Legislative Brief

The Draft Indian Telecommunication Bill, 2022

The Draft Indian Telecommunication Bill, 2022 was released by the Department of Telecommunications for public feedback on September 21, 2022.

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Highlights of the Bill

- The Draft Bill seeks to replace the Indian Telegraph Act, 1885, the Indian Wireless Telegraphy Act, 1933, and the Telegraph Wires (Unlawful Possession) Act, 1950.
- Operating telecom network and providing telecom services will be licensed activities. Telecom services will also include broadcasting, OTT, M2M, and data communication services.
- Spectrum may be allocated through auction, administrative process, or other mechanisms decided by the central government.
- The central government may intercept, monitor, or block messages or a class of messages between two or more persons. Such action may be taken if it is necessary or expedient in the event of a public emergency or threat to public safety, and is in the interest of the security of the state, public order, or prevention of offence. Telecom services may be suspended on similar grounds.
- The Bill provides a mechanism to exercise the right of way for laying telecom infrastructure.

Key Issues and Analysis

- The Bill has not incorporated procedural safeguards mandated by the Supreme Court to safeguard the right to privacy in case of interception of communication. The Bill may violate requirements for periodic review and authorisation by a high-ranking official.
- The Bill may enable mass surveillance. Such measures may violate the fundamental right to privacy.
- The central government will have the power to issue licenses for telecom network as well as services. The considerations for regulation of network and services may be different. This raises the question whether they should be regulated similarly.
- As per the Bill, TRAI may not have any role in matters of licensing in the telecom sector. The question is whether this is appropriate.
- In case of offences by companies, the Bill does not provide protection to employees on account of lack of knowledge or if they have exercised due diligence. It also does not hold the director, manager, or other officers liable for connivance or neglect.
- Some definitions may need a re-look. For example, mobile phones would fall under the definition of wireless equipment. This would imply prior authorisation is required for possessing a mobile phone.

PART A: HIGHLIGHTS OF THE BILL

Context

The telecom sector in India is governed by three laws: (i) the Indian Telegraph Act, 1885 providing for licensing of telegraph-related activities and interception of communication, (ii) The Indian Wireless Telegraphy Act, 1933 for regulation of possession of wireless telegraph apparatus, and (iii) the Telegraph Wires (Unlawful Possession) Act, 1950 for regulation of possession of telegraph wires.[1,2,3] In addition, the Telecom Regulatory Authority of India (TRAI) has been set up under the TRAI Act, 1997 as the telecom regulator.[4] The power to issue licenses remains with the central government.

The 1885 Act sought to regulate telegraph services, which involved sending messages in the form of symbolic codes over wires or radio waves known as telegram (telegraph services were shut down in India in 2013).[5] Communication technology has since evolved significantly to facilitate real-time transmission of text, voice, images, and video information. These have given rise to a variety of services including voice calling, SMS, radio broadcasting, television, and internet-based communication services for messaging and video calling. All this while, the 1885 Act has continued to be in use for the regulation of telecom services.

Another key development has been the ability to provide similar kinds of services across different technologies. For example, cable television network has been used to provide internet services, and internet can be used to provide access to public broadcasting. The Department of Telecommunications has observed that the nature of telecom, its usage, and technologies have undergone a massive change since the era of the telegraph. Hence, there is a need to restructure the legal and regulatory framework for the telecom sector.[5]

One such attempt was the Communication Convergence Bill introduced in Lok Sabha in 2001.[6] The Bill sought to replace the three telegraph laws, the TRAI Act, and the Cable Television Networks (Regulation) Act, 1995. The Bill was examined by the Standing Committee on Information Technology.[6] The Bill lapsed with the dissolution of 13th Lok Sabha. The Draft Indian Telecommunication Bill, 2022 has been released by the Department of Telecommunications in September 2022 for public feedback.[7] The Bill seeks to replace the three telegraph laws to provide a regulatory framework for the telecom sector. It seeks to amend the TRAI Act to remove certain functions of TRAI.

Key Features

- **Regulation of telecom-related activities:** The central government will have exclusive powers to lay telecom infrastructure, operate telecom network, and provide telecom services. It may allow other persons to undertake these activities by obtaining: (i) registration for building telecom infrastructure and (ii) license for telecom network and services. Telecommunication services are defined as services provided over a telecommunication network and include: (i) communication services over a telecom network such as voice calling and SMS, (ii) internet and broadband services, (ii) internet-based communication services, (iii) over-the-top (OTT) communication services, (iv) broadcasting services such as FM radio and direct-to-home television, (v) data communication services, (vi) interpersonal communication services, (vii) machine-to-machine communication services, and (viii) satellite communication services. The central government may exempt license or registration requirement, if it determines that it is necessary in public interest.
- **Assignment of Spectrum:** Spectrum for wireless telecommunication may be assigned through: (i) auction, (ii) administrative process for governmental functions or purposes in view of public interest or necessity, as specified in Schedule, and (iii) any other manner, as may be prescribed. To enable more efficient use of spectrum, the central government may re-purpose or re-assign any frequency range. The central government may permit sharing, trading, leasing, and surrender of spectrum.
- **Interception of communication:** The central government may intercept, monitor, or block messages or a class of messages between two or more persons on certain grounds. These actions must be necessary or expedient in the interest of public safety or public emergency. These must be in the interest of national security, friendly relations with other countries, public order, or prevention of incitement of offence. Telecom services may be suspended on similar grounds.
- **Temporary possession and standards:** The central government may take temporary possession of any telecom infrastructure, network, or services on occurrence of any public emergency or public safety. It may prescribe standards for telecom equipment, infrastructure, network, and services.
- **Identification and protection of users:** A telecom service licensee must identify the person accessing services, through a prescribed verifiable mode of identification. No user shall furnish any false particulars, supress information, or impersonate another person for availing telecom services. Such contravention will be punishable with imprisonment up to one year or fine up to Rs 50,000, or suspension of services, or a combination of these. The central government may prescribe measures for protecting users from unsolicited communication including: (i) requiring consent of users for receiving certain class of messages, (ii) preparing and maintaining 'Do Not Disturb' register, and (iii) reporting unsolicited messages.

- **Right of Way:** The Bill provides for a mechanism to obtain permission for laying telecom infrastructure in public as well as privately owned property. Any entity laying telecom infrastructure may submit an application to the entity who owns, controls, or manages a property. The access will be provided in a non-exclusive and non-discriminatory manner. The permission should be granted in an expeditious manner, and within a prescribed timeline. In case of private entities, the requesting entity and the permitting entity may enter into an agreement for facilitating laying of infrastructure. The central government may prescribe a framework for accessing and laying infrastructure in private property.
- **Functions of TRAI:** Currently, the TRAI Act requires the central government to seek recommendations from TRAI in matters of: (i) the need and timing for the introduction of a new service provider and (ii) terms and conditions of the license to a service provider. The Bill removes the requirement.
- **Telecommunication Development Fund:** Under the Telegraph Act, Universal Service Obligation Fund has been established to provide for telecom services in underserved rural and remote areas. The Bill renames this fund as Telecommunication Development Fund. It adds that the fund may also be used for: (i) research and development of new telecom services, technologies, and products, and (ii) supporting skill development and training in telecom.

PART B: KEY ISSUES AND ANALYSIS

Interception of Communication

Bill: Clause 24(2), 24(3), 24(4)

The central government may intercept, monitor, or block messages or a class of messages between two or more persons on certain grounds. These actions must be necessary or expedient in the interest of public safety or public emergency. These must be in the interest of national security, friendly relations with other countries, public order, or prevention of incitement of offences. Telecom services may be suspended on similar grounds (e.g., internet shutdown). Safeguards mandated by the Supreme Court against such actions have not been incorporated in the Bill. Currently, these safeguards have been provided through Rules under the Indian Telegraph Act, 1885.[8,9] The Bill neither specifies these safeguards nor delegates specific powers for rule-making. The Bill provides that the Rules under the 1885 Act will continue to apply. We discuss certain issues with these provisions below.

The Bill may violate certain safeguards mandated by the Supreme Court

In *PUCL vs Union of India (1996)*, the Supreme Court held that in the absence of a just and fair procedure to regulate the powers of interception of communication, it is not possible to safeguard the rights of citizens under Articles 19(1)(a) (Freedom of Speech and Expression) and Article 21 (Right to Privacy as part of Right to Life and Liberty) of the Constitution.[10] It mandated various procedural safeguards in case of interception, monitoring, or blocking of telecommunication.[10] These include: (i) establishing necessity – same objective cannot be achieved by any other means, (ii) purpose limitation – use of intercepted material should be limited to the minimum that is necessary to meet the objective, (iii) time limit – initial order only to be valid for two months, extension of a maximum of six months at once, and (iv) issuance of orders by high-ranked officials (Home Secretary) and mandatory review (by a Committee headed by Cabinet Secretary).

Similarly, under *Anuradha Bhasin vs Union of India (2020)*, in a matter of suspension of internet services, the Supreme Court held that freedom of speech and expression and freedom of trade and business over the internet are protected under Article 19(1)(a) and 19(1)(g) of the Constitution.[11] The restriction on this right needs to meet the test of proportionality. It held that suspension orders should be temporary and a periodic review must be conducted. It required that all orders must be published to enable affected persons to challenge them. Orders should state material facts to enable judicial review.

In its current form, the provisions under the Bill may violate some of these safeguards as discussed below.

Validity of orders: The Bill provides that an order under the above provisions may remain in effect as long as a public emergency or impediment to public safety exists. This may violate the requirement cast by the Supreme Court to put a narrow time limit on the validity of orders to ensure periodic review.

Who can issue orders: Any specially authorised officer by the central government or state government may issue orders for interception, monitoring, or blocking. Hence, an officer lower in the rank than the Home Secretary of the central government or the state government may also issue the order.

Whether procedural safeguards should be provided in the Act itself

The safeguards discussed above are to protect against the actions of the government, hence, the question is whether these should be specified in the Act itself, instead of through subordinate legislation issued by the government. In case of infringement of the fundamental right to life and liberty against criminal offences, safeguards have been provided through the Code of Criminal Procedure, 1973.[12]

The question is whether an independent oversight mechanism should be necessary for interception

The Bill does not provide for any oversight mechanism for interception orders. In *PUCL vs Union of India (1996)*, the Supreme Court mandated oversight through a committee consisting exclusively of government officials. The question is whether an oversight mechanism headed by the Executive is an appropriate safeguard against the actions of the Executive itself. This may go against the principle of separation of powers.

In certain cases when a person is aware of an infringement of fundamental rights, he can challenge such infringement before Courts. These instances may include any violation of: (i) the right to life and liberty through illegal arrest, or (ii) the right to freedom of speech and expression through blocking of user-generated content, or suspension of internet. However, in case of interception or monitoring of communication, by the very nature of such orders, the affected person may never be aware. Hence, he cannot challenge such orders for potential illegality. Thus, it may be argued that in such cases, the procedural safeguards must be even stricter.

The question whether judicial oversight may be necessary for interception was discussed in the PUCL judgement.[10] It was contended that prior judicial scrutiny may alone take away apprehension of arbitrariness or unreasonableness of the action.[10] The Court had observed that the judicial scrutiny would have to be provided through the statute.[10] While recommending only executive oversight, the Court referred to the Communications Act, 1985 of the United Kingdom.[10] The 1985 Act of the United Kingdom has since been replaced with a new law which requires the approval of a Judicial Commissioner for such actions.[13] Similarly, in Australia, judicial authorisation is required under the principal legislation.[14]

The Bill may enable mass surveillance, such measures may violate the fundamental right to privacy

The Bill provides that any message or class of messages, to or from any person or class of persons, or relating to any particular subject, may be subject to interception, monitoring, or blocking. Using these grounds, an order may be made to intercept or monitor all communication where a particular word or set of words is used. Such an order would require all communication of all users to be monitored. Enabling such monitoring may lower the degree of privacy of communication for all users. The Supreme Court (2017) has held that any infringement of the right to privacy should be proportionate to the need for such interference.[15] Such surveillance may be required to prevent incitement of offences. To trace a few messages that may be required for investigative purposes, the degree of privacy of communication of all users of a telecom network will need to be lowered. Hence, the question is whether such actions could be considered proportionate to the objective.

Licensing of Telecom Network and Services

Bill: Clause 3, 2(7), 2(17), 2(19), 2(20), 2(21)

The Bill makes operating telecom network and providing telecom services licensed activities. We discuss certain issues with these provisions below.

The question is whether network and service layers should be regulated similarly

The Bill provides that the central government will have exclusive privilege over establishing telecommunication network and providing telecommunication services. The central government may issue a license for these activities to private persons. Technically, all of these could be encompassed within the activity of transmission of information over long-distance using wires or electromagnetic waves. However, the aim for the regulation of network and services may be different. This raises the question whether they should be regulated similarly.

Regulation of network: Building a telecommunication network involves the use of limited natural resources such as spectrum and land. Mutually exclusive frequency bands need to be used by various entities using spectrum, which requires central coordination. A telecommunication network is considered a critical and strategic infrastructure. Further, network business could be considered a natural monopoly, and network duplication may lead to economic inefficiency. Due to high capital investment requirements, this sector may not see competition, which may have a negative consequence for consumer interest. These considerations may justify the need for licensing in case of network.

Regulation of services: Traditionally, providers of network and services such as voice calling and SMS were the same. However, with the proliferation of internet and private sector participation, it has become possible for other entities to provide similar services using the network. TRAI (2006) had observed that there is a possibility that telecom players in future may become pure access providers with services being provided by others.[16] Today, communication services are provided by a wide number of players. Regulation of services are mainly from the aim of: (i) access control – who can use these services, (ii) content regulation – transmitted content meets community and constitutional standards, and (iii) interception of content for law enforcement purposes.[17,18] However, there may be differences in regulatory standards depending on the type of communication. For example, content standards may be different for public broadcasting and one-to-one communication. These may require prior screening of publicly broadcasted content as it happens for films, whereas there is no such restriction on information exchanged privately.

The proposed regulation may be stricter as compared to the current standards where: (i) internet-based services such as emails and messaging apps are not subject to license or registration (regulated under the Information Technology Act, 2000), (ii) cable television broadcasting services are subject to only registration (regulated

under the Cable Television Networks (Regulation) Act, 1995).[17,18] TRAI (2020) had observed that in many jurisdictions such as United Kingdom, Australia, and South Africa, licensing regime has evolved to distinguish between network and service layers.[19] The service layer is mostly subject to light touch regulation.[19] In the recent past, TRAI has recommended against regulating the OTT-communication services in a similar way to telecom services.[20] It had recommended light-touch regulation for machine-to-machine communication.[20,21]

Implications of stricter compliance for internet-based services

Restricting access to non-licensed services: The internet enables an entity to provide services to any part of the world. The services of the entity need not be hosted or deployed in the country where the services are available. The entity need not have any physical presence in the same country either. This nature of internet enables a wide variety of choices for users. Suppose internet-based communication services are subject to license. Many players based in other countries may not be interested in getting a license for operation in India due to increased compliance costs. In a license-based regime, services of all those who do not have a license will have to be restricted through case-by-case blocking by Internet Service Providers. However, these restrictions may be bypassed by using virtual private network services (VPN).

Data retention requirements: Currently, telecom services are subject to significant data retention requirements. License conditions require telecom service providers to store details of communication over a telecom network for at least two years.[22] These include information about people on the network, who they talk to, how long they talk to, and from where they made contact. These obligations may not be compatible with the evolving principles of data protection and privacy.[23] To safeguard privacy, one of the key recognised principles is data minimisation, i.e., limiting data collection to what is necessary to fulfil a specific purpose of data processing.[24,25] Unchecked storage and availability of data increase the risk of profiling. If similar obligations were to be cast on internet-based communication services, it would lead to retention of more data about private communication of individuals.

TRAI may not have any role in licensing of telecom network and services

Bill: Clause 46(f), (g), (h) (i)

TRAI Act, 1997: Section 11

Currently, the TRAI Act requires the central government to seek recommendations from TRAI in matters of: (i) the need and timing for the introduction of a new service provider, and (ii) terms and conditions of the license to a service provider. The Bill removes the requirement. As per the Bill, the power to license remains with the central government. Thus, with the proposed amendments, TRAI may not have any role in matters of licensing. The question is whether this is appropriate.

The Long Title of the TRAI Act states that TRAI has been established to regulate telecommunication services.[4] Licensing could be considered to be one of the key regulatory functions. Under the proposed amendments, the process of licensing may not benefit from the subject-matter expertise of TRAI. The recommendatory powers of TRAI in matters of licensing were introduced through the TRAI (Amendment) Act, 2000.[26] The Statement of Objects and Reasons of the TRAI (Amendment) Bill, 2000 had observed that such powers were introduced in view of: (i) creating a level-playing field between public and private operators, and (ii) increasing investor's confidence.[27] In various other Acts, the function of licensing has been delegated to the sectoral regulator. For example, under the Electricity Act, 2003, the Central Electricity Regulatory Commission and State Electricity Regulatory Commission grant licenses to transmission and distribution companies.[28] RBI and IRDAI issue licenses for banking and insurance companies, respectively.[29,30] Note that the Communication Convergence Bill, 2001 had sought to empower the Communications Commission of India (which would have replaced TRAI) to issue licenses for telecommunication.[6]

Offences by companies defined differently

Bill: Clause 48

The Bill provides for offences by companies. It provides that an employee responsible for conduct of business relating to an offence will be liable. However, it differs on two counts from other Acts such as the Electricity Act, 2003 and the Environment Protection Act, 1986 which also provide for such offences.[28,31] First, these Acts provide protection if the employee can demonstrate that: (i) the offence was committed without his knowledge, or (ii) he had exercised all due diligence. Second, these Acts also hold director, manager, secretary, or other officer liable for the offence, in case of connivance or neglect. The Bill does not provide for these.

Drafting Issues

The definition of telecommunication services under the TRAI Act and the Bill are not harmonised

Bill: Clause 2(21)

TRAI Act, 1997: Section 2(k)

The definition of 'telecommunication services' is different in the Bill and the TRAI Act. The definition under the Bill is wider and includes services such as broadcasting services, machine-to-machine communication, internet-based communication services, and OTT communication services. The question is whether TRAI will also regulate these additional services.

Prior authorisation may be required for possession of mobile phones

Bill: Clause 2(23), 3(2)

As per the Bill, wireless equipment means "*any telecommunication equipment used or capable of use in wireless communication, including any wireless transmitter that is capable for broadcasting or emission of wireless communication"*. Mobile phones used by end-consumers also meet the above criteria, and can be categorised as wireless equipment. The Bill requires prior authorisation for possession of wireless equipment. This raises the question whether possession of mobile phones would require prior authorisation.

Whether registration or license is required for providing telecommunication infrastructure

Bill: Clause 2(19), 2(20), 3(2)

The Bill provides that a license will be required for establishing telecommunication network, and registration will be required for providing telecommunication infrastructure. However, as per the definition, telecommunication network could comprise solely of telecommunication infrastructure. This raises the question whether license or registration will be applicable for providing telecommunication infrastructure.

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1. The Indian Telegraph Act, 1885.
2. The Indian Wireless Telegraphy Act, 1933.
3. The Telegraph Wires (Unlawful Possession) Act, 1950.
4. The Telecom Regulatory Authority of India Act, 1997.
5. "Explanatory note to the Draft Indian Telecommunication Bill, 2022", Department of Telecommunications, September 21, 2022.
6. Report of the Standing Committee on Information Technology on the Communication Convergence Bill, 2001.
7. Draft Indian Telecommunication Bill, 2022, Department of Telecommunications , September 21, 2022.
8. Rule 419A, The Indian Telegraph Rules, 1951, issued under the Indian Telegraph Act, 1885.
9. Temporary Suspension of Telecom Services (Public Emergency or Public Safety) Rules, 2017, issued under the Indian Telegraph Act, 1885.
10. People's Union for Civil Liberties (PUCL) vs Union of India, Supreme Court of India, December 18, 1996.
11. Anuradha Bhasin vs Union of India, W.P. (Civil) No. 1031 of 2019, Supreme Court of India, January 10, 2020.
12. Code of Criminal Procedure, 1973.
13. Part-2: Lawful Interception of Communications, Investigatory Powers Act, 2016, United Kingdom.
14. Telecommunications (Interception and Access) Act 1979, Australia; Telecommunications Act, 1997, Australia.
15. Justice K.S.Puttaswamy (Retd) vs Union of India, W.P.(Civil) No 494 of 2012, Supreme Court of India, August 24, 2017.
16. "Consultation Paper on Issues pertaining to Next Generation Networks", Telecom Regulatory Authority of India, January 12, 2006.
17. The Cable Television Networks (Regulation) Act, 1995.
18. The Information Technology Act, 2000.
19. "Consultation Paper on Enabling Unbundling of Different Layers Through Differential Licensing", Telecom Regulatory Authority of India, August 20, 2020.
20. "Recommendations on Regulatory Framework for Over-The-Top (OTT) Communication Services", Telecom Regulatory Authority of India.
21. "Recommendations on Spectrum, Roaming and QoS related requirements in Machine-to-Machine (M2M) Communications", Telecom Regulatory Authority of India, September 5, 2017.
22. No. 20-271/2010 AS-I (Vol. III), Department of Telecommunications, December 21, 2021.
23. The Personal Data Protection Bill, 2019, as introduced in Lok Sabha introduced on December 11, 2019.
24. Article 5, General Data Protection Regulation of European Union.
25. White Paper of the Committee of Experts on Data Protection Framework for India under the Chairmanship of Justice B. N. Srikrishna, December 2017.
26. The Telecom Regulatory Authority of India (Amendment) Act, 2000.
27. The Telecom Regulatory Authority of India (Amendment) Bill, 2000, as introduced in Lok Sabha.
28. The Electricity Act, 2003.
29. The Banking Regulation Act, 1949.
30. The Insurance Regulatory and Development Authority of India Act, 1999.
31. The Environment Protection Act, 1986.