

LAWFOYER INTERNATIONAL
JOURNAL OF DOCTRINAL LEGAL
RESEARCH

(ISSN: 2583-7753)

Volume 2 | Issue 2

2024

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TELECOMMUNICATION ACT IN CONTRAST WITH FUNDAMENTAL RIGHTS OF THE INDIVIDUALS: A CRITICAL ANALYSIS OF THE ACT

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I. ABSTRACT

The Telecommunications Act of 2023, passed by the Parliament, replaces older telecom laws to simplify the regulatory framework. It consolidates laws related to telecommunication services and networks and is considered to bring significant renovation in the telecom laws. The key provisions include the interception of telecommunications under Section 20(2), biometric user verification under Section 3(7), and extensive powers for suspending telecommunication services under Section 20(2)(b). This allows the introduction of provisions for interception, biometric identification, and internet suspension, raising concerns about privacy rights and arbitrary use of government powers. The concerns also include dilution of procedural safeguards, biometric identification's impact on anonymity and internet suspension lacking clear guidelines and potentially infringing on freedom of expression. The Act, therefore, requires a thorough review to address these concerns and ensure a balanced approach in line with constitutional mandates.

II. KEYWORDS:

Telecommunication Act, Right to Privacy, Freedom of Speech and Expression, Arbitrary, surveillance, Biometric verification, Internet Suspension, Spectrum allocation

III. INTRODUCTION

The telecommunication regulation in India was governed by three main laws: the Indian Telegraph Act of 1885, the Indian Wireless Telegraphy Act of 1933, and the Telegraph Wires (Unlawful Possession) Act of 1950. The government passed the Telecommunications Bill on 24th December due to technological advancements. Hence the Telecommunications Act of 2023 (hereafter referred to as “the Act”) came

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which modernizes the regulatory framework for telecommunication networks, replacing old acts to consolidate laws for the development and operation of services. The government has wide-ranging powers for security reasons, promoting competition, and consumer interests. The act aligns with technology advancements which will help in revitalizing the telecom industry. It consolidates various provisions of telecom services like establishment, operation, maintenance, or expansion of the telecom network, along with possession of radio equipment and assignment of spectrum in India.² It contains 62 sections and 11 chapters.

IV. RESEARCH OBJECTIVES

1. To critically analyse the provisions of The Act with respect to Article 14 of the Indian Constitution.
2. To critically analyse the provisions of The Act with respect to Article 19(1)(a) of the Indian Constitution.
3. To critically analyse the provisions of The Act in light of the Right to Privacy under Article 21 of the Indian Constitution.

V. RESEARCH QUESTIONS

1. Whether the provisions of The Act are violative of Article 14 of the Indian Constitution?
2. Whether the provisions of The Act are violative of Article 19(1)(a) of the Indian Constitution?
3. Whether the provisions of The Act are violative of Right to Privacy under Article 21 of the Indian Constitution?

VI. RESEARCH HYPOTHESES

1. The government's arbitrary powers violate non-arbitrariness and equality principles under Article 14

² "The Telecommunications Act, 2023 – A Step towards Digital India - Trilegal" (Trilegal, December 29, 2023) <https://trilegal.com/knowledge_repository/the-telecommunications-act-2023-a-step-towards-digital-india/>

2. Telecom service suspension infringes on rights under Article 19(1)(a)
3. Certain provisions invade privacy rights under Article 21

VII. RESEARCH METHODOLOGY

The research methodology adopted in this paper is purely doctrinal in nature. Doctrinal research, also known as library-based research, is a distinctive method of conducting legal research that involves the study and analysis of existing legal provisions, case laws, and scholarly works. This methodology is well-suited for examining the theoretical and conceptual aspects of law and for providing a systematic exposition of legal doctrines and principles. The primary sources relied upon in doctrinal research include statutory materials, judicial precedents, and authoritative texts, while secondary sources such as commentaries, articles and legal digests are also consulted. The research process involves the identification, collection, and critical analysis of these sources to draw logical conclusions and offer insights into the legal issues under investigation. Through doctrinal research, this paper seeks to provide a comprehensive and coherent understanding of the legal framework governing the subject matter at hand.

VIII. LITERATURE REVIEW

This article examines a few sections of the Act in the context of the fundamental rights protected by Articles 14, 19,(1)(a), and 21³. The impact of the legislation on rights is discussed in this paper's constitutional law commentary by Dr. J.N. Pandey. Analysed Supreme Court cases that aid in guiding legal scrutiny include the landmark case of *Anuradha Bhasin* and *Justice K.S. Puttaswamy*. A thorough legal foundation for analysing the Act's violative and invasive aspects may be found in the examined literature. The purpose of the paper is to evaluate its adherence to recognised legal procedures and the Constitution. to assist in ensuring that the Act functions within the parameters of legitimate legality and to stop willful violations of personal freedoms.

³ Constitution of India, 1950

IX. THE TELECOMMUNICATION ACT, 2023

Aspects that raise concerns are as follows:

A. Excessive powers of government under the Act amounts to arbitrariness

The Act comprises certain elements that violate the principles led down in the landmark judgement of *E.P. Royappa v. State of T.N.*⁴ against arbitrary laws.

1. Inordinate powers of the government:

The Act grants extensive powers to control and interfere with telecommunication services.⁵ It gives the Union government arbitrary power over telecommunication services, including the power to suspend, curtail, or revoke authorization for any service in violation of its terms.

The Government can suspend any telecommunication service without checks and balances, leading to potential misuse and arbitrariness. The lack of clear guidelines increases the risk of arbitrary suspensions becoming more and more frequent.⁶

The potential misuse of these powers, especially if extended to internet services, poses a serious threat to online freedom and individual privacy.

2. Potential for Discrimination and Abuse:

Surveillance provisions could lead to discrimination and targeting of dissenters without adequate safeguards. The government acts as the owner of the spectrum on behalf of the public and can set terms for spectrum assignment.⁷

The Act grants the Central government the authority to allocate spectrum through auctions, with exceptions specified in the first schedule which will be done by an administrative process.⁸

⁴ (1974) 4 SCC 3

⁵ The Telecommunications Act, section 20(2)(b)

⁶ Gyan and Gyan, "Throttling Telecom: Shutdowns, Surveillance and Biometrics • Software Freedom Law Center, India" (Software Freedom Law Center, India • Defender of Your Digital Freedom, January 2, 2024) <<https://sflc.in/throttling-telecom/>

⁷ The Telecommunications Act, section 4(3)

⁸ The Telecommunications Act, s 4(4)

Satellite broadband Spectrum can also be allocated administratively by the government for point-to-point connections only.⁹ This method is a global standard for satellite broadband services, unlike auctioning. Specific areas like Mobile Satellite service and telecom services from state-run entities are designated for administrative allocation.

Supreme Court in *Centre for PIL v. Union of India*¹⁰ in 2G spectrum case held the administrative allocation of spectrum by the government as invalid. However, in this Act the assignment of the satellite spectrum is dealt with which is not a terrestrial spectrum for mobile-based communications.¹¹

B. Internet suspension leads to curtailment of Freedom of Speech and Expression

Article 19(1)(a) of the Indian Constitution guarantees the right to freedom of speech and expression, which is violated by the suspension of telecommunication services.

The Act is significantly impacted by the *Anuradha Bhasin v. Union of India*¹², particularly in relation to internet shutdowns and monitoring. These rules grant arbitrary powers to authorities to shut down internet access which can help in effectively suppressing opposing opinions and limiting freedom of speech.¹³ The principles outlined in the case emphasize transparency, procedural safeguards, judicial review, and protection of fundamental rights.

The Supreme Court highlighted the need for clear justifications and oversight mechanisms for any suspension of telecom services, including the internet. It also stressed the importance of judicial oversight to prevent abuse of power and protect

⁹ India PT of, 'Administrative Spectrum Allocation to Satcom Firms Only for Point-to-Point Connections' (Outlook Business) <<https://business.outlookindia.com/economy-and-policy/administrative-spectrum-allocation-to-satcom-firms-only-for-point-to-point-connections>> accessed 28 December 2023

¹⁰ 2013 8 SCC 18

¹¹ Admin and Admin, "An Examination of India's Telecommunications Act 2023" (IIPRD |, January 3, 2024) <https://www.iiprd.com/navigating-the-telecommunications-terrain-an-examination-of-indias-telecommunications-act-2023/#_ftnref12>

¹² (2020) 3 SCC 637

¹³ Sharma S and Law L, "Live Law" (Live Law, January 7, 2024) <https://www.livelaw.in/articles/surveillance-state-or-secure-nation-unveiling-the-interception-powers-in-indias-telecom-act-246058?infinite_scroll=1>

individual rights.¹⁴The Act establishes the government's power to suspend internet services 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.¹⁵

The Act should prioritize the preservation of individual liberties while addressing security concerns to avoid arbitrary restrictions on communication networks. The potential for misuse and the impact on fundamental rights, particularly the freedom of speech and expression, must be carefully considered with respect to the principles of necessity, proportionality, and procedural safeguards as laid down in Anuradha Bhasin decision.¹⁶

C. Extensive powers for surveillance and interception of communications without adequate safeguards is Violation of Right to Privacy

1. Biometric identification for user verification:

Section 3(7) of the Act which mandates biometric identification for user verification, is a clear violation of Right to privacy of individuals and raises serious concerns under Article 21 of the Constitution. This provision applies to a wide range of services, potentially leading to increased profiling of users and undermining the right to remain anonymous.¹⁷

These issues were highlighted in the landmark case of *Justice K.S. Puttaswamy (Retd.) & Anr. vs. Union of India & Ors*¹⁸, where guidelines for legal scrutiny were laid down which included the test of necessity and proportionality.

¹⁴ Gyan and Gyan, "Throttling Telecom: Shutdowns, Surveillance and Biometrics • Software Freedom Law Center, India" (Software Freedom Law Center, India • Defender of Your Digital Freedom, January 2, 2024) <<https://sflc.in/throttling-telecom/>>

¹⁵ Section 20(2)(b)

¹⁶ Gyan and Gyan, "Throttling Telecom: Shutdowns, Surveillance and Biometrics • Software Freedom Law Center, India" (Software Freedom Law Center, India • Defender of Your Digital Freedom, January 2, 2024) <<https://sflc.in/throttling-telecom/>>

¹⁷ Sharma S and Law L, "Live Law" (Live Law, January 7, 2024) <https://www.livelaw.in/articles/surveillance-state-or-secure-nation-unveiling-the-interception-powers-in-indias-telecom-act-246058?infinite_scroll=1>

¹⁸ (2017) 10 SCC 1, AIR 2017 SC 4161

The provision should meet the test of proportionality, showing that it is the least restrictive measure. The vague requirement of 'verifiable biometric based identification' only adds to this concern. It is also unclear why biometrics are necessary for user verification, especially considering the sensitive nature of biometric data. With the collection of data as sensitive as biometrics, and in the absence of permitting alternate identity proofs, this provision does not meet the test of proportionality¹⁹ and raises concerns about individual privacy and anonymity.

2. **Interception of telecommunication:**

Under Section 20(2) the Act allows interception of communications, which is totally against the Right to privacy under Article 21 of the constitution. The definition of "telecommunication services" has been left open to interpretation which makes internet-based services like WhatsApp and Gmail likely to fall under its ambit. Moreover, requiring messages to be disclosed in an "intelligible format" is irreconcilable with end-to-end privacy engineering and its non-compliance could create potential points of vulnerability.²⁰

3. **Suspension of telecommunication services :**

The government can suspend telecommunication services under Section 20(2)(b) for public safety or national security, but the Act lacks guidelines and safeguards, posing a risk of arbitrary restrictions on communication rights and privacy.²¹

Telecommunications Act of 2023 breaches privacy rights under Article 21 of Indian Constitution in the following manner:

- It grants wide surveillance powers to the government without safeguards
- It allows interception of communications in any case of breach of national security

¹⁹ Gyan and Gyan, "Throttling Telecom: Shutdowns, Surveillance and Biometrics • Software Freedom Law Center, India" (Software Freedom Law Center, India • Defender of Your Digital Freedom, January 2, 2024) <<https://sflc.in/throttling-telecom/>>

²⁰ Kathuria R and Suri I, "How the Telecom Act Undermines Personal Liberties" (The Indian Express, January 25, 2024) <<https://indianexpress.com/article/opinion/columns/how-the-telecom-act-undermines-personal-liberties-9126314/>>

²¹ Gyan and Gyan, "Throttling Telecom: Shutdowns, Surveillance and Biometrics • Software Freedom Law Center, India" (Software Freedom Law Center, India • Defender of Your Digital Freedom, January 2, 2024) <<https://sflc.in/throttling-telecom/>>

- Individuals' private conversations and digital communications can be monitored without their consent
- Unchecked surveillance violates the right to privacy which is integral to the right to life and personal liberty under Article 21 of the constitution
- Lack of transparency and accountability in the Act raises concerns for potential abuses
- Without safeguards, privacy rights guaranteed by Indian Constitution could be compromised

4. **Judicial scrutiny:**

The principles laid down in *PUCL vs Union of India*²² guide to assess the Act. In this case Judicial scrutiny was emphasized, when authorizing interceptions, ensuring oversight to prevent abuse of power.²³

The case highlights the importance of safeguards against such abuse of privacy and calls for stringent criteria and oversight mechanisms to prevent misuse of interception powers. It also suggests that interception measures should prioritize privacy while addressing security concerns.

Hence, the principles from the PUCL case provide significant guidance for the Telecommunications Act 2023 to uphold constitutional values, protect individual rights, and ensure accountability in the use of various surveillance measures.

X. CONCLUSION

The Telecommunications Act grants the government immense authority to intercept communications without proper safeguards which allows for the regulation of encryption and data processing in telecommunication. This interception can be done for national security reasons, raising concerns about the potential violation of free expression and privacy. The Act may give the government power to break encryption,

²² WP (Civil) 105 of 2004, Supreme Court, December 18, 1996

²³ Sharma S and Law L, "Live Law" (Live Law, January 7, 2024) <<https://www.livelaw.in/articles/surveillance-state-or-secure-nation-unveiling-the-interception-powers-in-indias-telecom-act-246058?infinite-scroll=1>>

compromising the security of platforms like WhatsApp and other daily modes of communication. The requirement for messages to be disclosed in an intelligible format, without exemptions for encrypted platforms, gives the government considerable control over all communications. This could be used for spying purposes, as the government can identify the originator of any information sent over any platform. Hence, the provisions of this Act can have significant implications on privacy and freedom of expression.

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