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NET NEUTRALITY: A FIGHT FOR FUNDAMENTAL RIGHTS*

INTRODUCTION

India has always been the land of agriculture and productivity. Since the birth of this nation, we have seen a lot of development in the form of internet boom in the year 1991 which changed the lives of people all over India. In 1991, the era was different than what we see now. India, a country where people hardly used to get a chapattis and one meal a day, could not imagine something like a computer PC and an internet connection.

After the advent of the internet, internet has become a phenomenon and a multimillion dollar industry. The other form of the word 'miracle' is internet. It is that form of a chapter in the lives of people that cannot be answered in simple world and essays. Today the world has shrunk to a small town from being a vast planet. By the previous sentence it means the world has shrunk virtually, with the help of Internet. Its use is uncountable be it in booking tickets, communicating, instant messaging, news reporting and web browsing etc. Its use is immense and cannot be counted on a scale of one by two.

There are inventions that has changed the globe and has mapped the continents together. This is nothing less but the evolution and revolution of the world through the Internet in the public domain.

What is internet? This question was the first question that was raised once the internet kept its foot in India. Overnight the internet became a success and a boom. Big companies like Microsoft, Google, and other companies mapped the future of internet and invested heavily in internet, resulting which, Microsoft and Google are now one of the biggest companies in the world in the world of I.T industry. The dot com was a boom. As of 2014 there are total 24 Crore¹ internet subscribers. Internet has become an array of web which will develop and will increase the more we access information over the internet and to the lives of people. The internet is like a traffic highway which has covered almost all the parts of this world, from east to west, from a remote corner to an urban area. Internet is an invincible and invisible power that has always stood true in its exertion to provide information to people and connecting people when needed.

The Indian internet service providers have set a landmark when it comes to connectivity and faster communication. Telephone communication has made the country closer and closer as the technology advanced and made the concept of postal letters much outdated though letters are still relied upon by various sectors in the economy. But, as and when time developed things also changed and now we have seen a new concept of internet being introduced by the Indian Telecom Service providers, i.e. The Internet Neutrality or Net Neutrality.

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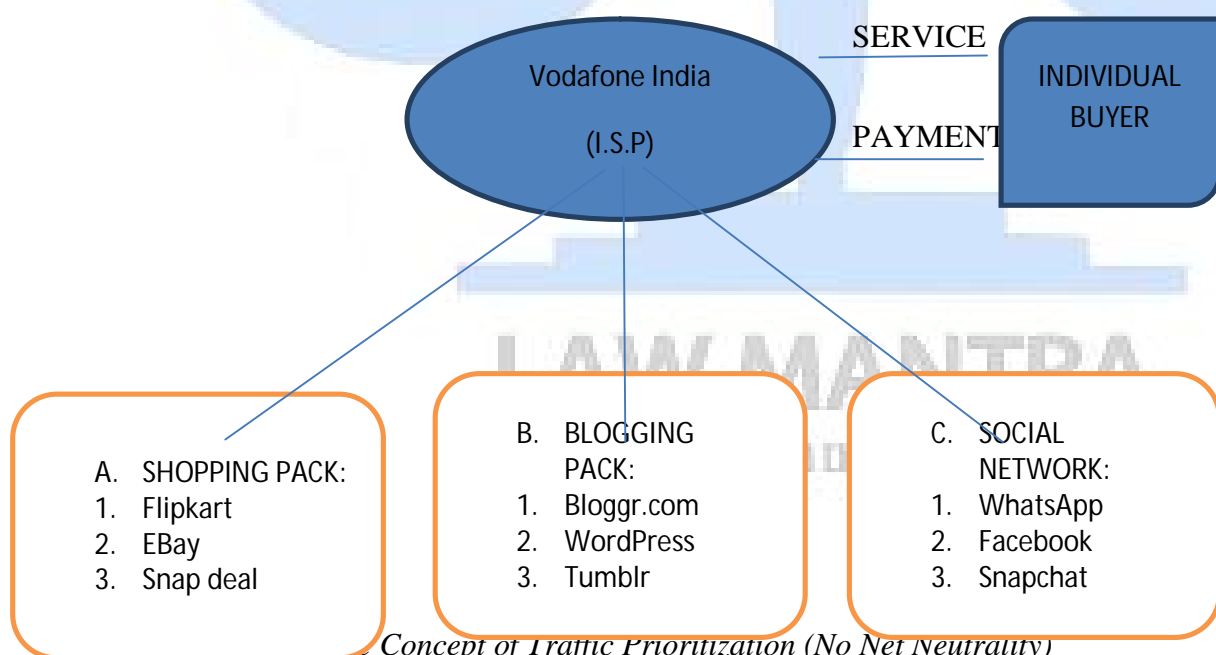
¹ Internet and Mobile Association of India and Internet Live Stats.com., <http://www.internetlivestats.com/internet-users/india/> last accessed on 20th October 2015, 23:29 PM

The immediate question is what internet or net neutrality is? And how does it affect the lives of the people?

Internet neutrality in India is a new principle where people who are the users of internet have a right to access internet in a democratised way and equally, making no discrimination between the users of the internet. For easier understanding the whole concept of internet neutrality can be explained with the help of a hypothetical example.

Say, John wants to buy a shirt online and there are only two sellers in the market, namely eBay and Amazon.com, and one ISP Vodafone India. Now, in a situation where there is traffic prioritisation, Vodafone will have deal worth billions with say eBay, which will give special rights of the users of Vodafone to use the ebay.com website at a tremendous high speed, but that will come again with a charge and poor people who have not subscribed to the eBay usage subscription, will not be entitled to use it at such high speed, compared to the ones who have already subscribed to the same subscription for using eBay at high speed. Hence, for the customers who did not pay for using eBay through Vodafone's network, those customers will have a tough time shopping on that site, and also on other shopping websites, as it won't open due to sluggish and slow internet speed, and if supposing John has subscribed to the eBay access pack from Vodafone and then he notices the shirt that he can buy at Rs. 600 from Amazon is being sold at Rs. 800 by eBay, there he will be in a losing situation as he will be forced to shop from eBay as it would be the one that could be accessed due to high speed subscription and Amazon.com will load for an infinite amount of time, hence, for John to search and buy a shirt from Amazon.com, will become a challenging task for him to. Isn't such environment of traffic prioritisation a havoc directly on the face of democracy, and will it not affect the rights of the people directly?

If we follow the principles of traffic prioritization the structure of the internet will look like the figure mentioned in the below diagram.



Concept of Traffic Prioritization (No Net Neutrality)

As per the traffic prioritization a person will subscribe to either Shopping Pack; Blogging Pack or Social Pack and the service for fast internet usage will be applicable to the above pack

which is subscribed to. If there is a net neutrality, then there will be no discrimination between the packs and no one will be deprived of the packs that's mentioned above. All packs will be one and will be available to everyone at a neutral and a common price and a common speed.

In the year 2014, Airtel and Vodafone both contended for traffic prioritisation, and favoured traffic prioritisation in the country. Both the giants requested Telecom Regulatory Authority of India (TRAI). The matter is currently with the TRAI which will decide the matter soon. Airtel came up with the unique concept of Airtel Zero, but such concept was criticised by most of the learned men in this field, than being welcomed with open arms. Airtel and Vodafone reported such to the TRAI to take positive actions on such matter of traffic prioritisation and also with respect to the Over the Top services (OTT) in India like WhatsApp, Linked In, and Facebook etc. OTT services are the one which provides basic service to the people and these OTT services use their network and make that money. ISPs in India, though are up for an implementation of traffic prioritisation, gave a valid argument that they also incur huge amount of cost when it comes to the running and maintenance of servers. Internet is a huge business involving lots of servers and billions of internet users for which there is a need of servers for the smooth running of the internet facility all over. The maintenance costs are huge and for the maintenance of servers the ISPs incur a huge amount of money. Most of the profit the ISPs in India make are by selling internet plans to the users of internet, out of which most of it flows for the maintenance of the servers in India and abroad. At last what is left with the ISPs are just peanuts when the profit is compared to the profits earned by the OTT services, by using the ISPs network and the ISPs getting nothing as a share out of the profit the OTT services make. Hence, the ISPs suggested to include them also for the sharing of profits with the help of traffic prioritisation, where the OTT services would directly pay to the company and make a deal for providing the high speed internet to the subscribes of the particular website.

Currently in India, the two business brands are considered the best and the most used in the country. In 2013, India had a promising number of 154 million internet users and it was ranked third in the world rankings after China and United States of America². India currently has a whooping number of 842 million internet users and the number is increasing at a stage where we may become a country with the largest number of internet users³. India is now second in the world forum. Isn't this number huge, which also reflects the income that is earned by these houses? As per the latest statistics and data Airtel has a market share of 34.4% and Vodafone holds a market share of 24% of the total market in India⁴. The profits earned by these business houses are so huge that it also outlasts the total GDP of some of the African nations. In the previous year the net profit of Vodafone stood at Rs. 37,606 Crore and on the other hand the balance sheet of Bharti Airtel showed a profit of Rs. 22,219 Crore. These two business houses are the most profitable business houses of the country and the following has been represented in a chart below (Fig. 02)

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² Based on data provided by Statista also available at <http://www.statista.com/topics/2157/internet-usage-in-india/> last accessed on August 30, 2015, 22:45 PM

³ Data based as provided by Trak.in also available at <http://www.statista.com/topics/2157/internet-usage-in-india/> last accessed on August 21, 2015, 22:48 PM

⁴ Kalyan Prabhat, The Economic Times, 12th June 2015 also available at <http://telecom.economictimes.indiatimes.com/news/industry/bharti-airtel-idea-cellular-gain-incremental-market-revenue-share-in-fy-2015/47637747> last accessed on August 22, 2015, 22:52 PM

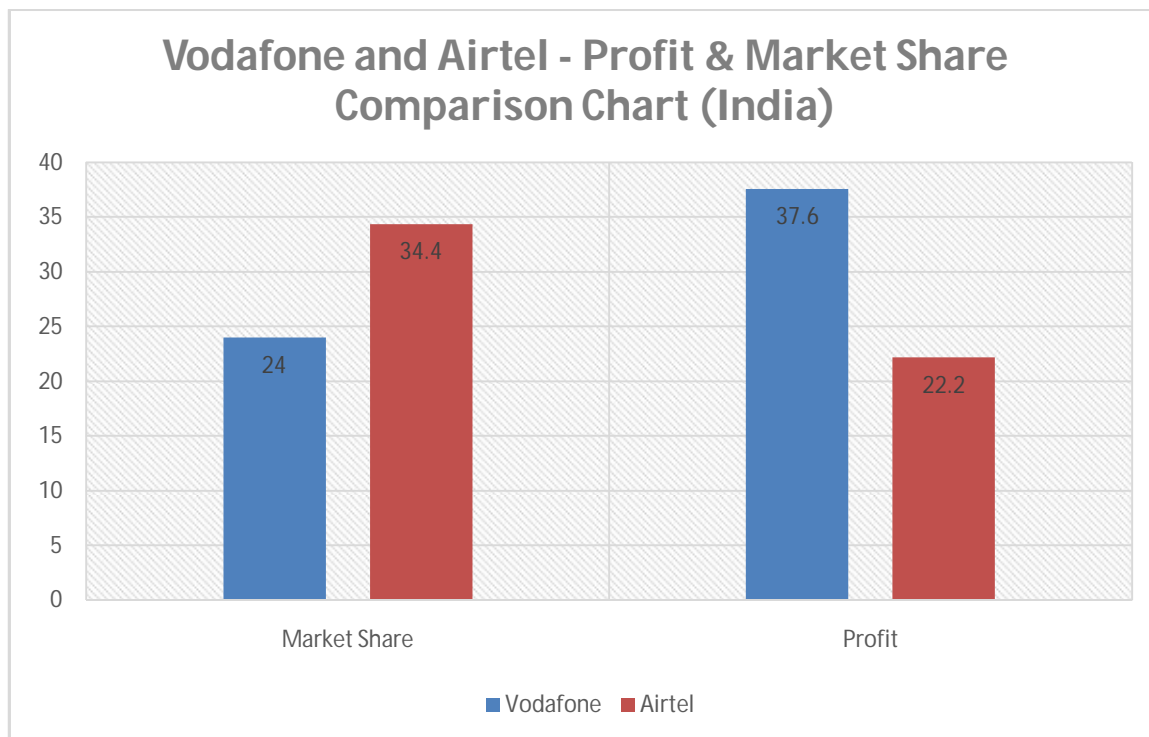


Fig. 02. Comparison chart between Vodafone – Airtel, 2014-2015 (Profit in Millions; Market Share in Percentage)

The above statistical data shows the trend and the profit that these companies make. Does it require more money to fill their balance sheets is the question.

After this whole haywire, TRAI came up with the consultation paper, which is available in their website, explaining the same situation before the nation. TRAI now being the final authority to decide the fate of net neutrality in India, will decide the matter soon.

The moot problem whether the traffic prioritization is a violation of fundamental right of the people? The question is quite difficult to analyse, when there is a situation like this and even more difficult when we do not have a proper legislation regarding the same in India, demarcating the provisions of net neutrality.

In our country, whatever the Constitution places becomes the law of the land. The unique values placed in the preamble are a reflection of what we see in India. India, has a good governance system and a strong democratic structure that upholds the rights of the people. There is Rule of Law and Constitutionalism in the country which pushes our country ahead even in difficult situations. But principles of traffic prioritization can be a bone of contention between the rule of law and inequality by the state. The unique feature of the Part III of the Constitution is that, the Constitution guarantees the Fundamental Rights of the people and a person can file a petition whenever there is a violation of their fundamental rights by the state machinery or a state body. The next question that arises in our mind is what is a state? As mentioned in Article 12 of the India Constitution:

Article 12⁵:

⁵ The Constitution of India, 1950

Definition In this part, unless the context otherwise requires, the State includes the Government and Parliament of India and the Government and the Legislature of each of the States and all local or other authorities within the territory of India or under the control of the Government of India.

A state by the preview of article 12 will constitute:

- a. Government of India and the Parliament of India
- b. State Government and the State Legislatures
- c. All local authorities and other authorities

Hence, is Vodafone and Bharti Airtel a part of the state it can violate the Fundamental rights of the users who use their service, and/ or rather TRAI violates, be also considered a state under article 12 of the Constitution of India, as it is already a statutory body under the Telecom Regulatory Authority Act, 1997? Is the main question before us?

India since its inception has recognised the aspect of development and has evolved as a welfare state. There is so much burden on the government that the private authorities are now also being slowly included in the ambit of state under Article 12. The Hon'ble Supreme court in its various judgements have expanded the definition of local and other authorities by going through a good amount of difficulty in the past and recent years. Some of the functions conducted by the government are discharged through the traditional government authorities and government departments where as some of the functions are discharged by other departments which are of autonomous character other than the government like the ONGC etc. As said above the traditional bodies of the government will undoubtedly be the part of the state under Article 12 of the Constitution but what about the bodies that act autonomous, is the major question before us. The Hon'ble Supreme Court time and again has expanded the meaning of instrumentality of the state to involve most of the agencies under the scope of Article 12 of the constitution so that there is a balance and welfare harmony maintained in the state and no person is deprived of the rights and liberties that's guaranteed by the state to its people. Supreme Court has discussed these matters in various cases.

In *Sukhdev vs. Bhagatram*⁶, the main problem before the Supreme Court was to decide whether statutory bodies like the Life Insurance Corporation (LIC), Oil and Natural Gas Commission (ONGC) and the Finance Corporation (FC) are a part of the state. It was held that these statutory bodies have an individual personality and is a separate legal entity but that will also not specifically mean that they are not a part of the state and these bodies are very well a part of the state under Article 12. The court also said that the bodies mentioned have a government control and are an instrumentality of the state.

In *Ramana D. Shetty vs. International Airport Authority*⁷, the question was whether International Airport Authority of India, which is a statutory body is a State under Article 12 or not? The court heard this matter and gave a verdict that the International Airport Authority will be a state under the Article 12 of the Constitution of India.

Hence, from the verdicts and decisions given by the Hon'ble Supreme Court it is clear that a statutory body which is formed under an act is an instrument of the State under Article 12 of the Constitution of India, 1950. If we look at TRAI, the main website of TRAI⁸, the website specifically mentions that TRAI is a statutory body under the Telecom Regulatory Authority of

⁶ AIR 1975 SC 1331 : (1975) 1 SCC 421

⁷ AIR 1979 SC 1628

⁸ www.trai.gov.in

India Act, 1997 and being a statutory body will be covered under Article 12 of the Indian Constitution being a State.

Now, let us take the next question at hand regarding the private and public bodies like the telecom companies in India. Are they an instrument of the state? A layman's answer to this question will always be a no, stating that a private body is a body which has no relation with the state. But the situation is not always the same. Considering the same welfare norm of the state the Hon'ble Supreme Court in its judgement have increased the scope of a private body being it a state. Telecom operators like the BSNL and the MTNL are considered to be a state instrument, though it's a non-statutory body. The question of non-statutory bodies being a state is discussed in *Ajay Hasia vs. Khalid Mujhib*⁹, the Supreme Court has laid down certain guidelines in the given case. The court said, for a statutory body being considered to be a state the following factors have to be considered¹⁰:

- a. If the entire share capital is held by the government, it goes a long way towards indicating that it's a government body.
- b. Where the financial assistance by the government is so large that it meets all the entire expenditure of the body.
- c. If the body enjoys a monopoly status given by the government.
- d. There is an existence of a deep and pervasive control of the state in the body.
- e. If the function of the body is of a public importance and the function performed by the body is very closely related to the function performed by the state.

In the case of *Pradeep Kumar Biswas vs. Indian Institute of Chemical Biology*¹¹, it has been held that it is not a hard and fast rule that all the factors of the *Ajay Hasia case*¹² need not be followed but, any of the factors in the *Ajay Hasia*¹³ case is enough for the body to be considered to be a state under the Article 12 of the Indian Constitution of India.

Hence, non-statutory bodies in India like the Bharat Sanchar Nigam Limited (BSNL) and the Mahanagar Telecom Nigam Limited (MTNL) are also considered to be an instrument of the state, as there is always a deep and a pervasive control of the government agencies in the working of BSNL and MTNL. But, in the case of Vodafone and Airtel, who are the main contributors to this principle are they a state, being a private body.

In a general sense a private body is totally different from a public authorities. In companies too, they are a separate entities. In Company's Act 2013, Private Company and Public Companies are defined in *Section 2(68)* and *Section 2(71)* of the Act. As per the understandings of the aforesaid sections, both private and public companies are totally different in general terms and do not bare relations with each other with respect to the section of the act. But the Hon'ble Supreme Court and various High Courts in India, have included the private bodies as an instrumentality of the state too, so that the private bodies also imbibe a sense of responsibility amongst themselves and towards the citizen and uphold the welfare principle concept which we follow in India.

In case *Som Prakash vs. Union of India*¹⁴, the Supreme Court in page 224 of the judgement has stated that any corporation that is performing a duty of the state will come under the ambit of Article 12 of the Constitution of India and hence a state. Also in the case of *Unnikrishnan vs.*

⁹ AIR 1981 SC 487

¹⁰ M.P. Jain, *The Indian Constitutional Law*, Pg. 858 (7th Ed, Lexis Nexis Publications)

¹¹ (2002) 5 SCC 111

¹² 1981 AIR 487

¹³ Ibid.

¹⁴ AIR 1981 SC 212 : (1981) 1 SCC 449

*State of Andhra Pradesh*¹⁵, the High Court of Andhra Pradesh deliberated the matter is the same lines that, whenever a body that performs a function of a State will be considered a State under the Article 12 of the Constitution of India and will be liable if the fundamental rights of the people are being taken away by the acts of these bodies in contrary.

In *Marsh vs. Alabama*¹⁶, the issue was regarding whether Mobil, Alabama, a town owned by a private company Gulf Shipbuilding Corporation, violate the rights of Gracie Marsh, who was distributing religious pamphlets on the sidewalks. Gracie Marsh was warned and told not to distribute the pamphlets on a private property and was arrested later. In the US Supreme court she presented that, she had a right to free speech and press under the first and the fourteenth amendment of the constitution of the US and it's a violation of the fundamental right. In the current case the court gave a historic decision and favoured the decision to Marsh. In the opinion of Justice Hugo, he used the balancing test weighing the private property right against the individual's basic right to free speech and press and the court favoured the latter, i.e. free speech and press. Based on the court's decision, it concluded that being a private body too if any entity does an act that is public in nature, like in this case managing the town, and that act violates the rights of humans, then it will lead to violation of human rights of the people. In this case to the principle of the welfare state is applied where though a company being a private body, a strict and rigid interpretation of state's definition is not applied but the ambit of the definition of State is widened, bringing the private body doing a public act in the ambit of State's definition.

When Prime Minister Narendra Modi was sharing the 'Digital India' campaign stage with a host of telecom bosses, seven representatives of the "Save the Internet" campaign told the committee why it was in the country's interest that the government resist the business tactics of these firms that would rob net users of the freedom to log on to apps and websites of their choice. Department of Telecommunications' recent report on net neutrality has recommended bringing voice over internet protocol-based (VoIP) domestic calling services, including applications such as WhatsApp, under licensing. The logic being that "through exercise of licensing powers available under Section 4 of the *Indian Telegraph Act* to ensure a level playing field." Net neutrality implies that equal treatment is accorded to all internet traffic and no priority be given to an entity or company based on payment to content or service providers such as telecom companies, which is seen as discriminatory¹⁷.

Telecom companies like Vodafone and Airtel perform a welfare and a public function in our country, and their acts help connect millions of people in this country and also abroad. Though these companies charge a fee for it but it is a facility given to the people. Hence, these companies are also a state under Article 12 of the Constitution. Telecommunication is a vital tool for the people in the current generation and for the generations to come. It is vital not only for Indians but also people abroad. Internet and internet calling have made the path of communication so easy that we cannot imagine even a single minute staying away from the gadgets we use. It is deeply imbibed in the minds and the hearts of the people. Communication and Internet has now become a phenomenon in the lives of the people. There are famous blogs and micro websites where people express their views and express their views, with the help of those websites. Just, imagine a day when your favourite blogging site is jammed and the ISP will not allow you to access the blogging site or the post a person wants to have an access to. This won't be a fair affair and it will be violation of the person's fundamental rights under Article 19 of the Constitution. Secondly, if an ISP or the TRAI, both being a state, brings out

¹⁵ 1993 AIR 217

¹⁶ *Marsh v. Alabama*, 326 U.S. 501

¹⁷ Technology – no net neutrality defeats 'digital India', *Business Economics*, August 2nd 2015; also available at <http://businesseconomics.in/?p=327> last accessed on August 30th 2015

regulations to stop the people of this state from accessing to a particular site at a particular speed and differentiating between the people on bandwidth speed, it will be a violation of the fundamental rights too.

Apart from the fundamental rights aspect, traffic prioritization is harmful for the economy and small start-up firms too. In India, start-ups are given a lot of priority and the taxes are liberalised for a start-up firm, as these firms usually do not have much capital and resources when they start the business, and currently they can go online even with a small amount as a website access fees, to expand their business further. But, after no internet neutrality, the start-ups won't be able to breathe amongst the other internet e-commerce giants. Approaching an ISP will be challenging as there will be other firms who would have now made up the deal in millions to give their site the priority speed under traffic prioritization. This would crush the system of e-commerce in India and it would hamper the competition in India at a large scale and favour monopolization. The start-up firms will die before they are even born.

Developing countries like Chili, Argentina, Brazil have already implemented net neutrality in their system by policies and legislations. In USA the Federal Communications Commission was set up to propound the good and bad of Internet Neutrality. In USA, A Republican Federal Communications Commission (FCC) board member in the month of January issued a doomsday warning on his government agency's plan to adopt so-called net neutrality rules. Republican commissioner Ajit Pai pushed back on the decision by holding a press conference to disparage the FCC's 332 page 'secret plan' to take control of the internet that he cautioned would bring about 'adverse consequences to the entire Internet economy.'¹⁸ In USA polls were conducted which reflected the public thought on internet neutrality. Polls last year found that many people were unfamiliar with the concept of net neutrality, but found stronger support for the idea, depending on how the question was worded. One automated poll, for instance, found that eight in ten people agreed with the broad concept that Web providers should not be allowed to block, slow down or discriminate against online traffic, though it did not get into the regulatory structure to enforce those restrictions. The survey polled 800 adults earlier this month and has a margin of error of 3.46 percent¹⁹. Most of the protest for the Internet neutrality in the country is crushed before it is born because of lack of awareness amongst the people with regard to internet neutrality and its uses; advantages and disadvantages. Which is a poor situation to be imagined. A survey conducted in USA proves the above theory true. On asking the people of USA about their feel on Internet neutrality, it was seen that most of the citizens never heard of such principle in their entire life, and when asked about it even when there was an unknown opinion about the fact, still people gave their view, even though there could have been a false fabrication of results. A poll in USA found that 20 percent of Americans supported net neutrality, despite the fact that only 7 percent had heard anything about it.²⁰

Hence, the ball is in our court now, and we need to think whether we want to implement net neutrality or not. The issue emphasised in this paper might not be an issue that has wedged fire in various electronic as well as print media but it is an issue that is being raised by various NGOs and other internet associations over the internet and on other platforms. Being a

¹⁸ Ellie Zolfegharifard, The Daily Mail dated February 26, 2015 also available at <http://www.dailymail.co.uk/sciencetech/article-2970596/How-net-neutrality-impact-FCC-votes-open-internet-rules-s-need-know.html> last accessed on September 1, 2015, 12:06 AM.

¹⁹ Julian Hattam; 'Poll finds scepticism over internet neutrality' dated February 19, 2015 also available at <http://thehill.com/policy/technology/233231-poll-finds-skepticism-on-net-neutrality>; last accessed September 01, 2015, 8:53 PM

²⁰ Gregory Ferenstein; 'Poll: Majority of Americans support net neutrality (if they know what it is)', Venture Beat dated May 18th, 2014 also available at <http://venturebeat.com/2014/05/18/poll-majority-of-americans-support-net-neutrality-if-they-know-what-it-is/> last accessed on September 01, 2015, 9:04 PM

potential user of the internet it is our responsibility to spread the awareness and the good and the ill effects of no internet neutrality to the world. Also, India has not reached to a stage where we can adopt internet neutrality because we still have 363 million people which is roughly 29.5%²¹ of the total population in India, also in India children have hardly any food to eat in this country, hence, bringing out traffic prioritization will make internet unreachable to large number of the poor population living in our country as they won't be able to use it due to heavy charges of internet. We are still at the development process and in a country where there is hardly children deprived of food and shelter, we cannot deprive them more by the way of taking away the internet. It is very evident from the principles of Internet Prioritization that if we implement this, it will only favour the elite class of people who can afford internet at any cost, but for the students who are going to government school and can barely buy books to study will be far from the reach of internet, being it a valuable source of information of the current and the upcoming generation.

Zomato, the online food seller, has echoed, saying that it could not have succeeded if such service plans had existed earlier, enabling its bigger corporate competitors to have exclusive reach to potential customers. In India, Airtel and Reliance have started rolling out such services.²² We need to understand that why we require net neutrality being so oppressive to economic and social growth as well as when it violated the fundamental rights of the people who are using the internet. Internet has a lot of uses. Internet even helps to save lives of people across the globe, the best example is the earthquake in Nepal which ruptured the life in the subcontinent India, Nepal as well as the adjoining areas, during that time it was Facebook, which helped spreading the knowledge across the near and dear ones, with the help of 'safe marking button' that gave a sigh of relief to thousands of people who were not able to contact their relatives due to the massive earthquake. Internet works a soul amongst people and to preserve this soul and the true purpose of the internet i.e. spreading knowledge all over the world we need to have a legislation too that backs internet neutrality in India. Being internet neutrality a concept new to India, there lacks special legislations that favours the same and there is currently no law in India with respect to internet neutrality as of August 2015, for public welfare, good and societal importance. Hence, for internet to be still neutral for all, be it rich or poor, we need to take a stand and spread the awareness of internet neutrality in India and its good and bad features, so that people know what no net neutrality or traffic prioritisation is and how will it affect everyone's lives in the near future if TRAI implements traffic prioritisation in our country. We need to say NO to traffic prioritization in India as in India internet is still taken as a need and not a luxury.



²¹ Mahendra Singh, *New Poverty Line: Rs 32 in Villages and Rs 47 in Cities*, The Times of India, dated July 7, 2014 also available at <http://timesofindia.indiatimes.com/india/New-poverty-line-Rs-32-in-villages-Rs-47-in-cities/articleshow/37920441.cms> last accessed on August 23rd 2015, 3:45 AM

²² Baijayanth Jai Panda, 'The Net advantages of Net Neutrality: Equal access to internet is vital to create new entrepreneurs', The Times of India, dated April 15, 2015, also available at <http://blogs.timesofindia.indiatimes.com/toi-edit-page/the-net-benefits-of-neutrality-equal-access-to-the-internet-is-vital-to-create-new-entrepreneurs/>, last accessed on October 22, 2015.