

**Playing With The Cultural Thin Skin: An Interrelationship between History, Censorship,
and Video Games in India and the United States of America**

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I. Introduction

In the last few decades, technological developments have transformed our world at an unprecedented scale. This technological renaissance has contributed to different sectors in our daily lives, such as industry, communications, and entertainment. The advent of the Internet has overhauled the way we consume and share knowledge. Entertainment sector, in particular, has benefitted significantly from these developments, making it possible for generation Y to stream high definition (“HD”) content or play HD games on smart devices in their pockets. In the gaming sector (not limited to online gambling), easier access to technology has enabled developers to produce video games (“VG”) with more detailed narratives and life like expressions. For instance, in VGs like Valiant Heart and Tropico 3 one experiences detailed journeys through landmark historical events.¹

While the United States’ (“US”) judiciary has thoroughly considered several Freedom of Speech and Expression (“Free Speech”) issues in VG, the discourse has primarily been dominated by concerns around obscenity. On the eastern end, India's VG sector is expected to reach US 1 billion in 2021.² Despite the exponential growth, there has barely been any legislation to regulate or discussions before the Indian judiciary regarding the legal challenges this industry presents. As virtual reality (“VR”) breaks the physical barriers between fantasy and reality, it is pivotal at this juncture to explore the limits to which certain experiences that have done down as dark days can be glorified in VGs. This paper analyzes the legal issues which may arise in India and the US with VGs based on “disturbing” historical events such as the holocaust, 9/11 twin-tower attacks, the 1984 operation Blue Star³. It further discusses the legal challenges presented by gaming content that use famous historical personalities as avatars (protagonists and villains). Since the

¹ *Origins: Current events in international perspective* (Dec 12, 2017, 11:36 PM), <http://origins.osu.edu/connecting-history/top-ten-origins-historically-themed-video-games>.

² KPMG, *Online Gaming in India: Reaching a new pinnacle*, A study by KPMG in India and Google, (December 06, 2017, 03:03 PM), <https://assets.kpmg.com/content/dam/kpmg/in/pdf/2017/05/online-gaming.pdf>.

³ *What is operation Blue Star?* THE INDIAN EXPRESS (December 13, 2017, 12:54 PM), <http://indianexpress.com/article/what-is/what-is-operation-blue-star/>.

jurisprudence specific to history and folklore vis-à-vis video games is underdeveloped, the paper will consider other epistemic avenues, including the courts' deliberations about other categories of literary work and media. It is fascinating to explore how the existing Free Speech discourse would treat such VGs, but on the other end, it is equally crucial to introspect the social impact of such games and how they "ought to be" treated by the society.

The paper proceeds in the following manner: the second section briefly discusses the Free Speech vis-à-vis VGs in the US. For analysis of history-themed based VGs, certain hypothetical games have been considered in the section. Part III recounts the development of Free Speech in India, it's differential treatment of historically respected personalities and how it may apply to gaming content. For analysis of history-based VGs in India, the paper delves into certain external considerations specific to India and how they may impact the video games' content development. While fictionalizing history for novels and motion pictures has been a common phenomenon, there's no certainty if the same standards of artistic liberty should apply to VGs as well. Sceptics contend that VGs being more immersive and interactive tend to promote violent tendencies. However, there are research backed studies to refute these claims as highlighted in the paper. The concluding section consolidates the potential challenges to the evolving India's Free Speech jurisprudence and nascent gaming industry, particularly for developing content driven VGs and how such challenges can be appropriately addressed without hampering this industry's growth.

II. Gamification in the United States of America

a. Free Speech in the US.

The First amendment ("**1st amendment**") of the US Constitution guarantees Free Speech to US citizens.⁴ US Judiciary has been inclined towards providing broad 1st amendment protection to any expression irrespective of its societal value, and rejects the notion that protection is limited only to

⁴ US Constitution 1st Amendment states that Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof, or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble, and to petition the government for a redress of grievances. <http://constitutionus.com/>.

the exposition of ideas. The innovation of new media forms has not deterred the courts to limit this protection to traditional media. US judiciary has observed that video games also qualify for 1st amendment protection as they communicate ideas and social messages utilizing several familiar literary devices (characters, dialogues, plots, and music), along with certain distinctive features of the medium such as players.⁵ Although not explicitly mentioned in the US Constitution, the courts have read “*permitted restrictions*” on Free Speech for certain limited areas, prevention of which do not raise any constitutional problems.⁶ These areas include content that is lewd, obscene,⁷ profane, and fighting words⁸ - those which by their very utterance inflict injury or tend to incite an immediate breach of peace. Restrictions under these categories are permitted only if they pass the strict scrutiny standard of the courts. Certain protected speech can also be limited via time, place, and manner restrictions provided it presents a “clear and present danger” of imminent lawless action.⁹ The high threshold of restrictions’ standard suggests that courts do not condone any form of restriction or censorship in the interests of “morality”¹⁰ or because certain speech is too harmful to be tolerated.¹¹ Unlike certain European nations which criminalize certain content-specific speech such as denial of holocaust and genocides (prominently the genocide of Armenians)¹², 1st amendment leans more towards a “content-agnostic” approach and does not restrict publication of controversial content.

Based on the above overview, the use of historical personalities and events in violent video games has been discussed below. For this analysis, the following VG illustration is considered.

A video game developer creates a game without seeking any prior permissions from any particular person, next of kin, or a governmental authority. The game’s

⁵ Brown v. Entertainment Merchants, 564 U.S. 786 (2011).

⁶ Chaplinsky v. New Hampshire, 315 U.S. 568.

⁷ Roth v. United States, 354, U.S., 476 (1957). It lays down the *standard for judging obscenity, adequate to withstand the charge of constitutional infirmity. As per the Roth test, it needs to be analyzed that to the average person, applying contemporary community standards, the dominant theme of the material, taken as a whole, appeals to prurient interest.*”

⁸ *Supra* N. 6.

⁹ Brandenburg v. Ohio, 395, U.S. 444 (1969), *See also*, Virginia v. Black, 538, U.S. 343 (2003).

¹⁰ 360 U.S. 684. 698, 3 L. ed. 2d. 1512. 1522.

¹¹ *Ibid*.

¹² <https://scholarlycommons.law.northwestern.edu/cgi/viewcontent.cgi?referer=https://www.google.com/&httpsredir=1&article=1172&context=njihr>.

narrative requires the player to create an emergency like situation in different cities of the US with firearms and ultimately assassinate the President to win. The game recreates several historical events and virtual avatars of former Presidents. One such event includes the recreation of President John F. Kennedy's assassination on a motorcade as displayed in the game JFK Reloaded, requiring the player to shoot the President Kennedy and Governor John Connally. The game also allows the player to use any other political leaders' avatars including the incumbent President or that of extremists like Osama Bin Laden, as the protagonist for the game.

Prima Facie such a game could raise several concerns ranging from the 1st amendment concerns about fictionalizing the political leaders, publicity rights of living people (or even deceased¹³), and portrayal of violence in video games against public figures. These concerns have been discussed below.

b. Association of violence with public representatives in Video Games.

Traditionally, we have seen that creative works have made prominent use of deceased celebrities as main characters. The novel “**Blonde**” fictionalizes Marilyn Monroe in its plot. In the gaming industry too, there have been several VGs that utilize historical footage and real-life characters. Games like “**Call of Duty**” have featured public personalities like President Lincoln, Fidel Castro, and David Petraeus.¹⁴ However, there is still a likelihood that the use of avatars similar to political leaders in the gameplay and portraying them as extremists contrary to their public image may lead to claims regarding violation of the right to publicity and tort claims such as defamation. To contextualize the discussion further, it needs to be noted that publicity rights in the US are state subject with respective different laws; however, 1st Amendment is generally used as a defense to

¹³ This is a state subject and may vary as per different state laws.

¹⁴ Catherine E. Scoichet, *the Judge, dismisses ex-dictator Manuel Noriega's 'Call of Duty' lawsuit*, CNN (December 11, 2017, 05:45 AM), <http://www.cnn.com/2014/10/28/tech/gaming-gadgets/manuel-noriega-call-of-duty-lawsuit/index.html>.

such claims throughout the country. Hence, courts have been divergent in their opinions regarding fictionalizing of celebrities' in VGs and other forms of media. In the case of *Martin Luther King Centre for Social Change*¹⁵, it was held that distribution of unauthorized busts of Martin Luther King could be barred, whereas in *ETW Corp*¹⁶ case, it held that the prints depicting Tigerwoods were protected under the 1st amendment due to the use of certain additional images. While analyzing the claims, the court primarily applied the "transformative use test". This test has been discussed in detail later. Other crucial judgments concerning the use of such personalities have been discussed below.

i. *Kirby v. Sega of America*¹⁷: In the given case, a game involving a reporter assigned to investigate the invasion of earth was in focus. The plaintiff alleged that the reporter's avatar was based on her identity, and such unauthorized use of her identity and likeness was misappropriated. While analyzing the claims, the court observed that Free Speech protection extended to all forms of expression, including written and spoken words (facts or fiction), video games, whether sold for profit or not.

"Free speech protection is available if the new work contains 'significant' transformative elements, i.e., it adds significant creative elements transforming it into something more than a mere celebrity likeness or imitation."

While the court agreed for the 1st amendment protection, it *inter alia* emphasized that the avatar was not a literal depiction of the plaintiff due to the different features accorded and different roles assigned to it in the VG. On the contrary, certain courts have refused to grant Free Speech Protection for exact depiction as sought in the games hypothetical as highlighted below.

ii. *No Doubt v. Activision Publishing case*¹⁸: The given case involved a game called "Band Hero", which allowed avatars of actual rock stars for a simulated performance. The band- No

¹⁵ Martin Luther King Jr. Centre for Social Change v. American Heritage Products, Inc, 250 Ga.135, 296 S.E.2d 697

¹⁶ ETW Corporation v. Jireh Publishing Inc., 332 F.3d 915 (2003)

¹⁷ 144 Cal.App.4th 47

¹⁸ 192 Cal.App.4th 1018

Doubt's members sued the developers for manipulation, for allowing players to play their songs, solo, or with other bands in the VG. The court denied the 1st amendment protection holding that despite several creative elements in the game, the avatars did not transform into anything other than their exact depictions and did exactly what they were known for.¹⁹ Based on the same ratio, in the *Keller v. Electronics Art*²⁰ case, the majority opinion held that the use of Samuel Keller's likeness in the EA's National Collegiate Athletic Association ("NCAA") college football VG did not contain significant transformative elements. His physical characteristics were duplicated and along with him, other players' avatars were placed in the football stadiums which were replicas of the real-life stadiums. It is unclear why the court did not consider taking the entirety of work into consideration, as suggested more convincingly in the dissenting opinion by Justice Thomas. Rather, it opted to deconstruct the transformative test by focusing on just one avatar and ignoring the involvement of other avatars.

Notwithstanding other claims like gravity of moral disturbance, the use of the president and historical events in such a game should most likely warrant the 1st Amendment protection. The use of historical events was specifically considered in *Guglielmelli v. Spelling Goldberg Productions*²¹, where the court observed that the range of Free Speech would be meaningfully reduced if prominent persons in the present and recent past were forbidden topics for the imagination of authors of fiction. While loosely based on true incidents, such a game would qualify as fiction, for it shall involve an emanation of the developer's imagination and perception of the events. The Presidents' use as a protagonist on a mission provides it a fanciful, creative character, extending beyond their literal depiction. Such a feature would contrast these characters from their exact functions performed in real life, thus, differentiating it from the depiction of avatars in No Doubt, NFL, and NCAA.

¹⁹ 192, Cal. App. 4th 1018 (Cal. Ct. App. 2011). Albeit the Court of appeal in the same case rejected the contention that placement of realistic avatars in a game overcomes the 1st amendment protection and held that even literal reproductions of celebrities might be transformed into expressive works based on the context in which the image is placed.

²⁰ 2013 WL 3928293 (C.A.9)

²¹ 25 Cal.3d 860

While it can be argued that the avatars of political leaders will add some marketability and economic value to the game, the “sum and substance” of such games will be placed on creative elements such as the thrill of killing a public leader or creating a public emergency in the country.

The right to publicity claims may not create such a hue and cry which the depiction of the acts of terrorism in a game and its exposure to minors could do in a vulnerable society. A motion against a similar game “Call of Duty” was dismissed for using an avatar of one Manuel Noriega (erstwhile military junta ruler of Panama) in a fictional narrative. However, our hypothetical game could be perceived different as it will reconstruct certain acts of terrorism that actually took place in the US and instilled the feelings of fear in the country for weeks. Over and above, certain sections of the society may raise objections on the grounds that the VG glorifies acts of terrorism by providing an interactive system to virtually assassinate the president and thus, harms the nation.

Motion pictures fictionalizing the 9/11 attacks such as *United 93*, *25th Hour*, or television shows like “Designated Survivor” depicting the assassination of President have been accorded 1st amendment protection. It cannot be said with certainty that similar VGs would also enjoy similar protection or could be restricted under 1st amendment’s “permissible restrictions”. In my view, while the idea of a game depicting such violence may not be favorable to many, it will be difficult to establish a compelling government interest in banning such games.

The Supreme Court of the United States (“**SCOTUS**”) has considered the use of violence in VGs in *Brown v. Entertainment Merchants*²² (“*Brown Case*”). As mentioned above, the government has a very limited power to limit the expression based on content and it cannot add new categories of unprotected speech, which it considers to be too harmful to be tolerated.²³ The court refused the proposition to consider violent speech regulation at par with obscenity.²⁴ Justice Alito and Justice Brayer while delivering the majority opinion refused to acknowledge several research studies highlighting the impact of violent VGs on human behavior.

²² 564 U.S. 786 (2011) (Supra N. 4). (Unless you change).

²³ *United States v. Stevens*, 559 U.S. 460 (2010)

²⁴ *Winters v. United States*, 207 U.S. 564 (1908)

Per the court, such studies did not demonstrate a direct causal link between violent games and harm caused by it to minors. The court also rejected the argument regarding the special problems presented by games due to their interactive nature, on the ground that all literature is interactive.²⁵ Even though the United Nations Security Council, in its resolution 1624, called for treatment of “*incitement of terrorism*” through use of media as a serious criminal offense; the US did not enact any such legislation.²⁶

It is far-fetched to consider that a VG like this could be considered as a tool for “incitement of terrorism”. *Arguendo*, if it is considered to be a kind of criminal advocacy, it will still be protected per the “imminent lawless action” test laid down in *Brandenburg v. Ohio*²⁷. Per this test, a speech can be prohibited if it is “directed at inciting or producing imminent lawless action” and it is “likely to incite or produce such action”. *Prima facie*, the hypothetical game may not meet the threshold as it will be difficult to establish that the purpose behind creating such a game is to provoke an imminent lawless action and that a mere gameplay could do so in the actual world. This approach reaffirms the US's commitment to accord the highest degree of Free Speech rights to its citizens.

In contrast to the US, the Free Speech treatment of such video games may significantly differ in India.

III. Gamification in India

a. Free Speech in India- Overview.

A speech, to reach a broad audience in India, needs to go through multiple hurdles. Not only can it be restricted by the government, but the non-state actors like political parties and vigilante groups also serve as a despotic-censors.²⁸ Threats to theatre owners²⁹, actors, and writers by non-

²⁵ American Amusement Machine Assn. v. Kendrick, 244 F.3d 572, 577 (7th Cir. 2001)

²⁶ KENT ROACH, THE 9/11 EFFECT: COMPARATIVE COUNTER-TERRORISM pg.? (2011).

²⁷ Brandenburg v. Ohio, 395 U.S. 444 (1969)

²⁸ Abhinav Chandrachud, Speech, *Structure and Behavior of the Supreme Court of India*, 25 COLUMBIA JOURNAL OF ASIAN LAW, 224 (2012)

²⁹ Subhradipta Sarkar, *Right to Free Speech in a Censored Democracy*, SPORTS AND ENTERTAINMENT LAW JOURNAL, (2008)

state actors with political parties' implicit participation in submission to the popular sentiment³⁰ has significantly stifled Free Speech in India. To some extent, the Indian judiciary makes efforts to preserve the expression integrity by striking down such executive orders as unconstitutional³¹, dismissing pleas to censor, and mandating the authorities to ensure the maintenance of law and order at the time of exhibition or circulation of speech.³²

Empirical evidence suggests that the apex court, i.e., the Supreme Court of India ("SCI"), has been ambivalent towards speech, harboring neither a clear bias in favor of, nor against speech.³³ While the Indian courts have not discussed the extent of Free Speech protection available to VGs, India's government has also not taken adequate steps to prevent thin-skinned sections, who get offended by VGs, from threatening and causing chilling effects to others' expression rights.

Recently, objections were raised in India and within certain Indian-American dominated regions in the US against the use of names and skins of certain Indian goddesses like Devi and Shiva in VGs "**Overwatch**" and "**Smite**".³⁴ Due to the lack of clarity of content laws' application, game developers exercise self-censorship and withdraw their games from the Indian market. For example, "**The Dragon Age: Inquisition**" was withdrawn in India for having a homosexual character.³⁵ To make things more complicated, the High Court of the State of Gujarat admitted a petition against the game "**Pokémon Go**" for hurting religious sentiments by superimposing augmented reality images in the gameplay at certain religious places.³⁶ The petitioners claiming to be vegetarians argued that a superimposed image of eggs that appeared on the game interface when phone camera was pointed at a temple hurt their religious sentiments.

³⁰ Indian Culture War stirs up trouble in Bollywood, Time, (December 13, 2017, 02:00 PM), <http://time.com/5042709/india-culture-war-trouble-bollywood/>.

³¹ *Ibid.*

³² AG Noorani, *Films and Free Speech*, 43, 18, ECONOMIC AND POLITICAL WEEKLY, 11 (2008).

³³ *Supra* N.28

³⁴ Hindu 'leader' in the US wants Overwatch to remove Devi Skin from Game, THE INDIAN EXPRESS (December 13, 2017, 2:54 PM), <http://indianexpress.com/article/technology/social/hindu-leader-wants-overwatch-makers-to-remove-games-devi-skin-2920879/>.

³⁵ *Video game pulled out of India for having gay character in key role*, DNA (December 10, 2017, 03:54 AM), <http://www.dnaindia.com/entertainment/report-video-game-pulled-out-of-india-for-having-a-gay-character-in-a-key-role-2036086>.

³⁶ *Pokémon Go in Indian Court for hurting religious sentiments*, BBC NEWS (December 08, 2017, 10:46 AM), <http://www.bbc.com/news/world-asia-india-37294286>.

Based on the Indian Free Speech jurisprudence, the following sections provide the scope of protection, which would be available to VGs in India.

The Constitution of India (“**Indian Constitution**”) under Article 19(1)(a)³⁷ guarantees the right to freedom of speech and expression to every Indian citizen. A citizen has the right to express one's conviction and opinion freely by any communicable medium or visible representation such as gesture, signs, word of mouth, writing, printing, cartoons, or any other mode.³⁸ In the case of **S. Khushboo v. Kannimal & Others**³⁹, the court observed that the importance of Free Speech was necessary to tolerate even unpopular views. However, Article 19(1)(a) is not an unqualified right and is subject to “**reasonable restrictions**” as provided under Article 19(2). The Article 19(2) states: *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 security of the State,*
- *Friendly relations with the foreign States,*
- *Public Order*⁴⁰,
- *Decency or morality,*
- *In relation to contempt of court,*
- *Defamation, or*
- *Incitement of an offense.*

Thus, any legislation restricting Free Speech will be held reasonable as long as a proximate relationship between the law and one of the abovementioned subject-matter limitations can be established. Mere “discussion” or even “advocacy” of a particular cause, however, unpopular is protected under Article 19(1)(a) and it is only when such discussion or advocacy reaches the level of “incitement” that reasonable restrictions under “Public Order” kick in.⁴¹ Free speech cannot be

³⁷ Article 19. Protection of certain rights regarding freedom of speech, etc.- (1) All citizens shall have the right- (a) to freedom of speech and expression.

³⁸ Romesh Thappar v. State of Madras, AIR 1950 SC 124.

³⁹ 2010 (5) SCC 600.

⁴⁰ *Supra* N. 38. An expression that signifies a state of tranquility that prevails amongst the members of political society as a result of internal regulations enforced by the government established by them. While assessing the reasonability of a restriction under this clause, we need to assess that the particular act leads to disturbance of the community, or does it merely affect an individual leaving the tranquility of society undisturbed.

⁴¹ Shreya Singhal v. Union of India, AIR 2015 SC 1523.

suppressed unless the situations created by allowing it are pressing and community interest is endangered. The restriction must be justified on the anvil of necessity and not the quicksand of convenience and expediency.⁴² A restriction to be "reasonable" needs to be narrowly tailored or narrowly interpreted to abridge or restrict only what is absolutely necessary.⁴³ Theoretically, any law not covered by the eight subject matters set out in Article 19(1)(2) can be struck down by the courts as unconstitutional. However, claims have been made that inclusion of this provision provides a room for an argument that censorship in the interest of morality would be permissible.⁴⁴

Expanding on the reasonable restrictions' subject-matter, the Indian government has come up with s legislations restricting speech on the basis of its content, such as Indecent Representation of Women Act, 1986⁴⁵, Representation of People Act, 1951⁴⁶ and provisions under the Indian Penal Code, 1860⁴⁷ ("IPC") Information Technology Act, 2000 that restrict speech on grounds such as obscenity⁴⁸, sedition (as discussed later), and promotion of enmity.

⁴² S. Rangarajan v. Jagjivan Ram, 1989 SCC (2) 574.

⁴³ *Supra* N. 41.

⁴⁴ Kingsley Corp. v. Regents of the University of New York, 360 U.S. 684. 698, 3 L ed. 2d. 1512.

⁴⁵ Indecent Representation of Women Act under section 2(c) prohibits any indecent representation of women, i.e., depiction in any manner figure of a woman, her form or body in such a way to have the effect of being indecent, or derogatory to, or denigrating, women, or that likely to deprave, corrupt or injure the public morality or morals.

⁴⁶ The Representation of People Act, 1951 under section 125 prohibits promoting enmity between classes in connection with elections

⁴⁷ IPC under Section 124A provides for a prohibition on Sedition

⁴⁸ Section 292 of the IPC: Sale, etc., of obscene books, etc.-(1.) For Sub-section (2) book, pamphlet, paper, writing, drawing, painting, representation, figure or any other object, shall be deemed to be obscene, if it is lascivious or appeals to the prurient interest or if its effect, or (where it comprises two or more distinct items) the effects of any one of its items, is, if taken as a whole, such as to tend to deprave and corrupt persons who are likely, having regard to all relevant circumstances, to read, see or hear the matter contained or embodied in it.] [(2)] Whoever— a) sells, lets to hire, distributes, publicly exhibits or in any manner puts into circulation, or for purposes of sale, hire, distribution, public exhibition or circulation, makes, produces or has in his possession any obscene book, pamphlet, paper, drawing, painting, representation or figure or any other obscene object whatsoever, or b) imports, exports or conveys any obscene object for any of the purposes aforesaid, or knowing or having reason to believe that such object will be sold, let to hire, distributed or publicly exhibited or in any manner put into circulation, or c) takes part in or receives profits from any business in the course of which he knows or has reason to believe that any such obscene objects are for any of the purposes aforesaid, made, produced, purchased, kept, imported, exported, conveyed, publicly exhibited or in any manner put into circulation, or d) advertises or makes known by any means whatsoever that any person is engaged or is ready to engage in any act which is an offense under this section, or that any such obscene object can be procured from or through any person, or e) offers or attempts to do any act which is an offense under this section, shall be punished ²⁶³ [on first conviction with imprisonment of either description for a term which may extend to two years, and with fine which may extend to two thousand rupees, and, in the event of a second or subsequent conviction, with imprisonment of either description for a term which may extend to five years, and also with fine which may extend to five thousand rupees].

Exception—This section does not extend to—

- a) any book, pamphlet, paper, writing, drawing, painting, representation or figure— (i) the publication of which is proved to be justified as being for the public good on the ground that such book, pamphlet, paper, writing, drawing, painting, representation or figure is in the interest of science, literature, art or learning or other objects of general concern, or (ii) which is kept or used bona fide for religious purposes;
- b) any representation sculptured, engraved, painted or otherwise represented on or in— (i) any ancient monument within the meaning of the Ancient Monuments and Archaeological Sites and Remains Act, 1958 (24 of 1958), or (ii) any temple, or on any car used for the conveyance of idols, or kept or used for any religious purpose.]]

b. Modes of expressions under Article 19(1)(a).

Courts, over time, have widened the scope of Article 19(1)(a) to include other expressions like liberty of the press.⁴⁹ It is thus possible that if a right does not find an express mention in any clause of Article 19(1), it may be covered by some clause therein as interpreted by the judiciary. Article 19(1)(a) covers several other rights implicitly interpreted by the courts such as the right to silence, right to fly the national flag, communication via Internet and motion pictures. Moreover, the content of the right under Article 19(1)(a) remains the same regardless of the means of communication, including Internet communication. The emphasis in the Indian Free Speech is on the "propagation of ideas."

The SCI in **S Rangarajan v. Jagjivan Ram**⁵⁰ held that Free Speech means the right to express one's opinion by words, writing, printing, picture, or in any other manner. The communication of ideas could be made through newspaper, magazine, movie, or any other medium. In **Tata Yellow Papers case**⁵¹, the court observed that "commercial advertisements" also qualified as Free Speech under Article 19(1)(a). Ergo, *prima facie*, it is possible that VGs based on their literary and artistic characteristics will be considered a mode of expression, accorded same level of the protection under Article 19(1)(a), and be restricted only under laws within the ambit of reasonable restrictions.

c. Differential Regulation for Different Modes of Expression.

Article 14 of the Indian Constitution allows for reasonable classifications, i.e., provision for different regulatory standards for treating a particular medium separate from other media. For the classification to be established, it should be founded on an *intelligible differentia* and should have a *nexus* with an object to be achieved.⁵²

In the case of **K.A. Abbas v. Union of India**⁵³, the SCI upheld the constitutionality of pre-censorship of films even though pre-censorship of books and novels had been held to be

⁴⁹ Indian Express v. Union of India, 1986 AIR 515.

⁵⁰ Supra N. 42.

⁵¹ Tata Press Limited and Anr. v. MTNL, AIR 1995 Bom, 107

⁵² Article 14 of the Constitution of India, 1950.

⁵³ 1971 AIR 481.

unconstitutional. The court acknowledged the classification of motion pictures as reasonable observing that *films can have a greater impact on people over books as they lead to arousal of an instant appeal due to its versatility, realism, and coordination of visual and aural senses. They can still steer up emotions more deeply than any other product of art.* Similarly, in the infamous Facebook Arrests case ⁵⁴ the Information Technology Act, 2000 (“IT Act”)’s section 66.A (Punishment for sending offensive messages) under which two students were arrested for a critical Facebook post, was held to be unconstitutional. The SCI acknowledged the intelligible differentia between the medium of print, broadcast, and real-life speech as opposed to the Internet. It observed that Internet provides a platform with very little payment and that anything posted on it travels fast and can reach millions all over the world. However, the same differentia cannot be used to differentiate the content of right under Article 19(1)(a). Actions on different mediums can be treated differently as long as the content parameters of Article 19(2) are uniformly maintained. Ergo, a case of differentiating VGs from the other forms of media could be made; however, the standard of reasonableness shall not vary.

Based on the above overview, the use of historical personalities in VGs in India has been discussed through this hypothetical’s lens.

A game developer creates a game based on the Operation Blue Star carried out by the Indian army at Golden Temple, a holy shrine for Sikhs, which led to the killing of several civilians along with the militants and desecration of the complex. The said game recreates the plot virtually of the temple’s complex where the player can play as the Indian army soldiers and kill the militants in the complex while trying to avoid the killing of the civilians. For the avatars, the developer allows a player to use virtual skins of the then Prime Minister Indira Gandhi, who was criticized and later assassinated by her Sikh bodyguards for launching the

⁵⁴ Supra N. 41.

operation. This event marks a dark phase of the Indian democracy and has thus, been used for the analysis.

A VG on a sensitive issue like this will raise several concerns ranging from hurting the religious sentiments, defamation of public representatives, and disturbance of public order to the creation of enmity between different religious groups. The relevant legislation and case laws that can affect such VGs are mentioned below. Since these laws have not been tested against VGs, the section refers to case laws relating to motion pictures for the purpose of the analysis.

Indian Penal Code, 1860

- **Section 124-A (Sedition) of the IPC:** *provides for punishment for any word spoken, either written or sign, or visible representation which incites violence, hatred or contempt, or excites dissatisfaction towards the Government of India.*
- **Section 295A of the IPC:** *provides for punishment for deliberate and malicious acts intended to outrage religious feelings of any class by insulting its religion or religious beliefs.*
- **Section 499 and Section 500 (Defamation) of the IPC:** *lay down punishment for any words, spoken or written, or any signs or visible representations or imputation against a person, intending to harm or knowing or having a reason to believe that such imputation will harm the reputation of such person.*

Under the broad interpretation of these provisions, government of India through executive orders has banned the distribution of several movies and books for allegedly hurting the religious sentiments. For example, “**The Satanic Verses**” by Salman Rushdie was for hurting religious sentiments of Muslims and “**The Hindus: An Alternative History**” by Wendy Doniger was forced to be withdrawn for denigrating the Hindu sentiments.⁵⁵ Quite often, to avoid the public outcry, such

⁵⁵ WENDI DONIGER, THE HINDUS: AN ALTERNATIVE HISTORY, (2010). It was withdrawn from print, and all its copies were destroyed by its publisher Penguin Books India after an out of court settlement in the backdrop of a case being filed against the book under section 295A of the Indian Penal Code, 1860 by a right-wing activist Dina Nath Batra, head of *Shiksha Bacaho Andolan*, a fringe Hindu right-wing group dealing with education and textbooks. Fearing the safety of its employees from threats of attack by right-wing fundamentalists offended by the book's content, the publisher *suo moto* decided to withdraw the book from the market and destroy all copies of what was in stock. See, Jonathan Shainan, *Why free speech loses in India*, THE NEW YORKER (December 15, 2017, 08:26 AM), <https://www.newyorker.com/news/news-desk/why-free-speech-loses-in-india>.

bans are not challenged in the court of law and settled outside, resulting in chilling effects on Free Speech. The following section discusses how such orders fair when challenged before the court.

d. The fictionalization of historical personalities and political leaders.

The fictionalization of historical, public figures, and mythological figures have been prevalent in Indian literature and film industry for decades. However, there have been several instances where objections have been raised against such fictionalization before the courts. The position of the courts is unclear and not uniform as highlighted below.

In the case of *Sh. Raghu Nath Pandey v. Bobby Bedi*⁵⁶, the plaintiffs objected to a movie based on an Indian freedom fighter “**Mangal Pandey**”. The plaintiff's claimed that the movie distorted history by associating him with a sex worker, and thus, an exhibition of such a film violated Article 19(1)(a). While dismissing the petition, the court observed that a film needs to be considered as a whole while judging its effect on audiences, and few scenes of the film cannot be taken out of context to make a grievance. The court further differentiated it as a feature film and not a documentary film and held that in a story based on actual or historical events, some fiction is permitted. While the given decision favors the infusion of fiction with history, it does not answer how much and what kind of fiction could be allowed. A significant part of the judgment is dedicated to highlighting the fact that the movie as a whole portrayed Mangal Pandey as a hero, and thus, certain fictionalization could be allowed. This raises a pertinent question that if a character is fictionalized in a negative portrayal, would such an expression pass the muster of Indian Free Speech laws?

The SCI recently faced this question in the case of *Devidas Ramachandra Tuljapukar v. State of Maharashtra*⁵⁷ (“**Gandhi Poem Case**”) where the name of Mahatma Gandhi was used as a way of allusion in a poem titled “I met Gandhi”, and certain obscene words were put in the poem as if spoken by Gandhi. While the case related to violation of local obscenity laws in India, the court’s

⁵⁶ 2006(89)DRJ40.

⁵⁷ AIR 2015 SC 2612.

analysis speaks extensively about Gandhi and his stature in the Indian history and polity. In its analysis of contemporary community standards, the court held that while a poet is free to depart from reality and use archaic words, when the persona of Gandhi is alluded or is used as a symbol, speaking or using obscene words, **the concept of degree comes in**. In such a scenario, "**contemporary community standards test**" becomes applicable with more vigor, to a greater degree, and accentuated. What can otherwise pass the contemporary community standards test for the use of the same language, it would not be so if the name of Mahatma Gandhi is used. The implications of this judgment have been discussed in detail later. On the other end, the *Bombay High Court* in a case relating to a movie based on Indira Gandhi, which used 30% of facts dismissed the petition holding that fact and fiction just could not be dissected and when combined together, the character and story is created and so the film.⁵⁸ It is unclear if the Gandhi Poem case is exclusive to Mahatma Gandhi or would extend to other historical personalities who enjoy a high stature in the Indian polity. Since the SCI did not specifically clarify this point, more litigation about this should be expected in future.

e. Depiction of violence in motion pictures.

As mentioned above, the SCI has held pre-censorship of motion pictures valid under Article 19(2). The Cinematograph Act, 1952, ("**Cine Act**") and the cinematography rules list out provisions relating to certification and exhibition of films in India. Every film must be certified by the Central Board of Film Certification ("**CBFC**") for public distribution and screening. The Cine Act states that certification can be denied if the CBFC considers the movie or any of its part against the interest of sovereignty and integrity of India, the security of the State, friendly relations with foreign States, public order, decency or morality, or involves defamation or contempt of court or is likely to incite the commission of any offense. The CBFC committee set up under the Cine Act, while reviewing the film is required to ensure that the medium of film provides clean and healthy entertainment, is of

⁵⁸ Priya Singh Paul v. Madhur Bhandarkar, Writ Petition (Lodging) No.1947 OF 2017.

aesthetic value, cinematically of a good standard, and that "pointless or avoidable scenes of violence, cruelty, and horror are not shown" and human sensibilities are not offended by vulgarity, obscenity, and depravity.⁵⁹ These restrictions have been replicated from Article 19(2) and are *per se* vague and broad.

As a result, CBFC on several occasions has denied certification to several movies and documentaries or made it conditional to certain edits on frivolous grounds that the movie depicts the Indian government in bad light or has a tendency to disturb public order.⁶⁰ In most instances, the producers agree to the edits to avoid cumbersome litigation; however, at times when such decisions have been appealed, the courts have delivered judgments in favor of the artists.

In the case of *Ramesh Pimple v. CBFC*⁶¹, the CBFC sought to curtail screening of a movie based on communal riots in the state of Gujarat as it considered that the movie endangered restoration of peace and tranquility between the communities. The court while ruling against the objection held that *motion pictures' potency is as much for good as for evil and in this case, it helps one appreciate the fact that the present state of things is a consequence of past and it is necessary to introspect the social reality of events, however grim it may be. Viewed from the healthy and common sense of point of view, a motion picture is more likely that it will prevent incitement to such offenses in the future by extremists and fundamentalists.*⁶²

It is evident that courts as such have not raised any objections to the display of historical events and historical personalities; however, the SCI at some occasions has drifted away from its own precedents by emphasizing on the social value which such conveyance by motion pictures can achieve.⁶³ Thus, based on this reasoning, in the event, the depiction of certain events does not "creates an impression of the message of peace and co-existence and compassion," and rather

⁵⁹ Section 5(B)2 of the Cinematograph Act, 1952.

⁶⁰ Someswar Bhowmik, *From Coercion to Power Relations Film Censorship in Post-Colonial India*, 38 No. 40, ECONOMIC AND POLITICAL WEEKLY, 3148 (2003).

⁶¹ 2004 (5) Bom CR 214.

⁶² Anand Patwardhan v. Union of India, 1997 (3) Bom CR 438.

⁶³ Ramesh v. Union of India, 1988 AIR 775.

serves only an entertainment value or no social interest, the court may uphold a restriction. Such a narrative towards “*patriotism*” was recently also observed in 2016 during the ***National Anthem Case***⁶⁴, where a division bench of the SCI upheld the executive order requiring all theatres to play the Indian national anthem before the screening of a motion film and further banned its commercialization and dramatization.

f. Video Games vis-à-vis Article 19(1)(a).

Indian courts, while deliberating on motion pictures, have acknowledged the observations made in academic studies regarding their cumulative effects on spectators’ attitudes and emotion, either in gross or microscopic proportions. The Madhya Pradesh High Court relied on findings of “*Reader in Public Opinion and Communication, Second Edition by Bernard Berelson and Morris Janowitz*”, in *UTV software communications case* while holding censorship by prior restraint to be necessary.⁶⁵ An excerpt from the judgment has been reproduced below.

“The authors of this book have demonstrated (at pp. 391 to 401 by scientific tests the potential of the motion pictures information of opinion by spectators and also on their attitudes. It is proved that even though one movie relating to a social issue may not significantly affect the attitude of an individual or group, continual exposure to films of a similar character will produce a change.”

“It has an equal potential to instill or cultivate violent or good behaviour. With these qualities and since it caters for mass audience who are generally not selective about what they watch, the' movie cannot be equated with other modes of communication. It cannot be allowed to function in a free marketplace just as does the newspapers or magazines. Censorship by prior restraint is, therefore, not only desirable but also necessary.”

Instead of equating motion picture’s interactive capacity with other forms, the courts have acknowledged its unique capacity to disturb the emotions. Thus, while assessing VGs, it is likely that courts would highlight their differentiating characteristics, as observed in some of the US judgments.⁶⁶ Last year, a state high court while issuing blocking orders against the download of

⁶⁴ KrishnaDas Rajagopal, National Anthem must be played before the screening of films: Supreme Court, The Hindu, (December 08, 2017, 5:50 PM), <http://www.thehindu.com/news/national/National-anthem-must-be-played-before-screening-of-films-Supreme-Court/article16729264.ece>. Thankfully, this decision was later overturned by the higher bench of the SCI.

⁶⁵ UTV Software Communication v. State of MP, AIR 2008 MP 177.

⁶⁶ American Amusement Machine Ass’n v. Kendrick, 244 F.3d 572 (2001). See also. Brown v. Entertainment Merchants Ass’n, 564 U.S. 786 (2011).

“*Blue Whale*” game made certain observations about online games. It held that games could be addictive and, in certain cases, could be psychologically harmful. It further stated that in this particular game, the administrator controlled the young minds of the victims and prompted them to commit suicide.⁶⁷ While the court made sweeping observations about the addictive nature of screens, it did not delve into the question of the constitutionality of violence promoting VGs.

Based on these judgments and India’s reliance on US judgments, it appears that the "realism" and "immersive" characteristics described in *Brown v. Entertainment Merchants*, will be sufficient to warrant an *intelligible differentia* for VG’s regulation in India. While saying so, it is not implied that the courts will apply a different standard of “reasonable restrictions” for content on VGs as well. Intelligible differential classification will only warrant different set of regulations as the SCI has clearly rejected medium-specificity as a guide to the determine “reasonable” standard of content in law.⁶⁸ The nature of the content of a VGs and any restriction on it will be assessed on the same parameters as any other media under Article 19(2).

For the depiction of historical personalities, the courts have been liberal in allowing for their use and fictionalization in motion pictures. However, based on the *Gandhi Poem Case*, it is possible that a developer could be restricted from alluding a historical personality’s character differently or in the manner considered derogatory to their character. Unfortunately, in the *Gandhi Poem* case, the exception for Gandhi as a "historically respectable personality” appears to be arbitrary with no basis in the Indian Constitutional jurisprudence for such classification. It will be difficult to assess the “concept of degree” as elucidated in the judgment, since it is not possible to establish standards to assess the same. For the depiction of disturbing historical events, the courts’ judgments to allow their depiction in motion pictures are based on the societal value they add by instilling the compassion in their audience. Applying the same standard of healthy and common-

⁶⁷ *Blue Whale Menace: Madras HC Tells Centre To Ask Russia To Block Links & Take Action Against Culprits*, LIVELAW.IN, (Dec 14, 2017, 04:47 PM), <http://www.livelaw.in/blue-whale-menace-madras-hc-tells-centre-ask-russia-block-links-take-action-culprits-read-order/>.

⁶⁸ Smarika Kumar, *Creating authority of law over a new technology: Reflections from Shreya Singhal*, SARAI, (December 09, 2017, 11:11 PM), <http://sarai.net/creating-authority-of-law-over-a-new-technology-reflections-from-shreya-singhal/>.

sense point of view, the court may consider whether the game merely affects certain individuals or leads to a disturbance of the community's current life.

Display of assassination of innocent Sikhs in a game for entertainment will most likely offend certain sections of Sikhs. However, the public reaction may differ significantly if the game allows a player to play as a militant. A significant majority of the Sikh population sympathizes with the militants and glorifies via other mediums of expression. Thus, in such a scenario, Sikhs may not object to such a VG but it will most likely offend certain other sections that sympathize with the army, reaffirming the dilemma of Free Speech jurisprudence that one man's trash is other person's art. It is also possible that the state governments would resort to issuing banning order on such VGs for maintenance of "public order" on the apprehension of disturbance of "law and order" or for not qualifying to "*create an impression of the message of peace and co-existence and compassion,*" or "serving any social interest". However, such moralistic censorship have high socio-economic costs, which outweigh the benefits such restrictions claim to offer in a shorter run.

IV. The many wrongs with pushing the "Right" in Free Speech Jurisprudence.

The Constituent Assembly of India was inspired by their counterparts in the US, due to which we witness certain glimpses of 1st amendment in India's Free Speech provisions. However, as prophesized, the first amendment to the Indian Constitution, listing "reasonable restrictions," has provided a strong argument for the state to impose censorship in the interest of morality.⁶⁹ While the judiciary has served as a protector of Free Speech rights, the high costs and duration of litigation in India⁷⁰, complemented by the political and social pressure, forces people to engage in self-censorship rather than defend their Free Speech rights in the court of law. Book publishers end up withdrawing their books from the market due to the fear of legal battles and the governments instead of defending their rights, end up giving in to the populist demands.

⁶⁹ Supra N. 44.

⁷⁰ Galanter, Marc, and Krishnan, Jayanth K., *Bread for the Poor: Access to Justice and the Rights of the Needy in India*, 55, HASTINGS LAW JOURNAL, 789 (2004).

When “subterranean censorship,” has become an infamous reality, the increasing “caretaker attitude” even from the judiciary lately has made the future of Free Speech very uncertain. The lower courts have not shied away from separating their personal opinions from the constitutional rights, as recently observed in the *Blue Whale Game case*’s interim order, where the Madras High court opined the VGs to be a “waste of time” and the Madhya Pradesh High Court in a dispute relating to a movie based on a folklore, directed the removal of a mythological figure’ name from its title.⁷¹ On the other hand, the SCI does not seem to overcome its paradoxical attitude towards expression rights. It restored the faith in the judiciary with highly progressive Facebook Arrests case judgment, but on the other end, it has pronounced regressive Free Speech restricting judgments regarding "respectable historical personalities". The government may brush such incidents off in the garb of justifications surrounding India's culture or law and order; however, this normalization of censorship has several negative economic and non-economic implications.

The absurdity of film censorship has impacted the Indian film industry, which still stands at an abysmal USD 2.1 billion compared to Hollywood.⁷² The nascent VG industry will not be immune to such adverse effects either. Despite being one of the most prolific filmmaking nations, the film industry has faced mortification at international forums.⁷³ While the narrative has primarily been dominated by antipathy towards obscenity, empirical research suggests that the government is not opposed to banning expression for either being too sensitive or provocative. Some of the implications of such moves have been discussed below.

1. Impact on India’s international influence: The United States has successfully developed a narrative epitomizing it as a soft-power, with the help of its entertainment industry (music,

⁷¹ Court orders removal of the word 'Ram Leela' from Bhansali's Film, The Hindu, (December 14, 2017, 06:35), <http://www.thehindu.com/features/cinema/court-orders-removal-of-word-ram-leela-from-bhansalis-film/article5351373.ece>.

⁷² Indiwood, the Indian Film Industry, Deloitte, (December 05, 2017, 04:40 PM), <https://www2.deloitte.com/content/dam/Deloitte/in/Documents/technology-media-telecommunications/in-tmt-indywood-film-festival-noexp.pdf>.

⁷³ Laya Maheshwari, *India’s 65 year battle against censorship: What needs to happen for it to end*, INDIE WIRE, (December 12, 2017, 07:22 PM), <http://www.indiewire.com/2017/08/india-film-censorship-pahlaj-nihalani-prasoon-joshi-1201868278/>.

movies, television, and VGs).⁷⁴ The hidden political narratives, even with movies with conspiracy theories about US political discourse, have helped expand its cultural influence globally. To a great extent, the success of such influence can be attributed to the liberty of artistic freedom and creative liberty provided in the US. Despite its rich cultural history, India has failed to make an impact on a global scale. Its influence is limited to a handful of figures and landmarks such as Gandhi, Taj Mahal, primarily due to its paternal viewpoint and harsh restrictions on Free Speech. For instance, the ban on BBC's documentary "*India's Daughter*" regarding the 2012 Delhi-Gang Rape case was criticized internationally, providing a tacit message to international film-makers about the deteriorating state of Indian Free Speech doctrine.⁷⁵ India possesses one of the richest and most diverse cultures in the world. Rather than stifling these initiatives, India could use these mediums as a tool like the US to expand its cultural influence abroad, particularly to the younger target audience via VGs.

2. Chilling Effects on creativity, information, and opinion rights: The World Freedom Index, recently ranked India at a low 136 out of 180 countries.⁷⁶ India also ranks as the nation with the highest number of government-imposed Internet shutdowns in the world.⁷⁷ While these studies do not directly point to the impact on the entertainment industry, they highlight the current status of Free Speech discourse in India. The country is currently debating on censoring a movie for distorting historical facts about a mythological queen whose existence is also debated by historians.⁷⁸ The entire episode highlights the slow death of creativity in India. To quote one of the leading film producers in India, Mr. Karaj Johar:

⁷⁴ Daniel Wagner, Michael Doyle, *The Rationale And Costs of Chinese Censorship*, HUFFPOST, (December 10, 2017, 06:24 AM), https://www.huffingtonpost.com/daniel-wagner/the-rationale-and-costs-o_b_1236646.html.

⁷⁵ Annalisa Merelli, *No, Jyoti Singh is not India's daughter*, QUARTZ INDIA, (December 07, 2017, 06:57 AM), <https://qz.com/356299/no-jyoti-singh-is-not-indias-daughter/>.

⁷⁶ India Three Points Down to 136 in World Press Freedom Index, The Hindu, (December 09, 2017 PM), <http://www.thehindu.com/news/national/poll-is-freedom-of-the-press-under-threat-in-india/article18371922.ece>.

⁷⁷ Internet Shutdown Tracker, Software Freedom Law Centre, India, (December 02, 2017, 9:03 PM), <https://www.internetshutdowns.in>

⁷⁸ Indian Culture War stirs up trouble in Bollywood, Time, (December 13, 2017, 02:00 PM), <http://time.com/5042709/india-culture-war-trouble-bollywood/>.

*"The over-sanitization of content is yet another impediment in an already turbulent industry. The new generation of writers and filmmakers are brimming with new ideas and stories. Clipping their wings and converting every risqué thought into a fairy-tale will drastically reduce the flow of cinema and cause severe economic damage. The freedom and liberation assault is, of course, more of a reason to worry."*⁷⁹

Additionally, the public's right to know is directly affected by censorship⁸⁰, whether regulatory or self-imposed as it is known to increase the cost of information. Censorship also influences the political behavior of its intended targets. Such arbitrary impositions also serve as an imposition to the understanding and spirit of tolerance⁸¹, stifle the right to dissent, and demobilize individuals from engaging in the behavior deemed objectionable by the state. These may be desired traits of authoritarian regimes; however, it is the guarantee of dissenting rights, which sets India apart from its neighboring nations, Pakistan and China.

3. Impact on Economic Growth: Censorship or blocking any access to information also has an impact on the economic growth of different sectors, particularly the media and entertainment sector. Although there has not been a dedicated study to analyze the loss to Indian cinema or to book publishing industry due to censorship, there have been reports estimating the loss to exchequer caused due to government-imposed arbitrary Internet shutdowns. According to the Brookings report, the Internet shutdowns imposed by the Indian government in 2016 cost India over USD 968 million.⁸² Censorship exists in India because it is easy and efficient to accomplish. It can potentially deter foreign investors from investing in the Indian entertainment sector; for the free world, investors prefer to interact and work with liberal democracies.

⁷⁹ Milind Deora, *Free Speech is needed for Economic Empowerment*, THE ECONOMIC TIMES, (December 04, 2017, 05:43 AM), <https://blogs.timesofindia.indiatimes.com/et-commentary/free-speech-is-needed-for-economic-empowerment-and-cheap-laughs/>.

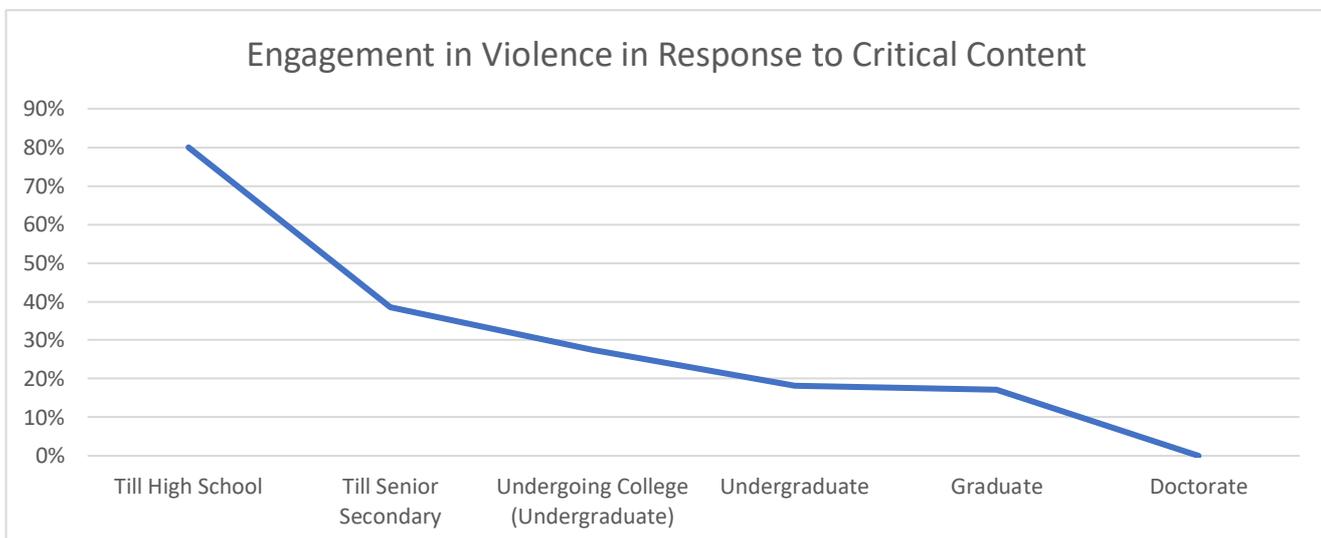
⁸⁰ *Supra* N. 41.

⁸¹ Saadiya, *Freedom of Expression and Maintenance of Public Order*, 3, JOURNAL OF THE CAMPUS LAW CENTRE (2015).

⁸² Darrel M. West, *Internet shutdowns cost countries \$2.4 billion last year*, CENTRE FOR TECHNOLOGY INNOVATION AT BROOKINGS, (December 02, 2017, 04:24 AM), <https://www.brookings.edu/wp-content/uploads/2016/10/internet-shutdowns-v-3.pdf>.

V. Exposure to violence- A legitimate concern or an overhyped clamor?

Empirical analysis suggests that authorities restrict certain movies and books on the basis of the likelihood of immediate danger of breach of peace, and such restrictions are justified on the grounds of maintenance of public order. Primarily, the threat of violence is juxtaposed as the primary justification to restrict Free Speech.⁸³ Albeit such a restriction *per se* appears vague and signifies the colonial hangover prevalent in Indian political discourse, the authenticity of these claims needs to be adequately examined. As per a statistical study conducted by Professor Sadiya⁸⁴ at Symbiosis Law School in India, such apprehensions are ill-founded. Professor Sadiya surveyed the impact of socio-political messages and videos received on WhatsApp. With respect to the cinema, 67.7% of the respondents agreed that they felt hurt on seeing any movie that questioned their faith, yet, 79% of the population denied any restoration to violence to express their anger. The study classified the respondents based on their literacy level and religion.⁸⁵ A summary of the conclusions of the study has been provided below:⁸⁶



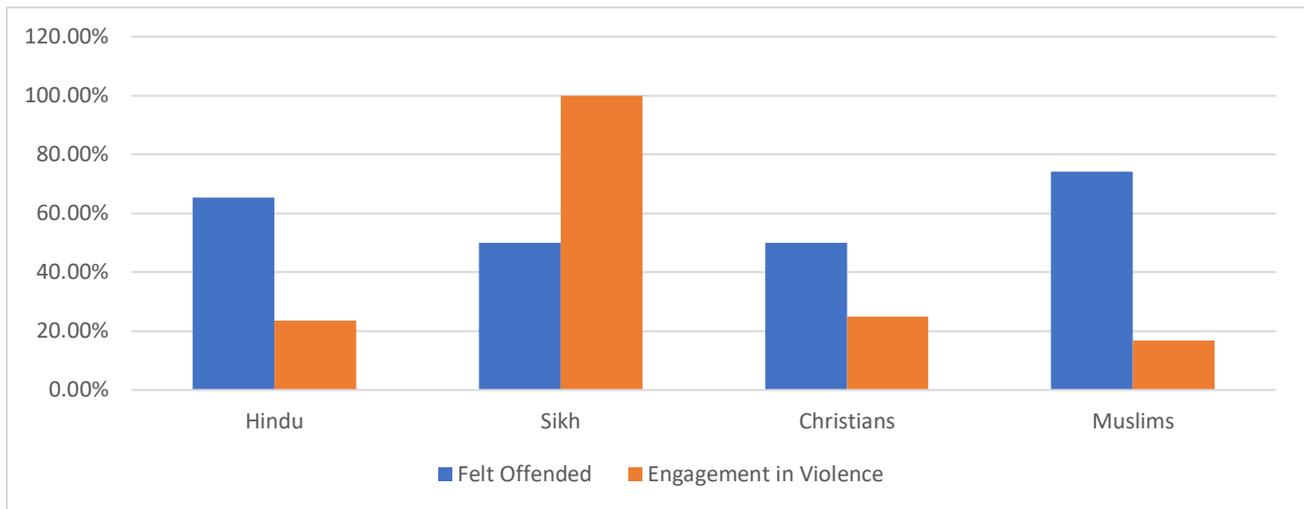
⁸³ There are several instances of restriction of Free Speech due to apprehension of violence. For example, Mr. Salman Rushdie's visit to the Jaipur Literary Festival was canceled due to the apprehension of violence by Muslim clerics. Ban on the motion picture "Aarakshan" based on the reservation in several states on the apprehension of breach of speech. Deletion of certain scenes in the movie "Aarakshan" by a state government's High-level Committee on the grounds of apprehended breach of peace.

⁸⁴ Professor of Law, Symbiosis Law School, Noida

⁸⁵ *Supra* N.81.

⁸⁶ *Supra* N.81, at p.2. For the purpose of the study, a survey was conducted in the month of March-April 2014, and a sample was taken from the population within a certain age range. The data was generated by two methods-online surveys (sample that comprised of people who use social media) and individual data collection by the distribution of a questionnaire. A total of 331 subjects undertook the survey, of which 51.1% were females. The maximum number of respondents was from the age group of 25-34 at 52.6%, followed by the 18-24 age group at 34.7%. Classifying the respondents based on educational background, 21.5% were pursuing graduation,

Further, on applying the Chi-square test, the p-value (0.003) came lower than the significance value, proving an inverse correlation between the education levels and violent reactions. The analysis between engagement in violence due to offensive content, intolerance, and religion is provided below.



On applying the chi-square tests, the study concluded that religion has no direct co-relation with either getting hurt or expression by violent means as the p-value (0.118 and 0.260) was higher than the significance level. Thus, curbing free speech on the apprehension that it offends certain sections of the society based on their faith, religion, and caste affiliation, does not actually address the problem and rather perpetuates the intolerance in the society. Instead, the increase in education reflects a significant reduction in the percentage of people resorting to violence.

Traditionally the Indian legislature and the judiciary have heavily relied on research studies regarding the tendency of motion pictures to disturb the emotions. In cases relating to penal offenses, the Indian investigation agencies casually make a co-relation between the lifestyle of the

23.6% were already graduates, and 41.1% were postgraduates. 5.7% were doctorate holders, 5.4% SSC pass, and 2.1% had only pursued their studies until high school. Of the total sample, Respondents were further classified by the parents' religion, which turned out to be 56.8% Hindus, 38.7% Muslims and rest 4.5% comprising of Christians, Sikhs, and atheists. 0.3% belonged to parents of different religions. The data was analyzed by using SPSS 17 and applying chi-square tests.

accused, her/his preferences towards online content, and the crime committed.⁸⁷ Ergo, quite often, censorship of violent content is justified based on such scientific studies and investigations. While certain studies suggest a statistical correlation between exposure to fictional violence and expression, in the developed democracies with access to more advanced research, it has been observed that there is no conclusive evidence to suggest that former leads to latter or vice-versa. There is a plethora of evidence available to counter such a hypothesis. Rather, there is evidence to suggest that other factors can influence such behavior, such as experience with real violence and state of mental health. For instance, despite a high rate of extreme violent content, Japan has a significantly low crime rate.⁸⁸ Even in India, most of the alleged criminals are either illiterate as highlighted above or suffering from mental health issues. Thus, the above hypothesis suggests that restricting the speech is not effective in curbing the prevalent violence and instead leads to causing chilling effects on other aspects of Free Speech such as creativity and right to dissent. Instead of barking at the wrong tree i.e. restricting speech, the state should direct its resources to improve literacy levels. Until there is no-conclusive evidence provided to suggest a direct correlation between “fictional” violent media and actions, it is better to err on the side of Free Speech than its limitations.

VI. Gandhi- Superior to the Constitution?

There is no denying that quite often public figures in India are glorified and revered. For instance, Mrs. Sonia Gandhi (President of the primary opposition party in India), Mahatma Gandhi, Rajnikant (South Indian actor), and Mr. Amitabh Bachchan (Bollywood actor) have temples dedicated to them.⁸⁹ The popularity they command is such that their followers consider them

⁸⁷ *Rajasthan hacking: Hate videos, not 'love jihad,' inspired Shambhu Lal to kill Muslim laborer*, INDIA TV, (Dec 13, 2017, 10:21 PM), <http://www.indiatvnews.com/news/india-rajasthan-hacking-hate-videos-not-love-jihad-inspired-shambhu-lal-to-kill-muslim-labourer-416003>. On November, a Hindu man brutally killed and burnt a Muslim man alive in Rajasthan, due to his animosity towards increasing inter-religion matrimonials. The preliminary investigation team has concluded that he was driven by his addiction to hate videos.

⁸⁸ *Freedom of Expression in the Arts and Entertainment*, ACLU, (December 13, 2017, 1:21 PM), <https://www.aclu.org/other/freedom-expression-arts-and-entertainment>.

⁸⁹ *A temple for Sonia Gandhi, MGR, Rajnikanth, Amitabh Bachchan, Khushboo and others*, DECCAN CHRONICLE,

immune to any public criticisms and have often protested and demanded police action against any criticisms or parody made about them.⁹⁰ Recently, certain comedians were arrested for superimposing the snap chat's dog filter on Prime Minister Narendra Modi's face. While the case has not been adjudicated yet, it reflects the inconvenience such expression can cause.⁹¹ Such instances test the boundaries of India's tolerance; however, the Gandhi Poem Case's judgment by creating a distinction between "Gandhi" and "common Indian" has cast a major blow to Free Speech discourse.

Satire, criticism, and parody constitute the bulwark of liberal democracy, and no such distinction for public personalities has been acknowledged in other liberal nations. The given judgment sets an erroneous precedent by carving out a new exception to Article 19(1)(a), i.e., "**historically respected personalities**". The restriction on the use of historical personalities is bad in law and can cast chilling effects on Free Speech rights. Different standards to judge different people based on their popularity and stature goes against Article 14 of the Indian Constitution, which guarantees equality before the law. Further, it is different to measure the "degree" of respectability as alluded by the SCI, and it also lies outside the jurisdiction of the court⁹² as there is no reasonable ground by which one can be forced to respect another individual irrespective of the person's stature. Freedom of speech and expression also consists of the right to information and the right to have an opinion. As an extension to this, a person has a right to explore truth or portray a historical event involving a public figure from a different point of view.

There are several critical pieces of literature available about historical figures. Still, such an attempt to protect revered personalities in the garb of social acceptance and established beliefs,

(Dec 05, 2017, 05:32 PM), <http://www.deccanchronicle.com/131030/news-current-affairs/gallery/temple-sonia-gandhi-mgr-amitabh-bachchan-khushboo-and-others>.

⁹⁰ Apoorva Sripathi, *Tanmay Bhat, Lata Mangeshkar & Sachin Tendulkar: Here's everything you don't need to know*, FIRSTPOST, (December 07, 2017, 08:43 PM), <http://www.firstpost.com/india/tanmay-bhat-lata-mangeshkar-and-sachin-tendulkar-all-you-need-to-know-to-move-on-in-life-2805908.html>.

⁹¹ Leela Mangaldas, *How a meme of Indian PM with Puppy Ears provoked Police Complaints in India*, (December 09, 2017 09:00 PM), FIRSTPOST, <https://www.forbes.com/sites/leezamangaldas/2017/07/17/how-a-meme-of-indian-pm-modi-with-puppy-ears-provoked-police-complaints-in-india/#2f1204d66570>.

⁹² Gautam Bhatia, *No dirty poems on Mahatma Gandhi: SC obscenity ruling is a big blow to free speech*, FIRSTPOST, (December 08, 2017, 08:43 PM), <http://www.firstpost.com/india/no-dirty-poems-mahatma-sc-obscenity-ruling-big-blow-free-speech-2245416.html>

inhibits free and rational thoughts and significantly limits the scope of creativity one can put in their work. Moreover, such measures could potentially open the Pandora's box of litigation where a large number of organizations will initiate criminal proceedings against people who have disrespected their ideals by merely expressing unpopular views.⁹³ Currently, such action is justified because any obscene/violent attribution to such a personality would tarnish her/his public perception; however, the given argument does not hold any ground. There have been several VGs in the United States, where erstwhile Presidents have been portrayed in different roles. The portrayal of President George Washington as the corrupt leader in "*Tyranny of King Washington*"⁹⁴ or President Obama's portrayal as someone fighting the SEALs in "*Mercenaries II*", do not seem to have harmed their public image.⁹⁵ Despite such depictions, their approval ratings have remained unchanged.⁹⁶ Hence, it is unreasonable to hold such a speech into a permissive license regime. The eminence of a historically relevant personality cannot and should not be subject to court's protection, as criticism and expression of opinion despite its popularity is at the core of our Constitution (or at least as projected by the founding fathers).

VII. The unintended consequences.

Conventional wisdom believes that increased censorship will strictly decrease access to information.⁹⁷ However, certain empirical studies also suggest that unforeseen disruption of media can backfire, either by angering the citizens of the government's efforts to suppress the flow of information or by sparking the interest in it.⁹⁸ In India, prohibition on the sale of pornographic

⁹³ Kartik, Utkarsh Chauhan, *Tackling the issue of Obscenity: Inconsistency in the Approach to Supreme Court*, 1, UDAM VIGYATI: THE ORIGIN OF KNOWLEDGE, 4 (2015).

⁹⁴ *The tyranny of King Washington*, VANDOM, (December 09, 2017, 03:26 PM), http://assassinscreed.wikia.com/wiki/The_Tyranny_of_King_Washington.

⁹⁵ Frank Caron, *Obama, Palin to be playable characters in Mercenaries 2*, ARSTECHNICA, (December 11, 2017, 04:22 AM), <https://arstechnica.com/gaming/2008/10/obama-palin-to-be-playable-characters-in-mercenaries-2/>.

⁹⁶ Mackenzie Weinger, Poll: George Washington still tops, POLITICO, (December 11, 2017, 04:22 AM) <https://www.politico.com/story/2012/02/poll-george-washington-still-tops-073032> See also, *Presidential Approval Ratings – Barack Obama*, GALLUP NEWS, (December 14, 2017, 06:30 AM) <http://news.gallup.com/poll/116479/barack-obama-presidential-job-approval.aspx>. President Washington is considered the most favorable President by 89% US citizens, while President Obama commands an approval rating of 59%.

⁹⁷ William Hobbs et al., *How Sudden Censorship can Increase Access to Information*, 21ST CENTURY CHINA CENTRE RESEARCH PAPER, (January 17, 2017).

⁹⁸ *Ibid.*

material led to a proliferation of an unregulated market, through which such movies are clandestinely exhibited throughout the country.⁹⁹ As ironic it may sound, the political capital of India, New Delhi, has one of the largest markets for pirated pornographic movies within the Lutyens Zone.¹⁰⁰ Hence, in case there is a demand for particular content, sudden or blunt censorship may add an extra layer to access in a shorter run, but will not diminish it. Censorship sometimes can also lead to stimulating increased public engagement by providing opportunities for opposition (**Streisand effect**). The unintentional publicity caused due to efforts to block access has been witnessed in the Indian film industry. Short budget movies such as “**Udta Punjab**”, based on the state-sponsored drug menace in Punjab, “**Ram Ke Naam**” based on 2002 Gujarat riots, gained nationwide publicity due to government's efforts to ban them.

The nascent Indian VG industry is not immune to this phenomenon either. Before the mass expansion of the Internet, VG piracy also thrived in India, merely due to the lack of availability of games and increasing demands.¹⁰¹ In 2008, a proposal was put before the Ministry of Information & Broadcasting to amend the Cine Act to regulate VG. It was predicted that such a move could increase the sale of erotic and violent video games.¹⁰² Therefore, any blunt censorship on VGs may not achieve its desired objective and may warrant a higher degree of attention by intriguing India's zealous gaming generation.¹⁰³

In India, attempts to ban video games have been unsuccessful and have led to the proliferation of a broken market to address their demand. For instance, markets such as Nehru Place, which provided pirated and smuggled versions of the latest games was listed as one of the most notorious information technology (“**IT**”) markets by the office of US trade representatives for

⁹⁹ Tejanwini 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*, INDIANA UNIVERSITY PRESS, 87 (2009).

¹⁰⁰ Akhil Sood, *No longer underground*, THE HINDU, (December 11, 2017, 05:22 AM) <http://www.thehindu.com/features/magazine/No-longer-underground/article14492632.ece>.

¹⁰¹ Sarthak Khurana, *Why is there such rampant piracy among gamers in India*, GAMING CENTRAL, (December 03, 2017, 05:22 AM), <https://gamingcentral.in/rampant-piracy-among-gamers-india/>.

¹⁰² Chetan Chauhan and Ruchi Hajela, *Censor scissors on video games soon*, HINDUSTAN TIMES, (December 06, 2017, 05:29 AM) <http://www.hindustantimes.com/india/censor-scissors-on-video-games-soon/story-em3rvqi0JnYLUQ1szsJZuM.html>.

¹⁰³ KPMG, *Online Gaming in India: Reaching a new pinnacle*, A study by KPMG in India and Google, (December 06, 2017, 03:03 PM), <https://assets.kpmg.com/content/dam/kpmg/in/pdf/2017/05/online-gaming.pdf>

massive IT violence.¹⁰⁴ Several online games also witnessed higher rate of illegal downloads, despite MeitY's¹⁰⁵ witch-hunt to find and block such links.¹⁰⁶ The proliferation of any black-market complemented with uncertainty about censorship laws will further deter the VG developers from investing in India and deprive the government of earning legitimate revenues from this nascent market. The paternal and moral outlook of Indian Free Speech discourse stems from the colonial hangover of its pre-independence laws. While much has changed in the legal firmament, the judicial squeamishness has remained a fixed star.¹⁰⁷ However, the government must acknowledge that large parts of its fears are unfounded and could be held unconstitutional, if challenged. Large sections of our society have become receptive to content tackling serious issues and do not need to be treated as infantile subjects to be shepherded by an external agency.¹⁰⁸ As motion pictures' success depends on the jury of the audience, the same shall apply to VGs as well. Thus, any game which is distasteful to the public at large will be rejected by them without the need for any external body's regulation.

VIII. Indian Video Game Industry- The Way Ahead.

Indian online gaming industry currently stands at USD 290 million and is poised to grow to USD 1 billion, with over 310 million online gamers by 2021.¹⁰⁹ The smartphone revolution has played a huge role in the spread of VGs; however, unlike the motion picture industry, there is still a dearth of development of India specific content. Indian cinema has an annual production of about 1600 to 2000 films in Hindi and regional languages with gross box office realization of USD 2.1 billion. It has managed to grow successfully despite frequent clampdowns. However, the same does

¹⁰⁴ US Shortlists Nehru Place as 'notorious market', NDTV, (December 1, 2017, 07:12 PM), <https://www.ndtv.com/delhi-news/us-shortlists-nehru-place-as-notorious-market-448782>.

¹⁰⁵ (Ministry of Electronics and Information Technology, India)

¹⁰⁶ Amit Anand Choudhary, *Not possible to block Blue Whale game, Centre tells Supreme Court*, TIMES OF INDIA, (December 18, 2017, 05:03 AM), <https://timesofindia.indiatimes.com/india/not-possible-to-block-blue-whale-game-centre-tells-supreme-court/article-show/61727942.cms>.

¹⁰⁷ Gautam Bhatia, *India's courts, Moral Guardians of the Nation*, LIVEMINT, (December 13, 2017, 05:03 AM), <http://www.livemint.com/Sundayapp/2YDE2m08VTb44gXpPqOAIp/Indias-courts-Moral-guardians-of-the-nation.html>.

¹⁰⁸ *Do we need a film censor*, THE HINDU, (December 14, 2017, 05:03 AM), <http://www.thehindu.com/opinion/op-ed/do-we-need-a-film-censor/article17993092.ece>.

¹⁰⁹ *Supra* N. 103.

not hold true for the VG industry, which is still evolving. Its growth will significantly be stifled if it is burdened with “political correctness” as expected from the motion picture industry. While the concerns discussed above may hold some relevance in India's socio-economic fabric, it is not necessary that any problem -real or illusionary- can only be addressed effectively by a legislative solution. Thus, other alternatives must be explored to provide a balance between the industry's economic interests and societal welfare rather than providing a pre-censorship regulatory framework. For example:

1. Media Literacy: The cognitive skills of an individual determine how an individual interprets events and channelizes her/his behavior and thoughts. Instead of censoring critical video games, efforts should be made to nurture the targeted audience in identifying stereotypes and distinguishing truth from propaganda.¹¹⁰
2. Certification: A certification body at par with the Entertainment Software Rating Board in the USA and Canada could be established whose role shall be limited to providing rating symbols to suggest age appropriateness of the game along with certain descriptions about the content.

As India occupies the leadership position left vacant by the United States in promoting an open Internet by reaffirming its commitment to network neutrality¹¹¹, it must take progressive steps towards promoting the growth of the VG industry and set an example for other developing nations. Thus, it is imperative that at least with respect to the Free Speech rights for VGs, India follows the United States' path and affirms that censorship has no place in its mature democracy.

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¹¹⁰ Can Media Literacy be an Alternative to Censorship?, Press Institute of India, (December 05, 2017, 3:12 PM), <http://www.pressinstitute.in/can-media-literacy-be-an-alternative-to-censorship-2/>.

¹¹¹ Mishi Choudhary and Eben Moglen, TRAI and fail: By decreeing net neutrality, India's regulator has trumped America's FCC for an open Internet, Times of India, (December 08, 2017, 04:12 PM), <https://blogs.timesofindia.indiatimes.com/toi-edit-page/trai-and-fail-by-decreeing-net-neutrality-indias-regulator-has-trumped-americas-fcc-for-an-open-internet/>.