THE DRAFT INDIAN TELECOMMUNICATION BILL, 2022; TO BE DEFINED!

OCTOBER 2022
The Indian Telegraph Act, 1885 ("Telegraph Act") and the Indian Wireless Telegraphy Act, 1933, the primary statutes governing the Indian telecommunication sector share a common genesis at the heart of a colonial mindset – they are laws that were made by the British for governing colonial India (albeit they were adopted by India soon after independence and amended from time to time by subsequent legislatures). The Government of India, realising the necessity to bring an end to this archaic legal regime (wherein these legislations were merely being expounded to fit the necessities of today), has decided to regulate the telecommunications sector afresh with the draft Indian Telecommunication Bill, 2022 (the “Bill”).

The laws that have governed the domain of communication in India, specifically the legislations preceding the Telegraph Act namely the Electric Telegraphs Act of 1854, the Telegraph Acts of 1860 and 1876 were often used to the peril of citizens including for the suppression of the Indian freedom struggle. In fact, the nexus between communication and State sovereignty, with the former being seen as an essential tool to secure the latter and the State’s exclusive power over “posts and telegraphs; telephones, wireless, broadcasting and other forms of communication” (with the exception of those who have been licensed by the State to operate in the domain) has been passed down from the foregoing legislations. The importance of telecommunication is also evident from the instruments of accessions that the myriad princely states in India signed when a young India was in the process of securing her own sovereignty, with communication -- specifically the aforementioned “posts and telegraphs; telephones, wireless, broadcasting and other like forms of communication” being one of the subjects on which only the Indian government could make laws.

The foregoing being said, it is high time - with India reaching seventy-five years as an independent nation, that a forward-looking law for this generation be adopted to govern the communications sector in the country. In keeping with aforesaid want of a new legislation, the Department of Telecommunications, Ministry of Communications ("DoT") released the draft Bill on September 21, 2022 with the objective of “establishing and enabling a future-ready framework for the development of the telecommunication sector and deployment of new technologies” and to have a legal framework that is “attuned to the realities of the 21st century.”

The Bill intends to replace the Telegraph Act, the Indian Wireless Telegraphy Act, 1933 and the Telegraph Wires (Unlawful Possession) Act, 1950 while at the same time bringing under its broad ambit, new forms of telecommunication and telecommunication services. The Bill has so far elicited a mixed response from stakeholders, it is also pertinent to note that the DoT released the Bill along with a call for comments from the public, indicating that the Bill may undergo a change depending on the stakeholders response before reaching the floor of the Parliament. This article seeks to summarise and analyse the key characteristics of the Bill.

3. See Entry 31 of List-1 of the Seventh Schedule to the Constitution of India.
7. The Bill defines “telecommunication” to mean “a transmission, emission or reception of any messages, by wire, radio, optical or other electro-magnetic systems, whether or not such messages have been subjected to rearrangement, computation or other processes by any means in the course of their transmission, emission or reception.”
8. The Bill defines “telecommunication services” to mean “service of any description (including broadcasting services, electronic mail, voice mail, voice, video and data communication services, audiotex services, videotex services, fixed and mobile services, internet and broadband services, satellite based communication services, internet based communication services, in-flight and maritime connectivity, services, inter-personal communications services, machine to machine communication services, over-the-top (OTT) communication services) which is made available to users by telecommunication, and includes any other service that the Central Government may notify to be telecommunication services.”
Regulation of Modern Telecommunication

The DoT, through the Bill has sought to regulate newer forms of communications which have so far not been regulated in India from a telecommunication point of view, such modes of communication include email, voice mail, video communication services along with over-the-top (“OTT”) communication services et al. This has been done by including such forms of communication within the definition of ‘telecommunication service’.

While it is understandable that the Bill seeks to regulate all forms of telecommunication services on a level playing field, especially given that some forms of such services compete with each other (for example, the voice calling services provided by a licensed telecommunication service provider and the voice calling service provided by an OTT service provider), regulating different types of telecommunication services in a similar fashion may not be practical. Given that most OTT communication services, email service providers and/or video calling service providers only provide a software solution which is merely accessible over a telecommunication network, it may not be necessarily justified in labelling all such services as ‘telecommunication services’. One may even argue that it is more appropriate to regulate OTT communication, email communication etc., under the Information Technology Act, 2000 (“IT Act”) (through specific rules prescribed thereunder or amendments to existing rules if necessary) especially given that such service providers already identify and find a place for themselves in the IT Act regime as ‘intermediaries’ and ‘social media intermediaries’. Further, most of these services providers render services from outside of India and a licensing regime would most likely dissuade their entry or likely result in stoppage of such services to the users in India. This problem is further exterminated by extending the applicability of the data localisation requirements (which are currently applicable to licensed telecommunication service providers and internet service providers) mutatis mutandis to OTT communication services.

Separately and most importantly, the Bill loosely uses the term “OTT communication services” without defining it – most websites or applications provide some form of a communication tool, for e.g. a social media platform provides its users to communicate with each other through text, voice and/or video, similarly a taxi aggregator platform also lets users communicate with the customer support / taxi driver, and it may not be practical to label both the above as OTT communication service providers. As a result, a clear, unambiguous definition of OTT communication service is the need of the hour.

Wide-ranging powers of the Central and State Governments

Carrying forward the nexus between telecommunication and sovereignty (as detailed in the introduction above), the Bill provides the Central Government with the power to prescribe standards for telecommunication services, networks, infrastructure and telecommunication equipment including standards on manufacturers, importers and distributors of such equipment. Further, the Bill extends unchecked powers to the Central Government as well as State Governments in situations of public emergency or for reasons of public safety which includes (a) taking possession of any telecommunication service, network or infrastructure; (b) providing priority call routing schemes; and (c) directing any message or class of messages to and from any class of persons relating to a particular subject to not be transmitted, intercepted or detained, suspended or disclosed among other things. It is difficult to imagine a scenario where exercise of such powers (specifically point (c) herein) by the telecommunication service provider or the Central/State Government would not raise serious concerns with respect to the breach of an individual’s fundamental right to privacy. This may result in further problems during implementation as OTT service providers who provide end-to-end encryption may not be able to identify the messages or class of messages that the government may want to suspend, detain or disclose.

9. The Bill defines “telecommunication networks” to mean “a system or series of systems of telecommunication equipment, or telecommunication infrastructure, or both, including terrestrial or satellite networks or submarine networks, or a combination of such networks, used or intended to be used for providing telecommunication services, but shall not include customer equipment.”

10. Section 2(w) of the IT Act states that an “intermediary” with respect to any particular electronic message means any person who on behalf of another person receives, stores or transmits that message or provides any service with respect to that message.

11. Rule 2(w) of the Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021 defines “social media intermediaries” to mean an intermediary which primarily or solely enables online interaction between two or more users and allows them to create, upload, share, disseminate, modify or access information using its services.
Diminished need for Telecom Regulatory Authority of India (“TRAI”)

The Bill has repealed certain provisions of the Telecom Regulatory Authority of India Act, 1997 (“TRAI Act”) wherein it may be perceived that the independence and powers of the regulator has been diluted to allow the DoT (part of the Government rather than an independent body) to take centre stage in terms of regulating the telecom domain. The restriction on the appointment of the chairman for the body not being a person who is or has been in the service of the Government has been done away with leading to the DoT (and the Ministry of Communication) having a grip over TRAI’s decision making. Further, the requirement for the Government to seek recommendations from the TRAI before issuing licences, the power of the TRAI to requisition documents from the Government that are necessary to make recommendations and the requirement for the DoT to refer the recommendations that it does not agree with back to TRAI for reconsideration, among others, have been repealed. The diminishing of TRAI’s independence and relevance has raised concerns for stakeholders in the sector.

Continuance of the Exclusive Privilege of the Central Government

In line with the Telegraph Act and the legislations preceding it as mentioned in the introduction hereinafore, the exclusive privilege or control over the provision of telecommunication services, the establishment, maintenance and expansion of all telecommunication networks and telecommunication infrastructure\(^\text{12}\) including the allocation of spectrum \((\text{which has now been specifically called out in the main legislation i.e., the Bill itself})\) has been vested with the Central Government. In furtherance of such exclusive privilege, the Central Government has the exclusive authority to grant or exempt \((\text{in the interest of the public})\) licenses, registrations, authorisations subject to terms and conditions and fees deemed suitable by it.

Continuance of the Licensing Regime

Further to the Central Government’s exclusive privilege on all telecommunication services, telecommunication networks and infrastructure, private entities can be provided access to the telecommunication market only through a license much akin to the unified license agreement that stakeholders are currently expected to enter into for the purpose of providing telecommunication services. Although, given the increased breadth of the definition of telecommunication services especially vis-à-vis OTT communications, internet-based communication services, email and video communications, it would be interesting to see if the Central Government would insist on a licensing agreement for such services or if such presently unlicensed and unregulated services would be exempted from the licensing regime. However, the Bill fails to define the different categories of communication services that may fall within the purview of services such as ‘OTT communication services’, ‘internet-based communication services’, etc., and a lack of such definition would cause nothing but, confusion and chaos in the industry.

Identification Obligations

The Bill prescribes all entities licensed by the Central Government to “unequivocally identify the person to whom it provides services.”\(^\text{13}\) The Bill also requires the identities of all persons who send messages\(^\text{14}\) using the service provided by entities licensed by the Central Government to be made available to any person who receives such messages. The Central Government is of the view that such identification obligations would pave the way for curbing frauds and malpractices,\(^\text{15}\) however, the implications of these obligations on privacy of users, specifically with regard to OTT communications, email etc., needs to be examined further.

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12. See Schedule – 5 of the Bill for a list of things that constitute telecommunication infrastructure.
13. See Section 4 (7) of the Bill.
14. The Bill defines “message” to mean “any sign, signal, writing, image, sound, video, data stream or intelligence or information intended for telecommunication.”
15. See Media interaction on draft Telecom Bill 2022 by Union Minister Ashwini Vaishnaw available at https://www.youtube.com/watch?v=_FoR5dr8_zk.
Spectrum Management

The Bill brings under its ambit the enabling provisions for spectrum allocation by the Central Government through auction or through an administrative process for specified governmental functions such as defense, law enforcement, scientific research, meteorology etc., in light of public interest or necessity. The Bill also provides for an enabling provision which allows the Central Government to implement a National Frequency Allocation Plan. In an attempt to promote efficient utilization of the spectrum, the Bill also proposes re-farming (repurposing of a frequency range for a different use) and harmonization (rearrangement of a frequency range) of the spectrum.

Right of Way

The Bill covers the aspect of right of way which is currently covered under specific rules issued by the DoT. The Bill recognises the importance of the right of way for telecommunication infrastructure through both public and private property for the purpose of expediting development of the telecommunication sector. Every public entity is required to grant the right of way for a facility provider unless the same cannot be granted due to substantive grounds. Likewise, in the case of private property, right of way may be mutually agreed between such facility provider and the owner of such private property. Where such terms cannot be mutually agreed, the Central Government may acquire such right of way and enable the facility provider to establish, operate and maintain the telecommunication infrastructure.

Other features

The Bill inter alia also includes other key measures that are forward looking, liberal and will result in opening up of the sector, such as (a) the simplification of the procedures with regard to mergers, demergers and acquisitions (that will do away with the requirement to provide notices and/or seek approvals from the DoT); (b) relaxations in the event of insolvency or bankruptcy of licensees; (c) introduction of alternative dispute resolution mechanisms; (d) introduction of a voluntary undertaking mechanism; (e) introduction of measures to protect users from “specified messages” which advertise/promote goods, services etc. (akin to the current regulations that govern unsolicited commercial communication) including the provisions which enable the Central Government to issue rules regarding ‘do not disturb’ registers, receiving prior consent of users for receiving the aforesaid messages and a mechanism for reporting of such messages received in contravention of the foregoing framework; and (f) the introduction of a regulatory sandbox to foster innovation.

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16. The Bill defines “spectrum” to mean “the range of frequencies of radio waves.”
17. See Schedule -1 of the Bill for the full list of governmental functions.
19. The Bill defines “Facility Provider” to mean “the Central Government or any licensee or registered entity, including any contractor or sub-contractor or agent working for the Central Government or licensee or a registered entity, and shall include any successors or assignees.”
More so than ever, it is the need of the hour that India, in its seventy fifth year as an independent nation adopts an Atmanirbhar telecommunication law that reflects the goals and aspirations of its ever-growing telecommunication sector. The Government, in its pursuit of framing a regulatory framework that is able to keep up with the developments in the 21st century India, has taken crucial steps in the right direction by introducing the Bill. However, the Bill, in its current form is a long way away from reaching the statute books. Further, while the Bill was framed with the objective of digital inclusion (i.e., making the information and communication services more accessible to the general public), the extension of the licensing regime to new age communication services (such as OTT communication services, the internet-based communication service), seems to run counter to the Bill’s objective.

Additionally, the Government, in trying to achieve its noble goal of simplifying laws and making them understandable to a common man may have simplified the law to an extent that it may even be perceived as vague in certain aspects. However, it is prudent for one to trust the legislative wisdom of the government and infer that a more pointed governance would flow from specific rules and regulations that the government issues pursuant to the enactment of Bill. That said, it is expected that like in any democratic and consultative process of legislation, the government will be receptive to the concerns and reservations that would be (or have been) raised by stakeholders and that there would be multiple iterations of the Bill before it reaches its final binding state as a law.