

Comments on the Draft Indian
Telecommunication Bill, 2022 |
*Submission to the Ministry of
Communications*

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For any clarifications/ queries in relation to this submission, please email Ameen Jauhar, Senior Resident Fellow and Lead, Centre for Applied Law and Technology Research (ALTR), at ameen.jauhar@vidhilegalpolicy.in and Sunetra Ravindran, Senior Resident Fellow and Lead, Legal Design and Regulation, at sunetra.ravindran@vidhilegalpolicy.in

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I. Introduction and Context Setting

The Department of Telecommunications, Ministry of Communications released a draft of the Indian Telecommunication Bill, 2022 (“**Draft Bill**”) on September 21, 2022 to solicit public comments. This was accompanied by an Explanatory Note which outlined the need to “restructure the legal and regulatory framework for the telecommunications sector”.¹ Since then, the Draft Bill has generated a significant amount of discussion on various changes that it proposes to make to the current telecom regulatory framework.²

The Draft Bill is an attempt by the Government to update the extant regulatory framework in keeping with the advancements and challenges in the sector. It proposes to consolidate the laws governing the provision, development, expansion and operation of telecommunication services, telecommunication networks and telecommunication infrastructure, and assignment of spectrum. This proposed law was much needed given that the three main legislations that currently occupy this domain are considerably outdated, with the most recent of these having been enacted more than 70 years ago. These legislations are: (i) the Indian Telegraph Act, 1885 (“**Telegraph Act**”); (ii) the Indian Wireless Telegraphy Act, 1934 (“**Wireless Telegraphy Act**”); and (iii) the Telegraph Wires (Unlawful) Possession Act, 1951 (“**Telegraph Unlawful Possession Act**”). The Draft Bill proposes to repeal these colonial era legislations and “restructure the legal and regulatory framework” for the telecommunications sector.

This submission sets out our comments on the Draft Bill on specific issues as identified by us. The comments also set out a brief context to the issues sought to be highlighted through our submission. We hope that our comments and drafting suggestions will be useful to the Department of Telecommunications, Ministry of Communications in finalising the Draft Bill.

¹ Department of Telecommunication, ‘Explanatory note on the Indian Telecommunication Bill, 2022’ (21 September 2022) Ministry of Communications (GOI), available at <<https://dot.gov.in/sites/default/files/Explanatory%20Note%20to%20the%20draft%20Indian%20Telecommunication%20Bill%2C%202022.pdf>>, accessed on 10 November 2022.

² See Trishee Goyal, ‘Explained: The draft Telecommunication Bill, 2022’ (29 September, 2022) the Hindu, available at <https://www.thehindu.com/business/Industry/explained-the-draft-telecommunication-bill-2022/article65952169.ece>, accessed on 10 November, 2022; and Neeti Biyani *et al*, ‘Internet impact brief: Draft Indian Telecommunication Bill, 2022’ (9 November 2022) Internet Society, available at <<https://www.internetsociety.org/resources/doc/2022/internet-impact-brief-draft-indian-telecommunication-bill-2022/>>, accessed on 10 November 2022.

II. Comments on the Draft Bill: Key Issues

1. Lack of a sector-specific definitional framework

(i) Context:

Clause 2(21) in the current iteration of the Draft Bill defines telecommunication services to include: (a) broadcasting services; (b) electronic mail; (c) voice mail; (d) voice, video and data communication services; (e) audiotex services; (f) videotex services; (g) fixed and mobile services; (h) internet and broadband services; (i) satellite based communication services; (j) internet based communication services; (k) in-flight and maritime connectivity services; (l) interpersonal communications services; (m) machine to machine communication services; (n) over-the-top (OTT) communication services which is made available to users by telecommunication; and (o) any other service that the Central Government may notify to be telecommunication services.³

Thus, it may be posited that the Draft Bill includes multi-sectoral services under a single broad heading of 'telecommunication services'. Services ranging from broadcasting to machine-to-machine communication have been clubbed under one category despite being vastly different in the medium they rely on, their architecture, and the type of service they provide.

(ii) Issues:

In our view, the lack of sector-specific regulations has the potential to create regulatory inefficiencies. Telecommunication services have advanced far beyond the imagination of the Telegraph Act and similar legislation made to govern the use of telegraphs. The Draft Bill attempts to accommodate such advancements in technology. However, while doing so, it clubs together telecommunication services under a single regulatory class despite their dissimilarities. The list of services mentioned in the Draft Bill differ from each other on several grounds, which include: (a) the medium of provision of services, such as spectrum, satellite, and internet; (b) the type of communication, such as interpersonal, machine to machine, and to the public; (c) reliance on physical infrastructure; and (d) features of the service provider.

Regulating different telecommunication services with dissimilarities under the same regulatory regime could lead to inefficiency and also negatively impact the ease of doing business.⁴ The cascading effect of a homogenous set of services is the inability to set up targeted licensing regimes based on the type of service being provided - the Draft Bill currently envisions a licensing regime that will apply to all services listed under Clause 2(21). However, the distinction between different types of licences that may be set out under this regime are not identified in the draft.

(iii) Recommendations:

While the Draft Bill carries the responsibility of reframing the regulatory framework of telecommunication in India, the definitional framework as it currently exists challenges this endeavour. It is proposed that telecommunication services should be reclassified based on the type of service provided.

As explained above, the Draft Bill currently has one broad class of services categorised as 'telecommunication services' under Clause 2(21). It has been observed that telecommunication services have evolved far beyond providing the same type of services and represents a complex set of often interrelated

³ Clause 2(21), Draft Bill.

⁴ Telecommunications Regulatory Authority of India (TRAI), 'Consultation Paper on Regulatory Framework for Over-the-Top (OTT) Services', (12 November 2018) available at <<https://www.trai.gov.in/sites/default/files/CPOTT12112018.pdf>>, accessed on 7 Nov 2022.

services and service providers.⁵ Classifying all the listed services under the same head may lead to regulatory confusion. Creating classes of telecommunication services will greatly benefit regulation by enabling more targeted regulation, opening the door to a service-specific licensing regime, allowing innovation and new entrants by ensuring a sliding-scale for regulation, and boosting ease of business.

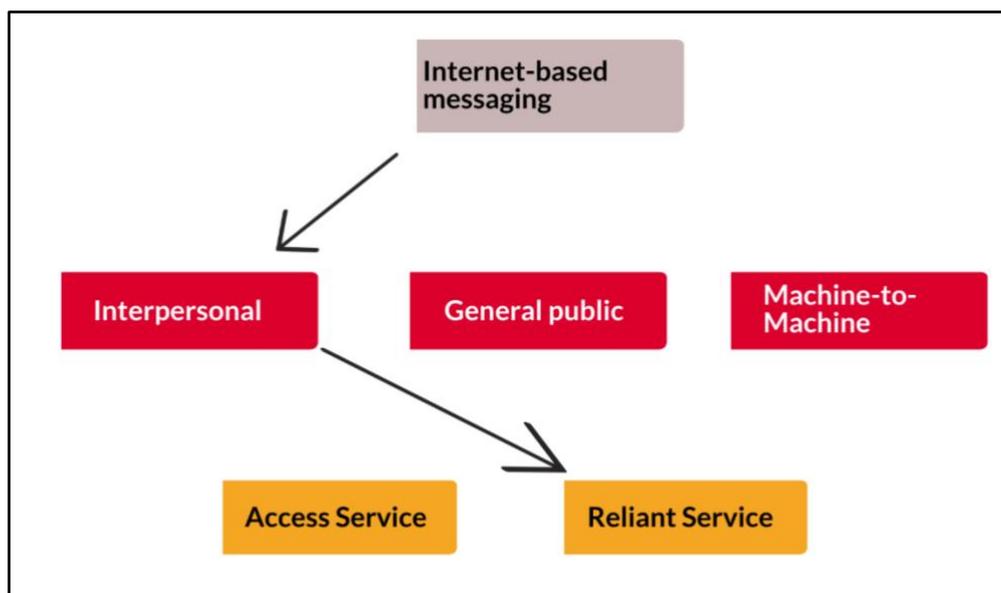
It is submitted that telecommunication services may be divided instead on the *type of communication service* being provided. Specifically, the sub-categories would include, (a) Interpersonal communication; (b) Communication with the general public; and (c) Machine-to-machine communication ('M2M').

It may be argued that even this categorisation may be inadequate to accurately capture the nuance of differences in the telecommunication services provided. For instance, interpersonal communication and communication with the general public could be further be classified into:

(a) **Access-based Service:** All services where the service providers engage in selling access would fall under this category. Given that physical infrastructure is related to the idea of access, those services that rely on such physical infrastructure can also be clubbed together in this category;

(b) **Reliant Services:** Those services that rely on the infrastructure set up by access-based service providers can be clubbed into the category of reliant services.

For instance, the diagram below outlines how this scheme of classification would operate practically. Taking the example of a private internet-based messaging app (for eg, Whatsapp), the below diagram demonstrates how it can be classified using this scheme. Depending on the type of communication allowed by the service, it would *first*, be classified as interpersonal, general public or M2M. In some cases, it may allow multiple kinds of communication and may be classified accordingly. *Second*, it would be examined whether this service is an access service, or a reliant service. In the example of the below diagram, a private internet-based messaging app may be classified as *a reliant service providing interpersonal communications*.



A service can thus be classified by analysing its sub-classifications and categorising it with the best fit (based on whether it fits into one category, or into multiple categories). In our view, the Draft Bill can provide greater regulatory certainty by not just specifying the classes of telecommunications services as discussed above, but also by providing a specific list, through a Schedule or Annexure, of the services governed by the Draft Bill and their classifications in the above-mentioned scheme.

⁵ Subhashis Gupta et al, 'Twilight of voice, dawn of data: The future of telecommunications in India', Working Paper No 563, Indian Institute of Management Bangalore (February 2018).

2. Definition of OTT communication services

(i) Context:

- OTT communication services are not currently defined in the Draft Bill. The present definition of telecommunication services in the Draft Bill includes 'over-the-top communication' as a single and broad category.
- OTT services, however, have been developing rapidly- social media platforms, streaming services, and platforms such as WhatsApp and Signal. The concern with an undefined usage of OTT communication services is the lack of clarity on what exactly constitutes such a service. The answer to this question is simple in the case of applications like WhatsApp, but the line gets blurry when one considers platforms that provide multiple services, with communication being one of them. Social media applications like Twitter and Instagram not only facilitate content creation but also offer consumers the ability to communicate on the app through Direct Messaging facilities.

(ii) Issues:

Answering the question of what constitutes an OTT communication service is crucial as it determines the ambit of its regulation. As of now, there is a lack of clarity on the services that would come within the purview of the Draft Bill, whether it includes all OTT services that offer a communication element or whether it only includes a sub-category of these applications. In order to effectively regulate these services, prevent over-regulation, and enable the ease of doing business, it is crucial that OTT communication services be defined in a clear and exhaustive manner.

The lack of a robust definition of OTT communication services in the Draft Bill may lead to confusion about what type of OTT services fall within the ambit of regulation as a telecommunication service. Given the wide variety of services provided by OTT platforms, there is a need to narrow the scope of regulation.

(iii) Recommendations:

In our view, OTT communication services must be defined under the Draft Bill. A specific legal definition which does not cast an overbroad net would be ideal.

For instance, the European Electronic Communications Code defines an "interpersonal communication service" as "*a service normally provided for remuneration that enables direct interpersonal and interactive exchange of information via electronic communications networks between a finite number of persons, whereby the persons initiating or participating in the communication determine its recipient(s) and does not include services which enable interpersonal and interactive communication merely as a minor ancillary feature that is intrinsically linked to another service*".⁶ These services are further classified into number-dependent and number-independent communication services. A definitional framework of this nature would similarly ensure that OTT communication services are defined in a precise manner, and consequently, would mitigate apprehensions of the overbroad application of the draft Bill.

To this end, the following markers may be used to identify OTT communication services that may fall within the ambit of the Draft Bill,

- **Interpersonal and interactive exchange of messages:** Only those OTT services which enable telecommunications services of this nature would be considered within the definition.
- **Communication as the primary service:** Only those OTT communication services that provide for communication as their primary service should be included under the Draft Bill.

⁶ Directive (EU) 2018/1972 of The European Parliament and of The Council of 11 December 2018 establishing the European Electronic Communications Code [2018], Article 2(5).

- **Finite communication with determined recipients:** Only communication services that enable unidirectional finite communication that is not general and publicly available should be considered an OTT communication service under the Draft Bill. Finite communication would entail that the communication is reaching a specific audience, with the sender being in control of who the recipient of the data is.
- **Delivered “over-the-top”:** The technical requirement must be included in the definition to ensure that only communication services which deliver their services using the network of a TSP⁷ are included in the definition.

3. Reliance on ‘same service, same rules’ standard

(i) Context:

In the Draft Bill, over-the-top (OTT) communication services have now been included within the ambit of telecommunication services, meaning that service providers like WhatsApp and Skype now stand to be regulated along with traditional Telecom Service Providers (TSPs) like BSNL and Reliance Jio.

The inclusion of OTTs in the Draft Bill can be traced back to the demand of Internet Service Providers (ISPs) to adopt the ‘same service same rule’ principle to define net neutrality.⁸ ‘Same service same rules’ would indicate that the supposed similarity in services provided by OTTs and traditional TSPs (calling, messaging) would mandate that they be regulated by the same framework in the same manner.

Clause 2 (21) of the Draft Bill also provides the Central Government the power to notify communication services that are currently not listed within the provision.⁹ While this could possibly account for the evolving nature of the telecommunication industry, there is a need for clearer standards to indicate what considerations would go into notifying a service as a telecommunications service.

(ii) Issues:

It is submitted that the ‘Same Service Same Rule’ principle is an inadequate standard to determine regulation for the reasons identified below.

The Same Service Same Rule principle is output oriented - it looks exclusively at the final service being provided and not at the underlying architecture of said service. While distinctions based on the services themselves may be important, determining regulation based on just the services fails to take into account the architectural framework that created these services in the first place. For instance, BSNL and WhatsApp may both provide messaging services but are radically different in the *method* employed to provide these services. For example, a TSP like BSNL would utilise a limited and government-allocated resource, spectrum, in order to deliver services. An OTT like WhatsApp depends on the physical infrastructure of the internet established by TSPs in order for their consumer base to even be able to access their services. Other key architectural differences include: (i) OTTs rely on data packets for service delivery, whereas traditional TSPs rely on the public switched telephone network; and (ii) OTTs use existing IP networks for their service, which is in contrast to the SMS gateways and Short Message Centres utilised by TSPs.

The second prong of the Same Service Same Rule principle relates to substitutability- the idea that the services provided by TSPs and OTTs are substitutable and should be regulated in the same way. While the idea of substitutability may not be the most appropriate to accommodate architectural differences of the services, it is also important to note that it does not consider licensing rationale. In our view, a licensing

⁷ Telecommunications Regulatory Authority of India (TRAI), ‘Consultation Paper on Regulatory Framework for Over-the-Top (OTT) Services’, (12 November 2018) available at <<https://www.trai.gov.in/sites/default/files/CPOTT12112018.pdf>>, accessed on 7 November 2022

⁸The Economic Times, ‘Go for ‘same services same rules’, *Internet body to Trai*’ available at <<https://economictimes.indiatimes.com/industry/telecom/go-for-same-services-same-rules-internet-body-to-trai/articleshow/47042574.cms?from=mdr>>, accessed on 7 Nov 2022

⁹ Clause 2(21), Draft Bill.

regime has two major aims: (a) to regulate the use of a scarce resource;¹⁰ and (ii) to prevent harm to society at large.¹¹ The 'same service same rules' test does not incorporate an analysis of these aims. Consequently, functional substitutability is unable to account for the considerations of whether a licensing regime is appropriate or not.

Finally, we believe that the Same Service Same principles fails to effectively accord relevance to the dissimilarities among the services that it seeks to regulate. If a service is similar on grounds A and B, but dissimilar on grounds C and D, a test needs to be able to determine which of these similarities and dissimilarities are relevant for regulation. Thus, the Same Service Same Rule principle lacks such a relevance test.

The Same Service Same Rule standard makes it impossible to configure architectural distinctions and licensing rationale into the equation. Alterations to this standard can ensure equitable and efficient regulation that can also ensure easier notification of new telecommunication services.

(iii) Recommendations:

The 'same service same rules' standard can be further refined by including a 'relevance' criteria in the standard. Presently, the Same Service Same Rule standard does not account for *dissimilarities* between the services being regulated under the same broad class of 'telecommunication services'. A relevance standard will help identify which similarities and dissimilarities are relevant for the purpose of regulation. This is evident through an examination of the claims below:

- **Claim 1:** WhatsApp and BSNL are similar because they both provide messaging and calling services. The absence of a relevance standard would omit the consideration of dissimilarities and also preclude the assessment of whether the existing similarities are relevant to cure regulatory asymmetry.
- **Claim 2:** WhatsApp and BSNL are similar because they both provide messaging and calling services, but dissimilar because they rely on different architecture and medium for service provision. The insertion of a relevance standard will allow the comparison of similarities and dissimilarities **to determine which of these are relevant for regulation**. Regardless of the outcome, the relevance standard can help operationalise the regulation of a constantly evolving telecommunication industry where dissimilarities in services are as important, if not more important than the similarities.

A relevance criterion as part of the 'same service same rules' standard would assist the application of this standard by:

- **Accounting for the underlying architecture of different services:** Traditional TSPs and OTTs rely on completely different architecture in order to deliver their services to consumers. While the relevance test will help determine the importance of such a distinction, there is a need for the standard to account for the input of a service. The medium, data-delivery method, physical infrastructure, and availability of secondary services are just some of the key distinctions related to the architecture of these services. In determining the regulatory framework for telecommunication services, the standard employed needs to account for such architectural differences and then apply the relevance test in order to arrive at the answer for whether particular services should be subject to the same regulations.
- **Considering the characteristics of the service provider:** Another reason that the Same Service Same Rules standard falls short is because it fails to take into consideration the entities providing the telecommunication services. The nature of the entity providing the service should be relevant because the regulations that are imposed are imposed upon the service provider. To cite an example, broadband services provided by BSNL and communication services provided by WhatsApp are different not only because of the type of service and underlying architecture, but also because BSNL and WhatsApp are leagues apart as service providers. Traditional TSPs exercise far more power in the telecommunication

¹⁰ *Secretary, Ministry of Information and Broadcasting v Cricket Association of Bengal*, [1995] 5 2 SCC 161.

¹¹ Matthew L Spitzer, 'The Constitutionality of licensing broadcasters' [1989] 64 NYU Law Review, 990.

sector than OTT service providers.¹² For instance, TSPs can acquire spectrum, exercise the right of way to set up physical infrastructure, can acquire numbering resources and can integrate with the PSTN. The extent of rights exercised by different service providers should be considered while deciding the regulation of these entities. The burden of compliance falls on the entities, and treating them as separate from the services they provide will lead to inequitable regulation.

In our view, the Same Service Rule could be modified in the Draft Bill in the following manner:

- In determining which telecommunication service would fall under which class of services, the Same Service Same Rule standard could be expanded and take into consideration the relevance of both similarities and dissimilarities, the underlying architecture of these services, and the nature of the service provider in order to determine the regulatory framework for these services. This must be spelt out under the Draft Bill.
- It is recommended that a clause must be inserted into the Draft Bill that codifies the standards for notifying any new service as a telecommunication service under Clause 2(21). A new service can only be notified under the Draft Bill when such standards are met, and should be notified under the appropriate class of telecommunication services based on considerations like the type of service, underlying architecture, and similarities and dissimilarities with other services under the same class.

4. Absence of tiered system of licences

(i) Context:

Clause 3(2) of the Draft Bill provides that the Central Government may exercise its exclusive privilege under Clause 3(1) by granting: (i) Licence for providing telecommunication services, and establishing, operating, maintaining and expanding telecommunication networks; (ii) Registration for providing telecommunication infrastructure; (iii) Authorisation for the possession of wireless equipment; and Assignment of spectrum¹³

As noted in the previous section, the definitions of different telecommunication services have been broadly defined in some cases, and not been defined in other cases. As a result, an unknown number of existing telecommunications services may be covered by the definitional framework of the Bill. While the Bill provides under Clause 3(3) that an exemption from the requirement of licensing, registration and authorisation may be provided,¹⁴ the Draft Bill nevertheless provides a statutory authorisation for the licensing of all telecommunications services.

Similarly, Clause 4 of the Bill provides the statutory authorisation for the terms and conditions of the terms of licences issued in pursuance of Clause 3(3). It also provides that any licences provided under the existing framework shall continue to be in operation, and upon an appointed date, may be required to migrate to a new set of terms and conditions.¹⁵ However, the provision does not specify the different tiers of licences that may be issued under the section, or provide clarity in relation to the terms of such licences. This may create an apprehension that a uniform licensing regime may be implemented for a diverse set of services.

(ii) Issues:

The absence of a tiered system of licences being set out under the Draft Bill raises concerns regarding a lack of clarity in the scope and procedure of licensing. The Draft Bill provides a broad statutory authorisation for the grant of licences under Section 4, without providing specifics.

The scope of licencing, and the procedure subject to which a licence is granted, may differ based on the type of telecommunication service, the structure of the market, the number of participants, the existence of State

¹² Telecommunications Regulatory Authority of India (TRAI), 'Consultation Paper on Regulatory Framework for Over-the-Top (OTT) Services', (12 November 2018) available at <<https://www.trai.gov.in/sites/default/files/CPOTT12112018.pdf>>, accessed on 7 November 2022

¹³ Clause 3(2), Draft Bill.

¹⁴ Clause 3(3), Draft Bill.

¹⁵ Clause 4, Draft Bill.

capacity and other factors. Given that the definition of telecommunication services is broad, and may expand to include new services, it is also likely that the scope and procedure of licensing will be required to be dynamic and adjust to evolving circumstances. The licensing regime under the Draft Bill, therefore, will necessarily feature a number of licences, with differing terms and conditions and procedures. This is the case in the licensing regime under the existing Telegraph Act as well.¹⁶ However, since the scheme of different types of licences is not set out under the Draft Bill, it does not make clear the legislative intent to regulate different kinds of telecommunications services in a precise manner.

Further, the manner in which Clauses 3 and 4 are currently drafted in the Bill retain the origination formulation under the Telegraph Act. This means that the licensing regime is predicated on the exclusive privilege of the Central Government to perform the functions referred to in Clause 3(1), namely, providing telecommunication services, establishing, operating, maintaining and expanding telecommunication infrastructure, and using, allocating and assigning spectrum. This formulation appears to rephrase the Telegraph Act's assertion of the exclusive privilege of "*establishing, maintaining and working telegraphs*". While the regime for regulating telecommunications in India gradually developed under the Telegraph Act to encompass a broad variety of services, the assertion of an exclusive privilege is not optimal for many services. The Draft Bill, in relation to certain types of telecommunication services, offers an opportunity to move away from the colonial-era formulation of an exclusive privilege of the Central Government, licensed out to private entities. This would also align with the market characteristics, structure and composition of the telecommunications sector in India today, which sees significant private sector participation.¹⁷

The assertion of an 'exclusive privilege' which is licensed out to private sector participants may be retained for functions like the "*use, allocation and assignment of spectrum*", given that spectrum is characterised as a rivalrous natural resource which must be used for the public good and governed in public trust.¹⁸ However, in relation to functions such as "*providing telecommunication services*", the assertion of a similar exclusive privilege may not be appropriate, given that several types of telecommunication services will not implicate rivalrous natural resources, such as OTT communications services. A licensing regime may be set up for such services depending on whether the characteristics of the service are appropriate for it, however, this may not necessarily be predicated on the assertion of the Central Government's exclusive privilege.

(iii) Recommendations:

● Specifying tiers of licenses and applicable terms under the Draft Bill

The Draft Bill may set out various classes of licences to govern the number of telecommunications services governed by it. The elucidation of classes of licences would: (a) clarify the distinctions between licences, registrations, and authorisations; (b) enable the Draft Bill to set out the procedures to which different classes of licences will be subject; and (c) enable the Draft Bill to set out terms and conditions in relation to different classes. In conjunction with the definitional classification suggested in the previous sections, this would bring considerable regulatory clarity to the Draft Bill.

For instance, different classes of licences may be set out depending on whether a service is (i) general, interpersonal or machine-to-machine; and (ii) access service, or a reliant service. A certain class of licences may be subject to spectrum allocation, licensing and payment of fees; on the other hand, another class of licences may be subject to merely granting registration, and a third class may be subject to self-certification. Classes of licences may also have different terms that may be set out in regulations under the bill. The creation of classes of licences would enable specific, precise and sophisticated regulations to develop around the governance of telecommunications services.

¹⁶ Telecommunications Regulatory Authority of India (TRAI), 'Consultation Paper on Regulatory Framework for Over-the-Top (OTT) Services', (12 November 2018) available at <<https://www.trai.gov.in/sites/default/files/CPOTT12112018.pdf>>, accessed on 7 November 2022

¹⁷ Competition Commission of India, 'Market Study on the Telecom Sector in India' (22 January 2021) available at <<https://www.cci.gov.in/images/marketstudie/en/market-study-on-the-telecom-sector-in-india1652267616.pdf>> accessed on 7 November 2022.

¹⁸ Lloyd R Cohen, 'The Public Trust Doctrine: An Economic Perspective' [1992] 29 Cal WL Review.

- **Specifying substantive and procedural safeguards for creation of new licensing requirements**

The Draft Bill amends the Telecommunications Regulatory Authority of India Act, 1997 ('**TRAI Act**') to remove the requirement of consultations with Telecommunications Regulatory Authority of India ("**TRAI**") before the creation of new licensing requirements.¹⁹ However, it does not supply any consultative mechanism or alternative process in its place. Given the broad statutory authorisation provided by the scheme of Clauses 3 and 4 of the Bill, it is submitted that the introduction of a new licensing requirement for any service not previously licensed may, except in exceptional circumstances, be subject to procedural and substantive safeguards. Procedurally, a mandatory consultation requirement which specifies the number of days for which inputs should be invited on any proposed licensing requirement may enable greater regulatory certainty in the implementation of the Bill. Substantively, the Bill may outline criteria or standards which shall determine whether it is appropriate to create a new licensing requirement. The criteria can include factors related to the characteristics of the telecommunication service, its underlying architecture, medium of transmission, scarce or non-rivalrous nature of resources and other such factors. Together, these safeguards would enable the expansion of a licensing regime in a clear and principled manner.

5. Lack of protections for network neutrality

(i) Context:

The principle of network neutrality was provided recognition under the Telegraph Act, and implemented through the amendment to the terms of the Unified Access Service License.²⁰ The 'Regulatory Framework on Net Neutrality', developed by the Department of Telecommunications and the Telecom Regulatory Authority of India after public consultations, has been widely hailed to be amongst the most progressive net neutrality regulations anywhere in the world.²¹ The Draft Bill provides, through Clause 4, for the continuation of existing terms and conditions of licences issued under the Telegraph Act. However, the Draft Bill also provides for subsequent amendment to these terms and conditions. This would enable these regulations to be amended in a manner that is not in keeping with the principle of network neutrality at a later date. Consequently, the lack of specific legislative protections for net neutrality may be a missed opportunity to provide statutory backing to amongst the most progressive elements of India's telecommunication regulations.

(ii) Issues:

The principle of network neutrality is broadly understood as a network principle requiring the equal treatment of data packets on internet networks.²² The principle prohibits discriminatory treatment of data or communications by a network service provider. Consequently, internet access services (such as ISPs) are governed by a framework which prohibits discrimination, restriction or interference in the treatment of content. This principle is considered essential to maintaining open and non-discriminatory access to the Internet, and has been recognised as such in the Indian regulatory framework. The adoption of network neutrality as a design principle ensures greater interoperability, promotes competition and enables innovation on the Internet.²³ The preparation of the Draft Bill provides an opportunity to provide the

¹⁹ Clause 46, Draft Bill.

²⁰ Department of Telecommunications, 'Regulatory framework for net neutrality', No-12-30/NT/2015/OTT Ministry of Communications (31 July 2018) accessed on <https://dot.gov.in/sites/default/files/DoT%20Letter%20on%20Net%20Neutrality%20Regulatory%20Framework%20dated%2031%2007%202018_0.pdf?download=1> accessed on 7 November 2022

²¹ BBC, 'India's net neutrality rules could be world's strongest' (November 2017) available at <<https://www.bbc.com/news/world-asia-india-42162979>> accessed on 7 November 2022.

²² Department of Telecommunications, 'Net Neutrality DoT Committee Report' (May 2015) available at <https://dot.gov.in/sites/default/files/Net_Neutrality_Committee_report%20%281%29_0.pdf> accessed on 7 November 2022

²³ Department of Telecommunications, 'Net Neutrality DoT Committee Report' (May 2015) available at <https://dot.gov.in/sites/default/files/Net_Neutrality_Committee_report%20%281%29_0.pdf> accessed on 7 November 2022

principle of network neutrality with statutory backing to ensure that the Indian telecom and internet industry develops with open and non-discriminatory foundational principles at its centre.

(iii) Recommendations:

It is submitted that the Draft Bill may state that any new terms and conditions prescribed for access services under Clause 4(3) of the Draft Bill should comply with the principle of net neutrality as provided for under the Draft Bill. The general articulation of the principle may be adopted from other jurisdictions, such as the European Union.²⁴ The specific protections for network neutrality in India present under the Unified Access Service Licences today may also be provided with statutory backing under the Bill. This would ensure that limited exceptions - for reasonable traffic management practices, development of specialised services and emergency situations - may continue to exist, but the principle of network neutrality will have legal force in the framework of the Draft Bill.

6. Know-your-customer and mandatory caller-id requirements

(i) Context:

In a bid to curb cyber-frauds and related malpractices, Clauses 4(7) and 4(8) of the Draft Bill cumulatively seek to strengthen disclosure and verification standards applicable to telecommunication users in India. Clause 4(7) of the Draft Bill currently seeks to mandate licensed entities to identify and verify (know-your-customer or 'KYC') all persons to whom such entities provide telecommunication services. The manner of identification and verification and the procedure to be followed while doing the same is proposed to be prescribed by the Central Government through rules upon finalisation of the Draft Bill. On the other hand, Clause 4(8) of the Draft Bill currently mandates licensed entities to incorporate caller-id like features to enable receivers of messages/calls to identify the sender.

(ii) Issues:

The proposed introduction of caller-ids and KYC requirements is to ensure greater protection of consumers from spam and fraudulent calls and messages. However, the provisions at present appear to compromise on anonymity, and consequently the privacy of users. The absence of a remedy available against privacy breaches, due to the lack of a data protection law may further vitiate informational privacy.

Clause 4(7) of the Draft Bill requires licensed entities to “*unequivocally identify*” its consumers and as such, requires the collection of their data. However, the Draft Bill does not clarify the collection and storage limitations of such aggregated personal data which are accepted principles of contemporary data protection norms. These principles require that only such data that is necessary must be collected, and should be retained only as long as the necessity exists.²⁵ These limitation principles are an essential feature of Fair Information Practices and Privacy by Design approach, and are fundamentally linked with ensuring consumer welfare through greater protection of their fundamental right to privacy.²⁶ However, given the broad mandate to unequivocally identify its users, Clause 4(7) in its present form enables the collection and storage of data by licensed entities without adhering to safeguards discussed above. As such, the lack of clarity regarding the particulars of consumer data that may be collected, the duration for which it may be retained, and who it may be shared with (for example, in instances of porting from one licensed service provider to another) raises concerns to privacy of telecommunication users and their welfare.

²⁴ Body of European Regulators for Electronic Communications, BEREC Guidelines on Implementation of the Open Internet Regulation, BoR (16 June 2020) (20) 112.

²⁵ OECD, 'The OECD Privacy Framework, Part Two: Basic Principles of National Application', available at <https://www.oecd.org/sti/ieconomy/oecd_privacy_framework.pdf>, accessed 7 November 2022; Ann Cavoukian, 'Privacy by Design: The 7 Foundational Principles' available at <https://iab.org/wp-content/IAB-uploads/2011/03/fred_carter.pdf> accessed 7 November 2022.

²⁶ Page 75, Committee of Experts under the Chairmanship of Justice Srikrishna, 'A Free and Fair Digital Economy: Protecting Privacy, Empowering Indians' (2018) available at <https://www.meity.gov.in/writereaddata/files/Data_Protection_Committee_Report.pdf>, accessed 7 November 2022; Ann Cavoukian, 'Privacy by Design: The 7 Foundational Principles' available at <https://iab.org/wp-content/IAB-uploads/2011/03/fred_carter.pdf>, accessed 7 November 2022.

Similarly, a blanket mandate to disclose the “*identity of a person sending a message*” to the receiver “*in such form as may be prescribed*” under clause 4(8) fails to provide certainty to users as to what particulars of their identity may be lawfully disclosed, and such, presents a likelihood of privacy invasion.

It is of note that similar concerns on anonymity and privacy have previously been raised in response to KYC based identification proposals by the Central Government,²⁷ and against caller-id applications such as Truecaller.²⁸

(iii) Recommendations:

The privacy concerns highlighted above may be alleviated by providing for clear safeguards and limits on the manner in which only necessary data is collected under clause 4(7) of the Bill. It further needs to prescribe storage and processing limitation standards, to ensure it complies with the accepted norms of privacy by design, which have also been reaffirmed by the B.N Srikrishna Committee Report.²⁹ The safeguards may be inserted in the form of a sunset provision intended to operate until a comprehensive data protection regime (as proposed by the Central Government) is subsequently operationalized. Additionally, the exact particulars of the sender’s identity that are required to be displayed as per clause 4(7) should be statutorily clarified, or alternatively, should explicitly be limited to measures that ensure adequate protection of individual privacy, by complying with the three-pronged test of Puttaswamy. This will ensure a balance between the proposed safeguards for customers, without seriously impinging on individual privacy.

7. Creation and maintenance of a do-not-disturb (‘DnD’) register

(i) Context:

Given the growing number of complaints against unsolicited commercial communication, usually employed for advertisement purposes (i.e., spam calls), the Draft Bill has sought the insertion of Chapter 9 for protecting users from such communication. Clause 33 of the Bill empowers the Central Government to prescribe measures to protect users from such “specified messages”. Such measures include the creation and maintenance of a “DnD register” which is proposed to contain the details of senders of specified messages.

(ii) Issues:

The prevalence of unsolicited communication is not a novel issue in the Indian telecommunication sector and tackling such messages has been a long-standing priority for the TRAI.³⁰ The creation and maintenance of a DnD register is a measure already in place.³¹ This DnD register, known as the National Customer Preference Register (‘NCPR’) was established in accordance with the then Telecom Commercial Communications Customer Preference Regulations, 2010, and has been in operation for more than a decade, yet, it has reportedly done little to mitigate the continuing volley of telemarketing and advertisement (spam)

²⁷ V. Sridhar, ‘*Caller ID raises privacy, security concerns*’ (May 2022) available at <<https://www.iiitb.ac.in/faculty-articles/caller-id-raises-privacy-security-questions>>, accessed 7 November 2022.

²⁸ The Hindu, ‘*HC issues notices to Centre, Maharashtra over PIL claiming Truecaller breached data privacy norms*’ (July 2021) available at <<https://www.thehindu.com/sci-tech/technology/hc-issues-notices-to-centre-maha-over-pil-claiming-truecaller-breached-data-privacy-norms/article35228499.ece>>, accessed 7 November 2021; The Outlook, ‘*Is True Caller Really being True?*’ (January 2021) <<https://www.outlookindia.com/website/story/india-news-is-truecaller-really-being-true/372511>>, accessed 7 November 2021; The Caravan, ‘*How Truecaller’s Success Banks on India’s Inadequate privacy laws*’ (March 2022) available at <<https://caravanmagazine.in/technology/truecaller-data-consent-india-privacy-laws>>, accessed 7 November 2022.

²⁹ Page 75, Committee of Experts under the Chairmanship of Justice Srikrishna, ‘*A Free and Fair Digital Economy: Protecting Privacy, Empowering Indians*’ (2018) available at <https://www.meity.gov.in/writereaddata/files/Data_Protection_Committee_Report.pdf> accessed 7 November 2022.

³⁰ The Telecom Commercial Communication Customer Preference Regulations, 2010 replaced by the Telecom Commercial Communication Customer Preference Regulations, 2018, available at <<https://www.trai.gov.in/faqcategory/unsolicited-commercial-communicationsucc>> , accessed on 7 November 2022.

³¹ The Telecom Commercial Communication Customer Preference Regulations, 2018, available at <<https://www.trai.gov.in/faqcategory/unsolicited-commercial-communicationsucc>>, accessed on 7 November 2022

calls that users receive.³² As such, clause 33(2) which provides for the creation of a similar register without any stated advancements in the manner in which the register is expected to tackle unsolicited messages, is arguably a redundant effort. Additionally, given that clause 33(2) does not reference the role of TRAI in maintenance of the NCPR, questions of jurisdictional conflict in respect of the register may also ensue.

(iii) Recommendation:

It is recommended that the Bill incorporates forward-looking measures to upgrade and strengthen the manner in which the DnD register is employed to limit unsolicited communication. Such measures may include stricter penalty provisions for both access providers and telemarketers for breach of obligations in regard to unsolicited commercial communication (which includes spam calls) under the Telecom Commercial Communications Customer Preference Regulations, 2018. Additionally, it is also recommended that the draft provision clarify the role of TRAI in the maintenance of NCPR upon enforcement of the Bill.

8. Internet Shutdowns

(i) Context:

Please note that Clause 24 (1) of the Draft Bill provides the Central Government the explicit power to order for internet suspension. This provision is intended to replace the extant framework under the Telegraph Act. Clause 24(1) empowers the Central and State Governments to notify temporary suspension of internet services if the relevant government is satisfied that the same is necessary or expedient on the occurrence of a public emergency. It must be noted that a similar power exists under Section 5(2) of the Telegraph Act, for taking possession of any telegraph for the duration that the public emergency exists, with the procedure for doing so being detailed under the Temporary Suspension of Telecom Services (Public Emergency or Public Safety) Rules, 2017 (“**Suspension Rules**”).

(ii) Issues:

While there are no official studies that have been undertaken on the impact of internet shutdowns, credible research evidence indicates that frequent internet shutdowns lead to unprecedented costs, in terms of economic loss, as well as disadvantages to people. For instance, in 2020, it was estimated that the internet was blacked out or there was curbed bandwidth access for more than 8,927 hours which cost the Indian economy around USD 2.8 billion.³³ In 2021, the Indian Government was estimated to have ordered 106 separate incidents of internet shutdowns, making it the country imposing the highest number of shutdowns globally for the fourth consecutive year.³⁴

In addition to the economic costs, the Supreme Court of India has also noted that such internet shutdowns impact the fundamental rights of the citizens, especially the right to freedom of speech and expression and the right to conduct business.³⁵ It is, therefore, important to assess whether an unbridled power as prescribed in Clause 24(1) of the Bill, could be reasonably limited. There are a number of facets that would improve the framework for internet shutdowns which is not apparently clear in the current draft.

³² The Economic Times, ‘Registration in ‘Do not Disturb’ List no Deterrent to Pesky Calls, Says Survey’ (March 2022) available at : <<https://economictimes.indiatimes.com/industry/telecom/telecom-news/registration-in-do-not-disturb-list-no-deterrent-to-pesky-calls-says-survey/articleshow/91622079.cms>> ; GadgetsNow by Times of India, ‘Trai’s Do Not Disturb (DND) list unable to stop unwanted calls: Survey’ (May 2022) available at: <<https://www.gadgetsnow.com/telecom/trai-s-do-not-disturb-dnd-list-unable-to-stop-unwanted-calls-survey/articleshow/91655040.cms>>, accessed 7 November 2022.

³³ Samuel Woodhams and Simon Migliano, ‘Government Internet Shutdowns Cost over \$4 Billion in 2020’ (4 January 2021) *Top10VPN* available at <<https://www.top10vpn.com/research/cost-of-internet-shutdowns/2020/>>, accessed 7 November 2022; Archana Chaudhary, ‘World’s Worst Internet Shutdowns Cost India \$2.8 Billion in 2020’ (6 January 2021) *Bloomberg Quint* available at <<https://www.bloomberg.com/news/articles/2021-01-05/world-s-worst-internet-shutdowns-cost-india-2-8-billion-in-2020>>, accessed 7 November 2022.

³⁴ Access Now, ‘The Return of Digital Authoritarianism: Internet Shutdowns in 2021’ (24 May 2022) available at <<https://www.accessnow.org/cms/assets/uploads/2022/05/2021-KIO-Report-May-24-2022.pdf>>, accessed 7 November 2022.

³⁵ *Anuradha Bhasin v. Union of India* [2019], WPC) 1031 of 2019.

First, considering that it is fairly clear that Internet shutdowns impinge on the freedom of speech and expression³⁶ and the freedom to practice any profession or carry on any trade, business or occupation,³⁷ the Supreme Court of India in *Anuradha Bhasin v. Union of India* (“**Anuradha Bhasin**”) required that orders for internet suspension should not only satisfy the test of “necessity and expediency” under Section 5 of the Telegraph Act, but should also pass the standard of proportionality. This means that it is important to assess whether “in regulating the exercise of fundamental rights, the appropriate or least -restrictive choice of measures has been made by the legislature or the administrator so as to achieve the object of the legislation or the purpose of the administrative order, as the case may be.”³⁸ Clause 24(1) arguably does not imbibe any standard of proportionality. In our view, the clause in its current iteration fails to provide a timeframe for the suspension order, which may allow the same to run in perpetuity, leading to concerns of it being impermissible and antithetical to the notion of proportionality.³⁹

This line of thought is further echoed in the recommendations of the Parliamentary Standing Committee on Information Technology (“**Standing Committee**”) on internet shutdowns. The Standing Committee notes that there should be defined parameters on what constitutes “public emergency” and “public safety” as the Central and State governments have applied these grounds for “routine policing and even administrative measures”.⁴⁰

It is arguable that grounds justifying the reasons internet shutdowns may be provided for in the rules subsequently. However, considering that ordering internet shutdowns forms an essential component of this legislation, and also keeping in mind that this action could have grave consequences as well as the potential to cause serious harm, it is important that the same is incorporated in the parent legislation itself.

Second, in our view, Clause 24(1) does not appear to have a robust oversight mechanism. Thus, there is no improvement on the extant framework of the Suspension Rules,⁴¹ under which the Review Committee can only “record its findings” on whether the directions issued by the Home Secretary are in accordance with Section 5 of the Telegraph Act. There is no express power with the Review Committee to set aside the internet suspension order. The need to strengthen the Review Committee has also been noted by the Supreme Court in *Anuradha Bhasin* and in the recommendations of the Standing Committee. The Standing Committee has recommended the need to include judicial officers in the Review Committee and to ensure that Review Committees are set up by all States / UTs.⁴²

Third, Clause 24(1) does not appear to provide for adequate transparency and accountability measures. In *Anuradha Bhasin* the Supreme Court held that the State was required to produce orders imposing restrictions on communications and the Internet. This was required to allow citizens to effectively exercise their right to remedy against these orders suspending the internet.⁴³ This has also been observed by the Standing Committee which points out that there were no verifiable, centralised records of internet shutdowns in the country.⁴⁴ The current clause falls short in prescribing for a need for publication of the reasoned orders justifying such shutdowns.

³⁶ Article 19(1)(a), Constitution of India.

³⁷ Article 19(1)(g), Constitution of India.

³⁸ Para 53, *Anuradha Bhasin v. Union of India*, WP(C) 1031 of 2019.

³⁹ Para 100, *Anuradha Bhasin v. Union of India*, WP(C) 1031 of 2019.

⁴⁰ Standing Committee on Communications and Information Technology, ‘*Suspension of Telecom Services / Internet and its Impact (2021-2022)*’ Page 36 available at <http://164.100.47.193/lssccommittee/Communications%20and%20Information%20Technology/17_Communications_and_Information_Technology_26.pdf>, accessed 7 November 2022.

⁴¹ Rule 2(6) of the Temporary Suspension of Telecom Services (Public Emergency or Public Safety) Rules, 2017.

⁴² Standing Committee on Communications and Information Technology, ‘*Suspension of Telecom Services / Internet and its Impact (2021-2022)*’ Page 42 available at <http://164.100.47.193/lssccommittee/Communications%20and%20Information%20Technology/17_Communications_and_Information_Technology_26.pdf>, accessed 7 November 2022.

⁴³ Para 53, *Anuradha Bhasin v. Union of India*, WP(C) 1031 of 2019.

⁴⁴ Sobhana K. Nair, ‘No Verifiable Records of Internet Shutdowns Available: Parliamentary Panel’ *The Hindu* (16 November 2021) available at <<https://www.thehindu.com/news/national/no-verifiable-records-of-internet-shutdowns-available-parliamentary-panel/article37525050.ece>>, accessed 7 November 2022.

(iii) Recommendations:

It is recommended that perhaps instead of relying heavily on the current iteration of Section 5 of the Telegraph Act, a provision that more accurately reflects the developments of judicial precedent and progress made with respect to the issue of internet shutdowns might be the need of the hour. Thus, the provision should ideally incorporate the principle of proportionality. For the Draft Bill, proportionality would require prescribed, reasonable time frames for suspension orders, an effective review mechanism, and transparency in the process of publishing information on internet shutdowns. The draft provision itself should address these issues and limited aspects should be operationalised through this power of the Central Government through the formulation of rules. Therefore, very little should be delegated to subordinate legislation so as to ensure that the provision does not suffer from excessive delegation. It is also recommended that the provision should provide for publication / notification of the suspension orders. Moreover, in the light of the *Anuradha Bhasin* judgement, which envisages a more active role for the Review Committee, the substantive provision should also lay down the mandate and powers of such a committee.

Further, as recommended by the Standing Committee, a centralised database of all internet shutdown orders in the country should be maintained by the Department of Telecommunications and Ministry of Home Affairs containing various types of information on internet shutdowns, such as the number of times suspension has been imposed, reasons, duration, decision of the competent authority, decision of the Review Committees and also whether any internet shutdown has been ordered by resorting to Section 144 of the Code of Criminal Procedure, 1973.⁴⁵ Lastly, apart from the legislative changes, as recommended by the Parliamentary Standing Committee on Information Technology, there is a need to conduct a government study to assess the impact of internet shutdown on the economy and also find out its effectiveness in dealing with Public Emergency and Public Safety to aid in the judicious issuance of internet suspension orders.⁴⁶

9. Interception and Surveillance

(i) Context:

The manner in which Clause 24(2) of the Draft Bill is currently drafted suggests that it is intended to replace Section 5 of the Telegraph Act. This Clause authorises the Central Government to exercise powers of interception and surveillance over “telecommunications services”. In doing so, the Draft Bill carries forward the same provisions for interception and surveillance as were provided for under the Telegraph Act.

(ii) Issues:

State surveillance has significant implications on the fundamental rights of citizens (i.e., freedom of speech and expression and the right to privacy⁴⁷).⁴⁸ There are two levels of concern with the way the Draft Bill treats the issue of surveillance.

The first set of issues arises from the fact that there has been considerable evolution in the jurisprudence on surveillance laws over the past few years that the current framing of clause 24(2) of the Draft Bill may not currently account for. Since the Supreme Court’s judgment in *PUCL v. Union of India* upheld the constitutionality of Section 5(2) of the Telegraph Act, the Indian judiciary has recognised the right to informational privacy as a fundamental right.⁴⁹ In *Justice KS Puttaswamy (Retd.) v. Union of India (Puttaswamy*

⁴⁵ Standing Committee on Communications and Information Technology, ‘Suspension of Telecom Services / Internet and its Impact (2021-2022)’ Page 38 available at <http://164.100.47.193/Isscommittee/Communications%20and%20Information%20Technology/17_Communications_and_Information_Technology_26.pdf>, accessed 7 November 2022.

⁴⁶ Standing Committee on Communications and Information Technology, ‘Suspension of Telecom Services / Internet and its Impact (2021-2022)’ Page 50 available at <http://164.100.47.193/Isscommittee/Communications%20and%20Information%20Technology/17_Communications_and_Information_Technology_26.pdf>, accessed 7 November 2022.

⁴⁷ Under Article 19(1)(a) of the Constitution of India and Article 21 of the Constitution of India.

⁴⁸ *Kharak Singh v. State of Uttar Pradesh*, [1964] SCR (1) 332. Per Subba Rao J. knowing that one’s “activities are watched and noted”, one cannot freely exercise his fundamental rights, often leading to self-censorship.

⁴⁹ *People’s Union of Civil Liberties v. Union of India*, AIR 1997 SC 568.

l), the Supreme Court of India lays down a three-pronged test of (i) legality, (ii) reasonableness, and (iii) proportionality, on the basis of which the constitutionality of a law impinging on the right to privacy was to be assessed.⁵⁰ This was further elaborated by the Court in *Puttaswamy II* to require that (a) there should be a legitimate goal; (b) there should be a rational nexus between the goal and the measures taken to achieve it; (c) there should not be any less restrictive measures that can achieve the same purpose and (d) it should not have a disproportionate impact on the rights holder.⁵¹

In our view, the current formulation of clause 24(2) of the Draft Bill may not imbibe the sufficient standards of “necessity and proportionality” in the substantive provision. The current formulation provides that an order of interception may be passed if the Central or State government is of the opinion that it is “necessary or expedient” to do so on the grounds of “interest of the sovereignty, integrity or security of India, friendly relations with foreign states, public order, or preventing incitement to an offence”.⁵² As noted by the Standing Committee, in its report on internet shutdowns, this legislative guidance is insufficient to ensure that the executive uses these powers for the purposes intended.⁵³ As such, Clause 24(2) may fall short of providing the adequate standards of “necessity and proportionality” in the current legislative formulation.

Moreover, even as data protection legislation is yet to be enacted in India, *Justice KS Puttaswamy (Retd.) v. Union of India*⁵⁴ (*Puttaswamy II*) has laid down basic data protection principles of lawful, fair and transparent processing, data minimization and accountability that need to be incorporated while incorporating the personal data of citizens. Though the Srikrishna Committee Report recommended an exemption from consent of the data principal for the purposes of data processing for surveillance, it did make applicable these other principles of data protection to the processing.⁵⁵ None of these data protection obligations appear to be reflected in the current provision. While the pith and substance of these obligations may be effectuated through subsequent rules, it is imperative that the legislative provision at least enables this mandate in its language.

Further, the current provision does not provide for judicial application of mind in the issuance of these orders. In *Puttaswamy II*, Justice Sikri, authoring the majority opinion struck down Section 33(2) of the Aadhaar (Targeted Delivery of Financial and Other Subsidies, Benefits and Services) Act, 2016 that allowed personal data to be shared for the purposes of national security. The Court directed that this provision must include the involvement of a more senior government official as well as a judicial officer, to prevent possible misuse.⁵⁶ As such, the legal need for judicial application of mind is evident in a surveillance framework which currently seems to be missing from Clause 24(2).

Apart from these privacy related concerns, there is also the issue of interaction of the proposed framework with currently existing frameworks of interception and surveillance. Irrespective of whether the draft Bill were to evolve a *de novo* surveillance framework or bring forth the existing one, the issue of applicability of multiple regulatory frameworks becomes evident. In Clause 2(17) of the Draft Bill, “telecommunication services” have been defined in a manner that would include internet enabled OTT communication services also. Surveillance regime for this set of communication services is presently set out in the Information Technology (Procedures and Safeguards for Interception, Monitoring and Decryption of Information) Rules, 2009 (“**IT Interception Rules**”). Neither the Draft Bill or the explanatory memorandum appear to specify whether the framework set out in the Draft Bill will replace, co-opt or apply in parallel to the IT Interception

⁵⁰ *Justice KS Puttaswamy (Retd.) v. Union of India*, 2017 (10) SCC 1.

⁵¹ *Justice KS Puttaswamy (Retd.) v. Union of India* 2019 (1) SCC 1.

⁵² Clause 24(2), Draft Bill, 2022.

⁵³ Standing Committee on Communications and Information Technology, ‘*Suspension of Telecom Services / Internet and its Impact (2021-2022)*’ Page 36 available at <http://164.100.47.193/lssccommittee/Communications%20and%20Information%20Technology/17_Communications_and_Information_Technology_26.pdf>, accessed 7 November 2022.

⁵⁴ *Justice KS Puttaswamy (Retd.) v. Union of India*, 2019 (1) SCC 1.

⁵⁵ Committee of Experts under the Chairmanship of Justice Srikrishna, ‘*A Free and Fair Digital Economy: Protecting Privacy, Empowering Indians*’ (2018) page 13 available at <https://www.meity.gov.in/writereaddata/files/Data_Protection_Committee_Report.pdf>.

⁵⁶ Para 349, *Justice KS Puttaswamy (Retd.) v. Union of India*, 2019 (1) SCC 1.

Rules. Going forward, this may cause confusion where law enforcement agencies may use one or the other framework leading to obfuscation in compliance at the end of the service providers.

(iii) Recommendations:

It is submitted that the Draft Bill overhaul the existing structure instead of carrying forward the provisions of the Telegraph Act by default that have not incorporated the evolution of law since.⁵⁷ It is also important to ensure that the pitfalls of the Rule 419A, Indian Telegraph Rules, 1951 are not reflected in the new framework. The framework under Rule 419A suffers from inadequate application of mind while passing the orders (given the sheer volume of orders passed by the respective home secretaries); lack of transparency (Rule 419(19) mandates maintaining complete secrecy) that hampers the right to effective remedies and a weak oversight mechanism.

First, it is imperative that the Draft Bill introduces elements of transparency and accountability in its proposed framework. Second, the principles of proportionality and requirement of judicial presence should also form a part of the surveillance law for the country. Third, it is needed that the procedure is provided for in the legislation itself and not delegated to the rule making power of the government. This would enable deeper inclusion of various procedural safeguards. Fourth, the interaction of existing and proposed frameworks needs to be harmonised to minimise overlaps in the law.

10. Restructuring, Defaults in Payment, and Insolvency

(i) Context:

To ensure the continuous utilisation of the spectrum, the Bill seeks to address situations where such spectrum is not being used due to insolvency.⁵⁸ It also seeks to create a disincentive for acquiring spectrum at a value lower than the auction-determined price, thus balancing its utilisation with realising its value. An entity undergoing insolvency proceedings may continue to operate the spectrum if it complies with certain listed requirements. If such an entity cannot comply with these requirements, the spectrum will revert to the control of the Central Government.

(ii) Issues:

While the intended aim of the Bill is laudable, in instances, there is a concern that it may go against the principles envisioned by the Insolvency and Bankruptcy Code, 2016 (“IBC”). This is the case even though the IBC was envisioned as a complete code on matters relating to insolvency and bankruptcy to ensure the maximisation of the value of assets and to promote entrepreneurship. First, it requires priority in payments during the Corporate Insolvency Resolution Process (“CIRP”), thus placing equally placed creditors on a different footing.⁵⁹ Second, it provides extraordinary powers to the Central Government to control the assets of the insolvent entity,⁶⁰ a power generally exercised by the Interim Resolution Professional (“IRP”) and, subsequently, the Resolution Professional (“RP”) for the interest of creditors. Third, it uses unclear and vague language, which can impact the certainty required during the CIRP.⁶¹

As per Clauses 20 (2) and (3) of the Draft Bill, the spectrum may revert to the Central Government if the insolvency entity fails to comply with certain conditions. In particular, the spectrum reverting to the Central Government requires the entity’s revenue to be placed in a separate designated account. Such placement of revenue puts the Central Government, which would be an ordinary operational creditor under the IBC, at a pedestal and grants it treatment not in line accorded to other equally placed creditors. The same sub-clause

⁵⁷ Clause 24(2), Draft Bill, 2022.

⁵⁸ The Bill seeks to ensure that the spectrum remains in use during and after insolvency proceedings. Department of Telecommunication, ‘Explanatory note on the Indian Telecommunication Bill, 2022’ (21 September 2022) Ministry of Communications (GOI), available at <https://dot.gov.in/sites/default/files/Explanatory%20Note%20to%20the%20draft%20Indian%20Telecommunication%20Bill%2C%202022.pdf>, accessed on 10 November 2022.

⁵⁹ Clause 20(3), Draft Bill.

⁶⁰ Clauses 20(3) and 20(5), Draft Bill.

⁶¹ See for example, Clauses 20(2) and 20(3), Draft Bill.

also provides that the payment of the licence fee and “*applicable charges*” shall be paid first in priority during CIRP. It is unclear if this includes both past and current charges under a licence or assignment agreement. As per Section 25 of the IBC, only current dues may be paid in priority as part of CIRP costs. There is also no guidance on whether the priority envisioned would take precedence over other CIRP costs, which would ideally call for a related amendment to the IBC.

Moreover, the Draft Bill runs the risk of restricting the possibility of an entity in insolvency continuing as a going concern since it risks losing control of its key asset – the spectrum – without which it is unlikely to have any value. In fact, as per clause 20 (5) of the Draft Bill, the Central Government may, in certain instances, notify an alternate person or entity which would manage the licence, assignment, or any identified business or property of an insolvent entity. This is the case even when the IBC provides that the commencement of insolvency vests the insolvent entity’s control and management, as well as its assets, with the IRP and, subsequently, the RP. The alternative management would have the effect of segregating the entity’s assets under multiple processes, resulting in additional delays and litigations by creditors intending to bring notified assets under the CIRP process. It also raises concerns regarding the period for which it may continue, i.e., the spectrum’s utilisation after the notified period of alternate management.

Lastly, the extant provision in the Draft Bill would benefit from additional clarity in several instances – such as whether the spectrum licence of the entity is suspended or reverts to such entity after the insolvency proceedings or alternate management, if any. This lack of clarity has the likelihood of playing a part in the proceedings by impacting the determination of the insolvent entity’s value during the CIRP.

(iii) Recommendations:

The Draft Bill has a difficult target to achieve. It has to balance the revival of insolvent entities with the continuous utilisation of the spectrum. In principle, the IBC should be the only legislation and authority governing insolvency to ensure the maximisation of the value of assets and to promote entrepreneurship. In this regard, it would override anything inconsistent in any other law or instrument. However, when enacted, the Draft Bill will take precedence by virtue of being passed at a later date. Hence, the concerns highlighted above may be alleviated by targeted interventions that abide by the schemes and principles of IBC.

First, the sequence of priority in payments should be aligned with the IBC to ensure that equally placed creditors are not put on a different footing or do not have differential rights and obligations. Further, the Draft Bill should clarify that “*any charges*” under clause 20 (3) are restricted to current dues and provide the priority of these charges in relation to other CIRP costs. Second, while the provision concerning the spectrum to revert to the Union Government is in line with the stated objective of the Bill, i.e., the continuous utilisation of the spectrum, such a provision should be restrictive. It should not allow the government to prescribe “*additional... terms and conditions*” with which an insolvent entity must comply to continue management of the spectrum. Instead, the government may only be granted powers to ease the terms and conditions on a case-to-case basis. Third, in keeping with the revival of an insolvent entity, the spectrum rights should revert to such an entity after the insolvency proceedings or alternate management, if any. In this regard, the Draft Bill should maintain its present position that an insolvent entity continues to hold its licence, given that no mention has been made concerning the suspension of the same during insolvency.

Annexure: Summary of Comments

Sr. No.	Topic	Summary of Recommendations
1.	Lack of sector-specific definitional framework	The Draft Bill currently has one broad class of services categorised as 'telecommunication services' under Clause 2(21). Creating classes of telecommunication services will greatly benefit regulation by enabling more targeted regulation, opening the door to a service-specific licensing regime, allowing innovation and new entrants by ensuring a sliding-scale for regulation; and boosting ease of business. A scheme for the classification of telecommunications services must be introduced in the Bill.
2.	Definition of OTT Communication Services	A precise definition of OTT Communication Services may be inserted in the Bill which focuses on (a) interpersonal exchange of communication; (b) as the primary service; (c) in a finite manner to a recipient determined by the sender. This would ensure that OTT communication services are defined in a precise manner, and consequently, would mitigate apprehensions of the overbroad application of the Draft Bill.
3.	Reliance on 'same service same rules' standard	The Same Service Same Rule standard needs to be refined by including a 'relevance criteria' in the standard, which considers the relevance of both similarities and dissimilarities, the underlying architecture of these services, and the nature of the service provider in order to determine the regulatory framework for these services. The Draft Bill must also codify the standards for notifying any new service as a telecommunication service under Clause 2(21).
4.	Absence of tiered system of licences	The Draft Bill must set out various classes of licences to govern the number of telecommunications services governed by it. Different classes of licences may be set out depending on whether a service is (a) general, interpersonal or machine-to-machine, and (b) access service, or a reliant service. Classes of licences may also have different terms and procedures that may be set out in regulations under the Draft Bill. The creation of classes of licences would enable specific, precise and sophisticated regulations to develop around the governance of telecommunications services.
5.	Lack of protections for network neutrality	The Bill should provide that any new terms and conditions prescribed for access services under Clause 4(3) of the Draft Bill must comply with the principle of net neutrality as may be laid out in the Bill. The specific protections for network neutrality in India present under the Unified Access Service Licences today may also be provided with statutory backing under the Draft Bill.
6.	KYC and mandatory caller-id requirements	Clauses 4(7) and 4(8) of the Draft Bill, in the absence of any safeguards and limits on collection, usage and storage of consumer's data for KYC purposes and clarity in regard to the particulars of their identity that may be disclosed to meet caller-id requirements, appear to compromise on users' privacy.

7.	Creation and maintenance of a DnD register	Clause 33 of the Draft Bill enables the creation of a DnD Register to maintain details of senders of certain specified messages including spam calls. Such a register is already in place and has reportedly not been effective in curbing spam calls, and hence empowering the creation of a similar register without necessary upgrades appears to be a redundant effort. Additionally, clause 33 does not clarify the role of TRAI in maintaining the DnD register, and hence may create jurisdictional conflicts.
8.	Framework for internet shutdowns	Clause 24(1) of the Bill lays down the powers of the government to order suspension of internet services. This clause replicates section 5(2) of the Telegraph Act which is not in keeping with the evolution of jurisprudence since, especially in the context of requiring that the test of “proportionality” is met when fundamental rights are violated. Additionally, the provision lacks adequate safeguards in the form of transparency requirements and an effective oversight mechanism.
9.	Framework for interception of communications	Clause 24(2) of the Draft Bill lays down the powers of the government to order interception of communications. This clause replicates section 5(2) of the Telegraph Act, 1885 which is not in keeping with the evolution of jurisprudence since, especially in the context of the fundamental right to informational privacy. Additionally, the interaction of this framework with the existing interceptions’ framework for electronic communications under the IT Rules, 2009 is unclear and would lead to overlapping application of laws.
10.	Restructuring, Defaults Payment, Insolvency in and	<p>Clause 20 of the Draft Bill aims to address situations where the allotted spectrum is not being used by an entity due to it being insolvent. However, in instances, the Draft Bill goes against the principles of the IBC. This is the case even though the IBC was envisioned as a complete code for insolvency and bankruptcy and was intended to be the principal legislation on the subject.</p> <p>First, by requiring priority in payments, the Draft Bill places equally placed creditors on a different footing. Second, the Draft Bill provides extraordinary powers to the Union Government to control the assets of an insolvent entity. This power is generally exercised by the Interim Resolution Professional and, subsequently, the Resolution Professional to preserve creditors’ interests. Third, the Bill uses unclear and vague language, which can impact the certainty required during the insolvency process. In principle, the IBC should be the only legislation and authority governing insolvency. Alternatively, these concerns may be alleviated by targeted interventions that abide by the schemes and principles of IBC.</p>

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Vidhi Centre for Legal Policy

**A-232, Ratanlal Sahdev Marg, Defence Colony
New Delhi - 110024**

011-43102767/43831699