

“HOW TO DESIGN AN INDIAN NET NEUTRALITY LAW”

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I. INTRODUCTION²

The past two years have seen net neutrality rise to prominence as a topic of public debate in India. Multiple policy development processes have been instituted within the executive and legislative branches of the government to formulate policies and regulations protecting net neutrality. The debate in India has seen all sides professing support, at least in principle, for the idea of “net neutrality”, although they have generally been somewhat less forthcoming with definitions of that idea. While proponents demand robust legal protection for net neutrality, opponents have tended to focus on broadening the scope of exceptions to net neutrality. It is conceivable that, as the various policy development processes continue to unfold, a consensus will emerge amongst policymakers in favour of protecting net neutrality through law (regardless of the extent of that protection).

The Telecom Regulatory Authority of India took a small first step in this direction in February 2016 in the form of regulations prohibiting the charging of “discriminatory tariffs for data services on the basis of content”.³ While the regulations themselves studiously avoided using the term “net neutrality”, they were aimed squarely at curtailing Facebook’s “Free Basics” product in the aftermath of a national debate over whether this product violated net neutrality.⁴ More such processes to develop some kind of legal

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³ “Prohibition of Discriminatory Tariffs for Data Services Regulations, 2016”, February 8, 2016 (available at http://www.trai.gov.in/WriteReadData/WhatsNew/Documents/Regulation_Data_Service.pdf).

⁴ See Devjyot Ghoshal, “Why TRAI backed net neutrality—and killed Facebook’s Free Basics in India”, Quartz India (February 8, 2016, available at <http://qz.com/612159/why-trai-backed-net-neutrality-and-killed-facebooks-free-basics-in-india/>).

instrument to protect net neutrality are likely to follow. However, such processes have, to date, been conceived as *ad hoc* reactions to specific products or proposals by Internet content providers and telecom service providers. Policymakers administering such processes must be careful not to fall prey either of two temptations: (1) making a law that they intend to apply to a specific service or services, but which, in practice, affects unrelated services in an unforeseen manner (i.e. “throwing the baby out with the bathwater”); or (2) indulging the putative public opinion of the day instead of making a decision based on evidence and policy principles – public opinion can be easily misrepresented, inherently fickle, capable of manipulation, uninformed, or some combination of all of these defects.

In this note, I offer a number of important “decision points” for policymakers tasked with designing a legal instrument to protect net neutrality. My objective is not to prescribe what I see as the “correct” outcomes for these decision points; instead, it is to provide a structured, conceptual framework to underpin a future net neutrality law. A law based on informed decisions on the key points I identify here is likely to do a better job of effectively protecting the interests of all affected stakeholders, and perhaps even survive judicial scrutiny if it is challenged.

II. THE FRAMEWORK OF REGULATION

The laws⁵ that presently govern telecommunications⁶ and the Internet in India are obsolete to greatly varying degrees, the example *par excellence* being the Indian Telegraph Act, 1885, which is now 130 years old. Even more recent laws, namely the TRAI Act, 1997 and the IT Act, 2000, are already obsolete given how rapidly technology has progressed since they were enacted.⁷ Obsolete laws provide a sub-optimal framework for policymakers to craft solutions to modern legal issues like net neutrality. They were designed to regulate behaviours that are markedly different from those that are

⁵ These include the Indian Telegraph Act, 1885; the Telecommunications Regulatory Authority of India Act, 1997; the Information Technology Act, 2000; and their respective subordinate legislation.

⁶ Although the Information Technology Act, 2000 was specifically designed to regulate various aspects of content on the Internet, telecommunications laws are highly relevant to the present discussion because they are a major source of regulation of Internet access providers (ISPs). For example, the central government’s act of licensing ISPs derives its authority from s.4 of the Indian Telegraph Act, 1885 (see note 30, *infra*).

⁷ This also explains why, in its 2016 regulations (note 3, *supra*), TRAI carefully couched its directions in terms of prohibiting “discriminatory tariffs for data services”.

currently being debated.⁸ And they are based on technological assumptions that are fast losing relevance. An example is the current trend of network convergence, in which all types of telecommunications and Internet traffic are increasingly being carried over IP-based networks, as opposed to the legacy circuit-switched networks that existing laws were designed to regulate. A much wider variety of data is being carried over telecommunications networks today than was thought possible when these laws were enacted – multimedia messages, high-definition video and audio streaming, web content, and video calls, to name a few. The rapidly evolving architecture and usage of telecommunications networks today could surely have existed only in the active imaginations of science fiction writers in 1885!

Existing laws also present problems other than obsolescence. A major shortcoming of the TRAI Act is that it confers extremely limited powers on TRAI, which was originally intended to be an independent regulator.⁹ On many major questions of policy, it limits TRAI’s power to making non-binding recommendations to the central government,¹⁰ which has the final say on policy formulation. Next, older laws may also sometimes influence newer laws. For example, provisions of the IT Act, 2000 and its subordinate legislation dealing with the interception of digital communications are worded very similarly to provisions of the Indian Telegraph Rules, 1951 dealing with the interception of telephone communications.¹¹ For these reasons, policy-makers must first consider a fundamental question – is it appropriate to use

⁸ For example, the Indian Telegraph Act, 1885 prescribes penalties for offences such as “intrusion into signal-room, trespass in telegraph office or obstruction” (s.23), “injury to or interference with a telegraph line or post” (s.25A), and “telegraph officer fraudulently sending messages without payment” (s.27).

⁹ The preamble to the Telecom Regulatory Authority of India Act, 1997 (the “TRAI Act, 1997”) states that it is “an Act to provide for the establishment of the Telecom Regulatory Authority of India...to regulate the telecommunications services...and to protect the interests of service providers and consumers of the telecom sector...”

¹⁰ See s.11 of the TRAI Act, 1997, which sets out TRAI’s functions. S.11(1)(a) sets out subjects with respect to which TRAI may only make recommendations to the central government, including “need and timing for introduction of new service provider”, “terms and conditions of license to a service provider”, “measures to facilitate competition and promote efficiency in the operation of telecommunications services”, and “technological improvements in the services provided by the service providers”, among others.

¹¹ The IT Act, 2000 grants the central and state governments wide powers to order the interception, monitoring, or decryption of “any information generated, transmitted, received or stored in any computer resource”. The procedure and safeguards relating to these powers are specified in the Information Technology (Procedure and Safeguards for Interception, Monitoring and Decryption of Information) Rules, 2009, and are very similar to Rule 419-A of the Indian Telegraph Rules, 1951. These, in turn, were formulated pursuant to guidelines laid down by the Supreme Court in *People’s Union for Civil Liberties v. Union of India*, (1997) 1 SCC 301. See Chaitanya Ramachandran, “PUCL vs Union of India Revisited: Why India’s Surveillance Law Must Be Redesigned for the Digital Age”, NUJS Law Review (forthcoming 2015).

the existing legal framework¹² to regulate behaviours associated with new issues such as net neutrality? Or might a better approach be to craft a new, modern framework law that contemplates modern technology?

Creating a new communications law is not a novel idea in India. In the early 2000s, the NDA government drafted a communications convergence bill that would have replaced the Indian Telegraph Act, 1885 and the TRAI Act, 1997, *inter alia*, and also overhauled the existing regulatory and adjudicatory apparatus by introducing a “Communications Commission of India” and appellate tribunal.¹³ The scope of this bill extended beyond telecommunications and the Internet to include broadcasting. Although the bill was never enacted into law, after a gap of more than a decade, the new NDA government has shown an intention to reintroduce an updated version of the bill.¹⁴ Creating a new law would also present an invaluable opportunity to craft reasonably “future-proof” standards that can be used to make determinations about the permissibility of future, yet-unforeseen forms of behaviour.¹⁵ Therefore, this may be an appropriate time to overhaul India’s aging telecommunications law framework.

III. THE OBJECTIVE OF REGULATION

The next fundamental question that policymakers must consider in formulating a net neutrality law is - *why do we need such a law?* Put another way, what harms will occur in the absence of such a law, and to whom? And more fundamentally, what is the underlying principle of a net neutrality law? These questions go straight to the heart of the ongoing net neutrality debate in India.

¹² Options for this approach include amending existing laws, creating new subordinate legislation, or altering the terms and conditions of licenses entered into by service providers under the Indian Telegraph Act, 1885.

¹³ See “The Communications Convergence Bill”, Bill no. 89 of 2001, available at http://www.dot.gov.in/sites/default/files/CCBill_of_pages_41.pdf.

¹⁴ “NDA rehashes old convergence bill, plans super regulator for telecom, TV and internet”, FirstPost (September 8, 2014, available at <http://www.firstpost.com/business/corporate-business/nda-rehashes-old-convergence-bill-plans-super-regulator-for-telecom-tv-and-internet-1988939.html>).

¹⁵ An example of a law that attempts to do this is the US FCC’s 2015 Open Internet Order, §136 of which sets out the “no unreasonable interference or unreasonable disadvantage standard for Internet conduct”, which is intended as a standard to test future forms of conduct on a case-by-case basis, and specifically “designed to protect against harms to the open nature of the Internet”. See the FCC 2015 Open Internet Order, note 35, *infra*, at §§136-7.

Broadly speaking, the debate contemplates three classes of actors – end users, ISPs, and Internet content providers. Internet access is often characterized in literature as a “two-sided market”,¹⁶ with ISPs dealing with end users on one side, and Internet content providers on the other. These are the three main stakeholders whose fates are considered in the net neutrality debate. The “classic” forms of net neutrality violation involve discrimination by ISPs. ISPs may discriminate between different content providers by blocking, throttling, or charging users extra for traffic from a specific content provider. They may do this primarily to manage network traffic, an example being Comcast’s alleged throttling of traffic associated with BitTorrent.¹⁷ Or, they may seek to disrupt perceived competition from Internet companies providing services similar to legacy telecom services like voice or text messaging; a recent example of this would be Airtel’s (abortive) 2014 attempt to charge users a premium for using VoIP services like Skype.¹⁸ These forms of discrimination by ISPs harm both content providers and end users. A content provider targeted by such discrimination may suffer crippling business losses, especially if the discriminating ISP serves a significant proportion of its prospective customer base. End users are also affected; the throttling of specific services degrades the quality of Internet access that they are paying for, and price premiums for specific services artificially raise the cost of Internet access to them. And in either case, their choice of Internet services is artificially constrained. So when ISPs discriminate, end users and content providers are the constituencies that need protection, and this is the primary goal of net neutrality proponents.

But the net neutrality debate in India has an interesting added dimension. Due to the predominance of mobile Internet access in India, telecom service providers (or “telcos”) also happen to be the largest ISPs. Lobbying by Indian telcos has had a prominent influence on the ongoing net neutrality policy development processes. Rather than focusing on resisting net neutrality regulation, what telcos have been most adamant about is seeking regulatory treatment for themselves that is equivalent to that applicable to content providers. Telcos claim that many online services compete directly with their own – that Skype competes with voice calling, or that WhatsApp

¹⁶ See, e.g. N. Economides et. al., “Network Neutrality on the Internet: a two-sided market analysis”, *Information Economics and Policy* 24 (2012) 91 (available online at http://www.stern.nyu.edu/networks/Economides_Tag_Net_Neutrality.pdf).

¹⁷ Hart vs. Comcast (available online at http://blog.wired.com/27bstroke6/files/hart_v_comcast.pdf).

¹⁸ Pranav Dixit, “Airtel Wants You to Pay Extra for Using Skype, Viber, more”, *Hindustan Times* (December 25, 2014, available online at <http://www.hindustantimes.com/technology-topstories/airtel-wants-you-to-pay-extra-for-using-skype-viber-more/article1-1300013.aspx>).

competes with SMS. The remedy they seek is a “level playing field”¹⁹ for themselves and Internet content providers. Telcos’ industry associations have argued that this means that Internet content providers should be made subject to the same legacy telecom licensing regime that telcos themselves must comply with.²⁰ The rationale they present for seeking such a “level playing field” is that competition from Internet services has led to lost revenues for telcos, and that bringing content providers (or “over the top” services, to use telcos’ preferred term) under the same licensing regime as telcos presents a remedy for this loss. This is why both TRAI²¹ and the Department of Telecommunications’ expert committee on net neutrality²² have devoted considerable time and effort to dealing with the question of telcos’ alleged revenue loss.

But policymakers need to look beyond this bald assertion and answer a more fundamental, possibly dispositive question – do telcos’ claims of revenue loss due to competition from Internet content providers *constitute a net neutrality problem at all*? If not, then a net neutrality law should not be concerned with this issue at all. A better understanding of what “net neutrality” actually means should provide some insight into this question, and this is discussed in the concluding part of this section. But for the present purpose, it is sufficient to consider that a violation of net *neutrality* must involve some kind of discriminatory behaviour – behaviour that affects the equal treatment of traffic on the network. The telcos’ claims of revenue loss do not imply any such behaviour. They are not claiming that traffic from Internet content providers is, by itself, degrading traffic associated with their own products.²³ What actually concerns them is what they perceive to be “unfair competition” from content providers, whom they view as “free riders” who, unlike telcos, do not need to invest in the expensive communications infrastructure that carries their services to end users. Had telcos been lobbying for the ability to block, throttle, or otherwise disadvantage traffic

¹⁹ See, e.g. “COAI Response to TRAI Consultation Paper on Regulatory Framework for Over-The-Top Services”, p.3 (available at <http://traai.gov.in/comments/24-April/Attachments-81/Annexure%201%20-%20COAI%20Response%20-%20TRAI%20CP%20on%20Regulatory%20Framework%20for%20OTT%20Services.pdf>).

²⁰ See note 19, *supra*, p.3 and responses to questions 1, 2, 8 and 17.

²¹ TRAI, “Consultation Paper on Regulatory Framework for Over-The-Top Services”, Chapter 2 and Question 3. (March 27, 2015, available at <http://www.traai.gov.in/WriteReaddata/ConsultationPaper/Document/OTT-CP-27032015.pdf>).

²² Department of Telecommunications, “Net Neutrality: DoT Committee Report”, Chapter 9 (available online at http://www.dot.gov.in/sites/default/files/u10/Net_Neutrality_Committee_report%20%281%29.pdf).

²³ However telcos have argued that they should retain the ability to determine how much of their fixed bandwidth they allocate to different services. This is a distinct question, that of “reasonable network management”, one of the most contested exceptions to net neutrality rules.

between end users and content providers, then the question would squarely have been one of net neutrality, albeit one in which the ISPs are the instigators of harm to another. But in demanding that regulators should impose a licensing framework on content providers (which would involve a license fee based on revenue sharing, which telcos hope would ultimately mitigate the revenue losses they allege), telcos are not raising a question of net neutrality, but of something else altogether – perhaps one of unfair competition or industrial regulation. Therefore, policymakers should be very circumspect about including, in a net neutrality law, provisions that seek to address such complaints from telcos. Indeed, they should be very careful about taking any action at all on such complaints in the absence of convincing evidence of harm.

This conclusion hints at the answer to a more fundamental question – what is the underlying principle of a net neutrality law? This question can be further sub-divided into two questions: what types of behaviours should such a law prevent? And whose interests is a net neutrality law supposed to protect?

The first question is more straightforward – a net neutrality law is supposed to protect the neutrality of the network! This means that it would prohibit forms of behaviour with respect to network traffic that are non-neutral. This could include blocking selected traffic, speeding up or slowing down selected traffic relative to other traffic, or making selected traffic cheaper or more expensive to access (e.g. by selectively applying caps on data transfer). These are the types of behaviour that tend to be prohibited by existing net neutrality laws around the world.²⁴ However, if net neutrality is a principle, then it must be expressed in a manner that goes deeper than prohibiting highly specific forms of conduct – it must create a *standard* that is capable of being applied to currently unforeseeable forms of network behaviour that may arise in the future. This is where current definitions of net neutrality tend to become either elusive, impractical, short-sighted, or some combination of all of these. Indeed, even the TRAI’s 2016 order is merely a rule proscribing a highly specific form of conduct, i.e. the charging of “discriminatory tariffs for data services on the basis of content”. But policymakers are beginning to recognize the need to state such a standard in clear terms. A contemporary attempt at doing this is the “standard for future conduct” laid out in the US FCC’s 2015 Open Internet Order, which states that broadband providers may not “unreasonably interfere with or unreasonably disadvantage: (i) end users’ ability to select, access, and use broadband Internet access service or

²⁴ For example, see the 2015 FCC Open Internet Order’s “bright line rules” against blocking, throttling, and paid prioritization of traffic. Note 35, *infra*.

the lawful Internet content, applications, services, or devices of their choice, or (ii) edge providers' ability to make lawful content, applications, services, or devices available to end users".²⁵ This is an instantly enlightening passage of the 2015 Open Internet Order, as it makes clear that the two stakeholder groups that the FCC wants to protect against non-neutral network behaviour are "end user" and "edge providers". It wants to protect both Internet users' choice in accessing content, and content providers' ability to make that content available.

This example sheds light on the second question above – whose interests is a net neutrality law supposed to protect? As I mentioned previously in this section, policymakers should recognize that non-neutral network behaviours disadvantage different stakeholders, and in different ways. Consumer choice is adversely affected by non-neutral network behaviours – consumers are restricted from freely using the Internet access that they've paid for. So are businesses that depend on delivering content online; an unfair playing field can cut them off from potential consumers and drive them out of business. This possibility has been repeatedly invoked by Indian net neutrality proponents, and can be called the "how will startups survive?" question. The assumption here is that startups and other small businesses simply do not have the same resources as larger companies, so if businesses are permitted to pay ISPs for preferential treatment, smaller businesses will lose fast and hard. In fact, non-neutral behaviour can negatively affect ISPs themselves – if one ISP is able to strike an exclusive deal to deliver a popular online service to its subscribers for free or very low cost, then users will flock to that ISP, leaving other ISPs at a competitive disadvantage. Last but certainly not least, non-neutral network behaviour affects society at large, even beyond the corpus of Internet users. Imagine if ISPs are permitted, or directed, to screen certain types of content, on the basis of political or moral "objectionableness". This would immediately affect the public discourse in society and chill free speech.

What is clear, however, is that net neutrality cannot and should not be used to protect an incumbent ISP against competition. To the extent that net neutrality protects ISPs, it is only to ensure a level playing field amongst different ISPs, and therefore *encourages* competition.

These examples show that, despite its origins as an (arguably arcane) regulatory principle, net neutrality can actually be a powerful shield to many different stakeholders. It can protect Internet users' freedom of consumer choice. It can protect businesses - both content providers and ISPs – from

²⁵ §21, *id.* (at <https://www.fcc.gov/article/fcc-15-24a>).

unfair competition between and amongst themselves. And it can protect society’s freedom of expression. Not all of these values will be equally cherished in every society. Therefore, policymakers must weigh these values from the perspective of their own society. What values does that society hold dear and want to defend?

IV. THE INSTRUMENT OF REGULATION

Policymakers tasked with preserving net neutrality in law may choose from a variety of legal and regulatory instruments to achieve the purpose. Surprisingly little attention appears to have been paid to the question of what legal instrument is best suited to the purpose of protecting net neutrality in India. This is, in fact, a fundamental question to which policymakers must pay due attention if a net neutrality law is to withstand judicial scrutiny.

The option that would require the most effort is a new act of Parliament. The act may itself define protected principles of net neutrality, or alternatively include a framework provision with the details to be spelt out in subordinate legislation. If the communications convergence bill mentioned in section I is to be tabled before Parliament in the near future, adding provisions relating to net neutrality to the bill would be an expeditious way for policymakers to achieve this time-consuming and politically unpredictable goal.

Less burdensome options include subordinate legislation in the form of rules or regulations under existing laws, and an amendment to the existing terms and conditions of various telecom licenses. The significance of these options lies in the relative ease with which they may be exercised by the central government. Where the central government is competent to formulate delegated legislation, it is significantly easier for it to amend such legislation in response to changing circumstances than for Parliament to amend or repeal an act. While this flexibility makes the use of subordinate legislation a naturally attractive method to create a net neutrality law, it is subject to a notable constraint; the doctrine of excessive delegation. The position laid down by the Supreme Court is that a legislature cannot delegate its “essential legislative power”, which may be understood as “the determination or choosing of the legislative policy and of formally enacting that policy into a binding rule of conduct”.²⁶ In other words, the executive branch of the central government cannot usurp Parliament’s policy-making role; in formulating subordinate legislation, it cannot itself craft a new policy. This

²⁶ *Delhi Laws Act, 1912, In re*, AIR 1951 SC 332 : 1951 SCR 747.

leads us to two pertinent facts. *First*, the question of whether net neutrality should be protected by law is certainly a question of policy. *Second*, no existing Indian law says anything about net neutrality. To the first fact, as the national debate on net neutrality has demonstrated, it is not simply a question of technical standards; it has at its heart fundamental questions about citizens' rights, and competition (real or perceived) between ISPs and content providers and *amongst* content providers. It is undoubtedly a question of policy. To the second fact above, as there is no existing law dealing with net neutrality in India, there is no "parent provision" that can support subordinate legislation on the issue. And finally, net neutrality has proven to be an emotive mass issue, and therefore a solution that is crafted by an obscure government department in the form of subordinate legislation is likely to enjoy less popular legitimacy than an act of Parliament that has been deliberated on and enacted by elected lawmakers.

One explicit reference to the appropriate instrument of net neutrality regulation is found in the report of the Department of Telecommunications' expert committee on net neutrality, which observed that "since amendment to licensing terms and conditions follow[s] a simple process, it is possible to build an enabling clause in the licence conditions through which the Government can acquire the ability to specify enforceable guidelines for prescribing the principles and rules of Net Neutrality. This can be an immediate solution to a vexed problem without recourse to the enactment of a new law in the short term...The Committee, therefore, recommends the incorporation of a clause in the license conditions of TSPs/ISPs that will require the licensee to adhere to the principles and conditions of Net Neutrality specified by guidelines issued by the licensor from time to time. The guidelines can describe the principles and conditions of Net Neutrality in detail and provide applicable criteria to test any violation of the principles of Net Neutrality."²⁷ The report suggests such guidelines, and also points to the aforementioned license terms and conditions as containing "the only relevant reference" to net neutrality.²⁸

The "license conditions" referred to in the report are the terms and conditions of the licenses issued by the central government (acting through the

²⁷ See DoT Committee Report, note 22, *supra* at §§13.5-13.6.

²⁸ "In relation to Net Neutrality, the only relevant reference is available in the scope of Internet Service license and the Internet Services authorization under Unified License which stipulates that the subscriber of Internet services shall have unrestricted access to all content available on Internet except for such content which is restricted by the Licensor or designated authority under law. This provision does not enable a mechanism for prescribing the principles and rules of Net Neutrality and define the enforcement methods." *Id.* at §13.5.

Department of Telecommunications), which are currently subject to the “Unified License” regime instituted in 2013.²⁹ These licenses are granted under section 4 of the Indian Telegraph Act, 1885,³⁰ and the exercise of licensing powers must therefore be guided by the content of that provision. The provision – which is more than a century old – confers upon the central government the power to “grant a license...to any person to establish, maintain or work a *telegraph*”, a word that applies to the provision of Internet services only by virtue of a liberal interpretation of a definition drafted with incredible foresight.³¹ Even noting that the report proposes this measure as a stop-gap solution at best, there are two issues with it. *First*, the definition of the word “telegraph” clearly limits its meaning to the *infrastructure* over which Internet traffic is carried, as is evident from the words “any appliance, instrument, material or apparatus...” Net neutrality regulation involves specifying standards for the carriage of *content* over ISPs’ networks, and is therefore unlikely to find support in section 4. *Second*, even assuming this objection is somehow overcome, net neutrality regulation is unquestionably a matter of policy, and the delegation of essential policy-making powers to the Department of Telecommunications (or any other central government body) is unlikely to withstand constitutional scrutiny under the doctrine of excessive delegation.

It is also worth briefly examining the nature of TRAI’s 2016 regulations,³² which constitute India’s first attempt at net neutrality regulation. The regulations are in the nature of tariff-setting under section 36 of the TRAI Act, 1997, in exercise of TRAI’s powers to “ensure compliance of terms and conditions of license”³³ and “notify...rates at which...telecommunication services within India and outside India shall be provided under this Act.”³⁴ It is immediately clear how constrained TRAI is by its parent statute, which contains no reference to the term “Internet”; instead of regulating behavior based on the essential nature of net neutrality (as discussed in section II), it was restricted to regulating a highly specific behavior in a manner

²⁹ See <http://www.dot.gov.in/licensing/unified-license>.

³⁰ “4. Exclusive privilege in respect of telegraphs, and power to grant licenses. — (1) Within India, the Central Government shall have exclusive privilege of establishing, maintaining and working telegraphs: *Provided that* the Central Government may grant a license, on such conditions and in consideration of such payments as it thinks fit, to any person to establish, maintain or work a telegraph within any part of India...”

³¹ *Id.* “Telegraph” is defined in s.3(1AA) to mean “any appliance, instrument, 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 or magnetic means.”

³² Note 3, *supra*.

³³ Section 11(1)(b)(i), TRAI Act, 1997.

³⁴ Section 11(2), TRAI Act, 1997.

that could plausibly be said to comport with one of the powers conferred to it by its parent statute. In TRAI's case, this is a structural constraint that renders the regulator incapable of doing much more than prohibiting a small subset of non-neutral behaviours as and when they arise – that is, it can only reactively treat certain symptoms, not the underlying cause of the problem. It is apparent that it may not always be appropriate to shoehorn attempts at net neutrality regulation into the limited regulatory toolkit of an existing regulator.

In sum, in choosing an appropriate legal instrument to regulate net neutrality, policymakers should be guided by two factors. The first is constitutionality; given that the question of whether to protect net neutrality is, at its heart, a question of policy, policymakers must carefully consider both the constitutional propriety of using subordinate legislation or license terms and conditions to protect net neutrality, and also carefully weigh the likelihood that the use of such means will withstand future judicial scrutiny. The second is popular legitimacy. Net neutrality has become a prominent political issue in India, for which reason the legitimacy of the means used to protect net neutrality is likely to be subject to intense public scrutiny.

V. THE SITE OF REGULATION

Net neutrality laws are conventionally thought of as being enforceable against ISPs, especially “eyeball” ISPs serving end users.³⁵ This is explained both by the obvious control that ISPs enjoy over Internet traffic flowing to end users, and by a number of recent instances in which ISPs have interfered with Internet traffic.³⁶ By contrast, the net neutrality debate in India was ignited by conduct perpetrated by an Internet *content provider* – Internet.org (subsequently rebranded “Free Basics”),³⁷ a Facebook-led initiative to provide access to a limited basket of services for free to end users in India, in partnership with mobile operators (of which Reliance Communications is

³⁵ For example, the FCC's 2015 Open Internet Order contains rules that are applicable to any “person engaged in the provision of broadband Internet access service” (US Federal Communications Commission, “Report and Order on Remand, Declaratory Ruling and Order in the matter of Protecting and Promoting the Open Internet”, March 12, 2015, available at https://apps.fcc.gov/edocs_public/attachmatch/FCC-15-24A1.pdf); while the net neutrality provisions in Brazil's Marco Civil are targeted at the “party responsible for the transmission, switching or routing” of Internet traffic (Brazilian Law No. 12-925, April 3, 2014, Art. 9. English translation available at <https://www.apc.org/en/blog/marco-civil-brazilian-internet-bill-rights-english>).

³⁶ Aaron Sankin, “The Worst Net Neutrality Violations in History”, The Daily Dot (May 21, 2014, available at <http://www.dailydot.com/politics/net-neutrality-violations-history/>).

³⁷ The name of this initiative was subsequently changed to “Free Basics”.

the first).³⁸ Net neutrality proponents in India called for the banning or regulation of Free Basics and similar zero-rated services,³⁹ and the Department of Telecommunications’ expert committee recommended that “collaborations between TSPs and content providers that enable such gatekeeping role to be played by any entity should be actively discouraged” (sic).⁴⁰ This indicates that sections of the general public as well as the central government believe that content providers should be regulated or even banned in order to protect net neutrality. This is a significant point of departure from net neutrality debates in other countries, because it calls for regulation of the behaviour of a content provider (as opposed to an ISP, the conventional target of net neutrality regulation), and, by implication, interference with contractual arrangements between content providers and ISPs. An excellent illustration of this is TRAI’s 2016 regulations, which TRAI has drafted to regulate the behavior of “service providers”⁴¹, prohibiting them from both (i) offering or charging “discriminatory tariffs for data services on the basis of content” and (ii) entering “into any arrangement, agreement or contract...that has the effect of discriminatory tariffs for data services being offered or charged to the consumer on the basis of content”.⁴² The latter clause directly regulates the contractual arrangements that ISPs may enter into with content providers, and therefore indirectly regulates the behavior of content providers.

However, policymakers must make a deliberate, considered decision about whether a net neutrality law should extend to the behavior of content providers as well. It is initially tempting to answer this question in the affirmative; for example, in the case of Free Basics, Facebook determined which apps were admitted to the platform, and could therefore be accessed by users free of charge.⁴³ In other words, with respect to users whose access to the Internet was limited to Free Basics, Facebook got to exclude any services that did not meet the criteria for Free Basics.⁴⁴ This is the behaviour that has been characterized as “gatekeeping” by the Department of Telecommunications committee.⁴⁵ If this behaviour can be interpreted as being equivalent to “blocking” traffic from websites not associated with Free

³⁸ “Internet.org by Facebook”, available at <https://internet.org/about>.

³⁹ “Why does #SaveTheInternet Hate Free?” (April 21, 2015, available at <http://blog.savetheinternet.in/why-does-savetheinternet-hate-free/>).

⁴⁰ See DoT Committee Report, note 22, *supra* at §12.8.

⁴¹ A term that has been defined to include telecom licensees, including the government in its capacity as a service provider. This is broad enough to cover all telecom licensees, including ISPs. See 2016 TRAI regulations, note 3, *supra*, regulation 2(l).

⁴² Regulations 3(1) and (2), 2016 TRAI regulations, note 3, *supra*.

⁴³ Along with the change of name to “Free Basics”, the business model has undergone substantial change as well. See <https://developers.facebook.com/docs/internet-org>.

⁴⁴ See <https://developers.facebook.com/docs/internet-org/platform-technical-guidelines>.

⁴⁵ See DoT Committee Report, note 22, *supra* at §12.8.

Basics, then it is tempting to think that it is non-neutral and should be remedied by a net neutrality law. However, this line of thinking is fallacious. Even assuming that all zero rating violates principles of net neutrality, it must nevertheless be distinguished from other examples of net neutrality violations, because net neutrality violations exist along a continuum of behaviours and are not all alike.

One thing that clearly distinguishes zero rating platforms from other forms of non-neutral behaviour by ISPs, such as blocking or throttling websites, is that such platforms do not in any way limit users' ability to access websites that are not zero-rated. They may, at any time, "graduate" to the "full Internet" by buying a data plan, or use non zero-rated services subject to the standard data rates offered by their ISP.⁴⁶ In other words, zero rating may be seen as a form of positive price discrimination, in which the cost of Internet access (albeit to a subset of the "full Internet") to end users is effectively subsidized by the content provider. Another crucial difference is that zero rating platforms like Free Basics are provided for free to end users. In contract law, an agreement is a contract, and therefore legally enforceable, only when it has lawful consideration.⁴⁷ Under consumer law, the definition of a "service" excludes services rendered free of charge,⁴⁸ implying that a consumer complaint cannot be made against free services. These examples point to the existence of a general legal principle that free services and paid services can be treated differently. Therefore, a fundamental question that policymakers must answer in order to address existing concerns about zero rating is whether or not zero rating services that do not prohibit usage of the "full Internet" and are provided for free should constitute a valid exception to a net neutrality law. To answer this question, policymakers will also need to consider whether positive price discrimination has an effect on end users that is equivalent to negative price discrimination or other forms of "clearly" non-neutral conduct such as blocking or throttling or traffic. The answer to this question is currently unclear, for which reason a hasty decision either way on zero rating would be ill-advised without rigorous inquiry into the questions presented above.

⁴⁶ David Post, "Facebook, Internet.org and the Net Neutrality Bugaboo", *The Washington Post* (August 17, 2015, available at <https://www.washingtonpost.com/news/volokh-conspiracy/wp/2015/08/17/facebook-internet-org-and-the-net-neutrality-bugaboo/>).

⁴⁷ S.10, Indian Contract Act, 1872.

⁴⁸ S.2(1)(o), Consumer Protection Act, 1986: "'service' means service of any description which is made available to potential users and includes, but not limited to, the provision of facilities in connection with banking, financing insurance, transport, processing, supply of electrical or other energy, board or lodging or both, housing construction, entertainment, amusement or the purveying of news or other information, but does not include the rendering of any service free of charge or under a contract of personal service...".

At the present time, from the above analysis it appears that the case for a *net neutrality law* that regulates just ISPs is stronger than the case for a law that regulates both ISPs and content providers. However, this does not preclude regulation itself. For example, Facebook has been accused of abusing its dominant position in a manner that may have an adverse effect on competition; critics of Free Basics argue the service has anti-competitive effects, as it would be very hard for competitors to launch competing services in a country where potential customers will have to pay to access such services while Facebook is exempt.⁴⁹ However, this is squarely a question of competition law, which the Competition Commission of India is adequately equipped to deal with, and should not be conflated with net neutrality, especially if net neutrality is understood as a principle of consumer protection rather than a principle of competition law. Similarly, concerns regarding privacy and data protection are also regulated through highly specialized legal regimes, and do not belong to the realm of net neutrality.⁵⁰ So, for the purpose of regulating the ability of content providers to act as “gatekeepers”, a net neutrality law may not be the ideal venue. While it is doubtless important to continue to study and analyze the harm or benefit of zero-rated services to consumers, to the extent that adequate remedies exist to address harms to competition or consumers, or where existing remedies can be strengthened to include previously unforeseen forms of behaviour that may constitute, in principle, violations of the existing laws that provide for such remedies, such harms do not necessarily need to be contemplated in a net neutrality law.

VI. THE MECHANISM OF REGULATION

The mechanism of telecom and Internet regulation in India displays considerable ambiguity and overlap between the powers of different government bodies to enforce regulations and adjudicate disputes. The Telecom Regulatory Authority of India (TRAI) is the nominally independent regulator.⁵¹ The Department of Telecommunications (within the Ministry of Communications and Information Technology) performs the state’s licensing

⁴⁹ Susan Crawford, “Zero for Conduct”, *Backchannel* (available at <https://medium.com/backchannel/less-than-zero-199bcb05a868>).

⁵⁰ See, e.g. Shruti Dhapola, “NetNeutralityDebate:Facebook’sInternet.orgHasPrivacy,Security Issues”, *The Indian Express* (May 7, 2015, available at <http://indianexpress.com/article/technology/social/net-neutrality-debate-facebooks-internet-org-faces-privacy-security-concerns/>).

⁵¹ See preamble to the TRAI Act, 1997: “An Act to provide for the establishment of the Telecom Regulatory Authority of India and the Telecom Disputes Settlement and Appellate Tribunal to regulate the telecommunications services, adjudicate disputes, dispose of appeals, and to protect the interests of service providers and consumers of the telecom

function, and also formulates policy. The Telecom Disputes Settlement and Appellate Tribunal (TDSAT) is a specialized dispute resolution forum. However, the division of functions between these bodies is neither precisely articulated in law, nor always consistent or predictable in practice. For example, the first major net neutrality policy-making exercise of 2015 in India was a consultation paper in which TRAI sought the public's input on 20 questions about both net neutrality and the potential regulation of online services.⁵² Notably, TRAI has not been explicitly granted the power to make rules relating to the Internet by its parent statute, and the justification for TRAI's competence to issue such a paper is found in residual language that allows it to make recommendations on "any other matter relatable to telecommunications industry in general" (sic).⁵³ This is why TRAI's 2016 order used, as its legal basis,⁵⁴ the power to "ensure compliance of terms and conditions of licence" (sic) in the TRAI Act.⁵⁵ The Department of Telecommunications claims full authority over telecom policy-making, but even it is subject to the paramountcy of the Union Cabinet.⁵⁶ So TRAI's process was thrown into disarray when, following the public consultation but before TRAI released its recommendations, the Department of Telecommunications released its own report on Net Neutrality.⁵⁷ The Union Minister for Communications and IT sought to reconcile these two developments by retroactively positioning the Department of Telecommunications' report as an input to TRAI in response to its consultation paper.⁵⁸ And as I have previously argued, the scene was further muddied when a Parliamentary Standing Committee on IT commenced its own hearings into net neutrality.⁵⁹ Returning to the subject of TRAI, it further muddied the waters when, following its 2016 order and without having released its recommendations on the 2015 consultation that included many questions relating to net neutrality (which remain unreleased at the time of writing), it further issued a "Consultation Paper on

sector, to promote and ensure orderly growth of the telecom sector, and for matters connected therewith or incidental thereto."

⁵² Note 21, *supra*.

⁵³ Section 11(1)(a)(vii), TRAI Act, 1997.

⁵⁴ See the preamble to the 2016 TRAI regulations, note 9, *supra*.

⁵⁵ Section 11(1)(b)(i), TRAI Act, 1997.

⁵⁶ PTI, "Net Neutrality Report: Government yet to take final view on Internet calls, says Telecom Min" (July 19, 2015, available at <http://indianexpress.com/article/technology/tech-news-technology/net-neutrality-report-govt-yet-to-take-final-view-on-internet-calls-says-telecom-min/>): "Prasad said that the report is now in public domain for comments and it will be sent to TRAI also. 'After the TRAI report, we will take a structured view. Thereafter Cabinet will take a final decision,' Prasad said."

⁵⁷ See the Department of Telecommunications Report, note 22, *supra*.

⁵⁸ See note 56.

⁵⁹ Chaitanya Ramachandran, "Competing Processes Obfuscate Internet Policy-Making in India", CircleID (June 4, 2015, available at http://www.circleid.com/posts/20150604_competing_processes_obfuscate_internet_policy_making_in_india/).

Free Data”⁶⁰ and a “Pre-Consultation Paper on Net Neutrality”.⁶¹ So, the policymaking process for net neutrality serves as an outstanding example of the dysfunction and ad hocism that characterizes communications law and policymaking in India. The roles of different government bodies are not clearly demarcated, and this leads to a confused, chaotic, unpredictable and imprecise policymaking process.

Therefore, the emergence of net neutrality as a topic of public debate in India also presents an opportunity to revisit our archaic and dysfunctional regulatory regime for communications, as I have argued above.⁶² But in addition to the opportunity to replace our aging communications laws, we are also presented with a golden opportunity to revisit the manner in which those laws are applied. At the moment, communications laws are enforced to varying degrees by TRAI (the independent regulator), the Department of Telecommunications (which forms part of the executive branch of the central government), and TDSAT (which is a specialized tribunal). The net neutrality debate has exposed a unique shortcoming of this haphazard regulatory mechanism – Indian administrative bodies like these three entities may be capable of enforcing narrowly-defined rules or regulations, but are not equipped – either in terms of expertise or legitimacy – of enforcing *standards*. That is to say, they are ill-equipped to adjudicate, on a case-by-case basis, whether a broad standard backed by a deliberate policy has been met by a given behaviour. It is increasingly becoming apparent that such standards are relevant because they are capable of simultaneously expressing the underlying spirit of a net neutrality policy *and* serving as clear and relatively future-proof litmus tests for determining whether a given behaviour is acceptable or not. A piece of delegated legislation (like rules or regulations) may serve as a simulacrum of the latter function, but cannot be future-proof because it is merely an instrument – and not a statement – of policy. The “standard for future conduct” in the FCC’s 2015 Open Internet Order is a notable first attempt at laying down such a standard, and could pave the way for similar attempts by policymakers in other countries, including India.

This gives rise to the question of whether an alternative mechanism may be more suitable to implement net neutrality standards in a manner that is flexible and responsive to changing technologies and behaviours. In

⁶⁰ TRAI, “Consultation Paper on Free Data” (May 19, 2016, available at http://www.trai.gov.in/WriteReadData/ConsultationPaper/Document/CP_07_free_data_consultation.pdf).

⁶¹ TRAI, “Pre-Consultation Paper on Net Neutrality” (May 30, 2016, available at http://www.trai.gov.in/WriteReaddata/ConsultationPaper/Document/Net_Neutrality_Preconsultation_30_may_2016.pdf).

⁶² Section I, *supra*.

pondering this question, policymakers should consider the role that courts – as opposed to the executive branch or even specialized tribunals – are capable of playing in testing behaviours against standards in a flexible manner that is capable of evolving with time. It is the courts that have historically been tasked with dispensing the essential, time-honoured judicial function of interpreting and applying the law to a specific set of facts. In performing this function, courts enjoy the twin advantages of centuries of experience in this activity, and public confidence in their ability to dispense justice. It is true that courts in India are beset with many institutional problems, including a massive backlog of cases. However, the costs of using the judicial system may not necessarily outweigh the benefits. This is not to say that a purely regulatory mechanism is incapable of enforcing standards; after all, that is precisely what the FCC does in enforcing instruments like the Open Internet Order. However, it is important to remember that the FCC has much more experience than TRAI in carrying out this function,⁶³ and over the course of this experience has routinely dealt with cases where emerging technology has challenged established law.

VII. CONCLUSION

The net neutrality debate in India is a welcome development primarily because public engagement with the arcana of communications law and policy at this scale is simultaneously unprecedented and badly needed. But the infusion of popular sentiment and politics into policy making processes for a highly technical subject like net neutrality presents a significant risk to the objectivity of those processes. I am, however, optimistic that a policy arrived at upon full consideration of the key decision points outlined here can overcome this risk and result in the creation of a law that protects affected stakeholders in a sustainable and just manner.

⁶³ TRAI was established in 1997, whereas the FCC was established in 1934 – a difference of 63 years.