

HOW THE TELECOM ACT UNDERMINES PERSONAL LIBERTIES

Relevant for: Developmental Issues | Topic: Regulatory & Quasi-Judicial bodies

“Is Big Brother watching you? At the press of a button a civil servant can inspect just about every detail of your life your tax, your medical record and periods of unemployment. That civil servant could be your neighbour. There is mounting concern over this powerful weapon that the computer revolution has put in the government’s hand. But no civil servant will be allowed to examine personal files from another department, without written authority from a Minister. I shall be announcing legislation enabling citizens to take action against any civil servant who gains unauthorised access to his file.” (Yes Minister). The year is 1980, the computer revolution is just about beginning and questions of surveillance have become pertinent; safeguards in the form of separation of powers between the executive and legislative are announced by the Minister for the protection of citizens.

Although theatrical, Yes Minister can yet be invoked to characterise governments in most parliamentary democracies especially India’s.

More than four decades on, the Indian Parliament witnessed the smooth passage of several pieces of legislation, including the Telecommunications Act (TA) 2023, which justifiably seeks to bury remnants of colonial-era laws. While the modern digital age creates conditions for unprecedented surveillance reflecting the Benthamite tenet of maximum monitoring at minimum cost, the question on everyone’s minds is whether the law has enough safeguards and an independent regulatory architecture to protect the rights of citizens.

Before contemplating this weighty query, let us set the narrative in context with a quick recap of the major markers in digital governance in India that have concluded, at least for the moment, in the passing of TA 2023.

The institutional regime for telecommunications dates back to the late 1990s and was created more by accident and less by design. The Telecom Regulatory Authority of India (TRAI) became necessary because private sector investment came in when the public sector operator was both player and referee. Massive litigation followed, leading to the setting up of TRAI. Within a few years, the Telecom Dispute Settlement Appellate Tribunal (TDSAT) was carved from TRAI to fast-track excessive litigation. In between, there was the dissolution of the first TRAI, only confirming who the “boss” was.

The desire to serve in regulatory regimes has surely been tainted by the goal of securing sinecures. This is not just an Indian phenomenon. For example, the Biden administrators wish they continue in office for long. It is in the nature of such positions that many of those appointed will never again be in a position of authority. There have been few instances after its dissolution that TRAI has taken on the government. The relationship between the legislature and the executive is complex but suffice it to say that such a separation in telecom is met much more in the breach.

The regulatory regime for telecom described above notifies subordinate legislation, enforces and adjudicates disputes — it performs the role of the executive and the adjudicator. One key safeguard for the protection of ordinary citizens is, therefore, already undermined. The separation of powers remains on paper and the exercise of authority through delegated rule-making ensures the government can intervene with little resistance.

In this background, TA 2023 poses challenges. Although undoing colonial-era laws is one of the stated goals, the re-purposing of some existing provisions and ambiguous drafting does little justice to that aim. For example, the definition of telecommunication services has been left open to interpretation. Internet-based services like WhatsApp and Gmail are, therefore, likely to fall under the Act's ambit. Provisions empowering the government to notify standards and conformity measures or ask for alternatives to end-to-end encryption such as client-side scanning could undermine privacy. Further requiring messages to be disclosed in an "intelligible format" is irreconcilable with end-to-end privacy engineering. Tinkering with end-to-end encryption for compliance could create potential points of vulnerability.

The grounds on which such information may be sought, outlined in Section 20 (2) include sovereignty and integrity of India, security of the state and public order. Prima facie these appear reasonable. However, the current phrasing leaves room for expansive interpretation by overenthusiastic enforcement machinery — it could go beyond the letter of the law to please political masters. Research conducted in 2021 by Vrinda Bhandari and others found that many orders issued under the guise of public order restrictions would not qualify as legal per se. The Act cements the government's power to suspend internet services (Section 20(2)(b)) and does not include procedural safeguards envisaged in the Supreme Court's Anuradha Bhasin judgment such as the proportionality test, exploration of suitable alternatives and the adoption of least intrusive measures.

The Act also does not establish an independent oversight mechanism for interception and suspension orders related to telecommunications. These rules, framed in 1996 in line with the directions of the Supreme Court in PUCL v. Union of India and requiring a committee consisting exclusively of senior government officials, reflect inadequate separation. In the UK the law mandates approval of interception warrants by judicial commissioners. Separation of powers is however not a panacea; it is just a necessary condition for the effective functioning of institutions. We must also observe the counsel of John Stuart Mill for the maintenance of institutional integrity namely, not "to lay [their] liberties at the feet of even a great man, or to trust him with powers which enable him to subvert [their] institutions" — JS Mill, quoted by BR Ambedkar on November 25 1949, requoted by sitting Chief Justice of India on Constitution Day (November 26, 2018).

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