

RESPONSE TO THE
**DRAFT BROADCASTING SERVICES
(REGULATION) BILL 2023**

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ESYA Centre
B-40 First Floor
Soami Nagar South,
New Delhi - 110017, India

The ESYA Centre is a New Delhi based technology policy think tank. The Centre's mission is to generate empirical research and inform thought leadership to catalyse new policy constructs for the future. More details can be found at www.esyacentre.org.

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Introduction

The Ministry of Information and Broadcasting (MIB) initiated public consultations for the Draft Broadcasting Services (Regulation) Bill, 2023 on November 10, 2023. The Esya Centre¹ is pleased to be afforded an opportunity to respond to the Draft Bill.²

Our analysis, which examines each clause in detail, aims to unravel the complexities in the Bill. In doing so, we provide in-depth insights, particularly focused on the proposed inclusion of OTT services and news and current affairs publishers under the same regulatory framework as traditional broadcasters such as cable TV and radio.

Detailed Response – Clause by clause analysis of the Bill

Sr. No.	Particulars (Clause/Sub-section, Section)	Views/Comments/Suggestions/Remarks/Recommendations
Extending the ambit of broadcasting services to OTTs		
1.	<p>Clause 2(1)(f)</p> <p>‘Broadcasting’ means one-to-many transmission of audio, visual or audio-visual programmes using a broadcasting network, intended to be received or made available for viewing, by the general public or by subscribers of the broadcasting network, as the case may be, and the expression “broadcasting services” shall be construed accordingly.</p> <p>Clause 2(1)(i)</p> <p>‘Broadcaster’ means a person who provides programming services and has been provided a registration under Section 11 for uplinking or downlinking of programmes, and in relation to Radio,</p>	<p>The Bill’s definition of ‘broadcasting’ and ‘broadcaster’ are inclusive of OTT services, implying an extension of traditional broadcasting regulations to these platforms. This approach erroneously assumes that OTT services are substitutable with traditional broadcasting, both from consumer and product standpoint. In reality, they are not substitutable due to key differences: the timing of content availability (product side); the varied settings in which consumers engage with content (demand side); and the distinct methods of content delivery (technical side).</p> <p>Push vs. Pull content: Traditional broadcasters like television and radio follow a push-based model where the timing and type of content are pre-determined, thereby limiting viewer control. This format necessitates viewers to adhere to the broadcaster’s schedule to access their favorite shows, restricting their ability to revisit previous segments or curate personalized content lists.³</p>

¹ The Esya Centre is a New Delhi-based technology policy think-tank. Its mission is to generate empirical research and inform thought leadership to catalyse new policy constructs for the future. It simultaneously aims to build domestic institutional capacities for generating ideas that enjoin the triad of people, innovation and value, consequently helping reimagine the public policy discourse in India. More information can be found at: www.esyacentre.org.

² The response is prepared by Noyanika Batta (Junior Fellow) and Akanksha Dutta (Junior Fellow) on behalf of the Esya Centre.

³ *Wynk Ltd. & Anr. vs. Tips Industries?*, Bom HC, COMAP-424-2019

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	OTT and Terrestrial broadcasting network, means the operator of such service.	<p>Conversely, OTT services operate on a pull-based model, giving consumers the freedom to choose their content and viewing times. This model significantly broadens user choices, allowing for a more tailored viewing experience. Unlike traditional broadcasting's uniform content and rigid scheduling, OTT platforms enable users to skip, fast-forward and select content as per their preferences, thus offering a heightened level of flexibility and personalization.⁴</p> <p>Public viewing vs. Individual consumption: The traditional broadcasting model of linear TV operates on a one-to-many distribution system. In this model, television content is simultaneously transmitted to a large number of viewers via radio frequency signals or cables. This distribution system forms the backbone of television broadcasting, enabling millions of viewers to simultaneously watch popular shows, news broadcasts, sports, live events and more. The widespread reach and public nature of this broadcasting model is a key reason why governments exert some control over what is shown on TV, as seen in regulations like the Cable Television Act and various program codes.</p> <p>Television, seen as a family medium in many cultures, fosters co-viewing among friends and family. In India, 82% consumers reported co-viewing with an average of 3.5 average number of co-viewers per household.⁵ Additionally, a BIF-CUTS International survey reveals that 38 percent of respondents view television as a family bonding activity.⁶ Despite the emergence of OTTs, TV consumption in India remains robust, with an increase in overall viewership, a trend attributed to the country's strong collective viewing culture.⁷</p> <p>OTTs, on the other hand, offer non-linear, on-demand content primarily intended for individual consumption. OTT content, typically viewed on smartphones, caters more to individual preferences. The proliferation of smartphones and smart feature phones in the country, coupled with affordable data have resulted in mobile phones becoming the dominant medium of online video consumption in India with</p>

⁴ *Wynk Ltd. & Anr. vs. Tips Industries*, Bom HC, COMAP-424-2019

⁵ BCG-CII, *Shaping the Future of Indian M&E*, CII Big Picture Summit 2022 (November 2022)

⁶ A. Kulkarni, S. Narayan & V. Sinha, *Towards Effective Choice: A Nation-Wide Survey of Indian TV Consumers*, CUTS International and Broadband India Forum (2022)

⁷ Competition Commission of India, *Market Study on the Film Distribution Chain in India*, CCI (October 2022)

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		<p>wide-spread freedom of access.⁸ As per a survey conducted by KPMG, 87% of the daily time spent on online video by the respondents is through the mobile phone.⁹ This trend marks a significant shift in how content is accessed and consumed on OTT services compared to traditional broadcast mediums.</p> <p>Mode of delivery of content and regulatory rationale: Another key distinction between traditional broadcasting services like TV and radio and OTT services lies in their content delivery models. Traditional broadcasters utilize the spectrum, which is a range of radio frequencies essential for communication. Specifically, the UHF bands IV and V (470 MHz to 960 MHz) have been used for broadcasting for many decades.¹⁰ The spectrum is a limited resource because at any given time and place one use of a portion of the spectrum precludes any other use of that portion. This makes efficient management and use of the spectrum vital. Regulation of broadcasting is therefore concerned with technical and economic aspects of policies. It primarily focuses on competition, with a view to ensure that a scarce resource i.e., spectrum is allocated to its most productive and efficient uses. These considerations typically translate into quality of service and licensing regulations to manage the relationships between the network service provider and different market participants.</p> <p>In contrast, OTT services provide content access via the public internet directly to users connected through any electronic device.¹¹ They do not make use of the spectrum. The content is transmitted via a high-speed internet connection rather than through cable or satellite providers.</p> <p>Given these differences, it is conceptually flawed to extend traditional broadcasting regulations to OTTs.</p>
2.	<p>Clause 2(i)(g)</p> <p>'Broadcasting network' means a system used for the transmission of programmes, including cable broadcasting networks, satellite</p>	<p>OTT providers cannot be treated as a broadcasting network operator as they have fundamentally different technical characteristics. OTT services primarily deal with content, while network operators focus on carriage. Broadcasting network operators operate at the network layer, utilizing spectrum– a scarce public resource. In contrast, OTT</p>

⁸ KPMG-Eros Now, '[Unravelling the digital video consumer](#)', KPMG, pg. 55 (September 2019)

⁹ KPMG-Eros Now, '[Unravelling the digital video consumer](#)', KPMG, pg. 55 (September 2019)

¹⁰ https://cuts-ccier.org/pdf/Chapter_on_Broadcasting_Sector.pdf

¹¹ Telecom Regulatory Authority of India, '[Consultation Paper on Regulatory Framework for OTT Services](#)' (March 2015)

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	<p>broadcasting networks, internet broadcasting networks, radio broadcasting networks and terrestrial broadcasting networks.</p> <p>Clause 2(i)(h)</p> <p>‘Broadcasting network operator’ means any person who operates a broadcasting network, and has been granted a registration or license or permission or who has provided an intimation as required under this Act, to provide services using a broadcasting network.</p>	<p>providers function at the application layer, offering apps and content over the public internet. This fundamental distinction in their operational layers and resource utilization clearly separates the content-focused nature of OTT services from the carriage-centric role of broadcast network operators. Therefore, it is conceptually flawed to regulate OTT providers as broadcast network operators.</p> <p>Moreover, the carriage aspect of OTT services is already regulated by the Telecommunication Act, 2023. Meanwhile, the Cable Television Networks (CTN) Act, enacted to govern broadcasting services, focuses primarily on the regulation of carriage of television and radio. Thus, extending the scope of the Broadcasting Bill which is replacing the CTN Act, to OTTs, is likely to create a complex situation of jurisdictional overlap. This overlap between the DoT, which governs the Telecommunications Act, and the Ministry of Information and Broadcasting (MIB), which oversees the CTN Act, raises questions about the efficacy and appropriateness of applying traditional broadcasting regulations to the digital realm of OTTs.</p>
3.	<p>Clause 2(i)(v)</p> <p>News and current affairs programmes means:-(i) newly-received or noteworthy audio, visual or audio-visual programmes or live programmes, including analysis, about recent events primarily of socio-political, economic or cultural nature, or (ii) any programmes transmitted or retransmitted on broadcasting network, where the context, purpose, import and meaning of such programmes implies so.</p>	<p>The definition of news and current affairs content under the draft Bill closely mirrors that of the IT Rules 2021, and therefore lacks distinctiveness and serves as a redundant inclusion. The overlap with the IT Rules adds no new dimensions or clarifications. Further, the definition as it currently stands is overly broad and ambiguous. It encompasses not only media companies and journalists but also any individuals who share news. This raises significant concerns, especially for independent journalists and individuals who utilize digital platforms like social media and online blogs to publish news. Such a wide scope means that anyone sharing news on these platforms could be held liable if they are deemed non-compliant with the codes by either the broadcaster, a broadcaster-appointed self-regulatory organization, or a government-appointed council.</p> <p>The broadened scope could also jeopardize the diversity of perspectives in news content as it creates scope for additional forms of censorship. This goes against judicial precedent regarding the freedom of the press which comes under the broader fundamental right of freedom of speech and</p>

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		<p>expression under Article 19(1)(a).</p> <p>To gauge public opinion in a related context, the Esya Centre conducted a survey of 2000 consumers across India. The findings of the survey provide relevant insights. Approximately 70% of the respondents expressed that they would be dissatisfied with any law leading to a decrease or limited availability of online services, including those relating to audio-visual content. The feedback from our survey respondents emphasizes the value placed on a rich and varied online information ecosystem, a sentiment that becomes particularly relevant in light of the potential impact of the draft Bill on content diversity.</p> <p>Further, the Bill's inclusion of news and current affairs programmes counters judicial decisions. Specifically, the Bombay High Court¹² and the Madras High Courts¹³ have stayed the enforcement of rules 9(1) and 9 (3) of the IT Rules 2021. These rules require news and current affairs publishers and publishers of online curated content to comply with a Code of Ethics and establish a three-tier grievance redressal mechanism. The Bombay High Court noted that Rule 9 not only deviates from the IT Act but also infringes on the fundamental right guaranteed under Article 19(1)(a) of the Constitution.</p>
Compliance & Registration Requirements		
4.	<p>Clause 4</p> <p>Intimation/registration requirement for OTT services</p>	<p>Clause 4(4) states that the Union Government has the authority to permit registration or notification of a broadcaster to meet certain '<i>social objectives</i>'. However, these objectives are not explicitly defined. This lack of clarity makes it challenging to comprehend why traditional broadcasting regulations should apply to Over-the-Top (OTT) services. Applying the same regulatory framework to both cable TV and OTT content could hinder innovation and growth in the industry of online curated content. Moreover, it is conceptually flawed to do the same as:</p> <p>Intimation/registration requirements for OTTs is incongruous when considering its operational domain:</p>

¹² *Agji Media Pvt. Ltd. & Ors. Vs. UOI* ([Writ Petition \(L.\) No. 14172 of 2021](#)); and *Nikhil Mangesh Wangle Vs. Union of India* (Public Interest Litigation (L.) No. 14204 of 2021)

¹³ [WP Nos. 13055 and 12515 of 2021](#)

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		<p>Traditional broadcasters and OTT applications operate in different layers. Traditional broadcasters like TV and radio operate in the network layer. OTT services function only in the application layer, which is user facing. They offer applications accessed by the public for the exchange of content over the public internet. The distinction is important as functioning on the network layer requires the use of a public resource: spectrum. Spectrum refers to the range of radio frequencies used for communicating. It is a scarce resource because at any given time and place one use of a portion of the spectrum precludes any other use of that portion. It is therefore crucial to ensure its efficient management and use. This is done through licensing, quality of service and other compliance requirements applicable to the network layer. On the other hand, OTT services do not make use of a scarce public resource and do not provide access to a network, so the need for a licensing/registration regime does not arise.</p> <p>An intimation/registration requirement also creates an artificial barrier to entry and may reduce competition in the market. As indicated earlier, 7 out of 10 Indians would be dissatisfied with such an outcome.</p>
5.	<p>Clause 5 General obligations of broadcasters and broadcasting Network Operators</p>	<p>Clause 5, read with Clauses 2(h) and (i), extends the general obligations of broadcasters to OTT services, which includes adherence to the Program and Advertising Code and compliance with orders that prohibit the transmission of a program or impose penalties for contravention of these Codes. It is contended that an additional layer of obligations for OTT platforms is not necessary due to the existing obligations under the IT Act and its Rules. Furthermore, there has been a notable increase in self-censorship within this domain.</p> <p>No need for these obligations as there is existing regulation under IT Rules 2021:</p> <p>OTT platforms are already regulated under the Information Technology Act 2000 and its Rules including the Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021. The position was affirmed in <i>Justice</i></p>

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		<p><i>for Rights Foundation v. Union of India</i>¹⁴, where the Court refused to frame additional guidelines or statutory regulations for online platforms holding that under the IT Act, there are comprehensive provisions that empower authorities to take necessary actions in case of violations. For instance, Section 67 deals with the transmission of obscene material in any electronic form. Further, Section 67A prescribes punishment for publishing or transmitting material containing sexually explicit acts, etc. in electronic form and Section 67B further provides for punishment for publishing or transmitting material depicting children in a bad taste. Additionally, Section 68 grants the Controller the authority to issue directives in these scenarios. Section 69 allows for interception, monitoring or decryption of information and blocking of content.</p> <p>The Court emphasized that these provisions of the IT Act are stringent and offer adequate procedural safeguards. If the internet platform is misused for carrying information or material which are not permissible under law then the provisions of the IT Act provide for deterrent action to be taken and as and when complaints are received, the statutory competent authority takes action in the matter.</p> <p>Further, in <i>Shreya Singhal v. Union of India</i>,¹⁵ the Supreme Court upheld Section 69A of the IT Act, which empowers the Central Government to block public access to any information through a computer resource. The Court upheld this section and the rules framed thereunder, recognizing that they incorporate inherent safeguards. These safeguards are designed to ensure that content is removed only when it is deemed necessary, on the basis of specified grounds.</p> <p>OTTs are seemingly mindful of local sensitivities and moderate their content strategies accordingly, thus there is no need for additional content regulation: Reports indicate that executives at streaming platforms' India offices, along with their legal teams, often request significant changes to content, particularly concerning politically or religiously sensitive plots or references to religion. Projects dealing with India's political, religious or caste divisions are frequently</p>

¹⁴ [Justice for Rights Foundation v. Union of India](#), W.P. (C) 11164/2018 dated 08.02.2019

¹⁵ [Shreya Singhal v. Union of India](#), (2015) 5 SCC 1

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		<p>turned down when they are proposed, or dropped midway through development. In some cases, even completed series and films have been discreetly shelved by streaming companies, reflecting proactive self-regulation. For instance, Prime Video canceled 'Gormint', a satire about Indian politics, likened to Veep, a satirical show about US politics. Industry observations indicate that in the current climate of self-censorship and revisionism, only passive and thoroughly sanitized content stands a chance on most platforms. Thus, the need for any additional layers of content regulation is unnecessary.¹⁶</p> <p>The Bill contradicts the duty of the state to protect artistic expression: It is argued that the proposed Bill contradicts the duty of the state to protect artistic expression, as recognized by the Supreme Court of India in two landmark cases. Firstly, in <i>Indibily Creative Pvt. Ltd. v. State of West Bengal</i>¹⁷, the Court acknowledged the state's responsibility to actively support and maintain conditions that allow for the free exercise of constitutional freedoms, especially in the context of art and literature. This is crucial to prevent these creative fields from succumbing to intolerance.</p> <p>Furthermore, in <i>S. Tamilselvan v. State of Tamil Nadu</i>¹⁸, which dealt with the controversy surrounding Prof. Perumal Murugan's novel 'Madhorubagan', the Court emphasized that the state has a positive duty under Article 19(1)(a) of the Constitution to protect artistic speech. This implies that the state cannot use the maintenance of law and order as an excuse to appease certain groups or individuals who oppose specific types of speech by enforcing censorship. In other words, the state should not pressure artists to alter their expression based on the demands of these non-state actors.</p> <p>The proposed Bill, therefore, contradicts this obligation to safeguard free speech. It effectively leads to a situation where artists might feel compelled to self-censor to avoid legal issues or disturbances, which is a direct contradiction of the state's duty as reaffirmed in the Indibily case. The state should create an environment where artistic freedoms guaranteed by the</p>

¹⁶ G. Shih & A. Gupta, 'Facing pressure in India, Netflix and Amazon back down on daring films', The Washington Post (Nov 2023)

¹⁷ *Indibily Creative Pvt. Ltd. v. State of West Bengal*, (2020) 12 SCC 436

¹⁸ *S. Tamilselvan v. State of Tamil Nadu*, (2020) 12 SCC 436

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		Constitution can be fully exercised, rather than being undermined by intolerance or the threat of unrest.
6.	<p>Clause 16(2)</p> <p>Intimation by Internet Broadcasting Network Operators</p>	<p>Same as above (pt. no. 4)</p> <p>Additional compliance burden without a specified purpose: OTT platforms are already required to furnish details of their entity for communication and coordination purposes under Rule 18 of the IT Rules 2021. This additional requirement for OTT platforms to intimate the Central Government of its operations increases the compliance burden placed upon the platforms. The Draft Bill does not provide any reasoning or objective for the intimation obligation. Further, the Draft Bill has not provided the subscriber or viewer threshold that triggers this obligation, thereby impeding stakeholders from assessing the implications of the Clause for small and medium OTT platforms.</p>
7.	<p>Clause 19</p> <p>Programme Code and Advertising Code</p>	<p><u>The absence of Programme and Advertising Codes amounts to delegating essential legislative powers</u></p> <p>The Bill lacks clarity and guidance regarding the content standards it seeks to enforce, as the Programme and Advertising Codes have not yet been prescribed. This delegation of the formulation of these Codes entirely to the executive is essentially a delegation of essential legislative powers.</p> <p>The legislature can delegate the authority to create ancillary rules to subordinate bodies for executing the legislative intent. However, this doesn't imply an inherent, unlimited power of delegation within the legislative function. The validity of such delegation relies on it being a necessary, ancillary measure for the effective and complete exercise of legislative power. Nevertheless, the legislature must retain the essential legislative functions and clearly articulate the legislative policy and standards for guidance.</p> <p>In <i>Raj Narain Singh v. Chairman, Patna Administration Committee</i>¹⁹, it was established that an executive authority can modify existing or future laws under statutory authorization, but not their essential features. Similarly, <i>In re: Delhi Laws</i></p>

¹⁹ *Raj Narain Singh v. Chairman, Patna Administration Committee*, (1955) 1 SCR 290

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		<p><i>Act</i>²⁰, the majority opinion held that the legislature cannot delegate its essential powers and must declare the policy and legal principles for any given case, <u>providing a standard for the bodies executing the law.</u></p> <p>Furthermore, in <i>Hamdard Dawakhana (Wakf) Lal Kuan v. Union of India</i>²¹, the Court invalidated a provision of an Act because the legislature failed to establish a criterion or standard, nor did it prescribe any principle for specifying particular diseases or conditions. This decision was based on the principle that the legislature cannot delegate unguided power to a subordinate body.</p> <p>The Bill, in its current form, delegates essential legislative powers to the executive due to the absence of any clear guidelines or a basic framework for the Programme Code and Advertisement Code. This constitutes excessive delegated legislation, as the Bill fails to delve into the specifics of implementation. Additionally, the frequent use of phrases like ‘as may be prescribed’ (appearing 60 times) and ‘as notified by the Central Government’ (mentioned 17 times) in the Bill adds to this ambiguity, potentially allowing for arbitrary governmental decisions. The over-reliance on such provisions means that the legislation lacks definitive clarity, leaving a majority of its clauses open-ended. Consequently, it grants the executive considerable discretion to make decisions as it deems fit. This not only erodes the transparency of the legislative process but also undermines the public’s ability to understand the scope and implications of the law. In the dissenting judgment in the verdict of the Supreme Court on demonetisation, Justice B.V. Nagarathna stated that unguided and unlimited powers under delegation would be <i>ex-facie</i> arbitrary and suffer from the vice of unconstitutionality.²²</p> <p><u>Current Laws already provide for established content standards</u></p> <p>There are no gaps in OTT content regulation. Currently, in India, content on OTT platforms is regulated by several codes and provisions of the Information Technology Act, 2000 (IT</p>

²⁰ *In re: Delhi Laws Act*, 1955 SCC 568

²¹ *Hamdard Dawakhana (Wakf) Lal Kuan v. Union of India*, (1960) 2 SCR 671

²² J. Britas & A. Babu, ‘*What lies beneath the PR blitz on the New Data Protection Act*’, The Wire (August 2023)

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		<p>Act), Indian Penal Code, 1860 and special legislations like the Indecent Representation of Women (Prohibition) Act, Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989 etc.</p> <p>Under the IT Act, Section 67 deals with the transmission of obscene material in any electronic form. Section 67A prescribes punishment for publishing or transmitting material containing sexually explicit acts, etc. in electronic form and Section 67B further provides for punishment for publishing or transmitting material depicting children in a bad taste. Additionally, Section 68 grants the Controller the authority to issue directives in these scenarios. Section 69 allows for interception, monitoring or decryption of information and blocking of content. Additionally, Section 69A of the IT Act empowers the Central Government to block public access to specific online information.</p> <p>The IT (Intermediary Guidelines) Rules, 2021, establish a due diligence framework for intermediaries, relating to the information hosted or published on their computer resources. These guidelines are applicable to OTT platforms, as they fall under the category of intermediaries defined by the IT Act.</p> <p>Under the Indian Penal Code, there are various provisions which are applicable to OTT platforms. These include Section 295A- which criminalizes Acts intended to outrage religious feelings. This can also apply to the content displayed on OTT platforms. Moreover, to prevent defamatory content from reaching the highly impressionable minds of people in India, Sections 499 and 500 of the IPC keep a check on preventing defamatory content from being published on such platforms.</p> <p>Thus, the existing regulations provide a comprehensive legal framework governing online content, encompassing a range of issues from obscenity to religious sensitivities.</p> <p><u>Judicial precedent dictates that contemporary content standards must be followed</u></p> <p>Any attempt towards regressive content regulation may fall foul of judicial precedent where courts have upheld the necessity to maintain contemporary standards.</p>

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		<p>In <i>DG Doordarshan v. Anand Patwardhan</i>²³ (2006), the Supreme Court considered if the refusal to telecast a documentary film on Doordarshan was a violation of the right to freedom of speech under Article 19(1)(a) of the Constitution of India. The Court observed that the reasonable restriction rights of Article 19 (1)(a) may include public decency and morality. The Court held that while examining if a film is obscene or transgresses public decency, it must be considered from the average, healthy, common sense point of view and viewed within that context of the film's message.</p> <p>In <i>Aveek Sarkar v. State of West Bengal</i>²⁴ (2014), the Supreme Court upheld the community standards test which is more adaptive to the changing society. It noted that regard must be given to contemporary national standards, and not the standard of sensitive persons. The assessment of obscenity must consider the point of view of an average person, using current community norms. Additionally, it is important to evaluate the context in which the material appears and the message it wants to convey. The Court rejected the Hicklin test in favour of the Community Standards Test to determine obscenity. The Hicklin Test was laid down by the Queen's Bench in <i>Regina v. Hicklin</i>. As per the test, work charged for obscenity can be judged by their apparent influence on most susceptible readers, such as children or weak-minded adults. Further, a publication can be judged based on isolated passages of a work considered out of context.</p> <p>Moreover, in <i>Anuradha Bhasin v. Union of India</i>²⁵ (2020) the Supreme Court held that the freedom of speech and expression and the freedom to practice any profession or carry on any trade, business or occupation under Articles 19(1)(a) and Article 19(1)(g) respectively, extends to the medium of the internet.</p> <p>The limits of restricting speech over the internet under Article 19 (2) have also been explored by the Supreme Court in <i>Shreya Singhal v. Union of India</i>. The Court struck down Section 66A of the IT Act 2000 and held that overly vague and wide restriction of communications over the internet would have a chilling effect on speech, restricting the right</p>

²³ *DG Doordarshan v. Anand Patwardhan*, Appeal (Civil) 613 of 2005

²⁴ *Aveek Sarkar & Anr. v. State of West Bengal & Ors*, (2014) 4 SCC 257

²⁵ *Anuradha Bhasin v. Union of India*, Writ Petition (Civil) No. 1031/2019

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		<p>under Article 19(1)(1)(a) and falling outside Article 19(2).</p> <p>Given the existing regulation of OTT content under the IT Rules 2021, further restrictions on the freedom of speech and expression through the Programme and Advertisement Codes of the Draft Bill should be avoided.</p>
8.	<p>Clause 20 News and Current Affairs Programmes</p>	<p><u>Extending traditional broadcasting regulations to news and current affairs programs raises censorship concerns</u></p> <p>Clause 20 of the Bill, which extends the Programme and Advertising Code to news and current affairs programs, raises censorship concerns as it may affect online free speech, freedom of journalistic expression & citizens' right to access differing points of view. These rights safeguarded under Article 19(1)(a) of the Constitution, include liberty of thought and expression, and freedom of exchange of information of all kinds and every nature.</p> <p>The Bill's impact is such that it could dissuade individuals from writing articles or disseminating information, fearing adverse/penal actions. This creates an unreasonable restriction not justified by Article 19(2) of the Constitution. It also raises the apprehension that news broadcasters will self-censor content, or feel compelled to only produce content which does not contradict the majority views.</p> <p>Dissent is a cornerstone of democracy, providing essential checks and balances that are fundamental to its functioning. A healthy democracy thrives on criticism and acceptance of contrasting viewpoints. Criticism, especially of public figures and those in public services, is vital for a structured and balanced growth of the nation. It invites necessary scrutiny that reinforces the principles of a democratic society.²⁶ However, with the implementation of this clause, there is a risk that writers, editors and publishers might hesitate to criticize public figures, even when their reasons are well-founded and justified.²⁷ The broad and undefined scope of the Codes could further enhance the chilling effect on freedom of speech and expression. Should the Broadcast Advisory Council (BAC) find any content objectionable, the content creator could face punitive actions or sanctions. This</p>

²⁶ *Aggi Media Pvt. Ltd. & Ors. Vs. UOI (Writ Petition (L.) No. 14172 of 2021)*

²⁷ *Ibid*

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		<p>situation could arise even if they have not overstepped the limits defined by Article 19(2) of the Constitution.</p> <p>This approach starkly contrasts with the principles of proportionality as laid down by the Supreme Court in Justice K. S. Puttaswamy v. Union of India (2017)²⁸, as it imposes mass censorship which is not permissible. Such an Act ought not to have been brought into force without involvement of all the stakeholders and discussion to its publication when it imposes such drastic provisions offending the constitutional rights. It is therefore submitted that the Bill creates a situation of an absolute <i>fait accompli</i> in as much as it is imminent that the citizens would suffer harsh consequences in clear violation of the fundamental rights guaranteed under Article 19(1)(a).</p> <p><u>It contradicts existing judicial decisions</u></p> <p>The inclusion of news and current affairs programmes within the scope of the Bill counters existing judicial decisions. Specifically, the Bombay High Court²⁹ and the Madras High Courts³⁰ have stayed the enforcement of rules 9(1) and 9 (3) of the IT Rules 2021. These rules require news and current affairs publishers to comply with a Code of Ethics and establish a three-tier grievance redressal mechanism. The Code of Ethics includes the existing Programme Code under the Cable Television Networks Act. The courts' rulings highlight the potential conflict in extending broadcast standards to online news publishers, questioning the Bill's alignment with established legal precedents.</p> <p><u>The need to preserve freedom of press has been repeatedly highlighted in various judicial decisions</u></p> <p>In <i>Halvi v. State of Kerala</i>³¹, the Kerala High Court refused to frame guidelines to regulate the print and electronic news media. The judges held that judicial precedents clearly indicate that the general framing of guidelines for regulation of the press was not permissible and that there were enough</p>

²⁸ [Justice K.S. Puttaswamy & Anr. v. Union of India](#), (2017) 10 SCC 1

²⁹ [Aggi Media Pvt. Ltd. & Ors. Vs. UOI \(Writ Petition \(L.\) No. 14172 of 2021\)](#); and [Nikhil Mangesh Wangle Vs. Union of India](#) (Public Interest Litigation (L.) No. 14204 of 2021)

³⁰ [WP Nos. 13055 and 12515 of 2021](#)

³¹ [K.S. Halvi Vs. State of Kerala & Ors.](#), WP(C). No. 16349 of 2020

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		<p>safeguards to restrict the misuse of Article 19(1)(a) under existing laws including the Press Freedom Council Act, 1978 and Article 19(2) of the Constitution. Therefore, additional guidelines for media control were not needed. The judges emphasized that the freedom enjoyed by the press as the fourth estate in the governance of the country is vital and also distinguished so as to protect the interest of the public, and in the matter of disseminating the news for the public good.</p> <p>The High Court followed the principle put forth by the Supreme Court in <i>Sahara India Real Estate Corporation v. SEBI</i>, stating that the freedom of the press is read into the freedom of speech and expression under Article 19(1)(a) and if any issues arise, the courts can be approached for a determination on a case-to-case basis.</p> <p>In the case of <i>Bennett Coleman & Co. v. Union of India</i>³², the Supreme Court noted that freedom of press is an essential element of Article 19(1)(a). The court recognised that freedom of press is not restricted to freedom from direct regulation of content. Quantity restrictions that are not purely content-based can also affect freedom of press.</p> <p>Further, building on this principle, in <i>Indian Express Newspapers Pvt. Ltd. v. Union of India</i>³³, the Supreme Court emphasized the critical role played by the press and the need to invalidate any law or administrative action of the Government that leads to suppression of the freedom of speech and expression. The Court held that freedom of press is the heart of social and political intercourse. It emphasized the press's role as a public educator making formal and non-formal education possible on a large scale particularly in the developing world, where television and other kinds of modern communication are still not available for all sections of society. The purpose of the press is to advance the public interest by publishing facts and opinions without which a democratic electorate cannot make responsible judgments. Newspapers being surveyors of news and views having a bearing on public administration very often carry material which would not be palatable to governments and other authorities. The authors of the articles have to be critical of</p>

³² *Bennett Coleman & Co. v. Union of India*, (1973) 2 SCR 757

³³ *Indian Express Newspapers Pvt. Ltd. v. Union of India*, (1985) 2 SCR 287

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		the action of the government in order to expose its weaknesses. This judgment reinforced the notion that media as the fourth estate is invaluable to democracy and, therefore, must be protected from executive interference.
9.	<p>Clause 21</p> <p>Self-classification by broadcasters</p>	<p>Existing Self-classification under IT Rules 2021: The classification of programmes transmitted through OTT services is already regulated under the Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021. Thus, any changes required should be brought as amendments to the existing IT Rules.</p>
10.	<p>Clause 22</p> <p>Access control measures</p>	<p>Compliance Burden on Broadcasters: The Draft Bill shifts the onus of regulating the content viewed by minors onto OTT broadcasters. These access control measures are in addition to the requirement for self-classification of content based on age appropriateness. Implementing access control measures poses technical challenges and will require OTT broadcasters to invest in specialized technology, potentially raising operation costs and increasing the compliance burden.</p> <p>Existing access control measures under IT Rules 2021: The implementation of measures to manage access to OTT programmes that have been classified for restricted viewing is already provided under the Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021. The regulation of OTT under a new legislation that is supervised by a different Ministry may increase the compliance burden on businesses and lead to confusion. Thus, any changes required should be brought as amendments to the existing IT Rules through coordination between the Ministry of Electronics and Information Technology and the Ministry of Information and Broadcasting.</p>
11.	<p>Clause 23</p> <p>Accessibility Guidelines for persons with disabilities</p>	<p>Existing accessibility guidelines under RPWD Rules 2017: The Rights of Persons with Disabilities Rules, 2017 (as amended in May 2023) (RPWD Rules) issued under the Rights of Persons with Disabilities Act, 2016 already require establishments to ensure that websites, apps, products and services which are based on information and communication technology comply with the standards prescribed under the RPWD Rules. Accessibility guidelines issued under the Draft Bill may conflict with the standards prescribed under the</p>

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		RPWD Rules and care must be taken to harmonize the accessibility standards for internet media.
Regulatory Structure		
12.	<p>Clause 24</p> <p>Regulatory Structure</p>	<p>Given the challenge to Part 3 of the IT Rules³⁴, which is administered by the MIB, an 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 is problematic.</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 Central government. Clause 24(2)(a) mandates that the CEC include members from diverse social groups including women, child welfare, scheduled castes, scheduled tribes, minorities etc. While the goal of ensuring diversity is commendable, valid concerns arise regarding the technical competence and expertise of these members to assess a wide array of curated content.³⁵ Most companies already have internal mechanisms for content evaluation, making state involvement in this process seem redundant and potentially overreaching.</p> <p>The requirement for broadcasters to self-certify every piece of content through the CECs is a step backwards and is likely to create significant operational hurdles. This is particularly challenging for OTT platforms who in addition to producing original domestic content also license a substantial amount of content from abroad.³⁶ Subjecting each piece of content to CEC scrutiny adds an unnecessary burden on these platforms, potentially impacting the ease of doing business for OTTs and the user experience too. This provision may have the effect of reducing investment in content, something which indirectly impinges on the right to freedom of speech and expression of content creators. In addition, it will also impinge on the right to freedom of speech and expression of</p>

³⁴A. Dasarathi & T. Singh, ‘*Supreme Court proceedings before High Courts challenging IT Rules, 2021, interim orders to continue*’, Internet Freedom Foundation (May 2022)

³⁵ J. Farooqui, ‘*Broadcasting Regulation Bill and its impact on the content world*’, The Economic Times (November 2023)

³⁶ S. Bansal, ‘*Draft bill sparks fear of micro-managing content across platforms*’, Hindustan Times (December 2023)

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		<p>consumers as this fundamental right includes the right to receive speech, including diverse and plural news and views as OTTs may stop investing in content both in India and may stop making international content available in the country.</p> <p>Additionally, the requirement for mandatory disclosure of the names and other details of CEC members potentially exposes them to considerable risks in both online and physical environments. The aspect of the provision could lead to significant safety concerns for these individuals.</p>
13.	<p>Clause 25</p> <p>Self-regulation by broadcasters and broadcasting network operators</p>	<p>Existing Self-Regulation under IT Rules 2021: The Self-Regulation framework under the Draft Bill is similar to the three-tier self-regulation structure under the IT Rules, 2021. Many OTT service providers are already a part of self-regulatory bodies such as Digital Publishers Grievances Council (DPCGC). The regulation of OTT under a new legislation that is supervised by a different Ministry may increase the compliance burden on businesses and lead to confusion. Thus, any changes required should be brought as amendments to the existing IT Rules through coordination between the MeitY and the MIB.</p>
14.	<p>Clause 27</p> <p>Broadcast Advisory Council</p>	<p>It is unclear why there needs to be a BAC as there is already a three-tier content regulation mechanism for both OTTs and broadcasters in the separate frameworks that govern these businesses.</p> <p>The constitutional legitimacy of the BAC is also in question. The Hon'ble Supreme Court has held that reasonableness of law is tested by the doctrine of proportionality (<i>Justice K.S. Puttaswamy vs Union of India</i> (2017) 10 SCC 1; and <i>Anuradha Bhasin vs Union of India</i> (2020) 3 SCC 637). The test contains four features: (a) A measure restricting a right must have a legitimate goal; (b) The measure must constitute a suitable means of furthering this goal (suitability or rationale connection stage); (c) There must not be any less restrictive but equally effective alternative (necessity stage); (d) The measure must not have a disproportionate impact on the right holder (balancing stage). The provisions of the Bill applicable to OTT services may fall foul of this test. A vague and unclear Program and Advertising Code made binding to OTT services and made enforceable by executive whim</p>

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		cannot under any circumstances be considered as the least restrictive measure available to ensure that online speech conforms to constitutional standards.
15.	<p>Clause 33</p> <p>Punishment for contravention of provisions of this Act</p>	<p>The draft bill introduces criminal penalties for the broadcasting sector. This marks a notable departure from the recent legislative trend, particularly in light of the Jan Vishwas (Amendment of Provisions) Act, 2023. This Act had effectively decriminalized the Cable Television Networks (Regulation) Act, 1995, with the intention of creating a more business-friendly atmosphere and boosting investor confidence in the sector. Such decriminalization was in line with the government's broader objective of facilitating ease of doing business.</p> <p>However, the draft bill appears to reverse this progressive trajectory by introducing substantial monetary penalties, as high as Rs. 50 crore. It also places a heavy burden on senior executives of broadcasting companies, exposing them to the risks of not just financial penalties but also imprisonment and the obligation to issue personal apologies. This shift towards re-criminalization and the imposition of severe penalties stand in stark contrast to the government's previously stated commitment to simplifying business regulations and minimizing regulatory overheads.</p>
16.	<p>Clause 35</p> <p>Penalty and measures for contraventions of Programme code and Advertisement Code</p>	<p>Lack of clarity in penal provisions: Under Clause 35(1)(f) the Central Government can impose monetary penalties on OTT platforms for contraventions like failure to intimate the Central Government, broadcasting programmes without CEC certification, and failure to publicize details of the CEC.</p> <p>However, there is a lack of clarity regarding the applicability of Clause 35(2) to OTT platforms as they are not subject to registration that can be canceled in response to non-compliance of penalties. Thus Clause 35 must separately specify the consequences of non-compliance of penalties for OTT platforms.</p>
17.	<p>Clause 36</p> <p>Power to prohibit transmission of programme or operation of broadcaster or broadcasting network</p>	<p>The usage of the phrase 'public interest' for restriction on transmission of content under Clause 36 is unconstitutional. It is patently ultra-vires Article 19(1)(a) of the Constitution as it travels beyond the reasonable restrictions imposed under 19(2).</p>

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		<p>In the landmark case <i>Romesh Thapar Vs. State of Madras</i>, a five-judge bench of the Supreme Court clarified the scope of permissible restrictions on freedom of expression as envisaged under the Constitution. The Court examined the Madras Maintenance of Public Order Act, 1949, which granted the State the powers to restrict free expression. The Court found that the Act's language, particularly the terms 'public order' and 'public safety', allowed for restrictions that extended beyond the narrow confined constitutionally permissible.</p> <p>The judgment differentiated between 'public order' and 'security of the State'. While public order covers a broad range of activities, security of the State pertains specifically to extreme acts of violence threatening the State. The Court held that the Act's allowance for restrictions in the interest of public order and public safety was broader than what the Constitution allows as reasonable restrictions of freedom of expression under Article 19(2). Furthermore, the Court opined that any legislation that can be applied both within and outside constitutional limits should be considered void. Consequently, the impugned section of the Act was deemed unconstitutional, as it conferred excessively broad powers on the State to restrict freedom of expression.</p> <p>The judgment is significant as it delineates the extent to which restrictions on speech are deemed reasonable under Article 19(2). It established that only speech posing a severe threat to the governance system, and falling squarely within the grounds enumerated under Article 19(2), could be legitimately restricted. This ruling thus serves as an authoritative guide in assessing the constitutionality of restrictions on freedom of expression.</p> <p>The principles set forth in Romesh Thapar's case were echoed in <i>Sakal Papers Ltd. v. Union of India</i>³⁷. Here, the Court held that the right of freedom of speech can be restricted only in the interests of the security of the State, friendly relations with foreign State, public order, decency or morality or in relation to contempt of court, defamation or incitement to an offence. It cannot, like the freedom to carry on business,</p>

³⁷ *Sakal Papers Ltd. & Ors. v. Union of India*, (1962) 3 SCR 842

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		<p>be curtailed in the interest of the general public.</p> <p>This proposition was further confirmed in the <i>Shreya Singhal</i>³⁸ case. Justice Nariman emphasized specifically that public interest is not one of the grounds, and so cannot be invoked to justify a speech restriction. In paragraph 21, he notes that under our constitutional scheme, it is not open for the State to curtail freedom of speech to promote the general public interest.</p> <p>Thus, having such a wide blocking power that transgresses the reasonable restrictions under Article 19(2), can have a terrible chilling effect in its applicability to the internet as it brings about a manifestly unreasonable and arbitrary regime amounting to an affront to the constitutional guarantee of the right of citizens to exercise freedom of speech and expression.</p>
18.	<p>Clause 41 Transitional provision</p>	<p>Clause 41 of the Draft Bill states that its provisions are in addition to the IT Act 2000. The concurrent regulation of OTT content by both the content Codes under the Draft Bill and the IT Act, in conjunction with the IT Rules 2021, is likely to cause administrative confusion. Thus, any necessary changes should be made through amendments to the IT Rules 2021 rather than through an Act overseen by a separate Ministry.</p> <p>Apart from the IT Rules 2021, contemporary content standards are already in place due to judicial decisions on provisions like Section 292 of the IPC dealing with obscenity.</p>

³⁸ *Shreya Singhal v. Union of India*, AIR 2015 SC 1523

B-40 First Floor
Soami Nagar South
New Delhi - 110017
contact@esyacentre.org
www.esyacentre.org

