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LEGALISING EXECUTIVE CONTROL: ON THE LAW OF ONLINE JOURNALISM IN INDIA

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Abstract

This working paper critiques the Government of India's recently enacted Information Technology (Intermediaries Guidelines and Digital Media Ethics Code) Rules 2021 ["the Rules"] as they relate to digital journalism. The Government's stated objective for making the Rules is that they seek to "level the playing field" of online journalism with print and broadcast journalism. I examine whether and how the Government sets about satisfying this objective. I make two broad claims in this paper. First, the Rules fail to "level the playing field". The objectives and approach to regulation that the Rules contemplate is significantly different from those that govern print journalism. The substance of both regulatory schemes is also different, and to the disadvantage of online journalism. Second, and following from the first, rather than "levelling the playing field", the Government gives itself overwhelming control of online journalism through the Rules. It exercises ultimate control over the regulatory structures that it sets out. And it gives itself extraordinary censorship powers over online journalism by carving out new compliance measures such as blocking and directions to publishers to delete and modify content. If my claims are correct, the Rules will lead to catastrophic consequences for online journalism and Indian democracy.

Keywords: IT Rules, Digital Media Ethics Code, Press Council of India, Online Journalism, Press Commission, Digital Media Ethics

INTRODUCTION

In February 2021, the Government of India introduced new rules under the Information Technology Act, 2000 (hereafter "IT Act"). The rules, entitled the Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021 (hereafter "the Rules"), have far-reaching coverage. They herald a wholesale change to India's prevailing intermediary liability regime. The Rules also systematically regulate online journalism and online streaming platforms for the first time in India. Together, therefore, the Rules make sweeping regulatory changes to the many ways that Indian digital users engage with the State and with one another through information and communication technologies, including social media, digital news, and online entertainment.

In this working paper, I study the Rules as they relate to online journalism. The Government's stated objective for making the Rules is that they seek to "level the playing field" of online journalism with print and broadcast journalism. I examine whether and how the Government sets about satisfying this objective. I make two broad claims in this paper.

First, the Rules fail to “level the playing field”. The objectives and approach to regulation that the Rules contemplate is significantly different from those that govern print journalism. The substance of both regulatory schemes is also different, and to the disadvantage of online journalism. Second, and following from the first, rather than “levelling the playing field”, the Government gives itself overwhelming control of online journalism through the Rules. It exercises ultimate control over the regulatory structures that it sets out. And it gives itself extraordinary censorship powers over online journalism by carving out new compliance measures such as blocking and directions to publishers to delete and modify content.

I have structured this working paper as follows. Part I seeks to better understand the Government’s objectives behind making the Rules. This part will also briefly set out, at a structural level, what the Rules do in relation to online journalism. Part II argues that the Rules fail to satisfy the objectives that the Government states that it hopes to achieve. Part III argues that through the Rules, the Government gives itself overwhelming censorship powers over online journalism. Part IV concludes with predictions about the future of online journalism under the Rules.

Part I: THE RULES AND THEIR OBJECTIVES

A. ANTECEDENTS

The Rules signal the Government’s formal legal entry into online journalism. But the Rules are not the Government’s first political or regulatory foray into the world of digital news. Three recent events in particular signal the Government’s intent to regulate the digital news industry. In August 2019, the Government virtually overnight imposed a cap on foreign direct investments in the digital news sector to 26%.² As there existed no previous regulation barring FDI in the sector, the Government’s move changed financial structures of entire digital media organisations that were operating under a regime that permitted 100% FDI.³ In November 2019, the Government invited comments to a proposed new Registration of Press and Periodicals Bill, 2019. This Bill seeks to replace the existing Press and Registration of Books Act, 1867 (PRB Act), a colonial era legislation that requires newspapers to register themselves with an office known as the Press Registrar and to comply with various requirements that the legislation sets.⁴ Since its inception, the PRB Act has applied only to “printed periodicals” and “books”.⁵ The Bill makes an advance to the PRB Act by requiring “digital media” to also register themselves with a similar office, known as the “Registrar of Newspapers in India”.⁶ Registration will have consequences: for starters, it harks back to

² <https://pib.gov.in/PressReleaseDetail.aspx?PRID=1583294>

³ <https://www.medianama.com/2019/09/223-fdi-in-digital-media-regressive/>.

⁴ <https://mib.gov.in/sites/default/files/Public%20Notice%20%20for%20RPP%20Bill%2C%202019.pdf>.

⁵ S.1(1) of PRB Act, defining “newspaper” as “any printed periodical work containing public news or comments on public news”.

⁶ Unclear whether “digital media” covers digital media organisations or websites of print newspapers and periodicals. Also vague is “Registrar of Newspapers in India” – undefined and used only once.

colonial-era newspaper regulation models that emphasise licensing and registration requirements. Moreover, as it stands, the Bill centralises Government control over the office of the Registrar.⁷ Finally, in November 2019 again, the Government formally designated “news and current affairs content on online platforms” as an item over which one of its departments, the Ministry of Information and Broadcasting (hereafter “MIB”), had formal charge.⁸

B. STATED OBJECTIVES

If we are to make sense of the Rules’ substance, we must first inquire about the Government’s objectives behind making them. The notification accompanying the Rules articulates the Government’s immediate justification. The Rules seek to “*provid[e] a level playing field between the offline (Print, TV) and digital media.*”⁹ The operative premise is that whereas *some* form of regulatory regime governs print and broadcast media, digital news media operates in a regulatory vacuum. The Rules therefore seek to achieve parity between the three media. As a general matter, this premise is misleading. Scholars have long pointed out that while the regulatory regimes unique to print and broadcast media by definition do not apply to digital news media, a number of other, more general laws and regulations do. Digital news establishments therefore do not operate in regulatory vacuum. If achieving formal equality in regulatory regimes across different media is the Government’s intention, the Government does not explain why that is either desirable or a justifiable regulatory end.

To better satisfy our inquiry, we will have to look beyond the notification. The MIB’s affidavit in a Supreme Court case about the regulation of hate speech in broadcast news gives some clues.¹⁰ The MIB makes a similar claim that while legislation, judicial precedents, and self-regulatory mechanisms govern the field of print and broadcast media, “web based digital media” operates “completely uncontrolled”. The MIB’s reasons are two-fold. First, print and broadcast journalism regulatory regimes have formalized the entry and working of publishers. As a result, the regimes set a number of “eligibility criteria”, “qualifying standards”, and registration requirements that act as effective checks against unethical or illegal dissemination of news. Such criteria, standards, or requirements simply do not exist with digital news. Second, the overhead costs of launching a print or broadcast media establishment – such as the requirement of a printing press, expensive equipment, license – act as implied checks to the manner in which such establishments disseminate news. But with developments in information and communication technology, costs for publishers to produce, upload, and share content has drastically reduced. Conversely, costs for users to

⁷ Aniruddh Nigam, Draft Press Registration Bill Is Nothing But a New Collar on an Old Leash, The Wire, July 1, 2020, <https://thewire.in/media/draft-press-registration-bill-colonial-era-law>.

⁸ https://mib.gov.in/sites/default/files/OM_additional%20work%20to%20MIB_19.11.2020.pdf.

⁹ PIB Notification Feb 25, 2021.

¹⁰ Affidavit of the MIB dated Sept. 19, 2020, in Firoz Iqbal Khan v. UoI & Anr., <https://www.medianama.com/wp-content/uploads/Firoz-Iqbal-Khan-v-Sudarshan-News-MIB-affidavit-21.9.2020.pdf>.

access and consume digital media is significantly lower than both print and broadcast media. The former requires merely an internet connection and a device that connects to the internet. The latter requires either a training in reading a language or a television set along with a news subscription, both of which are costly. As a result, digital news media is cheap, easy to produce, consume, and share. This drastically amplifies digital news' reach and impact. For these reasons, as per the MIB, digital news media regulation is of priority.¹¹

Concerns about the technological aspects of digital news media consumption inevitably turn to a crucial challenge in technology regulation today: misinformation. While neither MIB's affidavit nor the notification accompanying the Rules makes any mention about tackling the sceptre of misinformation in online journalism, it remains nevertheless a problem that the Government is anxious to tackle. In April 2018, then MIB Minister Smriti Irani set in motion an inter-ministerial committee to regulate the digital news industry. Her primary concern was to curb the spread of "fake news" on the internet.¹² Two years later, in August 2020, then MIB Minister Prakash Javadekar identified the problem of "fake news", one that he characterised was worse than "paid news", and called on the digital news industry to self-regulate digital content.¹³ Otherwise, said Javadekar, "everyone will have to bear the brunt of this menace."

If we are to take the Government at its word, even though there may be good reasons to be sceptical¹⁴, its objectives behind making the Rules seem to be to first and foremost subject the digital news industry to formal legal regulation. The Government's affidavit to the Court articulates strong reasons for why, beyond general laws that apply to *all* legal entities that exercise their right to free expression, digital news media outlets ought to be subject to an additional layer of regulation. These include the lack of formalised entry requirements, the ease of making and sharing news, and the general problem of online misinformation. Any additional regulation should, as per the Government, achieve parity with print and broadcast news media. The Government does not explain why, neither do I question this position.¹⁵

¹¹ MIB Affidavit, paras 21-28.

¹² Vasudha Venugopal, Information and broadcasting ministry looks at regulating online news, The Economic Times, April 5, 2018, <https://economictimes.indiatimes.com/news/politics-and-nation/information-and-broadcasting-ministry-looks-at-regulating-online-news/articleshow/63619859.cms>

¹³ Trisha Jalan, "I Am A Man Who Believes In Self-Regulation": I&B Minister Prakash Javadekar On Digital News, Medianama, Aug. 28, 2020, <https://www.medianama.com/2020/08/223-digital-news-self-regulation/>.

¹⁴ Internal Government documents reveal that the Government perceives a "bias" in digital news and it is interested in managing the narratives that emerge from DNMs. An Annotated Reading Guide to the Modi Government's Tool-Kit for Managing the Media, The Wire, Mar. 7, 2021, <https://thewire.in/media/annotated-guide-to-the-modi-governments-tool-kit-for-managing-the-media>.

¹⁵ Some, however, have questioned the value of uniform regulation across different media. See comments from N. Ram and Justice Ravindran. Nikhil Pahwa, On Self Regulation Of The Media In India – Notes From The Law Commission Consultation, Medianama Oct. 9, 2014, <https://www.medianama.com/2014/10/223-media-regulation-india-self-regulation/>.

C. SUBSTANCE: WHAT THE RULES DO

We are now positioned to notice what the Rules do. The Rules, first, subject digital news media establishments (hereafter DNM) to a “code of ethics”. The Code of Ethics comprises three items: (1) norms that print journalism must ethically follow under its self-regulatory scheme¹⁶; (2) norms that broadcast journalism must ethically follow under its self-regulatory scheme¹⁷; and (3) all laws that apply to online information. While item (3) general laws already covered DNM, items (1) and (2) did not hitherto apply to DNM.

By legally requiring DNMs to follow them, the Rules have effectively created new substantive law. This, however, raises troubling questions of administrative law. Subordinate legislations cannot create new legal obligations. They can only enforce those obligations that directly follow from the terms of the parent legislation. In other words, for the Rules to legitimately impose new substantive law such as the Press Norms or Programme Code on DNMs, the IT Act must have contemplated such a possibility. As it stands, the IT Act contains no provision that can reasonably be said to apply to the news industry.¹⁸ Conversely, the Government could have amended the Press Council of India Act and the Cable Television Networks Regulation Act, 1995 to cover DNMs. But they have not done so.¹⁹ Noting these concerns, the Bombay High Court has, as an interim measure, stayed the application of the Code of Ethics.²⁰

Second, the Rules create a three-tiered complaints redressal system to enforce the Code of Ethics. This system acts as a forum to adjudicate complaints filed by users and the Government against a DNM’s alleged contravention of the Code of Ethics. The system works as follows. At Level I, DNM publishers shall establish an in-house grievance redressal mechanism represented by a Grievance Officer. Complainants will first approach the Grievance Officer of the DNM with a complaint. At Level II, DNM publishers and associations shall constitute “self-regulating bodies” (hereafter “SRB”). If a user is unsatisfied with the response of the Grievance Officer at Level I, she may appeal to the SRB. At Level III, the MIB shall establish an Inter-Departmental Committee (hereafter “IDC”) comprising “representatives from the Ministry of Information and Broadcasting, Ministry of Women and Child Development, Ministry of Law and Justice, Ministry of Home Affairs, Ministry of

¹⁶ Norms of Journalistic Conduct of the Press Council of India under the Press Council Act, 1978.

¹⁷ Programme Code under section 5 of the Cable Television Networks Regulation Act, 1995.

¹⁸ Internal government documents reveal that the law ministry highlighted this concern. See Saurav Das, 2 Modi Govt Advisers Warned New IT Rules Beyond Scope Of Law, Were Overruled, Article-14, May 17, 2021, <https://www.article-14.com/post/2-modi-govt-advisers-warned-new-it-rules-beyond-scope-of-law-were-overruled> (“... the law ministry only noted there was ‘no specific provision in the IT Act enabling (sic) to impose any penalty or to take penal action against the intermediaries or digital media.’”).

¹⁹ See PCI press release dated Apr. 14, 2020, clarifying that the PCI has no jurisdiction over DNMs: <https://presscouncil.nic.in/WriteReadData/Pdf/PressReleaseAprilfourtentwenty.pdf>.

²⁰ Agij Promotion of Nineteenonea Media Pvt. Ltd. & Ors. v. Union of India & Anr. Writ Petition (L.) No. 14172 of 2021.

Electronics and Information Technology, Ministry of External Affairs, Ministry of Defence, and such other Ministries and Organisations, including domain experts, that it may decide to include in the Committee". Users unhappy with the decision of the SRB may appeal to the IDC. Moreover, even the MIB may refer a case to the IDC. The IDC's power is limited to making recommendations to the MIB. Beyond Level III, and sitting atop the system, is the MIB. The MIB has exclusive authority under the Rules to issue orders and directions to DNM publishers, after having considered the IDC's recommendations.

Complaints redressal systems are the backbone of many journalism regulatory frameworks. They make journalists accountable and ensure the observance of minimal professional standards. Conversely, they are also a forum for journalists to complain about interference to their freedoms, whether from inside or outside the industry. Complaints redressal systems exist in Indian press regulations too, managed by the Press Council of India ("the PCI"). The Government claims that the three-tier system the Rules creates for online journalism is equal to the systems that the PCI manages for print journalism.

PART II: THE RULES DO NOT DO WHAT THEY WERE PURPORTEDLY SET UP FOR

In Part I, we noticed that the Government introduced the Rules to achieve parity in the regulatory regimes of print, broadcast, and online journalism. In this Part, I argue that far from achieving parity, the Rules envisage a regulatory scheme that is wholly at odds with what governs print journalism. My argument rests on three pillars. First, the Rules are a marked departure from the philosophy and architecture that underpins print media regulation. Second, the Rules, unlike print media regulation, do not observe process-centric safeguards. Third, the Rules fail to take account of the many unique challenges to media ethics that online journalism presents. Before proceeding to my arguments, however, I must make three clarifications.

A. THREE CAVEATS

My first clarification is that by comparing the regulatory model that the Rules follows (which I argue below is meta-regulation) with regulatory model that print media regulation follows (which is statutory self-regulation), I do not intend to suggest that either one is superior. Both have their flaws, many of which are likely shared.²¹ I only want to highlight the fact that the two models are dissimilar.

Second, by drawing a comparison with the PCI, I do not intend to suggest that the PCI is an ideal institution. Scholars have, across generations, criticised the PCI's architecture and manner of operation. Various, commentators have pointed out that, institutionally

²¹ For a critique of press self-regulation, see The Hon. Ray Finkelstein & Rodney Tiffen, *When Does Press Self-Regulation Work?*, 38 *Melbourne University Law Review* 944, 952 (2015).

speaking, the PCI (a) is not powerful enough²², (b) is open to state capture²³, (c) has been weaponised by the Government to target journalists²⁴, (d) is not adequately represented by journalists²⁵, and (e) is plagued by lobbying and politics in the selection of its membership.²⁶ Operationally, the PCI (f) has not effectively protected journalists' interests, (g) has exercised its powers hypocritically, especially by turning a blind eye to Government interference with the press²⁷, and (h) has been impaired by "ignorant" members.²⁸ Because of these reasons, some commentators conclude that the PCI is neither credible nor legitimate. I will not, as I cannot, contest these assessments. But it seems to me that the PCI does not suffer from any inherent birth defects. Rather, the PCI's functioning in practice and the Government's ability to exercise influence on it are the root causes of its shortcomings. If I am correct, then I suspect any reform to the PCI should fashion around strengthening it, not – as some scholars have suggested²⁹ – abandoning it all together. In this Part, I argue that the Rules contemplate a regulatory regime that does not even rise to the level that the PCI inhabits.

Finally, third, I have consciously limited comparisons with press regulation. I do not account for broadcast regulation. While writing this paper, the Government framed new rules for broadcast regulation that are substantially similar to the Rules, complete with a three tier complaints redressal system that creates the same types of bodies that the Rules do.³⁰ Comparing these new rules with the Rules would have been redundant.

B. PHILOSOPHY AND DESIGN

Any attempt to design regulation for journalism must address a fundamental preliminary question: how to situate journalism's place in the State's social and political systems? From independent India's earliest days, the Indian State has viewed journalism, with its connotations of representing the Fourth Estate, as holding a vital place in Indian democracy. The work of the Press Commission of India, a body of journalists, politicians, lawyers, judges, economists and others that the Government set up in 1952, has significantly shaped deliberations about the press.³¹ For the Commission, the Press was a "responsible

²² Nireekshak, *Decorative Press Council*, 9(25) EPW 978 (1974).

²³ Rajiv Dhavan, *On the Law of the Press in India*, 26(3) JILI 288, 328-29 (1984).

²⁴ Nireekshak, *Decorative Press Council*, 9(25) EPW 978 (1974); Rajiv Dhavan, *On the Law of the Press in India*, 26(3) JILI 288, 328-29 (1984).

²⁵ A.G. Noorani, *The Press Council: An Expensive Irrelevance*, 44(1) EPW 13, 15 (2009)

²⁶ Nireekshak, *Decorative Press Council*, 9(25) EPW 978 (1974).

²⁷ Sukumar Muralidharan, *Press Council as Bully Pulpit: A Debate on Media That Could Go Nowhere*, 46(47) EPW 14, 17 (2011).

²⁸ A.G. Noorani, *The Press Council: An Expensive Irrelevance*, 44(1) EPW 13, 15 (2009).

²⁹ Nireekshak, *Decorative Press Council*, 9(25) EPW 978 (1974); A.G. Noorani, *The Press Council: An Expensive Irrelevance*, 44(1) EPW 13, 15 (2009).

³⁰ See *Cable Television Networks (Amendment) Rules, 2021*, framed under the *Cable Television Networks (Regulation) Act, 1995*. Some minor differences exist. Broadcasters are only subject to the Programme Code. DNMs are subject to the Programme Code, in addition to the Print Media Norms.

³¹ The Commission wrote two authoritative reports, in 1954 and 1982, about the history of the Indian Press, state of the contemporaneous press, and directions that future reform should take.

part of a democratic society”, not something outside looking in.³² The Press would, just like everybody else, enjoy the constitutional right to “freedom to hold opinions, to receive and to impart information through the printed word without any interference from any public authority.”³³ But the Press’ abilities to exploit that freedom was not like everybody else’s. Its function of providing a platform for the exchange of ideas and opinions, “the vehicle through which [public] opinion can become articulate”, makes it integral to democracy. This is because “democracy can thrive not only under the vigilant eye of its legislature, but also under the care and guidance of public opinion”.³⁴ As such, notwithstanding its constitutional rights, the Press also has a “moral right to free expression ... subject to certain responsibilities ...”³⁵ These “responsibilities” or “moral duties” were to manifest not in the law, but in the “subjective” (i.e. individual conscience of the journalist) and the “professional” realm (i.e. “the censure of fellow journalists”).³⁶

With these considerations in mind, the Commission concluded that statutory self-regulation was the “best way” to regulate print journalism.³⁷ The Commission used the design and experiences of the then prevailing British Press Council as a template from which to borrow ideas as well as rectify mistakes. For starters, the Commission welcomed the twin ideas of (1) forming an independent body such as a Press Council to oversee the proper functioning of journalism and (2) populating the Council with participants from the journalism profession. The British Press Council, though, was not a statutory body. Rather, it was a purely voluntary body with dubious enforcement capabilities. Voluntariness, according to the Commission, had “undoubtedly handicapped [the British Press Council] in the exercise of its authority over the Press.”³⁸ Moreover, statutory recognition of the Press Council’s powers, the Commission felt, would protect the Council and its members from abusive legal proceedings from the very actors that the Council may seek to censure.³⁹

Unlike the British Press Council, the PCI’s mandate was not limited to simply maintaining professional standards in journalism by building codes of conduct for newspapers, agencies, and journalists to follow. The PCI, the Commission recommended, should have a much larger vision. It should (a) protect (by safeguarding its freedoms and maintaining its independence from political interference and monopolistic forces), (b) coordinate (by promoting a functional relationship among all constituents of the industry), (c) guide (by ensuring that

³² First Press Commission, p.339 (1954) (emphasis mine).

³³ First Press Commission, p.358 (1954).

³⁴ First Press Commission, p.359 (1954). The Press’s democratic role is well-recognized. See The Hon. Ray Finkelstein & Rodney Tiffen, *When Does Press Self-Regulation Work?*, 38 *Melbourne University Law Review* 944, 952 (2015).

³⁵ First Press Commission, p.359 (1954). Similar to “moral” rights, BG Verghese has conceptualized the journalist’s right to free expression as a “social right” and a “social responsibility”. See B.G. Verghese, *The media in a free society*, 12(18) *Economic and Political Weekly* 731, 733 (1977)

³⁶ First Press Commission, p.360 (1954).

³⁷ First Press Commission, p.352 (1954).

³⁸ First Press Commission, p.353 (1954).

³⁹ First Press Commission, p.353 (1954).

journalism deepens the sense of rights, responsibilities, and public service among citizens and the industry), and (d) even keep an eye on foreign influence on the Press (by reviewing foreign funding of newspapers and the influence of foreign newspapers in India).

The statutory backing for the PCI coupled with its multi-dimensional mandate made the PCI “unprecedented”.⁴⁰ India’s Parliament largely accepted the Commission’s recommendations and formulated the PCI Act, 1965. During Indira Gandhi’s infamous internal emergency from 1975 to 1977, Gandhi’s Parliament repealed the PCI Act 1965. After the emergency, Parliament enacted a new PCI Act 1978, which largely followed the PCI Act 1965 and the recommendations of the Commission.

What can we take away from this glance at history? First, the Indian State has consciously considered that given journalism’s crucial role in a democracy, quite apart from legal restrictions, journalism must also be subject to “professional” scrutiny from within. This manifests through a body such as a Press Council composed of members from the profession. Self-regulation, therefore, was the “best” way to regulate the Press. Second, self-regulation of journalism must come within the folds of statute, and the PCI should not just be a voluntary body with no teeth. Accordingly, a legislative enactment (PCI Act) creates a statutory body (PCI) to oversee print journalism.

The Rules, however, strikingly depart from the Commission’s approach. They represent a different kind of regulatory design that rests on an altogether different conception of journalism’s place in India’s social and political system. If we are to discern the Government’s stated philosophical approach to DNM regulation, then we are out of luck. This is because unlike the deep deliberations that accompanied both PCI Acts, the Rules do not come with any additional defence in the form of, say, white papers or reports. We are left to make our own judgments based largely on the text of the Rules and the surrounding circumstances that accompanied their making.

The Rules’ text suggests that the Government has moved beyond statutory self-regulation and initiated what some regulation scholars call meta-regulation.⁴¹ As per Coglianese and Mendelson, “[m]eta-regulation refers to the ways that outside regulators deliberately – rather than unintentionally – seek to induce targets to develop their own internal self-regulatory responses to public problems.”⁴² The line between meta-regulation and self-regulation is thin and unclear. The former depends in large part on the latter. But one commonly agreed marker of difference is that meta-regulation involves a degree of

⁴⁰ First Press Commission, p.452 (1954).

⁴¹ Scholars have given very different meanings to meta-regulation. For an overview, see Peter Grabosky, *Meta-regulation*, in *Regulatory Theory* (Peter Drahos, ed., 2017) 149.

⁴² Cary Coglianese & Evan Mendelson, *Meta-Regulation and Self-Regulation*, *The Oxford Handbook of Regulation* (2010).

Government influence from above, perhaps in the form of oversight or rule-making or goal-setting or enforcement.

The Rules are evidently a form of meta-regulation with strong Government influence. As we noticed in Part I, the MIB sits outside and atop the three-tier grievance redressal system that the Rules create. It has final say on all matters that come before it, including individual grievance redressal and directions to publishers. Within the system, the IDC, a purely executive body composed of representatives from various government ministries, oversees the functioning of the system. Together, the MIB and the IDC exercise complete control over online journalism. They have the power to make “charters” and “Codes of Practices” for SRBs, “issue appropriate guidance and advisories to publishers”, adjudicate and “issue orders and directions to publishers” to comply with the Code of Ethics in individual cases.

As with any meta-regulation instrument, while a degree of self-regulation exists, they are restricted and ultimately secondary. Publishers’ in-house grievance redressal bodies and industry-level self-regulating bodies, the first two levels of the three-tier structure, are the only fora where peers in the profession judge the ethical validity of journalistic content. But even at these two levels, self-regulation is narrow, given that both bodies must adhere to “charters”, “codes of practices”, “guidance”, “advisories”, and past orders and directions issued by the IDC and the MIB.

Beyond self-regulation, the Rules also depart from print regulation’s emphasis on statutory backing. Statutory backing for the PCI, as we noticed, was warranted for two reasons: to secure some enforcement powers for the PCI and to protect the PCI and its members from abusive legal proceedings. The statutory route ensures another, more obvious benefit: print journalism’s regulatory scheme is a product of democratic deliberation by representatives of the public. Legislations by definition share this powerful legitimating benefit. But what makes availing of this benefit particularly important in the case of journalism is journalism’s central role in the successful functioning of democracy. If there must be regulations in how the public engages with the State and with one another, it must emerge at least from the majority opinion of the public. Only Parliament, not the Government, can secure that principle. In the context of the PCI Acts, deliberations in Parliament were serious, engaged, and took place over several years.⁴³ These deliberations gave Parliament a chance to clarify the PCI’s purpose, functions, and powers and consciously attempt to ensure that the PCI’s composition was representative of the many stakeholders in journalism and independent of Government control.

⁴³ For a list of dates over which both houses of Parliament debated both PCI Acts, see Rajiv Dhavan, *On the Law of the Press in India*, 26(3) JILI 288, fns. 346, 347 (1984).

The Government, however, formulated the Rules as subordinate legislation. As such, they do not command the legitimating benefits that the democratically deliberated PCI Act does. Surprisingly, the Government did not even seek public consultation on the Rules as they relate to online journalism. This is despite several public institutions, such as the Supreme Court⁴⁴ and the previous Central Government⁴⁵, insisting that all rule-making undergo public consultation. It is impossible to predict the opportunity cost of the road not taken. But public consultations at the very least could have made the Rules more responsive to the new challenges that journalism online faces, something I get into more detail later in this Part.

C. PROCESS AND SAFEGUARDS

Enough with philosophy and regulatory design. At a practical level too, the Rules fail to achieve parity. This is exemplified by the difference in the complaints process and in-built safeguards that the two regulatory regimes contemplate, in particular standing requirements, limitation periods, and material hurdles. In print regulation, complainants are bound by standing requirements. They need to demonstrate that they are either “personally affected” or have some “special stake or interest” in pursuing their complaint.⁴⁶ Standing requirements ensure that maliciously motivated individuals do not take undue advantage of the complaints process.

Complainants, moreover, must file their complaints to the PCI within 2 months of the objected publication.⁴⁷ This timeline is to be pursued strictly, unless the Chairman of the PCI is of the opinion that there is “sufficient cause” to condone delay in an individual case.⁴⁸ Limitation periods protect defendants, here the Press, from motivated complainants who abuse their complaint privileges by pursuing outdated claims. In the context of developing a regulatory scheme for broadcast news media, the Supreme Court has expressly recognised the need for limitation periods.⁴⁹

⁴⁴ Cellular Operators Association of India & Ors. v. Telecom Regulatory Authority of India & Ors. (2016) 7 SCC 703, paras 80-94.

⁴⁵ Letter from P.K. Malhotra to all Secretaries to the Government of India, available at <http://www.legislative.gov.in/sites/default/files/plcp.pdf>, (last accessed on July 12, 2018), stating that “[t]he Department/Ministry concerned might, in addition to placing the proposal in public domain, also hold consultations with all stakeholders.”

⁴⁶ See Accountable Journalism report on PCI, citing Dr. Sathyanarayanan Dave v. Indian Express (1989-90) A.R. 111, and Lalit Mohan Gautam v. Indian Express, (1990-91) A.R. 1 22, <https://accountablejournalism.org/ethics-codes/india-press-council-of-india>.

⁴⁷ Reg. 3(1)(f)(i), The Press Council (Procedure for Inquiry) Regulations, 1979.

⁴⁸ Proviso to Reg. 3(1)(f)(i), The Press Council (Procedure for Inquiry) Regulations, 1979.

⁴⁹ Common Cause v. Union of India (2018) 13 SCC 440, para 11 (“... we are of the view, that the Central Government, having framed Rules in the nature of Cable Television Networks Rules, 1994, would be well

Finally, any analysis on practicality must account for the material environment. To file a complaint, a complainant must undergo a tedious bureaucratic process. She must first write a letter to the newspaper about her objections, attach a copy of that letter in her complaint along with the newspaper's reply, state in detail the grounds of her objections, attach a "cutting" of the impugned publication, provide an English translation where the publication is in vernacular, make declarations about the validity of her claims, and finally file the complaint with multiple copies with the PCI.⁵⁰ If she does not comply with any of these requirements, the Chairman "may return the complaint ... asking the complainant to bring it in conformity with such requirements and represent it within such time as he may deem fit in that behalf."⁵¹ Together, standing requirements, limitation clauses, and material hurdles are powerful safeguards that protect print journalism's complaints process from abuse.

The Rules, on the other hand, contemplate no such safeguards. For one, they have liberalised standing requirements. As per Rule 10, "[a]ny person having a grievance regarding content published by the Publisher in relation to the Code of Ethics may furnish his grievance ...". The term "grievance" in turn is equally defined broadly in Rule 2(1)(j): grievance "includes any complaint, whether regarding any content, any duties of ... a publisher under the Act, or other matters pertaining to the computer resource of a ... publisher ...". Relaxed standing requirements of such a nature, while potentially beneficial in consumer protection legislations, may have disastrous consequences for journalism. They will certainly not act as a meaningful bar to motivated complainants.

The Rules do not have any limitation period either. They permit users to file complaints at any time after publication. While the Government has not explained its stance, there may be good technology-related reasons to justify this position. Unlike print or broadcast media, where news is *always* contemporary and transient, news on the internet never dies. Unless taken down by the publisher, online news publications are always just a click away. And sometimes, digital news publications (especially controversial political ones), like any digital content, tend to randomly turn viral, sometimes many years after their publication. Limitation periods, one may argue, will render meaningless any complaints mechanism for online publications.

Technological change often poses difficult questions for the law. I won't pretend to have good answers. At the same time, I think any answer cannot be blind to the adverse consequences that the absence of a limitations clause will signal for DNM in India. Users may harass DNM outlets and journalists by foraging internet archives. Online journalism in India, as I argue below, operates in a culture of persecution. The low costs to filing online complaints with a DNM's internal grievance redressal mechanism may incentivise abusive

advised, to frame similar Rules ... to formalize the complaint redressal mechanism, including the period of limitation within which a complaint can be filed ...").

⁵⁰ Reg. 3, The Press Council (Procedure for Inquiry) Regulations, 1979.

⁵¹ Reg. 3, The Press Council (Procedure for Inquiry) Regulations, 1979.

complaints. Unlike the material hurdles present in the print media complaints process, users in online journalism will find relative ease in filing complaints. Documentation requirements are limited to sharing URLs of impugned publications. Costs to users is limited to time and intellectual labour, both of which are in abundant supply for a motivated complainant.

D. OMISSIONS

If the first two reasons for why the Rules do not achieve parity with print media regulation relate to the terms of the Rules themselves, the third goes beyond the Rules. Central to the purpose behind the enactment of the PCI Act was, as its Preamble states, “preserving the freedom of the Press and of maintaining and improving the standards of newspapers and news agencies in India.” To achieve true parity with print media regulation, the Rules must aspire to that worthy objective. Today, any attempt at satisfying that objective in online journalism must take seriously two aspects: what are the unique ethical issues that the Internet raises (a) for the practice of journalism and (b) for journalists.

Information and communications technologies have fundamentally transformed journalism. As John V. Pavlik writes, the past couple of decades have witnessed “*the convergence of telecommunications, computing, and traditional media. Together, this new media system embraces all forms of human communication in a digital format where the rules and constraints of the analog world no longer apply.*”⁵² Pavlik’s diagnosis may be hyperbolic. There is a place for many of the rules, constraints, and the principles and logics underlying them, developed in the analog world. But the fears that Pavlik taps into are undeniable. The Internet presents different ethical challenges to journalism than print or broadcast media. To be sure, many ethical dilemmas in online journalism are familiar questions resurfacing in a new medium. Their resolution is easy and will likely draw heavily from ethical principles first developed for print media.

But there are some old ethical problems that pose new challenges partly or wholly due to the medium that is the Internet. Misinformation, for instance, is perhaps the most pressing problem for journalism across all media today. But misinformation has a long history, dating back to antiquity and more prominently to the early years of the modern press.⁵³ Another old problem that finds greater pronouncement because of the Internet is the blurring lines between advertisements and editorial content. To add to old problems that find new prominence online, the Internet presents new ethical challenges that the print medium never had to deal with. Problems such as image manipulation and its concerning cousin deep-

⁵² John V. Pavlik, *Journalism and New Media* xii (2001).

⁵³ Robert Darnton, *The true history of fake news*, 2017 NYRB, <https://www.nybooks.com/daily/2017/02/13/the-true-history-of-fake-news/>

fakes⁵⁴, cross-linking and the complications of “link rot” and “content drift”⁵⁵, and the moderation of user-generated comments are entirely new and alien to print journalism.

The Rules represented an opportunity for regulation to take account of the novel and unique challenges that the Internet poses for journalism. But the Rules ducks these challenges entirely. Instead, they simply transpose journalistic codes of conduct and laws framed in the context of the non-digital world on to online journalism. The Norms of Journalistic Conduct, the central code of norms incrementally developed by the PCI, does not at all address any of the unique challenges of the internet on online journalism. Indeed, the PCI has consciously not addressed such questions because it considered that it did not, and now with the Rules it positively does not, have the jurisdiction to entertain questions emerging from electronic media.⁵⁶

To be sure, the Rules obligate the MIB to “publish a charter for self-regulating bodies, including Codes of Practices for such bodies.”⁵⁷ What such a “charter” will entail and what will the “Codes of Practices” cover is anybody’s guess. The Rules do not define these terms and the Government has not clarified their import in public statements. At the time of writing, the MIB has not prescribed either a “charter” or any “Codes of Practices”.⁵⁸ Textually speaking, “charters” and “Codes of Practices” appear wide enough for the MIB to legitimately prescribe new norms for online journalism that engages with the unique challenges that the Internet poses. On the other hand, as the principal authorities under the Rules, the IDC and the MIB may, like the PCI in print media, incrementally and legitimately develop codes of conduct for online journalism.

But legitimacy does not always translate into normativity. Any purely executive body, like the MIB or IDC, should not have exclusive authority to frame journalistic codes of conduct. In print media, the PCI is expressly charged with the function “to build up a code of conduct for newspapers, news agencies and journalists in accordance with high professional standards.”⁵⁹ This it must do keeping in mind its other functions, such as “to help newspapers and news agencies to maintain their independence”⁶⁰, “to ensure on the part of newspapers ... the maintenance of high standards of public taste and foster a due sense of both the rights and responsibilities of citizenship”⁶¹, and “to encourage the growth of a sense of

⁵⁴ John V. Pavlik, *Journalism and New Media* 86 (2001).

⁵⁵ Jonathan Zittrain, *The Internet is Rotting, The Atlantic*, <https://www.theatlantic.com/technology/archive/2021/06/the-internet-is-a-collective-hallucination/619320/>

⁵⁶ PCI press release dated April 14, 2020 – “Electronic media, TV news channels, social media i.e. Whatsapp/twitter/Facebook do not come under the jurisdiction of the Press Council of India.”

⁵⁷ Rule 13(1)(a).

⁵⁸ To be updated/verified

⁵⁹ S.13(2)(b) of the PCI Act.

⁶⁰ S.13(2)(a) of the PCI Act.

⁶¹ S.13(2)(c) of the PCI Act.

responsibility and public service among all those engaged in the profession of journalism”⁶², among others. The PCI is suited to fulfil these purposes given that its composition, as described more fully below, is representative of all stakeholders in print media.⁶³

Apart from failing to notice the unique ethical challenges of online journalism, the Rules also fail to consider the Internet’s, and in particular social media’s, impact on journalists. As noticed above, the Indian digital public sphere is increasingly antagonistic towards journalists. Journalists have been the subject of incessant online trolling, misogyny, rape and death threats, and doxing, among other harms.⁶⁴ This antagonism is not restricted to popular culture. Parliament and the Government have also been hostile to journalists and the traditional legal protections afforded to them. While the Government’s weaponization of colonial-era criminal laws to silence journalists is well documented,⁶⁵ less talked about is the Government’s steady evisceration of long-established laws that have protected their status in the workplace. The Government has moved to subsume two legislations⁶⁶ that guaranteed basic rights to journalists at their workplace within a larger labour code, while simultaneously diminishing protections given to all workers.⁶⁷ While these two legislations covered only print journalists, and by extension excluded broadcast and digital journalists, surely the direction of reform should have been towards ratcheting up protections to the latter, not levelling down protections of the former.

Moreover, despite the evident hostility that journalists and journalism face in the digital public sphere, the Government has not considered either worthy of special protection. Take for instance the Maharashtra Media Persons and Media Institutions (Prevention of Violence and Damage or Loss to Property) Act, an otherwise worthy addition to the law of journalism. A state legislation instituted by the state of Maharashtra, it seeks to prevent “violence against Media Persons while carrying out their duties as Media Persons and prevention of damage or loss of property of Media Persons or Media Institutions”.⁶⁸ The legislation’s conceptualisation of “violence” is limited to physical acts of violence.⁶⁹ It neither protects journalists against the very real harm of online harassment, nor does it extend its protections

⁶² S.13(2)(d) of the PCI Act.

⁶³ See *infra* Step 2, part 1.

⁶⁴ **Instances to be cited.**; Swati Chaturvedi, *I am a Troll: Inside the Secret World of the BJP's Digital Army* (2016); RSF Report, *Online Harassment of Journalists*, https://rsf.org/sites/default/files/rsf_report_on_online_harassment.pdf.

⁶⁵ Tarunabh Khaitan, *Killing a Constitution with a Thousand Cuts: Executive Aggrandizement and Party-state Fusion in India*, 14(1) *Law & Ethics of Human Rights* 49, 88-90 (2020).

⁶⁶ The Working Journalists and other Newspaper Employees (Conditions of Service) and Miscellaneous Provisions Act of 1955; Working Journalists (Fixation of Rates of Wages) Act, 1958

⁶⁷ Anumeha Yadav, *Modi’s labour law ‘reforms’ will dilute your rights as a journalist*, NewsLaundry, July 22, 2019, <https://www.newslaundry.com/2019/07/22/modis-labour-law-reforms-will-dilute-your-rights-as-a-journalist>.

⁶⁸ Preamble to Maharashtra Media Persons and Media Institutions (Prevention of Violence and Damage or Loss to Property) Act, 2019.

⁶⁹ Priyal Shah & Aakanksha Chaturvedi, *Laws for Journalists in India: An Overview*, Curated Voices, April 2021, https://sprf.in/wp-content/uploads/2021/04/SPRF-2021_Journalism-Paper_Curated-Voices_Final.pdf.

to the new breed of journalists that the information and communications technologies have given rise to: social media journalists, bloggers, or freelance reporters.⁷⁰

Together, Government actions and public attitudes have created a culture of persecution against journalism and journalists generally, which take on particularly insidious forms online. The Rules, unfortunately, pay no attention to these contemporary challenges and the unique gloss that the Internet adds to them. Rather than secure the independence of online journalism, as should have been the objective if true parity was to be reached with print media regulation, the Rules read merely as a document of administration for one purpose: to set up a complaints redressal mechanism, with necessary institutions and procedures.

PART III: THE RULES SUBJECT DNMs to GOVERNMENT CONTROL

In Part II, I claimed that rather than achieving regulatory parity, the Rules are wholly at odds with print regulation's philosophy, approach, and substance. In this Part III, I will extend that claim and argue that in reality the Rules advance a regime where DNMs are subject to Government control. This is for two reasons: first, the final decision-making authorities under the Rules are purely Government bodies, and second, those bodies are charged with overwhelming and unprecedented censorship powers.

A. COMPOSITION

The composition of the final decision-making bodies under the Rules is concerning. In Part I, we noticed how the Rules structure its various tiers. At the top, where final decisions rest, lies the oversight body, the IDC, and beyond that is the MIB. The MIB exclusively decides the IDC's membership. The Rules only require that these members must represent various Government ministries and, if needed, may include "domain experts". The IDC, therefore, is predominantly an executive body, with the MIB retaining total control of its membership. Non-executive members who may exert democratic or discursive checks are not encouraged. DNMs, thus, are ultimately subject to the Government's decisions on all complaints that reach the IDC. Separately, the MIB may also refer matters to the IDC on its own volition, leading to the bizarre situation where the MIB may complain about a DNM's conduct, and ultimately decide on its own complaint.⁷¹

That journalism should be independent of the Government is a basic and unimpeachable principle of any constitutional democracy. In Indian democracy in particular, journalism has a central political role. Indeed, in any free society, the first function of journalism is a political one: to act as a watchdog and monitor Governments, who are seen as "inherently liable to

⁷⁰ Priyal Shah & Aakanksha Chaturvedi, *Laws for Journalists in India: An Overview*, Curated Voices, April 2021, https://sprf.in/wp-content/uploads/2021/04/SPRF-2021_Journalism-Paper_Curated-Voices_Final.pdf.

⁷¹ Rule 14(2)(b).

abuse power".⁷² To discharge this function, journalism requires independence from the government. As Audi writes, "[t]he most general principle applicable to government conduct toward the press in a free and democratic society is that the government must not tightly regulate the press or interfere in its operations in a way that abridges the people's political autonomy."⁷³ This does not mean that State regulation in journalism by definition is normatively suspect. Co-regulatory and even meta-regulatory governance models can be, and indeed have been, sufficiently independent of the Government. But it does mean that any Government influence must be targeted and limited.

By affording Government ultimate decision-making powers on the fate of complaints against DNMs, the Rules are anything but targeted or limited. DNMs are at the mercy of the very actors they seek to monitor. The consequences will be grave. For DNMs, the very presence of Government bodies as final arbiters on users' complaints will chill critical political reporting and editorialising. Worse, DNMs may find it expedient to further news that suit, not hold to account, the Government. For the Government, a control on DNMs will mean the retreat of an important check on its actions. For society, a perception of government control will gradually but surely mean the delegitimization of DNMs and online journalism.

For these reasons, press regulation around the world has largely converged around self-regulation.⁷⁴ By definition, any self-regulatory framework principally relies on regulation emerging from within, whether through individual or industry self-restraint.⁷⁵ Indian press regulation is no different. As we noticed in Part II, the Commission concluded that the "best way of maintaining professional standards in journalism was to bring into existence a body of people principally connected with the industry...", and thus conceived the PCI.⁷⁶ Its 29 members represent various interests from within and outside the journalism industry. From within, journalists (seven), editors (six), proprietors (six, two each from big, medium, and small newspapers), and news agencies (one) each command seats in the PCI. From without, Members of Parliament (five, three from the Lower House and two from the Upper House) and domain experts (three, one each in education, law, and literature) selected by different State institutions⁷⁷ exert external accountability checks. Legislators can be said to represent the public's interests and exert democratic checks in the PCI's decision-making. Domain experts, on the other hand, ensure that the PCI is discursively accountable to civil society and

⁷² Robert Audi, *The Function of the Press in a Free and Democratic Society*, 4(3) *Public Affairs Quarterly* 203, 207 (1990).

⁷³ Robert Audi, *The Function of the Press in a Free and Democratic Society*, 4(3) *Public Affairs Quarterly* 203, 208 (1990).

⁷⁴ Lara Felden, *Regulating the Press: A Comparative Study of International Press Councils*, Reuters Institute for the Study of Journalism, April 2012.

⁷⁵ Angela J. Campbell, *Self-Regulation and the Media*, 51(3) *Federal Communications Law Journal* 711, 713 (1999).

⁷⁶ *First Press Commission*, p.352 (1954).

⁷⁷ Respectively by the University Grants Commission, the Bar Council of India, and India's National Academy of Letters, also called the Sahitya Akademi.

its decisions benefit from expertise in law, culture, and education. Finally, a Chairperson, who is appointed by a committee comprising the Chairperson of the Upper House, Speaker of the Lower House, and a representative member of the PCI, heads the PCI. By convention, a retired Supreme Court judge has been the PCI's Chairperson. Retired judges' presence adds a degree of trust in the PCI's internal functioning and legitimacy, both legally and otherwise, to its decisions.⁷⁸ In all, the PCI's composition draws on a sophisticated multi-stakeholder model that, at least in theory, represents the interests of all concerned.⁷⁹

B. CENSORSHIP

The Rules do not simply subject DNMs to Government control. They go a step further and give the Government overwhelming censorship powers over DNMs. Powers such as blocking, deletion, and modification, all unprecedented in Indian online journalism, are all contemplated. Moreover, unlike similar powers in general criminal laws against the Press, these powers do not come with any basic inbuilt safeguards.

a. BLOCKING, DELETION, AND MODIFICATION

The Rules authorise the MIB with the qualitatively new power to block online journalistic content from public access. If the IDC considers that the challenged content strikes at certain prohibited grounds, the IDC may recommend to the MIB that the content be blocked from public access. The MIB may accordingly direct the publisher to block the impugned content. The MIB's power to block takes on added significance "in any case of emergency nature". In such a situation, if the Authorised Officer of the IDC considers that the challenged content strikes at the prohibited grounds, she may recommend to the MIB that that content be blocked immediately, without observing basic quasi-adjudicatory practices such as issuing notice or giving a hearing to the publisher. If the Secretary of the MIB agrees with the Authorised Officer's recommendation, he may temporarily issue a direction to block the content from public access "as an interim measure".⁸⁰

Blocking has been a problematic feature of information technology regulation in India. Section 69A of the Information Technology Act, 2000 ("IT Act") authorises the Government to block any online information that it considers "necessary or expedient" "in the interest of sovereignty and integrity of India, defence of India, security of the State, friendly relations with foreign States or public order or for preventing incitement to the commission of a cognizable offence relating to above". While these grounds derive their language from the

⁷⁸ Contra Noorani's claim that SC judges have been "ignorant" in discharging their duties. A.G. Noorani, *The Press Council: An Expensive Irrelevance*, 44(1) EPW 13, 15 (2009).

⁷⁹ Contra Nireekshak, who argues that journalists have not been adequately represented.

⁸⁰ R.16(2).

Constitution, they nonetheless remain wide-ranging. As such, their exercise turns on how the Government interprets their meaning in a given case.

Until now, the Ministry of Electronics and Information Technology (MEITY), a ministry dedicated to governing the information and communication technology sector, has had the exclusive authority to block online information. MEITY has often abused its blocking powers to target popular dissent.⁸¹ At the same time, when it comes to online journalism, MEITY has rarely, if ever, exercised that authority.⁸² This is despite the fact that, theoretically speaking, no law prohibits MEITY from regulating online journalism. One can only guess why. Assuming good faith and taken at its most generous, MEITY's practice of staying clear of online journalism may represent a (subconscious) belief that the Government should not interfere in basic journalistic freedoms. The truth may probably be more strategic; even if the law may not discriminate between journalism and ordinary exercise of free expression, naked restrictions on the former may create far more outrage than on the latter. Regardless of the reasons that the Government has hitherto chosen to not block online journalism, the practice itself is a norm worth preserving.

However, the Rules belie such pretensions. While the Rules leave untouched MEITY's general blocking powers, they create a parallel source of authority in the MIB for the specific purpose of blocking online journalism. The Government has defended this move, claiming that the authority to block online journalism always existed, and that the Rules merely change the ministry that will exercise that authority.⁸³ That defence is insincere. For starters, the Rules do not merely transfer authority from one ministry to the other. Nothing in the Rules suggests that MEITY can no longer legally block online journalism. Rather, the Rules set up a parallel authority – the MIB (in addition to MEITY) – that shall exercise the power to block. Parallel authorities that exercise similar powers incentivise forum shopping, particularly among motivated complainants. As a result, the Rules widen the pathways for Government censorship of online journalism.

Coupled with this is the attitudinal shift towards online journalism that the Rules signal. As I notice above, prior to the notification of the Rules, there existed a (perhaps subconscious) norm or convention that the Government ought to steer clear of blocking online journalism. The Rules are a game-changer. They permit, even encourage, the Government to block online journalism. As a result, any such convention or norm that may have existed prior to the Rules, have now been abandoned.

⁸¹ Freedom on the Net Reports.

⁸² In Sum and Substance, New Digital Media Rules Establish a Confusing Playing Field, *The Wire*, Feb. 28, 2021, <https://thewire.in/government/new-digital-media-rules-confusing-playing-field-newspapers-tv-channels> ("there has been so far no publicly documented instance of Section 69A of the IT Act being used to remove a news article or media report.").

⁸³ MIB Press Release on Feb. 27, 2021.

The Government's power to censor online journalism under the Rules does not stop at blocking. The Rules also vest the MIB with the power to direct a publisher to "delete or modify content for preventing incitement to the commission of a cognizable offence relating to public order".⁸⁴ In other words, if the IDC considers that certain information has the effect of inciting public disorder, it may recommend to the MIB to direct the publisher to "delete or modify" that information. Such a power is extraordinarily direct, unprecedented, and a significant escalation from blocking. If blocking is about restricting public access to information, directions to delete or modify is direct interference with the substance of that very information. Deletion in particular symbolises the crudest form of censorship, and that this power is otherwise unparalleled in the law and is reserved only for journalism is concerning. Modification, on the other hand, represents the initiation of compelled speech as part of the Government's toolbox to censor online expression.

That the Rules give the Government the three powers outlined above – of blocking, deletion, and modification of online journalism – raise familiar problems about the Government's central role in the adjudication of online expression.⁸⁵ These are both process-related, such as transparency and accountability, *and* substance-related, such as abuse of power. Relevant for journalism is the concern that the Rules signal a new regime of journalism regulation that permits censorship, by the Government no less, as a permissible regulatory remedy.

b. NO SAFEGUARDS

In print regulation, the PCI's powers are limited to warning, admonishing, censuring, or disapproving of the conduct of the newspaper or editor or journalist.⁸⁶ The PCI can ask a newspaper to do an affirmative act in only one circumstance: to publish particulars about a PCI inquiry that that newspaper may be subject to.⁸⁷ The PCI's limited authority does not however imply that newspapers can publish incendiary material without legal consequences. Two provisions in Indian criminal law in particular, found in the Code of Criminal Procedure 1973 (CrPC), authorise state governments with extraordinary powers to monitor press publications.⁸⁸ Section 95 enables state governments to "declare" that a newspaper – any newspaper – has published material that the government considers as hate speech and further that every copy of that issue of the newspaper must be forfeited to the government. To enforce this power, the police may, with a warrant, search any premises and seize that issue of the newspaper. Section 144 of the CrPC, on the other hand, grants magistrates with

⁸⁴ R.14(5)e.

⁸⁵ CCG NOC Report, pp. 24-26.

⁸⁶ S.14(1) PCI Act.

⁸⁷ S.14(2) PCI Act.

⁸⁸ Rajiv Dhavan, *On the Law of the Press in India*, 26(3) JLLI 288, 291-92 (1984).

general residuary policing powers in emergency-like situations.⁸⁹ Fearful that newspapers may exacerbate already prevailing public order tensions, Magistrates have sometimes used this residuary power to pre-censor the very publication of newspapers.⁹⁰

However, both sections 95 and 144 of the CrPC have three minimal built-in safeguards. First, a magistrate's approval, either as a warrant or as a direction, is required to enforce those powers. While magistrates, particularly executive magistrates, are sometimes considered as officials of the political executive, they are not purely executive bodies. Second, courts have required the Government and the Magistrates to follow basic rule of law principles while enforcing these sections. Governments need to state the "grounds of opinion" in their orders under section 95. Absent such grounds, the section may not be enforced.⁹¹ Magistrates should not act as rubber-stamping authorities and approve every request that the Government initiates. Magistrates need to apply their minds and formulate their orders with sufficient detail that takes account of all material circumstances.⁹² Third, orders under both sections are subject to review by High Courts.

As they currently stand, the Rules do not contemplate any similar basic safeguards. The MIB is empowered to take decisions unchecked by magistrates or some other body acting independent of the political executive. In exercising their powers, the Rules do not bind either the MIB or the IDC to follow any form of due process in exercising their powers. Moreover, the Rules limit the review of the MIB's directions to a Review Committee composed of only executive officials.⁹³ One cannot expect a true review from a committee staffed by members of a substantially similar rank and of the same institution (being of the Executive, unlike, say a Review Committee composed of retired judges).⁹⁴

PART IV: THE ROAD AHEAD

If my claims are correct – that the Rules do not achieve parity with print regulation, rather they empower the Government with overwhelming control of online journalism – then I suspect Indian online journalism will contract. As we have observed above, journalism generally and online journalism in India operate under a culture of State and citizen persecution. The Rules will only exasperate that. At the ground level, digital users may weaponize their newfound power to institute complaints against DNM. Even if DNMs act in

⁸⁹ Magistrates may "direct any person to abstain from a certain act ... if such Magistrate considers that such direction is likely to ... [lead to] a disturbance of the public tranquillity, or a riot, or an affray."

⁹⁰ **Instances to be inserted here.**

⁹¹ *State of Uttar Pradesh v. Lalai Singh Yadav*, (1977) 1 SCR 616.

⁹² *Ramlila Maidan Incident v. Home Secretary Union of India and Ors.*, (2012) 5 SCC 1; *Anuradha Bhasin v. Union of India*.

⁹³ The Review Committee, set up under Rule 419A of the Indian Telegraph Rules, 1951 comprises three members: the Cabinet Secretary, Secretary to the Government of India In charge, Legal Affairs, and Secretary to the Government of India, Department of Telecommunications.

⁹⁴ I have made a similar argument in the context of rules governing internet shutdowns. See Nakul Nayak, *Legal Analysis of Internet Shutdowns*, Internet Freedom Foundation Working Paper No. 1/2018, 13-14 (2018).

good faith and give good reasons for their decisions, users may be inclined to zealously pursue their appellate remedies to the self-regulating bodies and eventually to the IDC. As they stand, the costs associated with instituting complaints and filing appeals are low. At the editorial level, DNMs may choose to self-censor reporting politically controversial news. Worse, DNMs may become risk-averse and prioritize reporting non-political or non-controversial news to attract lesser State and public scrutiny. At the business level, the Rules may result in catastrophic consequences for small and emerging DNMs. Setting up grievance redressal mechanisms and complying with the Rules' regulatory scheme may prove financially unsustainable. At the industry level, the Government's power to play a pronounced role in dictating the form and substance of political reporting as well as determining in individual cases what is just, correct, and is "news", may be detrimental to the truth-seeking mission of journalism. At the level of democracy, given the potential consequences at the editorial, business, and industry levels, the Rules may shrink the marketplace of ideas and online journalism may be too weak to hold the State and other powers that be to account.