Dworkin, has stated that there are three main reasons why free expression matters. First, we cannot accept collective control of the culture, i.e.

¹⁴⁰ See "*Chand Bujh Gaya*" fades out in India!, YAHOO! INDIA NEWS, Mar. 22, 2005, <http://in.news.yahoo.com/050310/139/2k3zf.html>.

¹⁴¹ Siddiqui, *supra* note 12.

we must have the right to tell people what they do not want to hear. Second, there is an issue of democratic transparency; where a free press has a duty and responsibility to hold government and other powerful groups accountable. And last, there is democratic fairness; if we want people to accept democratic procedures and laws that express the will of the majority, then everyone must have not just a vote but a voice, however much we may dislike what they are saying.¹⁴² This argument of course puts the censoring of such films out of bounds. ‘Free debate’ and ‘open discussion’ has been considered to be an integral part of a democracy in various cases. Otherwise, democracy has no value and it is equivalent to a totalitarian regime. As noted British columnist Polly Toynbee puts it that the best way to destroy an undesirable idea is not to brush it under the carpet but to air it in public. The rationale consequence of providing a platform to such a political voice is that the public will be able to ridicule it.¹⁴³ Regrettably, it’s not the case in our country. The aforementioned incidents categorically assert that to feel proud of being a part of world’s largest democracy is a farce. This is the precise reason that films with a voice of dissent have often been sidelined from the mainstream. Furthermore, such censorship is absolutely arbitrary and illegal with respect to the international human rights law as well. India has actually disregarded its pledges taken before the international community by showing laissez-faire attitude towards the implementation of the international human rights obligations in general and Article 19 of the ICCPR in specific.

Whenever a movie falls out of the taste of the certain people exercising power, they have orchestrated to ban the movie arbitrarily in the name of ‘public interest’. Time and again, similar protests have been raised to restrain the exercise of the freedom. In fact, the viewers are deprived of watching a movie simply because it does not suit a group of persons with whom they have no link. On the contrary, they are deprived of freedom of information. In spite of the fact that the Supreme Court taking note of this aspect, every time the viewers suffer. A practical instance may help to understand the implication clearer as to whose interests is the protesters advocating for. ‘The Da Vinci Code’ was banned in 7 States – the result was over 200 million Indians in those States were deprived from viewing the movie. The total Christian population in the country is 2.3%, whereas the States that banned the movie has varied percentage of Christian residents. Kerala, which holds the largest number of Christians, the book had already been translated in Malayalam (the official language of the State) and widely circulated.¹⁴⁴ If this has been the case, then whose ‘religious sentiments’ and ‘emotions’ are involved? Only because of protests by few organizations, the State Governments scrapped the movie taking into consideration neither of a vast majority of the people in the States nor people of the minority community which is projected to be against the screening of the movie. And if the justification

¹⁴² See Ursula Owen, *A free society needs free speech*, 18 EQUAL VOICES 17, 18 (2006), available at <http://eumc.europa.eu/eumc/material/pub/ev/ev18/ev-18.pdf>.

¹⁴³ O’BYRNE, *supra* note 13, at 126.

¹⁴⁴ The source of population data is obtained from the official website on Census of India website, <http://www.censusindia.gov.in/>.

forwarded by the State Governments censoring the movie is put forward by other States, the movie can be banned in the whole country, in spite of Censor Board's positive nod.

The regulation intended under Article 19(2) of the Constitution is to be so exercised so as to serve the larger public good; but unfortunately in practice, it has been manipulated on many occasions to strangle the freedom of speech and expression. The grounds mentioned therein have often been interpreted very widely to clamp down on movies at the slightest opportunity. Under such circumstances, the question arises – do we really need such restriction? After witnessing all those arbitrary attacks on the freedom of speech, it appears that 'reasonable' restriction really needs consideration to match up with the so-called globalized and liberal world. The above discussion makes it obvious that censorship on the motion pictures under different circumstances have not been imposed on valid constitutional or legal grounds but to serve the interests of different powerful groups whether social, religious or political. Under no circumstances, the censorship of aforementioned nature can be justified. Often the excuse of India being a diverse country with unique set of problems has been put forward and the need of restrictions has been over emphasized. But in reality the restrictions have served more in the negative sense than for positive development. The logic of public interest or public good which has been consistently used as a shield by the State while censoring films, is in several instances somewhat bizarre. Whether 'Deshdrohi' or the Gujarat riot films or otherwise, the State squarely failed to provide a solution to the real problem but whenever any film tried to focus the issue, it was instantaneously banned. If the State does not provide the healing touch to the victims, then at least, the State is not safeguarding anybody's interest by censoring films.

Often the States have advanced the maintenance of 'law and order' as a justification for censorship. It is completely untenable. If at all, a film is to be restrained legally, it can be possible for the maintenance of 'public order' or protecting the 'security of the State'. And these three concepts have been judicially distinguished from each other.¹⁴⁵ One has to imagine three concentric circles, the largest representing 'law and order', the next representing 'public order', and the smallest representing 'security of the State'. Hence, an act may affect 'law and order', but not 'public order'; an act may affect 'public order', but not 'the security of the State'.¹⁴⁶ The Court reasoned: "The contravention of law always affects order but before it can be said to affect public order, it must affect the community or the public at large".¹⁴⁷ In the light of this judgment, we can assert that mere law and order problem or apprehension of the same cannot be a valid ground for film censorship.

The Censor Board is envisaged as a large expert body carefully constituted to cater to the needs of different segments of the society. Moreover, the procedure for grant of certificate of exhibition to a film is quite elaborate. So its decisions must be given full weight. Nonetheless, the role and

¹⁴⁵ Ram Manohar Lohia v. State of Bihar, A.I.R. 1966 S.C. 740.

¹⁴⁶ *Id.* at 758-59.

¹⁴⁷ *Id.* at 758.

position of the Board is confusing. The members are appointed and virtually controlled by the Government. The irony is that the game is not confined to only scrapping of movies by the Board. Even a positive nod by the Board or the FCAT is not ultimate. The Central Government and at times, the State Government has the final words before it is dragged to the courts. Consequently, films had to wait for years after completion and before they are actually released.¹⁴⁸ In the meantime, the theme of the film may lose its relevance altogether. In such circumstances, where does the importance of the Censor Board's decisions lie? At this juncture, the judgment of *Shankarappa* is much needed adrenalin. The 1952 Act provides for the construction of advisory panels which can only make recommendations to the Board. In case of 'Rang De Basanti', the Board invited Defence Minister and people from the forces and in case of 'The Da Vinci Code', it invited Information & Broadcasting Minister along with representatives of the Catholic Bishops' Conference of India for their advice; but those were the people who actually had the final say. Next time probably to make a film on the terrorists, the terror groups will be invited to certify the content. If in every case, people from respective spheres are to be called to verify the authenticity of the film and give a sort of binding advice, then there is no rationale of having a statutory expert body. The Board seems to be concerned about the impact of certain films in the public mind, but there are hardly instances where the Board organized symposia or seminars, or undertaking surveys to that effect as envisaged in the Rules of the 1952 Act. The Board also had to endure criticism from the film makers of being sympathetic towards Hindutva forces. Despite the fact, it banned films on Gujarat massacre, it approved films like 'Gadar – Ek Prem Katha' (Revolution – A Love Story), which consists of highly provocative dialogues directed against the Muslims.¹⁴⁹ At least the former pieces have basis in real facts but the latter was a product of wild imagination. Actually, the Censor Board has often failed to act in an impartial and judicious manner. Because the statutory law is highly centralized and too much power has been given to the executive, it has become virtually impossible to perform impartially. The legislation was intended to put restriction on 'reasonable' grounds but that has opened the floodgates for protests, litigations and all sorts of arbitrary acts.

However, the most unfortunate development in the entire debate has been of the political outlook. What is puzzling is the fact that when the framers of the Constitution, like Mahboob Ali, K.M. Munshi could think of withering away with the restrictions during the troubled times of independence, why can't we follow suit after more than half a century of freedom and democracy? In addition, the recommendation of the NCRWC is quite unfortunate. The amendment recommended to Article 19(1)(a) would have added no greater value as the Courts have already conceded the similar aspects. On the other hand, adding further grounds for restrictions under Article 19(2) is actually regressive. Not to mention, the Government of India's

¹⁴⁸ E.g., 'Black Friday' was completed in 2004 but was released in India in 2007 after 3 years. In between while it was screened for the overseas viewers, the Indians were kept at bay. Same was the fate of films like: 'Water', 'Final Solution' and many others.

¹⁴⁹ See Ziya Us Salam, *Ideology shackled*, THE HINDU, Aug. 13, 2004, available at <http://www.hinduonnet.com/thehindu/fr/2004/08/13/stories/2004081301600100.htm>.

effort to formulate restrictive guideline for film-makers and political censorship imposed by various political parties time and again.

The censoring of films also has some other implications. When a film is banned, it does not only affect the freedom of speech and expression of the film maker, it affects the economical aspect of many people which is also guaranteed under Article 19(1)(g)¹⁵⁰ of the Constitution. Film making, distribution and screening are essential aspects of film business, if the film is banned, it affects all those aspects which definitely falls under Article 19(1)(g). In many cases, violent groups ransack theatres in protest against the screening of certain films. Such actions destroy the property of the theatre hall owners. On the contrary, the right to property is inviolable under Article 300A of the Constitution without the authority of law.¹⁵¹ Hence, to allow one's properties to be destroyed by some group of people is a clear deprivation of the right to property guaranteed under the Constitution. Worse was the case in Andhra Pradesh where the Activists of All India Christian United Front stormed in and ransacked the premises of a multiplex in Hyderabad and forced the theatre management to stop screening of 'The Da Vinci Code', even after the AP High Court quashed the ban in the State.¹⁵² In any such case, the concerned State Governments shall be held responsible for failing in its duty to secure its people's rights.

VI. CONCLUSION: QUEST FOR A SOLUTION

Censoring movies in the name of maintaining public peace, respecting emotions of people and similar reasons are simply ridiculous. It may give wrong message to the public through indirect interpretation. It is always the best that the viewers themselves watch it and form their own opinion. General public in a country like ours may be devoid of proper education but not always of common sense. It is groups with tampered prejudices who deliberately distort the subject matter and mislead other people to serve their own purposes. Conversely, no group takes the role of a proper guide.

Subsequent to an elaborate analysis of all those incidents, judgments and laws, the activities and rationale of having a Censor Board becomes highly debatable. If at all we need to have such a body, it needs to be more autonomous rather than to be a puppet in the hands of the Government. Besides, scrapping movies regardless of clearance from the Censor Board is not only an arbitrary act but a dangerous trend of heightened intolerance. On a whole, the higher courts in the country have done a laudable job but recurrence of similar issues is the point of debate. Hence, a permanent solution is essential. It is imperative to enact a new law. The court judgments,

¹⁵⁰ INDIA CONST. art. 19, cl. 1. Protection of certain rights regarding freedom of speech, etc. – All citizens shall have the right – . . . (g) to practise any profession, or to carry on any occupation, trade or business..

¹⁵¹ INDIA CONST. art. 300A. Persons not to be deprived of property save by authority of law— No person shall be deprived of his property save by authority of law.

¹⁵² 'Da Vinci Code': AICUF activists ransack multiplex premises, OUTLOOKINDIA.COM, June 23, 2006, available at http://www.outlookindia.com/pti_news.asp?id=394168.

especially of *Shankarappa* and *Ranarajan* can act as the beacon light in that direction. In the prevailing circumstances, it is better to have a rating body than a Censor Board of the very nature we have at present. The extent of censoring power should be very limited. The most important criteria regarding such body should be that the Government can forward its suggestions/recommendations but the decision must be taken by it *independently*. The power of censorship delegated to the States has to be narrowed down drastically. They must satisfy the Central authority as to why the ban in their territory is *indispensable* and that there is no alternative left.

The power to impose restrictions is not the power which is available for exercise in an arbitrary manner or for the purpose of promoting the interest of those in power or suppressing dissent. While we enthusiastically profess right to information,¹⁵³ we cannot sit back and ban films and thus, censor information. If artists, playwrights and film makers of India are to exercise their right to free speech appropriately, the utmost necessity is to do away with the restrictive clauses under Article 19(2). If at all, any limiting line is to be drawn in the extreme cases, it shall be left to the judiciary on which the country has reposed enormous faith since inception. Also, the judiciary has to surge off the recent hiccups and deliver consistently upholding the right as it had done all through. In case any unlawful means is adopted by any person(s) to stop screening of films, the Government has to ensure that law and order is maintained by taking appropriate actions against the person concerned. It is also bound to take necessary preventive measures. Otherwise, it should be held for contempt of court.

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

¹⁵³ In India, the Right to Information Act, 2005, No. 22 of 2005, has been a path-breaking piece of legislation, which has been instrumental to empower citizens of the country in bringing out important and useful information of various types relating to the State which were so far considered 'confidential'. The mechanism provided under the statute is used extensively throughout the country by social activists, civil society groups, and common men alike.

