



NET NEUTRALITY AND ZERO-RATING DURING PANDEMIC: AN ANALYSIS IN THE LIGHT OF JIO-FACEBOOK DEAL

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ABSTRACT

The world has progressed at a very fast pace and has now become a digital village ending the distances among people just with a click of a mouse. The recent incidents like the multi-billion-dollar deal between ‘Facebook Inc.’ and ‘Jio Telecom’; and the request by various organizations to zero-rate applications and websites related to the COVID-19 have again ignited the issue of net neutrality in India. Zero-rating is claimed to be against the basic ethos of democratic internet access. The Jio and Facebook deal also raises suspicion of *data colonization* as both the organization are market leaders in their fields and have been accused of anti-competitive practices in the past e.g. Cambridge Analytica Scandal. The net neutrality framework in India is much stronger compared to the United States or even the European Union yet it has some loopholes which can be used by the organizations to circumvent the regulations like in the Netflix-Comcast incident. Data discrimination is against Article 19 (1) i.e. freedom of expression of speech and is also argued to be against the right to privacy under Article 21 of the Indian Constitution. Considering the ethos of Indian democracy, the provisions of net neutrality should not be diluted and data sovereignty should be protected.

KEYWORDS : Digital India, Data Privacy, Net Neutrality, Zero-Rating, Data Discrimination

1. INTRODUCTION

The world has progressed at a very fast pace and has now become a digital village ending the distances among people just with a click of a mouse. Much of the impact of digitisation has also been seen in India. The availability of cheap smartphones together with the accessibility

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of data at cheap rates led to the explosion in overall internet data consumption. India is now a frontrunner among the nations having the highest internet data consumption. According to a report published by the Internet and Mobile Association of India, the total number of internet users is around 560 million.² With such a large base of internet users in India, a sizeable amount of user-generated content, and its impact on the population, the internet has rightly been described as a *'global public entity that belongs to no one yet to everyone'*.³

The surge in internet traffic due to the lockdown world over because of COVID-19 and the governments swiftly using digital platforms to combat the same has shattered many of the presuppositions related to citizens' rights and internet governance around the globe. With the help of digital payments platforms, distribution of around \$5 billion is made by the Indian government in the form of cash benefits to its citizens who needed assistance during the COVID-19 lockdown.⁴ Additionally, the incidents like the multi-billion dollar deal between the world's largest social media platform 'Facebook Inc.' and India's largest internet service provider (ISP) Jio Telecom⁵; and further the request made by the Cellular Operators Association of India (COAI) to the Regulatory Authority (TRAI) which seeks to permit the ISPs to zero-rate applications and websites related to the COVID-19 has again ignited the issue of net neutrality in India.⁶

This article will deal with the impact of the Jio and Facebook deal on the net neutrality framework in India. Moreover, it will also analyse the growing need for zero-rating platforms in India especially during the time of emergencies like COVID-19 and the net neutrality concerns regarding the same. Additionally, this article will critically analyse the net neutrality framework in India and will also discuss the international framework related to net neutrality.

²Nandita Mathur, 'India now has over 500 million active Internet users: IAMAI' (Livemint, 5 May 2020) <https://www.livemint.com/news/india/india-now-has-over-500-million-active-internet-users-iamai-11588679804774.html> accessed 25 Aug 2020

³Net Neutrality: 'Grey Areas in The Internet Economy, Economic and Political Weekly' <<https://www.epw.in/engage/article/net-neutrality-gray-areas-internet-economy>> accessed 25 Aug 2020

⁴Ankita Sharma, 'COVID-19 has accelerated India's digital reset' (World Economic Forum , 01 Aug 2020) <<https://www.weforum.org/agenda/2020/08/covid-19-has-accelerated-india-s-digital-reset>> accessed 25 Aug 2020

⁵'Facebook in negotiations to acquire multi-billion dollar stake in Reliance Jio: Report' (Economic times) <https://telecom.economicstimes.indiatimes.com/news/facebook-in-negotiations-to-acquire-10-stake-in-reliance-jio-report/74802641> accessed 25 Aug 2020

⁶Shruti Jainshashidhar, 'Net neutrality in the time of COVID-19, Observer Research Foundation' <<https://www.orfonline.org/expert-speak/net-neutrality-in-the-time-of-covid-19-65290/>> accessed 25 June 2020



The article will also attempt to answer the question of whether the zero-rating platforms can be permitted in India in times of emergencies vis-à-vis the net neutrality framework.

2. ZERO RATING OF WEBSITES DURING EMERGENCIES

The need to zero-rate some of the crucial websites during emergencies has been raised by the Cellular Operators Association of India (COAI) in a letter dated March 21, 2020. In this letter, the COAI has requested the chairman of the Telecom Regulatory Authority of India (TRAI) to waive off the fees charged by the ISPs for accessing some of the important voice call services and websites.⁷

To understand the issue clearly, we need to look into the concept of Zero-rating first. According to the 'Body of European Regulators for Electronic communications' (BEREC), zero-rating is when telecom companies put a 'zero fee' to the data flow linked with a particular website or an application. Here, the data charges are not counted against any data limit placed by the telecom companies or the ISPs.⁸ Zero-rated content is free to the user.⁹ For example, if an ISP is not charging the user for accessing any website or application then it is called zero-rating of the websites by the ISPs.

The request made by the COAI seems to be rational and judicious in the prevailing circumstances of the COVID-19 pandemic. But before the regulator could look into the same, the lack of jurisprudence and clarity on the topic of net neutrality in India has alarmed the public and institutions working for democratic access to the internet. Many institutions have put forward their views on the same and some have even rejected the idea of zero-rating even in the present times.

The proponents of zero-rating argue that it is a blessing to the marginalized and poor population in India which remains unconnected. They base their arguments on the saying "*some*

⁷Aroon Deep, 'Request for Non Charging of Data', (Medianama), <<https://www.medianama.com/2020/03/223-coai-trai-zero-rating-net-neutrality/request-for-non-charging-of-data-pdf/>> accessed 25 June 2020

⁸'What is zero rating', BEREC, https://berec.europa.eu/eng/netneutrality/zero_rating/ accessed 3 Aug 2020

⁹Helani Galpaya, 'Zero-Rating in Emerging Economies, Centre for International Governance Innovation' <https://www.cigionline.org/publications/zero-rating-emerging-economies> accessed 4 Aug 2020



connectivity is better than no connectivity”.¹⁰ While on the other side, the opponents contend that zero-rating needs to be banned as it is against the basic ethos of democratic internet access and the principle of net neutrality.

According to a finding, published by Harvard University, zero-rating can be permitted in case of emergency services or security updates in most of the developing and underdeveloped countries.¹¹ Also, some proponents argue that looking at the economic stratification in India, zero-rating some of the important websites can be a game-changer for the dissemination of information to the citizens of the country which will ultimately help in fighting the distress caused by COVID-19 easily.¹² Furthermore, the regulatory framework provides for exceptions to ‘the principle of net neutrality in times of ‘grave public emergency’. But opponents to the same argue that zero-rating involves an element of subjectivity and there is a scope of bias that can be prejudicial to the free internet in India.

The issue seems to be simple and ephemeral but the concerns around this grow many folds because of the continuing efforts of the telecom operators or the ISPs to play down the principle of net neutrality in India.¹³ However, the more recent concern related to net neutrality is the Jio and Facebook multibillion-dollar agreement.

3. THE CONCERN OVER THE JIO AND FACEBOOK DEAL

With what is called a historic deal in the telecom-cum-technology sector in India, ‘Facebook’ has been able to secure 9.99% of stake for Rs 43,574 Crore in the Jio Platform which is owned by India’s largest telecom company ‘Jio Telecom’, a subsidiary of Reliance India Limited

¹⁰Four Reasons Why Facebook is Buying a Nearly 10% Stake in Mukesh Ambani’s Reliance Jio, (The wire) <<https://m.dailyhunt.in/news/india/english/the+wire+english-epaper/wireng/four+reasons+why+facebook+is+buying+a+nearly+10+stake+in+mukesh+ambani+s+reliance+jio-newsid-n180039086>> accessed 25 Aug 2020

¹¹ Bates, Samantha, Christopher Bavitz, Kira Hessekiel, ‘Zero Rating & Internet Adoption: The Role of Telcos, ISPs, & Technology Companies in Expanding Global Internet Access’ (Berkman Klein Center for Internet & Society Research Publication) <https://dash.harvard.edu/bitstream/handle/1/33982356/2017-10_zerorating.pdf?sequence=1&isAllowed=y> accessed 16 July 2020

¹² Smriti Parsheera, ‘Net Neutrality in India: Sighting the Finish line, Economic and Political Weekly’ <<https://www.epw.in/engage/article/net-neutrality-india-sighting-finish-line>> accessed 17 July 2020

¹³Comments on Consultation Paper on Traffic Management Practices (TMPs) and Multi-Stakeholder Body for Net Neutrality, (TRAI) <https://traigov.in/sites/default/files/RJIL_14022020.pdf> accessed 26 July 2020



(RIL).¹⁴ There has been no other deal in this sector with such a large valuation of over \$60 billion. The coming together of these two behemoth companies who are dominating players in their field and were earlier working adversarially has raised eyebrows of the people working with the Indian telecom market. Though Facebook's stake seems to be a minority one but it signals that the two players will work together and will have the capability to take over anyone in the telecom or internet space in India. It is more daunting for those companies or ISPs who are currently in operation than it is for the new entrants.

The size of Facebook and its growth can be understood from the fact that at present out of 560 million people who have access to the internet in India, 320 million are active users of Facebook while the ratio five years ago was meager.¹⁵ WhatsApp, which is owned by Facebook is India's largest cross-platform messaging application with a subscriber base of over 400 million.¹⁶ On the other hand, Reliance Jio is the biggest ISP and the telecom service provider in India with a user base of approximately 350 million users as of July 2019.¹⁷ It is clear that both the enterprise are the market leader with access to a huge amount of individual data and as claimed this deal has ripened the prospects of *Digital Colonization*.

Many people also show concern and raise the demand for scrutiny of the deal by the anti-trust authorities as this deal gives disproportionate and unwarranted advantage against the other tech players like Google, Amazon, and other local start-ups. The worry also revolves around the principle of net neutrality especially the preferential treatment of Facebook and WhatsApp by Jio Telecom.

One of the affiliate organisations of Rashtriya Swayamsevak Sangh (RSS) working on the issues related to the economy, Swadeshi Jagran Manch (SJM) has criticised the deal and

¹⁴Jio Platforms gets Rs 43,574 crore from Facebook for 9.99% stake sale, Business Standard https://www.business-standard.com/article/companies/jio-platform-gets-rs-43-574-cr-from-facebook-for-9-99-stake-sale-120070701818_1.html accessed 26 July 2020

¹⁵Soumyadip Choudhury, 'Connectivity as a human right: Facebook-Jio deal and Mark Zuckerberg's 2013 goal', (CNBC TV 18) <https://www.cnbc18.com/economy/connectivity-as-a-human-right-facebook-jio-deal-and-mark-zuckerbergs-2013-goal-5791501.html> accessed 26 July 2020

¹⁶Id.

¹⁷ Sandhya Keelery, 'Number of social network users in India from 2015 to 2018 with a forecast until 2023, Statista' < <https://www.statista.com/statistics/278407/number-of-social-network-users-in-india/> > accessed 27 July 2020



claimed that this may compromise privacy and the principle of net neutrality.¹⁸ According to SJM, this Jio and Facebook deal will monopolize the whole digitisation space. Ashwini Mahajan, Convenor of SJM, says that this deal will create an e-commerce monopoly in the Indian market which is expected to grow up to \$200 billion by 2028 and will affect the entire ecosystem.¹⁹ He added that as Jio telecom has created a kind of monopoly through free of cost services and making other telecom players dying day by day they will push their similar agenda and the Indian net neutrality ecosystem may collapse. Virendra Nagpal of Laghu Udyog Bharati has also said that there are many grey areas in the agreement where harm can be caused.²⁰

Another area of concern because of this deal is the digital payments sector as big players in this sector are already facing a cash crunch and the entry of WhatsApp may cause disruption. These apprehensions have also been highlighted by the largest body of retail traders Confederation of All India Traders (CAIT) and another RSS associate Laghu Udyog Bharati.²¹ The industries' insiders claim that this deal will not only hamper the e-commerce market by dominating the data but will also affect the DTH industry and the Over the Top (OTT) platforms. Eventually, it will be a big blow to net neutrality in India and ultimately hamper the democratic ethos in India or the democracy itself.

This fear has been endorsed in the recent past through the Cambridge-Analytica scandal. The *Facebook and Cambridge Analytica Scandal*²² was a major data scandal of the year 2018 in which Cambridge analytics gathered the personal information and data of the millions of Facebook users illegally and without their consent and sold this data for being used for political gains in elections. This has been termed as a turning point in the history of internet governance and data management. This incident has called for many reforms for maintaining the privacy of the individual. This scandal has its impact not only in the US but also in India where it has

¹⁸Shanker Arnimesh, 'RSS affiliate slams Facebook-Jio deal, says it's a bigger threat than Amazon, Flipkart' (The Print) < <https://theprint.in/india/rss-affiliate-slams-facebook-jio-deal-says-its-a-bigger-threat-than-amazon-flipkart/408599/>> accessed 17 Aug 2020

¹⁹Ashwani Mahajan and Soumik Dey, 'Need protection for small industries, not MNC-led monopoly' (The week) <https://www.theweek.in/news/biz-tech/2019/06/21/need-protection-small-industries-not-mnc-led-monopoly-ashwani-mahajan.html> accessed 17 Aug 2020

²⁰Shanker Arnimesh, supra note 19

²¹Shanker Arnimesh, supra note 19, at 5

²²Nicholas Confessore, 'Cambridge Analytica and Facebook: The Scandal and the Fallout So Far' (The New York Times) < <https://www.nytimes.com/2018/04/04/us/politics/cambridge-analytica-scandal-fallout.html>> accessed 17 Aug 2020



been claimed that some organisations manipulated and subverted the Indian election process using the data of millions of Indians. The investigation to which is still pending with the top investigation agency of India.²³ Further, Facebook has also been accused of adversarial policies and it has also shown its resistance against the government policies like its End to End Encryption policy.²⁴ Jio Telecom has been accused of predatory pricing and monopolistic tendencies by other telecom operators like Airtel and Vodafone. Hence the concern over this deal is also because of the antecedents of the companies involved in the deal.

Another issue that involved Facebook in the gross violations of the principles of net neutrality in India was related to its service that was launched in the year 2016 as 'Free Basics Service' or 'Internet.org' which as the name suggests gave free access to the users to some of the websites and other services.²⁵ This service was introduced in many states like Tamil Nadu, Kerala, Gujarat, and Andhra Pradesh. But this initiative led to a revolt by the civil society and net neutrality activists and a movement was started to 'free the internet' as it was termed discriminatory. Finally, this movement led to an acceptance of one of the strongest net neutrality frameworks in the world ending up all the discriminatory practices against internet access.

However, there are many groups who also vehemently support this deal and call the concerns of data protection erroneous and far-fetched. Many also claim that this investment will boost Indo-US trade relations and will hamper Chinese investment. The deal is seen to be a way of countering the rapid popularity of China's TikTok app which is increasing its base to millions of users every year. Broadband India Forum, a policy think tank writes that this deal will provide an economic push during times of global pandemic and underlines a strong outlook for the telecom sector in India.²⁶ The think tank claim that this partnership can bring benefits to

²³Julia Carrie Wong, 'The Cambridge Analytica scandal changed the world – but it didn't change Facebook' (The Guardian) < <https://www.theguardian.com/technology/2019/mar/17/the-cambridge-analytica-scandal-changed-the-world-but-it-didnt-change-facebook>> accessed 16 Aug 2020

²⁴Pankaj Doval, 'Facebook-Jio Platforms: Competition panel needs to clear deal' (Times of India) <https://timesofindia.indiatimes.com/articleshow/comments/75309721.cms?from=mdr> accessed 17 Aug 2020

²⁵Rahul Bhatia, 'The inside story of Facebook's biggest setback' (The Guardian) <https://www.theguardian.com/technology/2016/may/12/facebook-free-basics-india-zuckerberg> accessed 17 Aug 2020

²⁶Broadband India Forum writes to govt for implementing pending telecom policy, Traisuggestions, (Economic Times) <https://telecom.economictimes.indiatimes.com/news/broadband-india-forum-writes-to-govt-for-implementing-pending-telecom-policy-trai-suggestions/75639500> accessed 19 Aug 2020



almost 100 million farmers, 50 million MSMEs, and over 30 million small wholesalers and merchants in the unorganised and informal sectors.²⁷

India is said to have one of the toughest net neutrality frameworks in the world and many believe that with these regulations in place nothing contrary to net neutrality can be done.²⁸ The net neutrality framework had been adopted by the Department of Telecommunications (DoT) in July 2018. It administers the tracking and implementation functions in relation to it. Hence this deal has nothing to worry about. Facebook user base and technology clubbed with Reliance network and retail infrastructure can help India's small merchants by partnering with them. This will not only bring in more consumers to online retail but also benefit the sellers. This will also help in digital payments with ease as to both the enterprises aim for the same which can make India into a cashless economy. The CEO of Reliance Industries, the parent company of Jio Telecom has said that this deal will be a '*digital sarvodaya*' (universal service) for India.²⁹ Subramaniam Swami, a Member of Parliament in India also supports the deal and says that this deal will make millions of retailers, a part of the e-commerce and they will be the real beneficiary of the scale and accessibility of the companies.³⁰

The issue of the permissibility of zero-rating the internet at the time of emergencies or the call of civil society to watch the Facebook and Jio deal closely has a deep impact on the existing framework of net neutrality in India and the applicability of both deals will be tested on the touchstone of the principle of net neutrality. To better understand and participate in the debate related to the above two incidents and anticipate the regulator's actions we need to understand the concept of net neutrality better and look into India's framework of net neutrality.

²⁷Broadband India Forum: 'OTTs & TSPs Need to Work Together to Advance Digital India Goals' (Centre for Internet and Society) < <https://cis-india.org/telecom/news/newspatrolling-april-6-2019-broadband-india-forum-otts-tsp-need-to-work-together-to-advance-digital-india-goals> > accessed 19 Aug 2020

²⁸Megha Mandavia, Surabhi Agarwal & Devina Sengupta, 'Net Neutrality laws likely to be tested in clearance for FB-Reliance Jio deal' (Economic Times) < <https://tech.economictimes.indiatimes.com/news/internet/net-neutrality-laws-likely-to-be-tested-in-clearance-for-fb-reliance-jio-deal/75307016> > accessed 19 Aug 2020

²⁹Neha Chaudhari and Arpit Gupta, 'Only time will tell if Jio-Facebook deal is beneficial for India' (Economic Times) < https://economictimes.indiatimes.com/tech/ites/view-only-time-will-tell-if-jio-facebook-deal-is-beneficial-for-india/articleshow/75332306.cms?utm_source > accessed 19 Aug 2020

³⁰Subramaniam Swamy, 'Four reasons why Reliance Jio-Facebook deal is commercially sensible and good for India' (Money Control) <https://www.moneycontrol.com/news/trends/expert-columns-2/subramanian-swamy-writes-four-reasons-why-reliance-jio-facebook-deal-is-commercially-sensible-and-good-for-india-5198301.html> accessed 23 Aug 2020



4. NET NEUTRALITY

The term net neutrality has no proper definition and nor do any legal definition of the term exists. However, many attempts have been made to define net neutrality. A combination of these definitions can lead to a successful attempt at defining net neutrality. Net neutrality may be defined as the principle or a norm that ensures that the people should be able to access all content and applications freely and equally irrespective of its source.³¹ The principle of net neutrality restrains internet service providers (ISPs) to discriminate against data or specific services without any lawful justification. In simple terms, net neutrality is referred to as the tool for protecting data discrimination over the internet by the ISPs.³²

The term ‘net neutrality’ was coined by Tim Wu in the year 2003.³³ He claims the internet to be a ‘platform for innovation’ and argues that the neutrality of the internet has to be maintained for innovation and growth. ‘Wu’ argues in the favour of net neutrality and seeks a total ban on discrimination by the network operators except in special cases like spam.³⁴ The principle of net neutrality answers vital policy questions like the extent of operator autonomy in network management and the ability of operators to influence internet access.

The concept of net neutrality is not only complex, but it is also contentious. As internet penetration is growing in India, the complexity of net neutrality grows as its relevance also increases day by day. To understand the concept and the relevance we are here discussing a case study that is based in the US. Comcast is a telecom and internet service provider and Netflix is an entertainment company, both, based in the US. According to allegations made by Netflix, Comcast has slowed down the buffering speed of Netflix, slowing down the application has affected the entertainment experience and ultimately the consumer base of Netflix.³⁵ This

³¹Milton Mueller, ‘Net Neutrality as Global Principle for Internet Governance’(Society for Internet Governance) <https://www.internetgovernance.org/2007/11/01/11-2007-net-neutrality-as-global-principle-for-internet-governance/> accessed 23 Aug 2020

³²Sunil Abraham, ‘What is net neutrality and why it is important’ (Centre for Internet and Society) < <https://cis-india.org/news/times-of-india-january-20-2014-what-is-net-neutrality-and-why-is-it-important> > accessed 23 Aug 2020

³³Tim Wu, Network Neutrality, Broadband Discrimination, Journal of Telecommunications and High Technology Law, Society, June 5, 2003 at 142.

³⁴Id

³⁵Marguerite Reardon, ‘Comcast vs. Netflix: Is this really about Net neutrality’(CNet) <<https://www.cnet.com/news/comcast-vs-netflix-is-this-really-about-net-neutrality/>> accessed 19 Aug 2020



led to a huge uproar in the civil society which was working to save net neutrality. In 2014, Netflix agreed to pay Comcast a specific amount to end this problem and to get smooth streaming of its movies and shows in the US. This was one of a kind deal where a content creator has paid the service provider for smooth streaming over the internet traffic jam. Though the problem came to an end it had given a new thrust to the net neutrality debate making it heard all over the world.

As far as the net neutrality framework is concerned in the US, till 2017 Obama administration seemed to be strongly supporting the principle of net neutrality. It even had laid down six principles related to net neutrality. Also, in the year 2014, the US Supreme Court in a case³⁶ has narrowed down the authority of FCC concerning net neutrality. But in the year 2017, the Trump administration has rolled back the rules made by the Obama administration. This step is said to have made the net neutrality framework weak or practically non-existent.³⁷

After the Netflix-Comcast incident, many of the countries started the debate over net neutrality and started adopting a framework for the protection of the 'free internet'. Chile, a South American country embraced the net neutrality framework but it merely states that ISPs cannot arbitrarily block, hinder, or restrain the use of the internet. This framework is termed by many as a weak one.³⁸

The European Union (EU) has adopted a net neutrality framework in October 2015.³⁹ The regulation is a strong one with minute nuances in it; like the duty has been casted on the ISPs to inform the consumers about the minimum and maximum bandwidth allocation to the internet connection. But at several places, the text is not very clear and has left scope for abuse.⁴⁰ Australia does not have any specific framework. However, the grievances related to

³⁶Verizon Communications Inc. v. Federal Communications Commission (FCC) 535 U.S. 467 (2002)

³⁷Juliet Eilperin and Darla Cameron, 'How Trump is rolling back Obama's legacy' (The Washington Post) <https://www.washingtonpost.com/graphics/politics/trump-rolling-back-obama-rules/> accessed 28 Aug 2020

³⁸James Bosworth, 'Are Internet Policy and Technology the Keys to Latin America's Future?' (Centre for Strategic and International Studies < <https://www.csis.org/analysis/are-internet-policy-and-technology-keys-latin-america%E2%80%99s-future>> accessed 28 Aug 2020

³⁹'European Commission, Policy on Open Internet, 2016' <<https://ec.europa.eu/digital-single-market/en/open-internet-net-neutrality>> accessed 28 Aug 2020

⁴⁰BEREC, 'Guidelines on the Implementation of the Open Internet Regulation, 2020' http://berec.europa.eu/eng/document_register/subject_matter/berec/regulatory_best_practices/guidelines/ accessed 28 Aug 2020



net neutrality are addressed by the Australian Competition and Consumer Commission' (ACCC) along with certain other regulations related to the telecom sector. This has given ISPs an opportunity for zero-rating in Australia and traffic differentiation. This has led to many intense public debates on the issue in Australia and now the country is on the way to adopting a wholesome net neutrality framework in the coming years.⁴¹

NET NEUTRALITY IN INDIA

The debate related to net neutrality in India gained momentum in 2015 with Facebook's plan to launch a zero rating platform called 'Free basics' in India which was earlier called *Internet.org*.⁴² In India, Facebook teamed up with telecom provider Reliance Communication with an aim to bring 'Free Basics' to both smartphone and feature phones. To compete with Reliance, its rival telecom provider 'Airtel' started a similar platform called 'Airtel Zero' with zero data charges for its users.⁴³ This led to a furore in the civil society against the zero-rating platforms. An online 'free the internet' campaign started against these actions by civil society and it gathered a lot of people's support which forced the government to adopt the net neutrality regulation in the year 2016. The adoption of regulations made the zero-rating platforms like 'Free basics' and 'Airtel Zero' redundant in India. The net neutrality framework was welcomed by civil society groups and the citizens as it paved the path for free and democratic internet in India.⁴⁴

Though India's regulatory framework is considered to be one of the strongest in the world yet it cannot be said to be free of loopholes and ambiguities. The "*Prohibition of Discriminatory Tariffs for Data Services Regulations, 2016*" provides that no ISP can enter into an agreement that provides for charging discriminatory charges from the consumers based on content. However, it further states that in closed electronic communications networks, where data is

⁴¹Luca Belli, Primavera De Filippi, *Net Neutrality Compendium: Human Rights, Free Competition and the Future of the Internet* (2016).

⁴²Anita Babu, '10 things to know about Facebook's Free Basics, net neutrality' (Business Standard) <https://www.business-standard.com/article/companies/10-things-to-know-about-facebook-s-free-basics-net-neutrality-115122300326_1.html> accessed 28 Aug 2020

⁴³Id.

⁴⁴Anandita Singh, 'Airtel Zero plan prima facie violates the principle of net neutrality, says TRAI' (Economic Times) <<https://economictimes.indiatimes.com/tech/internet/airtel-zero-plan-prima-facie-violates-the-principle-of-net-neutrality-says-trai/articleshow/46938313.cms>> accessed 28 Aug 2020



neither received nor transmitted over the internet such tariffs will be permitted.⁴⁵ Indian regulations thus do not protect data offered on the closed communication networks, which raised concerns about the issue that the telecom companies can propose their services through the company-owned intranet which can defeat the purpose of the regulations. Many industry players and activists argue that this loophole will help the ISPs to curate the content within the walled garden and zero rates it and hence they seek TRAI's intervention to rectify the loophole related to closed data circulation. Susan Crawford, Professor at Harvard Law School says 'the claim that a walled garden with zero rating is good enough for marginalised people is untenable and destructive'.⁴⁶

The regulations under Chapter II also talks about the exception clause where it permits data discrimination and differential pricing in case of public emergency or at the time of providing emergency services.⁴⁷ Though a proviso has been put in place which makes it mandatory for the telecom operators to inform the regulator of such action within seven days of such action and the regulations have also levied hefty penalties in case of breach of such regulations. Furthermore, the TRAI has left a loophole by providing an opportunity to the ISPs to practice "reasonable traffic management" and has also left ambiguity in defining the term "reasonable traffic management practices".⁴⁸ Many positives of net neutrality are claimed by its proponents. It is said to provide a platform for innovation and gives choice to consumers as per their needs. It is also credited for providing unfettered access to the internet without any discrimination. However, the main contention to support the net neutrality framework in India is its coherence with Part III of the Indian constitution.⁴⁹ Net neutrality is said to protect the citizens' freedom of speech and expression, which is protected under Article 19 of the Constitution of India. The

⁴⁵Venancio D'Costa and Astha Ojha, 'India: Net Neutrality In India: Regulating Evolving Technology' (Mondaq) <<https://www.mondaq.com/india/telecoms-mobile-cable-communications/976168/net-neutrality-in-india-regulating-evolving-technology>> accessed 28 July 2020

⁴⁶Malini Bhupta, 'How TRAI has gone back on net neutrality, Business Standard,' <https://www.business-standard.com/article/economy-policy/how-traai-has-gone-back-on-net-neutrality-116053101546_1.html> accessed 28 Aug 2020

⁴⁷Smriti Parsheera, 'Net neutrality in India: From rules to enforcement,' (Medianama) <<https://www.medianama.com/2020/05/223-net-neutrality-india-rules-enforcement/>>

⁴⁸Id.

⁴⁹Supra Note 49



argument to support this initially flowed using the First Amendment to the US Constitution and a landmark judgment of the US Court in which the court propounded that⁵⁰

“While expression ought not to be thwarted by the State, it should not be compelled either” . . .

Also, in the *Ozair Hussain case*⁵¹, the Supreme Court of India said that compelling speech is as vital as any expression of freedom of speech under Article 19 (1). It is said that drifting away from the tenets of net neutrality led to a lack of opportunity over the internet space. Data discrimination will compel the consumers to perceive information in a particular manner and will hamper their freedom to perceive information in an all-around manner and hence affecting Article 19 of the Indian Constitution.⁵² Many jurists also argue that the violation of net neutrality will also affect the ‘right to privacy’⁵³ under ‘Article 21’ of the Constitution. As the complexity of the internet grows, the ISPs are likely to use Deep Packet Inspection (DPI), and taking the commercial interest of the ISPs into consideration, it is likely to affect the privacy of the internet users. DPI allows scrutiny at the level of application only, of the data, and also in real-time. If DPI-based network management will be allowed it may lead to interception and scrutiny of user data by the ISPs. This will result in the disclosure of considerable information of the user and would be a compromise with their privacy.

However, many critics of net neutrality argue that following the principles of net neutrality hampers foreign investment in India. It is said that net neutrality lumbers small businesses with burdensome directives and hampers their development. It also increases the cost per unit of data for the ISPs. Thus not following net neutrality will provide ease for accessing certain services which will be helpful for the underdeveloped and developing countries like India for providing the last mile connectivity of the internet.⁵⁴ Critics also claim that this hampers innovation in the telecom sector as with more demand, the ISPs will be bound to find new methods to provide a smooth experience. The main argument of the critics is that it can help in

⁵⁰Abod v. Detroit Board of Education, 431 US 209, 234 (1977)

⁵¹Ozair Husain vs Union of India (2002) 26 SCC 1265 (India)

⁵²Kruthika N.S., Addressing Net Neutrality Through The Lens Of Compelled Speech, National Law School of India Review, 2016 at 36

⁵³Justice K.S. Puttaswamy v. Union of India (2017) 10 SCC 1

⁵⁴Wynand Lambrechts and Saurabh Sinha, Limitations of Last Mile Internet Access in Developing Countries 51 (2019)



the dissemination of information to the last person at the time of emergency and will help in providing relief at the time of the crisis.

5. CONCLUSION

Net neutrality is the cornerstone for democratic access to the internet in India. As net neutrality breaks the incentives of zero-rating it doesn't help in spreading internet access. But that seems to be a very high cost to pay for free internet in comparison to the benefit it offers. Though countries like France and Germany don't adhere to a strong net neutrality framework, we also need to consider the socio-economic scenario in India which is different from those countries. India is already suffering from the menace of fake news and incidents like the Cambridge Analytica Scandal should caution us against providing the ISP's free run for data discrimination.

Big companies have the ability to bring changes in the favour of the consumer but this can be either towards strengthening the democracy or weakening it. Given the magnitude of both Reliance telecom and Facebook and the data they have with them, complete forbearance from the net neutrality framework cannot be an option and the regulator has to keep a close eye over the deal and functioning of both the technological giants. The regulator cannot put this deal in abeyance merely on the apprehension of misuse and no precautionary principle can be put to test in the case of net neutrality. With the strong regulations in India and a previous setback to Facebook over 'Free Basics', it is less likely that the deal will lead to violation of the principles of net neutrality but this doesn't mean that the regulator should remain carefree. The Jio and Facebook deal is a cause of concern because it involves the ancient diplomatic strategy of *realpolitik* where the dividend or a profit gets a priority over the ideology. To ensure democratic internet access, data sovereignty, and constitutional ethos this deal must be closely scrutinised by the regulator. Simply permitting zero-rating against the basic tenets of net neutrality at the time of emergency cannot be a solution. The problem of 'access to the internet' can easily be solved by developing more infrastructure, subsidizing internet devices and connections, or other alternatives. Considering the seriousness of COVID-19, it is the duty of both telecom operators and the government to work together and help marginalized people have access to the internet. However, TRAI should not set any precedent for the telecom industry which can further be used to dilute the canons of net neutrality.