MEMORANDUM FOR THE DOT COMMITTEE ON NET NEUTRALITY

Authors: Chinmayi Arun and Sarvjeet Singh with inputs from Akshaya Parthasarathy, Pearlita Narain, Saral Minocha, Shrutanjaya Bhardwaj and Shweta Kabra

Introduction

There are two kinds of input that we have offered in this note. The first part of this note is a summary of relevant Indian constitutional principles and how they might apply to licensing of over the top services or the encouragement of differential pricing of different kinds of content by regulators. The second part of this note highlights critical questions with respect to which a data-driven analysis should be performed before any policies are framed to regulate or deregulate the manner in which the market caters to over the top services.

We would like to highlight at the outset that several kinds of online content providers would not fall within the scope of the Telegraph Act, and the statute cannot therefore be used to create a licensing regime to regulate them. All the regulatory power emerging from the Telegraph Act, 1885 pertains to the licensing and regulation of telegraphs in India. Section 3(1)(AA) of the Indian Telegraph Act defines 'Telegraph' as "**telephone** or any **other instrument, appliance, material or apparatus** used or capable of use for transmission or reception of signs, signals, writing, images and sounds or intelligence of any nature by wire, visual or other electro-magnetic emissions, radio waves or Hertzian waves, galvanic, electric optical or magnetic means." Therefore the statute cannot be used to regulate online content that does not emerge from such a telegraph. This is what distinguishes online content from the Value Added Services (VAS) provided by telecommunications companies – the latter are provided by Indian telegraphs and can therefore be regulated. Although we appreciate that regulation of VAS may be need to be reviewed in view of the different regime applicable to online content, we

recommend that such regulation should also assess whether VAS are provided by telecommunication companies across carriers and whether there are packages that offer access to VAS without offering access to online content – these factors will be relevant while assessing whether VAS may be considered to be equivalent to online content in the context of net neutrality.

I. 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 Constitution[1] contains within it the right to *receive* information. This has been articulated repeatedly in cases ranging from Justice Mathews dissent in *Bennett Coleman*[2], the *Indian Express Newspapers v. Union of India*[3], *Secretary, Ministry of Information & Broadcasting, Govt. of India v. Cricket Association of Bengal*[4] and *Sahara India Real Estate Corporation Ltd. & Ors. v. SEBI & Anr*[5]. 'The public's right to know' has most recently been acknowledged in the context of the Internet by the Indian Supreme Court in *Shreya Singhal v. Union of India*[6].

Added to this is the fact that airwaves are a limited public resource. The Supreme Court of India held in *Cricket Association of Bengal*[7] that since airwaves are a scarce resource, they have to be used in the best interest of the society, and 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

[1] Article 19(1)(a), Constitution of India, 1950.
[2] *Bennett Coleman & Co. & Ors. v. Union of India & Ors.*, (1972) 2 SCC 788.
[3] (1985) 1 SCC 641.
[4] (1995) 2 SCC 161.
[5] (2012) 10 SCC 603.
[6] 2015 SCC OnLine SC 248.
[7] *Secretary, Ministry of Information & Broadcasting, Govt. of India v. Cricket Association of Bengal*, (1995) 2 SCC 161.

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.*[8], the Supreme Court acknowledged that telecommunications is an internationally recognised public utility of strategic importance. Further, in the case of *Centre for Public Interest Litigation and others v. Union of India & Ors.*[9] (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.*[10], the Supreme Court has explained 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 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 the obligation to ensure that the telecommunication infrastructure is used by its operators in a manner in which people are granted equal access both to wide range of information, and to 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 requirement that BSNL provide affordable services to remote areas, and the Universal Service Obligation Fund directed at financing the introduction of telecommunications services in rural and remote areas.[11] In the context of spectrum, this obligation is also reflected in the licensing agreements issued under Section 4 of the Indian

---

[8] (1996) 2 SCC 405, ¶ 2.
[9] (2012) 3 SCC 104.
[10] (2014) 6 SCC 110, ¶ 4.
[11] In addition to the primary documents, see Sagnik Datta, *Skewed Plan*, (June 14, 2013) Frontline, available at http://www.frontline.in/economy/skewed-plan/article4746549.ece.

Telegraph Act, 1885, which highlight 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.[12] In this context, the Supreme Court has emphasized in *Association of Unified Tele Services Providers & Ors.*[13] 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."

Finally, the question of whether Internet Service Providers perform a public function must be considered in the context of *Jayta Pal Singh v. Union of India*[14]. In this case, the Supreme Court's standard to check if a body is performing a public function is to "prove that the body seeks to achieve some collective benefit for the public or a section of public and accepted by the public as having authority to do so". The court then found that telecommunication operators do not meet this standard (in the context of the rights available to their employees) on the basis that they provide commercial services for commercial considerations – which was viewed as different in essence from the function performed by private institutions imparting education to children (acknowledged as a sovereign function by the judiciary). This principle recognizing that private bodies may perform public functions was also highlighted in *Binny Ltd. & Anr. v. V. Sadasivan & Ors.*[15], in which the Supreme 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 Court[16] and the UN Special Rapporteur on human rights[17] have highlighted the critical role played by Internet for the

---

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

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

[14] (2013) 6 SCC 452.

[15] (2005) 6 SCC 657.

[16] *Shreya Singhal v. Union of India*, 2015 SCC OnLine SC 248.

[17] 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' (7 September 2012) UN Doc A/67/357.

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.

II. Questions that must be considered in detail before proceeding with regulation

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 the people's access to information. We also recommend that a market study be conducted to gauge the effect on the market if net neutrality is mandated. We would caution however 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 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…"[18]

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

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

'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 Rights[19], 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 Rights[20], and General Comment 34[21] 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, should control the nature of information that citizens are able to access. In view of this, it is difficult to see how zero-rating can be implemented in the absence of a completely independent and legitimate regulator that is accountable to the people in a manner such that it will not attempt to exercise an adverse influence on the plurality of information that they are owed.

CONCLUSION

Most online content and services would fall outside the purview of the Telegraph Act. Moreover, any attempt at licensing these services is likely to result in the blocking of the bulk of this content from India since most small companies based in other jurisdictions will not be able to comply with onerous obligations in India. This will impact citizens' right to access information. Therefore any attempt at such licensing must take into account the likely effects of licensing on the free flow of information in India.

---

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

[20] International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR) art 19.

[21] HRC, One Hundred and second session 11-29 July 2011 'General Comment 34' (21 July 2011) UN Doc CCPR/C/GC/34.

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 that citizens benefit as much as possible from their services. The growth of the 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. The Indian government 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.

Finally, regulation to bring about net neutrality can take a variety of forms and it will be critical to choose a model that will be effective in within our regulatory environment. We are attaching a report[22] written by Stefaan Velhurst for the Open Society Foundations that offers a snapshot of the broad concerns that have influenced regulation around the world, and the different kinds of models that different countries have created in this regard. We would be happy to find additional material and conduct a more detailed study of the Indian environment once the Committee has determined what it sees as the best course of action.

---

[22] Stefaan G. Verhulst, *Mapping Digital Media: Net Neutrality and the Media,* (June 2011) Open Society Foundations, available at http://www.opensocietyfoundations.org/sites/default/files/mapping-digital-media-net-neutrality-20110808.pdf.