



By Email

To,
Shri Sanjiv Shankar,
Joint Secretary (Broadcasting-I) and CVO,
Ministry of Information and Broadcasting
Email: jsb-moib@gov.in

Date: December 07, 2023

IFF/2023/057

Sub: IFF's comments on Broadcasting Services (Regulation) Bill, 2023

Dear sir,

1. Internet Freedom Foundation ('IFF') is a registered charitable trust which advocates for the digital rights of Indians. Our mission is to ensure the growth of digitisation with fundamental rights guaranteed under the Constitution of India. We work across a wide range of issues with expertise in internet shutdowns, digital access and free expression.
2. We are writing to you to offer our inputs on the 'Broadcasting Services (Regulation) Bill, 2023'. We would like to express our opposition against the proposed inclusion of online news publishers and "OTT" broadcasters under the same regulatory framework as the other traditional broadcasters such as cable tv and radio. Although detailed reasoning for our concerns, in a clause-by-clause format, are listed in the table below (Page 03), we have summarised 5 broad key concerns in the following points:
 - a. **Frictions in the consultation process:** Although stakeholders were given 30 days to send comments, the draft bill as well as the accompanying explanatory note were only published in English, creating barriers for widespread public participation. To ensure an informed and meaningful consultation on this bill, which may have far reaching consequences on constitutional freedoms, the Ministry must publish relevant material in multiple regional languages and modes of media, and also conduct open-door, in-person consultations in different parts of the country. We hope that the Ministry follows additional healthy precedents for public consultations, including making the comments publicly available and allowing for counter comments. Given how crucial these conditions are for a meaningful consultation, we urge the MIB to extend the consultation deadline by a minimum of 30 days.



- b. **Definitional ambiguity and over reliance on delegated legislation:** Presence of vaguely or inadequately defined/ undefined terms and instances of excessive delegation of rule-making may lead to uncertainty for the stakeholders and may prevent them from being fully informed so as to meaningfully engage in the consultation process. Ambiguous definitions, uncertainty over scope of application, and reliance on future rulemaking by the executive makes the Broadcasting Bill vague, overbroad, and worrisome, that is open for misuse through subjective and selective application.
- c. **Threats to democratic functioning of media:** The bill extends the Ministry's regulatory ambit to any person who broadcasts news and current affairs programs through a digital medium (such as online paper, news portal, website, social media intermediary, or other similar medium). This provision will apply to any individual, and not just media companies or journalists, who chooses to share news as part of a 'systematic business, professional, or commercial activity'. Concerns over how "news and current affairs" is currently defined under the bill and uncertainty over the scope of application of this Clause augment concerns around erosion of democratic principles of online free speech. This will threaten journalistic expression as well as a users' right to access multiple, diverse points of view, especially in the environment of high penalties for non-compliance with prescribed ethical codes and government orders.
- d. **Risks of regulating online curated content:** The Ministry has proposed the expansion of the regulatory framework currently applied to traditional broadcasters to "OTT" broadcasters [For the purposes of these comments, the term "broadcasters" will be used to mean "broadcasters and broadcasting network operators"], in the absence of an elaborate reasoning or justification. The risks associated with applying stringent rules and codes to "OTT" broadcasters include, but are not limited to, increase in financial and compliance burden; negative impact on user experience, choice, and even costs borne by the users; entry barriers; stifled innovation; and potential censorship, both imposed and self-applied.
- e. **Disproportionate control retained by the Executive:** The powers of the Union government with respect to the third tier in the regulatory structure, unreasonable reliance on future rulemaking powers/ delegated legislation, as well as the inspection and penalty provisions (such as to prohibit operation in public interest), create a skewed power dynamic. In light of the several documented instances of the Union government imposing restrictions and exercising ultimate discretion with the content published by "OTT" broadcasters as well as news publishers, the MIB must refrain from creating overbroad provisions which empower the former with unbridled censorship powers and may impose restrictions of constitutional freedoms.



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3. In addition to our comments on the draft bill, IFF's principal recommendation to the Ministry is to withdraw the Broadcasting Services (Regulation) Bill, 2023 in its entirety. We urge the Ministry to refrain from acting as a 'moral compass' and to steer away from dictating modifications and deletions.

We look forward to your response. We remain at your disposal should you wish to discuss the matter any further.

Kind Regards,

Prateek Waghre,
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IFF's comments on the draft **Broadcasting Services (Regulation) Bill, 2023**

Internet Freedom Foundation



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We would like to thank Executive Director, Prateek Waghre for his assistance.

Detailed comments on the Broadcasting Bill, 2023

S. no.	Particulars	Views/Comments/Suggestions/Remarks/Recommendations
	Explanatory note	<p>The draft bill proposes a uniform regulatory framework for both traditional broadcasters and “OTT” broadcasting services. The explanatory note states the need to “bring clarity, consistency, and flexibility to regulations, while strengthening consumer protection and promoting ease of doing business” as one of the objectives for introducing the Broadcasting Bill. The Ministry however fails to elaborate on the underlying justification or rationale for introducing consistent regulations for emerging emerging technologies in the sector such as “OTT”. Moreover, the recurring reliance on future executive rulemaking contradicts their intention to introduce clarity and promote ease of doing business. While the Bill provides flexibility with the use of un-elaborated provisions such as “Programme Codes”, “terms and conditions”, “standards” etc., they aren’t even centred/ grounded in any core principles, which becomes a cause for concern as it may be arbitrarily implemented in the absence of any guiding principles.</p> <p>It also states the aim of creating a level playing field, fostering investment and innovation, adapting to emerging trends, safeguarding consumer interests, simplifying compliance, and encouraging growth and competition in the broadcasting sector. The “OTT” sector continues to witness enormous economic gains and has also democratised entry opportunities in the sector.¹ Additionally, the rise in viewership numbers and increasing preference for on-demand content among users has been well documented.² There exists no evidence from the government which explains how such an intervention would work in the interest of the consumers or even the industry.</p> <p>While “OTT” broadcasting services provide access to a range of content</p>

¹ “Indian OTT platforms’ revenue from global viewers up 194% in 2 yrs”, Fortune India, August 03, 2023.

<https://www.fortuneindia.com/enterprise/indian-ott-platforms-revenue-from-global-viewers-up-194-in-2-yrs/113626>.

² Vibhu Agarwal, “India’s OTT platforms”, The Times of India, February 14, 2023.

<https://timesofindia.indiatimes.com/blogs/voices/indias-ott-platforms/>.

		<p>on its platform to several of its subscribers, viewers retain the autonomy to not consume a programme if they wish to do so. This “pull model” is, in principle, a direct contradiction to the “push model” on which cable TV operates, wherein consumers cannot choose to stop the airing of a programme (even if they may be able to switch channels).³</p> <p>The overbroad compliances imposed on broadcasters, especially online curated content creators and news publishers, will create entry barriers, stifle innovation, and complicate compliance. Further, impact on the dynamic, diverse, extensive creator community and their artistic as well as creative freedom may be immeasurable. We urge the Ministry to uphold constitutional principles and prioritise that over economic incentives.</p> <p>Notably, the Union Minister for Information and Broadcasting, Anurag Thakur, has on several occasions voiced the need for “OTT” players to be mindful of Indian culture, to not “propagate vulgarity and abuse camouflaged as ‘creative expression’”, and to take responsibility for the content they produce.⁴ It also becomes pertinent to remind ourselves of the overbearing regulation of Cable TV, growth stifling price caps on channels, excessive broadcasting legal disputes, and formulaic production of content.⁵ Thus, it becomes important to reflect on the Ministry’s underlying intentions with bringing a flourishing “OTT” broadcasting sector under a similar regulatory framework.</p>
	<p>Clause 4(4)</p>	<p>Clause 4(4) states that the Union Government may allow registration or intimation of a broadcaster “<i>for the fulfilment of such social objectives as may be prescribed</i>”. In the absence of clarification or elaboration on these social objectives, it becomes difficult to understand on what basis or reasoning have the traditional broadcasting rules and codes been applied</p>

³ “Cable TV like regulation to affect OTTs growth,” say experts on Broadcasting Bill”, Indian Television, November 14, 2023. <https://indiantelevision.com/regulators/ib-ministry/%E2%80%9C-cable-tv-like-regulation-to-affect-otts-growth%2C%E2%80%9D-say-experts-on-broadcasting-bill-231114>.

⁴ “OTT platforms must be sensitive to India’s cultural diversity, says Anurag Thakur”, The Economic Times, July 19, 2023. <https://economictimes.indiatimes.com/industry/media/entertainment/media/will-not-allow-ott-platforms-to-demean-indian-culture-society-in-name-of-creative-freedom-anurag-thakur/articleshow/101869438.cms>.

⁵ Varun Ramdas And Srishti Joshi, “India’s digital economy isn’t broken. What is I&B ministry fixing by bringing OTT under it?”, The Print, November 23, 2023. <https://theprint.in/opinion/indias-digital-economy-isnt-broken-what-is-ib-ministry-fixing-by-bringing-ott-under-it/1855448/>.

		<p>to “OTT” broadcasting services. Regulatory homogenisation of the cable TV and “OTT” content may stifle innovation and growth in the online curated content industry.</p> <p>The move to bring “OTT” under regulation must be viewed in the backdrop of declining popularity of Cable TV and user migration to “OTT” platforms, especially post COVID. On the latter, a user has available a wide range of content, at cheaper costs, or in some cases, even free of cost. Thus, a decline in Cable TV revenue doesn’t come as a surprise.⁶</p> <p>The lack of insight into the government’s rationale inhibits the stakeholders’ ability to meaningfully engage in the consultation process. As we showcase in our comments below, such regulatory intervention may have a devastating, irreversible impact on online free speech, journalistic freedom, and artistic creativity.</p> <p>Thus, this bill must have been preceded by or introduced along with a white paper(s) or discussion paper(s). These papers should have included a clear articulation of the government’s reasoning behind expanding regulatory ambit over internet broadcasting services, findings of any impact analysis undertaken by the government, the types/kinds of options and/or alternatives considered by the government with respect to regulation of various services in the broadcasting sector and their position(s) on each of them, and so on. The Ministry must also proactively publish information on all its working groups on draft legislations, including any position papers/ white papers and internal minutes of meetings of all inter-departmental groups, in line with the public authority’s obligations under Sections 4(1)(b) and 4(1)(c) of the Right to Information Act, 2005.</p>
	<p>Clause 4(5)</p>	<p>Clause 4(5) allows the Union Government to “<i>make provisions for the regulation of services other than broadcasting services that are intricately linked to broadcasting networks or broadcasting services</i>”. Such</p>

⁶ “77% of cable TV operators expect a decline in revenue in 2020-2021: INTIN Study”, Financial Express, May 26, 2020. <https://www.financialexpress.com/business/brandwagon-77-of-cable-tv-operators-expect-a-decline-in-revenue-in-2020-2021-intin-study-1970975/>.



		<p>excessive delegation of rule-making leads to uncertainty for the stakeholders who may be impacted by the draft bill and prevents individuals from being fully informed so as to meaningfully engage in the consultation process. This instance of delegated legislation gives extensive powers to the Union Government for future rule-making. In the absence of relevant safeguards to protect against arbitrary rule-making, such instances of delegated legislation may lead to uncertainty in the industry.</p>
	Clause 5(1)(f)	<p>Clause 5(1)(f) imposes an obligation on broadcasters to provide ‘any such information’ that may be sought by the Union Government, State Government, any authorised agency, or authorised officer. An overbroad clause such as this one provides the executive with unchecked powers over the broadcasters. In the absence of adequate safeguards, such provisions may deepen the power imbalance between the broadcasting community and the executive, nurturing an environment of restricted freedoms and self-censorship.</p>
	Clause 8	<p>Clause 8 states the criteria for renewal of registration issued to the broadcaster. Clause 8(2) states that failure to comply with the terms and conditions related to renewal of the registration may lead to cancellation of the registration issued by the Union Government. If an individual uses an unregistered broadcasting network or service, either knowingly or despite having reason to believe so, will be issued a monetary penalty of Rs. 10 lakhs. Subsequent contraventions within the period of three years will amount to a penalty of Rs. 50 lakhs. As the meaning of ‘registration’ under Clause 2(hh) includes intimation, Clause 8(2) may apply to “OTT” broadcasters as well, posing a threat to the industry’s autonomy. However, how such a ‘renewal’ power will work in the context of an intimation is unclear.</p>
	Clause 9	<p>The Registering Authority may suspend or revoke the registration granted in case of violation of terms and conditions of such registration. Given that the authority will be notified by the Union Government, the executive once again retains power over the broadcasters through this clause. Notably, the safeguards are built into Clause 9 as it makes giving a reasonable opportunity of being heard to the broadcaster mandatory</p>



		before issuing an order of suspension or revocation. Similar ambiguity arises around how an intimation will be ‘suspended’ or ‘revoked’. The existence of such a provision may dissuade a platform or artist from entering or staying in the Indian creative market.
	Clause 10	Clause 10 mentions that an applicant may appeal against the decision of the Registering Authority to the Appellate Authority within thirty days of the order issued. Clause 10(1) allows the authority’s decision to refuse the grant or its renewal, and the suspension or revocation of registration to be appealed against, and Clause 10(2) provides the applicant a reasonable opportunity to be heard before the disposal of the appeal. Here, it is unclear whether only the broadcaster may appeal the Registering Authority’s decision or if an aggrieved user of a broadcasting service may also appeal the decision. For instance, if the registration of an “OTT broadcaster” such as Netflix gets suspended or revoked, it is unclear if an aggrieved Netflix subscriber can appeal the decision.
	Clause 16(2)	<p>Clause 16(2) states that any person providing an “OTT” broadcasting service in India will be required to provide an intimation to the Union Government of its operations, if their number of subscribers or viewers fall within the prescribed threshold. Since the threshold of number of subscribers or viewers is yet to be prescribed by the Union Government, it may create uncertainty among companies, preventing them from foreseeing the extent of their compliance burden. The absence of guidance/ principles/ criteria for deciding the threshold creates concerns even beyond its prescription, as in its absence, the Union government retains the ability to arbitrarily change the threshold with limited accountability and checks. Thus, at the outset, the Ministry must state such guiding principles or criteria for setting and changing a threshold. Depending on the prescribed threshold, some small scale companies or platforms may also be required to provide an intimation, and as a result comply with the provisions of the Act. Since Clause 2(z) includes ‘company’ under the definition of a ‘person’, it is unclear if foreign companies or platforms will also be required to comply with the provisions under this Act.</p> <p>As per the First Schedule, failure to intimate the Union Government of its</p>

		<p>operations will amount to an initial penalty of Rs. 50 lakhs and a subsequent penalty of Rs. 250 lakhs if the contravention is repeated within 3 years.</p>
	<p>Clause 19</p>	<p>Clause 19 states that the Programme Code and Advertisement Code (“Codes”), <i>“as may be prescribed”</i> by the Union Government, will be different for different broadcast services mentioned in the draft bill as well as any other category of broadcasting service notified by the government. Clause 5(1)(b) imposes an obligation on broadcasters to transmit or re-transmit broadcasting service in conformity with the Codes. Contravention of the Codes by the “OTT” broadcasters will amount to up to Rs. 20,000 for the first contravention, and up to Rs. 1,00,000 for the subsequent contravention. The prescription of the Codes at a later stage may introduce difficulties for companies to foresee the extent of their compliance burden.</p> <p>An obligation on “OTT” and digital news broadcasters to adhere to the ethical Codes has the potential to significantly impede online free speech, as the Codes currently applicable to Cable TV entail notably restrictive instructions. For instance, the Codes prescribed under the Cable Television Network Rules, 1994 states that no programme should be carried in the cable service which “Offends against good taste or decency”, “Contains attack on religions or communities....”, “Contains anything obscene...”, “Denigrates women....”, “Contains visuals or words which reflect a slandering, ironical and snobbish attitude in the portrayal of certain ethnic, linguistic and regional groups”, and “Criticises, maligns or slanders any individual in person or certain groups, segments of social, public and moral life of the country”.⁷ Subjecting online curated content to such constraining Codes, which contains exceedingly vague and ambiguous grounds for restricting speech, will forever inhibit the creative and artistic freedom currently exercised by artists. This will work towards formalising the ‘moral policing’ and censorship of content currently imposed informally and indirectly.⁸ Limiting our comments and suggestions to “OTT” broadcasters and individuals/ companies publishing</p>

⁷ Programme and Advertising Codes prescribed under the Cable Television Network Rules, 1994.

https://mib.gov.in/sites/default/files/pc1_0.pdf

⁸ Gerry Shih and Anant Gupta, “Facing pressure in India, Netflix and Amazon back down on daring films”, The Washington Post, November 20, 2023. <https://www.washingtonpost.com/world/2023/11/20/india-netflix-amazon-movies-self-censorship/>.



		<p>digital news media, we urge the Ministry to acknowledge the dangers of empowering the regulators, including the executive, with such a hazardous tool of censorship and request them to exclude the online content curation space as well as the news/ current affairs publishers from being subject to these Codes.</p>
	<p>Clause 20</p>	<p>Adherence to the Codes extends to any person who broadcasts news and current affairs programs through a digital medium (such as online paper, news portal, website, social media intermediary, or other similar medium) as part of a systematic business, professional, or commercial activity. This excludes publishers of professional or commercial newspapers and online replicas of such newspapers. Clause 20 fails to precisely and specifically define “news and current affairs programme” and “systematic business, professional, or commercial activity”, making it a vague, overbroad, and worrisome provision. Clause 20(2) states that the provision of the Act applicable to “OTT” broadcasters shall also apply to news and current affairs broadcasters. What is unclear is if a threshold for number of subscribers or viewers will also be prescribed for this category of broadcasters.</p> <p>As per the First Schedule, contravention of the Codes by the “OTT” broadcasters will amount to up to Rs. 20,000 for the first contravention, and up to Rs. 1,00,000 for the subsequent contravention. Clause 20 along with the penalty stated under the First Schedule may have wide ranging consequences on independent journalists who rely on the digital platforms such as social media to publish news that may typically be viewed as unpalatable to the government. This over broad provision will apply to not only journalists, but even individuals who choose to share news through online blogs or platforms. Regulatory powers to censure or prohibit content published by news broadcasters extend beyond the permissible restrictions on free expression allowed under Article 19(2) of the Indian Constitution.</p> <p>This Clause raises alarm as an individual sharing news on social media platforms may become liable if the broadcaster/ broadcasting network, self regulatory organisation, or a government appointed council believe that they have not complied with the Codes. If a Code similar to the ones</p>

		<p>notified under the Cable TV Rules, which includes excessively vague and overbroad restrictions on free speech on grounds such as “Contains anything affecting the integrity of the Nation”, “ promote anti-national attitudes”, etc., is applied to individuals sharing news and current affairs through digital mediums, it will cause an irreparable impact on online free speech as well as the freedom of journalistic expression of a news broadcaster or an independent news disseminator. In the <i>Bennett Coleman & Co. v. Union of India</i> (1972) judgement, regarding restrictions and regulations on newspapers and its effect on free speech, the Supreme Court of India found that freedom of the press was an essential element of Article 19(1)(a) and the absence of an express mention of such freedoms as a special category was irrelevant.⁹ In <i>Romesh Thappar vs The State Of Madras</i> (1950), the Supreme Court noted that “<i>Where a law purports to authorise the imposition of restrictions on a fundamental right in language wide enough to cover restrictions both within and without the limits of constitutionally permissible legislative action affecting such right, it is not possible to uphold it even so far as it may be applied within the constitutional limits, as it is not severable.</i>”¹⁰ Thus, only such reasonably defined, specified, and narrow restrictions must be included in Codes which fall under the reasonable restrictions under Article 19(2).</p> <p>Further, such regulation may also threaten a users’ right to access multiple, diverse points of view because the individual broadcasting news will likely only produce content which is palatable to the Union government so as to avoid non-compliance penalty.</p> <p>It is worth noting that the definition of “OTT broadcasting service” [Clause 2(y)] does not include a “social media intermediary, or a user of such intermediary, as defined in rules under the Information Technology Act, 2000 or such other entities as may be notified by the Central Government”. However, Clause 20(1) clearly states that individuals broadcasting programs through a social media intermediary will be liable to adhere to the Codes. This contradiction creates ambiguity over the application of the bill to such platforms. This is also indicative of the</p>
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⁹ Bennett Coleman & Co. v. Union of India [1973] 2 S.C.R. 757, <https://globalfreedomofexpression.columbia.edu/cases/bennett-coleman-co-v-union-of-india/>.

¹⁰ Romesh Thappar vs The State Of Madras [1950] AIR 124, <https://indiankanoon.org/doc/456839/>.



discriminatory application of the bill, wherein only news and current affairs programs broadcasted on social media platforms are brought under regulation. Given that social media platforms are a means for journalists, especially independent and small scale journalists, to disseminate relatively uncensored news, the extension of regulation to such platforms may deepen restrictions to free speech.

The summary of the 1995 Supreme Court Judgement on Airwaves in the case between the *Union of India & Cricket Association of Bengal* clearly outlines the need to maintain impartiality while regulating broadcasting media, especially the delivery of news, to preserve the right to receive and impart information.¹¹ Part 3(b) of the summary states, “*The right of free speech and expression includes the right to receive and impart information. For ensuring the free speech right of the citizens of this country, it is necessary that the citizens have the benefit of plurality of views and a range of opinions on all public issues. A successful democracy posits an “aware” citizenry. Diversity of opinions, views, ideas and ideologies is essential to enable the citizens to arrive at informed judgement on all issues touching them. This cannot be provided by a medium controlled by a monopoly – whether the monopoly is of the State or any other individual, group or organisation. As a matter of fact, private broadcasting stations may perhaps be more prejudicial to free speech right of the citizens than the government controlled media, as explained in the body of the judgement. **The broadcasting media should be under the control of the public as distinct from Government.** This is the command implicit in Article 19 (1) (a). It should be operated by a public statutory corporation or corporations, as the case may be, whose constitution and composition must be such as to ensure its/ their impartiality in political, economic and social matters and on all other public issues. It/they must be required by law to present news, views and opinions in a balanced way ensuring pluralism and diversity of opinions and views. It/they must provide equal access to all the citizens and groups to avail of the medium.*”

¹¹ *Union of India & Cricket Association of Bengal (1995)*. <https://mib.gov.in/document/supreme-court-judgement-airwaves>

		Thus, the MIB must not transgress this Supreme Court judgement and restructure the regulatory mechanism such that the independence of the broadcasters and news publishers are safeguarded from executive intrusion.
	Clause 21	The obligation on broadcasters to self-classify and rate content based on its context, themes, tone, impact, and target audience will significantly increase compliance burden on their part. Moreover, depending on the guidelines issued by the Union government on classification of these categories, the visibility, reach, and consumption rate of the content may be adversely affected.
	Clause 22	Similar concerns around visibility, reach, and consumption of the content arise around the suggested access control measures given the obligation to restrict viewing for certain programmes categorised as such. What kind(s) of, how frequently, and on what basis content will be restricted depends on guidelines issued by the government.
	Clause 23	Notwithstanding our criticisms of the draft bill, we appreciate the Ministry's intention to include Accessibility Guidelines in the Broadcasting Bill in order to make broadcasting services more accessible to persons with disabilities. Some commendable measures proposed include availability of sign language, audio descriptions and subtitles for videos, designation of a disability grievance redressal officer, etc. We appreciate the Ministry's intention and suggest a phased rollout of the accessibility guidelines to mitigate any compliance burden that may arise.
	Clause 24 (1)	<p>A three-tiered regulatory structure has been proposed for ensuring compliance and for grievance redressal. Quite similar to the structure proposed under the Cable TV Act, it claims to be reliant on an predominantly 'self-regulatory' structure. However, the executive oversight and government interference, especially at the third tier, reflects the language of 'co-regulation', but in a much more skewed power dynamic.</p> <p>Such a three-tiered regulatory system was introduced under Part 3 of the Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021 ("IT Rules, 2021"). This structure was created without</p>

		<p>any statutory basis or any public consultation. The allotment of such wide powers to the Union government in the absence of any constitutional or parliamentary backing posed a grave threat to the freedom of speech and expression of content creators and publishers, as well as to the right of free access to information of the consumers of such content. The constitutionality of this part of the IT Rules, 2021 has been challenged in several Courts.¹² The bill does not explicitly state if it is meant to replace or overhaul this part of the IT Rules, 2021.</p> <p>Given the challenge to Part 3 of the IT Rules, which is administered by the MIB, we must question the attempt to bring a similar model of regulation and grievance redressal for “OTT” content and digital news media as well as the imposition of other obligations on broadcasters such as the need to ‘intimate’ the Union government. A similar obligation was imposed on publishers of news media by the Ministry, to furnish information under Rule 18 of the IT Rules, 2021, despite a stay on the Rules that lay out the 3-tier regulatory mechanism.¹³ While there was no stay on the Rule that allows the MIB to seek this information, there is a stay on the Rules that lay out the 3-tier regulatory mechanism, which is the purpose of seeking such information in the first place. The extent to which the Broadcasting Bill will alter the discourse and landscape of the IT Rules challenge remains to be observed.</p>
	<p>Clause 24 (2)</p>	<p>In addition to this, every broadcaster or operator would be required to constitute one or more “Content Evaluation Committee” (“CEC”), the size, quorum, and operational details of which would be determined by the Union government. As per the draft bill, broadcasters could only broadcast programmes that have been certified by the CEC. Broadcasting un-certified programmes will lead to a penalty of Rs. 100 lakhs and Rs. 500 lakhs for subsequent contravention within 3 years [First Schedule]. Clause 24(2)(a) requires the CEC to have members representing social groups such as “women, child welfare, scheduled castes, scheduled tribes, minorities etc.” While the intention to have</p>

¹² Amala Dasarathi and Tanmay Singh, “Supreme Court stays proceedings before High Courts challenging IT Rules, 2021, interim orders to continue”, Internet Freedom Foundation, May 09, 2022. <https://internetfreedom.in/supreme-court-stays-proceedings-before-high-courts-challenging-it-rules-2021-interim-orders-to-continue/>.

¹³ Tanmay Singh, “News publishers furnish their details voluntarily, MIB claims in RTI Appeal”, Internet Freedom Foundation, March 15, 2022. <https://internetfreedom.in/rule-18-it-rules-rti-appeal/>.

		<p>diversity in the Committee is appreciated, the technical competence and expertise of these members to evaluate a diverse range of curated content may be questioned. It is fair to assume that most companies already have in place a mechanism to evaluate content. Thus, the State's involvement in the certification process seems unnecessary and dangerous.</p> <p>Additionally, the burden to mandatorily disclose names and other details of the members of the CEC may put these members under considerable safety risks, both online and physical spaces. Documented instances of platforms proactively censoring content in order to avoid conflict with the Union government sheds light on potential threats to free speech resulting from such mandated disclosure.¹⁴ As per the First Schedule, failure to publicise the names, credentials and other details of members of CEC will amount to an initial penalty of Rs. 50 lakhs and a subsequent penalty of Rs. 250 lakhs if the contravention is repeated within 3 years. The risk of facing such high monetary penalties further accentuates the risks arising from disclosing personal details. Given the wide ranging compliance requirements under this provision, it may result in creation of entry barriers, increased compliance cost, and disruptions in the ease of doing business, especially for small and medium scale broadcasters. Thus, the feasibility and practicality of such a compliance heavy provision must be viewed with caution. Moreover, such disclosure requirements should be encouraged, rather than mandated, only after conducting necessary risk assessments, instead of penalising non-compliance with heavy penalties.</p>
	<p>Clause 26</p>	<p>As per the functions listed under the Broadcasting Bill, the SROs will address grievances which have not been addressed by the broadcaster or broadcasting network operators within the prescribed time period, hear appeals filed by complainants against the decision of the latter, and issue guidance or advisories to its members for ensuring compliance to the</p>

¹⁴ Lata Jha, "OTT platforms in a fix over offensive int'l content", Mint, May 27, 2023.

<https://www.livemint.com/industry/media/afwaahon-ka-safar-sunny-deol-reacts-on-drunk-viral-video-11701855316424.html>.

See also: Gerry Shih and Anant Gupta, "Facing pressure in India, Netflix and Amazon back down on daring films", The Washington Post, November 20, 2023. <https://www.washingtonpost.com/world/2023/11/20/india-netflix-amazon-movies-self-censorship/>.

See also: Apar Gupta and Anushka Jain, "Tandav is a Case Study for OTT censorship under the IT Rules, 2021 #LetUsChill", March 27, 2021. <https://internetfreedom.in/tandav-case-study/>.

		<p>Codes [Clause 26(3)]. An SRO will also be required to make governing norms and articles for its members, which would include punishment for non-compliance with the norms or the Codes. The punishment includes an apology, temporary suspension, expulsion from membership, advisory, warning, censure, and/or monetary fine up to 5 lakhs [Clause 26(4)].</p>
	<p>Clause 27</p>	<p>The Broadcasting Bill allows the Union government to constitute the BAC consisting of an independent member with 25 years of experience in the media industry as the Chairperson; 5 ex officio officers representing MIB, Ministry of Women and Child Development, Ministry of Home Affairs, Ministry of External Affairs, and Ministry of Social Justice and Empowerment; and 5 additional eminent independent persons [Clause 27(1)]. The BAC, in essence, replicates a structure similar to the Inter Ministerial Committee (IMC) constituted by the MIB for the regulation of Cable TV.¹⁵ Also substantively composed of government officials, the IMC functions in a recommendatory capacity and has the power to suggest penalty and other content modification decisions to the Union Government. The composition of the BAC, which predominantly includes government representatives, raises questions around its decision making expertise with respect to online curated content, its transparency and accountability, and its diversity.</p> <p>The terms and conditions related to the appointment of members to the BAC, the manner of their selection, tenure, and the manner of performance of their functions are yet to be prescribed. The BAC may refer any appeal or reference to review panels constituted by it. The current composition of the BAC raises concerns around the Council's autonomy.</p> <p>Clause 27(5) gives the BAC the power to co-opt any number of additional members, who shall have the right to attend the meetings and take part in its proceedings but shall not have the right to vote. Notably, no criteria or qualifications have been provided for co-opting such members, opening the position to possibly anyone who the BAC members may deem fit. Interestingly, members co-opted with the approval or recommendation of</p>

¹⁵ Rajya Sabha Unstarred Question No. 869 answered by the MIB dated 09, February, 2017.
<https://sansad.in/getFile/annex/242/Au869.pdf>

		<p>the Union Government, shall have the right to vote. Thus, through this provision, the Union Government will be able to directly influence and even change the decision of the BAC, while also being able to evade the accountability and transparency obligations applicable to other non-co-opted BAC members. The apparent executive control paves the way for a toothless and unaccountable BAC.</p>
	<p>Clause 28</p>	<p>The BAC may hear appeals filed by complainants against the decision of the SROs as well as the complaints regarding violation or contravention of the Codes referred to it by the Union government [28(1)]. After examining complaints, the BAC has to make recommendations to the Union government, which will then issue appropriate orders and directions [Clause 28(2),(3)]. The ability of the Union government to refer a complaint to a government-appointed body as well as the power to issue final order is likely to pave the way for censorship as well as self-censorship.</p> <p>In light of increasing scrutiny of streaming platforms, the Union government oversight over the BAC and CEC raise censorship concerns.¹⁶ Here, the recommendations listed in the MIB’s Expert Committee report on Film Certification chaired by Shyam Benegal (“Expert Committee”) must be remembered and applied.¹⁷ The Expert Committee report calls for a more liberalised regime even for film certification and cautions against the Central Board of Film Certification acting as a ‘moral compass’. The Union government must take inspiration from the recommendation given by the Expert Committee and steer away from dictating modifications and deletions.</p>

¹⁶ Reuters, “Worried about obscenity, India asks OTT platforms for content checks”, Business Standard, July 14, 2023, https://www.business-standard.com/industry/news/worried-about-obscenity-india-asks-ott-platforms-for-content-checks-123071400415_1.html.

¹⁷ Ministry of Information and Broadcasting, Report of Committee of Experts chaired by Shri Shyam Benegal, January 6, 2021. <https://mib.gov.in/filmsdocuments/report-committee-experts-chaired-shri-shyam-benegal>.

	<p>Clause 29</p>	<p>This Clause refers to the constitution of review panels by the BAC. These review panels will be empowered to carry out the same functions as the BAC. The manner in which any appeals or reference will be assigned to the review panels by the BAC will be decided as per rules, yet to be drafted by the Union Government. Notably, these parallel panels will have the same functions and powers as the BAC, as well as the same level of executive oversight on and control over as the BAC. In the absence of adequate safeguards and institutional checks and balances, the third tier of the regulatory structure will essentially become a tool for the Union Government to (mis)use, to promote palatable or favourable content.</p>
	<p>Clause 30 and 31</p>	<p>Clause 30 empowers the Union Government or agency so authorised by it or authorised officer, with the right to inspect broadcasting networks and services. Upon instruction, the operator of broadcasting network or broadcasting services will be required to provide the necessary <i>“equipment, services and facilities at designated place or places for lawful interception or continuous monitoring at its own cost under the supervision of the Central Government or agency so authorised by it or authorised officer.”</i> Clause 31 allows the Union government’s power to inspect, intercept, monitor, and seize the equipment of broadcasting networks and services. The power to inspect, intercept, and monitor cable network and services and to seize equipment used for operating cable television networks were added to the Cable TV Act by way of an amendment in 2011. Clause 30 in the Broadcasting Bill is more or less identical to Section 10(A) of the Cable TV Act. Interestingly, the Cable TV Act includes a safeguard in the confiscation provision (Section 12), which states that the cable operator from whom the equipment has been seized may be liable to confiscation unless the operator registers himself as a cable operator. However, the exemption provision appears to be considerably narrower in the Broadcasting Bill, under which the broadcasting network will not be considered liable for confiscation only if they demonstrate ‘compliance with the provisions of this Act’. Thus, a broadcasting network will be required to comply with each and every direction of the regulatory authorities as well as the Union government directions, orders, and/or penalties, in addition to intimating/ registering with the Union government. The plethora of compliances introduced</p>



		<p>under the Broadcasting Bill will thus make it extremely difficult for such broadcasters to become exempt from confiscation.</p> <p>Both Clauses include a safeguard provision of the obligation to provide reasonable notice, and under Clause 31, the obligation to do so in writing, informing them of the grounds of confiscation, a reasonable opportunity of making a representation in writing, as well as an opportunity to appeal the decision of the authorised officer to the court.</p> <p>The application of such powers on “OTT” broadcasting services raises valid questions and concerns around the executive’s indirect control over the platforms. Moreover, the Union Government’s or their appointed officer’s power to intercept, monitor, inspect, and seize equipment may be misused to create a chilling effect and an environment of fear among the broadcasters, including news creators. The ambiguity around the scope of these powers, i.e. to what kinds of equipment and for how long can they be intercepted, monitored, inspected, and seized, especially in the context of “OTT” broadcasters and new publishers, further augments our fears around imposition of speech restrictions through indirect coercion or fear. In the absence of explicit safeguards and specificities, such provisions may be misused to create an environment of fear and forced adherence among broadcasters. The existence of such extreme powers along with the overbroad penalties for non-compliance will inevitably lead to self-censorship.</p>
	<p>Clause 33</p>	<p>In case of an offence committed by the company, every person who, at the time the offence was committed, was in charge of, and was responsible to, the company for the conduct of the business of the company, as well as the company, shall be deemed guilty of and liable for the offence. Moreover, if the offence committed may be attributed to any director, manager, secretary or other officer of the company, they will also be deemed guilty and liable. In such scenarios of individual exposure to heavy penalties and executive interference in moderation of content, several companies may be hesitant to enter and/or stay in the Indian market.</p>
	<p>Clause 35</p>	<p>Clause 35 allows the Union government to order the broadcaster or the</p>

	<p>and 36</p>	<p>network to delete or modify programme or advertisement and even direct the channel to be off-air for a specified number of hours as a penalty for violating the Codes. The Union government cements its censorship powers under the draft bill through Clause 36(2), read with Clause 5(1)(d), under which it may, in public interest, prohibit the operation of any broadcasting services or broadcasting network operators in the areas notified. The Union government cements its censorship powers under the draft bill through Clause 36(2) under which it may, if it deems it necessary or expedient to do so in public interest, prohibit the operation of any broadcasting services or broadcasting network operators in the areas notified. The language in Clause 35 and 36 is very similar to the language in Section 19 of the Cable TV Act, which also empowers the authorised officer or Union Government with such draconian powers.</p> <p>In early 2022, the Union Government blocked the broadcasting of the popular Malayalam language news channel, Media One, for the second time, citing ‘security reasons’.¹⁸ The government failed to state, both publicly and directly to the channel, the reasons and grounds for the blocking. This is an example of how such draconian powers can be misused in the absence of relevant safeguards and checks. While on one hand the judiciary has protected speech, by quashing the ban on Media One citing concerns around “chilling effect on free speech and particularly on press freedom”, on other instances, artistic creativity and freedom has also been unfairly stifled by the judiciary, wherein it chose to block certain provocative or dissenting pieces of content while not blocking other propaganda pieces, displaying an inconsistent application of grounds for blocking.¹⁹ The Broadcasting Bill is unfortunately indicative of a missed opportunity of liberalisation, with a clear inclination towards paternalistic approach of regulation resulting in censorship and government control.²⁰</p>
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¹⁸ “Centre blocks MediaOne broadcasting over unspecified security reasons”, Madhyamam, January 31, 2022.

<https://english.madhyamam.com/india/keralas-mediaone-news-channel-blocked-by-the-union-govt-922548>.

¹⁹ Ananthakrishnan G, “SC quashes ban on Media One: ‘Chilling effect’ on free press”, The Indian Express, April 6, 2023.

<https://indianexpress.com/article/india/malayalam-news-channel-media-one-ban-supreme-court-kerala-high-court-8539227/>.

See also: “Supreme Court refuses to ban Sudarshan TV show for now”, The New Indian Express, August 29, 2020.

<https://www.newindianexpress.com/cities/delhi/2020/aug/29/supreme-court-refuses-to-ban-sudarshan-tv-show-for-now-2189828.html>.

²⁰ Mohul Ghosh, “Govt Wants To Regulate Netflix, Prime, Hotstar & Other OTTs; New Bill Also Allows Govt To Run Ads On Digital & OTT Platforms”, Trak.in, November 19, 2023.

https://trak.in/stories/govt-wants-to-regulate-netflix-prime-hotstar-new-bill-also-allows-govt-to-run-ads-on-digital-ott-platforms/#google_vignette.



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