

Comparative Standards of Judicial Review on Artistic Freedom in Dramatic Performances: A Study of India, The United States, and The European Court of Human Rights¹



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Abstract

*This paper undertakes a comparative analysis of artistic freedom in dramatic performances as protected under the legal systems of India, the United States, and the European Court of Human Rights (ECHR). It explores how each jurisdiction balances freedom of artistic expression with legitimate state interests in morality, decency, and public order. The study highlights that while the United States employs a strict scrutiny standard under the First Amendment, and the ECHR applies a proportionality and necessity test under Article 10, Indian courts continue to follow a deferential approach rooted in executive discretion and colonial-era censorship laws. By analysing key precedents, including *Shreya Singhal v. Union of India*, *Freedman v. Maryland*, and *Unifaun Theatre Productions v. Malta*, the paper argues for harmonising India's constitutional framework with global standards by adopting a higher threshold of judicial review and removing pre-censorship in artistic works.*

Key Words: *Artistic Freedom, Dramatic Performances, Comparative Constitutional Law, First Amendment, Article 10 ECHR.*

Introduction

Artistic freedom, as an extension of the right to freedom of expression, lies at the core of democratic pluralism. Dramatic performances—plays, theatre, and live art—constitute one of the earliest and most enduring forms of such expression. Yet, the stage has also been one of the most frequently censored spaces, reflecting the tension between creativity and control. While democracies recognise artistic expression as constitutionally protected speech, the *standard of judicial review* applied to restrictions on such expression varies across jurisdictions.

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In India, the remnants of colonial censorship through the Dramatic Performances Act, 1876, and state-level policing laws continue to vest sweeping discretionary powers in the executive. Courts have often upheld such measures under the guise of “public order” and “morality,” applying a deferential standard of review. By contrast, in the United States, the First Amendment ensures a high threshold of protection, allowing restrictions only under compelling state interest and narrow tailoring tests. The European Court of Human Rights, through Article 10 of the Convention, employs a proportionality and necessity analysis, balancing state interference with individual freedom under the “margin of appreciation” doctrine.

This paper analyses how these three systems conceptualise and adjudicate restrictions on artistic expression, particularly in the context of dramatic performances. It argues that India must transition from an administrative, morality-driven model to a rights-based, judicially reviewable standard consistent with global constitutional principles of free expression.

Dramatic Performances and its Censorship in the USA

With respect to dramatic performances and its censorship in the US, there is no uniform or systematic prior restraint that is widespread and used by the government to regulate theatre productions. This does not mean that there is no prior restraint with respect to theatre in the USA, all it means is that the censorship of theatre in the US is restricted to local level regulation by the various states, and there is no national level regulation mechanism for the same. It must also be noted that the history of theatre and drama in the USA and its origins is still ambiguous, as it has not been recorded clearly as the origins in UK. This could be because the USA was a colony of England and all laws that were applied in England was applied in the US colonies as well, till they attained independence. The earliest incident of theatre censorship in the USA can be seen in puritanism of the English colonists in USA in the early 17th century. As examined earlier in this chapter, the puritans had a strong anti-theatre sentiment towards the stage shows. This view stemmed from the religious sentiments that were deeply rooted and questioned such shows as they were considered highly immoral as it transgressed the laws of God. The plays were considered to be chaotic and anarchic in nature and it was denounced as unchristian as the suspicion against such plays were profound. The puritan movement was thus reflected in the American soil as well, with respect to theatre and dramatic performances. During the colonial period in USA, all those laws that applied in the UK were also applied



in the USA, because of this many plays were banned, and the producers were prosecuted on the grounds of obscenity and immorality. For instance, the first ever recorded English play in the USA is that of *Ye Bare & Ye Cubb*, where the producers were taken to court for producing theatre which was banned at that time.² Again, if one traces the American history relating to stage performances and its regulation during the colonial period in the US, one can notice that the colonies in the South were more pro-theatre than the colonies in the North, where it was considered to be a highway to hell.³ Later, in the next few years anti-British sentiments were seen to be on the rise throughout the US, and anti-British nationalists groups, for instance the Sons of Liberty, called for the complete shutdown of theatres throughout US, as it was, just like British tea, a British export.⁴ It was in the later half of the 18th century, where most states started getting independence from the colonial powers, that the local legislations which regulated theatre performances were passed. For instance, Massachusetts passed a legislation titled the “Act to Prevent Stage-Plays and other Theatricals,” which outlaws using “*any house, room or place*” for “*acting or carrying on any stage-plays, interludes or other theatrical entertainments whosoever,*” and punishes any bystanders of theatrical events. This act continued to be the law of the land for 40 years. On May 31, 1759, the House of Representatives in the Colony of Pennsylvania passed a law forbidding the showing and acting of plays under a penalty of £500. In 1761 Rhode Island passed “*an act to Prevent Stage Plays and other Theatrical Entertainments within this Colony,*” and the following year the New Hampshire House of Representatives refused a troupe of actors admission to Portsmouth on the ground that plays had a “*peculiar influence on the minds of young people and greatly endanger their morals by giving them a taste for intriguing, amusement and pleasure.*”⁵ During the 1770s, in the midst of the American revolution, the Continental Congress called for the shutting down of all as *in order to encourage frugality...and discountenance and discourage, every species of extravagance and dissipation, especially all horse racing, and all kinds of gaming, cock fighting, exhibition of shows and plays,*

²See generally, Noel McCabe, *Indecent and Censorship of American Theatre* (Seattle Rep, 11 October 2019), <https://www.seattlerep.org/about-us/inside-seattle-rep/indecent-and-american-theater-censorship> accessed 3rd April 2023.

³See Arthur Hornblow, *A History of the Theatre in America From its Beginnings to the Present Time Vol. 1* (1st Edn, J.B. Lippincott Company 1919).

⁴See JH Houchin, *Censorship of the American Theatre in the Twentieth Century* (Cambridge University Press 2003).

⁵*cf* Hornblow (n. 118) 21.



*and other expensive diversions and entertainments,”*⁶. Finally in 1789, all laws regulating and prohibiting theatre plays were repealed. However, the laws that followed, enacted by the various States in the US, were much more stringent in nature, giving a lot of power to certain groups of elitists in the regulation of content in theatrical performances. Thus, even after independence the States in the US adopted strict laws forbidding theatrical performances. For instance, the New York State Licencing Act of 1839, required any “*theatre, circus, or building, garden or grounds, for exhibiting theatrical or equestrian performances*” in New York City to obtain a licence from the mayor, with all collected fees to be forwarded to the Society of Juvenile Delinquents. There was also a penalty put in for the violation of this law where the society would act as an agent of the State and collect all the penalties. Thus apart from the mayor and other local agencies, even such societies which were benefited in case of violations had a role in the regulation of theatrical performances. From the late 1860s onwards, there was an uneasy alliance between the police department, the mayors office, private moral reform societies, and neighbourhood groups, where a cultural surveillance of entertainment houses were done on a regular basis. Thus, whether or not a licence is acquired from the local authority to showcase a public performance such as a drama would depend on all these external elements other than the State. “*To thrive, an entrepreneur had to negotiate a treacherous terrain that included autocratic police captains, ever-vigilant moral reformers, outraged clerics, and organized neighbourhood citizens*”⁷ what must be noted is that these licences were given to all authorities where drama, music concerts, opera, circuses etc were to be performed in public. This regulation came about as a mechanism to control alcoholism and prostitution in such places. But it ultimately resulted in content regulation as well, at the whims and fancies of certain aristocratic groups of people. For instance, in 1873, the Comstock Act was passed under the influence of Antony Comstock.⁸ He was the head of the *New York Society for the Suppression*

⁶See *cf* Houchin (n.119).

⁷Daniel Czitrom, ‘The Politics of Performance: From Theater Licensing to Movie Censorship in Turn-of-the-Century New York’, (1992) 44 *American Quarterly* 526.

⁸An Act for the Suppression of Trade in, and Circulation of Obscene Literature and Articles of Immoral Use, this act *made it illegal to send “obscene, lewd or lascivious,” “immoral,” or “indecent” publications through the mail. The law also made it a misdemeanor for anyone to sell, give away, or possess an obscene book, pamphlet, picture, drawing, or advertisement. The breadth of the legislation included writings or instruments pertaining to contraception and abortion, even if written by a physician.* See Brandon R. Burnette, *The Comstock Act 1873 (The First Amendment Encyclopedia, 2009)*, *Comstock Act of 1873 | The First Amendment Encyclopedia* (mtsu.edu), accessed on 3 April 2023.



of *Vice*, which heavily influenced Congress to pass this legislation to ban obscene materials. He was also appointed by the Mayor of New York as the authority for censorship of such materials. This had a heavy impact on performances as well, as the scripts were heavily censored by Comstock. The 20th century saw two main changes with respect to theatre production. The first change was seen during the first half of the 20th century, where, many plays were censored by local authorities for “*corrupting philosophy*” and “*corrupting decency*”. Both the actors and the authors of the play were arrested on these grounds.⁹ While there was a general tendency in the whole of Europe to wade off censorship of plays, and the public opinion moving towards relaxation in theatre censorship, the situation in the USA was such that the local laws became more and more stringent giving a large amount of power to the local executive body such as the Police to even rewrite the play so as it wouldn’t result in public disorder. The second change took place during the latter half of the 20th century, when, there was a boom in the motion film industry, opening the audience to a visual treat. The evolution of motion pictures is very specific to the USA, and so are the censorship laws that followed.¹⁰ The impact that motion pictures had in the US society was immense. The latent boundaries of morality, slowly started withering away, paving way for an era of creativity and profound talent. This development had a huge impact on theatre and public performances as well.

What must be understood is that prior restraint for public performances was a method of regulation adopted by most States in cases of theatrical performances and stage shows. From local municipal laws, that regulates public nuisance, public order and prohibition of public nudity, there were also state statutes relating to morality obscenity and indecency. The theatre premises has to be licenced or leased out for the public performance. These municipal auditoriums and parks and other public places are usually under the control of some sort of authority such a Municipal Board. The members of the Board decided whether to grant permission for the exhibition, entertainment or public performance, after going through the script, in its entirety and examining

⁹For example, the play *Sopho*, where the actor and producer was arrested for corrupting public decency as the play was coarse, unsavory and indecent. Again, Geroge Bernard Shaw’s, *Man and Superman*, and also another play titled *Mrs. Warrens Profession*, saw the Police Commissioner dictate the scenes that can be played on stage, and the script being altered to a large extent, lest it corrupts the minds of people who view it. See *cf* Houchin (n.119).

¹⁰Discussed in detail in the next Chapter.



whether or not it will violate the local and state laws as mentioned above. Thus, as seen above a large amount of pre censorship powers were given to certain group of people in regulating artistic content. During this time period it can be seen that, in the USA, India and in the UK, the execution of the laws were done by a very few people who had no power to adjudicate, and artistic freedom was completely at the subjective notions of these people sitting in authority. But, with the advent of motion pictures theatre premises were opened up to viewership to a large amount of content. It was in 1950s, that the court for the first time in the US, extended First Amendment rights to motion pictures as well.¹¹ With the passage of time and the large number of cases that came up before the US Supreme Court, it can be seen that motion pictures in the US is part of the protected speech spectrum under the First Amendment, as it can be restricted only on grounds of obscenity. The standard of obscenity is very high and motion pictures become unprotected speech only if it has no literally, scientific, political, or artistic value¹². *“Entertainment, as well as political and ideological speech, is protected; motion pictures, programs broadcast by radio and television, and live entertainment, such as musical and dramatic works, fall within the First Amendment guarantee.”*¹³ With motion pictures being given the green signal in terms of First Amendment Protection, the type of content that was regulated in motion pictures also started varying. Sexuality and nudity and erotic content was protected, and since it won't stand the test of obscene content under the First Amendment, prior restraint was also relaxed. Though prior restraint and censorship has been upheld to be a valid regulation in the US, with respect to motion films, the authorities started granting licences more consciously, lest their verdict maybe called before a Court of law for lack of protection to artistic freedom under the First Amendment. Even though prior restraint was considered valid, it came with strict instructions from the court as to how it should be executed by the officials.¹⁴ This way, the subjective whims and fancies of authorities paved way to a slightly more objective standard of evaluation. It was in this backdrop that theatre, public performances, and stage shows were also considered to be a part of the First Amendment Right for the first time by the US Supreme Court. It was in 1975, that the Court held that the First Amendment rights shall also be extended to theatre productions and plays, just like motion pictures.¹⁵ Here, Chattanooga Memorial Auditorium

¹¹Burstyn v. Wilson, 343 U.S. 495; discussed in detail in the next chapter.

¹²See next chapter for a detailed study.

¹³Schad v. Borough of Mt. Ephraim, 452 U.S. 61 (1981)

¹⁴See Freedman v. Maryland 380 U.S. 51 (1965), also in detail in the next chapter.

¹⁵Southeastern Promotions Ltd. v. Conrad, 420 U.S. 546 (1975).



and the Tivoli, a privately owned theatre under lease to the city, denied a permit to South-eastern Promotions, Ltd., the company seeking to present *Hair*; which was considered to be a controversial rock musical because there were scenes of nudity, and other offensive dialogues that were considered obscene. The city officials denied permission for it to be staged in these public places as it would not be in the “best interest of the community”. The company appealed to the Tennessee District Court, and the Court with the help of a jury held that the city officials were right in not granting permission as if it was allowed to be staged it would run against the State’s public nudity law. Therefore, the company filed a case against the authorities before the Supreme Court of the US. The supreme Court, did not however, go into whether or not the play was actually obscene or not. The court held that it was a matter of prior restraint. And as seen in the case of *Freedman v Maryland*, there are certain procedural safeguards that have to be followed in the case of prior restraint. Firstly, the burden of proving that the censorship or prior restraint was necessary and that the material is unprotected is on the censor and not on the person who is censored. The burden of initiating the proceedings is also on the censor. Secondly, there must be the prior restraint can only be for the purpose of maintaining the status quo, and it should be temporary. Thirdly, it must be followed by prompt judicial review, where the matter can be finally only decided by the judiciary. The Court on these procedural safeguards held that the burden was always on the company, and there was no prompt judicial review of the same. Hence the prior restraint was held invalid and against the First Amendment protection. In this way, the First Amendment protection was also extended to theatrical performances.

Music and First Amendment Review in the USA

The Courts in the US have always adopted a very high standard of review in obscenity when it comes to First Amendment Rights. The courts have always applied the same in cases of music recordings and live music shows as a part of artistic freedom. The lyrics of music albums have come before the court on the grounds of obscenity, the allegation that they incite violence or that they are harmful to minors. It is usually against these three grounds that music has been accorded a First Amendment protection. One of the interesting cases on live music orchestra performance, was where a concert promoter company entered into a contract with the municipal corporation for the promotion of music concerts in local amphitheatres. This corporation



rejected six of the applications for such live performances suggested by the company. The company alleged a First Amendment violation. The Corporation claimed that the Company had no such right as it did not even know the nature of the songs or lyrics that it had suggested for performance in the Amphitheatre. The Court, however, held that the concert promoters were the ‘clergy house’ of expression just like booksellers or theatre owners. The Court further held that the place in question was a public place, and the only regulation that the government could make in this regard was content-neutral restrictions of restrictions on the place, time and manner, given its public nature. The live music performance permission was not granted because it was considered obscene and profane. The City Corporation’s main concern was that it was ‘rock music’ and it had a large impact on the young community in the city. There was also a fear of illegal activities happening in the premises such as drug abuse and pedaling. The Court held that these concerns were grave, however, it could not be done by curbing the First Amendment right of the concert promoters. The Court did not go into the obscenity question but held that live musical performances cannot be prohibited on the basis of content-based regulations. It is not in the power of the Municipal authorities to deny a First Amendment right in live musical performances on content-based regulations. And if there is a content-based regulation, it is for the Municipal Authorities to show a compelling state interest, that the particular regulation was narrowly tailored, and that there was no other alternative mechanism other than to deny access to the Amphitheatre. None of the above were done in this particular instance; hence, the court upheld the concert providers’ right to the First Amendment. Thus, the First Amendment rights were extended not only to authors or producers of the work but middle clergymen of expression such as theatre owners, booksellers, and concert promoters. Again, in public places, content-based regulation cannot be imposed, and if it is imposed there is a high standard of judicial review of compelling state interest, where the burden of proof is on the municipality, local government, or the State.¹⁶

In another interesting case was one that was concerning the lyrics of a rap song by the band called 2 Live Crew. The Sheriff of Florida took action to prevent record store owners from selling the alleged obscene album. It was against this arrest that a case was made in the District Court, claiming a First Amendment violation. The District Court held that the song in question was obscene and there was no unwanted prior restraint in this case. However,

¹⁶See *Cinevision Corporation v. City of Burbank*, 745 F.2d 560 (9th Cir. 1984).



on appeal the 11th circuit Court of Appeal, using the Miller test, held that this song had serious artistic value. The burden of proof was on the State to show that it lacked artistic value and they could produce any witness or evidence to show the same. On the other hand, the appellants proved through the expert opinion of scientists, music critics, and psychologists that the language was at most profane and misogynistic, but it did not lack any artistic value and hence was not obscene and fell under the First Amendment rights.¹⁷

There are two other instances of music censorship, that are very interesting in nature.¹⁸ Though it does not pertain to a live performance, these two instances were where there was a question of suicide being committed because of the lyrics of a particular song. In the first instance, it was a song where two heavy metal artists were arrested on the ground that their song resulted in two people committing suicide. The allegation was that the reversed song sequences in the tape resulted in mental agony and they thereby committed suicide. The Court adopted the *Brandenburg v Ohio* test of imminent lawless action, and held that there was no actual causal link between the music and the suicide.

Nude Dancing and the First Amendment Review in the USA

Generally, in the US, art speech that is political or satirical is accorded more protection than those for commercial purposes, under the First Amendment of the US Constitution. For instance plays with satire or political rhetoric will get more protection than nude dancing in bars. Initially the Court gave First Amendment protection to nude dancing in places where alcoholic beverages are sold. The Court held that the state can regulate nude dancing in such areas, but some of the performances of nude dancing can be accorded constitutional protection in the First Amendment.¹⁹ The Court then until the early 90s, upheld nude dancing as a form of entertainment and artistic freedom which had protection under the First and Fourteenth Amendment of the Constitution, from governmental regulation.²⁰ It was finally in 1991²¹, that

¹⁷See *Luke Records, Inc. v. Navarro*, 960 F.2d 134 (11th Cir. 1992).

¹⁸*Judas Priest v. Second Judicial District Court*, 760 P.2d 137 (1988), *Waller v. Osbourne*, 958 F.2d 1084 (11th Cir. 1992).

¹⁹ See *California v. La Rue*, 409 U.S. 109 (1972).

²⁰*Doran v. Salem Inn*, 422 U.S. 922 (1975), here the court held that topless dancing in bars may be accorded First Amendment Protection and it can be regulated by the State under certain circumstances. In *Schad v. Mount Ephraim* 452 U.S. 61 (1981). The Court held that nude dancing in bookstores in particular booths for the viewership of patrons in the bookstores could be accorded First Amendment protection.

²¹*Barnes v. Glen Theatre, Inc.*, 501 U.S. 560 (1991).



the Court held that governmental regulations regarding public nudity is acceptable in cases of creating buffer zones and operational requirements. This was a case where a local regulation was brought in with respect to the condition of wearing G Strings in places of public nude dancing as a regulation under the public indecency law of Indiana. It was challenged on the ground that erotic messages cannot be provided when a g String is worn. The court upheld the restriction as it was considered minimal and it leaves ample capacity to the nude dancer to convey the erotic message. What must be noted here is that though the Court upheld the restriction, it also recognized nude dancing as a form of symbolic speech under the First Amendment. the Court also held that the Government has the power to regulate expression in the light of secondary effects that the adult industry has on the public such as increased crime and decreased property rates. In other words, the secondary effects doctrine gives the power to the government in regulating expression and symbolic speech such as nude dancing. This indicates that nude dancing was given a First Amendment protection where the standard of review is very low or minimal, yet given protection. In the later cases, where there was a governmental regulation banning public nudity and complete nudity it was upheld by the Court, though semi nudity was protected.²² Thus, it can be seen that most cases of regulation of nude dancing is based on whether or not the regulation is content neutral or content specific. If the regulation is according to the time place and manner doctrine as brought by a large number of cases in the US, then it a valid regulation and nude dancing can be regulated. But, if it is a content specific regulation that goes into the subject matter of the expression of nude dancing then it is not a valid regulation and can be subject to stricter scrutiny of judicial review.²³

Art Speech in Theatrical Performances and the ECHR

Article 10²⁴ of the European Convention on Human Rights protects various

²²City of Erie v. Pap's A.M., 529 U.S. 277 (2000).

²³See Schultz v. City of Cumberland, 228 F.3d 831 (7th Cir. 2000).

²⁴1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises. 2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.



kinds of expression, including artistic, non-verbal and non-visual forms. This right means the freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. The courts have, in several occasions emphasised that Article 10 not only applies to ideas and imparting of information, or to those that are favourably received and is inoffensive or indifferent, but it also extends to anything that tends to offend shock or disturb, as it is required in a pluralistic broadminded society.²⁵

But there are situations where the state can legitimately impose certain conditions and restrictions on exercise of this right. These restrictions must be construed strictly and the need for these restrictions must be construed convincingly.²⁶

The Article places a positive obligation on the contracting State to see that these rights are protected and exercised without due interference from the State, and the State can interfere only in cases as mentioned under the said Article. This means that the State should ensure that the rights of the authors, artists and journalists are effectively protected against all state action, in such a manner that they have the space, opportunity and environment for participating in public debates even if their opinions go contrary to those of the State and even if they are shocking, disturbing or irritating.²⁷ There is a three step evaluation process to check if the contracting parties have complied with the provisions of the convention.

First, there must be an interference by the state with respect to person exercising his expression under the Article 10. This interference can be by introducing formalities, conditions, restrictions and penalties. The interference by the State must be in the form of a prescribed law, that are specific, available, and applied in a predictable manner.

Second, there must be a legitimate aim for the lawful interference by the State. This legitimate aim or the specific purpose of the legislation is clearly spelled out in para 2 of Article 10 of the convention, which include the interest of national security, territorial integrity, and public safety, for the prevention of disorder or crime, for the protection of health or morals, for

²⁵The Observer and Guardian v. The United Kingdom, 51/1990/242/313 (ECHR, 24 October 1991).

²⁶Stoll v. Switzerland, 69698/01 (ECHR, 10 December 2007).

²⁷Dink v. Turkey, 2668/07, 6102/08, 30079/08, 7072/09 and 7124/09 (ECHR, 14 September 2010), Khadija Ismayilova v. Azerbaijan, 65286/13 and 57270/14 (ECHR, 10 January 2019).



the protection of the reputation and rights of others, for the prevention of disclosure of information received in confidence, and for maintaining the authority and impartiality of the judiciary. If this second limb is not satisfied, the regulation automatically becomes void and the need to satisfy the third limb becomes insignificant.²⁸

Third, the legitimate aim should satisfy the test of the ‘necessity of the interference in a democratic country’. It must be shown by the State that the interference was necessary for the democratic country of the contracting State. The way to check whether a particular interference is necessary is to check whether it is proportionate to the legitimate aim so pursued by it. The test of proportionality can be determined by using various tools. Firstly, one of the tools created by the court to see if the interference is proportionate to its legitimate aim is to see if there is a pressing social need for the interference. The Court in many cases have held that a pressing social need is not the as the expressions of *admissible*”, “*ordinary*”, “*useful*”, “*reasonable*” or “*desirable*”²⁹. It cannot be synonyms to indispensable, but it is more or less on the same lines. In other words, if there is an interference, the State must show that the interference was absolutely necessary. Thus, the burden of proving that the interference was necessary is on the State, where the State must show that the interference was prescribed by law, there was a genuine legitimate aim sought to be achieved by the interference, and that the interference was necessary in a democratic country. But there is another doctrine called the margin of appreciation in relation to the ECHR. The degree of scrutiny with which the Court views the interference is inversely proportional to the degree of discretion given to the Contracting parties under the concept of margin of appreciation. This doctrine is directly related to the issue of consensus of the European nations regarding any issue at hand. In other words if there is less consensus regarding a human rights issue raised by the applicant amongst the Contracting parties, then national authorities are better placed to decide on the matter and the Court should be deferential to them in its final judgment.³⁰ Hence, even though the burden of proof is on the Contracting parties with respect to any interference on artistic freedom, whether or not the individual freedom is given more importance than State

²⁸Case of Khuzhin v. Russia, 13470/02 (ECHR, 23 October 2008).

²⁹Gorzelik and Ors. v. Poland, 44158/98 (ECHR, 17 February 2004); *Barthold v. Germany*, 8734/79 (ECHR, 25 March 1985); *The Sunday Times v. the United Kingdom*, 6538/74 (ECHR, 26 April 1979).

³⁰George Letsas, *A Theory of Interpretation of the European Convention on Human Rights* (Oxford, 2007).



action would depend on the application of the degree of margin of appreciation accorded by the Courts, to States with respect to the artistic freedom. If a wide margin of appreciation is accorded, it means that the States have discretion to make its own laws, and the Courts will generally refrain from scrutinizing these laws on grounds of violation of artistic freedom. On the other hand, if a narrow margin of appreciation is accorded, it means that the State has to Strictly abide by the principles under the Convention, and hence will be subject to a strict scrutiny under Article 10 of the Convention.

In the case of *Unifaun Theatre Productions Limited and Others vs Malta*³¹, which was an application made by the production company of the play called “Stitching”, against Malta for banning the play from being performed. The ban was issued by the Maltese Board for Film and Stage Classification (Board) because the play was deemed to be blasphemous, insulting to the victims Auschwitz, and portraying dangerous sexual perversion. The Board initially gave no reasons for the ban, however when the case came up before the Maltese Constitutional Court, the Chairman of the Board produced certain guidelines under the Maltese Cinema and Stage regulations, according to which major parts of the play was considered “beyond the limits of public decency.” The Maltese Court agreed with the decision of the Board and held that the play used vulgar, obscene and blasphemous language had aspects that were against the dignity of women. The Court held that free speech had limits prescribed, and it was accompanied by rights and responsibilities as well. Morals, reputation of others and public decency were restrictions according to the Maltese Constitution and the Convention read together, and hence the ban was upheld. The European Court on Human rights in this case identified the three limbs of Article 10-prescribed by law, should have a legitimate aim, and must be necessary in a democratic country. The ECHR, held that the guidelines were not published and the public had no means to access the said guidelines. It was only produced by the Board, whilst the proceedings were underway. There was no record of the date of publication. Its circulation and dissemination. Hence, the State failed to prove that the interference was prescribed by law. It was held that there was no clarity on the scope of discretion and the manner of its exercise by the concerning authority in imposing the ban. Therefore, whether banning a stage production was at all possible under the Cinema and Stage Regulations was not precise and foreseeable. The was lifted by the ECHR on the grounds it violated artistic freedom under the scope of Article 10 of the Convention.

³¹37326/13 (ECHR, 15 May 2018).



Here one can see that the burden of proof is on the state and a high standard of review was adopted by the Court, giving no regard to the concept of margin of appreciation.

Comparison with India – Conclusion and Suggestions

The Dramatic Performances Act, 1870, was enacted as a tool to be used by the British to curb any voice or dissent against their government in India. It is seen in the initial part of the chapter, that the British did away with all forms of censorship by the government on public performance through the 1967 legislation. The said Act, was prevalent in India until 2017. It was considered to be unconstitutional by several high courts. Though there is no Supreme Court decision to this effect, one could have argued that by reading in Article 13, pre constitutional laws that violate Part III is unconstitutional. However, the Act become obsolete through The Repealing and Amending (Second) Act, 2017.

In India, State control on Dramatic performances, are seen under 2 categories; Specific state legislations on regulation of dramatic performances; Special rules framed under the State Police Act, for regulation of public performances including dramas. Under both these types of state regulation, senior officers are to determine objectionable matter, such as the Deputy Commissioner or the Traffic Police Commissioner or even the Collector. In reality none of these officers find the time or take the effort to go through the script of the plays in detail and determine as to whether or not it amounts to objectionable performance as mentioned under the Acts. It is usually the head constable of the particular police station under whose jurisdiction the play is to be performed, that actually reads the script. The first type of legislation is more or less similar to the 1870 Central legislation, where, in defining what constitutes an objectionable material words like *sabotage, overthrowing or undermining the government, insulting or profaning, grossly indecent, scurrilous, intended to blackmail* are used, that are too broad and vague, primarily because the deciding authority is the State Government or an officer so appointed by the State government, which is usually the Police. In the Supreme Court decision regarding the play of '*kristuvinde Aaram Thirumuri*', there was no question regarding the constitutional validity, the court also did not discuss on the excess powers given to the district collector to judge whether or not a particular play is objectionable. Nor did the court go into whether the definition of objectionable under Section 2 was reasonable as per the restrictions given under Article



19 (2). Though the petition was filed arguing the artistic freedom of the author and organiser, there was no discussion in this regard in the entire judgment. The reasoning centred on what amounts to ‘satisfaction’ of the Collector and what amounts to a ‘deliberate’ intent to incite one religious’ group against the other. Whether a person who has no artistic sensibility can sit as an authority for pre censorship was not considered. Again, the play in question was an adaptation of an already existing novel and the court refused to take that as a ground for protecting artistic freedom. Here the court has completely missed the mark, in understanding that artistic freedom under Article 19 (1) (a) is a fundamental right and there can be a legitimate state interest in restricting that right on morality or public order only if such a restriction is reasonable. The court laid down certain guidelines to show what will amount to satisfaction of the Collector- and held that there must be a rational nexus between the relevant facts and the order passed. Here there is no implication to the fact that a Collector is not an adjudicating body, and the right to artistic freedom cannot be lost to bureaucracy. On the other hand, the Tamil Nadu High Court addressed all these aspects and recognised artistic freedom of the author and the organiser, and held that an authority such as that of the Police Commissioner or the District Collector cannot be an authority to judge whether a particular dramatic performance is objectionable or not. Moreover, abstract terms such as scurrilous cannot define an offence. though there were provisions given in the rules and the enactment to provide for an opportunity to be heard, this was never followed in practice and the entire script of the performance had to be given for scrutiny to the Police Commissioner who would then, without any merit decide whether it was objectionable or not according to his own whims and fancies.

Again, in the second category of legislations, in the instance of the Bombay Police Act, for public performance a performance licence is to be acquired from the police for public performance. The licence can be rejected if it causes *obstruction, inconvenience, annoyance, risk, danger, damage, harms national interest or cause law and order problem*³². None of these phrases fall within the scope of Article 19(2). Again, it must be accompanied by a suitability certificate from the pre censorship Board called the Scrutiny

³²Rule 110 (a), The Rules for Licensing and Controlling Places of Public Amusement (other than Cinemas); and Performances for Public Amusement, including Cabaret Performances, Melas, Discotheque, Games, Pool Game Parlours, Amusement Parlours providing Computer or Virtual Reality Games, Cyber Cafes, Bowling Alleys, Card Rooms, Social Clubs, Sports Clubs Melas and Tamashas, 1960 (No.2357-T of 1961).



Board. Performances that *lower the moral standards of the audience, is against the accepted canons of decency, depicts immoral as attractive, enlist sympathy from the audience for immoral characters, depict relationship between the sexes to lower the sacredness of marriage and depict illicit as normal or as an ordinary way of life* will not be granted a suitability certificate. Earlier in the chapter it was seen that even though there is a Scrutiny Board for pre censorship in Bombay, and there were no provisions for the right to be heard and appeal, against the decision of the scrutiny board. The Bombay High Court, took a stern stance regarding the constitutionality of these proceedings and held them to be unconstitutional. Here, however, there was no question with respect to the artistic freedom of the author, or whether the restrictions under the said Act and Rules were reasonable. It was judged purely on natural law principles and was held to be arbitrary. The unfettered powers given to the executive is also not discussed. Thus, in India, with respect to dramatic performances and other public performances unfettered power is given to the local authorities in relation to censoring artistic freedom. most of these regulations and guidelines do not fall within the scope of Article 19 (2). The standard of review with respect to these regulations is at a very low and deferential level, where the burden of proof is on the person, usually the theatre production or the author of the play in showing that his fundamental right to artistic freedom was violated. The courts have only procedural aspects and clarified the scope of authorities in the light of natural law principles, where the party whose freedom was curtailed should be given the right to be heard and a provision for appeal. The court has not discussed the right of the author as a part of Article 19 (1) (a), and looked into it as artistic freedom. the Court in India, have not addressed the substantive aspects such as what constitutes objectionable performance, abuse of discretionary power given to local bodies, or pre censorship.

In the USA, after the advent of motion pictures, first amendment rights were extended to any public performance, live or otherwise. This meant that the *Miller* test relating to obscene content was also extended to public performances and theatre productions. If the performance had any value, social, political, literary, artistic, scientific etc, it would not be considered obscene. Hence the standard of review is placed at a very high pedestal with the State having to prove that there was a compelling state interest in the interference and there was no other alternative mechanism other than the restriction imposed, and the restriction was narrowly tailored. The same



is the case of hate speech, where the *Brandenburg* test, of imminent law less action resulting from the speech has to be shown by the State. Thus, all legislations of the State, where local authorities are given the power to grant or reject licences for stage performances, will fall under the strict scrutiny of the Court under the First Amendment Rights. Live music shows and nude dancing that were prohibited by local regulations were upheld under the First amendment. The regulations were struck down as being content based regulations and subject to strict scrutiny review by the Court.

In the European Union, artistic freedom in theatre was upheld by the court on the grounds that the guidelines issued by the government were not prescribed by law as it was not made accessible to the public. The Court adopted a high standard of review, with the burden of proof placed on the State.

Table 1 – Comparative Standards of Judicial Review on Artistic Freedom in Dramatic Performances

Jurisdiction	Constitutional / Legal Basis	Standard of Review	Key Judicial Tests / Doctrines	Leading Cases	Judicial Approach to Artistic Freedom
India	Article 19(1)(a) & 19(2) – Constitution of India; State Police Acts; former Dramatic Performances Act, 1876	Low / Deferential Standard	“Reasonable Restrictions” test under Article 19(2); administrative discretion by executive authorities	<i>K.A. Abbas v. Union of India</i> and <i>Shreya Singhal v. Union of India</i>	Courts largely uphold executive pre-censorship; focus on procedural fairness over substantive artistic rights; limited scrutiny of morality - based restrictions
United States	First Amendment to the U.S. Constitution	Strict Scrutiny Standard	“Clear and Present Danger” test “Imminent Lawless Action” test (<i>Brandenburg v. Ohio</i>); “ <i>Miller Test</i> ” for obscenity	<i>Freedman v. Maryland</i> <i>Southeastern Promotions v. Conrad</i> (1975) 420 U.S. 546	Prior restraint heavily disfavoured; burden on the State to prove compelling interest and narrow tailoring; strong protection for theatre, music and film as artistic speech
European Court of Human Rights (ECHR)	Article 10, European Convention on Human Rights	Proportionality & Necessity Test	“Prescribed by Law”, “Legitimate Aim”, and “Necessary in a Democratic Society”; “Margin of Appreciation” doctrine	<i>Handyside v. United Kingdom</i> <i>Uniform Theatre Productions v. Malta</i>	Balancing model — courts uphold restrictions only if proportionate and justified by a pressing social need; burden on the State to prove legality and necessity of interference

Thus, it is difficult to digest what A. G Noorani,³³ suggests, i.e., to bring about a separate statutory independent authority for censorship of plays, which

³³ A.G. Noorani, The Police and Censorship of Plays 39 Economic and Political Weekly 47 (2004).



will be manned by a civil servant by election and appeals to lie to a separate Tribunal constituted for the same; as the purpose here is to prevent any sort of abuse of the fundamental right to artistic freedom. Just by shifting the powers from the police commissioner or the SI of police to the independent authority so constituted will not be an effective check on the arbitrary exploitation of the discretion to restrain free speech. this will result only in the sad state of affairs as seen in the UK that led to the 1968 legislation abolishing censorship. The most effective mechanism to protect the creativity and aesthetics of artistic freedom in plays is only by-

1. Abolishing any form of pre-censorship as seen in various states – either by special scrutiny boards created by the Police commissioner or SI or the Collector
2. Stripping the local authorities, such as the Police Department of its power to handle matters of art
3. Public performances and dramatic performances come within the scope of artistic freedom under Article 19 (1)(a), and it can be limited only by law, where the restrictions come under Article 19(2) and are reasonable.
4. Adopting a very high standard of review, applying the strict scrutiny principle in matters relating to artistic freedom, where the burden of proof is on the State to show that restricting public performance was necessary and there was no other alternative.