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NETWORK NEUTRALITY IN INDIA: JUSTIFIED IN LIGHT OF FREE SPEECH? *

ABSTRACT

Internet has become one of the essential necessities for every person in the world. With the increasing amount of users all over the world, it has triggered the debate regarding the implementation of network neutrality particularly in India. As the internet has attained such significance with time, the concept of network neutrality also becomes essential particularly when it involves the freedom of speech and expression under Article 19(1)(a) of the Constitution of India. Thus, it becomes necessary for the government to invest due consideration and caution before adjudicating on the implementation of it in India. It is also important for the government to keep the interests of small start-ups and the consumers before taking a decision on it. It is true that if the concept of network neutrality is implemented without any limitations, the quality of services will diminish and will be misused by the Telecom Service Providers by providing it to only specific competing applications. On the other hand, if it is not implemented, it will lead to internet fragmentation with the Telecom Service Providers taking the form of 'gate keepers' which will put the objective of 'Digital India' in jeopardy. This paper will first discuss the network neutrality debate in India and then will establish that the freedom of speech and expression is substantially connected with network neutrality. Hence, the implementation of network neutrality has to be dealt with extreme caution and a balanced approach must be adopted. Overall, the paper advocates that the government should adopt an approach which takes into account the interests of the consumers and the small start-ups since it is the freedom of speech and expression which is at stake. It must respect the transparency, privacy, neutrality and democratic nature of the internet.

INTRODUCTION

Internet as a medium of information and communication has come a long way since it was introduced. It has evolved the world and communities living within in a way which never existed before. It has undergone development from merely being a source of information for purposes of research to a medium of communication through social networking websites and other sources which minimizes the significance of a telephone and newspapers. It has excelled in promoting innovation through a platform full of opportunities for all the users. Internet has promoted the original ideas more than the capital. It is not owned by a specific individual or the government but is a public resource provided to all those connected to the network.

In India, the department of telecommunication and information technology has been consistently developing since its inception in order to provide a unique digital platform with

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the objective of enhancing innovation and growth of the internet infrastructure and connectivity. On July 1, 2015, Prime Minister Narendra Modi launched a 'Digital India' programme with the objective of transforming India into a digitally empowered society and knowledge economy. It includes improving the internet's infrastructure, connectivity and accessibility to rural areas with high speed networks.

India has been successful in exhibiting its ability to produce innovative business models in mobile telephony required for a developing country. According to a Telecom Regulatory Authority of India (TRAI) report, there are 997 million telecom subscribers and 99.20 million broadband subscribers with the accessibility of internet at a speed of 512 kbps. Moreover, with 300 million subscribers accessing the internet, 93% of them are on wireless media whereas 7% are on fixed wire line media¹.

With the enormous amount of users in India, it has led to increase in data traffic and consumption of bandwidth. Consequently, in order to achieve the demands of data usage Telecom Service Providers (TSPs) have adopted various approaches to increase their revenue from users and Content and Application Providers (CAPs). This has given rise to a debate in India about the implementation of the concept of net neutrality which is not an alien concept in several other countries. In layman's language, network neutrality can be understood as treating all data provided on the network equally without any discrimination or prioritization of any data, speed and price.

This paper will be divided into four parts. First, it will shed light on the concept of network neutrality and will examine the triggering of the network neutrality debate in India by focusing on the arguments advanced by both the proponents and opponents. Second, it will discuss the significance of freedom of speech and expression if network neutrality is implemented in India. This will be achieved by examining various judicial pronouncements where the scope of freedom of speech and expression has been adjudicated upon. Third, it will deliberate on whether or not constitutional obligations can be imposed on private companies such as TSPs by ascertaining the scope of a 'State' under Article 12 of the Constitution. Fourth, it will analyze the debate and suggest a position which can be adopted to simplify the issue of implementation.

CONCEPT OF NETWORK NEUTRALITY

Network neutrality does not have a standard definition around the world. However, various attempts have been made to define the term. The Body of European Regulators for Electronic Communications (BEREC) have defined 'network neutrality' as equal treatment of all electronic communication passing through a network. It has to be treated equally irrespective of content, application, service, sender's address and receiver's address².

Professor Tim Wu who is responsible for origination of the word 'Net Neutrality' has defined it as a network design principle. The idea being that a useful public information network aims to treat all content, websites and platforms equally³ in order to provide every kind of information and application. According to the TRAI, net neutrality is understood as all internet traffic being treated equally by TSPs irrespective of type, origination of content or methods which are used to provide packets. All points in a network must connect to all other points and

¹ Department of Telecommunications, Ministry of Communication and Information Technology, *Network Neutrality*, Pg 9, May 2015.

² Body of European Regulators for Electronic Communications, *BEREC Guidelines on Transparency in the scope of Net Neutrality: Best practices and recommended approaches*, Pg 7-8, BoR (11) 67, December 2011

³ Tim Wu is an American researcher, considered to have coined the expression "Net neutrality". Tim Wu's website, "Network Neutrality FAQ": http://timwu.org/network_neutrality.html

the service providers must be in a position to provide traffic without any discrimination with respect to speed, access, or price⁴. In other words, net neutrality can be defined as all internet traffic being treated equally.

According to the World Wide Web Foundation, net neutrality is understood as each packet of data which is channelized must be treated equally by the network, without censorship or prioritization to advance any political or business reason⁵. Moreover, negative measures such as blocking of content and positive incentivization such as prioritization of data or zero rating of specific content must be refrained from.

Federal Communications Commission, the telecom regulator in USA, has defined net neutrality or open internet as the platform where people have the freedom to make their own choices regarding applications and services and people can decide the content they wish to access or share⁶. Net neutrality does not have a fixed accepted definition around the globe however, its general meaning is that TSPs can charge consumers only once for access to internet without any discrimination with respect to service providers and the content provided.

NETWORK NEUTRALITY IN PRACTICE (USA AND INDIA)

Before examining the views put forth by the proponents and opponents of net neutrality in India, it would be essential to examine a situation where the concept has been already adopted. In USA, American Federal Communications Commission (FCC) enacted the Open Internet Order of 2010 which consist of regulations for establishment of the net neutrality concept. However, this order came up for consideration in the case of *Verizon v FCC*⁷. The Open Internet Order provided for obligations on the TSPs for transparency, no blocking and no unreasonable discrimination. The requirement of no blocking and no discrimination were removed by the United States Court of Appeals on the basis that TSPs do not qualify as common carriers in accordance with law.

According to the Court, a common carrier is an entity which has the ability to transport persons or goods in exchange for a fee. The instances are shipping or bus companies. Such an entity becomes a common carrier by receiving a license subjected to a condition of non-discrimination. A common carrier has an obligation not to refuse an individual who is willing to pay the required fees unless there is a compelling reason⁸. Thus, the Court rejected the contention that TSPs must be treated as common carriers.

If we look at the system existing in India, the TSPs are state owned as well as privately owned. Examples of state owned are BSNL and MTNL whereas private owned are Airtel, Spectranet, Reliance, Sify etc. Unlike other countries, India have not implemented any network neutrality laws yet. The Telecom Regularity Authority of India (TRAI) while issuing the license for Unified Access Service, endorses the principle of non-discrimination however, does not implements it. The reason behind is that the Information Technology Act (2008) does not provide for any regulations regarding Internet and does not even prohibit the TSPs from providing the internet services in a way which will promote their business interests.

⁴ Telecom Regulatory of India, Government of India, *Consultation paper on Regulatory Framework for Over the Top (OTT) services*, Pg 76-77, 27th March, 2015

⁵ World Wide Web Foundation, *Net Neutrality in India: A submission to the Department of Telecommunications, Ministry of Communications and Information Technology*, Pg 3, 1st May 2015, <http://webfoundation.org/wp-content/uploads/2015/05/Net-Neutrality-India-Submission-to-DoT.pdf>

⁶ Telecom Regulatory of India, *Supra note 5*, at Pg 77.

⁷ *Verizon Communications Inc. v Federal Communications Commission*, 740 F.3d 623, (D.C. Cir. 2014)

⁸ *Id.*

Due to increase in internet users leading to congestion and bandwidth difficulties, the TSPs have adopted several approaches including regulation of services by intervention. According to a survey, 10% mobile users consumes 90% of operators' bandwidth. At an international level, 70% of the bandwidth gets consumed for streaming of videos and in India it has reached at 36%⁹. These statistics have led the TSPs to adopt strategies and measures to resolve the capacity issues.

THE DEBATE

Net Neutrality has been a topic of discussion around the world. It has been linked with the right to freedom of expression and the right to information. The primary argument for the implementation of net neutrality has been with regard to new competitors who will have a fair competition with sufficient profits. It has also been argued that when a service provider does not adhere to open internet and provides preferential treatment, it will lead to unfair competition with new competitors being the victims as the accessibility is restricted. Such preferential treatment of the services will lead to uncompetitive market and disrupt the aim of innovation of internet¹⁰.

On the other hand, it has been argued that the principle of net neutrality would not be consistent with sound economic management of the internet. Innovation in services can also be achieved by responding to the price put forward by the service providers for instance, broadband producers. As the demand for 'fast lane' internet has been increasing consistently increasing in specific sectors, this makes the content providers to prioritize the delivery of the content. One of the instances of such demand is of telemedicine¹¹.

It has been argued that the incumbent application of net neutrality will reduce the ability of the providers to offer tiered services to third parties¹². For instance, TSPs must not be deprived of providing higher quality of services (QoS) to business consumers or home workers by the rules. Therefore, the real question relates to the effectiveness of over-arching telecom regulatory regime and the ability to remove discrimination and ensure that competition prevails in retail markets where there is wholesale market power.

Another aspect which needs to be considered when examining the debate is the internet traffic management. Basically, there are two forms of traffic management¹³.

a) 'Best-efforts' internet access: Under this form, TSPs provides all traffic on equal terms. This leads to the ideal situation of 'open internet' where no services are obstructed, although it may need to be managed in case of congestion.

b) Managed Services: Under this form, TSPs prioritize data traffic in accordance with the value fixed to it. This may amount to a discrimination however; it is considered to be efficient. People who oppose the implementation of net neutrality have argued that 'Best efforts' form cannot classify as neutral since different data and applications requires different network quality. Internet based on this form favors real time communications traffic over non-time sensitive traffic.

The opponents of net neutrality particularly the Internet Service Providers have argued that since they will not be able to control the Content and Application Providers (CAPs) and consequently will be unable to secure a fair share of the revenue obtained by the CAPs, they

⁹ Telecom Regulatory of India, *Supra Note 5*

¹⁰ *Id.* at Pg 78

¹¹ *Id.* at Pg 83

¹² *Id.*

¹³ *Id.*

will be dispossessed of the resources and incentive to increase and improve the functioning of the networks resulting in detriment of the consumers¹⁴.

However, the proponents have countered by saying that if any attempts are made to limit the consumer choice or innovation will be harmful itself for Internet Service Providers since the increasing demand for bandwidth content would eventually lead to increase in demand for high speed internet¹⁵.

Another aspect which needs to be considered when following the above approach is the bandwidth which is not infinite. It can be said that a person who wants to use Skype and requires a lot of bandwidth immediately should pay a price which is higher than the price fixed for normal surfing on the internet. However, proponents of net neutrality have said that he should not be given priority or charged higher. Moreover, the traffic must be considered in the same way as any other traffic based on best efforts¹⁶.

On the other side, the data packets do not have the same origination and have different characteristics. Different data packets have different requirements and consequently are entitled to differential treatment¹⁷. The approach of equal treatment cannot be implemented effectively due to different types of data which leads to different treatment. The concept of net neutrality has limitations and exceptions have to be made within the concept. The debate is significantly about balancing between the two views.

FREEDOM OF SPEECH AND EXPRESSION

The debate of network neutrality has been largely connected to the right to freedom of speech and expression. Internet as a platform have enabled people to speak freely, share and communicate. It has facilitated debate and dialogues where millions of people can speak at the same time without any intrusion. The internet provides an equal opportunity for expression of opinions and views without any discrimination based on age, caste, creed, religion, wealth or gender. In a democratic country like India where the fundamental rights are expressly recognized and forms part of basic structure of the Constitution, this freedom of expression on the internet is not alien to being significant element of public policy.

Going back to the history where the mass media was the substantial mechanism to express an opinion, it did not provide as much freedom as given by the internet. In order for an opinion to be expressed through this medium, it had to be supervised initially and if seen fit, would be allowed. On the other hand, internet is a public platform where such supervision is not a reasonable possibility. However, it is possible in situations where the service providers take the form of 'gate keepers' where they have control over the internet traffic to be channelized. This will hinder the constitutional rights and freedoms if not done in good faith. Thus, it becomes incumbent on the State to explicitly state the rights and limitations of the TSPs with regard to the traffic channelized.

Today, internet has become the most significant and primary medium of expressing an opinion or view and participate in activities such as governance. It seeks to protect the limitless freedom provided by legal recognition under the Constitution as a fundamental right. It cannot be said that such recognition is being over-ambitious, as internet has the ability to influence the

¹⁴ Gulati, A. G. 2015 '*The Net Neutrality Debate in the Indian Context, with a Pinch of Salt*', CIRC Working Paper No.13. New Delhi: CUTS Institute for Regulation & Competition.

¹⁵ *Id.* at Pg 1

¹⁶ *Id.* at Pg 14

¹⁷ *Id.*

course of politics and thus, it has become a necessity to protect it from any misuse for the preservation of the freedoms for the citizens in the long run¹⁸.

With the introduction of various social media and advancement in technology, the concept of freedom of expression has increased in its scope. Before the formulation of any policy, it is a necessity that the freedom of expression must be adhered to completely. It is important to note that the freedom of speech and expression is not absolute and reasonable restrictions have been placed under Article 19(2) of the Indian Constitution¹⁹ in the interests of sovereignty and integrity of India, the security of the State, friendly relations with foreign countries, public order, decency or morality or in relation to contempt of court, defamation or incitement to an offence. However, these restrictions over the freedom can only be enforced by the Government in an accountable manner. Thus, it has been recommended by the Department of Telecommunication (DOT) Committee that the rights of a user must be ensured and protected in order to prevent the TSPs from restricting their freedom to send, receive, display, post any legal content, application or service or restrict lawful internet activity²⁰.

SCOPE OF FREEDOM OF SPEECH AND EXPRESSION

The scope of freedom of speech and expression has come up for adjudication before the judiciary of various countries. In the case of *Marsh v Alabama*²¹, the Supreme Court has held that a state action will be initiated upon a private actor actions as the state has delegated a conventional state function to a private entity or the state has approved, encouraged or facilitated private conduct. It also observed that a privately owned town when performs an exclusive public function and thus, freedom of speech and religion cannot be banned as it is violating the Constitution²². Moreover, private entity is under an obligation to preserve this right when controlling a public infrastructure or when performing a public function. This idea of public obligations on private entities if they discharge public functions has been recognized by Indian Supreme Court as well in the judgment of Justice Mohan in *Unni Krishnan v State of Andhra Pradesh*²³.

These conceptions are not alien with the right to freedom of speech and expression in India. In the case of *Sakal Papers v Union of India*²⁴, the Supreme Court observed that that Article 19(1)(a) of the Constitution did not allow the government to impose measures which will violate the right of certain people in order to permit the others to express²⁵. In this case, the Court invalidated newspaper regulations which the government was defending on grounds of opening up of market and permitting smaller players to compete. Accessibility to newspapers has been recognized as a right under Article 19(1) and the Court observed that the most common reason of people in not purchasing newspapers is the cost of newspaper and the inability of the household to spare the necessary amount. Thus, the right to access newspapers at reduced prices is an inherent part of Article 19(1)(a).

In another landmark case of *Bennett Coleman v Union of India*²⁶, even though the approach adopted by the Supreme Court was similar to the above precedent however, it had to deal with a strong dissent from Justice Mathew. In his dissent, Justice Mathew expressed that a right to express an idea is nugatory unless there is a medium to express it. It went on to hold that

¹⁸ Department of Telecommunications, *Supra note 2* at Pg 42.

¹⁹ India Const. art. 19, cl. 2.

²⁰ Department of Telecommunication, *Supra note 2* at Pg 43.

²¹ *Marsh v Alabama*, 326 U.S. 501, (1946)

²² *Id.*

²³ *Unni Krishnan v State of Andhra Pradesh* 1993 AIR 2178 (India).

²⁴ *Sakal Papers v Union of India*, 1962 AIR 305, (India)

²⁵ *Id.*

²⁶ *Bennett Coleman v Union of India*, 1973 AIR 106 (India)

interpretation to Article 19(1)(a) must be adopted which recognizes the idea that imposing constraints on the governments in order to strengthen free speech is incomprehensible, if the private entities have the ability to restrain access to free speech. Such prohibition on government is of only significance when the Constitution provides a medium for expression of views and opinions.

He also observed that if there is a scheme which has been initiated for the distribution of a commodity such as newsprint in order to enhance the free flow of ideas to the market from whatever source possible is a step towards strengthening and advancing the freedom of speech. Moreover, if there is a scheme with an objective of preventing an oligopoly from being established in the market, it cannot be challenged on the grounds that such scheme includes a regulation of the press which would violate the freedom of speech²⁷.

It is significant to note here that the Supreme Court over the years, has not been consistent with their stance regarding the freedom of speech and expression. The case of *Union of India v The Motion Picture Association*²⁸ is an instance of a contradictory stance wherein certain provisions of the Cinematograph Act provided for certain compelled speech on moviemakers while exhibiting their movies, with the view to earmark a small portion of time of this entertainment medium for the purpose of showing scientific, educational or documentary films or news films which has to be understood in the context of promoting dissemination of ideas, information and knowledge to the masses for there to be an informed debate and decision making on public issues. The Court validated these provisions and held that these provisions were designed to advance the free speech and expression and not to curtail it²⁹.

Lastly in the case of *LIC v Manubhai D. Shah*³⁰, the Court upheld a right of reply in an in-house magazine, as fairness requires both the views to be presented before the readers in order to enable them to make their own conclusions. There was no justification for refusing the publications³¹. It also observed that the respondent's fundamental right of speech and expression enabled his views on the subject to be reached to those who read the magazine in order for it to understand the complete picture before them and not only the one side of the story. It held that it is a requirement of Article 19(1)(a) to structure the public sphere in an equal and inclusive manner.

The objective behind examining these judicial pronouncements on freedom of speech and expression was to understand the true nature of it in order to impose limitations on TSPs who have replaced the government in controlling the mediums of expressions. Thus, it is clearly evident that the TSPs can not only be subjected to right to free speech and expressions obligations but also requires them to keep internet free and inclusive in the public sphere.

DIVERSITY OF SOURCES OF CONTENT

The diversity of sources of content on the internet is important for understanding the concept of freedom of speech. Lack of net neutrality will lead to situations where the content of one CAP or speech of an individual would be more prioritized than others thus, not only hindering right to equality under Article 14³² but also right to freedom of speech and expression under Article 19(1)(a) of the Constitution.

²⁷ *Id.*

²⁸ *Union of India v The Motion Picture Association* (1999) 6 SCC 150 (India)

²⁹ *Id.*

³⁰ *Life Insurance Corporation of India v Manubhai D. Shah*, 1993 AIR 171 (India)

³¹ *Id.*

³² India Const. art. 14.

Diversity of sources of content has been understood to be a part of the Article 19(1)(a) by the Supreme Court in *Cricket Association of Bengal*³³ in 1995. Both access and diversity of sources on the Internet has been recognized as a part of Article 19(1)(a).

IMPOSITION OF CONSTITUTIONAL OBLIGATIONS ON PRIVATE ENTITIES

Before analyzing the question whether TSPs will violate the fundamental freedom of speech and expression under the Constitution of the citizens if they do not effectively implement net neutrality, it is necessary to understand whether the obligations under the Constitution can be imposed on those TSPs which are privately owned. It is established that the fundamental rights can be enforced against the State however, it is not clear whether they can be enforced between two private parties. As far as Article 19 is concerned, it cannot be enforced between two private parties.

Article 12³⁴ states that “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”³⁵. The term ‘other authorities’ has been quite ambiguous and there has been no fixed meaning attached to it by the Supreme Court for the purposes of the Part III of the Constitution.

In the case of *Pradeep Kumar Biswas v Indian Institute of Chemical Biology*³⁶ (2002), the Constitution bench framed the definition of the term as “the question whether an authority is a State would be ascertained in each case in light of the facts established, and whether the entity is financially, functionally and administratively dominated by or under the control of the Government”. The control must be attached to concerned authority and must be pervasive. If these elements do exist, then such entity would come under the purview of Article 12³⁷. However, when the control is only regulatory by virtue of statute or otherwise, it would not be considered as a State. This definition is under inclusive and does not include the privately owned TSPs because they are not financially, functionally and administratively controlled by the State.

The case which must be considered to bring the TSPs under the ambit of ‘state’ is the *Unnikrishnan v State of Andhra Pradesh*³⁸ which was regarding the constitutionality of high capitation fees charged by the private educational institutions. The bench though did not rule on the issue whether Article 14 applied to private educational institutions however, justice Mohan observed “What is the nature of functions discharged by these institutions? They discharge a public duty. If a student desires to acquire a degree *for example*, in medicine, he will have to route through a medical college. These medical colleges are the instruments to attain the qualification. If, therefore, what is discharged by the educational institution, is a public duty that requires it to act fairly. In such a case, it will be subject to Article 14.”³⁹

On 24th March 2015, the landmark case of *Shreya Singhal v Union of India*⁴⁰ was adjudicated by the Supreme Court of India where they invalidated section 66A of the Information Technology Act (IT), 2000 on the grounds of being constitutionally invalid. Section 66 A provided punishment for sending offensive messages through communication services. The

³³ The Secretary v Cricket Association of Bengal 1995 AIR 1236 (India)

³⁴ India Const. art. 12.

³⁵ *Id.*

³⁶ Pradeep Kumar Biswas v Indian Institute of Chemical Biology (2002) 5 SCC 111 (India)

³⁷ *Id.*

³⁸ Unni Krishnan v State of Andhra Pradesh 1993 AIR 2178 (India).

³⁹ *Id.*

⁴⁰ Shreya Singhal v Union of India 2015 5 SCC 1 (India)

Court upheld the sacrosanct nature of the freedom of speech and expression on the internet and held that Section 66A of the IT Act violated the grounds mentioned under Article 19(2) of the Constitution⁴¹. The judgment generated a lot of debate as it preserved the internet freedom of the citizens.

Even though the case of Pradeep Kumar Biswas ruled against the application of the Constitution on private entities, the judgment delivered by Justice Mohan takes a different view. The obligations of the Constitution will be attracted on private entities if they are performing public duties and would delineate the uncontrolled nature of private entities. The nature of obligation would depend on the nature of the function exercised by such entity. Education being a public activity requires it to be open and non-discriminatory. Thus, private educational institutions are under an obligation to adhere to the principle of equality provided under Article 14. Therefore, it has become increasingly possible to impose obligations on private entities including the privately owned TSPs to the norms under the Constitution even if they do not come under the purview of 'State' under Article 12 of the Constitution.

ANALYSIS

There have been many valid points advanced by both proponents and opponents of net neutrality. However, the side which has more essential and significant arguments particularly for the development of the digital world will take the form of law in India. Though I am in concurrence with certain views of TSPs and stakeholders, I am still of the view that network neutrality as a concept is a significant one and cannot be discarded without giving due consideration to it by the government. The reason behind is that the fundamental freedom of speech and expression has been put at stake which cannot be overlooked in any circumstance.

Even though it is true that with the implementation of network neutrality, the incentive for making an investment in the telecom market by the providers will be less if freedom is given to the TSPs to take action as they deem fit, it is not sufficient enough for justifying non-implementation of network neutrality. In fact, it will dissuade the new entities to invest in the digital world and would certainly not increase the competition for the development of the infrastructure as the established TSPs would be in a position to have absolute control over the market with no due regard to small businesses and start-ups. Such uninhibited freedom would increase the possibility of misuse of power and discrimination which would ultimately have a direct impact on the consumers.

While it may seem unfair to the TSPs where they will be compelled to make an investment and support CAPs without receiving their share of profits from the CAPs, but if they are not required to do so they will take the form of a 'gatekeeper' and would restrict the accessibility to internet to only those who are being able to afford it. Only established networks will be available to access content negating other sources and unestablished entities. This is where net neutrality will come into play which will monitor the activities of the TSPs and will ensure that preferential treatment and discrimination are not part of the digital world.

It is not agreeable that the fast lane internet will compel the providers to prioritize the content due to bandwidth limitations and different requirements of different data packets. The objective behind implementation of net neutrality is to ensure that no prioritization of content is done and if this is not adhered to, the internet would not be able to achieve innovation and would instead result in inefficiency in the functioning of the market. It may be possible that the principle of net neutrality would not lead to sound economic management of the internet however, with uniform prices irrespective of the bandwidth it would strengthen functioning of the internet.

⁴¹ *Id.*

Moreover, it will preserve the nature of principle of equality under Article 14 of the Constitution.

It has become incumbent on the government to give due consideration to net neutrality in light of small startups and consumers' interests. With regard to the new entities in the market, it would be extremely unjust not to give them a fair opportunity to establish themselves in the digital market. This would not be conceivable if net neutrality is not mandatorily implemented in India. With such an enormous number of internet users in India, internet has become one of the most important issues and cannot be disregarded in a haste manner particularly when it is dealing with the sacrosanct nature of freedom of speech and expression.

It has already been established above that the freedom of speech and expression includes the freedom on the internet as well. Moreover, it is possible to impose the obligations of the Constitution on the privately owned TSPs. TSPs do not enjoy absolute freedom when it comes to regulation of the internet as they have taken the role once completely controlled by the government. The diversity of sources of content has been recognized to be a part of the Article 19(1)(a) thus, in the absence of net neutrality TSPs will restrict the access of content to only specific providers which are established and recognized. Moreover, it would not be accessible for those who cannot afford it. Therefore, non-implementation of net neutrality will violate the freedom of speech of the users as the TSPs will be in a position to dominate, misuse and serve their private interests.

CONCLUSION

Internet is the most essential platform for information and exchange of opinion and views. India should value an open internet just as much as it values the fundamental freedom of speech and expression. Net neutrality debate is significant as it will determine the future of the digital market in India. The debate is essentially about freedom and equality and does not have a definite solution. It is essential for the government to take into consideration views of different stakeholders whether being in support of it or not and must compare their approach with the approaches adopted by various other countries. It must be comprehended that net neutrality as a concept is complex and a complicated process. If it is absolutely implemented without any exceptions, it would not be possible to provide Quality of Services(QoS). This may motivate TSPs to use the element of QoS to amend the competition existing in the market by providing QoS to only specific competing applications. If freedom is given to the TSPs to provide QoS and consequently impose a charge for it, it may diminish the quality of baseline services and demotivate them to expand the infrastructure of their networks.

On the other hand, if TSPs are given absolute freedom to regulate the internet market, it would create a situation of internet fragmentation. TSPs will be in a position to misuse it and may decrease the speed of 'normal lane' traffic in order to force the CAPs to make payment for the 'fast lane' traffic which will have a direct impact on the innovators and small CAPs. It can be said that strict application of net neutrality and no regulation at all do not contemplate an effective approach and are instead flawed. Discrimination being completely banned will restrict the evolution of the network whereas no limitations will lead to exclusion.

The government must adopt an approach which addresses the concerns of the citizens as whichever approach the government may decide to take, it will ultimately have a substantial impact on right to freedom of speech and expression of the citizens. It cannot be overlooked and should not adopt an approach which completely violates their freedom. Overall, the government needs to engage and devote a lot of thinking taking into account different perspectives of the shareholders in order to realize the true nature of fundamental freedom of

speech and expression under Article 19(1)(a). It must uphold transparency, privacy, neutrality, and democratic nature of the internet.



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