

JOINT LETTER AND COUNTER-COMMENTS ON THE TRAI'S CONSULTATION PAPER ON DIFFERENTIAL PRICING FOR DATA SERVICES

This document contains joint submissions made by the signing organisations, experts, and other individuals towards the TRAI's ongoing consultation on differential pricing for data services. It represents common submissions on facts and principles - and consolidated responses to previously filed comments - so as to aid the TRAI. The joint submission supplements any individual counter-comments filed by different signers.

Preamble

We submit that the open Internet is a public access good as also recognized by the Indian Government at various global fora.¹ The Internet is a universal platform made possible by the usage of spectrum and the right to way facilitated by government agencies. Spectrum is a public resource, as was held by the Supreme Court of India in the *Bengal Cricket Association case*², and can therefore only be used for the purpose of furthering general public good, and must exclude any commercial considerations in deciding upon its usage. Commercial considerations include any private interest, and are not restricted to instances of asset transfer. Spectrum, a national resource, is owned by the people of India, and managed under the stewardship of the government. No entity other than the people of India can be allowed to influence decisions on its usage and management.

We support and affirm the objective of increasing Internet access to the entire population and adding diversity to the online ecosystem. The right to a diverse media

¹ Government of India's initial submission to Global Multistakeholder Meeting on the Future of Internet Governance ¶ 1 (April 23-24, 2014), available at <http://content.netmundial.br/files/138.pdf>; Statement by Mr. Santosh Jha, Director General, Ministry of External Affairs, at the First Session of the Review by the UN General Assembly on the implementation of the outcomes of the World Summit on Information Society in New York, ¶ 8 (July 1, 2015), available at: https://www.pminewyork.org/adminpart/uploadpdf/74416WSIS_stmnt_on_July_1,_2015.pdf.

² *Secretary, Ministry of Information & Broadcasting, Govt. of India v. Cricket Association of Bengal*, (1995) 2 SCC 161.

environment has been held by the Supreme Court to be an integral part of the Right to Free Expression under Article 19 of the Constitution of India³, upholding the internationally recognized principle enshrined in Article 19 of the International Covenant on Civil and Political Rights⁴ to which India is a signatory, and whose provisions have been implemented by our courts⁵.

To further the aim of creating a diverse and universal Internet, which is open and freely accessible, we submit that any situation of gatekeeping the Internet or a section thereof needs to be strictly and categorically prohibited⁶.

We would put on record our fears regarding the Internet evolving into a system as is prevalent in the digital television market, where content creators are forced to enter individual agreements with Service Providers in order to reach consumers. There is a high transaction cost involved in this process in order to transmit content to users of the medium. This is antithetical to the spirit of the Internet which envisions a horizontal environment that is universally accessible, with little or no transaction costs for everyday users to become content providers and any attempt to charge access fee will perpetuate the cable TV model in the open Internet context, which will be counter-productive and harmful.⁷

³ *Secretary, Ministry of Information & Broadcasting, Govt. of India v. Cricket Association of Bengal*, (1995) 2 SCC 161, ¶¶ 201(3)(a) and (b).

⁴ International Covenant on Civil and Political Rights, art. 19, (Dec. 16, 1966), 999 U.N.T.S. 171.

⁵ See also Article 51(c), Constitution of India, 1950.

⁶ “[...] The Committee, therefore, is of the firm opinion that content and application providers cannot be permitted to act as gatekeepers and use network operations to extract value, even if it is for an ostensible public purpose. Collaborations between TSPs and content providers that enable such gatekeeping role to be played by any entity should be actively discouraged. [...]”: Department of Telecom, Ministry of Communications and Information Technology, Government of India report on Net Neutrality, p. 70, ¶ 12.8 (May 2015), available at [http://www.dot.gov.in/sites/default/files/u10/Net_Neutrality_Committee_report\(1\).pdf](http://www.dot.gov.in/sites/default/files/u10/Net_Neutrality_Committee_report(1).pdf).

⁷ Robin S. Lee & Tim Wu, *Subsidizing Creativity Through Network Design: Zero-Pricing and Net Neutrality*, 23(3) J. ECON. PERSP. 61, 69 (2009); Susan P. Crawford, *The Looming Cable Monopoly*, YALE L. & POL’Y REV. INTER ALIA (June 1, 2010), http://ylpr.yale.edu/inter_alia/looming-cable-

We affirm that there is comprehensive justification for the enactment of bright line rules to protect net neutrality in India. The same has been explained thoroughly in the body of this counter-comment, as well as in the comments submitted to TRAI by the undersigned parties.

We submit that the regulator should frame comprehensive bright line rules that protect Net Neutrality at the earliest. Further, TRAI must in the interim decide on the issue of differential pricing and zero-rating under the Telecom Tariff Order⁸ and parallelly frame rules regarding the same. This process must be soon expanded to frame rules on outlining core principles of net neutrality and enforcement tools to combat network discrimination so as to form a comprehensive Open Internet regime for India. We submit that it is however insufficient to merely look at the issue of differential pricing from the perspective of harm to competition.⁹ There are a variety of interests at play, including those of end users, and their freedom of expression. The principles of maintaining a plural and diverse media also play a role in the forming of the relevant policy on this issue. Therefore, a regulatory authority that looks at a variety of principles applicable must necessarily take the decision on this policy. It is worth noting that the Competition

[monopoly](https://medium.com/backchannel/less-than-zero-199bcb05a868-lq308jucl); Susan P. Crawford, *Zero for Conduct*, MEDIUM (Jan. 7, 2015), <https://medium.com/backchannel/less-than-zero-199bcb05a868-lq308jucl>; Nivedita Mookerji, *DTH pricing teaches us why net neutrality is important*, BUSINESS STANDARD (April 14, 2015), http://www.business-standard.com/article/opinion/dth-pricing-teaches-us-why-net-neutrality-is-important-115041400481_1.html; Vanita Kohli-Khandekar, *Net neutrality - Lessons from cable TV*, BUSINESS STANDARD (April 14, 2015), http://www.business-standard.com/article/opinion/vanita-kohli-khandekar-net-neutrality-lessons-from-cable-tv-115041401043_1.html; Raghav Bahl, *After My Cable Massacre, I Punch For Net Neutrality*, QUINT (April 16, 2015), <http://www.thequint.com/opinion/2015/04/15/after-my-cable-massacre-i-punch-for-net-neutrality>

⁸ The Telecommunication Tariff Order, 1999, available at <http://tinyurl.com/tto1999>.

⁹ Barbara van Schewick, *Network Neutrality and Quality of Service: What a Nondiscrimination Rule Should Look Like*, 67 STAN. L. REV. 1, 2, 54-64 (2015); Letter to the US Federal Trade Commission by 36 leading scholars on why only the US Federal Communications Commission can protect the Open Internet, (January 29, 2015), available at <https://cyberlaw.stanford.edu/downloads/ProfessorLetterToFTC-20150129.pdf>.

Commission of India has also asked TRAI to take a stand regarding the issue by framing rules for the same¹⁰.

We submit that any action taken at this point needs to make the open Internet more accessible to Indian citizens, and does not hamper or dilute this access. This means that content providers should face lesser hurdles to make their material and services available to users. Users should not face commercial discrimination or regulatory hurdles to become content creators and reach the whole of the Internet with their content. And all users must enjoy the same kind of access to the same open Internet.

We want to ensure that the next billion users are able to enter a free and open Internet. We believe that this cannot co-exist with the proliferation of gatekeeper model zero rating arrangements where limited sets of content determined by the service provider is made available to users. Such practices will result in the new generation of users experiencing only a deformed Internet, without the freedom for users to roam and access content created anywhere across the globe. Their access will be limited to what the available service providers deem to be necessary or appropriate to make available to the users.

We submit that it is crucial to approach these issues from an understanding of a rights-based approach. The focus of the arguments needs to be on the users and their rights with respect to being entitled to a free and open Internet, unencumbered by the undue influence of service providers and content providers.

¹⁰ PTI, *Competition Commission says TRAI needs to take a stand on Net Neutrality*, INDIAN EXPRESS (May 21, 2015), <http://indianexpress.com/article/technology/tech-news-technology/trai-needs-to-take-a-stand-on-net-neutrality-cci/>.

Question 1: Should the TSPs be allowed to have differential pricing for data usage for accessing different websites, applications or platforms?

The system of differential pricing as described in the TRAI Consultation Paper¹¹ is based on classification of users based on the specific content that they access. This is not a valid basis for classification of users as it discriminates between different content providers. While there is a much-publicized trend of differential pricing employed across different sectors, these cases are those where different services are priced differently, or where it is based on extent of services used.

The need to maintain the status of the open Internet as a horizontal space is essential, because users of the Internet are consumers as well as creators of content. Price differentiation creates different streams of the Internet and restricts users to a walled off division of the Internet, limiting user choice and freedom to use services and spread content throughout the open Internet.¹²

The Government has an obligation to ensure that people are not trading away their rights

While consumer choice indeed plays an important role in the shaping of the Internet and the infrastructure supporting it, it is however the duty of the state to ensure

¹¹ Telecom Regulatory Authority of India, Consultation Paper on Differential Pricing for Data Services. (Dec. 9, 2015), available at <http://www.trai.gov.in/WriteReadData/PressRelease/Document/PR-70-09122015.pdf>.

¹² Timothy Wu and Lawrence Lessig, Ex Parte Letter at pp. 2, 7, Appropriate Regulatory Treatment for Broadband Access to the Internet over Cable Facilities, CS Docket No. 02-52 (Aug. 22, 2003), available at <http://apps.fcc.gov/ecfs/document/view?id=6514683885>; Brief Amicus Curiae of Professors Jack M. Balkin, Jim Chen, Lawrence Lessig, Barbara van Schewick, & Timothy Wu Urging that the FCC's Order Be Affirmed at p. 18, Comcast Corp. v. FCC, 600 F.3d 642 (D.C. Cir. 2010) (No. 08-1291), available at <http://cyberlaw.stanford.edu/files/publication/files/vanschewick-2009-amicus-brief.pdf>; BARBARA VAN SCHEWICK, INTERNET ARCHITECTURE AND INNOVATION 57-81, 277 (2010); Barbara van Schewick, *Network Neutrality and Quality of Service: What a Nondiscrimination Rule Should Look Like*, 67 STAN. L. REV. 1, 66 (2015); Susan P. Crawford, *Zero for Conduct*, MEDIUM (Jan. 7, 2015), <https://medium.com/backchannel/less-than-zero-199bcb05a868-lq308jucl>.

that no citizen is in a position to trade away their fundamental rights as guaranteed under the Constitution of India. A plural media with diverse sources is part of the right to receive information, enshrined in Article 19 and ensuring adherence to net neutrality to preserve the open Internet plays a crucial role in protecting this right.

Harm to Competition, Users, and Free Speech

As has been mentioned in various comments, including of the signatories, the creation of a subset of the internet with differential pricing harms competition and innovation, as a significant portion of users are likely to remain within that sphere of the internet which is zero-rated, only. Users will be restricted in their choice of services that they use. Content providers will be cut off from the user-base who are trapped within the restricted set of zero-rated services, and cannot compete with the services that do have access to these users. Users themselves often become creators in the prevailing structure of the Internet where most interactions work both ways across the entire consumer-base. This structure needs to be preserved, as it is also crucial to how the Internet supports free speech. The open Internet remains the single largest platform, which allows users to concurrently be content creators, which sets it apart as a service.

The thirty-third amendment to the Telecommunication Tariff Order makes clear the competition harms caused by differential pricing. A service provider with an influential position in the market will be able to pressurize competitors in terms of the prices imposed on customers and those paid into the upstream market as well.

We would also point out that a case-by-case basis for deciding the Indian policy on differential pricing would not be appropriate or effective. This is because there is not nearly enough regulatory infrastructure to efficiently deal with the various instances of transactions and interactions that a market as expansive and diverse as the Internet involves. The first issue would be the burden on small Internet companies (a market where there is a large proportion of startups) to approach the regulatory authorities. This burden would cause harm to innovation and stall the growth of the Indian industry, and especially growing companies for whom this kind of regulatory burden is all the more

severe. The other issue is that the variety of interests that are at play in this situation if the principle is formed through a disjointed and ad hoc set of processes. The interests of the Indian public, the large user base of the Internet, and the interests of free expression, which are central to the structure of the open Internet, can only be successfully captured by a principled policy on the issue of differential pricing.¹³

We reiterate that an effective network neutrality regime requires bright-line rules prohibiting all forms of access fees, not just fees paid in return for prioritization and application-specific discrimination. It needs to include a non-discrimination rule that applies to all forms of differential treatment and bans discrimination based on identity or type of the content or application accessed by the user. There should be an explicit ban on any type of zero-rating in exchange for edge-provider payment, and on zero-rating of selected applications within a class of similar applications, as well as zero-rating of all applications in a class without charging edge providers.

Question 2: If differential pricing for data usage is permitted, what measures should be adopted to ensure that the principles of non-discrimination, transparency, affordable Internet access, competition and market entry and innovation are addressed?

There should be bright line rules prohibiting differential pricing for data usage. We believe that any consideration of initiation of zero-rating services, if at all explored as an option, must be restricted to emergency services provided by the state. Further, any allocation of the power to provide zero-rating services needs to be carried out under legal conditions of complying with principles of administrative fairness and the rules applicable to public procurement. A failure to comply with these standards will result in the service provider being liable to challenge in court by any citizen of India.

We reiterate that we are opposed to any form of differential pricing as described in the Consultation Paper. However, when discussing the idea of zero-rating in principle,

¹³ Barbara van Schewick, *Network Neutrality and Quality of Service: What a Nondiscrimination Rule Should Look Like*, 67 STAN. L. REV. 1, 69-80 (2015).

a necessary requirement for a legitimate deployment of this scheme would be a legally valid basis for classification of consumers. This however is lacking in the models discussed in the Consultation Paper, making any further discussion on the issue a moot point.

Question 3: Are there alternative methods/technologies/business models, other than differentiated tariff plans, available to achieve the objective of providing free Internet access to the consumers? If yes, please suggest/describe these methods/technologies/business models.

Some of the submissions to the current consultation paper assume that telecom companies are the only way to achieve the objective of universal internet connectivity, and also that zero rating is the primary method of fulfilling this objective. However, an important factor to keep in mind is that the existing telecom companies are not the only channels of increasing Internet access. The models of differential pricing and a limited set of online applications are precisely aimed at helping existing telecom and internet market leaders to find a way to expand by compromising on the rights of citizens to access information. The discourse has created an artificial binary between providing limited Internet access to all, and providing full Internet access to a limited set of users. This presupposes the need for a compromise in the commitment made to provide full access to all citizens. However, the mandate needs to be respected by aiming for full access to the Internet for all, and the models explored should have this objective in mind.

It is the duty of the State to protect public interest. As a part of this exercise, state agencies must aim to increase access to the Open Internet for all people. There however is a misplaced focus placed by the consultation paper on giving telecom companies economic advantages for providing Internet access to remote areas and communities. This approach ignores the main objective of TRAI and the state, to provide Internet connectivity to people irrespective of who provides the service or how it is done. If telecom companies are unable to make a profit by providing further access

and infrastructure, and choose not to do so, it is not within the mandate of state agencies to assist companies to reach their profit margins or expansion goals. The State agencies cannot remedy the lack of business alternatives by giving companies decision-making power over people's access to resources.

In the *Geneva Declaration of Principles from World Summit on the Information Society (WSIS) 2003*¹⁴, India committed to providing access to the full Internet to all people. The relevant paragraphs states:

“14. We are resolute to empower the poor, particularly those living in remote, rural and marginalized urban areas, to access information and to use ICTs as a tool to support their efforts to lift themselves out of poverty.

[...]

23. Policies that create a favourable climate for stability, predictability and fair competition at all levels should be developed and implemented in a manner that not only attracts more private investment for ICT infrastructure development but also enables universal service obligations to be met in areas where traditional market conditions fail to work. In disadvantaged areas, the establishment of ICT public access points in places such as post offices, schools, libraries and archives, can provide effective means for ensuring universal access to the infrastructure and services of the Information Society.”

This was reaffirmed by all United Nations member states, including India, in the recently concluded review of the implementation of the Outcomes of the World Summit on the Information Society¹⁵ (WSIS+10).

¹⁴ WSIS, Declaration of Principles- Building the Information Society: A Global Challenge in the New Millennium ¶¶ 14, 23, Doc. No. WSIS-03/GENEVA/DOC/4-E (Dec. 12, 2003), available at http://www.itu.int/dms_pub/itu-s/md/03/wsis/doc/S03-WSIS-DOC-0004!!PDF-E.pdf.

General Comment 34 to the International Covenant on Civil and Political Rights, to which India is a signatory also obligates that member state provide access to the Internet for all citizens¹⁶.

“15. States parties should take account of the extent to which developments in information and communication technologies, such as Internet and mobile based electronic information dissemination systems, have substantially changed communication practices around the world. There is now a global network for exchanging ideas and opinions that does not necessarily rely on the traditional mass media intermediaries. States parties should take all necessary steps to foster the independence of these new media and to ensure access of individuals thereto.”

Moreover, the sudden focus on zero-rating plans, as a primary modus operandi to achieve universal Internet connectivity is unusual and out of place in the context of previous discussions about increasing Internet access. These discussions did not feature zero-rating as one of the methods of fulfilling the objective, which raises the question of what is motivating the current rhetoric regarding zero-rating being the solution to India’s problems of internet access. Further, the National Telecom Policy of 2012 envisages an equitable and inclusive development of Internet participation, and sees no collateral damage of inferior access for the underserved.

Professor Schewick eloquently sums up how letting companies offer zero-rating services is perhaps not the best course of action to remedy lack of widespread Internet access to marginalized communities¹⁷:

¹⁵ UNGA, Outcome document of the high-level meeting of the General Assembly on the overall review of the implementation of the outcomes of the World Summit on the Information Society ¶ 2, U.N. Doc. A/C.2/59/3 (Dec. 13, 2015), available at http://www.un.org/ga/search/view_doc.asp?symbol=A/70/L.33&referer=https://t.co/QauJe5c1Wn&Lang=E.

¹⁶ International Covenant on Civil and Political Rights General Comment 34, *Freedom of Opinion and Expression*, U.N. Doc. CCPR/C/GC/34, ¶ 15 (Sept. 12, 2011).

“Some commenters argue that at least one type of zero-rating in this class – giving users access to [...]” a limited part of the Internet “even if they haven’t bought a mobile Internet plan – is beneficial for underserved communities. Having “free” access to [...]” part of the Internet, “they argue, is better than not having no access to the Internet at all.

[...]

And second, the argument suggests a false choice. The choice is not between granting low-income communities free access to [...]” a limited part of the Internet “or no Internet access at all. Instead of allowing free access to [...]” a limited part of the Internet, “ISPs could offer low-cost, limited options that give users free, but limited access to the entire Internet.

Zero-rating [...]” a limited part of the Internet “doesn’t meet the needs of underserved communities. Now more than ever, Internet access is necessary to secure full participation in [...] economy and democracy. However, access to [...]” a limited part of the Internet “is not the same as access to the Internet. Low-income families need access to the Internet to do homework, communicate with teachers, search for jobs, sign up for health insurance, and register to vote. Minority communities, who have historically been left out of broader social and political discourse, need the Internet to organize, create, educate and innovate online.” A few applications “[...] alone do not allow them to do this [...]

[...] allowing ISPs to zero-rate certain applications as a tool to help spread the digital divide sets a dangerous precedent [...]

¹⁷ Barbara van Schewick, *Network Neutrality and Zero-rating*, pp. 6-7 (Feb. 19, 2015), available at <http://apps.fcc.gov/ecfs/document/view?id=60001031582>.

[...] Low-income families, both on their computers and on their phones, will be restricted to sites that providers choose for them. It will shuttle already marginalized communities into “walled gardens” – cutting them off from free information and full participation.”

There are various other alternatives to providing access to entire Internet. These include measures like data usage vouchers. Digital literacy is crucial for the target demographic to be able to make use of Internet facilities, and initiatives, which aim to increase this capacity, would be extremely useful. Other measures we recommend in this regard include the strengthening of Internet access infrastructure at Post Offices and Common Services Centres, as committed under the Digital India initiative.

We also recommend that the thrust of state-led efforts to increase Internet access should focus on Community-oriented solutions, as has been done with Community Radio. Points of community shared Internet access can be an effective tool in remote areas, and models of implementation ought to also include members of the community as content providers on the platform.

On a similar note, the diversity of the players who are providing Internet access needs to be increased. Taking measures to increase the number of options offering Community-oriented solutions can do this. That apart, greater diversity in the marketplace of internet service providers will also empower users, as a greater variety of providers will mean that different sets of users’ needs can be fulfilled by specialized service providers catering to that category of users.

The alternatives for expanding Internet access through state owned enterprises such as BSNL, BBNL etc. should also be explored in areas where private companies fail to meet market requirements, or choose not to expand. Further, the resources available through the Universal Service Obligation Fund (USOF) which is currently in excess of ₹

40 thousand crores¹⁸, can be used for the requisite investment in the absence of private investment in providing access to remote areas. The said fund has been set up with the specific objective of providing equitable access to the Internet by connecting those groups and areas that have not been serviced by conventional expansion of the telecom industry. It is thus a perfect alternative to provide the economic backing for projects with these objectives.

India has already made a commitment to develop Information and Communications Technology (ICT) infrastructure to improve connectivity through USOF and other public funds during 2015 WSIS+10 outcome discussions¹⁹.

“36. We commit to efficient public resource allocation to deployment and development of information and communications technology, recognizing the need for budgeting for information and communications technology across all sectors, especially education. [...] We recognize the potential to improve connectivity, especially in remote and rural areas, through universal service funds and publicly funded network infrastructure, among other tools, particularly in areas where market conditions make investment difficult.”

We strongly reiterate that it is the duty of the State and various agencies including TRAI to protect the right to freedom of speech and expression of citizens, and not business models²⁰. The public interest demands that we secure the benefits of an open and participatory Internet for this century and frame strong network neutrality framework.

¹⁸ Universal Service Obligation Fund Status (January 14, 2015), available at <http://www.usof.gov.in/usof-cms/usof-fund-status-table.jsp>.

¹⁹ UNGA, Outcome document of the high-level meeting of the General Assembly on the overall review of the implementation of the outcomes of the World Summit on the Information Society ¶ 36, U.N. Doc. A/C.2/59/3 (Dec. 13, 2015), available at http://www.un.org/ga/search/view_doc.asp?symbol=A/70/L.33&referer=https://t.co/QauJe5c1Wn&Lang=E.

²⁰ See *infra* pp. 15-19

Question 4: Is there any other issue that should be considered in the present consultation on differential pricing for data services?

We wish to place on record that the focus of the debate on net neutrality is misplaced by over-emphasising the conflict of interests between Internet companies and telecom companies. The more crucial element which is much ignored is the right of users to access a diverse set of Internet content from multiple sources of media, and the principles to which usage and allocation of spectrum is subject. These concerns are dictated by the requirements of Article 19(1)(a) of the Constitution of India and international human rights standards, both of which any policy of Indian state agencies is subject to. The characterization of the debate cannot be merely about the marketplace, but rather about the “marketplace of ideas – which the Internet provides to persons of all kinds” as stated by the Supreme Court in the recent *Shreya Singhal* judgment²¹.

We have observed that a large number of comments have come in to TRAI regarding differential pricing. We greatly appreciate the value of these comments and their usefulness in helping form the relevant policy in India. We would however also like to point out to TRAI, that in forming the policy that is to regulate the Indian telecom sector, primary importance and fidelity must be given to Indian Constitutional provisions and principles, and their subsequent interpretation by the Indian Judiciary.

We wish to strongly reiterate that TRAI must take into account constitutional and international human rights principles, as well as the India Supreme Court’s jurisprudence on Article 19, before finalizing its view on the issue of differential pricing.

Telecommunications companies may be private, market-driven entities but they operate in a sector in which they perform a public function by offering information services to citizens. They are, and have always been, regulated with the object of citizens deriving as much benefit as possible from their services. The growth of the

²¹ *Shreya Singhal v. Union of India*, (2015) 5 SCC 1, ¶ 21

Internet has meant that these companies now perform a critical gatekeeping function in providing citizens with access to online information, which is increasingly being recognized as an important human right. TRAI must ensure that these companies do not abuse their gatekeeping function and their control over an important national resource such that citizens are deprived of access to a plurality of information.

The part below is a summary of relevant Indian constitutional principles and how they might apply to the regulatory clearance of differential pricing of different kinds of online content.

CONSTITUTIONAL PRINCIPLES

There are three key principles that the committee must consider in the context of the Internet. The first is the public's right to receive information under Article 19(1)(a) of the Constitution of India, the second is that the government is required to regulate limited public resources such that they are used in the best interest of society, and the third is that even private parties will be required to respect constitutional rights when they perform a public function.

The right to freedom of speech and expression in the Indian Constitution²² contains within it the right to *receive* information. This has been articulated repeatedly in a series of Supreme Court judgments ranging from Justice Mathew's dissent in *Bennett Coleman*²³, the *Indian Express Newspapers v. Union of India*²⁴ case, *Secretary, Ministry of Information & Broadcasting, Govt. of India v. Cricket Association of Bengal*²⁵, and *Sahara India Real Estate Corporation Ltd. & Ors. v. SEBI*

²² Article 19(1)(a), Constitution of India, 1950.

²³ *Bennett Coleman & Co. & Ors. v. Union of India & Ors.*, (1972) 2 SCC 788.

²⁴ (1985) 1 SCC 641.

²⁵ (1995) 2 SCC 161.

& Anr²⁶. ‘The public’s right to know’ has most recently been acknowledged in the context of the Internet by the Supreme Court in *Shreya Singhal v. Union of India*²⁷.

Added to this is the fact that airwaves are a limited public resource. The Supreme Court of India held in *Cricket Association of Bengal*²⁸ that since airwaves are a scarce resource, they have to be used in the best interest of the society, and that the government may regulate the grant of licenses accordingly. The public authority must control and regulate airwaves or frequencies **in the interests of the public** and to prevent the invasion of their rights. *Justice Jeevan Reddy’s* concurring judgment adds that public good lies in ensuring plurality of opinions, views, and ideas.

Telecommunications infrastructure has already been recognized by the Indian judiciary as a public resource. In *Delhi Science Forum & Ors. v. Union of India & Anr*²⁹, the Supreme Court acknowledged that telecommunications is an internationally recognized public utility of strategic importance. Further, in the case of *Centre for Public Interest Litigation and others v. Union of India & Ors.*³⁰ (the 2G case) the Supreme Court recognized spectrum as a scarce natural resource, and applied the public trust doctrine to explain that the state must protect such resources for the enjoyment of the general public rather than to permit their use for private ownership or commercial purposes. In *Association of Unified Tele Services Providers & Ors. v. Union of India & Ors.*³¹, the Supreme Court has reemphasized that the State is bound to protect spectrum resources for the enjoyment of general public rather than permit their use for purely commercial purposes. It has pointed out that the public trust doctrine “puts an implicit embargo on the right of the State to transfer public properties to private party if such transfer affects

²⁶ (2012) 10 SCC 603.

²⁷ (2015) 5 SCC 1.

²⁸ *Secretary, Ministry of Information & Broadcasting, Govt. of India v. Cricket Association of Bengal*, (1995) 2 SCC 161.

²⁹ (1996) 2 SCC 405, ¶ 2.

³⁰ (2012) 3 SCC 104.

³¹ (2014) 6 SCC 110, ¶ 4.

public interest”, and that it “mandates affirmative State action for effective management of natural resources and empowers the citizens to question ineffective management.”

The mechanism for distributing the resource must therefore follow the doctrine of equality, which requires among other things, that the people be granted equitable access to natural resources. This means that the Department of Telecommunication is under an obligation to ensure that the telecommunication infrastructure is used by its operators in a manner by which people are granted equal access to both, a wide range of information as well as platforms on which they may express themselves. This is an obligation that is taken seriously in India, as is reflected by the National Telecom Policy, 1999 through its requirement that BSNL provide affordable services to remote areas, and by the Universal Service Obligation Fund directed at financing the introduction of telecommunications services in rural and remote areas.³² In the context of spectrum, this obligation is also reflected in the licensing agreements issued under Section 4 of the Indian Telegraph Act, 1885. It highlights the fact that the Central Government enjoys an “exclusive privilege” so far as “spectrum” is concerned, which is a scarce, finite, and renewable natural resource which has got intrinsic utility to mankind.³³ In this context, the Supreme Court has emphasized in *Association of Unified Tele Services Providers & Ors.*³⁴ that spectrum “is a natural resource which belongs to the people, and the State, its instrumentalities or the licensee, as the case may be, who deal with the same, hold it on behalf of the people and are accountable to the people.”

This principle recognizing that private bodies may perform public functions was also highlighted in *Binny Ltd. & Anr. v. V. Sadasivan & Ors.*³⁵, in which the Supreme

³² In addition to the primary documents, see Sagnik Datta, *Skewed Plan*, FRONTLINE (June 14, 2013), <http://www.frontline.in/economy/skewed-plan/article4746549.ece>.

³³ *Association of Unified Tele Services Providers & Ors. v. Union of India & Ors.*, (2014) 6 SCC 110, ¶ 23.

³⁴ *Association of Unified Tele Services Providers & Ors. v. Union of India & Ors.*, (2014) 6 SCC 110, ¶ 23.

³⁵ (2005) 6 SCC 657.

Court, in the context of the writ jurisdiction under Article 226 of the Indian Constitution, explained that when a “private body is discharging a public function and the denial of any right is in connection with the public duty imposed on such body, the public law remedy can be enforced”.

Authoritative sources on human rights, including the Indian Supreme Court³⁶ and the UN Special Rapporteur on human rights³⁷ have highlighted the critical role played by Internet for the exercise of freedom of expression rights of citizens. It is our submission that any consideration of the role of Internet service providers in the context of freedom of expression online is likely to satisfy the public function test since access to information is in fact not just a collective benefit but a fundamental right of the public.

Further, differential access and pricing of online content by Internet Service Providers could have the effect both of thwarting the market and causing serious losses to Indian content-based start-ups, as well as affecting people’s access to information. We would also caution that regulation of information markets must always take into account diversity of content and the access rights of citizens, and must be regulated from the point of view of providing the maximum possible information, and a plurality of information to citizens.

MEDIA PLURALISM

The Supreme Court of India has read Article 19 of the Constitution to mean that citizens have a right to a plurality of information. In the words of the Apex Court:

“The right of free speech and expression includes the right to receive and impart information. For ensuring the free speech right of the citizens of this country, it is necessary that the citizens have the benefit of plurality of views and a range of opinions on all public issues. A successful

³⁶ *Shreya Singhal v. Union of India*, (2015) 5 SCC 1.

³⁷ UNGA, Sixty-sixth session Report by Special Rapporteur Frank La Rue on the Promotion and Protection of the Right to Freedom of Opinion and Expression, (Sept. 7, 2012) UN Doc A/67/357.

democracy posits an ‘aware’ citizenry. Diversity of opinions, views, ideas and ideologies is essential to enable the citizens to arrive at informed judgment on all issues touching them. This cannot be provided by a medium controlled by a monopoly — whether the monopoly is of the State or any other individual, group or organisation...”³⁸

This reading of the right to freedom of expression suggests that zero-rating may be problematic since it will create monopoly control (whether by the state or private parties) over the information available to a large number of citizens. Especially in view of the government’s ‘Digital India’ program, such control may be unnecessary since the government is already working on ways to ensure that there is universal access to the Internet.

In addition to being recognized in India, the necessity of plurality of information, especially in the context of the media is a well-established norm in Europe. It has been explicitly recognized in the European Charter of Fundamental Rights³⁹, which states that ‘the freedom and pluralism of the media shall be respected’. Plurality has also been recognized as being a priority in the context of Article 19 of the International Covenant on Civil and Political Rights⁴⁰, and General Comment 34⁴¹ to the covenant urges states to prevent monopoly control of the media and promote plurality of the media.

It must therefore be kept in mind that while market-priorities and access to information are important, it is an equally important principle embedded in Article 19 of the Indian constitution that no entity, not even the government, can control the nature of information that citizens are able to access.

³⁸ *Secretary, Ministry of Information & Broadcasting, Govt. of India v. Cricket Association of Bengal*, (1995) 2 SCC 161, ¶¶ 201(3)(a) and (b).

³⁹ Charter of Fundamental Rights of the European Union, [2010] OJ C 83/02, art. 11(b).

⁴⁰ International Covenant on Civil and Political Rights, art. 19 (Dec. 16, 1966), 999 U.N.T.S. 171.

⁴¹ International Covenant on Civil and Political Rights General Comment 34, *Freedom of Opinion and Expression*, U.N. Doc. CCPR/C/GC/34, ¶ 40 (Sept. 12, 2011)

Lastly, having read a number of the comments submitted by the service providers, we have observed that one of the common justifications provided by them is that differential pricing is permitted across a number of sectors. However, we think that it is critical to recognize that the information sphere is distinct from any other sector. In this context a distinctly different set of factors to need to be considered in shaping regulation as opposed to other sectors. This concern is amplified by the fact that the information sphere and the open Internet in particular play a crucial role in shaping the democratic discourse in the country and as explained above any regulation will have to be framed in accordance with Article 19(1)(a) which protects the right to freedom of expression.

SIGNATORIES

- Access Now
- Centre for Communication Governance at National Law University, Delhi
- Common Cause
- Delhi Science Forum
- Digital Empowerment Foundation
- Foundation for Media Professionals
- Internet Democracy Project
- The SavetheInternet.in Coalition
- Society for Knowledge Commons, New Delhi
- SFLC.in