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PRIVACY CHALLENGES IN TELECOMMUNICATION ACT 2023: A COMPARATIVE LEGAL ANALYSIS

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Abstract

In December 2023, the anticipated Telecommunication Act 2023 was executed, prioritising the development of a strong security framework to protect essential mobile networks from cyber threats and unauthorised access. Telecommunication networks, being prime targets for cybersecurity threats, necessitate stringent data protection measures to mitigate risks effectively. This research emphasizes procedural shortcomings identified by the various judicial trends and examines instances such as Section 66A of the Information Technology Act and that its use in cyber weapons like Pegasus[1999] exceeds the authority, falling into the realm of hacking, a criminal offense and essentially an attack on the basic right of one's privacy which is an integral part of Right to life. It is imperative to ensure that data processed within the telecommunications domain adheres strictly to prevailing data protection laws. This includes obtaining explicit authorization for any deviations from compliance and ensuring that all processing activities align with principles of legitimacy, necessity, and proportionality.

[1999] Nilesh Navalakha v. Union of India, 2021 SCC OnLine Bom 56

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I. Introduction

In this digital age data is the new oil, it has been proven to significantly change the way of human's psychology into making them do whatever and buy whatever given if the human data is controlled in a manner that lets you control this human behaviour. Therefore, data is more relevant than any money.[2000]

The absence of a data protection laws in India had left a void in terms of oversight until, efforts were underway, as reflected in the Justice B.N. Srikrishna Committee Report of 2018, which has led to the drafting of a Data Protection Bill currently under consideration by the Joint Parliamentary Committee. This suggested legislation envisions the establishment of a Data Protection Authority (DPA) as an independent regulatory body responsible for enforcing and implementing data protection laws effectively and was a major driving force for the India's first data protection law implemented in August 2023.

In the light of various issues in relation to the research gap herein the application of new Section 69A of the IT Act granted the Central Government the power to restrict public access to information on computer resources. This authority extended to ordering agencies to block material stored on such resources. In the case of Shreya Singhal v. Union of India, the Supreme Court validated Section 69As constitutionality. However, experts advocate for greater transparency and accountability regarding Internet shutdowns.

The nature of data protection laws is indeed a critical aspect in today's digital age, especially considering the rising incidents of identity theft, ATM skimming, and phishing. These crimes exploit vulnerabilities in digital systems and often result in significant financial losses and privacy breaches for individuals. Conventional cyber laws, such as the Information Technology Act, 2000, and the Penal Code, 1860, have struggled to keep pace with the complexities of cybercrimes, leading to gaps in legal frameworks and enforcement mechanisms.

Cybersecurity threats like Aadhaar data leaks highlight the need for robust identity protection mechanisms and citizen awareness. According to recent data, a notable percentage of respondents have experienced non-consensual pornography, where their intimate images or videos were shared without their consent, leading to misuse and victimization. Additionally, instances of doxxing have been reported, with perpetrators publicly sharing personal information to cause harm or embarrassment to individuals. The manipulation and sharing of original photos online, along with the unauthorized posting of images from social media platforms with malicious intent, further highlight the risks faced by individuals in maintaining their privacy in the digital realm.[2001]

Over 60 digital rights establishments, including Firefox, consider this bill poses a grave danger to our fundamental rights, democracy, and the existing internet landscape. They urge its withdrawal and modification to address these issues, as it would establish standards on encryption and data processing without limitations, creating uncertainties for service providers in offering robust encryption and fostering privacy-respecting innovations. In the same predicament, there may be a valid motivation to revise colonial-era laws elsewhere. The recent attempt to overhaul the BNS bill and now BNS II has also brought about multiple improvements, albeit with persisting ambiguities. Ambitious tasks are bound to take up a long time and hastily pursuing legislative processes for political gain may have lasting consequences for citizens. While some may perceive the extensive curtailment as the lowest ebb, it becomes crucial to recognize that the resulting consequences pose a threat that

[2000] Abhimanshi Singha, Democracy is in Blood and Pegasus holds the Smoking Gun, 2 JCLJ 1215 (2022).

[2001] Dr. Sheetal Arora & Poonam Yadav, Victimization of Females in Cyberspace - A Study on Females Enrolled in Higher Education Institutions in India, 2 JCLJ 412 (2022).

looms larger over the very fabric of our Constitution.

A. Legislative Background

The Telecommunications Bill of 2023, represents a significant change of India's telecommunications regulatory framework. One of its key objectives is to repeal outdated legislation such as the Indian Telegraph Act of 1885, the Indian Wireless Telegraphy Act of 1933, and the Telegraph Wires (Unlawful Possession) Act of 1950. These laws, being relics of a bygone era, no longer adequately address the complexities and challenges of the modern telecommunications landscape.

By repealing these old acts, the new bill aims to streamline and modernize regulatory processes, making them more adaptable to the rapidly evolving technologies and services in the telecommunications sector. This move reflects a proactive approach to ensure that India's regulatory framework remains relevant, efficient, and conducive to fostering innovation and growth in the telecommunications industry.

The historical framework of India's telecommunications sector spans from 1885 to 2023, characterized by significant legal milestones and regulatory changes that have shaped the industry's evolution.

The recent repeal of the Telegraph Wires (Unlawful Possession) Act, 1950, by the Repealing and Amending Act of 2023 underscores the importance of regulatory adaptability in response to changing technological landscapes. This repeal reflects a broader trend of updating and modernizing outdated laws to align with contemporary needs and challenges in the telecommunications sector.

In terms of regulatory authorities, the Telecom Regulatory Authority of India (TRAI) Act of 1997 was instrumental in tariff regulation and established bodies such as TRAI and the Telecom Disputes Settlement and Appellate Tribunal (TDSAT). However, the licensing authority remained vested in the central government, highlighting the division of regulatory responsibilities between governmental and quasi-judicial bodies.

Now in December 2023, the highly anticipated Telecommunication Act 2023 was implemented, prioritising the development of a strong security framework to protect essential mobile networks from cyber threats and unauthorised access. While the Digital Personal Data Protection Act was passed in early August of 2023. The act is expected to come into force in 2024 through a government notification.

The inception of major activities in establishing the telecommunication system in India marked a pivotal moment, leading to the formulation of the National Telecom Policy in 1994. Envisaging telecommunication accessible to all, the policy aimed at achieving world-class service quality, resolving consumer complaints, and positioning India as a significant manufacturing and exporting hub for telecom equipment. As a response to growing needs, the separation of regulatory functions from the service-providing functions of the Department of Telecommunication (DOT) became imperative.

This necessitated amendments to the old Indian Telegraph Act of 1885, leading to the conceptualization of the Indian Telegraph (Amendment) Bill, 1995. Despite its preparation, the Bill did not materialize, paving the way for an independent regulatory body. Subsequently, the Telecom Regulatory Authority of India (TRAI) Bill, 1995 was drafted but replaced by an ordinance in 1996 due to delays in parliamentary consideration. The regulatory journey continued with the introduction of the Telecom Regulatory Authority of India Bill, 1996, and subsequent amendments based on recommendations from the Standing Committee of the Parliament.

The culmination of these legislative endeavours resulted in the enactment of the TRAI Act, 1997, signifying a commitment to regulating telecommunication services in India. The Act addressed crucial aspects, including defining licensees and service providers, outlining

qualifications and functions of the Authority, and ensuring compliance with terms and conditions of licenses. The TRAI was entrusted with advising the Central Government on licensing matters, determining the introduction of new service providers, monitoring services, and conducting surveys to maintain prescribed standards of quality.

II. Telecommunication Act & its Consequences

The Telecommunications Act of 2023 in India represents a significant overhaul of the regulatory framework governing the telecommunications sector. One of its notable aspects is the replacement of several outdated acts, including the Indian Telegraph Act of 1885, the Indian Wireless Telegraphy Act of 1933, and the Telegraph Wires (Unlawful Possession) Act of 1950. This consolidation streamlines the legal landscape and brings about more cohesive and modernized regulations. Under the Telecommunications Act, the central government is entrusted with the authority to provide authorization for telecom-related activities and assign spectrum. This marks a shift towards a more centralized approach in managing telecom operations and ensuring efficient spectrum allocation, tailored to the specific needs of various telecommunications services.

The Telecom Act, with its emphasis on prior authorization from the central government for providing telecommunication services and operating telecommunications networks, plays a pivotal role in ensuring regulatory oversight and compliance with established standards and regulations. This authorization requirement serves as a mechanism to maintain control over the telecommunication sector, promoting transparency and accountability in the provision of services.

Likewise, the Act provides continuity and stability for existing telecom operators by recognizing the validity of licenses granted under previous regulations for their designated periods or up to five years. This provision allows for periodic reviews and updates, ensuring that telecom operations evolve in line with industry norms and technological advancements while maintaining regulatory coherence.

In terms of spectrum allocation and usage, the Act adopts an auction-based approach for allocating spectrum, except for specific purposes such as national security, disaster management, and satellite services. This approach aims to promote efficient spectrum utilization and management by allocating spectrum resources to entities that can utilize them optimally. Additionally, the Act empowers the government to re-purpose frequency ranges and allows for spectrum sharing, trading, leasing, and surrender, further enhancing spectrum management practices.

The Act also grants the government necessary surveillance and suspension powers to intercept, monitor, or block messages on specified grounds related to public safety or emergencies. This includes the ability to suspend telecom services and take temporary possession of infrastructure during public emergencies, ensuring that national security and public safety measures can be implemented effectively and swiftly.

The Act further addresses regulatory standards by empowering the central government to prescribe standards for telecom equipment and infrastructure. This provision aims to ensure the quality, reliability, and interoperability of telecom services within the ecosystem. Additionally, amendments to the TRAI Act, 1997, provide criteria for the appointment of TRAI chairpersons and members, allowing experienced individuals from various sectors, including the private sector, to contribute to regulatory decision-making and policy formulation. The Act even introduces measures such as the Digital Bharat Nidhi (formerly the Universal Service Obligation Fund), which can be utilized for research and development initiatives, promoting digital inclusion and innovation. Additionally, the Act excludes over-the-top (OTT) services, indicating that their regulation falls under potential separate legislation, such as the Digital India Act, 2023.

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This highlights the evolving regulatory landscape for digital services and the need for comprehensive legislative frameworks to address emerging challenges in the digital sphere.

To conclude, the Act specifies criminal and civil offences related to the unauthorized provision of telecom services and breach of terms, along with corresponding penalties ranging from fines to imprisonment. These penalties are enforced through adjudication overseen by designated officers and committees, ensuring accountability and deterrence against illegal activities in the telecom sector.

One of the key provisions of the Act pertains to interception, where the procedure and safeguards are mandated to be prescribed by the Central Government. This signifies a structured and regulated approach to interception activities, aiming to balance security concerns with individual privacy rights. The inclusion of stringent punishment for violators further reinforces the seriousness with which interception activities are viewed under the Act, ranging from three years' imprisonment to hefty fines of up to 50 lakh rupees.

A. State Surveillance

In recent years, the rapid advancement of technology has led to a substantial reduction in global distances, facilitating instant communication across vast distances through various digital means. The Telecommunications Bill, 2023, reflects a shift in India's telecom regulatory landscape to address modern challenges. However, concerns have been raised about provisions allowing interception and monitoring of communications, potentially compromising privacy rights. The Bill's broad definition of "public interest" and exemptions for certain entities raise further privacy concerns. Additionally, the Bill lacks provisions to address surveillance issues adequately. This technological progress has also brought to the forefront a critical issue concerning privacy and surveillance, particularly in the context of wiretapping or phone tapping by governments and law enforcement agencies.

Phone tapping and interception have long been contentious issues, especially concerning the legal framework and safeguards in India. The Indian Telegraph Act, 1885, particularly Section 5(2), has been a focal point of debate regarding the substantive and procedural safeguards necessary for lawful interception. The recent case in Telangana involving the arrest of a deputy superintendent of police for alleged phone tapping serves as a relevant case study to understand these legal complexities and challenges. Starting with substantive safeguards, the Court's acknowledgment of the necessity for procedural laws alongside substantive requirements is crucial. While Section 5(2) itself was not deemed unconstitutional, the absence of proper procedural safeguards renders the substantive provisions vulnerable. Section 25 of the Telegraph Act provides substantial safeguards by imposing penalties, including imprisonment, for unauthorized interception, emphasizing the gravity of such actions.[2002]

The sections discussed in the Telecom Act that impact privacy laws include provisions related to interception, monitoring, and blocking of communication by state instrumentalities on grounds such as national security, public order, and prevention of incitement to offenses. These provisions are outlined under the Bill's powers of interception and search. It mandates telecom service providers to verify subscriber identity through biometric-based identification, which raises concerns about privacy infringement and compliance with fundamental rights to privacy. The provisions for suspending telecom services in specific areas based on security grounds also have implications for privacy, as they could lead to broader surveillance and monitoring of communications.[2003]

B. **The Takeover**

One of the most debated aspects of the provisions regarding interception, monitoring,

[2002] Dhriti Kawale, Wiretapping in India: Understanding its Laws and Implications, , 4.2 JCLJ (2023) 581

[2003] KP Singh, Strike a balance between surveillance and privacy, The Tribune (December 25, 2023), https://www.tribuneindia.com/news/comment/strike-a-balance-between-surveillance-and-privacy-575077.

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and blocking of communications. The Act empowers state instrumentalities to undertake such actions on specified grounds related to national security, public order, friendly relations with other countries, and prevention of incitement to offences. While these powers are crucial for safeguarding critical interests, concerns have been raised regarding potential misuse and overreach.

The entire take-over of the telecommunication network from an authorized entity in itself possesses grave danger It is well developed notion that the ambition at the end is to strike a better balance between protecting individual privacy and ensuring security measures.[2004] But, it is clear that this possesses an unequivocal dangers to the privacy of any citizen when such takeover has taken place by the government. Certain safeguards has to be taken into account or else otherwise, it devolves into an Orwellian narrative of autocratic control. The takeover of telecommunication networks by unauthorized entities represents a significant peril.

The right to privacy, which is intricately linked with the right to life and personal liberty under Article 21, faces significant challenges in such situations. The government's ability to take control of telecommunication services and networks can lead to intrusive surveillance and monitoring of individuals' communications, thereby violating their privacy rights. This becomes especially concerning when there are insufficient safeguards in place to prevent abuse of power or misuse of data collected during such takeovers. The lack of transparency and accountability in these processes further compounds the threat to privacy rights. Without clear guidelines and oversight mechanisms, there is a risk of unchecked government surveillance, undermining citizens' trust in the state's ability to protect their privacy and uphold their constitutional rights.

III. Judicial Trends over Surveillance

In the case of Manohar Lal Sharma vs. Union of India and Ors.[2005], the Supreme Court of India delved into allegations concerning the potential infringement of Indian citizens' right to privacy through the use of spyware technology. This case specifically focused on the Pegasus suite of spyware developed by the NSO Group, an Israeli technology firm.

The scrutiny of this case sheds light on the critical need for robust safeguards to protect privacy rights in the digital age. Spyware technologies like Pegasus raise serious concerns regarding unauthorized surveillance, intrusion into private communications, and the potential misuse of personal data. Such activities, if left unchecked, can significantly undermine individuals' right to privacy, as recognized under Article 21 of the Indian Constitution.

Moving on to procedural safeguards, the past decade has seen numerous scandals related to phone tapping, leading to political controversies and public outcry. The People's Union of Civil Liberties (PUCL) filed a Public Interest Litigation (PIL) seeking clarity on electronic tapping laws, specifically challenging the arbitrary powers granted by Section 5(2). The alteration made in 1971 expanded interception powers beyond emergencies, raising concerns about privacy and misuse of authority. The Telangana case emphasizes the practical challenges and potential misuse of interception powers. It raises questions about the adequacy of existing safeguards and the necessity for comprehensive legislative oversight. The formation of an elite committee post the PUCL case reflects efforts to address legality concerns, yet the effectiveness of such measures remains debatable.[2006]

Another viewpoint is pivotal in the context of internet shutdowns and fundamental rights

[2004] Daniel J. Solove, Nothing to Hide: The False Tradeoff Between Privacy and Security (2011)

[2005] Manohar Lal Sharma v. Union of India, 2021 SCC OnLine SC 985= AIR 2021 SC 5396

[2006] Sreenivas Janyala, As Telangana phone tapping case unravels, ex-intel bureau chief is named as prime accused, The Indian Express (March 31, 2024), https://indianexpress.com/article/cities/hyderabad/telangana-phone-tapping-case-unravels-ex-intel-bureau-chief-prime-accused-9233209/.

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wherein the Apex Court reaffirmed that Article 19 of the Constitution protects the freedoms of speech, expression, and online engagement in professions or trade. It emphasized that any restrictions on these rights must adhere to the constitutional provisions outlined in Articles 19(2) and 19(6).[2007]

And again the Apex Court recognized the importance of 4G internet services for various activities, including communication, education, business, and access to information.[2008] *The court recognized the legitimate concerns regarding national security and public order that Section 69A seeks to address but emphasized the need for transparency, accountability, and procedural safeguards in its implementation but, Section 66A was struck down because it was vague and over-reached the citizen's fundamental right, leading to potential misuse and violation of freedom of speech and expression as guaranteed under Article 19(1)(a) of the Indian Constitution. The court found that Section 66A was not narrowly tailored and could encompass a wide range of legitimate speech, leading to arbitrary censorship and chilling effects on free speech.*

A. Eminent Test of Proportionality

As formulated in Gujarat Mazdoor Sabha v. State of Gujarat[2009] and Ramesh Chandra Sharma v. State of Uttar Pradesh[2010], the critical role of proportionality in assessing and discerning the constitutionality of state actions that infringe upon fundamental rights. The doctrine of proportionality serves as a safeguard against potential abuses and ensures that state measures are in line with the principles of fairness, necessity, and balance with individual rights. Under the proportionality test, as outlined in Modern Dental College and Research Centre v. State of Madhya Pradesh[2011], any restriction on fundamental rights must satisfy the three-pronged test of necessity, suitability, and proportionality. This means that the restriction must be necessary to achieve a legitimate aim, must be suitable to achieve that aim, and must be proportionate, ensuring that the restriction is not excessive or disproportionate to the goal sought to be achieved.

Present date rulings have essentially attributed to Justice KS Puttaswamy v. Union of India, wherein the author's dissenting opinion stands out for its cogent analysis, particularly in declaring the right to privacy as a fundamental right and finding the Aadhaar Act ultra vires of the Constitution. [2012]Absolute control over networks may not satisfy the proportionality test outlined by Justice Puttaswamy. The unrestricted authority to monitor and control communications may not be necessary, suitable, or proportionate to achieving legitimate aims such as national security or public order. This raises concerns about overreach by the state and the potential for disproportionate restrictions on privacy rights. Granting absolute control over telecommunications networks to the government poses a grave threat to privacy rights. Such control can lead to intrusive surveillance, monitoring of communications, and potential breaches of individuals' privacy without adequate safeguards. This contravenes the principles laid down by Justice Puttaswamy regarding the fundamental nature of the right to privacy**.**

IV. Conclusion

Ever since the Pegasus spyware case, allegations of snooping have arisen. Aadhar data leaks and other compromised databases reveal a troubling dis- regard for privacy. These leaks have undermined our privacy across the spectrum, and the gravity of its insinuation is unfathomable. Policymakers have consistently displayed negligence in addressing data protection laws, and it is imperative to establish safeguards that align with our requirements.

[2007] Anuradha Bhasin v. Union of India, (2020) 3 SCC 637
[2008] Foundation of Media Professionals v. Union Territory of Jammu & Kashmir, (2020) 3 SCC (Cri) 194
[2009] Gujarat Mazdoor Sabha v. State of Gujarat, (2020) 10 SCC 459
[2010] State of U.P. v. Ramesh Chandra Sharma, (1995) 6 SCC 527
[2011] Modern Dental College and Research Centre v. State of Madhya Pradesh (2016) 7 SCC 353
[2012] K.S. Puttaswamy (Privacy-9J.) v. Union of India, (2017) 10 SCC 1

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This lack of concern dramatically devalues our privacy, especially when juxtaposed with nations like the USA that exhibit heavy penalties and maintain a zero- tolerance stance towards the violation of their citizens' privacy in any regard. Against this backdrop, the revelations of surveillance through Pegasus and many other instances internationally not only raises individual privacy concern but also poses a significant threat to press freedom under the umbrella of free speech.
In the digital age, data has become a crucial asset, comparable to oil in its value and significance. However, with the rapid accumulation of data through various government schemes and private sector initiatives, India faces significant challenges in ensuring data protection and establishing robust oversight mechanisms.

The recent controversies surrounding TikTok in the United States underscore a significant and growing tension between national security interests and the principles of a free, open market. TikTok, a Chinese-owned viral video-sharing platform, has been targeted by U.S. authorities over concerns that its data could be accessed by the Chinese government, potentially leading to espionage or manipulation. The Trump administration, citing national security threats, made aggressive moves to ban the app unless its Chinese owners divested their stakes in its U.S. operations. This action sparked a broad debate regarding the implications for free speech, competition in the tech industry, and the concept of the 'splinternet'—a fragmentation of the global internet.[2013]

Parallel to the TikTok issue, another significant case involves Huawei, the Chinese telecommunications giant, which has faced intense scrutiny from the U.S. and other Western governments. Huawei has been accused of potentially facilitating backdoor access for the Chinese government through its telecommunications equipment. This concern is particularly acute given the role Huawei plays in the development of global 5G networks, which promise not only faster cellular service but also the capacity to connect more devices than ever before in the so-called Internet of Things.[2014]

The U.S. government has taken several steps to mitigate this threat, including banning Huawei from its communications networks and urging its allies to do the same. The fear is that the company could install backdoors in its network equipment that could be used for spying or cyber sabotage. In September 2020, the U.S. Department of Justice unsealed indictments against five Chinese nationals associated with global hacking campaigns that compromised more than 100 companies worldwide, illustrating the broader concerns of cybersecurity tied to Chinese firms, including Huawei.

Upholding data protection principles, including data minimization, transparency, and accountability, is essential for maintaining trust, protecting privacy, and mitigating cybersecurity risks within the telecommunication sector. The recent developments in the telecom sector, underline the standing of aligning data protection principles with telecom practices. The case discussions regarding government takeovers of telecommunication networks and allegations of privacy violations through spyware technologies accentuate the delicate balance required between security measures and privacy rights. In conclusion, while India's proposed data protection Bill is a step forward, it falls short in ensuring comprehensive privacy protection. Revisions are needed to strengthen data protection measures and address privacy concerns effectively.

The telecommunications sector plays a pivotal role as a catalyst for economic and social progress, serving as the primary gateway to digital services in today's interconnected world. The safety and security of telecommunication networks are paramount, as they underpin not

[2013] Wang, Jufang. "From banning to regulating TikTok: Addressing concerns of national security, privacy, and online harms, (2020).

[2014] Williams, Robert D. "Beyond Huawei and TikTok: Untangling U.S. Concerns over Chinese Tech Companies and Digital Security, (2020).

just economic activities but also crucial aspects of national security. Therefore, establishing the right legal and regulatory framework is imperative to ensure a safe and secure telecommunication environment that fosters digitally inclusive growth.

Central to this framework is safeguarding users' sensitive personal information throughout the data processing lifecycle. With the increasing digitalization of services and transactions, protecting this information from misuse or unauthorized access is of utmost importance to maintain trust and confidence in digital platforms. A competitive landscape is vital for innovation and customer choice. Any new player entering the services market must have non-discriminatory and non-exclusive access to infrastructure on a commercial basis. This approach encourages healthy competition and prevents monopolistic practices, ultimately benefiting consumers and driving innovation.

A unified vision and concerted efforts by the government of India are crucial to bring synergies across various aspects of the telecommunications sector. This includes harmonizing licensing frameworks, setting robust standards, enhancing skilling initiatives, and establishing effective governance mechanisms. A cohesive approach across different departments ensures efficient and effective regulation, promotes industry growth, and contributes to India's digital transformation journey.