Note

Analysis of the Broadcasting Bill, 2024 for Digital News Platforms, Online Creators and Intermediaries

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Apar Gupta, Advocate
Law Office of Apar Gupta
office@aparlaw.in

1. Preliminary

1.1. This note aims to advance the legal and policy discussion on the provisions of the Broadcast Services Regulation Bill, 2024 (BSR, 2024) and its impact on digital communications, including digital news broadcasters, OTT providers, and content creators. It is based on an unofficial public copy which has been published online[1]. This note contains five sections. The first provides background on the BSR, 2024. The second summarizes the BSR, 2024 and its overall structure. The third outlines compliance requirements for digital news outlets, OTT streaming providers, and online creators. The fourth section explains the new powers granted to the MIB over online platforms. Finally, I examine the schedules for levying penalties and fines.

1.2. Given the BSR Bill's vast scope, it requires a breadth and diversity of analysis and commentary from legal, policy, and media experts. This document serves as a detailed clause wise explainer, not a legal opinion or advice. It is not comprehensive and should be seen as a preliminary overview of provisions that warrant deeper study. Disagreement on interpretation is foreseeable. There are also obvious limitations to this brief as to my regret I have omitted due to a paucity of time reference to economic studies and primarily undertaken a legal analysis. Please use your best judgment when referencing this document, as it is based on an unofficial public copy. This is a work in progress just like the BSR, 2024 and I may update it at a later date. I would like to thank Naman Kumar, Advocate and Ahsnat Mokarim, Law Student and Intern for providing assistance in research and proofreading.

2. Background and Overview of the BSR, 2024

2.1. The BSR, 2024 is a revised draft of the Broadcasting Services (Regulation) Bill, 2023 (BSR, 2023). The BSR, 2023 was released for public consultation by the

[1] Meghnerd, Modi 240 wants to shut down @MrBeast... and @dhruvrathee | Broadcasting Bill EXPLAINED! (2 August 2024) <https://youtu.be/Vj5p7jrw7d4?feature=shared> accessed on 07 August 2024

Ministry of Information & Broadcasting (MIB) on November 10, 2023[2]. At the time, industry bodies, think tanks, and civil society widely criticized the BSR, 2023[3]. In a political economy analysis published in The Hindu on November 27, 2023 I described the BSR, 2023 as, *"It requires registrations and adherence to the programme code not only from online broadcasters but also from individual journalists and creators who systematically comment on "news and current affairs."*[4] Following the public consultation, the Hindustan Times reported on July 26, 2024, that a revised draft has been prepared by MIB and a copy of the BSR, 2024 had been made available to select "stakeholders," but it has not been released to the public[5]. The BSR, 2024 contains significant alterations to the BSR, 2023, expanding the MIB's powers and the scope of regulation. Writing again in The Hindu on July 31, 2024 I have described the BSR, 2024 as, "*a digital license raj for content creators*"[6]. An unofficial copy of BSR, 2024 has been leaked online, but the MIB has yet to publish or make it available to the public, contrary to the Union Government's Pre-Legislative Consultation Policy (PLCP) dated January 10, 2014[7]. Public consultation, though not a formal statutory requirement, has been commended by the Supreme Court in the context of environmental protection[8] and telecom regulation[9]. Evidently at present the MIB is in contravention with both the spirit and form of these requirements by not making BSR, 2024 public and neither conducting a transparent and participatory process for its development.

2.2. Drafting legislation before setting principles with constitutional and economic goals creates several problems. Such guiding principles within an articulated policy document offer greater longevity, and when embedded in legislation, they help achieve clear objectives and prevent frequent, time-consuming amendments. However, the BSR, 2024 is advancing alongside ongoing consultations by the MIB on a National Broadcasting Policy (NBP). This process began when the MIB itself, in a letter dated July 13, 2023, requested the Telecom

[2] Ministry of Information & Broadcasting, 'Ministry of Information and Broadcasting Proposes Broadcasting Services (Regulation) Bill, 2023' (PIB Daily, 10 November 2023 5:10PM).
[3] Aditi Aggarwal, 'Broadcasting Bill 2023 relies too much on delegated legislation: Industry bodies to MIB' (Hindustan Times, 07 August 2023).
[4] Apar Gupta, 'Old censorship on a new medium' (The Hindu, 17 November 2023) <https://www.thehindu.com/opinion/lead/old-censorship-on-a-new-medium/article67576676.ece> accessed 7 August 2024.
[5] Aditi Aggarwal, 'New draft of broadcasting bill: News influencers may be classified as broadcasters' (Hindustan Times, 26 July 2024).
[6] Apar Gupta, 'A license raj for digital content creators' (The Hindu, 31 July 2024) <https://www.thehindu.com/opinion/lead/a-licence-raj-for-digital-content-creators/article68465662.ece> accessed 7 August 2024.
[7] Ministry of Law and Justice, 'Adherence to PLCP' (PIB Daily, 10 Feb 2022). <https://cdnbBSR.s3waas.gov.in/s380537a945c7aaa788ccfcdf1b99b5d8f/uploads/2023/02/2023021333.pd?f>.
[8] *Hanuman Laxman Aroskar v. Union of India*, (2019) 15 SCC 401.
[9] *Cellular Operators Assn. of India v. TRAI*, 2016 7 SCC 703, paras 80-92.

Regulatory Authority of India (TRAI) to provide inputs under Section 11 of the TRAI Act, 1997, for formulating the NBP[10]. Following this request, TRAI held multiple consultations, including a Pre-Consultation on September 21, 2023[11], a Consultation Paper on April 2, 2024[12], and Recommendations to the MIB based on the inputs released on June 20, 2024[13]. These Recommendations are not binding on the MIB and require further deliberation to finalize the NBP. The BSR, 2024 significantly overlaps with the proposed NBP. For example, Part B.3 of the Recommendations, titled "Support the growth and proliferation of Indian Content through OTT broadcasting services," contains several suggestions that may conflict with Part E of the BSR, 2024. In the absence of a finalized NBP, drafting specific legislation like the BSR, 2024 leads to confusion and policy incoherence. A finalized NBP should lead to the BSR, 2024 — not the other way around. Further, there are multiple TRAI recommendations which are not being considered by the BSR, 2024. As the submission by the Asia Video Industry Association (AVIA) to the public consultation to the BSR, 2023 notes:

> "*there are multiple TRAI consultations which, although now closed, contain a number of outstanding recommendations which may impact the direction of any NBP or Draft Bill. These include "Regulating Converged Digital Technologies and Services – Enabling Convergence of Carriage of Broadcasting and Cable services", "Issues relating to Media Ownership", "Review of Regulatory Framework for Broadcasting and Cable services" and "Regulatory Mechanism for Over-The-Top (OCC) Communications Services, and Selective Banning of OCC Services". The outcomes of these could provide valuable input in the development of the Draft Bill and we recommend that comments and recommendations to these consultations should be taken into account in any Broadcasting Services Bill.*"[14]

2.3. Let us now proceed to look at the substance of the BSR, 2024. As an outline it is organized into 7 chapters, 50 sections and 2 schedules. These are divided into the following portions:

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[10] Ministry of Communication, 'TRAI releases recommendations on 'Inputs for formulation of National Broadcasting Policy-2024' (PIB Daily, 20 June 2024)

[11] Telecom Regulatory Authority of India, 'Pre-Consultation Paper on Inputs for Formulation of "National Broadcasting Policy"' (21 September 2023) <https://www.trai.gov.in/sites/default/files/CP_21092023.pdf> accessed 7 August 2024.

[12] Telecom Regulatory Authority of India, 'Consultation Paper on Inputs for Formulation of "National Broadcasting Policy"' (2 April 2024) <https://www.trai.gov.in/sites/default/files/CP_02042024.pdf> accessed 7 August 2024.

[13] Telecom Regulatory Authority of India, 'Recommendations on Inputs for formulation of National Broadcasting Policy-2024' (20 June 2024) <https://www.trai.gov.in/sites/default/files/Recommendations_20062024.pdf> accessed 7 August 2024.

[14] Asia Video Industry Association, 'Comments on the Draft Broadcasting Services (Regulation) Bill, 2023' (26 January 2024) <https://avia.org/wp-content/uploads/2024/03/MIB-Broadcasting-Services-Regulation-Bill-2023-260124.pdf?958480340> accessed 7 August 2024.

2.3.1. Chapter I (Secs. 1 - 2) covers the preliminary aspects, including the short title, commencement, applicability, and definitions essential to understanding the bill's scope and terms.

2.3.2. Chapter II (Secs. 3 - 19) regulates broadcasting services, establishing requirements and obligations for broadcasters and network operators, including registration, compliance, and infrastructure sharing. Within this Part - E is specifically applicable to OTT Broadcasting Services, Digital News Broadcasters, and Ground-Based Broadcasters.

2.3.3. Chapter III (Secs. 20-23) focuses on content standards (Programme and Advertising Codes), accessibility, and access control measures, detailing, anti-piracy provisions, self-classification guidelines, and accessibility guidelines for persons with disabilities.

2.3.4. Chapter IV (Secs. 24-29) defines the regulatory structure, including self-regulation by broadcasters, self-regulatory organizations, and the Broadcast Advisory Council, and establishes a Content Evaluation Committee for self-certification.

2.3.5. Chapter V (Secs. 30 - 37) outlines the powers of inspection, seizure, and confiscation of equipment, penalties for contraventions, and the process for appealing decisions, with a detailed list of offenses and their corresponding punishments.

2.3.6. Chapter VI (Secs. 38 - 39) introduces provisions for regulatory sandboxes to encourage innovation and outlines regulations for emerging and future broadcasting technologies.

2.3.7. Chapter VII (Secs. 40 - 50) contains miscellaneous provisions relating to transitional provisions and application of other laws such as Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021 (IT Rules, 2021).

2.3.8. The First Schedule specifies offenses and punishments thresholds for criminal prosecutions categorized by the severity and frequency of the offense, while the Second Schedule details the civil penalties restricted to fines based on the category of entity (Micro, Small, Medium, Major) and the nature of the contravention.

3. Ambit and scope of the BSR, 2024

3.1. A preliminary query arises regarding the scope of application of BSR 2024, which requires reference to the definitions of "person," "broadcaster," and "broadcasting." The definition of "person" includes both natural and artificial persons, even extending to local authorities [Section 2(1)(cc)]. BSR 2024 then links a "person" to various other definitions, such as "Broadcaster" [Section 2(1)(i)] or "Digital News Broadcaster" [Section 2(1)(m)], for its application. A significant change from BSR 2023 to BSR 2024 is the removal of the citizenship requirement, which previously defined a "person" as "an individual who is a citizen of India." As a result, the application of BSR 2024 has been expanded to non-nationals, or resident companies and individuals who are classified as "broadcasters." This brings us to the two most important definitions in the BSR, 2024 which are, "*Broadcasting*" [Section 2(1)(f)] and, "*Broadcaster*" [Section 2(1)(i)(iv)]. The definition for, "broadcasting" is broad to include a functional criteria of, "*transmission of audio visual…. available for viewing, by the general public… and the expression, "broadcasting services" shall be construed accordingly*". In addition to it the term, "*Broadcaster*" includes within itself a prescriptive classification including the mention of any, "*operator*" (who is a, "person") within four separate categories, two of which are, *"Digital News Broadcaster*" [Sec. 2(1)(i)(ii)] (referred to as, "DNB") and "*OTT broadcasting service*" [Sec. 2(1)(i)(iii)] (referred to as, "OTT").

3.2. This brings us to what actually constitutes a, "OTT broadcasting service". This has been separately defined under Section 2(1)(bb) and is focused on the "*curation*" of any, "*programmes, other than news and current affairs…. made available on demand or live…. through a website, social media intermediary, or any other online forum….. as part of a systematic business, professional, or commercial activity*". Here, "*curation*" as per an explanation to the section means, "*selection, organization and presentation of online content or information using skill, experience or expert knowledg*e". Hence, it brings within its ambit not only curated OTT streaming services such as Jio Cinema, Amazon Prime and Netflix (as per industry parlance referred to as Online Curated Content Publishers or OCCPs), but also independent content creators who use social media, "*as part of a systematic business, professional, or commercial activity*". Even the term, "professional" is defined broadly as, "*a person engaged in an occupation or vocation*" [Sec. 2(1)(ff)]. Such phrasing omits reference to any qualification or limiting criteria such as, "full-time", "primarily", or exclusion criteria such as, "part time", thereby making it applicable to content creators who may use social media channels to promote their business and personal brands. This may even be a small and medium business owner, any creative professional or artist who uses a social media presence to build brand awareness or for customer interactions.

3.3. The expansion of regulation and classification in OTTs (which also includes independent content creators) into, "*broadcasters*", contravenes past determinations based on sound policy by various public authorities including the following court determinations particularly for OCCPs:

3.3.1. The Telecom Disputes Settlement and Appellate Tribunal (TDSAT), in *All India Digital Cable Federation v. Star India Private Limited*,[15] recognized the distinction between OTT platforms and television channels. It held that, prima facie, an OTT platform is not a television channel and therefore does not need to obtain a license from the Central Government. The tribunal also acknowledged the ongoing regulatory consultations by the Telecom Regulatory Authority of India (TRAI) to determine the appropriate framework for OTT platforms.

3.3.2. The Hon'ble High Court of Delhi in a series of judgements such as, *Justice for Rights Foundation v. Union of India,*[16] *Nikhil Bhalla vs. Union of India & Ors.*[17] which were noted in *Mehul Choksi v. Union Of India,*[18] that refused further regulation of OCCP platforms stating that, "*this Court cannot issue a mandamus for framing general guidelines or provisions when there are stringent provisions already in place under the Information and Technology Act….*".

3.4. There exists evidence based policy recommendations for the exclusion of OTT and OCCPs that highlight a distinction in the technical operations (use of the public internet as opposed to spectrum) between them and traditional broadcasters as well as behavioral differences. As per the Esya Center's submission to the public consultation on the BSR, 2023[19]:

> "*Television, seen as a family medium in many cultures, fosters co-viewing among friends and family…. OTTs, on the other hand, offer non-linear, on-demand content primarily intended for individual consumption.As per a survey conducted by KPMG, 87% of the daily time spent on online video by the respondents is through the mobile phone.*"

3.5. Given the exclusion of, "*news and current affairs*" from the definition of, "*OTT broadcasting service*", the BSR, 2024 provides for a separate definition of a, "*Digital News Broadcaster*" [Sec. 2(1)(m)] and "*News and current affairs programmes*" [Sec. 2(1)(y)]. The definition of a, "*Digital News Broadcaster*"

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[15] B.P. No. 217 of 2023, *All India Digital Cable Federation v. Star India Private Limited*.
[16] *Justice for Rights Foundation v. Union of India*, 2019 SCC OnLine Del 11902.
[17] *Nikhil Bhalla v. Union of India*, 2019 SCC OnLine Del 12419.
[18] *Mehul Choksi v. Union Of India* W.P.(C) 5677/2020 <https://indiankanoon.org/doc/60045562/> accessed on 7 August 2024.
[19] Esya Centre, 'Response to the Draft Broadcasting Services (Regulation) Bill 2023' (25th January 2024).

includes within itself, "*publisher of news and current affairs content*", "*who broadcasts news and current affairs programs through an online paper, news portal, website, social media intermediary, or other similar medium as part of a systematic business, professional or commercial activity but excluding replica e-papers*". Further, "*news and current affairs programmes*" are vaguely defined as, "*(i) newly-received or noteworthy textual, 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, where the context, purpose, import and meaning of such programmes implies so…*". This definition is particularly vague within sub-clause (ii) when it states, "*the context, purpose, import and meaning of such programmes implies so*". Hence, any website carrying text (such as a sports/film/gadget review blog runs ads, or has a patreon link) or social media posts from a "*person*" with comment and analysis that is not even within the ambit of reporting will become a "Digital News Broadcaster" (DNBs).

3.6. Here several definition criteria suffer from vagueness and leave their application to thresholds which may be defined by the MIB at a later stage, or even as per individual determinations of enforcement actions without any anchoring criteria. This may promote a pick-and-choose criteria and presents risks of compliance defaults and prosecutions serving political rather than governance interests. Such form of delegated legislation is contrary to precepts of administrative law given that it leaves the determination of core policy choices that are essentially within the domain of the legislature to the executive branch, i.e. MIB. As laid down by the Supreme Court in cases of *Harishankar Bagla v. State of Madhya Pradesh*[20] and *Vasantlal Maganbhai Sanjanwala v. State of Bombay*[21], the "*legislature cannot delegate its essential legislative function in any case. It must lay down the legislative policy and principle, and must afford guidance for carrying out the said policy before it delegates its subsidiary powers on that behalf*". It is incumbent upon the legislature to provide clear and substantive guidance for the implementation of said policy before it may delegate any ancillary powers in furtherance of these objectives. The current delegation undermines the essential separation of powers and risks compromising the integrity of the legislative process.

3.7. It is noteworthy that the BSR, 2024 creates a separate definition of an, "*intermediary*" distinct from the pre-existing definition under the Information Technology Act, 2000 [IT Act, 2000]. Under Section 2(1)(si), an "intermediary" is defined as any person who, "*stores, displays or transmits that programme or provides any service with respect to that programme and includes social media*

[20] *Harishankar Bagla v. State of Madhya Pradesh*, (1955) 1 SCR 381.

[21] *Vasantlal Maganbhai Sanjanwala v. State of Bombay*, (1961) 1 SCR 341. See also *Municipal Corporation Of Delhi vs Birla Cotton, Spinning and Weaving Mills, Delhi*, 1968 SCR (3) 251; *Hamdard Dawakhana v. Union of India*, (1960) 2 SCR 671.

intermediaries, advertisement intermediaries, internet service providers, online search engines and online-marketplaces". Thereafter, "*social media intermediaries*", are defined to, "*primarily or solely enables online interaction between two or more users and allows them to create, upload, share or disseminate, modify or access information using its services*".The inclusion of "social media intermediaries" within the regulatory scope of the BSR, 2024 is notable, especially when considering the separate definitions provided in the IT Act, 2000 (which defines "intermediary" in Section 2(1)(w)) and the IT Rules, 2021. This expansion of regulatory coverage results in additional compliance requirements for social media intermediaries and establishes a distinct safe harbor regime for them, marking a significant change in their legal and operational landscape.

3.8. Some other definitional clauses which are relevant include: "Authorized Officer" [Section 2(1)(d)]; "Prescribed" [Section 2(1)(ee)], "Programme" [Section 2(1)(gg)], "Guidelines" [Section 2(1)(r)] "Registration" [Section 2(1)(jj)], "Registering Authority" [Section 2(1)(kk)], "Subscriber" [Section 2(1)(oo)], "Subscriber Data" [Section 2(1)(pp)], "Subscriber Management System" [Section 2(1)(qq)], "User" [Section 2(1)(vv)].

4. <u>Regulations applicable to all "broadcasters"</u>

4.1. The BSR, 2024 under Chapter II starts with Section 3 which states that Part - E will specifically apply to "OTT broadcasting services, digital news broadcasters (DNBs) and ground-based broadcasters". However, prior to the commencement of Part - A (which starts from Section 11), a list of general requirements are prescribed to all broadcasters and provisions contained in other Chapters (such as penalties) are applicable to them. These regulations introduce a mandatory registration or intimation requirement under Section 4(1). However, Section 4(2) provides exemptions for several categories, including Central and State Governments, other Public authorities, and Political parties. These entities are not required to comply with the registration or intimation process outlined in Section 4(1). The exemption also applies to individuals holding official positions within these exempt bodies. Consequently, this provision effectively prohibits exempt entities, such as political parties, and their officers from operating any "broadcasting services." However, this is not an absolute bar as the Central Government, "for the fulfillment of social objectives", may allow them to register [Section 4(4)]. These registrations are not perpetual but subject to renewal on terms and conditions including a payment of fee to be specified at a later date [Section 9] and may also be suspended for any violation [Section 10].

4.2. A list of general requirements are further contained in Section 5 which states that, "every broadcaster" is, "*in conformity with the Programme Code and Advertisement Code*" [Section 5(1)(b)]. This is further reinforced by Section 20 of

the BSR 2024 which states that all programs and advertisements must adhere to the Programme Code and Advertisement Code. The section also allows for different codes to be applied depending on the type of broadcasting service, such as linear broadcasting, on-demand services, radio, or any other service the government designates. At present the Programme and Advertising Code which has been made under the Cable TV (Regulation) Act, 1995 uses vague and subjective terms like “good taste,” "half-truths," "anti-national attitude," "snobbish attitude," "suggestive," and "repulsive." These terms are vague, subjective and violate the grounds of reasonable restrictions under Article 19(2) of the Constitution of India,[22] making the Programme and Advertising Codes excessive, disproportionate, and unconstitutional. The Programme and Advertising Code plays a central role in the four-tiered compliance, contravention and penalty system which is separately analyzed. As per the Indian Broadcasting & Digital Foundation’s (IBDF) submission to the public consultation on the BSR, 2023[23]:

> *“Instead of imposing a programme and/or advertising code on OTT platforms, we advocate for a statutory requirement that prohibits content that violates applicable laws. This approach aligns with the distinct nature of OTT technology and respects viewer choice. Age-rating and content descriptors already empower viewers to make informed decisions, rendering additional programming and advertising codes unnecessary. These legacy codes, designed for linear television, are less relevant within the on-demand, personalized viewing experience offered by OTT platforms.”*

4.3. In the landmark case of *Shreya Singhal v. Union of India*[24], where Section 66A was declared unconstitutional, the Hon’ble Supreme Court emphasized the doctrine of, “*void for vagueness*.” Citing *K.A. Abbas v. Union of India*[25], the Court stated that when a law is so vague that it leaves individuals in a, “*boundless sea of uncertainty*” and appears to infringe on guaranteed freedoms, it must be deemed unconstitutional, as was the case with the Goonda Act. Consequently, vague phrases like "good taste" and "half-truths" cannot be precisely defined, even with the help of a dictionary. Such vagueness renders the reliance on the Programme and Advertising Code unconstitutional.

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[22] Test of reasonableness as developed in cases of *Romesh Thappar v. The State Of Madras*, 1950 AIR 124, *Brij Bhushan And Another v. The State Of Delhi*, 1950 AIR 129; *Dr. Ram Manohar Lohia v. State Of Bihar*, 1966 AIR 740 and cited with approval in *Shreya Singhal & Ors. v. Union of India & Ors.,* AIR 2015 SC 1523.

[23] Indian Broadcasting & Digital Foundation (IBDF), ‘Comments on the Draft Broadcasting Services (Regulation) Bill, 2023 <https://www.medianama.com/wp-content/uploads/2024/02/IBDF-Comments-to-MIB_Draft-Broadcasting-Bill-2023.pdf> accessed 7 August 2024.

[24] *Shreya Singhal & Ors. v. Union of India & Ors.,* AIR 2015 SC 1523.

[25] *K. A. Abbas v The Union Of India & Anr.,* (1970) 2 S.C.C. 780.

5. Regulations specific to OTT, DNBs and Social Media Intermediaries

5.1. Under Part-E, the principal compliance required by OTTs and DNBs is to notify the Central Government of their operations within one month of the Act's notification or upon reaching a prescribed threshold [Section 18(1)]. This notification must be done in a specified form and manner which means it will be notified at a subsequent date by the MIB and as to what details or conditions it may contain. It is pertinent to mention that such "intimation" may carry conditions or contain requirements for fulfillment before it may be accepted. It may be noted that content creators which are classified within OTT broadcasters, as much as other subcategories within OTT may be exempted for, "avoiding genuine hardships". The phrase, "genuine hardship" is not defined, and this exclusion which may be notified at a later date does not cover DNBs [Section 18(2)]. It has been further clarified that OTTs and DNBs who use a social media intermediary, are responsible for ensuring compliance with all the requirements [Section 18(3)].

5.2. These intimations at the very least will require individuals to disclose their identities and contact details to the MIB, which may lead to either mass non-compliance or the closure of pseudonymous and anonymous accounts that constitute OTT and DBS. It may further lead to pick and choose enforcement actions, account closures, or self-censorship by persons from vulnerable social, economic, caste and gender backgrounds. This will constitute a form of a "chilling effect", which is described by the Supreme Court in *Anuradha Bhasin v. Union of India*[26], as any regulation that encourages self censorship, and deter persons from engaging even in lawful speech, for fear of legal consequences. The Supreme Court even observed that, "*A regulatory legislation will have a direct or indirect impact on various rights of different degrees. Individual rights cannot be viewed as silos, rather they should be viewed in a cumulative manner which may be affected in different ways. The technical rule of causal link cannot be made applicable in the case of human rights. Human rights are an inherent feature of every human and there is no question of the State not providing for these rights.*"

5.3. This brings us to the independent safe harbor regime being created under the BSR, 2023 for all "intermediaries". While it broadly copies the language of Section 79 of the Information Technology Act, 2000, it does so not through reference but as an independent statement [Section 19(a)]. This has the effect of a distinct regulatory regime for the notice and takedown of content under the BSR, 2023. Such intermediaries are not liable, if they follow the, "due diligence while discharging his duties under this Act and also observe such other guidelines as may be prescribed". Further flexibility is provided for the MIB in prescribing different guidelines for sub-classes such as "social media intermediaries". The compliances which are statutorily contained include:

[26] *Anuradha Bhasin v. Union of India*, AIR 2020 SC 1308.

5.3.1. Providing information as required by the MIB, including details about OTT broadcasters and Digital News Broadcasters on their platforms, to ensure compliance with the Act [Section 19(2)].

5.3.2. The Central Government can direct Internet Service Providers or intermediaries to enforce compliance with the Act concerning OTT broadcasters and Digital News Broadcasters [Section 19(3)].

5.4. The aggregate effect of a registration requirement with the MIB for OTTs and DNBs with a separate provision to regulate social media intermediaries indicates forethought for a strict double sided system of private compliance. Here independent reports may be required by the MIB to be proactively filed from the end of the OTT/DNB and the social media intermediary which hosts it. This may as per future rules and enforcement actions permit the MIB to mandate social media intermediaries to require declarations and submission of information of the registration requirement on its users. For eg., YouTube may be required to verify that all channels that are available in India within the category of, “news and current affairs” are registered as DNBs with the MIB. Regulations may also apply to distinct pieces of content such as adherence and declarations of compliance with the Programme and Advertising Code, or Self-Certifications by the Content Evaluation Committee (CEC).

5.5. This also prompts a query as to the applicability of the IT Rules, 2021 which will overlap with provisions of the BSR, 2024. Here, Section 50(4) which contains the savings and repeals clause states that the IT Rules, 2021, “*shall, in so far as they relate to matters for which provision is made in this Act or rules made or notification issued thereunder and are not inconsistent therewith, be deemed to have been made or issued under this Act as if this Act had been in force on the date on which such rules were made or notifications were issued and shall continue to be in force unless and until they are superseded by any rules made or notifications issued under this Act*.”. A consequence of Section 50(4) is to clarify that the MIB and the Central Government will not be limited by the IT Rules, 2021 and can prescribe further due diligence guidelines and compliances to intermediaries. It suggests that the IT Rules, 2021 will continue to govern online intermediaries, and have also been provided a direct legislative basis under the BSR, 2024 as independent from the IT Act, 2000. A reason for this is pending constitutional challenges to different provisions of the IT Rules, 2021 before the High Courts of Delhi and Bombay, which include stay orders premised on arguments on it being beyond the rule making powers of the IT Act, 2000. The intersection of two safe harbor regimes is likely to lead to regulatory uncertainty with the possibility of conflicting compliance requirements.

5.6. This amounts to a colorable exercise of legislation given the existence of court orders on similar compliances contemplated under the IT Rules, 2021. Here, the Madras High Court and the Bombay High Court have stayed the enforcement of

Rules 9(1) and 9(3) of the IT Rules 2021.[27] These rules require news and current affairs publishers, as well as publishers of online curated content, to follow a Code of Ethics and implement a three-tier grievance redressal mechanism. A batch of these petitions concerning challenges not only to the IT Rules, 2021 but also the Cable TV Regulation Act, 1995 and the rules framed thereunder have been transferred by the Supreme Court to the High Court of Delhi for determination.[28] Specifically with respect to Rules 9(1) and 9(3) the interim order by the Bombay High Court remains binding when it observed that:

> "*for proper administration of the State, it is healthy to invite criticism of all those who are in public service for the nation to have structured growth but with the 2021 Rules in place, one would have to think twice before criticizing any such personality, even if the writer/editor/publisher may have good reasons to do so without resorting to defamation and without inviting action under any provision of law…. people would be starved of the liberty of thought and feel suffocated to exercise their right of freedom of speech and expression, if they are made to live in present times of content regulation on the internet with the Code of Ethics hanging over their head as the Sword of Damocles.*"

Subsequently, the Supreme Court has also stayed the enforcement of the "fact-checking" amendment to the IT Rules, 2021 that empowered the Union Government to order the censorship of any online content it by itself deemed to be, "*fake, false and misleading… concerning the business of the Union Government*".[29]

6. <u>The quadruple regulatory labyrinth</u>

6.1. While the BSR, 2024 declares the title of Chapter IV as, "self-regulation", it is a red herring. The chapter instead contains a four tiered system of compliance, regulation and censorial power vested with the MIB. At the outset, a statutory direction requires, "*compliance with the Programme and the Advertising code" at the first level a system of, "Self-certification by a Content Evaluation Committee (CEC)*". Conceptually, it is oppugnant for a statutory direction placed on a private person to be termed as a form of, "self-regulation" [Section 24(2)]. However, unbounded by logic, the MIB requires, "*every broadcaster*" to then constitute, "*one or more*", CECS with diverse individuals having knowledge of, "*different social groups, women, child welfare, scheduled castes, scheduled tribes,*

[27] WP(L) No. 14172 of 2021, *Agij Promotion of Nineteen One Media Pvt. Ltd. & Ors.vs . Union of India & Anr*. and PIL (L) No. 14204 of 2021, *Nikhil Mangesh Wagle vs. Union of India* (14th August 2021).
[28] Union of India v Sudesh Kumar Singh TP (C) 100-105/2021 - 'Advay Vora 'Supreme Court transfers challenges to IT Rules 2021 to the Delhi High Court' (Supreme Court Observer 23 May 2024) <https://www.scobserver.in/journal/supreme-court-transfers-challenges-to-it-rules-2021-to-the-delhi-high-court/> accessed on 07.08.2024
[29] *Editors Guild of India v. Union of India*, 2024 SCC OnLine SC 1537.

minorities" [Section 24(2)(a)]. To enforce compliance the names and credentials of these have to be intimated to the MIB. Further, prior to the broadcast of any "*programme*", a certificate has to be issued by the CEC that can be requisitioned by any Public Authority including the MIB. The requirement of prior-certification by the CEC excludes, "*programmes already certified for public viewing*", "*news and current affairs*", "*educational programmes*", "*live events*", "*animations for Children*" and, "*other programmes as may be prescribed*".

6.2. As CEC certification applies to, "*programmes*" and not, "*broadcasters*" and hence its constitution will be mandatory by all OTTs (including content creators) and DNBs even when they make programmes primarily for, "*news and current affairs*"; or a sports broadcaster which not only telecasts, "*live events*", but also makes a feature on a sporting event. Take another example of an individual content creator who is classified as a DNB engaged in, "news and current affairs" but also then publishes a video for general entertainment such as a travel vlog, it will still require a CEC certificate. Hence, through the provision of a CEC, the BSR, 2024 leads to the creation of thousands, if not millions, of privatized censor boards. This will ultimately amount to pre-censorship of content and will inevitably have a chilling effect on the freedom of speech and expression guaranteed under Article 19(1)(a) of the Constitution to the broadcasters. This contravenes the rulings of the Supreme Court in cases of *Romesh Thappar v. The State Of Madras*[30] and *Bennett Coleman v Union of India*[31] that have held policies imposing pre-censorship or direct regulation of press to be unconstitutional.

6.3. The first level of such mandatory, "self-regulation" after CEC certification then extends the responsibilities of broadcasters and broadcasting network operators regarding complaint handling [Section 25]. They must appoint a grievance redressal officer to receive and address complaints about violations of the Programme Code and Advertisement Code [Section 25(1)(a)]. Additionally, they must be members of a self-regulatory organization and establish mechanisms for filing and resolving complaints [Section 25(1)(b) and Section 25(1)(c)]. They are also required to prominently publish information about their complaint redressal processes [Section 25(1)(d)]. If a complainant is not satisfied with the decision or if no decision is made within a set time frame, they can appeal to the self-regulatory organization or, if unavailable, to the Broadcast Advisory Council. Both the CEC and the process for the appointment of a grievance redressal officer contain no thresholds as to reach or the commercial revenue of the, "Broadcaster". This is significant as the BSR, 2024 provides for differential penalty thresholds for Micro, Small and Medium (MSME) enterprises based on their yearly turnover. Hence, little thought has been given to the additional costs

[30] *Romesh Thappar v. The State Of Madras*, 1950 AIR 124.

[31] *Bennett Coleman v Union of India,* 1973 AIR 106. See also *Brij Bhushan And Another v. The State Of Delhi*, 1950 AIR 129, *Indian Express Newspapers (Bombay) v Union of India,* 1986 AIR 515.

of compliances which will be incurred both by content creators and DNBs to staff and maintain the censorship apparatus required by the BSR, 2024.

6.4. The second tier in the quadruple regulatory labyrinth created by the BSR, 2024 is a, “self-regulatory organizations” (SROs). Any OTT or DNB broadcaster has to compulsorily become a member of a SRO [Section 25(1)(b)]. Any such membership may require the payment of membership fees and at the very least require administrative overheads to register and maintain a registration. Each such SROs will be in turn be required to register with the MIB and play several roles such as handling grievances that broadcasters or operators have not resolved within a specified time, hear appeals from complainants dissatisfied with the broadcaster's decisions, and issue guidance to ensure compliance with the Programme Code and Advertisement Code. Each SRO can establish their own rules consistent with the Act, and they have the authority to enforce penalties for violations, including expulsion or suspension from membership, issuing warnings, or imposing fines of up to Rs. 5 lakhs per violation. It may be noted here that as mentioned before similar adjudicatory functions of SROs formed under the IT Rules, 2021 has been stayed by an interim order of the Madras and the Bombay High Courts. Further, many sectoral SROs in domains such as ed-tech, fin-tech or gaming are either defunct or have not been formed that forms doubt as to the viability of multiple SROs existing in the same domain. The existence of multiple SROs also presents the challenge of preventing domain shopping, the exit, or the formation of new SROs led by an influential “broadcaster” to avoid a penalty. Given the absence of any effective governance norms for the formation of SROs till date is unlikely to lead to any effective form of, “self-regulation”.

6.5. In addition to an increase in costs due to the mandatory, “self-regulation”, the creation of a CEC, appointing a grievance officer and becoming a part of a SRO is opposed to existing compliance mechanisms in OTT streaming platforms, particularly OCCPs. These include the Standards and Practices (S&P) departments which are intrinsically involved in content review and regulatory compliance. Here, the IBDF submission states that, “*At the broadcasters’ level, the respective members of the IBDF ensure grievance redressal by way of well-established Standards and Practices (S&P) for the programme content aired on their TV channels to deal with the complaints that come directly to the channels in respect of the content aired on their respective TV channels…*”. Substanting this, the AVIA submission explains, “*we note that for the growth of the industry, policy stability and certainty is of key importance. The Draft Bill has created new frameworks, concepts and terminologies which can lead to confusion and problems in the industry*”.[32]

6.6. The third tier that is sought to be established by the BSR, 2024 is the Broadcast Advisory Council (BAC) which is a body created and controlled by the Central

[32] IBDF (n 23) 12.

Government [Sec. 27]. The BAC is fully controlled by the government in the following manner:

6.6.1. Absence of an independent regulatory body: Rather than creation of an independent regulatory body for broadcasting and media which would have a juridical personality or a corporate personhood (eg. SEBI, TRAI), which exists in foreign countries (eg. OFCOM in the UK), the BAC is a body that is appointed by the Government of India.

6.6.2. Appointment, composition and removal: Such appointment also is made directly by the Central Government [Section 27(1)] rather than through an intervening body such as an appointments committee that may comprise of functionaries beyond the executive branch such as the Leader of the Opposition, or the Chief Justice of India. Further, there is a lack of independence in the BAC as beyond the chairperson an equal number of five, “independent” experts that are appointed by the Union Government are matched with five officers nominated from different ministries. The term of office of the members is also not defined under the BSR, 2024 and it is stated they hold the term of office, “which shall come to an end as soon as” they “cease to hold office”. This means that the Union Government by a notification can replace any member of the BAC and appoint a replacement as per whim [Section 27(2)].

6.6.3. Advisory nature: The BAC is as the very name denotes merely possesses, “advisory” powers. Hence, the ultimate determination for censures and penalties for issuing a legal order is retained at the ministerial level which constitutes the fourth and final tier of quadruple regulatory labyrinth under the BSR, 2024 [Section 28(3)]. It is also relevant to note that the MIB can directly refer complaints to the BSR skipping the queue where the BAC ordinarily hears appeals from decisions of SROs [Section 28(1)(b)]. Further the MIB can prescribe how the BAC must establish review panels [Section 29].

6.7. The quadruple regulatory labyrinth of mandatory "self-regulation" outlined in the BSR, 2024 is a deeply flawed compliance structure. It starts with the broadcaster, moves to a self-regulatory organization (SRO), then to the Broadcast Advisory Council (BAC), and ultimately to the Ministry of Information and Broadcasting (MIB). This cumbersome process is anything but independent. It not only imposes an excessive compliance burden on large broadcasters and OTT platforms but also contravenes their established business practices. The system outsources the responsibilities of self-censorship to private entities under the looming threat of severe penalties, yet it still allows the Union Government, through the MIB, to maintain direct censorial control.

6.8. Given the universal applicability of the BSR, 2024 where the net of, "broadcasters" is cast without any limitation it presents risks of pick and choose or political enforcement. This in many ways bears the hallmark of a permit, or a license raj system which allows for discretionary enforcement and opportunities for abuse of power and corruption. Explaining how such systems of, "statutory self-regulation" work in in weakly democratized or non-democratic states, Adeline Hulin explains that:

> "[*a]fter years of promoting this [self-regulation] system, these international players start realizing that media self-regulation might be captured by the state and transformed into a kind of compulsory self-censorship…. Media professionals as well as public authorities have to be careful that media self-regulation remains a means of promoting media freedom. Turning media self-regulation into a compulsory system should be avoided…*".[33]

7. Inspections, Penalties and Appeals

7.1. The coercive enforcement of the BSR, 2024 goes beyond the quadruple regulatory labyrinth to direct powers of inspection, seizure and confiscation. These powers are bestowed to an "*inspecting officer*" [Section 30], which is an undefined phrase as the BSR, 2024 only defines an, "*authorised officer*" under Section 2(1)(d). Any such, "inspecting officer" has the, "right" to inspect [Sec. 30(1)], "broadcasting networks and services" and it is an obligation on the broadcaster to cooperate with them. Here, while there is a mention of, "*giving reasonable notice*" prior to the inspection it is not mandatory and can be waived [Secs. 30(3) and 30(4)]. This, "inspecting officer" also has the confiscated equipment of any, "cable broadcasting network", "radio broadcasting network", or, "any broadcasting network or service notified in the official gazette". While this excludes OTTs and DNBS from within its present power, it may later be expanded as per a notification in the official gazette. Such seizure does not affect other penalties and the seizure is liable for confiscation, which means monetary fines and even criminal prosecution will be over and above such seizure. Such orders as per Section 32 will be passed only after an opportunity, however prior-notice can be dispensed with and a post-decisional hearing may only be given within 10 days of the seizure. All such orders are also appealable.

7.2. The penalty system under the BSR, 2024 is as follows:

7.2.1. Criminal prosecution: The offenses for contravention of the BSR, 2024 are prescribed under the First Schedule and commence only on a complaint in writing made by, "an authorised officer" who is appointed by

[33] Hulin, Adeline, Statutory Media Self-Regulation: Beneficial or Detrimental for Media Freedom? (December 2014). Robert Schuman Centre for Advanced Studies Research Paper No. RSCAS 2014/127, Available at SSRN: https://ssrn.com/abstract=2554260 or http://dx.doi.org/10.2139/ssrn.2554260.

the Central Government [Section 33]. These include, operating a broadcasting service without a registration for which a term of imprisonment up to two years may be imposed, and five years for every subsequent offense. Another offence is for furnishing "incorrect information", or "false affidavit" in connection to, "any proceeding under this act" carrying a similar penalty.

7.2.2. Violations other than the Programme Code: If a broadcaster or broadcasting network operator contravenes any provision excluding those related to the Programme and Advertising Codes an, "authorised officer" can impose penalties including an advisory; warning; censure; monetary penalties (as outlined in the Second Schedule). The section also includes the much criticized, "three strike rule", where on more than three contraventions over three years, the authorized officer can suspend or revoke the broadcaster's registration, provided they give a written explanation and a reasonable opportunity to be heard [Section 34].

7.2.3. Violations of the Programme Code: The MIB has retained direct powers to adjudicate [per advice of the BAC] and levy penalties for violations of the programme and the advertising code. It may order broadcasters to: delete or modify a program or advertisement; comply with an advisory, censure, or warning; display or read an apology; suspend broadcasting for a specified time; and/or pay a penalty (as specified in the Second Schedule). For repeated or persistent non-compliance it may cancel the broadcaster's registration, but only after providing a reasonable opportunity to be heard [Section 35].

7.3. The appeals for the penalties imposed by the registering authority, authorized officer will be made before an appellate authority within a period of thirty days.

8. Parting Notes

8.1. The legal analysis presented above clearly shows how censorial power over content creators, OTTs and DNBs is being centralized within the Union Government. This is being done with statutory vagueness, excessive delegation to the executive branch and the absence of the creation of an independent regulatory authority. What this analysis fails to demonstrate is the rich diversity of online speech which enriches public discourse and oils the economic engine of a digital economy.

8.2. Take for instance, the recent viral rap song, "Big Dwags" by Bengaluru based rapper HanumanKind.[34] The discovery of this song has been primarily facilitated

[34] Hanumankind, Big Dawgs (YouTube, 21 May 2018) https://www.youtube.com/watch?v=hOHKltAiKXQ accessed 8 August 2024.

through his YouTube channel and at present has 27 million hits. It has broken into the Billboard Hot 100 charts making it possibly India's first global rap hit. It has now been used across social media by thousands of individuals as a pop culture reference to showcase their products, remix it with their own visuals, brands and experiences. Rap music has an accepted cultural practice of using cuss words that are present within this song (eg. *"F*** the laws, lawyer with me, we ain't gotta call…Why you worried 'bout it h*? Get up off my d*** (get up off my d***)*"). Further, the music video shows automobile and bike stunts by circus performers which may be considered risky. If the compliance of a programme code is sought to be achieved would the lyrics be sanitized, or lengthy disclaimer would be placed? Even otherwise the compliance burdens of establishing a CEC and appointing a grievance officer would lead an upcoming indian talent to divert resources towards compliances than spends on the core function of music creation and promotions. The BSR, 2024 will injure such content creators by levying a confusing compliance framework that amounts to a regulatory tax or levy.

8.3. The impact on DNBs is even more significant and gives an appearance of bad faith in the drafting of the BSR, 2024. As I had explained in the Hindu:

> "*Two CSDS-Lokniti surveys provide insights into 642 million voters and 924 million broadband connections. These surveys covered thousands of respondents and highlight the growing importance of digital media beyond the metropolises. The post-poll survey shows that 29% of respondents consume political material every day on digital platforms, with 18% doing so occasionally. While this is less than television (42%), it surpasses newspapers (16.7%) and radio (6.9%). Respondents accessed WhatsApp (35.1%), YouTube (32.3%), Facebook (24.7%), Instagram (18.4%), and Twitter (6.5%) several times a day. This data suggest a "content election" or an "influencer election", with digital media critical of the Prime Minister challenging the dominance of television news. The widespread use of digital media critical of the Prime Minister also challenges the dominance of television news, which Vanita Kohli-Khandekar, an expert on the Indian media, describes as catering primarily to Bharatiya Janata Party (BJP) voters and being "homogenized into one lump". This leads to a crucial question about the Union government's gameplay.*"

8.4. As stated before, the inescapable conclusion we are left with is that the BSR,2024 — "*bears all the hallmarks of what Jagdish Bhagwati termed "a maze of Kafkaesque controls", creating an overly bureaucratic and politicised system — a digital licence raj. This ex-ante regulation model aims to overcome the administrative burden of the notice-and-takedown approach, where the government struggled to censor each creator and online text or video one post at a time*."