



How to Regulate

**OTT
STREAMING
SERVICES**

in India

BY SHUBHANGI HEDA

Edited by Marius Dragomir

Introduction

In the past three or four decades, the law rested on a perception of technology that is often inaccurate and that changes slowly as technology changes fast.[1] The technological advances in the audiovisual field have occurred at a fast pace in the last century. The world has moved from films as a sole medium of dissemination of moving pictures to television and now to the internet.

There is a causal link between the changes in the medium used to disseminate audiovisual content and the changes in society. The effect that a medium has on society forms the basis of its regulation by the state. The ongoing digital disruption in the media landscape changed people's perceptions of time and space, bringing about new habits of content consumption that were triggered mostly by the increased accessibility, portability and freedom of choice.

Specifically, the television-watching experience has been revolutionized by the over-the-top (OTT) media services.[2] In India, this revolution has led to a policy vacuum. India currently does not have any guidelines or policies for content regulation on OTT services, a regulatory vacuum that has led to complaints in court and self-regulatory action taken by the industry players.

The Indian media landscape has traditionally been very dynamic. With a diverse population in terms of religion, economic status, caste and language, the issue of content regulation has always been important in India. Government in India has been known for its attempts in the past to censor content on grounds of public morality, communal harmony or the need to protect history, among various reasons.[3]

The OTT services created a parallel medium to disseminate such content. That has led to a situation where the same content might be censored in cinemas and on television, but not on streaming platforms as regulation of content on paid OTT services does not exist.

This brings into question the issue of how the government perceives content regulation, prompting various experts to wonder whether digital disruption can help dilute censorship in India.

India's government, which traditionally tends to maintain its paternalistic role over the distribution channels, usually has an offhand attitude when it comes to bringing policy up to speed with technology.

This paper explores possible patterns of content regulation in India at a time of major technological changes, with the goal to identify good practices in content regulation that take stock of changes in accessibility, portability, cultural disruption and freedom of speech.

[1] Ithiel de Sola Pool, *Technologies of Freedom*, Harvard University Press, 1984, see more <http://www.hup.harvard.edu/catalog.php?isbn=9780674872332>

[2] Chuck Tryon, "TV Got Better: Netflix's Original Programming Strategies and Binge Viewing." *Media Industries Journal* 2 (2), 2015, see <http://dx.doi.org/10.3998/mij.15031809.0002.206>

[3] Subradipta Sarkar, "Right to Free Speech in a Censored Democracy." *University of Denver Sports and Entertainment Law Journal* 7: 62–90, 2009

Short History of Content Regulation in India

Advent of Cinema in India: Emergence of Content Regulation

The first films were exhibited in India during 1896 as the Indian film industry was embarking on a rapid expansion with both imported films and indigenous productions available to the public. That increasing popularity turned cinema into a medium with impact on the mass audience.

As a result, the Indian Cinematograph Act was introduced in 1918 in India. It was accompanied by the establishment of censorship boards, operational in various provinces, whose task was to judge content based on prevalent, socially accepted standards of morality.

In 1928, during the British rule, the government commissioned the first report about the censorship framework and issues of distribution and exhibition of films in India. The inquiry was prompted by concerns among authorities regarding the effect of cinema on the Indian audience. The report presents a detailed account of the censorship practices and the influence of cinema as a medium on the Indian population. It also explores the influence dynamics between western and indigenous content. The report argued that censorship was needed as cinema as a medium had a much larger effect on the audience than other media: films have a special appeal, creating a vivid impression on the spectator. The Indian Cinematograph Committee (ICC), which was set up in 1928 by the Governor General of India to monitor censorship of cinema films in India, stated that the public opinion in India was not developed and, as the public could not be left to decide what is appropriate or not for the society, censorship was needed.

The main concerns expressed in the report were related to the potential of the western content to alienate the Indian youth from the Indian cultural values and customs. Nevertheless, the committee felt that western content, in fact, helped the Indian audience to get more exposed to diverse content and become better educated. The committee, on the other hand, encouraged exhibition of more Indian content by introducing a quota system that would force cinemas to show a certain amount of local content. The committee found existing censorship framework introduced by the Indian Cinematograph Act of 1919 to be sufficient although, the committee said, some room for improvement remained. The committee added that a centralized body like a cinema department was needed to replace provincial censors.

The 1928 report concluded that sexually explicit content should not be allowed and films that present propaganda by other countries should be censored, regulations that were already in place.[4] The committee concluded that the standards in place were satisfactory but that there was room for improvement. During the colonial period, films that promoted nationalist ideas were subjected to censorship. They included *Bhakta Vidur* (Devotion of Vidura), a 1921 Indian silent film directed by Kanjibhai Rathod, in which the Hindu mythological character Vidura is built on the personality of Mohandas Karamchand Gandhi, India's anti-colonial, nationalist hero. It was the first film banned in India. Other films such as *Battleship Potemkin* and *Orphans of the Storm*, which promoted ideas of fraternity, liberty and freedom inspired by the French Revolution, were

[4] "Report of the Indian Cinematograph Committee," Calcutta: Government of India, 1928

also banned.[5] After 1930, with the emergence of the sound film, the demand for Indian films exceeded that for western films.

A new film enquiry committee submitted a report in 1951, after India's independence and one year before the adoption of a new Cinematograph Act. The report found that films in India were watched on average by some 1.6 million people, which was more or less equal to the reach of daily press. As content regulation was seen as an evolving concept and the social and moral fabric of the Indian society was changing fast, one of the report's recommendations was to renew certification of films every five years, but the new legislation did not include provisions in this direction. The committee also noted in the report that film producers were guided by rather shallow motives related to entertainment than public interest.[6]

The Indian Cinematograph Act of 1952 introduced censorship as a way to arguably protect the audience from immorality in films. Such thinking was similar to the practices from the colonial times. The newly introduced legal provisions reaffirmed the power of the state over the film as a medium.[7] In constitutional debates about whether the exhibition of cinema films should be considered a state or a union subject, policymakers agreed that films were considered an important educational medium that has a major role in building the national character. Apart from that, films were considered an important means of expression, which justified the active role that the central government wanted to play in controlling cinema. As a result, it was eventually decided that exhibition of films was to be regulated at union level, only the central government having the power to sanction films.[8]

The Cinematograph Act of 1952[9] introduced a rating system for films that included the following categories: U (universal exhibition), A (adult exhibition), UA (with permission after 12 years of age) and S (for professionals).[10] The industry lobbied for a centralized system of film certification as they believed that once a central authority was established, the certification of films would be easier and faster. In short, the industry wanted a change in the philosophy of censorship.[11]

One of the first cases of censorship in the post-independence era was *K.A Abbas vs Union of India*. [12] In this case, the courts considered the justification for censorship and the importance of films as a medium in India. The petitioner was a journalist who produced a short film named *A Tale of Four Cities* that depicted realities of life in four major Indian cities. The request of the producer for a UA certificate from the Censor Board was not approved. The board granted instead a certificate restricting the public viewing to an audience of adults, saying that a UA certificate

[5] Arpan Banerjee, "Political Censorship and Indian Cinematographic Laws: A Functionalist Liberal Analysis," *Drexel Law Review* 5 (May): 557–626, 2010

[6] K.S Patil, "Report Of The Film Enquiry Committee (1951)", New Delhi: Government of India, 1951, see more at <http://archive.org/details/in.ernet.dli.2015.51593>

[7] Someswar Bhowmik, "From Coercion to Power Relations: Film Censorship in Post-Colonial India," *Economic and Political Weekly* 38 (30): 3148–52, 2003

[8] Government of India, "Constituent Assembly Debates," 9. New Delhi: Government of India, 1949

[9] Ministry of Information and Broadcasting, *The Cinematograph Act, 1952*, see more at <https://www.mib.gov.in/acts/cinematograph-act-1952-and-rules>

[10] *The Cinematograph Act, 1952*, cit.

[11] Someswar Bhowmik, "Politics of Film Censorship: Limits of Tolerance," *Economic and Political Weekly* 37 (35): 3574–77, 2002

[12] M Hidayatullah, "K.A Abbas vs. Union of India AIR 481," *Supreme Court of India*, 1971.

could be awarded if a scene showing prostitution was removed from the film. The petitioner filed a writ petition before the Supreme Court, claiming that his right to freedom of expression was violated and that the Indian Cinematograph Act of 1952, which empowered the censors, was unconstitutional.

While examining the subject matter the court relied on a report of Khosla Committee, appointed in 1968 to assess the model of censorship in India. The committee had pointed out that India had one of the strictest models of censorship in the world and that there was need for a more liberal form of content regulation. The court observed that motion pictures could not be considered at par with other media as motion pictures serve the lowest denominator of the society and stir emotions and sensitivities in a different way.

The court thus held that categorization and censorship of films based on age and content is a valid classification based on public decency, morality and interest. Although the court stated that it was the responsibility of parliament to adopt policies and introduce standards for filmmakers, it decided that a list of rules on what may not be shown on cinema, dating back to the colonial times, had to be followed.[13] The amendment of the Indian Cinematograph Act of 1952 was pending in parliament at the time of writing.

In summary, the state control, in one form or another, has been considered justified in the film exhibition industry because, since the early days of cinema in India films were considered a powerful medium that can influence society. As the film industry grew, calls for more liberal forms of censorship and for a more independent censorship board have intensified. Those objectives have not yet been achieved.[14]

Transition to Television in India: Evolution of Content Regulation

While the rise of cinema prompted the government for the first time to act as a content regulator, another powerful medium emerged in India in 1959. Television was introduced in India as an educational project that was initially supported by UNESCO and Ford Foundation. Television as much as radio was largely controlled by the government.

To assess the use of television as a medium in India, the government appointed Chanda Committee to draft guidelines for the broadcasting sector.[15] The report issued by the committee stated that there were growing expectations from television after the government had allocated INR 100bn (the equivalent today of nearly US\$ 1bn) for the development of television over a period of 25 years. The committee's report was released in 1965. It stated that the power of television as a disseminating medium was speculation, similar to the claims that sound broadcasting would become a powerful medium. Like sound broadcasting, television is likely to fade away, the committee claimed. They argued that television was a luxury that served the

[13] M Hidayatullah, "K.A Abbas...", cit.

[14] A.G. Noorani, "TV Films and Censorship," *Economic and Political Weekly* 25 (6): 300–300, 1990

[15] Rommani Sen Shitak, "Television and Development Communication in India: A Critical Appraisal," *Global Media Journal – Indian Edition* 2: 26, 2011

entertainment interest of the Indian society elites. But the committee also concluded that television could be used as an educational medium to serve the public interest by disseminating relevant information to the general public.

The committee said that television, by showing violent images or degrading characters, could also have an adverse impact on young minds, but if controlled properly such impact can be curbed. Such observations indicated the government's early intent to regulate television content. The committee recommended the government to expand television and bring in more foreign investors to acquire the necessary equipment. According to the committee, television should be expanded to reach out to 113 towns and 2.1 million villages, which would cover 47% of India's total territory. The committee much favored the use of television for promoting development programs related to health and hygiene, agriculture, family planning and techniques of industrial production, among other things.[16]

One of the first major educational programs on television came about as a cooperation between the Indian Department of Atomic Energy and the National Aeronautical and Space Administration (NASA) of the U.S. in 1975. The aim of this program was to provide India's rural population with informal education related to agriculture, family planning, health, children education and recreational programs. The program was initially rolled out in 2,400 Indian villages.[17] It was one of the first experiments used to assess the power of satellite communication through television as a medium. An impact assessment conducted at the time found that television made people more engaged and aware about the government's various development programs.[18]

Television at the time was still in its nascent stage and was highly manipulated by the government because of its monopoly over broadcasting. Until the 1980s, the sole television content distributor in India was Doordarshan, the country's state broadcaster. One of the few instances where the state demonstrated its power to control the medium was when "Bobby," an Indian Bollywood romance film was aired on television to prevent people from joining an anti-government protest organized by a political leader at exactly that time. During the same period, Doordarshan exhibited more films that promoted Mrs. Gandhi, then Prime Minister of India, as a great political leader with progressive ideas, such as "Indus Valley to Indira Gandhi", "New Students" and "Giton Bhari Sham." At the same time, the television was devoting generous coverage to events organized by the government.[19]

An emergency imposed in India during the time of Indira Gandhi in 1975 brought some of the major concerns of content regulation on the table as the government had the potential to control the people through mass media. When the emergency was over, the government published a white paper that highlighted the misuse of mass media in India as mentioned above through favoring the government. The control of television by the government began to be questioned.

[16] "Chanda Committee Report," New Delhi: Ministry of Information and Broadcasting, 1964

[17] H.R. Luthra, *Indian Broadcasting*, Publications Division Ministry of Information & Broadcasting, 1986

[18] Planning Commission of India, "Evaluation Report On Satellite Instructional Television Experiment (SITE)," Study Report, New Delhi: Government of India, 1981, available online at <http://planningcommission.gov.in/reports/peoreport/cmpdmpeo/volume2/erosi.pdf> (accessed on 5 September 2019)

[19] Parliamentary Committee, "White Paper on the Misuse of Mass Media During the Internal Emergency," New Delhi: Parliament of India, 1977, available online at <https://publicarchives.files.wordpress.com/2014/09/white-paper-on-the-misuses-of-mass-media-during-the-internal-emer.pdf> (accessed on 10 September 2019)

The B.G Varghese Committee was formed to recommend policy guidelines that would ensure autonomy in broadcasting. The committee recommended the creation of the National Broadcasting Trust, which would independently regulate the broadcast sector. The Prasar Bharati Bill of 1979, which was designed to establish a public broadcast service in India, was presented to parliament, but the government fell before the law was adopted. Following Indira Gandhi's return to power in 1980, the government did not support the bill.[20]

A major technological development, the launch of the satellites INSAT-1 A and B by NASA in 1983 had a major impact on television in India as they helped expand the reach of television and at the same time allowed the introduction of color television in India. Hosted by India in 1982, the Asian Games (a continental multi-sport event known as Asiad) were aired on television at the suggestion of S.S. Gill, the secretary general of the committee that organized the games. The games had boosted the public appeal of television.[21] The success also prompted the broadcaster to diversify its content by adding some new popular programming types such as soap operas and mythological drama.

In 1980, discussions in parliament touched on the impact of color television on society, with some of the MPs saying that such a strong medium was not fit for a poor country. Other MPs argued that the government had to expand television to many more Indian states that do not have access to it.[22]

Following these debates, in 1985 the government set up a working group to look into a software development plan for Doordarshan. The original premise behind this initiative was that television advanced at such a fast pace that the society was not able to use it in an efficient way. The group made recommendations to improve television as a medium that could be used for education, public awareness and development, also exploring issues related to content regulation. Among other things, the group found that the heavy reliance of television on cinema content had a negative effect on the image of women in society. Hence, the group recommended the creation of a programming advisory and monitoring committee that would prevent importation of foreign films and programs that negatively affected the image of women. It also recommended the B.G Varghese Committee to establish an autonomous body in charge of managing television broadcasting.[23]

By 1988 about 12% of the Indian population watched television regularly. As the viewership increased, the Doordarshan came to be increasingly scrutinized by the courts as it became a medium not only promoting public interest but also increasingly critical of the government. One of the first controversial cases involving *Doordarshan* was *Ramesh vs Union of India*, in which the

[20] Madhavi Goradia Divan, *Facets of Media Law*, 1st ed, Eastern Book Company, 2006, see more at https://books.google.com/books/about/Facets_of_Media_Law.html?id=uQJMGQAACAAJ

[21] Sunetra Sen Narayan, *Regulation of the Broadcast and Cable Media*, Oxford University Press, 2013, see more at <https://www.oxfordscholarship.com/view/10.1093/acprof:oso/9780198092360.001.0001/acprof-9780198092360-chapter-7>

[22] Parliament of India, "Discussion on the Working of the Ministry of Information And Broadcasting," Rajya Sabha Parliament of India, 1980, see more at http://rsdebate.nic.in/bitstream/123456789/407606/1/PD_115_28071980_4_p178_p236_13.pdf

[23] Working Group on Software for Doordarshan, "An Indian Personality of Television," New Delhi: Ministry of Information and Broadcasting, 1985, see more at <http://devcomprojects.co.in/viewprojects/OSMjIzEjlyMyMDI=#page/27/mode/1up>

appellant demanded that the broadcast of “Tamas,” an Indian television series, be halted because it showed communal riots between different religious groups. The court had already concluded that series had been checked by the censorship board and Doordarshan’s management, which both found it suitable for public viewing.[24]

In another case, *Odyssey Communication Pvt. Ltd vs Lokvidyan Sanghtan*, the broadcast of the series “Honi Anhoni” was questioned as critics claimed that it induced fear among people and spread blind faith. The court in this case established that the series was not prejudicial to the community and did not hinder public morality. It concluded that the producer has the right under freedom of expression to exhibit films on Doordarshan.[25]

In yet another case, the broadcast of “Beyond Genocide,” an award-winning documentary related to Bhopal gas tragedy, a leak incident in 1984 that affected nearly half a million people, turned into a controversy. A petition was filed by Professor Manubhai Shah with the Delhi High Court as Doordarshan refused to air the documentary. Following an unfavorable ruling by the High Court, the government appealed to the Supreme Court. Both courts held the view that Doordarshan does not have the right to halt broadcasting the documentary based on its guidelines because such a decision curtailed freedom of speech and expression.[26]

In 1989, when the new government reintroduced the Prasar Bharati Bill to give autonomy to the Indian public service broadcaster, for the first time they defined broadcasting as “dissemination of content through any form of wireless transmission.” In its 1989 form, the bill suffered some alterations. First, the provision on protection of freedom of speech and expression was removed. Another provision led to the creation of a parliamentary committee consisting of members from both houses to oversee the operation of Prasar Bharati.[27]

As television became a heavily regulated medium, for economic reasons the broadcast sector was liberalized, the market opening up to private players and foreign content. Many corporations saw a great potential in the Indian market. The market liberalization led to a massive increase in the number of television channels in India. By 1996, 14.2 million households had access to cable television.[28]

As the broadcast market expanded and foreign content gained momentum, concerns related to content regulation also grew. In 1995, in a landmark judgement, the Supreme Court of India stated: “[...] most people obtain the bulk of their information on matters of contemporary interest from the broadcasting medium. The television is unique in a way in which intrudes into our homes. The combination of picture and voice makes it an irresistibly attractive medium of presentation. It has tremendous appeal and influence over millions of people. Television is

[24] S. Mukharji, *Ramesh vs Union of India* AIR 775, Supreme Court of India, 1988

[25] Mukharji, Sabyasachi, Sen, A.P, Venkataramiah, E.S., and Ojha, N.D. (J). 1988. *Odyssey Communication Pvt. Ltd vs. Lokvidyan Sanghtan* AIR 1642. Supreme Court of India[26] Ahmadi, LIC vs. Prof. Manubhai D. Shah AIR 171, Supreme Court of India, 1992

[27] Ministry of Information and Broadcasting, *The Prasar Bharati (Broadcasting Corporation Of India) Bill, 1989*, Vol. 99, available online at http://164.100.24.219/BillsTexts/LSBillTexts/AsIntroduced/99_1989_LS_Eng.pdf (accessed on 12 September 2019)

[28] Daya Kishan Thussu, “Privatizing the Airwaves: The Impact of Globalization on Broadcasting in India,” *Media, Culture & Society* 21 (1): 125–131, 1999

shaping the food habits, cultural values, social mores and what not of the society in a manner no other medium has done so far.” Furthermore, the court held that airwaves are public property and government must establish an autonomous body to regulate the frequency spectrum. The court noted that the Indian Telegraph Act was obsolete and inadequate for the impact that broadcasting creates.[29]

Thereafter the government passed the Cable Television Networks (Regulation) Act of 1995, aimed at curbing the cultural invasion caused, it said, by the emergence of western content in India through the proliferation of satellite channels. The act put forward a set of guidelines inspired by the regulation of films through the Cinematograph Act of 1952 that had to be followed in television as well. The act introduced a program code with guidelines for prohibited content. Companies interested in broadcasting in India had first to obtain a broadcast license from the state by bringing guarantees that they were going to adhere to these content requirements.[30] Furthermore, a Broadcasting Bill was introduced by parliament in 1997. The Prasar Bharati Bill, which was passed earlier, was also amended.[31]

As television has grown in popularity and the media space was fully liberalized, the government was increasingly showing a tendency to regulate content. As television viewership increased, cultural sensitivities among people came to the forefront. The government tried to turn television into its own mouthpiece, but that became increasingly difficult because of technological advances and liberalization policies that changed the television landscape from a government monopoly to a competitive broadcasting market.

The government in India controls television content through a program code and by imposing its own interpretation of public order and morality, which is derived from earlier film regulations. While television became popular in India, regulators still felt that foreign content and actors were dominating over indigenous content as foreign players kept entering the television market.

Shift to OTT Video Streaming Services. The Arrival of Architectural Censorship?

The OTT services have a hybrid character as they combine the passive consumption mode of television and the consumer choice of the web. The latter, in fact, has created a massive demand for it.[32]

[29] P Sawant, Ministry of Information and Broadcasting vs Cricket Association of Bengal & Others A.I.R 1236, Supreme Court of India, 1995

[30] Ministry of Information and Broadcasting, The Cable Television Networks (Regulation) Act, 1995, available online at <https://www.wipo.int/edocs/lexdocs/laws/en/in/in033en.pdf> (accessed on 3 September 2019)

[31] Madhavi Goradia Divan, *Facets of Media Law*, cit.

[32] Chuck Tryon, “TV Got Better...,” cit.

The first OTT video service in India was BigFliX launched by Reliance Entertainment in 2008.[33] Eight years later, U.S.-owned Netflix and Amazon started their operations in India.[34] Many traditional broadcasters also started their own OTT services in the meantime. The OTT market in India is supposed to grow to \$218m by 2020.

Censorship rules related to the online space are likely to be applicable on content provided by OTT service companies as such content is accessible over the internet. In the case *Shreya Singhal vs Union of India*, the Supreme Court ruled that user-generated content (USG) cannot be censored online, but delegated the question of on-demand video content, like that provided by OTT services, to the Information Technology Act of 2000,[35] which has a content regulation provision that empowers the government to regulate intermediaries, including OTT platforms.[36]

In one of the first cases regarding the release of censored content online, the court ordered the Ministry of Information and Broadcasting (MIB) to draft policies to regulate content that is censored on other media, but not online (precisely because of the lack of a regulatory framework). [37] In 2015, the Telecom Regulatory Authority of India (TRAI) released a consultation paper on regulation of OTT services, but no consensus on a regulatory framework had been reached by September 2019.[38] The legislature in 2019 was working on amending the Cinematograph Act of 1952, taking in recommendations from the Mukul Mudgal Committee and Shyam Benegal Committee, two committees set up by MIB to find ways to improve the existing regulatory framework for cinema and to propose new standards for content regulation. According to the reports drafted by the two committees, the relevance in the digital age of the Central Board of Film Certification (CBFC) and of the universal rating system were questioned by the public as technology allows film producers today to release their films through online platforms.[39]

Because of the policy vacuum, people resort to the judiciary when they have concerns related to vulgar content on online media.

In the United States, policy experts argued that the government can't maintain its paternalistic role in technology if they want the society to benefit from technological development. The Electronic Freedom Foundation argued, for example, that the same content cannot be governed by different laws because that would simply make the law obsolete.[40] Similar concerns were raised in India in the past year as viewership of OTT video streaming services has been on the rise.

[33] Sandhya Dangwal, "Reliance Entertainment Launches BIGFLIX, India's First Global Multi-Language HD Movie Platform," *India.Com*, 27 April 2017, available online at <https://www.india.com/business/reliance-entertainment-launches-bigflix-indias-first-global-multi-language-hd-movie-platform-2074662/> (accessed on 10 September 2019)

[34] Supantha Mukherjee, "Netflix Launches in India, Plans Start at 500 Rupees," *Reuters*, 6 January 2016, available online at <https://www.reuters.com/article/us-netflix-india-idUSKBN0UK24F20160106> (accessed on 16 September 2019)

[35] *Shreya Singhal vs. Union of India*, 5 SCC, Supreme Court of India, 2015

[36] Government of India, Information Technology Act, 2000

[37] *Raksha Jyoti Foundation vs Union of India and others*, High Court of Punjab and Haryana, 2016

[38] "Consultation Paper on Regulatory Framework for Over-The-Top (OTT) Communication Services," Consultation Paper, New Delhi: Department of Telecommunications, TRAI, 2018, available online at https://main.traai.gov.in/sites/default/files/CPOTT12112018_0.pdf (accessed on 2 September 2019)

[39] Shyam Benegal, "Broad Guidelines/ Procedure for Certification of Films by the Central Board of Film Certification (CBFC)," 2016, New Delhi: Ministry of Information and Broadcasting; Mukul Mudgal, "The Committee of Experts to Examine Issues of Certification Under the Cinematograph Act 1952," New Delhi: Ministry of Information and Broadcasting, 2013

[40] *FCC vs Fox Television Stations, Inc.*, Supreme Court of United States, 2012

A public interest litigation (PIL) against OTT services including Netflix, Amazon Prime and Hotstar was filed in 2019 with the Supreme Court by Justice Rights Foundation, which claimed that, without any policy or law to regulate online content, sexually explicit and vulgar content is widely accessible online. The foundation referred to shows like “Scared Games,” “Vikings” and “Game of Thrones”. The petitioner stated that these platforms are profit-driven and do not consider the cultural sensitivities and the moral fabric prevalent in the society.[41] The matter is sub judice as the court asked the government to reply.[42] Earlier on, in the same matter, the Delhi High Court concluded that, in the absence of legal provisions on licensing OTT platforms, the government cannot censor them, advising that the petitioner’s complaints should be considered under the Information and Technology Act.[43] A similar ruling was made in a separate case that involved the television series “Sacred Games.”[44]

Prompted by these growing concerns, the Mobile and Internet Association of India drafted a code of ethics for the regulation of content on OTT services. The code, however, has not drawn support from all the OTT services. Netflix, for example, signed it, but Amazon and few others were still not on board at the time of writing.[45] In 2018, MIB also set up a committee to draft regulations for online content, but no output has been made public to date. A public consultation on OTT regulation, launched in May 2019 by TRAI, was ongoing at the time of writing.

Content Regulation in India: Looking Ahead

In India, content regulation has been shaped by the shifts in technology and three key policy players: the government, courts and the industry. The regulation of content in India from the rise of the cinema to today’s on-demand media has been characterized by a paternalistic state and a disconnect between policy and technology, with policies badly lagging behind the technology.

The popularity of films and the engagement they created with the audience prompted the government to contain the effect of the cinema. With television, accessibility took a new turn as broadcast transmission could now be made from one place to multiple places. The government saw television as a powerful medium to spread propaganda and publicize government-led initiatives. Television was initially controlled by the government, but with the market liberalization, it came to be deregulated. Private players disrupted the broadcasting landscape and played a leading role in leading the policy towards deregulation. Nevertheless, the government has maintained its influence in content regulation mainly through the program code.

[41] Justice for Rights Foundation vs Union of India, Supreme Court of India, 2019.

[42] Abhijit Ahaskar, “Supreme Court Asks Centre to Regulate Online Video Streaming Services,” Livemint.Com. 10 May 2019, available online at <https://www.livemint.com/news/india/supreme-court-asks-centre-to-regulate-online-video-streaming-services-1557492797710.html> (accessed on 25 September 2019)

[43] Justice for Rights Foundation vs Union of India, cit.

[44] Nikhil Bhalla vs. Union of India & Ors, Delhi High Court, 2019

[45] Namita Singh, “IAMAI’s Regulatory Code for OTT Platforms Outlining Principles and Seeking a Creation of Grievance Redressal; Will It Lead to Self-Censorship?” MediaNama (blog), 17 January 2019, available online at <https://www.medianama.com/2019/01/223-iamai-ott-regulation-video-platforms/> (accessed on 2 September 2019)

The advent of OTTs has changed viewing habits, but the most significant concern is related to the infrastructure they use to operate. The open internet, which has immensely changed viewing habits in India, makes it difficult for the government to impose regulations. Internet has made it possible for anybody who has access to digital devices to also gain access to content. The government can no longer regulate the timing of the shows being broadcast or to enforce classification of content.

Thus, accessibility and portability brought about by digital technology[46] led to a situation where the same content is available on different platforms or media, which are regulated differently. Netflix's slogan, "TV got better," is the best illustration of that trend.[47] As India is primed to become the second largest video viewing population in the world by 2020, the government is likely to design new regulations. In history, major technological shifts forced state regulators to adopt laws as a way to also save themselves from losing control over content.

But today, as in the past, the industry is pushing back. The CEO of Netflix, Reed Hastings, argued in 2019 that self-regulation should be the way forward because nobody wants government regulation, but also because the internet gives users total freedom to choose the content they want.[48]

But because of the regulatory tradition in India, a model combining state censorship and self-regulation is likely to be more accepted. It will likely lead to a system of co-regulation whose impact on freedom of speech and expression is still hard to predict. Debates about OTT content regulation tend to be influenced by both film and cable TV regulatory thinking because the OTT brings in curated content from both. On the other hand, the regulation of film and television goes in different directions in India. On the one hand, the Central Board of Film Certification regulates films in India. In contrast, television is moving towards self-regulation but under the larger umbrella of the state that already set guidelines under the Cable Television Networks Regulation Act of 1995.

The powerful effect of films in India prompted the government to introduce regulations, especially in the post-independence era when the film industry grew at a much larger scale, forcing the government to take on a paternalistic role as a way to protect the ideals of public morality. The television content regulation in India saw a shift of control from the public to private sphere. The government tried to control television completely as it served political interests thanks to its access to households. The difference in approach to content regulation for films and television can be explained by the different type of promoters: cinema was introduced by individuals as a source of entertainment whereas television was introduced by the state as a form of education and public awareness. An individual with a camera could make a film, without the government getting involved. But television was controlled by the government since its inception because the technology used for signal transmission was in the hands of the government.

[46] Chirag Dagli, "Indian OTT Platforms," MICA, 2018, see more at <http://keic.mica-apps.net/wwwisis/Open%20Access%20Resources/Report/OTT.pdf>

[47] Grant McCracken, "WIRED BRAND LAB » Netflix: TV Got Better," 2014, see more at <http://brandlab.wiredinsider.com/portfolio/netflix-tv-got-better/>

[48] Jagmeet Singh, "Netflix CEO Describes Why Self-Regulation Is Better Than Alternative," NDTV Gadgets 360, 19 March 2019, available online at <https://gadgets.ndtv.com/entertainment/features/netflix-india-self-regulation-online-censorship-reliance-jio-red-hastings-interview-2009865> (accessed on 26 September 2019)

However, regulations always came much later than technology. For example, the government introduced legal provisions for private television channels in 1995, 12 years after they began operating in the country.

The judiciary played a key role in regulation of television content mostly by making the government aware of the lack of policy in this sector. The courts generally left their judgments open-ended, asking parliament to perform its policymaking role. In one important decision, though, the judiciary contributed to freeing television from the state monopoly by ruling that airwaves for television transmission are a public resource and must be used in a way that would ensure protection of free speech and expression.[49]

The television regulation in India has moved towards a more self-regulatory approach in recent years, a significant step in that regard being the establishment of the Indian Broadcasting Association as a response to the industry's discontent with existing regulations enforced by ministry bureaucrats.[50]

One major concern for content regulators throughout the past century, in both television and films, was the influence of foreign content on society. In one of the first assessments, the state's film censors found that foreign content was beneficial for Indian audiences. Nevertheless, committees appointed by the government to find content regulation models for television repeatedly said that foreign content affected cultural sensitivities. Such concerns are now aggravated as OTTs are flooding India with content from all around the world.

The theory of media determinism seemed to have influenced the government in its content regulation policies, but at the same time, the political ideology of the ruling government and liberalization policies also had a significant effect on regulations. The effects of the medium that disseminated content usually shaped the attitude of the government in policymaking, an effect arguably of the "soft technological determinism." [51]

The changes in the dissemination medium from film to television to satellite transmission expanded the reach of technology in people's lives, prompting the government to take a paternalistic role in controlling the medium, which had an impact on content regulation. Sociological factors, nevertheless, played a role in it as well. They include cultural sensitivities such as concerns regarding sexually explicit and vulgar content, economic policies such as allocations of state subsidies for the expansion of television, liberalization policies that allowed the entry of foreign television channels and various political events, such as the time of emergency state when the government could exploit mass media.

In summary, the paternalistic attitude of the Indian government in content regulation is likely to lead to new forms of content regulation that would rely on existing regulatory models as well as self-regulation patterns (as in television broadcasting). The courts have pushed the government towards a policy framework aligned, and possibly in pace, with technological change.

[49] Jariwala, C.M. 1996. "An Emerging Frontier of Speech and Expression: Freedom of Doordarshan." *Journal of the Indian Law Institute* 38 (2): 149–67

[50] Kasturika, "NDTV India Ban: A Case of Regulatory Overreach and Insidious Censorship?" Centre for Communication Governance (blog), 29 November 2016, available online at <https://ccgnludelhi.wordpress.com/tag/censorship-2/> (accessed on 22 September 2019)

[51] Ithiel de Sola Pool, "A Shadow Darkens," in *The New Media Theory Reader*, Open University Press, 2006

As no regulations of OTT services exist, courts are pushing the government to address the effects of OTT services. TRAI has circulated a consultation paper and a committee was created by the government to look into regulatory options for online content. However, the government has no concrete plans in this respect. Industry players, on the other hand, have made attempts to draft a code of ethics to guide their work.

History shows though that the government will attempt to introduce legislation expanding its content control ambit when a tipping point in technology is reached. That would mean that although attempts of self-regulation coming from the industry can go in the right direction, it will be the government who will ultimately formulate the regulations.

That doesn't mean bad. It could be an opportunity for the government to build a convergence-based regulatory model that could align policy with technological change. Nonetheless, the ideological bias in this process is hard to gauge or forecast. If the government properly understands the freedom of choice that the internet gives to people, it could go for a regulatory model entrenched in a more liberal paradigm, which is the one that would best serve society.

Recommendations

The history of content regulation in India shows the importance of technology in shaping the environment in which content is created and disseminated. However, since the introduction of cinema through the rise of television, policymaking and content regulation have not been at all technology-centric in India. But in the digital times, because of the internet, a rapidly changing dissemination medium allowing more people than ever before to participate, content regulation must focus on technology as the architecture of regulation. The effect that the medium has on consumers (listeners and viewers) must be a primary consideration when internet content regulations are designed. At the same time, the right to freedom of speech and expression must be enforced in such regulations.[52]

A technology-centric approach allows policymakers to properly assess the economic conditions of the industry's new business models, the changes in consumer behavior and the influence of distribution platforms. The government should treat the internet as a marketplace of ideas that transgresses geopolitical considerations, and therefore, should adopt policies anchored and following the logic of the technological change. The government should also take into account the future of free speech regime in India, which will play a major role in the impact of content regulation. Any kind of content regulation on OTT video platforms is likely to directly affect the power of the states to regulate other forms of online content and to create a snowball effect for other OTT services. Because of the networking effects that the internet triggers, any kind of content regulation should be carefully thought and designed with a long-term approach.[53]

The analysis in this paper has unearthed a set of indicators and parameters that should be considered when content regulation is adopted. They have to do with accessibility, portability, cultural disruption and freedom of choice, four areas on which the following recommendations are based.

[52] Derek E. Bambauer, "Foxes and Hedgehogs in Transition," 2015, *Columbia Law and Technology Journal* 13 (1): 17

[53] Roberto Taufick, "Over-the-Top Content and Content Regulation," 2015, *SSRN Electronic Journal*, <https://doi.org/10.2139/ssrn.2708278>

Self-Regulation as an Alternative

Given the nature of OTT services and their growing reach, self-regulation presents itself as a strong alternative to state censorship. Existing self-regulatory attempts are far from satisfactory.

Some OTT services embrace self-censorship models as a reaction to existing legal framework, suppressing critical content.[54] The codes of ethics adopted by some OTT players are incipient forms of private censorship. Given the tradition of government's intervention in regulation in the past, it is likely that authorities will try to introduce state censorship or a co-regulation model where the state will have an upper hand.

Hence, a multi-stakeholder approach to self-regulation is expected to be the most adequate for India. Such a model should be adopted through stakeholder exchanges and discussions, agreed by the industry itself without interference from the government.

The Convergence Model

Another potential regulatory regime could be based on a convergence model, which means a single framework for content regulation that would cover different platforms of dissemination. That would require the government to adopt a new law that covers content on all platforms and in all formats. An earlier attempt to introduce such a convergence model in India was the Communication Convergence Bill drafted in 2001, but never passed.

If such a model is preferred, the government should resume the due legal process, but the old bill should be completely rewritten to take stock of the latest technological shifts. As the power of technology as a liberating medium should not be curbed, legislation should move away from content regulation towards content enablement. The government should draft this legislation in collaboration with industry players. As in the self-regulation model, a multi-stakeholder approach to content regulation should also guide the policy process if convergence is preferred. The convergence model should not lead to the emergence of new regulatory institutions, but be based on coordination between existing regulators. Such a convergence model would ensure uniform regulation. However, the main risk related to it is the potential to overpower the government in internet regulation.[55]

Global Ratings

Another policy proposal floated at international level is to develop global content ratings to be followed by all OTT players. Global OTT players tend to bring foreign content to India, heightening red flags that have been raised since 1928 with advent of films. However, proliferation of foreign content in India must be contextualized as people's cultural sensitivities have become more diluted thanks to the internet, which expose us to more realities in more countries. The global

[54] Daniel Bar-Tal, "Self-Censorship..." cit.

[55] Markus Steingröver, Edgar B. Cardozo Larrea & Nikolay Zhelev, "The Rise of OTT Players: What Is the Appropriate Regulatory Response?" in *Future Telco: Successful Positioning of Network Operators in the Digital Age*, edited by Peter Krüssel, 241–49. Brussels: Springer International Publishing. https://doi.org/10.1007/978-3-319-77724-5_21

ratings proposal aims at introducing a standard rating system for content and quotas for indigenous content on OTT platforms. Some of the OTT service providers have reacted negatively to the proposal. Netflix, for example, expressed concerns that such ratings would directly affect the choice presented to consumers.

This regulatory model would ensure consistency as it will employ the same standards for all players, but its form should be decided by the industry rather than governments of different countries. Although this model is probably the most advanced for the networked and globalized world we live in, the risk of being challenged by various governments is high.[56]

Internet usage has been growing in India, becoming a marketplace for ideas, an opportunity for content creators to reach more people than ever before and a new medium for entertainment and education. In light of this, both the government and the industry should appreciate the new space that the internet has given to free speech in India and, as a result of it, the need to adopt a more regulatory and freedom-oriented regulatory approach. Therefore, self-regulation by the industry alone, without the interference of the government, seems to be the right approach to OTT regulation in India: it gives the industry a chance to grow and empowers consumers while protecting the internet as a medium from political scrutiny and ensuring freedom of expression.

[56] Scott W Minehane, "The Challenge of Managing Digital Content," New Delhi: Internet Telecommunications Union, available online at <https://www.itu.int/en/ITU-D/Regional-Presence/AsiaPacific/Documents/Events/2017/August-RR-ITP-2017/ITU%20Report%20Regulating%20Digital%20Content%202017%20Final.pdf> (accessed on 23 October 2019)

Theoretical Framework

Content Regulation as an Evolving Concept

Content regulation as a concept has constantly evolved due to rapid modernization and advancement in technology along with changes in economy, politics, culture and institutions. The concept of content regulation is related to censorship, a practice going back to the “censors”, people who during Roman times were responsible for assessing the morale of the citizens.[57] Censorship in a modern society, where there are technical means of communication able to reach a mass audience, is a practice of prescribing regulations or determining, based on political, economic, religious and cultural circumstances, the content that should or should not be disseminated. Censorship may also involve modifying the content so that its effect can be limited or to ensure the content complies with prescribed guidelines.

Content regulation was developed with the aim of protecting the masses from harm in the interest of public welfare.[58]

The meaning of censorship also depends on the case to which it is applied. The construction of its meaning and purpose relies on three factors: the reasons for censorship, the medium or parties subjected to it and the means used for enforcing it.[59] Hence, in most cases, censorship either involves state actors prescribing laws and rules for content exhibition[60], or, in some cases, it becomes self-censorship wherein content providers themselves put limitations on the circulation of their own content, depending on certain factors.[61] Another form of censorship is societal censorship, the case where societal norms prescribe the nature of the content being disseminated.

Censorship as a concept cannot be reduced to one set of institutions as the practice of censorship constantly shifts within different narratives creating new dynamics and power relations amongst various actors.[62]

Censorship is perceived as a threat to free speech and, as technologies change, it brings different variations to the concept of content regulation. With the change in technology, a new form of censorship, **architectural censorship**, has emerged. Architectural censorship limits speech through the medium or the technology used for dissemination.[63]

[57] Saeed Abbasi Irum & Laila Al Sharqi, “Media Censorship: Freedom versus Responsibility,” *Journal of Law and Conflict Resolution* 7 (4): 21–24, 2015, see more at <https://doi.org/10.5897/JLCR2015.0207>

[58] Gary T. Marx, “Censorship and Secrecy: Legal Perspectives,” *International Encyclopedia of the Social & Behavioral Sciences*, edited by Neil J. Smelser and Paul B. Baltes, 1581–88, 2001, Oxford: Pergamon, see more at <https://doi.org/10.1016/B0-08-043076-7/02840-0>

[59] Pranesh Prakash, Nagla Rizk & Carlos Afonso Souza, eds., *Global Censorship: Shifting Modes, Persisting Paradigms. Access to Knowledge Paper Series*, 2016, American University, Cairo; and Instituto de Tecnologia & Sociedade do Rio: Information Society Project at Yale Law School, see more at https://law.yale.edu/system/files/area/center/isp/documents/a2k_global-censorship_2.pdf

[60] Owen Fiss, “State Activism and State Censorship,” *Faculty Scholarship Series, Faculty Scholarship Series*, January, 1991, see more at https://digitalcommons.law.yale.edu/fss_papers/1199

[61] Daniel Bar-Tal, “Self-Censorship as a Socio-Political-Psychological Phenomenon: Conception and Research,” *Political Psychology* 38 (S1): 37–65, 2017, see more at <https://doi.org/10.1111/pops.12391>

[62] Annette Kuhn, *Cinema, Censorship and Sexuality 1909-1925* (Routledge Revivals), Routledge, 2016, see more at <https://doi.org/10.4324/9781315637181>

[63] Lawrence Lessig, “The Censorships of Television,” 34, 1999.

Technology and Media Determinism

With the emergence of new ways of dissemination, there is need to rethink the power relations between the state, the public and media as perceptions of society and culture are changing.

In the framework of regulation, laws and norms are used to regulate behavior. In economics, prices regulate behavior. But, with the technological advances, the basis of regulation is also moving more towards the physical medium. Lessig says that technology as an architecture introduces a new way to regulate the physical medium by moving the emphasis to context and environment. Thus, the regulatory framework in the digital era should consist of laws, norms, price and architecture. Especially in cyberspace, the role of technology as an architecture of regulation is becoming increasingly pertinent.[64]

The term “technology determinism” was coined by the American sociologist Thorstien Veblen who said that transformation in society is triggered by the change in technology. As technology develops and new media appear, the society needs to adapt itself to such technology. The adaption could mean changing the way regulation, rules or norms govern the society. A soft form of technology determinism accepts technology as a major driver for change, but also recognizes the role of other factors.[65] The latest wave of technology determinism is linked with the advent of the internet that has fundamentally changed the pace of life.[66]

The technological determinism found its critics. Technology plays a major role in forming the basis of regulation, they say, but it cannot be the sole factor as different technologies are perceived and responded to in different ways in different societies. Therefore, to understand the policy habitat of regulation, both technological and sociological factors need to be understood.[67] Hence, in choosing the right framework for the future of content regulation, it is important to take into consideration the role of technology in determining the relations between the regulatory regime and the society.

Another theoretical framework relevant for content regulation is the media determinism theory, established by Marshall McLuhan, anchored in his famous “medium is the message.” This theory says that it is the medium through which content is communicated that impacts people rather than the content itself. McLuhan considers media as the extension of human sense and personal energies, and a force that alters our perception of social realities.[68]

In conclusion, the medium can be understood as the driving force for policy changes, but, at the same time, it is also important to explore the political, cultural and economic tipping points related

[64] Lawrence Lessig, “Architecting for Control,” Cambridge Review of International Affairs, 2000, see more at <https://cyber.harvard.edu/works/lessig/camkey.pdf>

[65] Bruce Bimber, “Karl Marx and the Three Faces of Technological Determinism,” *Social Studies of Science* 20 (2): 333–51, 1990, see more at <https://doi.org/10.1177/030631290020002006>

[66] Alvin Toffler, *The Third Wave*, New York: Bantaman Books, 1980, see more at https://archive.org/stream/The_Third_Wave_Alvin_Toffler/The%20Third%20Wave%20-%20Alvin%20Toffler_djvu.txt

[67] Ian Hosein, Prodromos Tsiavos & Edgar A. Whitley, “Regulating Architecture and Architectures of Regulation: Contributions from Information Systems,” *International Review of Law, Computers & Technology* 17 (1): 85–97. 2010, see more at <https://doi.org/10.1080/1360086032000063147>

[68] Marshall McLuhan, *Understanding Media: Extensions of Man*. London: Routledge London, 1964, see more at <https://web.mit.edu/allanmc/www/mcluhan.mediummessage.pdf>

to the changing medium and to look at the medium in the context of socio-cultural realities.[69] To understand the relation between media and society there are two questions that need to be answered: a) what does new technology do to people?; b) what do people do with new technology?[70]

Changing Media and Sociological Factors Affecting Content Regulation

McLuhan divides media into two broad categories: hot and cold media. The hot media category encompasses high-definition media like radio and films that provide many details within one frame. By providing a lot of detail, hot media leave little room for audience imagination, the audience being more a receiver of the information. Soft media are low-definition, giving less information and thus increasing the imaginative scope of the audience to fill in the missing details.[71]

The categorization of media in hot and cold is also related to the type of effect they have on the audience, which is closely linked with the type of regulation such media will be subjected to.

Films as a Medium

In 1895, the Lumiere brothers invented the cinematograph that led to the creation of moving pictures. The film as a medium exhibits the process of change in an entertaining format to the audience. It could transport the viewers from their reality to the world that is created through moving images. Oftentimes, these realities are constructed in moving images in the form of dreams desired by the audience, which increases the impact of movies on the audience. This compelling effect on the audience creates the demand for it,[72] which led to the emergence of a billion-dollar industry in the 20th century. Its uses have not been only limited to entertainment. Film has also been used for propaganda or to raise awareness about societal issues and education.[73]

In India, films have traditionally been a powerful medium of communication. Since the introduction of films in India, cinema has grown in reach and impact. The Indian film industry grew into a large scale sector during the post-independence era with the introduction of new technologies in film production and distribution, which helped it gain recognition at global scale.[74]

British colonizers in India understood at the time that cinema as a medium had a different effect on people compared to print media. There was also an inherent idea within the censorship policy of the colonizers that the colonized were less rational people and hence more vulnerable to the

[69] Nancy Shaw, "The Method Is the Message: Rethinking McLuhan Through Critical Theory," *Canadian Journal of Communication* 24 (1), 1999, see more at <https://doi.org/10.22230/cjc.1999v24n1a1087>

[70] David Croteau & William Hoynes, *Media/Society: Industries, Images and Audience*. United States of America: Pinge Forge Press, 1997

[71] Marshall McLuhan, *Understanding Media*, cit.

[72] Marshall McLuhan, *Understanding Media*, cit.

[73] Geoffrey Nowell-Smith (ed.), *The Oxford History of World Cinema*, United States of America: Oxford University Press, 1996, see more at https://books.google.com/books/about/The_Oxford_History_of_World_Cinema.html?id=MZwVDAQAQBAJ

[74] B.P. Mahesh Chandra Guru, M.S.Sapna, M.Prabhudev, & Dileep Kumar, "History of Indian Cinema." *International Journal of Business and Administration Research Review* 2 (11): 186, 2015

effect of moving images, an illustration of the power dynamics during that time. The British brought their conflicting ideas of cinema control and censorship to India.[75] During the advent of cinema in India, the policy of content regulation was largely dictated by the need of the British to control the spread of nationalist fervor and of socialist ideas.[76] They, however, masked such censorship policies under the need to prioritize public interest and morality. Even in the post-colonial context many of those archaic ideas of censorship justified by the need to protect public morality were perpetuated through legislation and policies.[77] On a different note, Mazzarella wrote that the effect of cinema in India has created the need for its censorship in a period he described as cultural emergency when exhibition of Hollywood films in Indian cinemas raised concerns.[78] The censorship policy on films is still implemented through the Cinematograph Act of 1952.

Television as a Medium

Television is defined as a low-definition medium as it offers little details within one frame, increasing the scope of the involvement by the audience. It is more consumer oriented.

The emergence of television and radio together created broadcasting as a social institution whose initial use was controlled by the state. The main benefit of the broadcast technology was its capacity to connect all the households, which is why the term "mass communication" appeared. [79]

Television as a medium of mass communication, with an educational agenda, was introduced in India in 1959 as the government realized its potential to educate and entertaining people.[80] As broadcasting was recognized as a powerful medium of communication, the judiciary in India said that the government should not have a monopoly over its use.[81] The 1990s saw a series of technological developments in the broadcasting sector including the rise of cable and satellite television.[82] The influence of television as a medium grew particularly as a result of a series of liberalization policies coupled with the introduction of satellite television in India. Satellite television brought new content, turning television into a personal entertainment device present in most of the Indian households. The market was also influenced by the shift in the operation of television broadcasting from the public to the private sphere at a time when the telecommunications market was opening to foreign distributors and imported content.[83]

[75] Miriam Sharma, "Censoring India: Cinema and the Tentacles of Empire in the Early Years," *South Asia Research* 29 (1): 41-73, 2009, see more at <https://doi.org/10.1177/026272800802900103>

[76] Someswar Bhowmik, "From Coercion to Power Relations...", 2003, cit.

[77] Priya Jaikumar, *Cinema at the End of Empire: A Politics of Transition in Britain and India*, London: Duke University Press, 2006

[78] William Mazzarella, *Making Sense of Censorship: Censorium: Cinema and the Open Edge of Mass Publicity*, Duke University Press, 2013

[79] Raymond Williams & Ederyn Williams, *Television: Technology and Cultural Form*, London: Routledge, 1990

[80] Rommani Sen Shitak, "Television..." 2011, cit.

[81] Kumar R Girish & Paul Relfi, "Rights of Broad Casting Organizations: Do We Need Legal Reform?" *Indian Journal of Intellectual Property Law* 5 (87), 2009, see more at <http://www.commonlii.org/in/journals/INJIPLaw/2009/5.html>

[82] Mrinal Singh, "The Dawn of Digital India- Television to Internet," *IOSR Journal of Humanities and Social Science* 21 (07): 63-66, 2016, see more at <https://doi.org/10.9790/0837-02107016366>

[83] Daya Kishan Thussu, "Privatizing the Airwaves...", cit.

The broadcasting sector in India was marked by power struggles around content between the government and the private sector, each trying to assert their dominance.[84] The television as a medium affected government policies, but, at the same time, policies of liberalization influenced the technological advancement of the broadcasting sector in India.

The increasing influence of television in the lives of people and proliferation of television content prompted the government to introduce a range of policies that covered the new forms of television transmission including cable and satellite television, and Direct-to-Home service (DTH). In the policy debates, concerns that liberalization and introduction of foreign content through broadcasting do not serve well the cultural values of the Indian society were raised. As always, these debates were influenced by the ideals of public morality and cultural sensitivity characterizing the Indian context.[85]

Internet as a Medium

The arrival of Web 2.0 revolutionized media in many ways. The reception of information through the digital medium has expanded manifold in recent years. Internet is seen as a new liberation force driving ideas, thoughts and content across border and societies. It has led to the emergence of new actors and allowed consumers to be in charge of selecting the content they want to receive and view.[86] The internet has revolutionized the means of communication and exchange of information. It has brought to the forefront a new medium of expression.[87]

Digitization has created a new social order where differences of time and space have become increasingly blurred. It has converged the different media that existed earlier in the form of library, with films and television stored on our computer screens. The force of internet as a medium has led governments and policymakers all around the world to rethink the way content can be regulated.[88]

User-generated content has proliferated across online video portals. Internet Protocol Television (IPTV) and OTT services fundamentally changed the broadcasting sector. The Internet has brought about a new wave of content, providing consumers with the freedom to choose the time and space for the reception of the content. One of the leading OTT services, Netflix was developed on a movie rental format, but it then grew into a new form of television. Although theorists view in OTT the death of television, streaming seems more like a transition to a new medium of watching audiovisual content.[89] Video streaming services create a more engaging environment. But the shift from cable television to OTT services has forced regulators to think about the patterns of regulation that most fit this new form of broadcasting.

[84] Victoria L. Farmer, "Nation, State, and Democracy in India: Media Regulation and Government Monopoly," 19–20 United States of America, 2009, see more at <http://global.asc.upenn.edu/fileLibrary/PDFs/VFarmer.pdf>

[85] Sunetra Sen Narayan, *Regulation of the Broadcast and Cable Media*, cit.

[86] Astra Taylor, *The People's Platform: Taking Back Power and Culture in the Digital Age*, New York: Metropolitan Books, 2014

[87] Wiley Lee Umphlett, *From Television to the Internet: Postmodern Visions of American Media Culture in the Twentieth Century*, Madison, NJ : Fairleigh Dickinson University Press, 2006

[88] Christine Cooper, "Television on the Internet: Regulating New Ways of Viewing," *Information & Communications Technology Law* 16: 1–16, 2007

[89] Amanda D. Lotz, *The Television Will Be Revolutionized*, [Electronic Resource]. New York: New York University Press, 2007

OTT services do not have one universally accepted definition. The Internet Telecommunication Union (ITU) defines OTT service as an “internet application that may substitute or supplement traditional telecommunication services, from voice calls and text messaging to video and broadcast services.”[90] The Indian communications regulator, Telecom Regulatory Authority of India (TRAI), borrows the same definition.

Internet and mobile penetration have experienced an immense growth in the past decade in India, making OTT services available to masses.[91] The number of digital subscriptions to OTT services has boomed and the penetration of the audiovisual traffic was expected grow to 82% of the total digital traffic.[92] In 2017, the user base of Netflix and Amazon Prime (the video streaming services of the e-retail giant Amazon) grew by 5.37 million and 12.64 million, respectively.[93]

The Indian government and other regulatory bodies have not tried to adjust policies to the change in technologies. The debate in India about digital content regulation has varied between calls for state censorship and self-regulation.[94] The dilemma that authorities have been faced with is whether to subject the OTT media platforms to broadcast or films policies or to include it in the larger internet regulation frameworks.

[90] “ICT Regulation Toolkit,” available online at <http://www.ictregulationtoolkit.org/toolkit/2.5.2> (accessed on 30 May 2019)

[91] Joshi Sujata, Sarkar Sohag, Dewan Tanu, Dharmani Chintan & Purohit Shubham, “Impact of Over the Top (OTT) Services on Telecom Service Providers,” *Indian Journal of Science and Technology* 8: 145–160, 2015

[92] “Digital Media: Rise of On-Demand Content,” Deloitte, 2015, available online at <https://www2.deloitte.com/content/dam/Deloitte/in/Documents/technology-media-telecommunications/in-tmt-rise-of-on-demand-content.pdf> (accessed on 1 September 2019)

[93] “Technology, Media and Telecommunications Predictions,” Deloitte, 2018, available online at <https://www2.deloitte.com/content/dam/Deloitte/in/Documents/technology-media-telecommunications/in-tmt-predictions-2018-noexp.pdf> (accessed on 1 September 2019)

[94] Arjun Rajkhowa, “The Spectre of Censorship: Media Regulation, Political Anxiety and Public Contestations in India (2011–2013),” *Media, Culture & Society* 37 (6): 867–86, 2015, see more at <https://doi.org/10.1177/0163443715584099>

Methodology and Research Design

The aim of this paper is to understand the response of state institutions to content regulation and policy throughout various periods in India's recent history as a base for proposing recommendations for policies and regulations that are adequate in today's technological context.

Focusing on the new opportunities to disseminate content made possible by technological changes and on the changing sociological factors, the paper is basing its key argument in path dependence, a theory in policy research describing a situation where a present policy is based on choices made in the past. Path dependence perceives the policy problem through a historical perspective that allows understanding the attitude to and the nature of the institution that dealt with a similar type of problem in the past. It bases its arguments on the "efficacy of history." [95] Some theorists criticized the use of the path dependency theory in policy research, but Torfing critically analyzed the path dependency, reestablishing its relevance in public policy. [96]

In studying technology and its effect on society in particular, the notion of path dependence is important as technology opens new avenues of thinking and perception, which, however, tend to be influenced by past behavior and notions. Relying on a combination of path dependence and the importance of historiography in the study of technology and its relation to the society, this paper argues that the changes of the medium should be used as vantage points to look into content regulation policy. The paper maps and analyzes the behavior of the government and society as a way to understand the future of policy after the disruption caused by paid OTT services in India.

Research Question

This paper explores the changes in content regulation in parallel with the changes of the dissemination medium. It explores the impact of history of content regulation and policy on the policy environment that was shaped in the post-network era by paid OTT services such as Netflix, Amazon Prime or Hotstar, using India as a case study.

At the time of writing, India did not have specific content regulations and policies for OTT video streaming services, but with the increasing demand for these services and their growing reach, the OTT sector becomes a significant policy area that needs serious research. The primary research question in this paper touches on three key issues/questions:

- Is content regulation and policy based in the technology determinism theory or shaped by the critique of the technology determinism theory and sociological factors?
- What do changes in the media show when it comes to the behavior of content regulators?
- What new content regulations and policies should be adopted in India?

[95] Jacob Torfing, "Rethinking Path Dependence in Public Policy Research," *Critical Policy Studies* 3 (1): 70–83, 2009, see more at <https://doi.org/10.1080/19460170903158149>

[96] Jacob Torfing, "Rethinking Path Dependence....," cit.

Research Design

This paper draws its findings from qualitative research using document analysis of content regulations and policies focused on the changes in the medium of dissemination.[97] The aim of the analysis was to assess the response of the government and institutions to technological change and the role played by other sociological factors in the political and economic environment of the country.

The document analysis included:

- Policy documents such as white papers, consultation papers and reports issued by government institutions and other bodies involved in content regulation in India;
- Journal articles, books and other academic works that track content regulations and policies across different points in time in India;
- Legislation and case laws with a specific focus on the provisions related to content regulation guidelines relating to the audiovisual medium and to content regulation at the time when a new medium of dissemination emerged.

The key aim of the document analysis is to understand the drivers of change in content regulation and policy and the arguments made by the government in justifying these regulations. The analysis of case laws was used to determine free speech jurisprudence and the role played by the judiciary in influencing content regulation policy in India. Relevant case laws reflect the perception held by society of the content regulations and policies. With every change in technology, it is important to study the relevant legal perspectives.[98] The analysis of case laws and legislation reflects on technology as an agency for legal change or vice-versa.

Why India?

India has been selected as a case study as it is one of the largest emerging markets for OTT video streaming services. In 2018, the Asia-Pacific region saw the steepest growth, of 24%, in the OTT video market globally. [99] India has also seen in recent years a sustained debate about content regulation on OTT platforms. India has a vibrant audiovisual industry. The overall media consumption in the country has been growing at an annual rate of 9% over the course of the last six years, one of the highest in the world. Digital media consumption has been also growing fast as the number of broadband users increased to 480 million. The number of internet users in India rose by 13.9% between 2016 to 2017.[100]

[97] Document analysis is a method of evaluation of documents, both electronic and in hardcopy, used to understand a particular phenomenon or an issue. By providing rich analysis of a particular phenomenon, it is oftentimes used as a standalone method of research. (Glenn Bowen, "Document Analysis as a Qualitative Research Method," *Qualitative Research Journal* 9 (August): 27–40, 2009, see more at <https://doi.org/10.3316/QRJ0902027>)

[98] Arthur Cockfield & Jason Pridmore, "A Synthetic Theory of Law and Technology," *Minnesota Journal of Law, Science & Technology* 8 (2): 40, 2007

[99] Kanchan Samtani & Gaurav Jindal, "Entertainment Goes Online," Mumbai, India: Boston Consulting Group, 2018, available online at https://www.afaqs.com/all/news/images/news_story_grfx/2018/11/53972/BCG-Entertainment%20Goes%20Online.pdf (accessed on 2 September 2019)

[100] "Yearly Performance Indicators of Indian Telecom Sector," New Delhi: Department of Telecommunications, TRAI, 2018, available online at <https://main.trai.gov.in/sites/default/files/YPIRReport04052018.pdf> (accessed on 2 September 2019)

People in India consume 190 minutes of video content a day on different platforms. The rate of consumption of video content has grown by 8% in the last seven years. There has also been an increase in platforms available for viewing, including OTT services and apps on different devices, apart from existing television channels.[101]

The investment in the OTT sector in India has also skyrocketed as a response to the growing demand for on-demand content. The revenue from OTT services is expected to grow by a Compound Annual Growth Rate (CAGR) of 20% in the period of 2017-2023, which would be a much higher growth rate than traditional television. The online video audience in India grew by 50 % between 2013 to 2018.[102] India has seen a surge in OTT platforms also thanks to the existing media conglomerates that operate various television channels in India. For example, Star TV runs Hotstar, Sony TV has SonyLiv and Zee TV operates Zee 5. They have transferred their content libraries traditionally available on their television channels to these OTT platforms. At the same time, multinational OTT players like Netflix and Amazon Prime expanded their reach in India and began to invest in local content.[103]

Such a growth in OTT video streaming services is therefore raising the question of content regulation. TRAI released in 2018 a consultation paper about the regulation of OTT services, inviting third-parties to make suggestions about the circumstances in which OTT can be regulated as traditional media.[104] As a response to the government's attempts to regulate the OTT media space, the Internet and Mobile Association of India (IAMAI) issued in 2019 a Code of Best of Practice, which was signed by some of the OTT platforms.[105]

This paper is hopefully going to contribute to this policy debate, too.

[101] Kanchan Samtani & Karishma Bhalla, "One Consumer, Many Interactions," Mumbai, India: Boston Consulting Group, 2018, available online at <https://media-publications.bcg.com/CII-BCG-One-Consumer-Many-Interactions.pdf> (accessed on 2 September 2019)

[102] "Media Ecosystems: The Walls Fall Down," KPMG, 2018

[103] Kanchan Samtani & Gaurav Jindal, "Entertainment Goes Online," cit.

[104] "Consultation Paper on Regulatory Framework for Over-The-Top (OTT) Communication Services," Consultation Paper, New Delhi: Department of Telecommunications, TRAI, 2018, available online at https://main.trai.gov.in/sites/default/files/CPOTT12112018_0.pdf (accessed on 2 September 2019)

[105] "Code of Best Practices for Online Curated Content Providers," New Delhi: Internet and Mobile Association of India, 2019; see also Namita Singh, "IAMAI's Regulatory Code for OTT...," cit.

About the author

Shubhangi Heda is a MA in Public Policy with a specialization in 'media and communications policy' from the Central European University in Budapest, Hungary, with undergraduate degree in law. Her research interest lies in technology policy issues related to freedom of speech and expression, privacy, data ethics and platform governance.



Tel: +36 1 327 3000 / 2609
Fax: +36 1 235 6168
E-mail: cmds@ceu.edu
cmds.ceu.edu
Postal address:
Center for Media, Data and Society
Central European University
Nador u. 9
1051 Budapest
Hungary