

POLITICAL CENSORSHIP AND INDIAN CINEMATOGRAPHIC LAWS: A FUNCTIONALIST- LIBERAL ANALYSIS

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I. INTRODUCTION

India produces more motion pictures than any other country.¹ Indian cinema is synonymous with the extravagant musicals of “Bollywood,” a portmanteau word that the *Oxford English Dictionary* credits the British detective novelist H.R.F. Keating with inventing.² There also exists a parallel arthouse genre of Indian cinema.³ Internationally, the most well-known proponent of the latter school is probably the late Bengali director Satyajit Ray, whose many laurels include an honorary Oscar for Lifetime Achievement.⁴ Throughout history, these two divergent cinematic schools have shared an unfortunate common characteristic – that of rigorous state censorship.

Indian government ministers sometimes superciliously take the moral high ground over China—a wealthier geopolitical rival—by pointing to India’s democratic traditions.⁵ For a

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1. UNESCO INST. FOR STATISTICS, ANALYSIS OF THE UIS INTERNATIONAL SURVEY ON FEATURE FILM STATISTICS 4 (2009), available at http://www.uis.unesco.org/template/pdf/cscl/Infosheet_No1_cinema_EN.pdf.

2. See *Bollywood*, OXFORD ENGLISH DICTIONARY, <http://dictionary.oed.com/cgi/entry/00304190> (last visited May 15, 2010).

3. See generally YVES THORAVAL, THE CINEMAS OF INDIA 1–19 (photo. reprint 2001) (2000) (describing the different genres and development of Indian cinema).

4. See Peter B. Flint, *Satyajit Ray, 70, Cinematic Poet, Dies*, N.Y. TIMES, Apr. 24, 1992, at A25, available at <http://www.nytimes.com/1992/04/24/movies/satyajit-ray-70-cinematic-poet-dies.html>.

5. See, e.g., Shashi Tharoor, *Olympic Proof: India is Not China*, HUFFINGTON POST, Feb. 11, 2009, available at http://www.huffingtonpost.com/shashi-tharoor/olympic-proof-india-is-no_b_166101.html; Corydon Ireland, *Chidambaram Talks About ‘Rich Poor’ India*, HARV. GAZETTE, Oct. 25, 2007, available at <http://news.harvard.edu/gazette/story/2007/10/Chidambaram-talks-about-rich-poor-india/>.

brief period in history, India did try to follow an authoritarian system of governance. Between 1975 and 1977, the then Prime Minister Indira Gandhi suspended civil liberties and imposed the infamous "Emergency." During this period, the government made trains run on time, arrested striking factory workers, bowdlerized newspapers, and forcibly sterilized slum-dwellers.⁶ Many affluent and educated Indians, such as the respected writer Khushwant Singh, supported Gandhi's radical policies.⁷ Ultimately, however, a popular uprising led to the end of the Emergency, and Gandhi was voted out of power. In the words of one jurist, the people of India made it clear that they would prefer freedom over bread if they had to choose between the two.⁸ Because the right to express dissent is apparently highly valued in India, the country's laws on freedom of speech warrant close scrutiny. Considering the massive cultural importance of Bollywood, Indian cinema serves as an interesting backdrop.

In the 1980s, a noted lawyer lamented that the bulk of scholarship on Indian media law was only "concerned with questions of 'hard' black letter law," mentioning "next to nothing about where the laws came from, why they were introduced and how they became absorbed in social and political reality."⁹ This is largely true even today, especially in the case of cinematographic laws. This Article represents a modest endeavor to contextually study Indian cinematographic legislation. This Article examines the political censorship of Indian cinema amid a wider historical milieu. I argue that certain colonial and statist traces in Indian cinematographic laws have enabled political censorship to take place. Proceeding along functionalist liberal lines, I assert three arguments against the political censorship of films in India: it (1) impedes "political accountability,"¹⁰ (2) is vitiated by more liberal television laws, and (3)

6. See generally EMMA TARLO, *UNSETTLING MEMORIES: NARRATIVES OF THE EMERGENCY IN DELHI* (2003).

7. See generally KHUSHWANT SINGH, *WHY I SUPPORTED THE EMERGENCY: ESSAYS AND PROFILES* (2009).

8. Mahendra P. Singh, *Decriminalisation of Homosexuality and the Constitution*, 2 NUJS L. REV. 361, 362 (2009).

9. RAJEEV DHAVAN, *ONLY THE GOOD NEWS: ON THE LAW OF THE PRESS IN INDIA* ix (1987).

10. Paola Mattei, *Managerial and Political Accountability: The Widening Gap in the Organization of Welfare*, 73 INT'L REV. OF ADMIN. SCI. 365, 369 (2009) (defining "political accountability"

harms the Indian film industry's global diversification ambitions. I thus submit that Indian cinematographic laws should be remodelled to conform to a more liberal framework that reduces state intervention.

Parts II, III, and IV of my Article build a jurisprudential foundation for my arguments. I validate the application of functionalist liberal reasoning, which is an essentially Western notion, in an Indian context. I analyze how Indian political leaders were influenced by Western liberal thought, and how such ideas found their way into the Indian Constitution. In Part II, I frame a working definition of the term "political censorship." In Part III, I introduce the free speech theories of John Stuart Mill and Alexander Meiklejohn. In Part IV, I contrast Western liberal ideas on speech and expression with Hindu and modern Indian viewpoints.

Parts V through VIII deal with the legal aspects of my Article. In Part V, I provide an overview of the British establishment's legal response to the arrival of cinema. I comment on how, back in India, the British Empire was trying to stifle the Indian freedom movement through repressive press laws. I then discuss the measures taken to regulate cinematic content in India during these turbulent times. In Part VI, I evaluate post-colonial developments in relation to film censorship. I introduce the topic by recollecting debates surrounding the birth of Article 19 of the Indian Constitution, which conferred on all citizens the right to freedom of speech.¹¹ I then explain the existing law and procedure governing film censorship in India. I also mention a few noteworthy examples of political censorship in post-Raj India and summarize the recommendations of a government-appointed committee which suggested changes to the censorship mechanism. In Part VII, I discuss case law on film censorship. I begin by arguing that judicial attitudes towards political criticism have become more liberal since India became independent. I submit that the judiciary has generally ruled in favor of filmmakers in cases concerning political criticism. Part VIII consolidates the case for reforming Indian cinematographic laws. I contemplate changes to the

as a process through which public officials are made to "answer for their activities" by being open to "external scrutiny").

11. INDIA CONST. art. 19.

existing film censorship system and also consider situations where political censorship can sometimes be justified.

II. DEFINING POLITICAL CENSORSHIP

This Part frames a working definition of political censorship. I adopt the term “political censorship” to mean the pre-censorship (i.e., prior restraint) of content which criticizes the state or political actors. I first articulate the various connotations of the term “censorship” and then define the contours of “political censorship” for the purposes of this paper.

The word “censor” divides lawyers as well as linguists. According to the *Oxford English Dictionary*, the word originates from the title given to Roman census officials who supervised public morals. Hence, like census, censor comes from the Latin *censere* (to estimate).¹² But *Merriam-Webster* also mentions a possible Indo-Aryan link.¹³ Some well-known Indo-Germanic philologists have propounded the latter theory, maintaining that censor is derived from a Sanskrit root word used to describe ceremonial praise.¹⁴ In the legal fraternity, there is a narrow and a broad view of what constitutes censorship. Kathleen Sullivan defines censorship as “the restriction of speech by the government.”¹⁵ Eric Barendt’s use of the word is even narrower and confined to state-imposed prior legal restraints on speech.¹⁶ Adherents of the broad view, such as Paul O’Higgins and Louis Blom-Cooper, believe that censorship can emanate from nonstate actors and is not necessarily limited to legal prohibitions.¹⁷ O’Higgins lists six possible methods of censorship, including autonomous methods.¹⁸ Two of O’Higgins’s methods—“legal censorship” and “extra-

12. OXFORD ENGLISH DICTIONARY (2d ed. 1989), available at <http://dictionary.oed.com/cgi/entry/50035516>.

13. MERRIAM-WEBSTER’S ONLINE DICTIONARY (2010), <http://www.merriam-webster.com/dictionary/censors> (last visited May 12, 2010).

14. M MAYRHOFER, ETYMOLOGISCHES WORTERBUCH DES ALTINDOARISCHEN 599f (1996); J POKORNY, INDOGERMANISCHES ETYMOLOGISCHES 566 (1969).

15. Kathleen M. Sullivan, *The First Amendment Wars*, 207 NEW REPUBLIC 35, 38 (Sept. 28, 1992).

16. ERIC BARENDT, FREEDOM OF SPEECH 151–53 (Oxford Univ. Press 2005) (1987).

17. PAUL O’HIGGINS, CENSORSHIP IN BRITAIN 11–13 (1972); Stuart Hampshire & Louis Blom-Cooper, *Censorship?*, 6 INDEX ON CENSORSHIP 55 (1977).

18. O’HIGGINS, *supra* note 17, at 12–13.

legal censorship” — involve reference to questions of law.¹⁹ Legal censorship is imposed through means strictly authorized by law. It comprises both pre-censorship (pre-dissemination restraints) and subsequent censorship (post-dissemination sanctions).²⁰ Extra-legal censorship refers to the suppression of information through means not strictly authorized by law, such as “bluff and bluster.”²¹ Therefore, in O’Higgins’s scheme of things, Barendt’s idea of censorship is simply pre-censorship, which is one of many kinds of censorship.

Barendt’s view of censorship is unhelpful while discussing freedom of expression in an Indian context because of the prevalence of extra-legal censorship in the country. To illustrate, despite acknowledging that India has “a legal framework that is largely favourable to press freedom,” Reporters Without Borders ranked India a lowly 118 in its 2008 Press Freedom Index.²² The organization justified the poor rank by saying that Indian journalists face threats from “politicians, religious groups and criminal gangs.”²³ Like journalists, Indian filmmakers have borne the brunt of extra-legal censorship on many occasions. A particularly egregious example concerned the film *Kissa Kursi Kaa*. The film, which was made during the Emergency, lampooned Indira Gandhi and her regime. Nearly all existing copies of the film were destroyed.²⁴ Gandhi’s son, Sanjay Gandhi, and a former Minister for Information and Broadcasting (I&B) were convicted by a trial court for masterminding the act.²⁵ However, the Supreme Court of India acquitted the duo,²⁶ in a judgment criticized for ignoring strong circumstantial evidence.²⁷ The intolerance of politicians towards filmmakers has continued well after the Emergency. For instance, the sets of the film *City of Joy* were attacked by squads of West Bengal’s ruling communist party. The film portrayed the hardships faced by the poor in Calcutta, the

19. *Id.* at 12.

20. *Id.*

21. *Id.* at 12–13.

22. REPORTERS WITHOUT BORDERS, PRESS FREEDOM INDEX (2008), <http://en.rsf.org/press-freedom-index-2008,33.html>.

23. *Id.*

24. See *Shukla v. State*, A.I.R. 1980 S.C. 1382.

25. See *id.*

26. *Id.*

27. See A.G. Noorani, *Kissa Kursi Kaa Case*, 15 ECON. & POL. WKLY. 1067, 1073 (1980).

capital of the communist bastion of West Bengal.²⁸ Similarly, activists from the Hindu nationalist Bharatiya Janata Party (BJP) vandalized the sets of the Hindi film *Water*, which recounted the discrimination faced by Hindu widows in olden days.²⁹ *Water*, which eventually had to be shot outside India, went on to receive an Oscar nomination for Best Foreign Language Film (representing Canada). When not rampaging film sets, political outfits have resorted to attacking theatres, as they did in a well-known incident involving the film *Fire*.³⁰

A second problem with employing Barendt's definition of censorship is that it ignores subsequent censorship. Subsequent censorship, according to O'Higgins, involves the application of "extremely vague" laws to suppress speech.³¹ This is certainly fairly common in India, and two examples from the recent past may be mentioned. In 2007, a law prohibiting programs violating "good taste or decency"³² was applied to briefly ban a channel from showing the program *World's Sexiest Commercials*.³³ Critics argued that the state had overlooked more objectionable content elsewhere.³⁴ In 2009, the editor of Calcutta's liberal *Statesman* newspaper—an inveterate foe of West Bengal's communist establishment—was arrested under a law proscribing "[d]eliberate and malicious acts intended to outrage religious feelings."³⁵ The paper had reprinted a column from the center-left British newspaper *The Independent*, which had defended the right to criticize religions, and criticized certain aspects of the prophet Mohammed's conduct

28. Barbara Crossette, 'City of Joy' Starts Filming, But Calcutta Still Simmers, N.Y. TIMES, Feb. 23, 1991, available at <http://www.nytimes.com/1991/02/23/movies/city-of-joy-starts-filming-but-calcutta-still-simmers.html>.

29. Jasmine Yuen-Carrucan, *The Politics of Deepa Mehta's Water*, BRIGHT LIGHTS FILM JOURNAL, Apr. 2000, <http://www.brightlightsfilm.com/28/water.html>.

30. See Praveen Swami, *Furore Over a Film*, FRONTLINE, Dec. 19, 1998–Jan. 1, 1999, available at <http://www.hinduonnet.com/fline/fl1526/15260430.htm>.

31. O'HIGGINS, *supra* note 17, at 12.

32. The Cable Television Networks (Regulation) Act, Act No. 7 of 1995, § 19; India Code, [http://tdsat.nic.in/books/THE_CABLE_TELEVISION_NETWORKS_\(Regulation\)_Act.doc](http://tdsat.nic.in/books/THE_CABLE_TELEVISION_NETWORKS_(Regulation)_Act.doc); The Cable Television Networks Rules, 1994, http://tdsat.nic.in/books/THE_CABLE_TELEVISION_NETWORKS_RULES.doc.

33. *Ad Show Axe on AXN*, THE TELEGRAPH (Calcutta), Jan. 18, 2007, http://www.telegraphindia.com/1070118/asp/frontpage/story_7277486.asp.

34. Shweta Thakur, *Actors, Directors Irked with AXN Ban*, BOLOJI, Jan. 21, 2007, <http://news.boloji.com/200701/00914.htm>.

35. India Pen. Code, § 295A (1860).

(other religions were also not spared).³⁶ In the case of films, however, this sort of subsequent censorship is quite uncommon, mainly because films are subject to state scrutiny at the pre-dissemination stage.

Hence, an Indo-centric study of censorship—as Barendt defines the term—would shift focus from some unpredictable but important factors. Yet, applying O’Higgins’s more expansive definition is fraught with practical difficulties. It is difficult to conceive, for example, how legal regulations can address or rectify psychological censorship. As for extra-legal censorship by mobs, the antidote to tackling this phenomenon arguably lies in police and criminal justice reform rather than media law reform. Likewise, subsequent censorship is also mired in many complexities outside the scope of media legislation. Moreover, the subsequent censorship of films is infrequent. Therefore, for the sake of brevity and utility, this Article focuses specifically on Barendt’s narrow conception of censorship, which O’Higgins prefers to call pre-censorship.

Regarding a definition of political censorship, Laswell says that a governing authority suppresses information which it believes can undermine either: (1) its authority, or (2) the social and moral code it protects.³⁷ Laswell’s categorization fits in snugly with Goldstein’s bifurcation of censorship into political and moral censorship.³⁸ Goldstein defines “political” to mean “discussions of the nature of governmental policies and personnel.”³⁹ This Article adopts Goldstein’s definition.

Political and moral censorship can overlap, an obvious example being the censorship of content regarding the sexual conduct of public officials. The truth is that a content-based classification of censorship cannot be watertight because the state can always invoke morals or public decency laws to cover a more direct political goal, and the very act of defining sweeping societal moral standards is a political act. Nevertheless, this Article uses the term political censorship to broadly

36. Jerome Taylor, *Editor Arrested for ‘Outraging Muslims,’* THE INDEPENDENT, Feb. 12, 2009, at 26, available at <http://www.independent.co.uk/news/world/asia/editor-arrested-for-outraging-muslims-1607256.html>.

37. O’HIGGINS, *supra* note 17, at 11.

38. ROBERT JUSTIN GOLDSTEIN, *POLITICAL CENSORSHIP* vii–viii (2001).

39. *Id.* at vii.

refer to the censorship of content that comments on matter related to governmental policies and personnel.

III. THE FUNCTIONALIST LIBERAL ARGUMENT AGAINST POLITICAL CENSORSHIP

The right to freedom of speech is a basic human right. Article 19 of the Universal Declaration of Human Rights of 1948 states, "Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference" ⁴⁰

In *Leonard Hector v. A-G of Antigua*, Lord Bridge observed:

In a free democratic society it is almost too obvious to need stating that those who hold office in government and who are responsible for public administration must always be open to criticism. Any attempt to stifle or fetter such criticism amounts to political censorship of the most insidious and objectionable kind. ⁴¹

Like Lord Bridge, liberal free speech theorists believe that it is too obvious to mention that political censorship is objectionable. However, they adduce different theories for reaching this conclusion. This Part introduces the two main Western liberal philosophies on freedom of speech.

Western liberals have traditionally followed two approaches while advocating freedom of expression—the deontological liberal approach and the functionalist liberal approach. ⁴² Deontological liberals, such as Thomas Scanlon and Ronald Dworkin, assert that the state is morally bound to protect an individual's autonomy. Scanlon defines an autonomous individual as one who is "sovereign in deciding what to believe and in weighing competing reasons for action." ⁴³ Dworkin says:

that censorship is degrading because it suggests that the speaker or writer is not worthy of equal concern as

40. Universal Declaration of Human Rights, G.A. Res. 217A, art. 19, U.N. GAOR, 3d Sess., 1st plen. Mtg., U.N. Doc. A/810 (Dec. 10, 1948), available at <http://www.un.org/en/documents/udhr>.

41. (1990) 2 A.C. 312, 318.

42. See D.F.B. TUCKER, LAW, LIBERALISM AND FREE SPEECH 1–63 (1985).

43. T. Scanlon, *A Theory of Freedom of Expression*, in THE PHILOSOPHY OF LAW 153, 162 (Ronald Dworkin, ed., 1977).

a citizen, or that his ideas are not worthy of equal respect; that censorship is insulting because it denies the speaker an equal voice on politics and therefore denies his standing as a free and equal citizen; or that censorship is grave because it inhibits an individual's development of his own personality and integrity.⁴⁴

Since Scanlon and Dworkin give primacy to the rights and dignities of a speaker rather than the consequences of his or her speech, they have been labeled as "contemporary Kantian philosophers."⁴⁵ A central tenet of Kantian thought is the rejection of the Consequentialist⁴⁶ view that that an act should be judged in light of its foreseeable consequences.⁴⁷

In contrast with deontological liberals, functionalist liberals adopt Consequentialist reasoning and support freedom of speech on the premise that it has beneficial consequences for society. John Stuart Mill, the nineteenth century English economist and philosopher, is generally acknowledged as the founder of this school of thought. In his 1644 essay *Areopagitica*, written in opposition to press licensing laws, the British poet John Milton made arguments similar to those of Mill.⁴⁸ It has even been said that Mill did not properly acknowledge the influence that *Areopagitica* had upon him.⁴⁹ However, a crucial difference between Mill and Milton is that the former was a liberal while the latter was influenced by Christian puritanical beliefs.⁵⁰ Milton "had no love of liberty as such and was opposed to liberty for Catholics or for Episcopalians."⁵¹ Mill, on the other hand, was a disciple of the utilitarian philosopher Jeremy Bentham.⁵² Mill's advocacy for freedom of speech has

44. RONALD DWORKIN, A MATTER OF PRINCIPLE 386 (1985).

45. JEFFRIE G. MURPHY, CHARACTER, LIBERTY, AND LAW: KANTIAN ESSAYS IN THEORY AND PRACTICE 127 (1998).

46. See Philip Pettit, *Consequentialism*, in CONSEQUENTIALISM 95, 98 (Stephen Darwall ed., 2003).

47. See JOHN E. ATWELL, ENDS AND PRINCIPLES IN KANT'S MORAL THOUGHT 87-104 (1986) (providing a broad overview of Immanuel Kant's philosophy and theoretical framework).

48. See STEWART JUSTMAN, THE HIDDEN TEXT OF MILL'S LIBERTY 75-110 (1991).

49. See *id.*

50. *Id.* at 75.

51. Denis O'Keeffe, *Liberty and Law*, 29 STUD.: AN IRISH Q. REV. 187, 187-88 (1940).

52. See, e.g., John Stuart Mill, *Bentham*, in MILL ON BENTHAM AND COLERIDGE 39 (F.R. Leavis ed., 1950).

thus been described as a liberal and “secular reformulation” of Milton’s puritanical notions.⁵³

In his famous essay *On Liberty*, Mill supported freedom of speech on the premise that truth is likely to emerge in societies which allow the free exchange of ideas.⁵⁴ Mill was motivated by a utilitarian belief that truth has benefits for societal progress. Mill did not view truth as an absolute unchallengeable principle, but as a product of “the reconciling and combining” of conflicting arguments.⁵⁵ Mill believed that the “prevailing opinion on any subject is rarely or never the whole truth,”⁵⁶ and that it is “only by the collision of adverse opinions that the remainder of the truth has any chance of being supplied.”⁵⁷ Citing the examples of intellectual movements in Europe, Mill argued that vast improvements “in the human mind or in institutions” had occurred because of fierce scholarly debate.⁵⁸ Mill thus concluded that the “mental well-being of mankind” was dependant on allowing freedom of speech, and that even erroneous opinions should not be suppressed.⁵⁹ However, Mill felt that a person’s liberties could be curbed against his or her will in order to “prevent harm to others.”⁶⁰ Mill’s “harm principle” is often invoked in debates surrounding the proscription of pornography and hate speech.⁶¹

The twentieth century American political theorist Alexander Meiklejohn is another influential functionalist liberal. Meiklejohn’s espousal of freedom of speech was based on his interpretation of the First Amendment to the Constitution of the United States. Meiklejohn was of the view that freedom of speech is an important prerequisite to democratic govern-

53. See Vincent Blasi, *Milton’s Areopagitica and the Modern First Amendment*, in YALE L. SCH. OCCASIONAL PAPERS, Paper 6 (1995), available at http://digitalcommons.law.yale.edu/ylsop_papers/6/.

54. JOHN STUART MILL, *ON LIBERTY* 33–34 (1859).

55. *Id.* at 86.

56. *Id.* at 95.

57. *Id.*

58. *Id.* at 63.

59. *Id.* at 94–95.

60. *Id.* at 21–22.

61. See, e.g., L.W. Sumner, *Should Hate Speech Be Free Speech? John Stuart Mill and the Limits of Tolerance*, in LIBERAL DEMOCRACY AND THE LIMITS OF TOLERANCE: ESSAYS IN HONOR AND MEMORY OF YITZHAK RABIN 133 (Raphael Cohen-Almagor ed., 2000); David Dyzenhaus, *John Stuart Mill and the Harm of Pornography*, 102 ETHICS 534 (1992).

ance.⁶² Meiklejohn argued that the American government should encourage participatory debate and decision making, allowing ideas “which promise greater wisdom and effectiveness” to supplant old ones.⁶³ Meiklejohn believed that it was essential to protect art and literature from censorship as “[t]hey lead the way toward sensitive and informed appreciation and response to the values out of which the riches of the general welfare are created.”⁶⁴

Meiklejohn’s defense of the arts is worth dwelling upon. While Mill had defended free speech at a time when even radio communication had not been invented, Meiklejohn did so in the flourishing era of Classical Hollywood cinema. One of the darker legacies of this period was the American film industry’s blacklisting of suspected Communist sympathizers in the wake of investigations conducted by the House Committee on Un-American Activities (HUAC).⁶⁵ Meiklejohn had authored an amicus curiae brief submitted to the United States Supreme Court in connection with a case concerning the “Hollywood Ten.”⁶⁶ The co-signatories to the brief included renowned scientists, intellectuals, and Hollywood personalities. In the brief, Meiklejohn stated that motion pictures were the most effective medium of mass communication, “capable of penetrating the great illiterate and semiliterate strata where words falter, fail, and miss.”⁶⁷ Thus, freedom of speech had a “special significance” in the context of cinema.⁶⁸ Meiklejohn criticized attempts by HUAC to purge left-wing viewpoints from Hollywood movies, saying that citizens of a democracy

62. Alexander Meiklejohn, *The First Amendment Is an Absolute*, 1961 SUP. CT. REV. 245, 255 (1961).

63. *Id.*

64. *Id.* at 257.

65. See generally JOHN J. GLADCHUK, HOLLYWOOD AND ANTICOMMUNISM: HUAC AND THE EVOLUTION OF THE RED MENACE 1935–50 (2009); Harold W. Horowitz, *Loyalty Tests for Employment in the Motion Picture Industry*, 6 STAN. L. REV. 438 (1954) (describing how the film industry screened employees for communist connections).

66. Brief for Alexander Meiklejohn et al. as Amici Curiae Supporting Petitioner, *Lawson v. United States*, 339 U.S. 934 (1950) (No. 248). The “Hollywood Ten” was the nickname given to a group of ten artists who had refused to answer questions about their political affiliations before the HUAC. The ten artists were convicted under contempt laws. Martin H. Redish & Christopher R. McFadden, *HUAC, the Hollywood Ten, and the First Amendment Right of Non-Association*, 85 MINN. L. REV. 1669, 1669–70 (2001).

67. Brief for Alexander Meiklejohn, *supra* note 66, at 12 (internal quotations omitted).

68. *Id.* at 10.

must necessarily have the “right to propagandize.”⁶⁹ Meiklejohn dismissed the notion that there ought to be a distinction between entertainment and propaganda while assessing films, as even “the ‘purest’ entertainment film” could have “hidden psychological or social implications.”⁷⁰ Meiklejohn encapsulated his argument by reproducing the following excerpt from a report prepared by the Commission on Freedom of the Press (a non-governmental body of academics formed in the 1940s):

Civilized society is a working system of ideas. It lives and changes by the consumption of ideas. Therefore it must make sure that as many as possible of the ideas which its members have are available for its examination. . . . Valuable ideas may be put forth first in forms that are crude, indefensible, or even dangerous. They need the chance to develop through free criticism as well as the chance to survive on the basis of their ultimate worth.⁷¹

In summary, the functionalist liberal argument against political censorship can be stated as follows: the consequences of freedom of expression include fierce intellectual debate and a citizenry that is better informed by being open to a variety of viewpoints. In the long run, these consequences have useful benefits for society and contribute toward its progress. Therefore, censorship is undesirable because it hinders intellectual debate and results in a citizenry that is less informed. Functionalist liberal thought has influenced the attitudes of Indian lawmakers and judges toward freedom of speech. However, before delving into that subject, this Article will first inquire whether the functionalist liberal theories of Mill and Meiklejohn have any parallel in traditional Indian philosophy. In other words, this Article will examine whether Indian advocates of civil liberties must necessarily “mouth and patter the principles of Western Liberalism . . . and begin chopping logic with John Stuart Mill” — as Churchill had so condescendingly described them.⁷²

69. *Id.* at 19.

70. *Id.* at 12.

71. *Id.* at 30.

72. Winston Churchill, Speech Delivered at the Albert Hall, London: Our Duty in India (Mar. 18, 1931), available at <http://www.winstonchurchill.org/learn/speeches/speeches-of-winston-churchill/105-our-duty-in-india>.

IV. WESTERN LIBERALISM VIS-À-VIS INDIAN PHILOSOPHY

The Indian Constitution was framed by the Constituent Assembly of India (Assembly). The Constitution was almost singlehandedly authored by the Chairperson of the Assembly's Drafting Committee, Bhimrao Ramji Ambedkar. This was largely owing to a quirk of fate which saw Ambedkar's six co-drafters unable to perform their duties for various reasons.⁷³ The Constitution conferred on all citizens the right to freedom of speech. Tripathi says that India possessed "no centuries-old background of individual liberty" and that the framers of the Constitution borrowed this concept entirely from Western jurisprudence.⁷⁴ Robertson and Nicol insist that "free speech is an English invention."⁷⁵ Yet, one should still try and probe India's intellectual history on this subject. Thus, this Part explores what Hindu texts say regarding free speech. I then analyze a plea authored by Raja Rammohan Roy during the reign of George IV, using this to illustrate Western-influenced liberal Indian thinking.

A. *Hindu Law and Philosophy*

Even though Buddhism and other reformist movements were born in India, it is Hinduism which has always been the dominant indigenous philosophy of the country. The vast majority of India's billion-plus population is Hindus. Hindu law is believed to have originated circa 1500 BC to 500 BC, passing through various phases thereafter.⁷⁶ Following the Muslim conquest of India circa 1100 AD, Hindu law "simply became a personal law" within Mughal empires.⁷⁷ Mughal rule in India was followed by British rule, where Hindu law was similarly relegated to the status of personal law. This practice has con-

73. Of Ambedkar's co-drafters, one person passed away, one resigned, one went to America, one was apparently occupied with other governmental work, and two others were supposedly unwell. There were also instances of "chronic absenteeism." See CHRISTOPHE JAFFRELOT, *DR. AMBEDKAR AND UNTOUCHABILITY: FIGHTING THE INDIAN CASTE SYSTEM* 108 (2005).

74. Pradyumna K. Tripathi, *Free Speech in the Indian Constitution: Background and Prospect*, 67 *YALE L.J.* 384, 390 (1958) [hereinafter Tripathi, *Free Speech*].

75. GEOFFREY ROBERTSON & ANDREW NICOL, *MEDIA LAW* viii (5th ed. 2007).

76. WERNER MENSKI, *COMPARATIVE LAW IN A GLOBAL CONTEXT: THE LEGAL SYSTEMS OF ASIA AND AFRICA* 204-58 (2d ed. 2006).

77. *Id.* at 237.

tinued in post-colonial India. Today, India is governed by a common law system and traces of Hindu law can only be seen in certain personal laws governing matters like marriage and inheritance.

The problem with studying Hindu law is that it is mostly custom-based. Hindu rulers "never made any serious attempt to rule . . . by legislation."⁷⁸ The *Manusmriti* (Code of Manu) represents the earliest attempt among Hindus to "fix ancient customs and traditions in a systematic form."⁷⁹ However, the *Manusmriti* codified only a "very small body" of customs and also went through several mutilations and revisions since it was first authored by the sage Manu.⁸⁰ Because Hindu customs are numerous and vary greatly between India's myriad communities, Menski contends that the oft-practiced method of studying Hindu law through written texts like the *Manusmriti* is actually fallacious.⁸¹ But because of the unwieldiness inherent in discussing unwritten and non-codified customs, this Article continues with the popular and undemanding method of evaluating written Hindu texts. Hindu texts which address issues like speech and expression predate the Mughal era, and it is these texts on which this Article will now focus.

The concept of *satya* (truth) is central to Hindu philosophy, and speech is seen as a vehicle through which truth can be spread.⁸² In the *Manusmriti* and in Patanjali's *Yoga-sutras*, it is stated that truth should obey the principle of *ahimsa* (non-injury).⁸³ It is tempting to draw parallels between the Hindu emphasis on *satya* and the Millian emphasis on truth. It is also tempting to view the *ahimsa* qualification as an ancient precursor of Mill's harm principle. Indeed, in modern times, Hindu law has occasionally been invoked to justify functionalist liberal approaches towards free speech. For instance, debates of the Constituent Assembly show that while one member cited Mill's harm principle to rationalize curbs on freedom of

78. SRIPATI ROY, CUSTOMS AND CUSTOMARY LAW IN BRITISH INDIA 22 (1911).

79. *Id.* at 13, 14.

80. *Id.* at 14.

81. MENSKI, *supra* note 76, at 201-02.

82. See generally William G. Kirkwood, *Truthfulness as a Standard for Speech in Ancient India*, 54 S. COMM. J. 213 (1989) (discussing Hindu texts which emphasize the importance of truth).

83. *Id.* at 220-21.

speech,⁸⁴ another cited the *Manusmriti*.⁸⁵ To give a more recent illustration, the National Commission to Review the Working of the Constitution (NCRWC) cited the Hindu maxim *Satyameva Jayate* (Truth Alone Triumphs) while recommending changes to Indian contempt of court laws.⁸⁶ The maxim, borrowed from the *Mundaka Upanishad* of the *Atharva Veda*,⁸⁷ was quoted to advocate greater leeway to criticize judges. However, two important aspects of Hindu law—*dharma* and caste—override the liberal-sounding tenets which glorify *satya*.

The Hindu concept of truth is intertwined with that of *dharma* (duty). Hindu legal texts do not confer “a catalogue of personal rights” and instead mandate that individuals carry out their duty.⁸⁸ While texts mention the notion of *rajadharma* (a ruler’s duty), *rajadharma* ought not to be enforced by others.⁸⁹ During a debate of the Assembly, Ambedkar had remarked that the people of India ought to “observe the caution which John Stuart Mill has given . . . namely, not ‘to lay their liberties at the feet of even a great man, or to trust him with powers which enable him to subvert their institutions.’”⁹⁰ Such credulous deference to authority is precisely what Hindu law seemingly mandates. The Hindu caste system is also fundamentally illiberal. The *Manusmriti* implies that humans are born unequal and that this macrocosmic reality should be preserved. While the *Manusmriti* exhorts people to speak the truth, lower castes are asked not to speak against higher castes, and a king is practically deified.⁹¹ Therefore, while Mill viewed truth as the product of intellectual challenges to established ideas, the concept of truth laid down in the *Manusmriti* appears to be a puritanical one, subservient to certain inflexible and harshly elitist principles.

84. 11 CONSTITUENT ASSEMBLY DEBATES 727 (Nov. 21, 1949) (statement of Arun Chandra Guha).

85. See 7 CONSTITUENT ASSEMBLY DEBATES 769 (Dec. 2, 1948) (statement of Algu Rai Shastri (citing MANUSMRITI ch. 4, line 138)).

86. See NAT’L COMM’N TO REVIEW THE WORKING OF THE CONSTITUTION, REPORT OF THE NATIONAL COMMISSION TO REVIEW THE WORKING OF THE CONSTITUTION VOL. 1, ¶ 7.4.1 (2002).

87. M.A. Mehendale, *Satyam Eva Jayate Nanrtam*, 81 J. AM. ORIENTAL SOC’Y 405, 405 (1961).

88. A.M. BHATTACHARJEE, HINDU LAW AND THE CONSTITUTION 9 (2d ed. 1994).

89. MENSKI, *supra* note 76, at 224–25.

90. 11 CONSTITUENT ASSEMBLY DEBATES 979 (Nov. 25, 1949) (statement of B.R. Ambedkar).

91. See THE LAWS OF MANU ch. 11 (George Bühler trans., 1969); see also *id.* chs. 7–8.

It should be kept in mind, however, that Western scions of free speech have been as guilty of displaying prejudice. The liberal British historian James Mill, father of John Stuart Mill, condemned the *Manusmriti's* caste doctrines and remarked, "Notwithstanding the mildness which has generally been attributed to the Hindu character, hardly any nation is distinguished for more sanguinary laws."⁹² Yet, he came to the illiberal conclusion that Indians were an uncivilized people and that colonial dictatorship was justified in India (a land he never even visited). He observed, "In truth, the Hindu, like the Eunuch, excels in the qualities of a slave."⁹³ James Mill's book has attracted its fair share of detractors—a recent one being Sen, who is amazed at how the book even disputes that the decimal system and the zero were Indian inventions.⁹⁴ John Stuart Mill, oddly, wrote little about India, despite serving at the India Office in London for over thirty years. But it has been said that he was a "faithful follower of his father" and may have held similar prejudices regarding India.⁹⁵ Vinay Lal contends that John Stuart Mill did not maintain "a consistently . . . liberal position on Indian affairs" and "was willing to countenance certain forms of despotism."⁹⁶

For Ambedkar, however, choosing between John Stuart Mill and Manu was not difficult. Accurately described as a "Westernised democrat," Ambedkar belonged to India's lowest caste and vehemently opposed Hindu philosophy, even once organizing a protest meeting where the *Manusmriti* was placed in a bonfire.⁹⁷ Ambedkar had legendary clashes about the viability of Hindu philosophy with his fellow barrister Mohandas "Mahatma" Gandhi.⁹⁸ Gandhi's views, notably his *satyagraha* (force of truth) philosophy, had roots in Hinduism.⁹⁹ Gandhi

92. 1 JAMES MILL, *THE HISTORY OF BRITISH INDIA* 176 (5th ed. 1858).

93. 2 JAMES MILL, *THE HISTORY OF BRITISH INDIA* 517 (4th ed. 1840).

94. AMARTYA SEN, *THE ARGUMENTATIVE INDIAN* 78–79, 147–48 (2005).

95. LYNN ZASTOUPIL, *JOHN STUART MILL AND INDIA* 28–50 (1994).

96. Vinay Lal, *Organic Conservatism, Administrative Realism, and the Imperialist Ethos in the 'Indian Career' of John Stuart Mill*, 54 *NEW QUEST* (Jan.–Feb. 1998), available at <http://www.sscnet.ucla.edu/southasia/History/British/jsmill.html> (reviewing ZASTOUPIL, *supra* note 95).

97. JAFFRELOT, *supra* note 73, at 47–48, 108.

98. See generally B.R. AMBEDKAR, *WHAT CONGRESS AND GANDHI HAVE DONE TO THE UNTOUCHABLES* (1945) (arguing that Gandhi has not been the savior of the untouchables); Harold Coward, *Gandhi, Ambedkar, and Untouchability*, in *INDIAN CRITIQUES OF GANDHI* 41 (Harold Coward ed., 2003) (describing the disagreement between Gandhi and Ambedkar).

99. GAVIN FLOOD, *AN INTRODUCTION TO HINDUISM* 260 (1996).

isolated Hindu principles of truth from caste discrimination, which he argued had "nothing to do with" Hinduism.¹⁰⁰ Gandhi is thought to have been influenced by the teachings of the Hindu spiritual leader Swami Vivekananda.¹⁰¹ Vivekananda, in turn, had been inspired by John Stuart Mill and believed that individual and political freedom benefited societies which permitted them.¹⁰² Vivekananda maintained that the caste system in Hinduism originally was conceived as a division of labor and had been misused by the ruling classes to create a form of social discrimination. He argued that "caste," in his understanding of the term, existed in all societies of the world and was a progressive, pragmatic idea. Thus, while condemning caste discrimination, he reiterated, "Caste is good."¹⁰³ Some scholars have criticized this view of Hinduism as romanticized and Orientalist.¹⁰⁴ The contrary argument has been that religious traditions are not immutable and can always be revised and reinterpreted.¹⁰⁵

Ambedkar, of course, would not be swayed by the repackaging of Hinduism into a philosophy harmonious with modern liberalism. After Gandhi's assassination, Ambedkar "took his posthumous revenge on the Mahatma" by ensuring that the Constitution ignored Hindu doctrines and was based predominantly on Western principles of individual liberty.¹⁰⁶ Gandhi's adherents wished the Constitution to be based on

100. See BIDYUT CHAKRABARTY, *SOCIAL AND POLITICAL THOUGHT OF MAHATMA GANDHI* 110 (2006). See generally M.V. Nadkarni, *Is Caste System Intrinsic to Hinduism? Demolishing a Myth*, 38 *ECON. & POL. WKLY.* 4783 (2003) (arguing that Hinduism does not support the caste system).

101. See MARGARET CHATTERJEE, *GANDHI AND THE CHALLENGE OF RELIGIOUS DIVERSITY: RELIGIOUS PLURALISM REVISITED* 114 (2005); see also B. G. Gokhale, *Swami Vivekananda and Indian Nationalism*, 32 *J. BIBLE & RELIGION* 35, 39 (1964) (identifying Hindu nationalism as a foundation for Vivekananda and Gandhi).

102. P.R. BHUYAN, *SWAMI VIVEKANANDA: MESSIAH OF RESURGENT INDIA* 180–81 (2003).

103. *Id.* at 60.

104. See generally NARASINGHA P. SIL, *SWAMI VIVEKANANDA: A REASSESSMENT* (1997) (looking critically at the career and character of the revered Swami Vivekananda). But see Richard King, *Orientalism and the Modern Myth of "Hinduism,"* 46 *NUMEN* 146, 147–48 (1999).

105. See Subrata Mitra, *Caste, Democracy and the Politics of Community Formation in India*, in *CONTEXTUALISING CASTE: POST-DUMONTIAN APPROACHES* 49, 53–55 (Mary Searle-Chatterjee & Ursula Sharma eds., 1994); Catherine Rolfsen, *Resistance, Complicity and Transcendence: A Postcolonial Study of Vivekananda's Mission in the West* (June 2005) (unpublished M.A. thesis, Queens University, Kingston), available at <http://hdl.handle.net/1974/230> (follow "MA Essay Catherine Rolfsen.pdf" hyperlink).

106. JAFFRELOT, *supra* note 73, at 110.

village-based community values and clashed with Ambedkar when he presented the draft of the Constitution.¹⁰⁷ One member of the Assembly criticized the Draft Constitution for having “taken this from England and that from America” but nothing “from the political and spiritual genius of the Indian people.”¹⁰⁸ The member, however, grudgingly acknowledged that “[t]his is perhaps in tune with the times.”¹⁰⁹ Ambedkar, describing rural India as “a den of ignorance, narrow-mindedness and communalism,” remarked, “I am glad that the Draft Constitution has discarded the village and adopted the individual as its unit.”¹¹⁰ The Draft Constitution was mostly kept intact by the Assembly. Thus, India shed centuries of tradition and became a republic inspired by the individualist values of Western liberalism.

I now return to the questions which I sought to answer: Does the philosophy of Mill have a comparable parallel in traditional Hindu philosophy? By glorifying *satya*, did ancient Hindu scholars preempt Mill on the question of freedom of speech eons ago? My answer to these questions is in the negative, simply because I believe that modernist reinterpretations of Hindu philosophy are just that—modernist reinterpretations. Arguably, the Mill-Meiklejohn doctrine is incompatible with orthodox Hindu law and philosophy, which imposes too many curbs on an individual’s freedom to speak without restriction. Because the modernist view of Hinduism was inspired by Mill’s writings, it cannot be regarded as a philosophy that predated Mill’s. Vivekananda and others, to borrow Kopf’s words, essentially “pour[ed] the new wine of modern functions into the old bottles of Indian cultural traditions.”¹¹¹ When the NCRWC was invoking Hindu philosophy to advocate freedom of speech, they too were adopting the same tactic, giving the Millian notion of truth the facade of *satya*. Does this, therefore, mean that advocates for freedom of speech in India must regard Mill as their primary ideological guru? The answer to this question is also in the negative.

107. *Id.* at 111.

108. 7 CONSTITUENT ASSEMBLY DEBATES 218 (Nov. 5, 1948) (statement of H.V. Kamath), available at <http://164.100.47.132/LSSNew/constituent/vol7p2.html>.

109. *Id.*

110. 7 CONSTITUENT ASSEMBLY DEBATES 833 (Nov. 23, 1949) (statement of B.P. Jhunjhunwalla), available at <http://164.100.24.207/LSSNew/constituent/vol7p35.html>.

111. DAVID KOPF, BRITISH ORIENTALISM AND THE BENGAL RENAISSANCE 205 (1969).

The next Section argues that over forty years before *On Liberty* was published, Raja Rammohan Roy had put forward functionalist liberal arguments and opposed political censorship. To form a theoretical basis for opposing political censorship in India, much can be gleaned from Rammohan.

B. The Views of Raja Rammohan Roy

Raja Rammohan Roy was a social reformer in British India who challenged many orthodox Hindu practices. Rammohan eventually founded a syncretic spiritual movement known as Brahmoism.¹¹² One of the many hats that Rammohan wore was that of a newspaper editor and publisher.¹¹³ In 1823, the acting Governor-General of Bengal, John Adam, issued an ordinance imposing a number of restrictions on the press.¹¹⁴ The ordinance was enacted shortly after James Buckingham, the editor of a newspaper in Calcutta, was deported to England for publishing articles criticizing the British administration.¹¹⁵ The ordinance required the newspaper to obtain a license and made the printing or selling of unlicensed material punishable by fine. The ordinance included a provision which required publishers to obtain the prior permission of the state before printing news items dealing with certain categories of information. The categories included "libellous or abusive reflections and insinuations against the public officers of Government" and "[o]bservations or statements touching the character, constitution, measures, or orders" of the British administration in India.¹¹⁶ Thus, the categories were so broadly worded that they would include virtually all kinds of political news items within their sweep.

In 1824, Rammohan wrote a petition to King George IV requesting him to withdraw the ordinance. Rammohan's peti-

112. See generally DAVID KOPF, *THE BRAHMO SAMAJ AND THE SHAPING OF THE MODERN INDIAN MIND* (1979) (discussing the conflicts and challenges leading to the creation of Brahmoism).

113. SOPHIA DOBSON COLLET, *THE LIFE AND LETTERS OF RAJA RAMMOHUN ROY* 93-106 (1914).

114. A Rule, Ordinance, and Regulation, for the Good Order and Civil Government of the Settlement of Fort William in Bengal (1823), in 1 *ORIENTAL HERALD* 123 (1824) [hereinafter *Ordinance*].

115. See MARGARITA BARNS, *THE INDIAN PRESS* 93-110 (1940).

116. *Ordinance*, *supra* note 114, at 470.

tion has been termed the "Areopagitica of Indian history."¹¹⁷ Rammohan's ideological leanings, though, were closer to those of Mill than Milton. Since Rammohan's petition predated the writings of Mill, he could not have been influenced by *On Liberty*. However, Rammohan was inclined toward the philosophy of Bentham. Rammohan's "ethical sheet-anchor was the Benthamite principle of 'the greatest happiness of the greatest number.'"¹¹⁸ It thus seems plausible that, like Mill, Rammohan's utilitarian outlook was shaped by reading Bentham. Bentham himself held Rammohan in high esteem, once addressing him in a letter as an "[i]ntensely admired and dearly beloved collaborator in the service of Mankind."¹¹⁹

Rammohan's petition showed a clear functionalist liberal streak. He thought of the ordinance's likely effect upon the Indian people. He argued that the people needed a free press "for their moral and intellectual improvement" and to save them from "mental lethargy."¹²⁰ But, more interestingly, Rammohan analyzed whether the ordinance would really help the consolidation of British power in India, which was its unwritten intention. He meticulously argued that a free press had practical administrative benefits, and was thus "equally necessary for the sake of the Governors and the governed."¹²¹ Rammohan's perspective was that of an unabashed British sympathizer. Claiming that the rights of Hindus had been "constantly trampled upon" during Muslim rule, he made it clear that he viewed the British not as "conquerors, but rather as deliverers."¹²²

Rammohan observed that the ordinance effectively gave the state and its officials "complete immunity from censure or exposure."¹²³ This, he felt, would ultimately "suppress truth,

117. COLLET, *supra* note 113, at 101; *see also supra* text accompanying note 48.

118. B.N. Ganguli, *Rammohan: His Political and Economic Thought*, in RAMMOHUN ROY: A BICENTENARY TRIBUTE 44, 46 (Niharranjan Ray ed., 1974).

119. Letter from Jeremy Bentham to Rammohun Roy, (Feb. 8, 1828), in 12 THE COLLECTED WORKS OF JEREMY BENTHAM: CORRESPONDENCE 447 (Luke O'Sullivan & Catherine Fuller eds., 2006).

120. Raja Rammohan Ray, *Appeal to the King in Council*, in THE ESSENTIAL WRITINGS OF RAJA RAMMOHAN RAY 238, ¶ 44, at 255 (Bruce Carlisle Robertson ed., 1999).

121. *Id.* ¶ 38, at 252.

122. *Id.* ¶ 3, at 238-39.

123. *Id.* ¶ 15, at 245.

protect abuses—and encourage oppression.”¹²⁴ Rammohan believed that the conduct of public officials “should not be allowed to pass unnoticed.”¹²⁵ He reminded the British of how some perspicacious Mughal rulers had appointed news-writers with the intention of “checking the delinquencies of their subordinate officers.”¹²⁶ In Rammohan’s opinion, “immense labour” was required to keep track of developments in a land the size of India.¹²⁷ Therefore, a free press would be an easier means of gathering “impartial information” about the country for the British.¹²⁸

Rammohan allayed fears that allowing the press to criticize officials would incite people towards revolution. He contended that a free press had “never yet caused a revolution in any part of the world,” whereas the absence of it usually resulted in public grievances being ignored, thereby inciting revolution.¹²⁹ Rammohan may have been alluding to developments leading up to the American Revolution. When the United States was under British rule, many attempts were made to gag the press. These developments proved to be “the germ of American freedom.”¹³⁰ Rammohan, however, took an example from closer to home. He contrasted the reigns of the Mughal emperors Akbar and Aurangzeb. Akbar, who was “celebrated for . . . granting civil and religious liberty to his subjects . . . reigned happy [and] extended his power.”¹³¹ On the other hand, Aurangzeb practiced “cruelty and intolerance” and “met with many reverses and misfortunes”¹³² It seems that Rammohan was referring mainly to the disparate manner in which Akbar and Aurangzeb treated their Hindu subjects, a “Manichaeian” comparison frequently made by historians.¹³³ However, it is pertinent to note that two of Aurang-

124. *Id.* ¶ 38, at 252–53.

125. *Id.* ¶ 15, at 245.

126. *Id.* ¶ 50, at 257.

127. *Id.* ¶ 48, at 256.

128. *Id.* ¶ 47, at 256.

129. *Id.* ¶ 31, at 249.

130. See JEAN FOLKERTS & DWIGHT L. TWEETER, JR., LAW OF MASS COMMUNICATIONS: FREEDOM AND CONTROL OF PRINT AND BROADCAST MEDIA 34, 38 (2002).

131. Ray, *supra* note 120, ¶ 35, at 251.

132. *Id.*

133. See A HISTORY OF MODERN INDIA 1480–1950, at 81, 105 (Claude Markovits ed., Anthem Press 2004) (1994).

zeb's confidantes ascribed biased news reporting as a major reason for his downfall. According to their accounts, Aurangzeb's officials regularly bribed his news-writers to conceal adverse news from him.¹³⁴ Therefore, the downfall of Aurangzeb strengthens not just the case for tolerant leaders, but also the case for allowing unbiased criticism of state affairs.

Rammohan's plea against the ordinance ultimately fell on deaf ears. The ordinance was not withdrawn until many years later. Nevertheless, there are important lessons which can be learned from Rammohan's petition. A particularly noteworthy feature of Rammohan's advocacy is that he empathized with the state and argued that a free press could lead to administrative efficiency. Contemporary economists have done the same. Taking the example of India, Drèze and Sen have said that a free press can be a country's best "early warning system" to prevent famine.¹³⁵ Drawing from Sen's work, Stiglitz has contended that a free press can "enhance the likelihood that people's basic social need will be met."¹³⁶ A study by Besley and Burgess has similarly shown that Indian authorities have been more responsive to calamities in areas with more newspapers.¹³⁷ Since Rammohan's petition predated *On Liberty* and advanced arguments presciently similar to those of modern-day scholars, perhaps John Stuart Mill should not be regarded as the only lodestar while discussing freedom of speech in an Indian context.

Nevertheless, there is no escaping the fact that Rammohan was inspired by principles of Western liberalism, just as Vivekananda was in later years. Therefore, it is indisputable that free speech must be regarded as a fundamentally Western idea imported into India. Rammohan's petition can be regarded as an early milestone in the path that led to the eventual genesis of this idea in the Constitution. His petition reveals how Westernized Indians had internalized the principles of British liberalism. As Bentham wrote of Rammohan's work: "I read, a style which, but for the name of an Hindoo [sic], I

134. BARNES, *supra* note 115, at 4-5.

135. JEAN DRÈZE & AMARTYA SEN, HUNGER AND PUBLIC ACTION 19, 61, 212-14 (1989).

136. Joseph Stiglitz, *Transparency in Government*, in THE RIGHT TO TELL: THE ROLE OF MASS MEDIA IN ECONOMIC DEVELOPMENT 27, 28 (World Bank Inst. ed., 2002).

137. Timothy Besley & Robin Burgess, *The Political Economy of Government Responsiveness: Theory and Evidence From India*, 117 Q.J. ECON. 1415, 1423 (2002).

should have ascribed to the pen of a superiorly well-educated and instructed Englishman."¹³⁸ Ambedkar and his colleagues in the Assembly carried on Rammohan's legacy by framing a constitution, written in English, which recognized individual freedoms. The legal discourse surrounding free speech in India is thus essentially Western in nature. While discussing freedom of speech, Indian courts pepper their judgments with references to Mill and Meiklejohn.¹³⁹ Hence, it is not incongruous to employ logic steeped in Western tradition while opposing political censorship in India.

V. POLITICAL CENSORSHIP IN COLONIAL INDIA

Before delving into the political censorship of films in colonial India, I will discuss the origins of film censorship in England. I will then comment on how the Raj, aided by deferential judges, systematically suppressed its critics in the press by enacting oppressive media laws.

A. Early Film Censorship in England

The cinema first cast its footprint in Britain in 1896 with a demonstration of the cinematograph by the Lumière brothers. Cinema reels were then made from highly inflammable material. This presented county councils with safety concerns, which were heightened after a deadly fire in Paris originated from a film projector.¹⁴⁰ The concerns about public safety culminated in the enactment of the Cinematograph Act of 1909 (Act of 1909).¹⁴¹ The Act of 1909, according to its preamble, aimed to "make better provision for securing safety at Cinematograph and other Exhibitions."¹⁴²

Under the Act of 1909, county councils in England gradually began imposing conditions unconnected with public safety.¹⁴³

138. Bentham, *supra* note 119, at 447.

139. See, e.g., *In re Mulgaokar*, (1978) 3 S.C.R. 162, ¶ 1; *Rangarajan v. Jagjevan*, (1989) 2 S.C.R. 204, ¶¶ 39–42; *Singh v. Gandhi*, (2002) A.I.R. (Del.) 58, ¶ 59; *Bhadra v. State of W. Bengal*, (2005) 4 C.H.N. 601, ¶ 12.8; *Rajagopal v. Jayalalitha*, (2006) A.I.R. (Mad.) 312, ¶ 27; *Khan v. State of Rajasthan*, (2008) 1 R.L.W. (Raj.) 809, ¶ 62.

140. NEVILLE MARCH HUNNINGS, *FILM CENSORS AND THE LAW* 37–39 (1967).

141. *Id.* at 38.

142. *Id.* at 46.

143. *Id.*

In *London County Council v. Bermondsey Bioscope*, a court held that the London County Council (LCC) could demand that a licensee not show films on certain holidays.¹⁴⁴ Chief Justice Alverstone ruled that the wording of the Act of 1909 allowed the LCC to impose “something more” than safety regulations.¹⁴⁵ Emboldened by this decision, some county councils began placing conditions on film content.¹⁴⁶ A few months prior to Chief Justice Alverstone’s decision, the LCC had advised licensees against showing a famous bout where the boxer Jack Johnson, who was black, triumphed over his white opponent Jim Jeffries.¹⁴⁷ Meanwhile, moral activists began protesting against the cinema, blaming it for promoting sex and violence.¹⁴⁸ Amid demands for rigid governmental censorship, the film industry grew apprehensive. A delegation from the film industry met the then British Home Secretary and proposed the establishment of an industry-funded censorship body. The suggestion was met with approval.¹⁴⁹ In 1912, the industry created a self-financing censorship body called the British Board of Film Censors (British Board).¹⁵⁰ This body is today known as the British Board of Film Classification (BBFC). The British Board was empowered to certify films as either “U” (Universal) or “A” (Adult), or deny certification altogether.¹⁵¹ A “U” certificate denoted that a film was suitable to be viewed by all, while an “A” certificate denoted that it was suitable for adults only.¹⁵² The British Board was headed by retired bureaucrats, thus making it only “nominally independent.”¹⁵³ The British Board’s certification, while only advi-

144. (1910) 1 L.J.K.B. 145 (K.B.).

145. *Id.* at 450–51.

146. HUNNINGS, *supra* note 140, at 48.

147. *Id.* at 50. The fight between Johnson and Jeffries was promoted as a fight for racial supremacy. Jeffries said before the bout: “I am going into this fight for the sole purpose of proving that a white man is better than a Negro.” Dave Zirin, *The Unforgiven: Jack Johnson and Barry Bonds*, INT’L SOCIALIST REV., July–Aug. 2007, <http://www.isreview.org/issues/54/unforgiven.shtml>.

148. Dean Rapp, *Sex in the Cinema: War, Moral Panic, and the British Film Industry, 1906–1918*, 34 ALBION 422, 422–23 (2002).

149. HUNNINGS, *supra* note 140, at 52.

150. *Id.* at 53–54.

151. *Id.* at 55, 75.

152. *Id.* at 75.

153. GUY PHELPS, FILM CENSORSHIP 28, 32 (1975).

sory in nature, gradually gained the acceptance of the county councils, who still had the final say.

In its early years, the British Board did not follow a written censorship code. In 1916, the British Board's President, T.P. O'Connor, summarized the organization's policy by listing forty-three grounds for censorship (popularly called "O'Connor's 43").¹⁵⁴ Thirty-three of the grounds "concerned matters which may properly be called moral," banning sex, nudity, prostitution, and perversion.¹⁵⁵ The remaining grounds included "[r]eferences to controversial politics" and "[s]cenes tending to disparage public characters and institutions."¹⁵⁶ Thus, political censorship was also on the British Board's agenda. In the coming years, the British Board refused to certify pro-communist Russian films like Eisenstein's *Battleship Potemkin* and Pudovkin's *Mother*, regarded as aesthetically significant.¹⁵⁷ Intriguingly, in the case of *Mother*, the LCC overrode the British Board and granted permission to an upper-class film society to screen the film, but denied the same permission to a working-class film society. A group of intellectuals, including George Bernard Shaw, Bertrand Russell, and John Maynard Keynes, collectively criticized this decision as "illogical and stupid."¹⁵⁸ The LCC's treatment of *Mother* shows that the British establishment was not oblivious to the aesthetic value of politically motivated films. Evidently, its fear was that while the upper classes would only appreciate the artistic value of these films, plebeian folk would sympathize with the dogmas expressed therein.

One of the interesting aspects of O'Connor's 43 was that it contained an item dealing specifically with India: "Subjects dealing with India, in which British Officers are seen in an odious light . . ."¹⁵⁹ This raises the question—why a separate mention of India? The probable explanation is that O'Connor's 43 was framed at a time when the Indian freedom movement was not just gaining in strength, but also finding

154. HUNNINGS, *supra* note 140, app. at 408–09.

155. JEFFREY RICHARDS, *THE AGE OF THE DREAM PALACE: CINEMA AND SOCIETY IN BRITAIN 1930–1939*, at 92–93 (1984).

156. HUNNINGS, *supra* note 140, app. at 408–09 (see in particular items 15–23).

157. *See id.* at 97.

158. Margot Oxford et al., Letter to the Editor, *Film Censorship*, SATURDAY REV., Mar. 8, 1930, at 292.

159. HUNNINGS, *supra* note 140, at 408.

support amongst some socialist British leaders. For instance, after the Jallianwala Bagh Massacre, V.H. Rutherford labeled the Raj as “the lowest and the most immoral” government.¹⁶⁰ Hence, it seems likely that the British Board—or the government officials advising it—was concerned about incipient anti-Raj sentiments in Britain. Meanwhile, back in India, the British did not endear themselves to the public by muzzling the press through various harsh laws.

B. Press Regulation in British India

British rule in India practically began after the Battle of Plassey (1757), where the East India Company (Company) dethroned the Nabob of Bengal after conspiring with his general.¹⁶¹ The Company gradually expanded its territory after winning other important battles. In 1773, Lord North’s Regulating Act gave the British Parliament regulatory control over the Company, which was facing a severe financial crisis. Warren Hastings was appointed as the first Governor-General of the Presidency of Fort William in Bengal.¹⁶² The Raj was formally instituted after the Company’s forces quelled the Revolt of 1857. The British Parliament enacted the Government of India Act in 1858. This statute transferred the functions of the Company directly to the Crown and established the post of Secretary of State for India, who headed the India Office.¹⁶³

Hastings’s tenure as the Governor-General of Bengal (in pre-Raj British India) saw the birth of tensions between the Indian media and the colonial administration. In 1780, an Englishman named James Hicky published the first newspaper in India, the *Bengal Gazette*. The *Bengal Gazette* specialized in political satire, and its brand of humor has been compared with that

160. V. H. RUTHERFORD, MODERN INDIA: ITS PROBLEMS AND THEIR SOLUTION 10–19, 77 (1927).

161. The East India Company was founded in 1600 by a group of British merchants. The Company was given monopoly rights by the British Crown to trade with kingdoms in India. The Mughal emperor Jahangir allowed the Company to set up factories in India. Over time, the Company acquired militaristic ambitions, and ultimately took control over all of India. See generally PHILLIP LAWSON, THE EAST INDIA COMPANY: A HISTORY (1998).

162. COURTENAY ILBERT, THE GOVERNMENT OF INDIA: A BRIEF HISTORICAL SURVEY OF PARLIAMENTARY LEGISLATION RELATING TO INDIA 42–49 (1922).

163. *Id.* at 94–97.

of the cheeky British magazine *Private Eye*.¹⁶⁴ In his paper, Hicky made numerous attacks on Hastings and the Chief Justice of Bengal. Hicky's "most devastating mockery" was the publication of a political farce in which he cast Hastings as the "dimwitted and dictatorial" character "Wronghead."¹⁶⁵ Hicky was fined for libel on multiple occasions and his equipment was later confiscated.¹⁶⁶ Ironically, he was imprisoned by the very Chief Justice he had mocked, before leaving for England to find work.¹⁶⁷ In the coming years, a few other newspapers were inaugurated, but outspoken journalists were persecuted like Hicky.¹⁶⁸

In 1799, during his reign as Governor-General of Bengal, Arthur Wellesley passed an order which is considered to be the first direct attempt to impose press censorship in India.¹⁶⁹ Wellesley's order required printers to submit all content to the government for prior inspection.¹⁷⁰ At the time, the Company was waging a fierce battle with the Sultan of Mysore.¹⁷¹ Wellesley, a man "irritated . . . at any public criticism" enacted the law amid speculation in the press regarding the Company's prospects in the war.¹⁷² Wellesley's regulations were lifted in 1818, but John Adam reintroduced censorship in 1823, which Rammohan Roy unsuccessfully pleaded to have revoked.¹⁷³ In the years that followed, the British consolidated their power and annexed other territories, including Burma.¹⁷⁴ The post of Governor-General of Bengal was also replaced by the post of Governor-General of India (later, also replaced by the post of Viceroy and Governor-General of India).¹⁷⁵ In 1835,

164. GRAHAM SHAW, *PRINTING IN CALCUTTA TO 1800: A DESCRIPTION AND CHECKLIST OF PRINTING IN LATE 18TH-CENTURY CALCUTTA* 53 (1981). *Private Eye* is a satirical magazine that often caricatures politicians and public figures.

165. THOMAS M. CURLEY & SIR ROBERT CHAMBERS, *LAW, LITERATURE, AND EMPIRE IN THE AGE OF JOHNSON* 333-37 (1998).

166. BARNES, *supra* note 115, at 46-49.

167. *Id.* at 49.

168. *Id.* at 63-70.

169. *Id.* at 74.

170. *Id.*

171. *Id.*

172. *Id.* at 73-74.

173. *Id.* at 89, 115, 123-24.

174. PERCIVAL SPEAR, *THE OXFORD HISTORY OF MODERN INDIA 1740-1975*, at 151-62 (Oxford Univ. Press 1978) (1965).

175. *Id.* at 177-78.

the acting Viceroy and Governor-General, Charles Metcalfe, finally lifted the restrictions imposed by Adam.¹⁷⁶ Metcalfe declared, "'If India could be preserved as a part of the British Empire only by keeping its inhabitants in a state of ignorance, our domination would be a curse to the country, and ought to cease.'"¹⁷⁷ But resentment against British rule had steadily grown by then, resulting in the abortive Revolt of 1857.¹⁷⁸

The Revolt of 1857 was a pivotal moment in the history of press legislation. Soon after the revolt, Viceroy and Governor-General Canning passed Act XV of 1857,¹⁷⁹ popularly referred to as the "Gagging Act." The new law made it a criminal offense to own a printing press without a license from the government.¹⁸⁰ It also authorized the state to search premises suspected of housing unlicensed printing presses.¹⁸¹ Licenses could only be obtained on the condition that publishers refrained from printing, *inter alia*, "observations or statements impugning the motives or designs" of the Raj or "tending to bring [it] into hatred or contempt," or seeking "to excite disaffection or unlawful resistance to its orders"¹⁸² The British editor Henry Mead denounced the Gagging Act, saying that the view that "rebellion would suffer . . . by the gagging of the press was either foolish or dishonest."¹⁸³ Canning repealed the unpopular law in 1858. In 1860, the Indian Penal Code (IPC), drafted by Thomas Macaulay, was born. The IPC introduced the offense of sedition (defining it to cover acts attempting to "excite feelings of disaffection" against the state) and made it punishable by transportation.¹⁸⁴ The IPC's provisions on sedition were used against political leaders opposed to the Raj—

176. BARNES, *supra* note 115, at 219.

177. *Id.* at 222.

178. For causes of the revolt, see J.J. MCLEOD INNES, THE SEPOY REVOLT 3-19 (photo. reprint 2005) (1897); RUDRANGSHU MUKHERJEE, AWADH IN REVOLT, 1857-1858, at 64-81 (2002).

179. HENRY MEAD, THE SEPOY REVOLT: ITS CAUSES AND ITS CONSEQUENCES 188 (1858).

180. *See id.* at 360. For the full text of the Act, see *id.* at 377.

181. *See id.* at 360.

182. Cecil Beadon, Secretary to the Government of India, Notification, CALCUTTA GAZETTE, June 20, 1857, reprinted in MEAD, *supra* note 179, at 361.

183. MEAD, *supra* note 179, at 184.

184. INDIA PEN. Code § 124A (1860). Although no longer punishable by transportation, Section 124A still exists and the definition of sedition has not been altered radically by the post-Raj state. However, in *Singh v. State of Bihar*, the Supreme Court of India diluted the provisions of this section. *See infra* note 355 and accompanying text.

notably the fiery but revered Hindu nationalist leader Bal Gangadhar Tilak.¹⁸⁵

In 1876, the Dramatic Performances Act was enacted in response to the growing success of anti-British plays, such as *Nildarpana*, a fictitious account of the treatment of indigo farmers by British plantation owners.¹⁸⁶ Play scripts now began to be stringently censored. Plays glorifying the exploits of mythological gods and ancient kings were banned, as the scripts were deemed to contain subliminal messages about colonialism.¹⁸⁷ The year 1878 saw the introduction of the short-lived and reviled Act IX of 1878 by Viceroy and Governor-General Lytton. This law, better known as the Vernacular Press Act, empowered authorities to compel publishers of vernacular newspapers to submit a security deposit and sign a bond promising not to print anything "likely to excite feelings of disaffection to the Government."¹⁸⁸ The security deposit (vast sums were often demanded) could be confiscated along with the entire plant of a newspaper, if the state felt that the bond had been violated. The law had a devastating effect upon the vernacular press, which was read by the vast majority of the populace. The *Amrita Bazar Patrika*, a nationalist Bengali daily believed to be one of the main targets of the Vernacular Press Act, decided to convert into an English paper to evade jurisdiction under Lytton's law.¹⁸⁹ Sections of the British establishment also opposed the Vernacular Press Act for reasons that echoed Rammohan's opposition to press censorship half a century before. The Earl of Cranbrook pragmatically argued that the "great difficulty of Indian administration" was that of "ascertaining facts of social condition and political sentiment," but the vernacular press had "always been considered one valuable means of getting at these facts."¹⁹⁰

As the twentieth century dawned, the movement for Indian independence intensified. The British cracked down on the Indian press by using general laws aimed at preserving public

185. BARNES, *supra* note 115, at 259–304.

186. Farley Richmond, *The Political Role of Theatre in India*, 25 EDUC. THEATRE J. 318, 319–20 (1973).

187. *Id.* at 319–22.

188. JOHN DACOSTA, REMARKS ON THE VERNACULAR PRESS LAW OF INDIA, OR ACT IX OF 1878, at 2 (1878).

189. J.R. MUDHOLKAR, PRESS LAW 20 (1975).

190. DACOSTA, *supra* note 188, at 40.

order as well as legislation specific to the press. The latter category included the Newspapers (Incitement to Offences) Act 1908 (Act of 1908),¹⁹¹ The Indian Press Act 1910 (Act of 1910),¹⁹² and The Indian Press (Emergency Powers) Act 1931 (Act of 1931).¹⁹³ The Act of 1908 empowered the state to, inter alia, confiscate the printing presses of newspapers which printed articles containing "any incitement to murder . . . or to any act of violence."¹⁹⁴ The Act of 1910 was a harsher reincarnation of the Vernacular Press Act; it required all English and vernacular publishers to submit a security deposit, forfeitable on the publication of "prohibited matter," namely, material that "likely or may have a tendency, directly or indirectly, whether by inference, suggestion, allusion, metaphor, implication, or otherwise" to "bring into hatred or contempt His Majesty or the Government established by law in British India."¹⁹⁵ Under the Act of 1910, sanctions of some kind were imposed against almost a thousand publications, and over 170 prospective newspaper presses were denied a license.¹⁹⁶ The stifling of the press became an issue which galvanized public opinion against the Raj. Gandhi protested against the Act of 1910 and, in 1919, was arrested for printing an unlicensed paper in defiance of the statute.¹⁹⁷

The Act of 1910 and the Act of 1908 were repealed on the recommendations of a government committee. The committee felt that the Act of 1910 had "been of little practical value" and that "no press law" could prevent "more direct and violent forms of sedition."¹⁹⁸ However, press censorship was once again introduced by the Act of 1931, which was substantively similar to the Act of 1910. The Act of 1931 was enacted soon

191. Newspapers (Incitement to Offences) Act of 1908, *reprinted in* BARNES, *supra* note 115, app. I at 439-41.

192. The Indian Press Act of 1910, *reprinted in* BARNES, *supra* note 115, app. II at 442-49.

193. The Indian Press (Emergency Powers) Act, *reprinted in* BARNES, *supra* note 115, app. III at 450-60.

194. The Newspapers (Incitement to Offences) Act of 1908, § 3.

195. The Indian Press Act of 1910, § 4(c).

196. R.C. MAJUMDAR, STRUGGLE FOR FREEDOM 113 (1969).

197. JUDITH M. BROWN, GANDHI'S RISE TO POWER: INDIAN POLITICS 1915-1922, at 174 (1972).

198. REPORT OF THE COMMITTEE APPOINTED BY THE GOVERNMENT OF INDIA TO EXAMINE THE PRESS AND REGISTRATION OF BOOKS ACT, 1867, THE INDIAN PRESS ACT, 1910, AND THE NEWSPAPER (INCITEMENT TO OFFENCES) ACT, 1908 ¶ 5 (1921).

after the launch of the Civil Disobedience Movement, which was spearheaded by Gandhi.

Significantly, all twentieth century, Raj-era press regulations contained provisions for appeal in the High Courts of Judicature. The first of these High Courts—in Calcutta, Bombay and Madras—were established in 1862. The High Courts heard matters ranging from sedition cases to appeals against the forfeiture of security deposits. But the Raj's judges—both British and Indian—were rarely on the side of the nationalist press. One of the infamous examples of the pro-government stance of the courts was the tacit judicial endorsement of the witch-hunt against Tilak.¹⁹⁹ In a speech, Tilak had praised the medieval Hindu King Shivaji's act of killing a Mughal general. A week after the speech, two British officials were murdered by Indian youths in Tilak's home state. Tilak was arrested on the basis that his speech was an allegorical cry promoting the murder of British nationals, and he thus incited the murders. Tilak was found guilty of sedition by a Bombay High Court jury.²⁰⁰ Two-thirds of the jury comprised Europeans who did not understand the language in which Tilak had made the speech. Ten years later, Tilak was again tried for sedition in the Bombay High Court.²⁰¹ This time, he was arraigned for writing articles blaming the Raj for aggravating militant tendencies in the Indian freedom movement. Justice Dawar rebuked Tilak for possessing "a diseased and a perverted mind" and told him: "Your hatred of the ruling class has not disappeared during these ten years" ²⁰² Tilak was sentenced to six years transportation. Noorani commented that "Justice Dawar's behaviour is a fine example of the servility that can possess a judge who is anxious to please the government."²⁰³

There are numerous other instances of such judicial servility. In *Bakshi v. Emperor*, the Calcutta High Court found a writer guilty of sedition for simply saying that the Raj was "more terrible" than the Tsar of Russia.²⁰⁴ In *Roy v. Emperor*, the Bombay High Court upheld the sedition conviction of a journalist who

199. A. G. NOORANI, *INDIAN POLITICAL TRIALS 1775-1947*, at 114-36 (2005).

200. *Tilak v. Queen-Empress*, (1898) I.L.R. 22 (Bom.) 112.

201. *Emperor v. Bal Gangadhar Tilak*, (1908) I.L.R. 33 (Bom.) 221.

202. *Id.* ¶¶ 65-66.

203. NOORANI, *supra* note 199, at 134-35.

204. (1930) A.I.R. (Cal.) 220, ¶ 2 (1929).

had described protestors killed in police firing as “martyrs.”²⁰⁵ In *Besant v. Madras*, the Madras High Court upheld the forfeiture of a security deposit under the Act of 1910.²⁰⁶ The offending newspaper, which was edited by the Irish theosophist Anne Besant, had accused the Raj of treating the press in a “barbarous” manner and branding “harmless” people as criminals.²⁰⁷ The Court concluded that the articles in question were “calculated to bring the Government established by law into hatred or contempt and to interfere with the maintenance of law and order.”²⁰⁸ The Allahabad High Court upheld a similar forfeiture in *In re Sundar Lal*.²⁰⁹ The concerned newspaper had accused the government of misdeeds such as “showering volleys of bullets upon unarmed and innocent people” and falsely discrediting Gandhi.²¹⁰ The Court observed that it would “have considered the Local Government strangely lacking in its duty if it had failed to step in and put a penalty on the dissemination of envenomed articles such as these.”²¹¹ In *In re Mrinal Ghose*,²¹² a newspaper proprietor appealed to the Calcutta High Court against the confiscation of his deposit under the Act of 1931. The newspaper had published articles praising Gandhi and accusing the Raj of exercising “Insolent Might” and inflicting “injustice and oppression.”²¹³ Chief Justice Rankin stated that he was “not unwilling to make some allowance for pulpit rhetoric.”²¹⁴ However, he nonetheless held that the articles were “highly abusive” and that it would be “quite impossible to give a finding in the negative” on the question of whether they intended to excite disaffection towards the government.²¹⁵

Dhavan remarks that, although Mill worked for many years at the India Office, his philosophy on freedom of speech was,

205. (1921) 23 Bom. L.R. 709, ¶ 2 (1920).

206. (1916) 37 Ind. Cas. 525.

207. *Id.* ¶¶ 43, 46, 84.

208. *Id.* ¶ 146.

209. (1919) A.I.R. (All.) 91.

210. *Id.* ¶ 13.

211. *Id.* ¶ 15.

212. (1932) A.I.R. (Cal.) 738.

213. *Id.* ¶ 4.

214. *Id.* ¶ 23.

215. *Id.*

ironically, never incorporated in the Raj's press laws.²¹⁶ Looking at the above cases, it could be said that judges in British India were similarly disinclined toward Mill's liberal views. With mistrust of the cinema in Britain growing and the Raj's antipathy toward the press increasing, the cinematograph could not have chosen a more inauspicious moment to arrive in India.

C. Film Censorship and the Raj

The cinematograph reached Indian shores in 1896, a few months after its British debut. The Lumière brothers visited Bombay and exhibited their instrument at the Hotel Watson.²¹⁷ By 1913, the first Indian-made film—a Hindu mythological film called *Raja Harishchandra*—had been released.²¹⁸ British officials, however, were wary of how Indians might exploit the new technology. One official expressed fears that the cinematograph could be used to propagate “inflammatory matters” like “Gandhi doctrines.”²¹⁹ Ironically, Gandhi himself denounced the cinema as “sinful”²²⁰ and a “sheer waste of time.”²²¹ Gandhi was so detached from the world of movies that when he was introduced to Charlie Chaplin, he had to be told who Chaplin was.²²² While Gandhi and other Indian leaders edited newspapers, the cinema did not enjoy the same political patronage. Hence, films had a limited relationship with the freedom movement.

In British India, the Cinematograph Act of 1918 (Act of 1918) was the first law devoted specifically to film censorship. The objectives of the Act of 1918 were ensuring audience safety and enforcing censorship.²²³ The first aim was achieved by permitting screenings only in licensed premises. As for the

216. DHAVAN, *supra* note 9, at 275–76.

217. THORAVAL, *supra* note 3, at 1.

218. *Id.* at 6–7.

219. Stephen P. Hughes, *Policing Silent Film Exhibition in Colonial South India*, in MAKING MEANING IN INDIAN CINEMA 39, 47 (Ravi S. Vasudevan, ed. 2000) (quoting Letter no. 29 (confidential) in Tamil Nadu Archives, Law (Gen.), G.O. no. 1545, 29 Sept. 1921)).

220. GAUTAM KAUL, CINEMA AND THE INDIAN FREEDOM STRUGGLE 44 (1998).

221. Robin Jeffrey, *The Mahatma Didn't Like the Movies and Why It Matters: Indian Broadcasting Policy, 1920s–1990s*, 2 GLOBAL MEDIA & COMM. 204, 211 (2006).

222. *Id.* at 210.

223. INDIAN CINEMATOGRAPH COMM., REPORT OF THE INDIAN CINEMATOGRAPH COMMITTEE ¶¶ 6, 224 (1928) [hereinafter ICC REPORT].

second aim, the Act of 1918 established a Board of Censors in each of the four major film importation centers—Bombay, Calcutta, Madras, and Rangoon (now in Burma). Bollywood was virtually non-existent then, and censorship was chiefly aimed at foreign films.²²⁴

Under the Act of 1918, a film could not be exhibited without a certificate from a Board of Censors (Board).²²⁵ A Board could designate films as either suitable or unsuitable for public exhibition. No “A” or “U” rating existed.²²⁶ The state could also revoke film certificates.²²⁷ All Boards had serving police commissioners as presidents, and the other members included bureaucrats.²²⁸ In contrast with Britain, therefore, censorship in British India was directly and more tightly state-controlled.

The Act of 1918 did not specify any certification guidelines, and the Boards were free to frame their own. The Board in Bombay adopted O’Connor’s 43.²²⁹ In practice, films discussing Indian nationalism were diligently censored.²³⁰ *Bhakta Vidur*, whose protagonist resembled Gandhi, became the first Indian film to be banned.²³¹ Extensive cuts were ordered in a film criticizing British education policies.²³² Even minor references to the freedom movement were deleted. In one film, a scene showing a picture of a nationalist leader in a person’s wallet was ordered removed.²³³ Amongst foreign films, bans were imposed on *Battleship Potemkin* and DW Griffith’s *Orphans of the Storm*, which was based on the French Revolution.²³⁴

However, grievances burgeoned about a perceived laxity towards moral censorship. Much of this criticism had to do with a belief that Hollywood films tended to lower the pres-

224. ENQUIRY COMM. ON FILM CENSORSHIP, REPORT OF THE ENQUIRY COMMITTEE ON FILM CENSORSHIP ¶ 2.5 (1969) [hereinafter KHOSLA COMMITTEE REPORT].

225. ICC REPORT, *supra* note 223, ¶ 6.

226. *Cf. id.* (reviewing the state of Indian censorship law under the Act of 1918).

227. *See id.*

228. ICC REPORT, *supra* note 223, ¶¶ 228–31.

229. *Id.* ¶¶ 2.5, 2.8.

230. KAUL, *supra* note 220, at 30–37, 83, 127.

231. *Id.* at 31.

232. The film’s name was *Vande Mataram Ashram*. *See id.* at 82–83; ASHISH RAJADHYAKSHA & PAUL WILLEMEN, ENCYCLOPAEDIA OF INDIAN CINEMA 231 (British Film Institute, 1994).

233. KAUL, *supra* note 220, at 127.

234. *Id.* at 30; Bruce Michael Boyd, *Film Censorship in India: A Reasonable Restriction on Freedom of Speech and Expression*, 14 J. INDIAN L. INST. 501, 504–05 (1972).

tige of the white race in the eyes of Indians.²³⁵ An article in a British newspaper complained that images of scantily-clad actresses and of "Charlie Chaplin squirting inoffending people with soda-syphons" were making it "difficult for the Britisher in India to keep up his dignity."²³⁶ The article caught the attention of the then Secretary of State for India, who sought details of the censorship system.²³⁷ These criticisms culminated in the formation of the Indian Cinematograph Committee (ICC) in 1927.

The ICC was set up to study a range of issues relating to the film industry, including censorship. In its report, the ICC favored the idea of screening Western films in India, as the films would show Indians "more advanced conditions of life."²³⁸ With regard to censorship, the ICC recommended that a centralized body should be formed in order to offset any chance of the different Boards adopting inconsistent standards.²³⁹ The ICC also suggested adopting the British practice of issuing two classes of certificates, in this case, "universal" and "public."²⁴⁰

The ICC's report focused mainly on moral censorship. The ICC was generally supportive of existing censorship practices, terming criticism of the Boards "ill-informed."²⁴¹ The ICC concluded that some of the criticism had been conjured up by the British film industry, which was frustrated by Hollywood's worldwide domination.²⁴² The ICC refuted the claim that films degraded the white race in the eyes of Indians.²⁴³ It mentioned an incident its members had witnessed in a "cheap cinema":

The white heroine in every reel was being persecuted by a cosmopolitan band of villains whose leader was an Oriental and whose rank and file comprised other Orientals. Whenever the white hero made a timely appearance or the heroine escaped from the toils, spontaneous applause broke forth, and on one occasion

235. ICC REPORT, *supra* note 223, ¶ 8.

236. KHOSLA COMMITTEE REPORT, *supra* note 224, ¶ 2.9.

237. *Id.*

238. ICC REPORT, *supra* note 223, ¶ 5.

239. *Id.* ¶ 263.

240. *Id.* ¶ 265.

241. *Id.* ¶ 245.

242. *Id.* ¶¶ 241–48.

243. *Id.* ¶ 243.

when the screen showed the heroine about to fall into the hands of her Oriental persecutor an excited voice cried out in Tamil "Look out, Miss, look out!"²⁴⁴

In a brief paragraph devoted to political censorship, the ICC observed that while "a propaganda film prepared by a hostile power" could incite revolutionary tendencies, "a historical film which may picture incidents, say, of the French Revolution" would not.²⁴⁵ This attitude was, of course, not shared by the Boards, as they scrupulously censored films with political themes. But to term the ICC as a liberal dissenter, amid the Raj's oppressive media law guardians, would be stretching the imagination. The ICC was established at a time when not too many Indian films were being made. Had Bollywood been more prolific and politically active, one wonders whether the ICC would have glossed over the question of political censorship. In post-Raj India, the film industry metamorphosed into a commercial and cultural powerhouse, and political censorship assumed greater significance.

VI. FILM CENSORSHIP IN POST-RAJ INDIA

This Part concentrates on postcolonial developments. It argues that the political censorship of films has been frequent in post-Raj India. First, this Part looks at some of the debates surrounding the birth of Article 19 of the Indian Constitution,²⁴⁶ which became the legal bedrock of freedom of expression in independent India. It then discusses the provisions of the Cinematograph Act of 1952,²⁴⁷ and some of the criticisms leveled at the censorship system. This Part concludes by giving a few examples of films that suffered from political censorship.

A. Birth of Article 19

In 1947, India received Dominion status. The Republic of India was born in 1950, when the Indian Constitution came

244. *Id.*

245. *Id.* ¶ 251.

246. INDIA CONST. art. 19.

247. Cinematograph Act of 1952, Act No. 37 (Mar. 21, 1952), available at http://mib.nic.in/writereaddata/html_en_files/actsrules/act_films/cinemaACT1952.htm.

into effect. Part III of the Constitution enumerates a list of “[f]undamental [r]ights,” which are applicable to all citizens.²⁴⁸ Under Articles 32 and 226 of the Constitution, the Supreme Court of India and the various High Courts can respectively issue writs against the State for the enforcement of these fundamental rights.²⁴⁹ Also, under Article 13(2), the State is barred from making “any law which takes away or abridges” the fundamental rights.²⁵⁰ The list of fundamental rights includes Article 19(1)(a), which gives all citizens the right to “freedom of speech and expression.”²⁵¹ Article 19(2), however, permits the State to make laws imposing “reasonable restrictions” on that right “in the interests of the sovereignty and integrity of India, the security of the State, friendly relations with foreign States, public order, decency or morality, or in relation to contempt of court, defamation or incitement to an offence.”²⁵²

Article 19 is thus worded differently than the First Amendment to the United States Constitution.²⁵³ In *Kingsley v. Regents*,²⁵⁴ Justice Douglas of the United States Supreme Court, while holding statutory film censorship void, observed, “If we had a provision in our Constitution for ‘reasonable’ regulation of the press such as India has included in hers, there would be room for argument that censorship in the interests of morality would be permissible.”²⁵⁵ Thus, on its face, Article 19 places a lesser burden on the State to justify restrictions on speech when compared to the more libertarian First Amendment.²⁵⁶ The Supreme Court of India has affirmed that American precedents on freedom of speech “can have no application in India.”²⁵⁷

After years of political persecution at the hands of the Raj, the Assembly’s members welcomed the notion of a right to

248. INDIA CONST. pt. III.

249. INDIA CONST. art. 32, cl. 2; INDIA CONST art. 226, cl. 1.

250. INDIA CONST. art. 13, cl. 2.

251. INDIA CONST. art. 19, cl. 1(a).

252. INDIA CONST. art. 19, cl. 2.

253. U.S. CONST. amend. I (“Congress shall make no law . . . abridging the freedom of speech . . .”).

254. 360 U.S. 684 (1959).

255. *Id.* at 698.

256. HM SEERVAI, 3 CONSTITUTIONAL LAW OF INDIA 710 (2004).

257. *Parate v. Maharashtra*, (1961) 3 S.C.R. 423, ¶ 24.

free speech. One member, though, objected to the right being “hemmed in by so many provisos,” remarking, “For attaining these rights the country had to make so many struggles . . . what was deemed as undesirable then is now being paraded as desirable.”²⁵⁸ The restrictions were, however, rationalized by Govind Das. Das drew attention to the ongoing communist uprising in neighboring China, arguing that unrestricted liberties were not appropriate in an infant nation like India.²⁵⁹ During a later session, Ambedkar countered that it was mainly Indian communists who wanted unrestricted liberty, “so that if their Party fails to come into power, they would have the unfettered freedom not merely to criticise, but also to overthrow the State.”²⁶⁰ However, Das and others objected to the initial inclusion of “sedition” in the list of reasonable restrictions on speech, reminding the Assembly of Tilak’s sedition trials. Das recollected how he himself had been jailed for sedition, merely by saying that a royal ancestor of his had sinned by aiding the British.²⁶¹ The word “sedition” was finally dropped from the list of restrictions in what is now Article 19(2).

From these exchanges, it is clear that the founders of independent India wanted citizens to be able to strongly criticize the government, as some of them had done in colonial times. But, as apparent from the references to the Chinese Communist Revolution, they also felt that this liberty must not be used to advocate violent rebellion. The Assembly was thus espousing beliefs akin to the “margin of appreciation” doctrine applied by the European Court of Human Rights, which is “based on the notion that each society is entitled to certain latitude in resolving the inherent conflicts between individual rights and national interests.”²⁶² It has also been argued that Article 19 embodied the ideology of the Indian freedom movement, where violent forms of resistance were discouraged by leaders like Gandhi.²⁶³

258. 7 CONSTITUENT ASSEMBLY DEBATES 750 (Dec. 2, 1948) (statement of B.S. Mann).

259. 7 CONSTITUENT ASSEMBLY DEBATES 750–51 (Dec. 2, 1948) (statement of G. Das).

260. 11 CONSTITUENT ASSEMBLY DEBATES 975 (Nov. 25, 1949) (statement of B.R. Ambedkar).

261. 7 CONSTITUENT ASSEMBLY DEBATES 750–51 (Dec. 2, 1948) (statement of G. Das).

262. Eyal Benvenisti, *Margin of Appreciation, Consensus, and Universal Standards*, 31 N.Y.U. J. INT’L L. & POL. 843, 843 (1999); see also *Handyside v. United Kingdom*, 1 Eur. Ct. H.R. 737, ¶ 47 (1976).

263. Tripathi, *Free Speech*, *supra* note 74, at 391.

Article 372 of the Constitution allowed the continuance of Raj-era laws until they were repealed. This permitted the prolongation of numerous colonial media laws. Therefore, in this respect, the Constitution did not represent a clean break from the Raj's censorship laws.²⁶⁴ However, Article 13(1) of the Constitution stated that pre-constitutional laws that were "inconsistent" with fundamental rights were void "to the extent of such inconsistency."²⁶⁵ In the Assembly, a member noted that certain colonial laws "of a repressive character" stifled the right to free speech and would have to either be scrapped or "altered radically."²⁶⁶ This did indeed occur in the case of press legislation. When India was still a dominion, a committee was established to "review the Press Laws of India with a view to examine if they [were] in accordance with Fundamental Rights formulated by the Constituent Assembly."²⁶⁷ The committee recommended the repeal of the Act of 1931, saying, "In our judgment, the retention of this Act on the Statute Book would be an anachronism after the establishment of a democratic state in India."²⁶⁸ This recommendation was implemented some years later, effectively abolishing newspaper censorship.²⁶⁹ In the case of cinematographic legislation, however, censorship was retained. The Act of 1918 was repealed, but it was later replaced with a law not dissimilar in scope. If debates of the Assembly are an indication, the fact that films were placed under a greater level of scrutiny was perhaps related to Gandhian concerns about the moral effects of cinema. One member of the Assembly, a follower of Gandhi, expressed her disapproval of films of "little or no educational value" containing "[n]auseating songs and very cheap themes."²⁷⁰

B. Cinematograph Act of 1952

The Seventh Schedule of the Constitution contains three lists (the Union List, the State List, and the Concurrent List) deline-

264. DHAVAN, *supra* note 9, at 27.

265. INDIA CONST. art. 13, cl. 1.

266. 7 CONSTITUENT ASSEMBLY DEBATES 713 (Dec. 1, 1948) (statement of Damodar Swarup Seth).

267. REPORT OF THE PRESS LAWS ENQUIRY COMMITTEE 1 (1948).

268. *Id.* at 32.

269. Thakur v. Punjab, (1964) Cri. L.J. 696 (Punjab) para. 2 (Khosla, J.).

270. 9 CONSTITUENT ASSEMBLY DEBATES 822 (Aug. 31, 1949) (statement of G. Durgabai).

ating union-state legislative domains.²⁷¹ Entry 60 of the Union List reads, "Sanctioning of cinematograph films for exhibition."²⁷² In the Assembly, Ambedkar explained that the purpose of inserting this item in the Union List was to ensure "a uniform standard" of censorship and to protect producers whose films "may not be sanctioned by any particular province by reason of some idiosyncrasy."²⁷³ This paved the way towards fulfilling the ICC's recommendation of a centralized censorship body.

The Cinematograph (Amendment) Act of 1949 made two changes to the Act of 1918. First, the regional Boards were replaced by the Central Board of Film Censors (Central Censor Board), a censorship authority headquartered in Bombay.²⁷⁴ Second, the British practice of issuing "U" and "A" certificates was adopted.²⁷⁵ The Cinematograph Act of 1952 (Cinematograph Act) finally repealed the Act of 1918.²⁷⁶ Today, the Cinematograph Act continues to be the main statute governing film censorship. The Cinematograph (Amendment) Act of 1981 renamed the Central Censor Board as the Central Board of Film Certification (CBFC),²⁷⁷ which proved to be only a token change.²⁷⁸ Section 4 of the Cinematograph Act requires all films to be submitted to the CBFC for certification, while Section 7 provides criminal penalties for non-compliance with Section 4.²⁷⁹ Therefore, uncertified films essentially cannot be legally released in India. This distinguishes the film censorship system in India from that in Britain²⁸⁰ and the United States.²⁸¹

271. INDIA CONST. sched. 7.

272. INDIA CONST. sched. 7, list I, cl. 60.

273. 9 CONSTITUENT ASSEMBLY DEBATES 824 (Aug. 31, 1949) (statement of B.R. Ambedkar).

274. KHOSLA COMMITTEE REPORT, *supra* note 224, ¶ 2.19.

275. *Id.*

276. *Id.* ¶ 2.20.

277. See *Adarsh v. Union of India*, (1990) A.I.R. (A.P.) 100, ¶ 5.

278. Someswar Bhowmik, *Politics of Film Censorship: Limits of Tolerance*, 37 ECON. & POL. WKLY. 3574, 3577 (2002).

279. Cinematograph Act of 1952, Act No. 37, §§ 4, 7 (Mar. 21, 1952), available at http://mib.nic.in/writereaddata/html_en_files/actsrules/act_films/cinemaACT1952.htm.

280. See ROBERTSON & NICOL, *supra* note 75, at 817-26.

281. See Jacob Septimus, *The MPAA Ratings System: A Regime of Private Censorship and Cultural Manipulation*, 21 COLUM.-VLA J.L. & ARTS 69, 72-73 (1996) (discussing the MPAA's rating procedure).

All the members of the CBFC are appointed by the union government under Section 3 of the Cinematograph Act,²⁸² and are often serving bureaucrats. Hence, the Indian government has retained the “bureaucratic stranglehold on the censorship regime” which existed during the Raj.²⁸³ Kaul argues that the colonial system of film censorship was compatible with the “Soviet model of management of information” envisaged by Jawaharlal Nehru, who served for nearly twenty years as India’s first Prime Minister.²⁸⁴ While Nehru’s detractors have unfairly branded him a Stalinist,²⁸⁵ the better view is that he believed in a utopian brand of socialism which sought to blend individual liberty with tight state control.²⁸⁶ The Cinematograph Act, therefore, represents a colonialist and statist confluence.

The CBFC’s membership is statutorily limited to a maximum of only twenty-five.²⁸⁷ Section 22 of the Cinematograph Act solves the problem of a shortage of censors by empowering larger Advisory Panels to certify films in conjunction with the CBFC.²⁸⁸ Advisory Panels, whose members work in an honorary capacity, exist in most major Indian cities. Because of the small size of the CBFC, the members of Advisory Panels are often the principal film censors in India. Advisory Panel appointees are, like members of the CBFC, selected by the union government. When in power, the Indian National Congress (INC) and the Bharatiya Janata Party (BJP), India’s two main national parties, have both ensured that Advisory Panels contain a large number of their respective party functionaries and sympathizers.²⁸⁹ For these reasons, the differences be-

282. Cinematograph Act of 1952, Act No. 37, § 3 (Mar. 21, 1952), available at http://mib.nic.in/writereaddata/html_en_files/actsrules/act_films/cinemaACT1952.htm.

283. Someswar Bhowmik, *From Coercion to Power Relations: Film Censorship in Post-Colonial India*, 38 ECON. & POL. WKLY. 3148, 3150 (2003).

284. KAUL, *supra* note 220, at 199.

285. See SITA RAM GOEL, *GENESIS AND GROWTH OF NEHRUISM* xiv (1993).

286. See P.C. Joshi, *Nehru and Socialism in India*, in *SOCIALISM IN INDIA 1919-1939*, at 122, 135-36 (B.R. Nanda ed., 1972).

287. Cinematograph Act of 1952, Act No. 37, § 3 (Mar. 21, 1952), available at http://mib.nic.in/writereaddata/html_en_files/actsrules/act_films/cinemaACT1952.htm.

288. *Id.*

289. See, e.g., Varghese K. George, *Thanks to Minister, Youth Congress Leaders Will Now Censor Your Movies*, INDIAN EXPRESS, Nov. 2, 2006, available at <http://www.indianexpress.com/news/thanks-to-minister-youth-congress-leaders-will-now-censor-your-movies/15924/0>; Sid-

tween the Advisory Panels and the CBFC are superficial, and hereinafter references to the latter include the former.

Sections 22 through 26 of the Cinematograph (Certification) Rules of 1983 delineate the censorship procedure followed by the CBFC. A film is first viewed by an examining committee.²⁹⁰ The examining committee may, under the existing system, award the film any one of the following certificates: "U" (unrestricted public exhibition); "UA" (unrestricted public exhibition, subject to parental approval for children under 12); "A" (public exhibition restricted to adults); or "S" (exhibition restricted to members of a special audience, for example, doctors).²⁹¹ The examining committee may also seek changes to, or refuse, any certificate.²⁹² Presently, the government is considering introducing new categories of certificates which exist in other countries, such as "12+" and "15+" (suitable for persons above twelve and fifteen, respectively).²⁹³

Appeals from an examining committee's decision are decided by a "revising committee."²⁹⁴ The Film Certification Appellate Tribunal (FCAT), situated in New Delhi, hears appeals from the revising committee's decisions.²⁹⁵ As a last resort, filmmakers aggrieved with the FCAT's decisions can file a writ in court.²⁹⁶ The FCAT was established by the Cinematograph (Amendment) Act of 1981 on the basis of a recommendation by the Supreme Court of India in *Abbas v. India*.²⁹⁷ The FCAT's chairperson is conventionally a retired high court judge. Its other members have included bureaucrats, lawyers, and politicians. The FCAT is thus a quasi-judicial body.²⁹⁸ However, the FCAT has been approached by filmmakers only

dharth Narrain, *Exit, Anupam Kher*, FRONTLINE, Nov. 6-19, 2004, available at <http://www.thehindu.com/line/fl2123/stories/20041119008112600.htm>.

290. Notification Issued by the Ministry of Information & Broadcasting, § 22 (May 9, 1983), available at http://mib.nic.in/writereaddata/html_en_files/actsrules/act_films/cinemaACT1952.htm [hereinafter Cinematograph (Certification) Rules, 1983].

291. *Id.* §§ 22(9)(a)-(d).

292. *Id.* §§ 22(9)(e)-(f).

293. Hemchaya De, *Not Just Adults Only*, THE TELEGRAPH, May 12, 2010, available at http://www.telegraphindia.com/1100512/jsp/opinion/story_12438982.jsp.

294. *Id.* § 24.

295. Cinematograph Act of 1952, Act No. 37, § 5D (Mar. 21, 1952), available at http://mib.nic.in/writereaddata/html_en_files/actsrules/act_films/cinemaACT1952.htm.

296. *Id.* §§ 5E-F.

297. (1971) 2 S.C.R. 446.

298. See *India v. Shankarappa*, 2000 S.C.A.L.E., 659 ¶ 7.

sporadically. The apparent deterrents include the high cost of litigation, delays, and the low success rate of applicants approaching the FCAT.²⁹⁹

Section 5B of the Cinematograph Act specifies the grounds on which films *shall* be denied certification by the CBFC.³⁰⁰ These grounds mirror the restrictions in Article 19(2) of the Constitution. Section 5B also enables the union government to issue guidelines to the CBFC, and the government has done so. The existing guidelines (Certification Guidelines) were originally issued through a notification issued by the I&B Ministry in 1978.³⁰¹ The issuance of the notification was also a consequence of the decision in *Abbas*. The Certification Guidelines direct the CBFC to “ensure” that certain scenes are not shown.³⁰² The list of proscribed items has been enlarged from an original list of ten (in 1978) to twenty (as of 2009).³⁰³ Prior to the 1978 notification, the guidelines followed by the Central Censor Board (Old Guidelines) were described by the Supreme Court of India as “more or less” the same as O’Connor’s 43.³⁰⁴

The Certification Guidelines discourage, *inter alia*, sexual violence, child abuse, and the glorification of drugs. The Certification Guidelines also prohibit showing scenes “likely to incite the commission of any offence” or scenes endangering public order and state security.³⁰⁵ On their face, the Certification Guidelines are not very different from the BBFC’s present guidelines. The BBFC’s guidelines direct compulsory cuts in films which, *inter alia*, endorse sexual violence, present violence in a “sensationalist” manner, or sanction illegal activity.³⁰⁶

299. See Arpan Banerjee, *Assessing The Track Record of India’s Film Certification Appellate Tribunal*, 4 J. MEDIA L. (forthcoming Fall 2010).

300. Cinematograph Act of 1952, Act No. 37, § 5B (Mar. 21, 1952), available at http://mib.nic.in/writereaddata/html_en_files/actsrules/act_films/cinemaACT1952.htm.

301. Notification Issued by the Ministry of Info. and Broad., Gov’t of India, Jan. 7, 1978, in VINAYAK PUROHIT, *ARTS OF TRANSITIONAL INDIA* 976 (1988).

302. Notification Issued by the Ministry of Info. & Broad., § 2, Dec. 6, 1991, available at http://mib.nic.in/writereaddata/html_en_files/actsrules/act_films/cinemaACT1952.htm [hereinafter Notification on Certification Guidelines, 1991].

303. *Id.*

304. *Abbas v. Union of India*, (1971) 2 S.C.R. 446, ¶ 11.

305. Notification on Certification Guidelines, 1991, *supra* note 302, § 2.

306. BRITISH BD. OF FILM CLASSIFICATION, *THE GUIDELINES* 33 (2009), <http://www.bbfc.co.uk/downloads/pub/Guidelines/BBFC%20Classification%20Guidelines%202009.pdf>.

Unlike the Old Guidelines, the Certification Guidelines state that artistic freedom should not be unduly curbed and that the CBFC should be responsive to social change. Here lies the paradox that has been at the center of disputes between filmmakers and the state: the CBFC has carried out political censorship by pointing to the items in the Certification Guidelines, but filmmakers have argued that the CBFC has denied them their creative freedom and thus contravened the Cinematograph Act and Article 19(1)(a) of the Constitution.

C. The Government's Track Record on Film Censorship

1. Before the Certification Guidelines

During the 1950s and 1960s, India's film censorship regime was "one of the strictest in the world."³⁰⁷ This has been blamed on the "puritanical attitude" of India's lawmakers,³⁰⁸ especially those of the first three I&B Ministers, who were all "stalwart devotees" of Gandhi.³⁰⁹ Balkrishna Vishwanath Keskar, the I&B Minister between 1952 and 1962, publicly condemned Bollywood for making "vulgar" films and warned the industry to mend its ways.³¹⁰ During Keskar's tenure, the government revoked the certificate awarded to *Shin Shinaki Bubla Boo*, a major Bollywood release, on the pretext that the film violated "public decency and morality."³¹¹ The government also revoked the certificates of a number of international hits, including Alfred Hitchcock's *Dial M for Murder*.³¹² Political censorship was also prevalent;³¹³ for example, films showing the police in a bad light were censored.

In the 1960s, Indo-Soviet relations blossomed. The Indian Government used the Central Censor Board to expunge films that spoke ill of its ally. Cuts were sought in Cold War spy

307. HUNNINGS, *supra* note 140, at 227.

308. *Id.* at 226–38.

309. Jeffrey, *supra* note 221, at 211–12.

310. HUNNINGS, *supra* note 140, at 232.

311. *Id.*

312. *Id.*

313. *Id.*; see also KAUL, *supra* note 220, at 64–65.

movies and in David Lean's *Doctor Zhivago*.³¹⁴ The cuts in *Doctor Zhivago* prompted criticism from Lean. In its report, the Enquiry Committee on Film Censorship (Khosla Committee) sympathized with Lean and accused the Central Censor Board of surrendering to "political pressure."³¹⁵ In 1968, amid mounting criticism of the censorship system, the Indian government established the Khosla Committee. It was headed by Justice G.D. Khosla, a former Chief Justice of the Punjab High Court; other members included filmmakers and bureaucrats. The Khosla Committee's goal was to recommend improvements to censorship laws so as to enable Indian cinema "to develop into an effective creative medium."³¹⁶ Filmmakers told the Khosla Committee that censorship laws had made them "shy of taking up social and political themes and dealing with them frankly and boldly."³¹⁷

The Khosla Committee declared that some items in the Old Guidelines were "clearly beyond the ambit of the reasonable restrictions" specified in Article 19(2) of the Constitution and that some of the Central Censor Board's decisions would be "difficult to defend" in court.³¹⁸ The Khosla Committee thus recommended that film censorship be strictly confined by the limits in Article 19.³¹⁹ The Khosla Committee also advocated a more liberal attitude on the issue of political censorship, observing that Article 19 allowed "a great deal of latitude" in political speech, and that India had "perfectly good law" on defamation anyway.³²⁰ As for concerns about security and public order, the Khosla Committee felt that Article 19(2) did allow restrictions on films preaching "violent mass agitation" or communal hatred.³²¹ However, this did not mean that socially significant films could be censored due to "fear of . . . possible agitation by an oversensitive group."³²² The Khosla Committee went on to state that political films like *Battleship*

314. KOBITA SARKAR, YOU CAN'T PLEASE EVERYONE! FILM CENSORSHIP: THE INSIDE STORY 35-36 (1982).

315. KHOSLA COMMITTEE REPORT, *supra* note 224, ¶ 8.25.

316. *Id.* ¶ 1.1.

317. *Id.* ¶ 6.73; *see also id.* ¶ 8.34.

318. *Id.* ¶ 4.19.

319. *Id.* ¶ 4.24.

320. *Id.* ¶ 4.16.

321. *Id.* ¶ 8.21.

322. *Id.* ¶ 8.22.

Potemkin and D.W. Griffith's *Intolerance* should be encouraged in India, instead of the "repetitive and escapist boy-meets-girl" fare.³²³

Soon after the Khosla Committee submitted its report, one of its members, Khwaja Ahmad Abbas, challenged the constitutionality of film censorship itself in the Supreme Court of India.³²⁴ The Supreme Court referred to the Khosla Committee's findings and was also critical of the censorship system.³²⁵ The enactment of the Certification Guidelines and the establishment of the FCAT followed the Supreme Court's decision. Yet, political censorship has continued unabated since then, as a few notable instances from the past two decades demonstrate.

2. After the Certification Guidelines

In 1993, the CBFC refused to certify a documentary which accused the state of indulging in human rights violations.³²⁶ The FCAT criticized the CBFC for "bureaucratic overzealousness" and held that the film would have to be certified.³²⁷ However, the FCAT still asked for numerous cuts. On a direction from the Delhi High Court, the FCAT re-examined the film and revised its demand to only two cuts.³²⁸ In 1995, the CBFC asked for several cuts in the Bollywood film *Bombay*, an inter-religious love story set amidst a backdrop of Hindu-Muslim violence. In the end, the producers deleted the contentious scenes, including veiled references to an influential politician. *Bombay* went on to become one of Bollywood's biggest-ever hits. Despite the film's success, the *Times of India* regretted that, because of the hurdles faced by the director, Bollywood would probably "avoid significant themes" in the future and "continue to assault the viewer with stories which have little or nothing in common with reality."³²⁹ That same

323. *Id.* ¶ 8.34.

324. *Abbas v. Union of India*, (1971) 2 S.C.R. 446, ¶ 11 (1970).

325. *Id.* ¶¶ 11, 37, 49-50.

326. A.G. Noorani, *Censoring Behind the Barricade*, 28 ECON. & POL. WKLY. 1843, 1843 (1993).

327. *Id.*

328. *Cinemart v. CBFC, FCAT*, Apr. 19, 2002 (unreported).

329. *Obstructing "Bombay," TIMES OF INDIA* (New Delhi), Apr. 10, 1995.

year, the CBFC asked for cuts in a big-budget Bollywood satire on political corruption.³³⁰

During the late 1990s, the CBFC asked for thirty-eight cuts in *Train To Pakistan*, a film based on Khuswant Singh's novel about the Partition of India.³³¹ The FCAT cleared almost all the scenes, but the film was not released until two years later because of litigation-related delays.³³² Around the same time, the CBFC sought a large number of cuts in *Such a Long Journey*, a film based on the book by the renowned Indo-Canadian author Rohinton Mistry.³³³ The film, set in the 1970s, allegedly contained unflattering references to Indira Gandhi.³³⁴ The CBFC Chairperson at the time told the press: "There is a reference to Indira Gandhi accusing her of siphoning money. How do you expect us to pass such nonsense?"³³⁵ The film was finally released with over twenty-five cuts.³³⁶ Sooni Taraporevala, the film's screenwriter, familiarly blamed censorship laws for "discouraging socially-conscious filmmakers attempting serious subjects."³³⁷

In the present decade, films that the CBFC has objected to include the independent film *Amu* and the documentary *Final Solution*, both of which addressed communal violence. The former revolved around anti-Sikh riots in 1984, which followed the assassination of Indira Gandhi by her Sikh bodyguards. A judicial inquiry concluded that a senior INC leader had "very probably" been behind the violence.³³⁸ According to the film's director, a member of the CBFC had told her: "[W]hy should young people know a history that is better bur-

330. See Khalid Mohamed, 'Oh Darling...' *Refused Certificate*, TIMES OF INDIA (New Delhi), May 28, 1995.

331. A.K. Dhar, "Train to Pakistan" *Screened in London*, INDIAN EXPRESS (Bombay), Nov. 23, 1998, <http://www.expressindia.com/news/fe/daily/19981123/32755394.html>.

332. N. Kazmi, *Train to Pakistan Finally Reaches the Silver Screen*, TIMES OF INDIA (New Delhi), Jan. 24, 1999.

333. MSM Desai & Deepa Deosthalee, *Censors Cut a Long Journey Short*, INDIAN EXPRESS (Mumbai), Aug. 12, 1999, <http://www.indianexpress.com/ie/daily/19990812/ile12055.html>.

334. *Id.*

335. *Id.*

336. Email from Sooni Taraporevala to author (Dec. 26, 2008, 21:16) (on file with author).

337. Aditi Sharma, *Such a Long Journey*, MUMBAI MIRROR (Mumbai), Dec. 11, 2005, available at http://www.soonitaraporevala.com/media/slj_mummirror.html.

338. Vinay Kumar, *Credible Evidence Against Tytler: Nanavati*, THE HINDU (Chennai), Aug. 9, 2005, available at <http://www.hindu.com/2005/08/09/stories/2005080911440100.htm>.

ied and forgotten[?]"³³⁹ *Final Solution* dealt with anti-Muslim riots in the state of Gujarat in 2002. These riots were widely reported to be have been planned by politicians linked to or part of the BJP.³⁴⁰ *Final Solution* was initially refused a certificate.³⁴¹ After public criticism, a certificate was finally awarded.³⁴² *Amu* and *Final Solution* both received critical praise and the latter film won an award at the Berlin Film Festival.³⁴³

In most of the aforementioned examples, the filmmakers deferred to the wishes of the State and edited their films. However, some uncompromising filmmakers took their grouse with the CBFC to the courts. The next Part discusses some of these cases.

VI. JUDICIAL ATTITUDES ON POLITICAL CENSORSHIP

With respect to the appointment of judges, the question of the extent to which the Indian judiciary is insulated from executive influence is complex.³⁴⁴ However, post-Raj India has an exciting history of judicial activism.³⁴⁵ In this regard, the Indian judiciary has been quite impartial and independent-minded. Since the enactment of the Constitution, the Supreme Court has examined executive restraints on speech against the touchstone of Article 19, and has passed many judgments against the State.³⁴⁶

In 1949, when India was still a dominion, the Punjab High Court was confronted with a case where a newspaper pro-

339. David Walsh, *An Interview with Shonali Bose, Director of Amu*, WORLD SOCIALIST WEB SITE, Oct. 6, 2005, <http://www.wsws.org/articles/2005/oct2005/bose-o06.shtml>.

340. CONCERNED CITIZENS TRIBUNAL, 2 CRIME AGAINST HUMANITY: AN INQUIRY INTO THE CARNAGE IN GUJARAT 75-80 (2002), available at <http://www.sabrang.com/tribunal/tribunal2.pdf>.

341. *India Bans Religious Riot Movie*, BBC NEWS, Aug. 6, 2004, available at <http://news.bbc.co.uk/1/hi/entertainment/3542340.stm>.

342. *HURRAY! Breaking Free, Finally*, THE HINDU (Chennai), Oct. 9, 2004, available at <http://www.hindu.com/mp/2004/10/09/stories/2004100900750100.htm>.

343. *India Bans Religious Riot Movie*, *supra* note 341.

344. Nirmalendu Bikash Rakshit, *Judicial Appointments*, 39 ECON. & POL. WKLY. 2959, 2959-61 (2004); S.P. Sathe, *Appointment of Judges: The Issues*, 33 ECON. & POL. WKLY. 2155, 2155-57 (1998).

345. See generally S.P. SATHE, JUDICIAL ACTIVISM IN INDIA (2002) (examining judicial review through its role in the Indian democracy, and tracing the development of judicial activism in the courts).

346. See SEERVAI, *supra* note 256, at 709-94.

tested the imposition of fines under the Act of 1931.³⁴⁷ The newspaper had published an emotionally-charged letter—apparently from a refugee who had fled Pakistan—accusing the Indian government for meting out “step-motherly” treatment to Hindus and Sikhs and favoring Muslims instead.³⁴⁸ The High Court set aside the financial penalty and observed:

[T]hese proceedings clearly bring home to us that the official mind still moves in [the] old groove of suspicion and distrust. The change in the situation in the country and the new set-up do not appear in the least to have brought about any change in the outlook of the executive Our newly won freedom has not broadened their vision and they are still prone to stifle legitimate comments and criticisms. The outpourings of aggrieved persons who pray for redress instead of being appeased are sought to be smothered³⁴⁹

This uncelebrated judgment—delivered even before Article 19 of the Constitution was born—was an early indication that the post-Raj judiciary would not be as malleable as its colonial predecessor arguably had been, at least on matters concerning political criticism.

A few months after the Constitution came into force, the Supreme Court struck down a state government’s ban on a communist magazine, which had been imposed on public order grounds. Justice Sastri held that the omission of “sedition” from Article 19(2) was an indication that the authors of the Constitution had intended that “criticism of Government exciting disaffection or bad feelings towards it” should not be outlawed.³⁵⁰ In another case, the Court quashed a similar order directing the censorship of a far-right magazine. Justice Sastri again observed that it was “not difficult to discover the reason” why sedition was excluded from Article 19(2).³⁵¹ The Supreme Court somewhat diluted these liberal pronouncements in a later case when it refused to strike the Act of 1931 as void under the Constitution.³⁵² Nevertheless, the Court still struck

347. *Pratap v. Crown*, 1949 A.I.R. 305 (Punjab and Haryana H.C.) ¶ 1.

348. *Id.* ¶¶ 19–22.

349. *Id.* ¶ 27.

350. *Thappar v. State of Madras*, (1950) 1 S.C.R. 594, ¶ 9; *see* INDIA CONST. art. 9, cl. 2.

351. *Brij Bhushan v. State of Delhi*, (1950) 1 S.C.R. 605, ¶ 15.

352. *Bihar v. Shailabala Devi*, (1952) 1 S.C.R. 654.

down an order applying the Act of 1931 against a radical left-wing pamphleteer.³⁵³ The Act of 1931 was repealed some years later.³⁵⁴ Meanwhile, in the early 1960s, the Supreme Court diluted the circumstances in which the law of sedition could be applied, declaring, "A citizen has a right to say or write whatever he likes about the Government, or its measures . . . so long as he does not incite people to violence against the Government"³⁵⁵ In another important case from the 1970s, the Court invoked the writings of Meiklejohn and said that the point of freedom of speech "is not that everyone shall speak, but that everything worth saying shall be said."³⁵⁶

These seminal cases no doubt encouraged the Khosla Committee's conclusion that some of the Central Censor Board's decisions would be struck down if challenged in the courts. The Committee's observations inspired Abbas to seek judicial redress after the Board censored his documentary about socioeconomic inequalities in India. The case, decided in 1970, marked the first legal battle of note between a filmmaker and the censorship authorities.

Although Abbas's film involved a political theme, the case actually revolved around moral censorship. The Central Censor Board had objected to certain scenes in Abbas's film.³⁵⁷ When Abbas appealed to the government (the FCAT did not exist then), he was informed that he would receive a "U" certificate upon removing certain "suggestive" scenes filmed in a red light area.³⁵⁸ The government cited an item in the Old Guidelines, which forbade scenes showing "prostitution or procuration."³⁵⁹ When Abbas petitioned the Supreme Court, the government agreed to certify the film as "U" without any cuts.³⁶⁰ Abbas then challenged the constitutionality of film censorship itself.

An interesting aspect of the case was that, ten years before, Justice Douglas of the United States Supreme Court had pre-

353. *Id.* ¶¶ 2, 18.

354. *Thakur v. State of Punjab*, (1964) Cri. L.J. 696 (Punjab), ¶ 2.

355. *Singh v. State of Bihar*, A.I.R. 1962 S.C. 955, ¶ 37.

356. *Bennett Coleman & Co. v. India*, (1973) 2 S.C.R. 757, ¶ 126 (citing ALEXANDER MEIKLEJOHN, *POLITICAL FREEDOM* 26 (1965)).

357. *Abbas v. Union of India*, (1971) 2 S.C.R. 446.

358. *Id.* ¶ 50.

359. *Id.*

360. *Id.*

emptively suggested that film censorship was constitutionally valid in India.³⁶¹ The Indian Supreme Court referred to Justice Douglas's remarks and agreed with him.³⁶² The Court held that film censorship was indeed a reasonable restriction on the freedom of speech under Article 19(2) of the Indian Constitution.³⁶³ Chief Justice Hidayatullah observed that it had been "almost universally recognised that the treatment of motion pictures must be different from that of other forms of art," as films were "more true to life."³⁶⁴ "A person reading a book or other writing or hearing a speech or viewing a painting or sculpture [would not be] so deeply stirred as by seeing a motion picture."³⁶⁵ In other words, the judge implied that films were, to borrow an expression of Seagle's, "superior vehicles of infection."³⁶⁶

Referring to the Khosla Committee's report, the Court criticized the Central Censor Board. Noting that the Old Guidelines were merely a replica of O'Connor's "43 points," the Court blamed the Indian government for not separating "the artistic and the sociably valuable" from that which is objectionable.³⁶⁷ The Court thus recommended that "directions to emphasize the importance of art to a value judgment" be issued to the Central Censor Board.³⁶⁸ The Court also favored the establishment of an independent tribunal to hear appeals against the Central Censor Board's decisions.³⁶⁹

The Supreme Court's suggestions were finally implemented through two enactments.³⁷⁰ The renaming of the Central Censor Board to the CBFC³⁷¹ a few years later was also probably meant to signify a change in policy from deletion to certification. Ironically, the coming years saw more litigation between aggrieved filmmakers and the CBFC.

361. *Kingsley Int'l Pictures Corp. v. Regents of the Univ. of N.Y.*, 360 U.S. 684, 698 (1959).

362. *Abbas v. Union of India*, (1971) 2 S.C.R. 446, ¶¶ 40–41.

363. *Id.* ¶¶ 41–42.

364. *Id.* ¶ 21.

365. *Id.*

366. WILLIAM SEAGLE, *CATO, OR THE FUTURE OF CENSORSHIP* 24 (1930).

367. *Abbas v. Union of India*, (1971) 2 S.C.R. 446, ¶ 52.

368. *Id.* ¶ 53.

369. *See id.* ¶ 9.

370. Notification on Certification Guidelines, 1991, *supra* note 302, § 3; Cinematograph (Amendment) Act of 1981, Act No. 49 (Dec. 18, 1981).

371. Cinematograph (Amendment) Act of 1981, Act No. 49, § 3 (Dec. 18, 1981).

In the 1990s, the CBFC halted the acclaimed film *Bandit Queen*.³⁷² The film was a biopic of a low-caste female dacoit who was abused in her youth.³⁷³ In a classic overlapping case of moral and political censorship, a revising committee ruled that the film could be given an "A" certificate only after the deletion of certain scenes, including those of police atrocities.³⁷⁴ The scenes were held to contravene three prohibited items in the Certification Guidelines: scenes of "vulgarity, obscenity or depravity" which offend "human sensibilities;" "scenes degrading or denigrating women;" and scenes showing prolonged "sexual violence against women."³⁷⁵ The FCAT struck down the revising committee's decision, declaring that removing the scenes "'would be a sacrilege,'" apart from an Article 19 violation.³⁷⁶ The Supreme Court upheld the FCAT's decision and said that "a film that illustrates the consequences of a social evil necessarily must show that social evil."³⁷⁷ Taking a dig at the Bollywood genre, Chief Justice Bharucha remarked, "It is not a pretty story. There are no syrupy songs or pirouetting round trees."³⁷⁸ Importantly, the Court ruled that the list of prohibited items in the Certifying Guidelines "cannot outweigh the sweep" of the artistic freedom clause.³⁷⁹ Thus, the Court observed, "Where the theme is of social relevance, it must be allowed to prevail."³⁸⁰

The case of *Anand Patwardhan v. CBFC*³⁸¹ was one of a number of cases arising during the first-ever five-year reign of a BJP-led government (between 1998 and 2003). An examining committee asked for six cuts in the award-winning filmmaker Anand Patwardhan's documentary *Jang Aur Aman* (War and Peace).³⁸² On appeal, a revising committee made matters worse by seeking fifteen more cuts.³⁸³ The film criticized the

372. Bobby Art Int'l v. Hoon, (1996) 2 S.C.R. 136, ¶ 6.

373. *Id.* ¶ 3.

374. *Id.* ¶¶ 9–10.

375. *Id.* ¶ 17.

376. *Id.* ¶ 9.

377. *Id.* ¶ 34.

378. *Id.* ¶ 28.

379. *Id.* ¶ 26.

380. *Id.*

381. (2003) 5 Bom. C.R. 58.

382. *Id.* ¶ 4.

383. *Id.*

BJP government's decision to test nuclear weapons. The many contentious scenes included a scene criticizing the BJP's defense policy, a scene showing a low-caste Buddhist leader criticizing upper-caste Hindus, and clips of a sting operation showing the involvement of a senior BJP politician in a defense scandal.³⁸⁴ The last objection was laughable, as the incident had been widely reported in the media.³⁸⁵ The CBFC also conveniently overlooked Patwardhan's reference to another defense scandal involving the INC.³⁸⁶ The FCAT reduced the number of cuts to two, but the Bombay High Court held that Patwardhan did not have to make any cuts at all and that the film should be certified as "U."³⁸⁷ The Court remarked, "It is high time that the persons in authority realise the significance of freedom of speech and expression rather than make and allow such attempts to stifle it."³⁸⁸ Echoing the Mill-Meiklejohn tradition, Judge Gokhale said that citizens ought to have the right to "fully and fearlessly" express a counter-view.³⁸⁹ The judge opined that "immense damage" to society would be caused "due to an erroneous decision" by authorities "in the absence of the counter-view."³⁹⁰ Like Rammohan Roy, the Court stressed that those in authority suffer equally when erroneous decisions are made because of the suppression of such counter-views.³⁹¹

During the BJP era, two other cases arose concerning the CBFC's refusal to issue certificates to films critical of the BJP's role in the Gujarat riots. One of these, a low-budget film called *Chand Bujh Gaya* (The Moon Has Been Eclipsed), belonged to the Bollywood genre. The other, *Aakrosh* (Rage), was a documentary. In the former film, the director made a

384. See *id.* ¶ 6.

385. See Harish Khare, "Expose on Defense Deal" Puts NDA Govt. in a Spot, *THE HINDU* (New Delhi), Mar. 14, 2001, available at <http://www.hinduonnet.com/2001/03/14/stories/01140001.htm>; see also Aniruddha Bahal & Mathew Samuel, *Operation West End*, *TEHELKA*, <http://www.tehelka.com/home/20041009/operationwe/investigation1.htm> (chronicling a sting operation by journalists to sell non-existent military technology to the Indian defense establishment).

386. See Someswar Bhowmik, *Politics of Film Censorship: Limits of Tolerance*, 37 *ECON. & POL. WKLY.* 3574, 3575 (2002).

387. *Patwardhan v. Cent. Bd. of Film Certification* (2003) 5 *Bom. C.R.* 58, ¶ 30.

388. *Id.* ¶ 32.

389. *Id.*

390. *Id.*

391. *Id.*

Hindu-Muslim love story set in the backdrop of the Gujarat riots, thus defying the prophecy made by the *Times of India* after the commotion surrounding *Bombay*.³⁹² The film's villain had an unmistakable resemblance to the highly controversial Chief Minister of Gujarat. The CBFC refused to certify the film, saying that it would "foment communal disharmony" and that its characters were "clearly identifiable with actual personalities."³⁹³ The FCAT upheld the refusal.³⁹⁴ The Bombay High Court overturned the decision and held that the film would have to be certified.³⁹⁵ The court rebuked the CBFC and the FCAT for having "misconceived the scope and function of their powers" and familiarly pointed to the artistic freedom clause in the Certifying Guidelines.³⁹⁶ Mentioning films on the Holocaust, the court remarked that social cohesion could "only be promoted by introspection into social reality, however grim it be."³⁹⁷ As for the unambiguous references to the Chief Minister, the court said, "Those who hold important positions must have shoulders which are broad enough to accept with grace a critique of themselves"³⁹⁸ In the case concerning *Aakrosh*, the Bombay High Court similarly ruled against the CBFC and the FCAT, saying that "[t]he film . . . would shame and shock ordinary people and hopefully spur many of them to think and act positively."³⁹⁹

Some years ago, the Delhi High Court described the Indian judiciary as a "messiah" which often rescued the media from state interference.⁴⁰⁰ Ironically, they made this observation when handing out a controversial conviction for "scandalising" the Court.⁴⁰¹ Judges who apply this archaic offense to shield the judiciary from legitimate criticism can hardly be seen as saviors of the media. But as evident from some of the above cases, the Delhi High Court's boast is not unfounded. Yet, the courts have sometimes acted as illiberally as the ex-

392. See *supra* note 329 and accompanying text.

393. *F.A. Picture Int'l v. CBFC*, A.I.R. 2005 Bom. 145, ¶ 3.

394. *Id.* ¶ 4.

395. *Id.* ¶ 19.

396. *Id.* ¶ 12.

397. *Id.* ¶¶ 12-13.

398. *Id.* ¶ 13.

399. *Ramesh Pimple v. Cent. Bd. of Film Certification*, (2004) 5 Bom. C.R. 214, ¶ 5.

400. *Khatry v. Trehan*, (2001) Cri. L.J. 3476, ¶ 25.

401. *Id.* ¶ 17.

ecutive. The reason the *Bandit Queen* case rose to the Supreme Court was that the Delhi High Court had overturned the FCAT's decision to certify the film, finding the contentious scenes "absolutely disgusting."⁴⁰² Similarly, a High Court judge once bizarrely invoked contempt of court laws and ordered the expungement of a Bollywood film for hinting, in one scene, that judges could be bribed.⁴⁰³

Hence, on the whole, the post-Raj judiciary is better characterized not as a messiah, but as a generally reliable, sometimes fickle upholder of free speech. Undoubtedly, the post-Raj judiciary has been more liberal than its colonial predecessor. Judges have consistently allowed acerbic criticism of the government's policies. To many, this would hardly seem impressive, as the judiciaries of all democracies are expected to uphold the freedom of speech. However, in India, both legal and extra-legal censorship are rampant. Hence, the judiciary's singular view holds great symbolic importance. Moreover, the judiciary's liberal pronouncements lend credence to the case for reforming the film censorship system.

VII. THE CASE FOR REFORM

A. *The Case Against Political Censorship of Films*

1. *Political accountability and the cinema*

The noted Iranian director Mohsen Makhmalbaf calls Bollywood a "sanitised world meant for enjoyment, not introspection."⁴⁰⁴ Indisputably, film censors must be blamed for politically emasculating Bollywood and forcing filmmakers to make musicals with clichéd romantic plots.⁴⁰⁵ Studios perceive audacious political films as risky investments, which discourages the production of such films.⁴⁰⁶ As Taraporevala says, "Making a film is an expensive proposition. Who is going to risk all

402. *Amitabh Bachhan Corp. v. Hoon*, (1996) 37 D.R.J. 352, ¶ 82.

403. *Rao v. Dep't of Home*, 1995 A.I.R. 359 (A.P.), ¶¶ 5-7.

404. Saibal Chatterjee, *Iranian Director Turns Lens on India*, BBC NEWS, Nov. 19, 2004, available at http://news.bbc.co.uk/1/hi/world/south_asia/3763074.stm.

405. Sharma, *supra* note 337.

406. *Id.*

that capital, if at the end of the day, the film never gets shown? Anand Patwardhan wins all the national awards, but has to go to court to show his documentaries."⁴⁰⁷

Arguably, films have the potential to catalyze political reforms in India, especially films in the popular Bollywood genre. The impact of the Bollywood blockbuster, *Rang De Basanti* (popularly known as *RDB*), is a case in point. *RDB*, released in 2006, depicted corruption in the Indian defense establishment, and the film's climax saw its protagonists assassinating the (fictional) Indian Defence Minister.⁴⁰⁸ In its final scenes, the film's heroes make a plea for fighting corruption.⁴⁰⁹ *RDB* starred Aamir Khan, a major Bollywood superstar. Before clearing the film, the CBFC organized a screening of *RDB* attended by the real Defence Minister and the Army, Navy, and Air Force Chiefs⁴¹⁰—a measure of Khan's cultural importance in India. Surprisingly, considering the CBFC's track record, it cleared the film without cuts.⁴¹¹ Patwardhan surmises that the censors treated *RDB* differently than *Jang Aur Aman* because documentary films generally "face far harsher censorship than their [fictional] Hollywood and Bollywood counterparts."⁴¹² According to Patwardhan, "[d]ocumentaries, at least at the best of times, are a historical record of things that happened and are much harder to refute which is why they pose a greater threat to the people they expose."⁴¹³ Hence, by clearing *RDB*, the CBFC (presumably, in conjunction with the Ministry of Defence) was clearly distinguishing between seemingly harmless entertainment films and harmful propaganda films, concluding that *RDB* fell into the former category. Meiklejohn warned against making such distinctions by arguing that viewers could imbibe political messages from films meant

407. *Id.*

408. Sandeep Bajeli, Review of *Rang De Basanti*, <http://www.revolutionarydemocracy.org/rdv12n1/film.htm> (last visited Apr. 12, 2010).

409. *Id.*

410. Sujan Dutta, *Rang De Wins Seal of War Cabinet*, THE TELEGRAPH (Calcutta), Jan. 11, 2006, available at http://www.telegraphindia.com/1060111/asp/frontpage/story_5706745.asp.

411. *Id.*

412. Interview with Anand Patwardhan, film director (July 29, 2009).

413. *Id.*

primarily for entertainment.⁴¹⁴ That certainly proved to be the case with *RDB*.

Sometime after *RDB*'s release, a court in Delhi acquitted the son of an INC leader in a murder case, despite overwhelming evidence of guilt.⁴¹⁵ The acquittal led to a public outcry.⁴¹⁶ Citizens held candlelight vigils at Delhi's India Gate, replicating a crucial scene from *RDB*.⁴¹⁷ Protestors also rallied against a similarly unfair acquittal for another murder in which the accused was a senior policeman's son.⁴¹⁸ A newspaper said of one of the rallies: "Several people who took the mike that day referred to *Rang De Basanti*: at times it seemed [that] more than the injustice itself, the film was their inspiration."⁴¹⁹ The press thus branded such activism as the "*Rang de Basanti Effect*" or the "*RDB Effect*."⁴²⁰ The Delhi High Court eventually fast-tracked both controversial cases and overturned the verdicts.⁴²¹ In one of the cases, the High Court observed that the crime had "sent ripples in the society"⁴²²—an implicit recognition of the *RDB Effect* and subsequent activism.

Skeptics argued that the activism flowing from the *RDB Effect* was ephemeral, urban-centric, and did not lead to macro-level judicial reforms.⁴²³ Yet, it can be argued that *RDB* did enough public good for one film. The vast majority of Bollywood films are fantastical love stories without even the slightest trace of political sentiment. If political censorship ceases

414. Brief for Alexander Meiklejohn, *supra* note 66, at 12.

415. See Shiv Pujan Jha, *Jessica Murder: Accused Acquitted*, CNN-IBN, Feb. 21, 2006, <http://ibnlive.in.com/news/jessica-murder-accused-acquitted/5695-3.html>.

416. Shoma Chaudhury, *Sleeping Idealists?*, TEHELKA, Mar. 18, 2006, http://www.tehelka.com/story_main23.asp?filename=hub031806Sleeping_idealists1.asp.

417. *Id.*

418. T.K. Rajalakshmi, *A Shocking Acquittal*, FRONTLINE, Dec. 25, 1999, available at <http://www.hinduonnet.com/fline/fl1627/16270340.htm>.

419. Chaudhury, *supra* note 416.

420. See, e.g., Shirin Abbas, *Colleges to Radio Stations, All Observe "Black Day,"* INDIAN EXPRESS (Mumbai), Feb. 28, 2006, available at <http://cities.expressindia.com/fullstory.php?newsid=171602>; Riddhi Shah & Kimi Dangor, *A People-powered Revolution*, INDIA TODAY, Aug. 14, 2006, available at <http://www.indiatoday.com/itoday/20060814/bom-civic.html>.

421. *State v. Vashisht*, 2009 93 D.R.J. (Del.) 145; *State v. Singh*, 2006 D.L.T. 133 (Del.) 393.

422. Transcript of Record at 3, *State v. Singh*, 2006 D.L.T. 133 (Del.) 393, available at http://www.ebc-india.com/downloads/santoshsingh_sentencing.pdf.

423. See, e.g., Amrita Shah, *Justice Is Not an Opinion Poll*, INDIAN EXPRESS (Mumbai), Dec. 22, 2006, available at http://www.indianexpress.com/story_print.php?storyId=19130; R.K. Raghavan, *Lessons from Jessica Lal*, FRONTLINE, Mar. 11–24, 2006, available at <http://www.thehindu.com/fline/fl2305/stories/20060324002910400.htm>.

and Bollywood can make more films addressing pressing social concerns, phenomena like the *RDB Effect* could occur more often.

2. *The effect of news channels*

While the release of *Such a Long Journey* was being stymied by the CBFC, Mistry wrote to the Indian government and pointed out that his book was readily available in India.⁴²⁴ But it is easy to understand why the Indian government is more concerned about the moving image than the written word. A large portion of Indians are illiterate, and only one-fifth of the population reads newspapers.⁴²⁵ However, the relatively recent advent of private news channels in India has thwarted attempts by state officials to keep citizens in the dark.

For many years, the "somnolent and widely discredited" state broadcaster Doordarshan was India's only television news source.⁴²⁶ In the early 1990s, the Indian government, which was facing a severe budget crisis, permitted greater foreign and private participation in the tightly-controlled economy. One of the repercussions of this was the entry of private satellite channels.⁴²⁷ Today, there are well over two hundred privately-owned domestic news channels, and the number is fast increasing.⁴²⁸ Critics argue that the sudden proliferation of news channels has resulted in the "tabloidisation of television news."⁴²⁹ Yet, it is undeniable that the increase in private news channels has led to the state being subject to greater scrutiny than the days of Doordarshan. The *RDB Effect*, which was fueled by private news channels, is a prime example of this. Another criticism of news channels has been their dispropor-

424. Desai & Deosthalee, *supra* note 333.

425. *Daily Newspapers Reach Over 200 Million People, Says NRS 2006*, THE HINDU (Mumbai), Aug. 30, 2006, available at <http://www.hindu.com/2006/08/30/stories/2006083010621300.htm>.

426. Khozem Merchant, *The Television Revolution: India's New Information Order* (Reuter Foundation Paper 42, Univ. of Oxford) ch. 1.

427. N. Sinha, *Doordarshan, Public Service Broadcasting and the Impact of Globalization: A Short History*, in BROADCASTING REFORM IN INDIA 22 (Monroe E. Price & Stefaan Verhulst eds., 2002).

428. *410 Channels Uplink from India, 143 Await Nod*, MSN INDIA, Aug. 5, 2009, <http://entertainment.in.msn.com/tv/article.aspx?cp-documentid=3126356>.

429. Daya Kishan Thussu, *The "Murdochization" of News? The Case of Star TV in India*, 29 MEDIA, CULTURE & SOC'Y 593, 600 (2007), available at <http://mes.sagepub.com/cgi/reprint/29/4/593>.

tionate focus on issues affecting the urban middle-class at the expense of problems affecting rural India.⁴³⁰ Indeed, the majority of India's population is rural. However, television is slowly trickling into villages and reaching the "information underclass."⁴³¹ The rural television audience is bound to grow in future and form an important market one day. This will quite likely influence the content of news channels and lead to greater coverage of rural issues.

In the *Abbas* case, the Supreme Court justified film censorship on the premise that the public reacted more strongly to films. The Court made that observation when television was non-existent in India. Arguably, television is as emotive a medium as the cinema. The Bombay High Court acknowledged this in the *Aakrosh* case.⁴³² The Court said, "The violence . . . has been the subject-matter of extensive debate in the press and the media and it is impermissible to conjecture that a film dealing with the issue would aggravate the situation."⁴³³ A prominent Bollywood producer argues, "[T]here is no censorship for television. Why should there be censorship for films alone?"⁴³⁴ But to say that Indian television is uncensored is a half-truth.

In India, private channels are regulated by the Cable Television Networks (Regulation) Act 1995 (CTN Act)⁴³⁵ and the Cable Television Networks Rules of 1994 (CTN Rules).⁴³⁶ Section 6 of the CTN Rules lays down a Programme Code, and Section 19 of the CTN Act allows the government to ban a program, or an entire channel, that violates the Programme Code.⁴³⁷ The

430. See Nicolas Jaoul, *The "Righteous Anger" of the Powerless: Investigating Dalit Outrage over Caste Violence*, S. ASIA MULTIDISCIPLINARY ACAD. J. ¶ 48 (2008), available at <http://samaj.revues.org/document1892.html>; Salil Tripathi, *A Question of Caste*, NEW STATESMAN, Jan. 22, 2007, available at <http://www.newstatesman.com/society/2007/01/india-bhotmange-lall-justice>.

431. See KIRK JOHNSON, TELEVISION AND SOCIAL CHANGE IN RURAL INDIA 214-18 (2000).

432. *Abbas v. India*, (1971) 2 S.C.R. 446, ¶ 21.

433. *Id.* ¶ 13.

434. MSM Desai, *Is Censorship Redundant?*, SCREEN INDIA, May 12, 2000, <http://www.screenindia.com/old/may12/film11.htm>; see also Tejaswini Ganti, *The Limits of Decency and the Decency of Limits: Censorship and the Bombay Film Industry*, in CENSORSHIP IN SOUTH ASIA: CULTURAL REGULATION FROM SEDITION TO SEDUCTION 87, 107-08 (William Mazzarella & Raminder Kaur eds., 2000).

435. Cable Television Networks (Regulation) Act of 1995, Act No. 7 (Mar. 25, 1995).

436. Cable Television Networks Rules of 1994, No. 9 (Sept. 29, 1994).

437. Cable Television Networks (Regulation) Act of 1995, Act No. 7, § 19 (Mar. 25, 1995); Cable Television Networks Rules of 1994, No. 9, § 6 (Sept. 29, 1994).

Programme Code comprises a list of prohibited items resembling those in the Certifying Guidelines.⁴³⁸ The I&B Ministry has issued notifications stating that movies and music videos shown on television must be certified by the CBFC.⁴³⁹ Therefore, some content on Indian television is subject to prior restraint. In the case of television shows and programs on news channels, however, only post-dissemination sanctions can be imposed. This subsequent censorship mechanism is ineffective, as there is no specific television regulatory authority in India, making it difficult for the I&B Ministry to monitor hundreds of channels. Thus, the enforcement of the CTN Rules has been haphazard. While the government temporarily banned a channel for showing *World's Sexiest Commercials*,⁴⁴⁰ it has not taken the same action against other channels in breach of the Programme Code. The I&B Ministry has merely issued occasional warnings and advisories to these errant channels.⁴⁴¹

In 2007, the government framed a bill to better regulate television channels.⁴⁴² The bill (the first draft of which was framed over a decade ago) has clauses relating to, inter alia, concentration of media ownership and public broadcasting obligations.⁴⁴³ It also seeks to create a regulatory body for television.⁴⁴⁴ But the bill has been successfully resisted by media companies thus far. Therefore, at the moment, Indian television laws are in a state of disarray and the industry awaits future developments. Until then, the "news channel boom"⁴⁴⁵ continues unhindered, making political censorship of films quite anomalous.

438. Compare Cable Television Network Rules § 6(a)–(m) with Notification on Certification Guidelines, 1991, *supra* note 302, § 2(i)–(ii), (vii)–(xviii).

439. CBFC Clearance Must for Telecast of Films, Songs, THE HINDU (New Delhi), Aug. 4, 2006, <http://www.hindu.com/2006/08/04/stories/2006080409450100.htm>.

440. India Lifts Ban on a Tamed Fashion TV, REUTERS, May 25, 2007, <http://in.reuters.com/article/companynews/idINDEL21871120070525>.

441. Electronic Media Monitoring Centre, Details of Orders/Warnings/Advisories Issues To Various Channels, Dec. 30, 2008, <http://emmc.gov.in/ShowArticle.aspx?id=Mzg=>.

442. Gov't of India Ministry of Info. & Broad., *A Draft of the Proposed Broadcasting Services Regulation Bill*, 2007, available at http://mib.nic.in/writereaddata/html_en_files/document/docu_bro/Bill200707.pdf.

443. *Id.* ch. 2, cls. 10–11.

444. *Id.* ch. 3. See generally Arpan Banerjee, *Television Content Regulation in India: Are News Channels Crying Wolf*, 21 ENTERTAINMENT L. REV. 58 (2010) (discussing recent attempts to regulate television broadcasting in India).

445. Gauri Bhatia, Arijit Barman & Charubala Annuncio, *Reality Bites With Images*, OUTLOOK, Feb. 17, 2003, <http://www.outlookindia.com/article.aspx?219005>.

3. *Hampering Bollywood's global ambitions*

A third reason for opposing the political censorship of films is that it hinders the Indian film industry's global expansion plans. The number of viewers that watch Indian films is believed to outstrip the number that watch Hollywood films.⁴⁴⁶ However, the revenues earned by the Indian film industry are a modest fraction of Hollywood's.⁴⁴⁷ The Indian film industry is thus seeking to win over "non-traditional" audiences.⁴⁴⁸ Indian studios are looking to forge alliances with foreign studios. For example, the Indian company Reliance Big Entertainment recently bought a fifty-percent stake in America's DreamWorks Studios.⁴⁴⁹

Arguably, there is a lucrative nontraditional audience which is keen to watch films based on international political events. Examples of films in this genre that have enjoyed worldwide commercial success include the international co-production *Hotel Rwanda* (based on a true story about the Rwandan genocide), the British film *The Last King of Scotland* (a fictionalized depiction of the reign of the former Ugandan President Idi Amin), the German film *Das Leben der Anderen* (a fictional story involving the East German Stasi), the French animated film *Persepolis* (set against the backdrop of the Iranian revolution), and the Israeli film *Waltz with Bashir* (an animated documentary about the Israel-Lebanon War). Because the Indian film industry is reasonably competent technologically and has abundant, low-cost talent, it is conceivable to make political films in Indian languages and simultaneously market them to nontraditional audiences abroad. Burgeoning Indo-Western studio alliances would facilitate such ambitions. Yet, because of the threat of political censorship, few major Indian studios would want to invest in a bold, undisguised film about governmental corruption and human rights abuses, or a non-hagiographical biopic of an Indian politician such as, perhaps, Indira Gandhi. Incidentally, it has been reported that objec-

446. Daya Kishan Thussu, *The Globalization of "Bollywood": The Hype and the Hope*, in *GLOBAL BOLLYWOOD* 98 (Anandam P. Kavoori & Aswin Punathambekar eds., 2008).

447. *Id.*

448. *See id.* at 99-111.

449. *See* Rhys Blakely & Nic Fildes, *Reliance's Ambani Expected To Bid for MGM*, *TIMES ONLINE* (London), Jan. 15, 2010, http://business.timesonline.co.uk/tol/business/industry_sectors/media/article6989812.ece.

tions from the Indian government forced Universal Studios to cancel a proposed film set in British India; the film would have been directed by Joe Wright and featured Hollywood stars Hugh Grant and Cate Blanchett.⁴⁵⁰ The Indian government protested against the film because it was to broach the subject of a supposed affair between Nehru and Lady Edwina Mountbatten.⁴⁵¹ Because this alleged romance has been frequently pondered over by historians, the government's opposition to the film was criticized by the Indian media.⁴⁵² As the foregoing demonstrates, Bollywood would likely stand a better chance of challenging Hollywood's hegemony if it were free to determine its own content.

B. Suggested Changes

The late 1950s have been identified as a turning point in the history of British cinema.⁴⁵³ As the English class system gradually broke down, there occurred "a shift in the nation's cultural mood and tastes."⁴⁵⁴ The British film industry complained that the BBFC's tendency to "sanitize any film representing contemporary life" was making it difficult for them to compete with Hollywood.⁴⁵⁵ The industry argued that this was inhibiting British filmmakers from making movies like *On the Waterfront* (which showed oppressed dockworkers) and *From Here To Eternity* (about a rebellious soldier in the Second World War).⁴⁵⁶

John Trevalayn, appointed Secretary of the BBFC in 1958, sympathized with the industry and decided to initiate reforms.⁴⁵⁷ A new liberal code was adopted, an "X" certificate was introduced to certify sexually explicit films, and a film depicting the ill-treatment of Jews by the British was cleared

450. *Universal Cancels Blanchett Film*, BBC NEWS, Oct. 21, 2009, <http://news.bbc.co.uk/2/hi/8317829.stm>.

451. *Id.*

452. Pratik Kanjilal, *Living in Denial, Forever*, HINDUSTAN TIMES (Gurgaon, India), Oct. 23, 2009, <http://www.hindustantimes.com/Living-in-denial-forever/H1-Article1-468535.aspx>.

453. SUE HARPER & VINCENT PORTER, *BRITISH CINEMA OF THE 1950S: THE DECLINE OF DEFERENCE 1* (2003).

454. *Id.*

455. *Id.* at 231.

456. *Id.*

457. *Id.* at 220, 238.

without cuts despite opposition from the right-wing press.⁴⁵⁸ During the 1960s, the Khosla Committee noted that the BBFC had become “more and more liberal.”⁴⁵⁹ O’Higgins, writing in the 1970s, remarked that the BBFC no longer exercised “open censorship on political or social grounds.”⁴⁶⁰ Today, most criticisms of the BBFC seem to revolve around the age-based classification system rather than censorship. Some critics, for example, are appalled that *Spiderman* was rated “12” rather than “PG.”⁴⁶¹

Unlike the BBFC, the CBFC continues to practice strict political censorship. The Certification Guidelines cannot be faulted; as noted earlier, they are similar to the BBFC’s guidelines.⁴⁶² Therefore, the problem lies with those members of the CBFC who misread the Certification Guidelines by suspiciously overlooking the artistic freedom clause. One possible way to prevent political censorship would be to de-link the CBFC from the State and allow an industry-funded body like the BBFC to be established. The Khosla Committee concluded that voluntary self-regulation has obvious advantages.⁴⁶³ The Committee spoke favorably of the BBFC model, which allows the State to “double check” its decisions through the county councils.⁴⁶⁴ Yet, the Committee did not recommend such a model for India, observing that the film industry was in a “chaotic” state.⁴⁶⁵ In the 1990s, some Bollywood artists spoke in favor of self-censorship but doubted the film industry’s ability to institute such a mechanism.⁴⁶⁶ However, the Indian film industry today is far better organized than it was in the 1960s, or even the 1990s. Whereas the industry was once dependent on financing from the underworld, the situation is vastly different now, and many legitimate production houses exist.⁴⁶⁷ It

458. SUE HARPER & VINCENT PORTER, *BRITISH CINEMA OF THE 1950S: THE DECLINE OF DEFERENCE* 220–21, 227 (2003).

459. KHOSLA COMMITTEE REPORT, *supra* note 224, ¶ 3.23.

460. O’HIGGINS, *supra* note 17, at 90.

461. ROBERSTON & NICOL, *supra* note 75, at 821–22.

462. See *supra* note 306 and accompanying text.

463. KHOSLA COMMITTEE REPORT, *supra* note 224, ¶ 7.3.

464. *Id.* ¶ 3.23.

465. *Id.* ¶ 8.63.

466. Ganti, *supra* note 434, at 110–14.

467. Surajeet Das Gupta, *How Bollywood Makes Money*, REDIFF INDIA ABROAD, May 27, 2006, available at <http://www.rediff.com/money/2006/may/27spec1.htm>.

is thus not impossible for an industry-funded body like the BBFC to be established in India today.

Nevertheless, this issue is only of academic significance, as it appears extremely unlikely that the Indian State will relinquish the task of film censorship. Therefore, to find a solution to the problem of political censorship, a compromise within the existing framework of the CBFC must be worked out. The Khosla Committee put forward one such compromise solution, recommending that people from an arts and culture background be appointed to the Central Censor Board.⁴⁶⁸ In fairness, the government has given members of the film industry greater representation in recent years. In the early 1990s, the CBFC's Chairperson was BP Singhal—a BJP politician and a staunch right-wing conservative, known for fulminating against miniskirts and pubs, among other things.⁴⁶⁹ Today, the CBFC Chairperson is Sharmila Tagore, a noted actress who has also served on the Cannes Film Festival jury. Many other literary and artistic personalities currently serve on various advisory panels. But ultimately, the fate of a film depends on the composition of an examining or revising committee on a given day.

To better implement the cultural background compromise, one avenue that could be contemplated is a collaborative censorship effort involving the CBFC and the jury of the National Film Awards. The National Film Awards are a prestigious state-sponsored cinematic accolade. The jury of the National Film Awards, although appointed by the government, is broadly respected. In the past, the National Film Awards jury has given prizes to films obstructed by the CBFC, such as *Ban-dit Queen* (Best Actress Award, 1996) and *Final Solution* (Special Jury Award, 2005). It is possible that members of the National Film Awards jury could also be appointed on revising committees and the FCAT. Nonetheless, the presumption that all artists are liberals who support freedom of speech is not always correct. For example, while it is true that many artists came out in defense of the Hollywood Ten, there were a fair

468. KHOSLA COMMITTEE REPORT, *supra* note 224, ¶ 7.13

469. Sanjoy Hazarika, *India's Top Censor Says Films Must Be Cleaner*, N.Y. TIMES, Jan. 3, 1991, at C18, available at <http://www.nytimes.com/1991/01/03/movies/india-s-top-censor-says-films-must-be-cleaner.html>; *Moral of the Story: Can't Drink to Indian Culture*, CNN-IBN, Jan. 31, 2009, available at <http://ibnlive.in.com/news/moral-of-the-story-cant-drink-to-indian-culture/84122-3.html>.

number who vehemently opposed them, such as Adolphe Menjou.⁴⁷⁰ In India, hosts of artists have ventured into politics. If such individuals are appointed to the CBFC, there is no guarantee that they will not ask for cuts in films criticizing their respective political parties. Therefore, if political censorship is to be done away with, what really needs to happen is a change of mindset in the political establishment. This is also true in the case of moral censorship.

Despite the foregoing discussion, I do not believe that a complete elimination of censorship would be desirable. Many in the Indian film industry have also opposed the complete absence of censorship, although for differing reasons.⁴⁷¹ As far as political censorship is concerned, the censorship of violent propaganda is, arguably, justified. Mill's harm principle essentially postulates that "your rights end where my nose begins."⁴⁷² Frederick Schauer, a contemporary functionalist liberal, likens "criticism of law or government policy" to a spectrum.⁴⁷³ At one end of the spectrum is "non-inflammatory criticism."⁴⁷⁴ For Schauer, the censorship of such criticism is "fundamentally inconsistent" with the right to freedom of speech.⁴⁷⁵ At the other end of Schauer's spectrum, is "speech specifically, directly and exclusively devoted to inciting disobedience."⁴⁷⁶ In the United States, any attempt to censor such speech would have to pass the "imminent lawless action" test articulated by the United States Supreme Court in *Brandenburg v. Ohio*.⁴⁷⁷ In *Brandenburg*, the Supreme Court struck down the conviction of a Ku Klux Klan leader who advocated violence against Jews and African-Americans, observing that the U.S. Constitution's guarantee of freedom of speech does not permit the censorship of speech advocating violence "except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action."⁴⁷⁸

470. See DAVID M. OSHINSKY, *A CONSPIRACY SO IMMENSE: THE WORLD OF JOE MCCARTHY* 98 (2005).

471. Ganti, *supra* note 434, at 95–103.

472. RICHARD A. POSNER, *OVERCOMING LAW* 28 (1995).

473. FREDERICK SCHAUER, *FREE SPEECH: A PHILOSOPHICAL ENQUIRY* 192–95 (1982).

474. *Id.* at 192.

475. *Id.*

476. *Id.*

477. 395 U.S. 444 (1969) (per curiam).

478. *Id.* at 447.

However, this position on freedom of speech is a “recalcitrant outlier” that differs “dramatically from those accepted in most of the remainder of the open and democratic world.”⁴⁷⁹ For example, much like Article 19 of the Indian Constitution, Article 10 of the European Convention of Human Rights of 1950 gives people “the right to freedom of expression” but states that the right “may be subject to . . . restrictions . . . necessary in a democratic society, in the interests of national security, territorial integrity or public safety, [or] for the prevention of disorder or crime.”⁴⁸⁰ The European Court of Human Rights, applying the margin of appreciation doctrine, has upheld penalties imposed on speech glorifying violence.⁴⁸¹

Schauer argues that a person who “seeks to impose his views by force . . . can reasonably be said to have forfeited” his freedom of speech.⁴⁸² Indian authorities intermittently conduct raids and seize clandestinely-made terrorist propaganda films.⁴⁸³ This kind of censorship is thus not inconsistent with the functionalist liberal position on freedom of speech. But a dilemma arises with respect to the censorship of speech belonging to the gray area in the middle of Schauer’s spectrum, such as xenophobic but non-militant speech. Holocaust denial is a good example of such speech. In an Indian context, a more relevant test case would be the short film *Fitna*, directed by the Dutch politician Geert Wilders. *Fitna* caused an outcry across Europe a couple of years ago.⁴⁸⁴ Wilders’s film blamed Islamic extremism on the ideology of the Koran. The film also reproduced the controversial Danish cartoon of the prophet Mohammed with a bomb atop his head and showed the bomb exploding. The film led to angry demonstrations by many European Muslims. The British government barred Wilders from entering the United Kingdom, informing him that his “statements about Muslims and their beliefs” in *Fitna* “would

479. See Frederick Schauer, *The Exceptional First Amendment*, in AMERICAN EXCEPTIONALISM AND HUMAN RIGHTS 29, 30, 56 (Michael Ignatieff ed., 2005).

480. Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention of Human Rights) art. 10, Nov. 4, 1950.

481. See *Zana v. Turkey*, 27 Eur. Ct. H.R. 667 (1999).

482. *Id.*

483. See, e.g., Baig, *Abdullah Circulated Seditious CDs: Police*, THE HINDU (Chennai), Dec. 18, 2009, available at <http://www.thehindu.com/2009/12/18/stories/2009121860280500.htm>.

484. See Samira J. Simone, *Dutch lawmaker's film criticizing Islam finds Web host*, CNN, Mar. 27, 2008, <http://edition.cnn.com/2008/WORLD/europe/03/27/islam.film>.

threaten community harmony and therefore public security in the UK."⁴⁸⁵ Wilders successfully appealed this decision in the Asylum and Immigration Tribunal in the United Kingdom.⁴⁸⁶ The Tribunal held that the British police were "well able to protect a right as fundamental in a democratic society as that of freedom of expression," and that there was "no demonstrable risk of community disharmony or disorder arising from" Wilders's arrival in England.⁴⁸⁷

In the United States, a ban on *Fitna* would surely be unconstitutional, pursuant to the decision in *Brandenburg*. In India, a ban on *Fitna* on public order or security grounds cannot be easily dismissed as unconstitutional. Supporters of *Fitna* can argue that the film primarily discusses the topical issue of Islamic fundamentalism. Despite its bellicose tone, the film does not actually advocate violence or unlawful acts against Muslims. Therefore, banning the film would be inconsistent with the Mill-Meiklejohn tradition of allowing public debate. Two judicial precedents can buttress this submission. In *Rangarajan v. Ram*, the certificate of a National Award-winning film criticizing caste-based affirmative action was revoked by the Madras High Court, which upheld the state government's contention that releasing the film would lead to violence and undermine state security.⁴⁸⁸ At the time, low-caste groups had held demonstrations against the film. The Supreme Court, however, reversed the High Court verdict and held that "[t]he State cannot plead its inability to handle the hostile audience . . . Freedom of expression . . . cannot be held to ransom, by an intolerant group of people."⁴⁸⁹ The Court also quoted Meiklejohn and observed that "conflicting views may be expressed, must be expressed, not because they are valid, but because they are relevant."⁴⁹⁰ The Supreme Court's views, along with Meiklejohn's words, were quoted with approval by the Calcutta High Court in *Bhadra v. State of West Bengal*.⁴⁹¹ In this case, the High Court struck down a ban imposed on a book

485. *GW v. An Immigration Officer, Heathrow* [2009] UKAIT 00050 ¶ 5.

486. *See id.*

487. *Id.* ¶¶ 55–56.

488. *Rangarajan v. Ram*, (1989) 2 S.C.R. 204, ¶¶ 2, 5.

489. *Id.* ¶¶ 48, 50.

490. *Id.* ¶ 39 (quoting ALEXANDER MEIKLEJOHN, *POLITICAL FREEDOM* 27 (1960)).

491. (2005) 4 C.H.N. 601, ¶¶ 12.7–12.8.

criticizing certain aspects of Islam, written by the exiled Bangladeshi feminist Taslima Nasreen.⁴⁹²

Alternatively, opponents of *Fitna* can argue that in *Rangarajan*, the Supreme Court did give the state a certain margin of appreciation in matters of political censorship by saying:

Our commitment to freedom of expression demands that it cannot be suppressed unless the situations created by allowing the freedom are pressing and the community interest is endangered. The anticipated danger should not be remote, conjectural or far fetched. It should have [a] proximate and direct nexus with the expression In other words, the expression should be inseparably locked up with the action contemplated like the equivalent of a "spark in a powder keg."⁴⁹³

Arguably, there is a subtle but important distinction between the dicta in *Brandenburg* and *Rangarajan*. In the former case, the U.S. Court held that the speech in question must itself be directed towards promoting lawlessness. But in the latter case, the Indian Court did not qualify censorship by referring to the intention of the speaker. Even a well-meaning speaker who does not advocate violence may be censored. Moreover, the endangerment of community interest does not necessarily equate to the endangerment of public order. Hurting religious sentiments can also run against the community interest.

Unlike the United Kingdom, communal violence and religious zealotry are on the rise in India. As the Delhi High Court observed in a case involving a famous artist: "These days unfortunately some people seem to be perpetually on a short fuse, and are willing to protest often violently, about anything under the sun on the ground that a book or painting or film etc. has 'hurt the sentiments' of their community."⁴⁹⁴ During the Danish cartoon controversy, some Muslim groups

492. *Id.* ¶¶ 2, 105.

493. (1989) 2 S.C.R. 204, ¶ 42.

494. *Hussain v. Pandey*, (2008) Cri. L.J. 4107 (Del.) ¶117. The Court quashed an arrest warrant issued against Maqbool Fida Hussain, for allegedly hurting Hindu sentiments by making "obscene" nude paintings of goddesses. *Id.* at ¶121.

in India held violent protests.⁴⁹⁵ Thus, there is at least an arguable case for censoring *Fitna*—or a similar cinematic tirade against Hindus or Christians—in India because of a proximate and direct chance of community interests being endangered if it is released. One can only hope that, in such tricky cases, filmmakers would generally receive the benefit of the doubt.

Nonetheless, practically all the precedents of film censorship given in this paper involved the censorship of non-inflammatory speech. While many Western democracies would think twice before allowing the release of a film like *Fitna*, none would ever contemplate censoring content of the type that the CBFC has tried to suppress. Therefore, the immediate need is to ensure that legitimate, non-inflammatory political criticism—which a large section of the Indian public is already anyway exposed to on news channels—is first permitted.

VIII. CONCLUSION

The Cinematograph Act is riddled with colonial and statist traces that encourage political censorship. These anachronisms are incompatible with the spirit of the Indian Constitution, which was inspired by the Western liberal belief that political speech must not be suppressed. Indian courts, by adopting the functionalist-liberal ideology of Mill and Meiklejohn, have emphasized the need to allow free and frank criticism of the state—the “counter-view,” as the Bombay High Court described it in Anand Patwardhan’s case.⁴⁹⁶ Political censorship not only restricts the artistic freedom of Indian filmmakers, but also inhibits their chances of catering to international audiences that would pay to watch political films about other countries. But what about the impact of political censorship on citizens? “You take somebody that cries their goddam eyes out over phony stuff in the movies, and nine times out of ten they’re mean bastards at heart.”⁴⁹⁷ Yet, as the RDB Effect demonstrates, a sensitive minority of the populace

495. See, e.g., *Friday Riot Rocks City*, TIMES OF INDIA (New Delhi), Feb. 18, 2006, <http://timesofindia.indiatimes.com/city/hyderabad/Friday-riot-rocks-city/articleshow/1419510.cms>.

496. *Patwardhan v. Cent. Bd. Film Certification*, (2003) 5 Bom. C.R. 58, ¶ 32.

497. J.D. SALINGER, *THE CATCHER IN THE RYE* 140 (Little, Brown & Co. 1991) (1951).

can imbibe political messages from films and effect social change. In a country where several millions of people are passionate about cinema, even a small minority adds up to a numerically large number. Many evils ail India. If Indian filmmakers are allowed to discuss these evils boldly, they can surely help cure some of them—and earn a little extra on the side.