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Deconstructing the Role of Film Censorship, as a Constraint on Free Speech

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ABSTRACT

This paper attempts to illustrate how film censorship as a practice, hampers the 'free' usage of the right to free speech and expression under Article 19(1)(a) of the Indian Constitution. To undertake this research objective, reliance has been placed on the judiciary's track record in handling censorship cases. The findings of this paper show that even while the judiciary has recognised that cinema falls under the ambit of Article 19(1)(a), it has not always been proactive in advocating in favour of the right to free speech and in fact, has often justified censorship by giving certain reasons, which nevertheless seem problematic. When the judiciary takes such steps, it not only cripples the right to free speech and expression but also frightens and raises inhibitions in the minds of the citizens, and thereby giving rise to consequences. Therefore, by using judicial pronouncements from various landmark judgements, this paper highlights that right to free speech in censorship cases has not been a value dear to judiciary as it has more often than not, favoured censorship, thereby showing how censorship acts as a constraint in being able to freely exercise right to free speech. Further, the paper also unveils the ramifications of such actions of the judiciary alongside discussing some of the recent debates on film censorship and the right to free speech.

Keywords – Film Censorship, Free Speech, Constitutional Rights, Censorship Board, Judiciary

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INTRODUCTION

The freedom to express and speak one's mind out is the cornerstone of a democratic nation. Right from Mahatma Gandhi's non-violence period, expressing oneself through the medium of writing and speaking has been the set trajectory in raising peaceful debates and dialogues². Article 19(1)(a) of the Indian Constitution³ recognises the right to freedom of speech and expression as a fundamental right. Nevertheless, unlike the U.S. constitution, the Indian constitution does not guarantee free speech as an absolute right⁴ and imposes definite restrictions as enlisted under Article 19(2)⁵.

Cinema as a platform has been used as an artistic tool by many to express their views and, hence, is construed to be under the ambit of Article 19(1)(a)⁶. However, this mode of expression has not been free of regulations and interventions. The Central Board for Film Certification, censors and certifies films as per the provisions envisaged under the Cinematograph Act, 1952⁷.

The existence of censorship as a practice implies the denial of freedom of speech and expression. To censor something in its literal sense means to obstruct and regulate what one can put forth in the public sphere⁸. Sections like 5(b)(1) of the Cinematograph Act⁹ and the guidelines therein empower the authorities to occlude and decide what content reaches the

² Pradyumna. K. Tripathi, Free Speech In the Indian Constitution, Vol. 67, Background and Prospect The Yale Law Journal. 384, 391 (1958).

³ India Const. art 19, cl. (1)(a)- All citizens shall have the right to freedom of speech and expression. (The term Article in this paper refers to Articles of the Indian Constitution)

⁴ LAWRENCE. LIANG, FREE SPEECH AND EXPRESSION: THE OXFORD HANDBOOK OF THE INDIAN CONSTITUTION, 842, (Sujit Choudary et al. eds., Oxford University Press, 2016).

⁵ India Const. art 19, cl. (2)- Nothing in sub clause (a) of clause (1) shall affect the operation of any existing law, or prevent the State from making any law, in so far as such law imposes reasonable restrictions on the exercise of the right conferred by the said sub clause in the interests of the sovereignty and integrity of India, the security of the State, friendly relations with foreign States, public order, decency or morality or in relation to contempt of court, defamation or incitement to an offence.

⁶ Satyam. Rathore, A Critical Overview of Censorship in Indian Cinema In The Light of Role of CBFC, Bharati Law Review. 218, 219 (2016).

⁷ The Cinematograph Act, 1952, No. 37, Acts of Parliament, 1952 (India).

⁸ Shameek. Sen, Right To Free Speech and Censorship: A Jurisprudential Analysis, Vol. 56, No. 2, Journal of the Indian Law Institute. 175, 176 (2014).

⁹ The Cinematograph Act, 1952, §. 5(b)(1), No. 37, Acts of Parliament, 1952 (India). As per the section, if the authorities think the film is offending any of the grounds mentioned therein (which are same as the ones under Article 19(2) of the Indian Constitution), then the board can abstain from certifying the film and order cuts/modifications.

public space. This capacity of the government has resulted in choking free speech in various instances, which will further be discussed throughout this essay. Movies like *Aandhi* (1975), *Fire* (1996), *Indu Sarkar* (2017), *Mohalla Aisi* (2018), etc., have endured immense criticism and censored for them for their eye-opening and thought-provoking topics such as patriarchy, relationships outside marriage/outside binary and pillorying the ruling party. Incidents like these encourage citizens to seek judicial intervention.

The judiciary's track record in dealing with censorship grievances shows that they have not always been champions of free speech. The Supreme Court overtly held that motion pictures ought to be censored, given their abilities to influence the audience¹⁰. The way the judiciary has answered the question of whether censorship is a constraint on free speech is worrisome. The Apex Court's pronouncements, in a few landmark cases (such as *K.A. Abbas*¹¹, *Rangarajan*¹², *Bobby International*¹³), have made it clear that freedom of speech and expression has not always been a value dear to the judiciary, which would be clear from the discussion in this essay. Such actions of judiciary, along with provisions like s. 5(b)(1) of the Cinematograph Act¹⁴ and Article 19(2) of the Indian Constitution do not just undermine the right to freedom of speech and expression, but also subdue and intimidate citizens from exercising their rights freely causing a "chilling effect"¹⁵. Therefore, this essay attempts to deconstruct and highlight the judiciary's stance on film censorship in light of freedom of speech and expression and its chilling effect, alongside discussing some of the recent debates on film censorship and right to free speech.

¹⁰ K.A. Abbas v. Union of India, MANU/SC/0053/1970 (India) at paragraph 21 [hereinafter to be referred as *K.A. Abbas*].

¹¹ K.A. Abbas v. Union of India, MANU/SC/0053/1970 (India).

¹² S. Rangarajan and Ors v. P. Jagjevan Ram and Ors, MANU/SC/0475/1989 (India) [hereinafter to be referred as *S.Rangarajan*].

¹³ Bobby Art International and Ors v. Om Paal Singh Hoon, MANU/SC/0466/1996 (India) [hereinafter to be referred as *Bobby Art International*].

¹⁴ The Cinematograph Act, 1952, §. 5(b)(1), No. 37, Acts of Parliament, 1952 (India).

¹⁵ LIANG, *Supra* Note 3, at 859.

(When there is any inhibition or a sense of fear that intimidates people from exercising their right freely, it is referred to as 'chilling effect'.)

FREE SPEECH AND EXPRESSION IN CENSORSHIP CASES- NOT A VALUE DEAR TO THE JUDICIARY

Film censorship in India can be traced back to the colonial era, where the British, by establishing a censorship board, heavily censored films with themes of independence; the colonisers feared the impact of this new medium as it was a convenient platform to convey reasoned judgments and opinions¹⁶. Flowing from this, even independent India under the Nehru regime believed that films were a ‘powerful influence’ in the society, hence must be regulated to keep the social morals intact¹⁷ and films which convey societal values must be encouraged as they can help in fostering the nation-building process¹⁸.

This perspective seems to have contributed to assessing the legal position of censorship with respect to free speech, as is inferable from the landmark precedent of *K.A Abbas*¹⁹. Upon being rejected a ‘U’ certificate and receiving an order of deletion of scenes showing prostitution and immoral procurement of women, the decision was challenged by the petitioner, stating prior restraint in the form of censorship as incompatible with Article 19(1)(a). The Apex Court, after the petitioner had quoted *Kingsley International Pictures Corp.*²⁰, where it was held that prior restraint in the form of censorship is unconstitutional²¹, deemed the position of prior restraint in the form of censorship to be not unconstitutional in India, given the requirements to meet ‘social interest’ in India.

Censorship as a practice seems anti-democratic as it puts a restraint on what one gets to express, thereby regulating one’s free speech. A perusal of the concept of censorship makes us realise how, on one hand, citizens are constitutionally granted the right of free speech and expression, but at the same time, conventions like censorship regulate and intervene with it. Courts from

¹⁶ Someswar Bhowmik, *From Coercion to Power Relations: Film Censorship in Post-Colonial India*, 38(30), Economic and Political Weekly 3148, 3148-3149 (2003).

¹⁷ Camille. Deprez, *The Films Divisions of India, 1948-1964: The Early Days and the Influence of the British Documentary Film Tradition*, Vol. No 25(3), Indiana University Press 149, 150-155 (2013).

¹⁸ Cherian. V.K., *Jawaharlal Nehru and The Rise of Indian Cinema*, SAHAPEDIA (July 12th, 2019), <https://www.sahapedia.org/jawaharlal-nehru-and-rise-indian-cinema>.

¹⁹ *K.A Abbas v. Union of India*, MANU/SC/0053/1970 (India).

²⁰ *Kingsley international pictures corp v. Regents* (1959)360 U.S. 684 (U.S.A).

²¹ *K.A Abbas v. Union of India*, MANU/SC/0053/1970 (India) at Paragraph 28.

time to time, justifying censorship, have stated that what is displayed in public must uphold public order and morality²². Such pronouncements are bothersome because, when the court attempts to obstruct a citizen from exercising their right to free speech right for it not being in accordance with the societal morals, the citizen is deprived of ‘freely’ exercising their right, thereby going against the very idea of guaranteeing such a right.

At times, it seems as if courts have analysed censorship cases not just based on what is given in the law, but also as per their subjective standpoints, which is disappointing. In *S. Rangarajan*²³, when a film on caste-reservation was denied grant of ‘U’ certificate and was ordered cuts, it was accused of calling Dr. Ambedkar anti-egalitarian²⁴. Even though the court, in this case, ruled in favour of free speech, the reasoning given by the court implies that the favoured ratio could have been due to the mere fortune of the petitioner, as the Apex court found the comment on Dr. Ambedkar to be untrue. Nevertheless, it went on to say that had the comment existed, it would have been imperative to censor that portion, as in the ‘court’s opinion’, no person worked as relentlessly as him towards equality²⁵. This statement is worrisome because it is not under the dominion of the court to decide what is true or not based on its opinion and “use the force of law to mould citizen’s expression to match their interpretation on a certain topic”²⁶. The court further mentioned that our society’s foundation is based on our culture and values, and hence , any speech capable to disturb it must be regulated. Such remarks are not just problematic because they compromise autonomous freedom for fulfilling collective social interest but also suppress one’s right to disseminate their views on vital issues of the country in the name of social interest.

When aggrieved artistes have approached courts (as seen in *K.A. Abbas* and *S.Rangarajan*), it can be noticed that they have given substantial consideration to determining whether the content put forth by the individual is socially sound and matches the opinion of the majority section of the society before granting the individual their right to free speech even while such

²²Bruce. M. Boyd, Film Censorship In India : A "Reasonable Restriction" On Freedom Of Speech And Expression, 14(4), Journal of the Indian Law Institute. 501, 524 (1972).

²³ S. Rangarajan and Ors v. P. Jagjevan Ram and Ors, MANU/SC/0475/1989 (India).

²⁴ S. Rangarajan and Ors v. P. Jagjevan Ram and Ors, MANU/SC/0475/1989 (India) at Paragraph 27.

²⁵GAUTAM. BHATIA, OFFEND, SHOCK, OR DISTURB: FREE SPEECH UNDER THE INDIAN CONSTITUTION, 186 (Oxford University Press, 2016).

²⁶*Id.*

a right is a fundamental one. For instance, in cases like *Ramesh v. Union of India*²⁷ and *Bobby Art International*²⁸, the materials in contention were accused of single-minded reproduction of catastrophic historical riots and obscenity respectively; the Supreme Court stated that the former film was fit for public manifestation as it contained a ‘socially beneficial message’ and the latter was worthy of an ‘A’ certificate without censoring all the parts recommended for censorship, as the depiction of certain scenes was necessary to convey a socially valuable message, and hence, was not against public morality²⁹. Even when the ruling favoured the film, the reasonings used to arrive at these conclusions still fundamentally supported censorship, hence are troublesome as such a stance by the court gives the impression that a citizen’s right to speech is not of utmost importance to the judiciary because it has been constantly subjected to what is ‘acceptable’ and ‘beneficial’ to the people at large.

From insight into these landmark judgements, one can clearly observe an akin pattern in the court’s response to interpreting free speech in censorship cases. Irrespective of whether the issue is obscenity as in the case of *Bobby Art International*, religion/caste as in *S.Rangarajan* or related to violence as in the case of *Ramesh v. UOI*, etc., as long as the content does not intervene with certain set regimes such as social acceptability/decency, majority opinion, political parties/figures, etc., it gets the nod from the authorities. To illustrate, in the case of *K.A. Abbas*, immoral procurement of women was unacceptable as it infringed with social acceptability; in *Bobby Art International*, obscenity is objected to by a majority of people in India and is therefore against the majority opinion. Lastly, as witnessed in *S.Rangarajan*, speaking ill about Dr Ambedkar was considered against the image of a political figure and what was considered to be the truth by a large group of people and, hence, was a problem to the authorities. Therefore, any speech or expression that offends the set practices, norms, or beliefs of the society, cannot find a place in this ‘democratic’ nation, as deducible from the above discussion.

²⁷ Ramesh. S/O Chotalal Dalal v. Union Of India & Ors, MANU/SC/0404/1988 (India) at Paragraph 4-7.

²⁸ Bobby Art International and Ors v. Om Paal Singh Hoon, MANU/SC/0466/1996 (India) at Paragraph 3. (A film depicting the tragic events of social isolation and sexual harassment faced by Phoolan Devi right from a tender age, was denied ‘U’ certificate on the grounds that it showed too much sexual violence and immoral portrayal of womanhood; and was ordered certain cuts.)

²⁹ BHATIA, *Supra* note 26, at 181.

II) ‘Chilling effect’ and its impact on exercising freedom of speech and expression:

The judiciary has showcased that a citizen’s autonomous speech and expression is not a constitutional value that it considers at the top of its priority list, as inferred from a perusal of the leading judgements above. The problems with such decisions do not just end at the fact that they are refraining citizens from freely enforcing a right that is guaranteed by the constitution, but also discourage and intimidate people from indulging in free speech in the future, thereby give rise to the chilling effect.

The judgements passed by the courts do not just have a binding effect at that particular instance but make the citizens realise the possible outcome of similar cases in the future. This indeed causes people to abstain from utilising their rights freely if they feel that it may not be in line with the judicial decisions, therefore causes inhibitions. Revisiting *Bobby Art International*³⁰, prominently known as the *Bandit Queen* case, the film portraying the unfortunate events of Phoolan Devi was ordered cuts and denied a ‘U’ certificate by the Central Board for Film Certification. The supreme court ordered a grant of ‘A’ certificate, provided the cuts were made³¹. Judgements like these make a citizen feel, as if expressing their views on traumatic events, could also subject them to state’s and judiciary’s scrutiny. Such judicial actions would deter citizens from exercising their free speech as it creates a sense of uncertainty and scepticism. The impact of such deeds and the chilling effect caused therein could lead to ‘self-censorship’ by citizens as they might refrain from making any content that could potentially be censored.

In *Mushtaq Tarani*³², a renowned film called ‘*Black Friday*’ which depicted the 1993 Bombay blasts, was asked by the Central Board for Film Certification to cut specific scenes and put a disclaimer stating that the film was based on a book so that no guilt is imputed on personalities shown in the movie. The claimant filed a petition accusing the film to be derogatory. The Board’s decision was upheld by the Court³³ and the film’s release was stalled till 2007 whereas it was supposed to be released in 2004. The irony being the book used to base the film was in

³⁰ Bobby Art International and Ors v. Om Paal Singh Hoon, MANU/SC/0466/1996 (India).

³¹ Bobby Art International and Ors v. Om Paal Singh Hoon, MANU/SC/0466/1996 (India) at Paragraph 11, 36 & 37.

³² Mushtaq Tarani v. Government of India and Ors, MANU/MH/1614/2005 (India) at Paragraph 1 [Hereinafter to be referred as *Mushtaq Tarani*].

³³ Mushtaq Tarani v. Government of India and Ors, MANU/MH/1614/2005 (India) at Paragraph 66 & 67.

public circulation since 2002³⁴. Such a decision has immense potential to discourage citizens from exercising their right to free speech because one would always be petrified to express their thoughts freely upon realising that even if their film is based on a source that is freely sustaining in the market, the film could be a victim of censorship.

Along with the actions of the judiciary, a provision like “section 5(b)(1) of Cinematograph Act”³⁵ and Article 19(2) of the Indian Constitution also embody the potential of causing a chilling effect due to their restrictive and regulatory nature. The Supreme Court in the case of *Life insurance corp of India*³⁶, asserted that the restrictions of Article 19(2) must be read into s.5(b)(1). S.5(b)(1) provides the authorised person of the Central Board for Film Certification to decide whether a film is violative of any grounds mentioned in Article 19(2) ‘in his opinion’. The term ‘in his opinion’ suggests that the basis for certifying a film is dependent on an authorised person’s ‘subjectivity’ and if in his opinion, a film requires cuts/modifications, such orders can be made, hence, causes concerns. This wide discretion that vests with the authorities frighten citizens from using their rights freely as the law provides for the govt’s subjectivity to suppress his/her views.

Even when restrictions mentioned under Article 19(2) are to be construed reasonably, the possibility of one’s view being repressed if found to be against any grounds can itself, cause the chilling effect. Additionally, by revisiting the ‘social interest’ argument in *K.A. Abbas*, where the court held censorship to be constitutional as it aided in meeting the social interest of the society, which is a vital factor in determining public order, which indeed is a reasonable restraint under Article 19(2). The movie merely opined how the procurement of women happens in certain parts of the country. Even when subject matters that are important to our society are this susceptible to censorship on grounds mentioned in Article 19(2), it could have the potential of making one feel like the restrictions have a broad scope, thereby landing the citizens in bewilderment and eventually make them startle. Further, even in *S. Rangarajan*, the court mentioned that freedom of speech and reasonable restraints under Article 19(2) cannot be

³⁴ Subhradipta. Sarkar, Right To Free Speech In a Censored Democracy, (1), Sports and Entertainment Law Journal, 62, 69 (2009).

³⁵ The Cinematograph Act, 1952, §. 5(b)(1), No. 37, Acts of Parliament, 1952 (India).

³⁶ *Life Insurance Corp of India and Union of India (UOI) and Ors v. Manubhai. D. Shah and Cinemart Foundation*, MANU/SC/0032/1993 (India) at Paragraph 16.

balanced as if they are of equal weight and that free speech would be suppressed if in contravention with community interests³⁷. This statement clearly puts societal interest in a superior position, which thereby undermines an individual's free speech and expression. This indeed could have the effect of daunting citizens from exercising their right freely as now it is even more explicit that their speech could be suppressed if found to be violative of these overbroad provisions.

Thus, the narrow interpretation of freedom to speech and expression by judiciary alongside the levy given to the state in the form of provision such as s.5(b)(1), have had a cumulative effect of causing chilling effect, thereby being counter-productive to the idea of free speech and expression.

RECENT DEBATES ON FREE SPEECH AND FILM CENSORSHIP

By placing reliance on the above discussion, it is limpid that the judiciary has not been the best advocate for free speech. The illiberal and conservative approach taken by courts in certain cases seems to have set bad precedents in free speech debates, as recent judgements and debates mirror them.

When Amol Palekar, a renowned filmmaker, in 2019, filed a writ petition in the Apex Court³⁸ questioning the constitutionality of censorship and suggesting the demise of censorship, it ignited a lot of debates and controversies³⁹. He claimed censorship as a concept to envisage unwarranted and unfair restrictions on free speech and expression. While challenging certain provisions like 5(b) of the Cinematograph Act, 1952⁴⁰, he stated that these provisions promote unfair and unwarranted restrictions on filmmakers' free speech and expression. In reply to this petition, the Central Board for Film Certification stated that India only has three ratings ('U', 'A', 'U/A') due to which it becomes difficult to not order cuts for issuance of certificates⁴¹.

³⁷ S. Rangarajan and Ors v. P. Jagjevan Ram and Ors, MANU/SC/0475/1989 (India) at paragraph 42.

³⁸ Amol Palekar v. union of India and Anr, Writ petition (Civil) No. 187 of 2017 (India).

³⁹ *Amol Palekar's Petition Challenges The CBFC's Structure*, TIMES OF INDIA (April. 17, 2017) <https://timesofindia.indiatimes.com/entertainment/marathi/movies/news/amol-palekar-detailed-cbfc-petition/articleshow/58220731.cms?from=mdr>.

⁴⁰ Amol Palekar v. union of India and Anr, Writ petition (Civil) No. 187 of 2017 (India) at Paragraph 20.

⁴¹ Garima Mishra, *Supreme Court seeks Centre's Reply on Amol Palekar Petition Against Pre-censorship*, THE INDIAN EXPRESS, (April. 18 2017), <https://indianexpress.com/article/india/supreme-court-seeks-centres-reply-on-amol-palekar-petition-against-pre-censorship-4617246/>.

Such reasoning by the Central Board seems implausible and outrageous because controlling a citizen's expression in the name of faulty procedures/mechanisms is incompatible with the morals of democracy.

There does not seem to be a notable difference in the way free speech has been treated in censorship cases from the precedents discussed in the recent judgements. *Sudhirbhai Mishra v. CBFC*⁴² is another recent incident where a citizen's free speech has yet again been regulated. The contented film called '*Lipstick Under My Burkha*', was rejected a certificate on the grounds of being 'lady oriented' and against the morals of our society. The Film Appellate Tribunal ordered for censoring certain scenes involving intimacy and cuss words, thereafter, making it eligible for an 'A' certificate⁴³. The resulting implication is that by demurring against such subject matters, the court is iterating that women must not transgress their set boundaries and that any speech or expression that tries to show women and their desires in a liberal sense shall be suppressed.

Furthermore, in the celebrated judgement of the film '*Jolly llb 2*'⁴⁴, the facts suggest that a writ petition was filed by the claimant against the film, as he was hurt with the satirical depiction of lawyers and judiciary, hence contempt of court was claimed. It is ironic how the High court issued four cuts even when the film was cleared for public exhibition. The fact that the film was cleared by the Central Board for Film Certification without any order for cuts is indicative of the film not attracting the restriction of contempt of court⁴⁵. This latest judgement is a classic example of how judicial decisions have an enormous potential of causing the chilling effect. The aggrieved petitioners who were intending to file an appeal in the Supreme court decided to not proceed further and instead take the order to make the cuts⁴⁶. The narrow-minded approach adopted by the High court seems to have been the reason for such a move, as they could perhaps have sensed an eventual defeat because of the High court's skewed judgement.

⁴² *Sudhirbhai Mishra v. CBFC*, F.No. 2/4/2017-FCAT (India) [hereinafter to be referred as *Sudhirbhai Mishra*].

⁴³ *Sudhirbhai Mishra v. CBFC*, F.No. 2/4/2017-FCAT (India) at Paragraph 15.

⁴⁴ *Ajaykumar Shankarrao Waghmare v. UOI*, PIL No. 11 of 2017 (India) at Paragraph 2-5.

⁴⁵ *Ajaykumar Shankarrao Waghmare v. UOI*, PIL No. 11 of 2017 (India) at Paragraph 4.

⁴⁶ Gautam. Bhatia, *Judicial Censorship and Judicial Evasion: The Depressing Story of 'Jolly LLb 2'*, *INSCONLAWPHIL* (May. 2, 2019) <https://indconlawphil.wordpress.com/tag/judicial-censorship/>.

CONCLUSION

Therefore, the contention that this essay posits is that censorship acts as a limit setter on one's right to free speech and expression. This is due to its restrictive nature wherein it dictates an individual as to what can be expressed in the public domain. In the judgements such as *K.A. Abbas*, *S.Rangarajan*, *Bobby Art International*, *Sudhirbhai Mishra* and the other cases discussed, the court was constantly seen to be curtailing the right to free speech of the artistes on various reasons, rather than giving more importance to protecting the individual's right. All in all, the take-away one can seek upon perusing these judicial pronouncements is that the judiciary has not been a champion of upholding free speech most of the times even when it has been enshrined as a fundamental right in the Constitution. Allowing the usage of the right under Article 19(1)(a) in a hassle-free manner is not only important because it is constitutionally guaranteed, but also because it promotes dissent which can lead to constructive criticism, thereby facilitating efficient functioning of the nation. This kind of suppression of artistes' right to free speech and expression in the name of censorship has the potential of causing a chilling effect. The aftermath of a chilling effect can be harmful to ensuring the democratic nature of a nation as it strips citizens from voicing their opinions. From the examination of the recent debates, it seems as if even after so many years of independence, we are still stuck with the mind-set that a film must be of some societal benefit as postulated by the Nehruvian government. In light of the above discussion, it can be said that there is a need for a more liberal approach towards right to free speech in film censorship cases because the very nature of democracy promotes open discussion and expressions, artistes should be given more liberty by the Central Board for Film Certification and judiciary to express themselves. However, whether there this would actually happen, remains an open question while most of us may wish for it.