

ZERO RATING AS THE DEMON AND THE SAVIOUR: RETHINKING NET NEUTRALITY AND FREEDOM OF EXPRESSION FOR THE GLOBAL SOUTH

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ABSTRACT *Zero-rated mobile applications like Internet.org have been characterised both as a supposed exterminator of the digital divide and as a violation of net neutrality in developing countries like India. This serves to illustrate how net neutrality and bridging digital divide have been posited as goals in contradiction to each other. How this seeming contradiction is relevant to developing a more nuanced understanding of the freedom of speech and expression and of net neutrality is the subject of the present paper. Accordingly, the paper is divided into three broad sections: I begin by analysing how far different conceptions of freedom of speech and expression respond to private forms of clamping of speech. To do this, I invoke Jack Balkin's theory of democratic culture and contextualise it against the jurisprudence on freedom of expression in contexts of private discrimination in India. I then illustrate how a negative interpretation of net neutrality is able to successfully address some of these forms of private discrimination. Thereafter, the second section begins by*

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tracing the forms of private discrimination, which negative net neutrality is unable to address by delineating the different kinds of (lack of) internet access. It then maps these factors hindering internet access against two important aspects of freedom of speech and expression, viz. the principle of media diversity and the goal of expanding citizens' access to media infrastructure, some aspects of which can be termed structural media access. In the third section of this paper, I argue that the delinking of the principles of media diversity and structural media access in law and policy debates hinders an inclusive response to all forms of private discrimination. Thereafter, through an examination of TRAI's policy engagement with these issues, I argue that these principles need to be relinked for the development of a concept of net neutrality which comprehensively addresses the concerns of freedom of speech and expression for citizens in the global south.

I. INTRODUCTION

The proliferation of zero-rated internet services has initiated concern regarding net neutrality debate in the developing world. Usually offered in the form of mobile internet apps, zero-rated internet refers to digital services which offer content to users free of mobile data costs. Facebook's Internet.org (later, rebranded as "Free Basics"¹), which has been offered in certain developing countries² including in India³, has been one of the most discussed examples of such services. According to Facebook CEO, Mark Zuckerberg, Internet.org will contribute to diminishing the digital divide by allowing people to access the internet at lower cost.⁴

¹ Srinivasan Ramani, *Facebook rebrands internet.org platform as "Free Basics by Facebook,"* The Hindu, 25 September 2015, available at <<http://www.thehindu.com/sci-tech/technology/internet/facebook-rebrands-internetorg-platform-as-free-basics-by-facebook/article7686680.ece>>, last accessed 03 January 2017.

² Internet.org by Facebook, *Where We Have Launched, Facebook*, available at <<https://info.internet.org/en/story/where-weve-launched/>>, last accessed 03 January 2017.

³ Facebook, *Internet.org App Now Available In India*, 10 February 2015, available at <<http://newsroom.fb.com/news/2015/02/internet-org-app-now-available-in-india/>>, last accessed 03 January 2017. This was also followed by zero-rating app offer by Airtel in India, see Firstpost on 21 April 2015, available at <<http://tech.firstpost.com/news-analysis/timeline-airtel-zero-to-internet-org-what-fuelled-the-ongoing-net-neutrality-debate-in-india-264130.html>>, last accessed 03 January 2017.

⁴ Jonathan Barnes, *Inside Facebook's Ambitious Goal To Bridge The Digital Divide With Drones*, 31 March 2014, available at <<http://www.forbes.com/sites/ptc/2014/03/31/inside-facebooks-ambitious-goal-to-bridge-the-digital-divide-with-drones/#7e6cb161e430>>, last accessed 03 January 2017.

But contrary to its misleading name, Internet.org does not provide free access to the *entire* internet. In fact, it cherry picks internet content services which Facebook deems useful for the financially-lacking users of Internet.org. Content on Internet.org has been limited, among others, to certain websites providing information about weather, news, dictionaries, medical assistance, sports updates, and of course, Facebook. Consequently, Internet.org has been accused of attempting to create a “poor person’s internet,”⁵ by leaving out large portions of the internet out of its offer of Internet.org as well as of distorting market competition against local internet content platforms and individual content creators like bloggers which are not part of the Internet.org scheme.⁶ Another point of criticism has been that since Internet.org can be accessed only through a “qualifying” mobile operator⁷, it also distorts competition in the telecommunications market.⁸ And since it does not treat all internet traffic equally, but rather works by prioritising certain content over others, it is argued to be in violation of net neutrality, which may be broadly understood as a principle of non-discrimination between different kinds and sources of internet content by private owners of internet media infrastructure.⁹

In this manner, like other zero-rated services, Internet.org has been characterised both as a supposed exterminator of the digital divide and as a violator of net neutrality. But what do these characterisations mean for the

⁵ Cory Doctorow, ‘*Poor Internet for Poor People*’: India’s Activists Fight Facebook Connection Plan, 15 January 2016, available at <<https://www.theguardian.com/world/2016/jan/15/india-net-neutrality-activists-facebook-free-basics>>, last accessed 03 January 2017.

⁶ It should be noted that Facebook claims that any content provider can join Internet.org, but it still means that Facebook is exercising a gatekeeping function upon the users of Internet.org by *choosing* which content application is made available, rather than making all internet content available. See *infra* note 18 for elaboration on this criticism.

⁷ The description for Facebook Free Basics on Google Play states, “*With Free Basics, you can connect to Facebook and other websites for free using a SIM card from a qualifying mobile operator. Stay in touch with friends and family, search for jobs, check out news and sports updates, and get health information – all without data charges.*” (emphasis added), available at <<https://play.google.com/store/apps/details?id=org.internet&hl=de>>, last accessed 03 January 2017.

⁸ Nikhil Pahwa, *What Mark Zuckerberg Didn’t Say About Internet.org*, 10 October 2014, available at <<http://www.medianama.com/2014/10/223-zuckerberg-india-internet-org/>>, last accessed 03 January 2017; The Economist, *Why Facebook’s “free internet” effort is in trouble in India*, 06 January 2016, available at <<http://www.economist.com/blogs/economist-explains/2016/01/economist-explains-3>>, last accessed 03 January 2017; Mathew Ingram, *Is Facebook’s Internet.org project a charitable effort or a customer acquisition strategy?*, Fortune Magazine, 20 May 2015, available at <<http://fortune.com/2015/05/20/facebook-internet-org/>>, last accessed 03 January 2017.

⁹ This generic understanding of net neutrality is based on the work of Tim Wu, who coined the term. See, Tim Wu, *Network Neutrality FAQ*, available at <http://www.timwu.org/network_neutrality.html>, last accessed 13 February 2018.

freedom of expression on the internet? The broad aim of this paper is to address this question by unravelling the implications of the net neutrality debate on the freedom of speech and expression on the internet. The contextual focus on zero-rated internet services in this regard is of special relevance for developing countries like India which have seen a significant rise in such services.

One might ask why it is important to contextualise the net neutrality debate against the idea of freedom of expression, especially since the issue of net neutrality stems from techno-commercial concerns of the private sphere.¹⁰ On the other hand, as one of the fundamental rights for democracy, freedom of expression qualifies soundly as a public issue, and seems to have little direct relationship with the private technical/economic sphere of net neutrality. However in reality, the debates of net neutrality and those of freedom of expression online are actually deeply intertwined. A legal governance mechanism embodying net neutrality principles has consequences for the original architecture of the internet,¹¹ which is widely (if questionably) assumed to be more decentralised, and therefore have more democratic potential than the media preceding it.¹² It is argued that a legal design embodying net neutrality is essential to prevent a compromise of this architecture.¹³ Such a compromise can occur through arbitrary discrimination by the owners of “private conduits of public expression”¹⁴ on the internet,¹⁵ which can seriously erode citizens’ right to freedom of speech and expression in the digital sphere.¹⁶ These private conduits- the material networks through which information on the internet flows (viz. cable internet networks, dedicated

¹⁰ V. Sridhar and Rohit Prasad, *How Complex is Net Neutrality?*, OUP BLOG <http://blog.oup.com/2015/05/how-complex-is-net-neutrality/> (last updated May 8, 2015).

¹¹ Barbara Van Schewick, *Internet Architecture and Innovation*, 355-375 (2010).

¹² Lawrence Lessig, *The Architecture of Innovation*, 51 DUKE L. J. 1783 (2002); See also generally, Barbara Van Schewick, *Internet Architecture and Innovation (2010)*, Jonathan Zittrain, *The Future of the Internet* (2008), LAWRENCE LESSIG, *Code Version: 2.0* (2006).

¹³ Barbara van Schewick, *Towards An Economic Framework for Network Neutrality Regulation*, 5 JOURNAL OF TELECOMMUNICATIONS AND HIGH TECHNOLOGY LAW, 338-340 (2007); Parminder Jeet Singh, *Net Neutrality Is Basically Internet Egalitarianism*, ECONOMIC AND POLITICAL WEEKLY, Vol. 5, Issue no. 19 (09 May 2015); *supra* note 4, 96-97, 387-388.

¹⁴ Dawn Nunziato, *Virtual Freedom: Net Neutrality and Freedom of Speech in the Internet Age*, 1-23 (2009).

¹⁵ Nikhil Pahwa, *Airtel Wants To Ruin The Internet By Bringing In A Digital VIP Culture*, Scroll.in, 7 April 2015, available at <<https://scroll.in/article/718820/airtel-wants-to-ruin-the-internet-by-bringing-in-a-digital-vip-culture>> (last accessed 3 January 2017); Sean Hollister, *Netflix Accuses Comcast of Charging Twice for the Same Internet Content*, The Verge, April 24, 2014, available at <<http://www.theverge.com/2014/4/24/5650406/netflix-accuses-comcast-of-double-dipping-with-isp-toll>> (last accessed 3 January 2017).

¹⁶ Dawn Nunziato *Supra* note 14, 2-23.

leased lines, optic fibre networks, mobile spectrum networks or satellite internet)- constitute the infrastructure for the internet media.¹⁷ It is the huge gatekeeping power which private actors exercise over this internet media infrastructure¹⁸ that has led to concerns about the limitation of freedom of speech and expression on the internet, and its subsequent adverse impact for democracy.¹⁹

All this hints that the boundaries between the public right to free expression and the private sphere of commercial negotiations and net neutrality are blurry.²⁰ One cannot really hope to understand net neutrality, either descriptively or normatively, without delving into what free expression online really means or should mean, and vice-versa. Engaging with one provides the missing link to comprehensively engaging with the other. This is what the present paper hopes to do. It asks how far freedom of expression on the internet is protected through our understandings of net neutrality. What implications do such understandings of net neutrality have for media diversity and digital divide? Relatedly, how can we reimagine net neutrality, especially in the global south context of India, such that it really protects and enhances the democratically-cherished idea of freedom of expression?

To approach these questions, I refrain from laying down the definitions of either “net neutrality” or “freedom of expression” at the beginning, since both are terms with evolving meanings that also vary according to the philosophical lens used to understand them.²¹ The paper rather approaches these terms by mapping their diverse socio-legal understandings in the context of citizens’ interests to lay down a theoretical framework for a freedom of expression-oriented conception of net neutrality.²² The hope is that such

¹⁷ Throughout this paper, I use the terms “media/internet infrastructure” and “infrastructure for media/internet” interchangeably to mean the material or physical infrastructure which makes media/internet possible.

¹⁸ Parminder Jeet Singh, *Net Neutrality Is Basically Internet Egalitarianism*, ECONOMIC AND POLITICAL WEEKLY, Vol. 50, Issue no. 19(09 May 2015); Pranesh Prakash, *Regulatory Perspectives on Net Neutrality*, The Centre for Internet and Society, 08 July 2015, available at <<http://cis-india.org/internet-governance/blog/regulatory-perspectives-on-net-neutrality>> (last accessed 03 January 2017).

¹⁹ Anita Gurumurthy, *Net Neutrality at a Crossroads: Why India’s Policy Process has Important Lessons for the US*, OpenDemocracy, 30 November 2017, available at <<https://www.opendemocracy.net/anita-gurumurthy/net-neutrality-crossroads-heres-why-india-s-policy-process-has-important-lessons-fo>> (last accessed 13 February 2018).

²⁰ Christopher T. Marsden, *Net Neutrality: Towards A Co-Regulatory Solution*, 1-2 (2010).

²¹ See, Gautam Bhatia, *Offend, Shock, or Disturb* 3-24(2016), for a discussion on how the legal understanding of freedom of speech and expression depends on the legal theory used to conceptualise it.

²² In using this methodological approach, I draw on the work of STS scholars like Shoshana Zuboff who understands technical concepts (in her case, big data) as a social process rather than an autonomous technological effect. See, Shoshana Zuboff, *Big Other: Surveillance*

mapping will allow a deeper and more nuanced understanding of these concepts and consequently, more responsive governance centred on the citizen.

To do this, the paper is divided into three major sections: I begin by analysing how far different conceptions of freedom of speech and expression respond to private forms of clamping of speech. To do this, I invoke Jack Balkin's theory of democratic culture and contextualise it against the jurisprudence on freedom of expression in contexts of private discrimination in India. I then illustrate how a negative interpretation of net neutrality is able to successfully address some of these forms of private discrimination. Thereafter, the second section begins by tracing the forms of private discrimination, which negative net neutrality is unable to address by delineating the different kinds of (lack of) internet access. It then maps these factors hindering internet access against two important aspects of freedom of speech and expression, viz. the principle of media diversity and the goal of expanding citizens' access to media infrastructure, some aspects of which can be termed structural media access. In the third section of this paper, I argue that the delinking of the principles of media diversity and structural media access in law and policy debates hinders an inclusive response to all forms of private discrimination. Thereafter, I argue that such delinking hinders the development of a concept of net neutrality which comprehensively addresses the concerns of freedom of speech and expression for citizens in the global south by examining TRAI's policy engagement with these issues.

A couple of points regarding the scope of the present paper need to be underscored in order to pre-empt the misconstruction of its arguments. First, this paper responds to the net neutrality debate in the context of zero-rating practices via the limited framework of freedom of expression. It does not, in any comprehensive way, take into account alternative frameworks like competition and innovation, to name a couple, through which zero-rated internet applications can and need also be analysed for any efficient law- and policy-making to occur. Consequently, the present paper refrains from providing any comprehensive legal policy or governance solutions to the phenomenon of zero-rating in developing countries- it deals with only one aspect of it, viz. the freedom of speech and expression.

The second point is that the present paper limits itself to analysing only mobile-based zero-rating. This is because, first, since the economic, access and experiential ecologies of broadband and mobile data/internet are quite

Capitalism and the Prospects of an Information Civilisation, *J. OF INFO TECH.*, 30 75-89 (2015). Like her, I propose understanding net neutrality as a social process, shaped also through legal influence, rather than as something rooted in the inherent architecture of the internet.

different, it is possible that arguments applying within one context would not be valid within another. Second, the ratio of mobile connections (5.6 billion) to fixed line internet connections (572 million) in developing countries is 10:1, which is a significant difference from the developed world ratio of 3:1.²³ This potentially makes mobile-based zero-rating way more relevant for developing countries like India. And third, because mobile internet is emerging as an increasingly popular as a mode of internet access – at the end of December 2015, India had over 331 million internet subscribers in the country, of which about 94% were wireless internet users²⁴ - it is appropriate that mobile-based zero-rating become the focus of this analysis.

II. NET NEUTRALITY AS A RESPONSE TO PRIVATE DISCRIMINATION OF FREE EXPRESSION

A. Forms of private control of speech and expression

Traditionally, the State has been understood as the most powerful presence in the public sphere, and therefore, usually it is against the State that the freedom of expression has been invoked by law.²⁵ However, in the past century, there has been an increasing recognition of the vast influence that private entities wield on communication within public spheres around the world.²⁶

This has been characterised by two distinct threads: First, cases of private instances of censorship that occur when creators and distributors of expression lose faith in the State enforcement of the rule of law.²⁷ These cases raise

²³ International Telecommunications Union, *World Telecommunication/ICT Indicators Database*, ITU: Geneva 19th edition (1 July 2015), available at <<http://www.itu.int/en/ITU-D/Statistics/Pages/publications/wtid.aspx>>, (last accessed on 03 January 2017).

²⁴ Telecom Regulatory Authority of India, *The Indian Telecom Services Performance Indicators*, September-December 2015; see also, Telecom Regulatory Authority of India, *Pre-Consultation Paper on Net Neutrality*, 30 May 2016, 1

²⁵ See for example, *Ranjit D. Udeshi v. State of Maharashtra*, AIR 1965 SC 881; *S. Rangarajan v. P. Jagjivan Ram*, (1989) 2 SCC 574 : (1989) 2 SCR 204, *Bobby Art International v. Om Pal Singh Hoon*, (1996) 4 SCC 1; *Shreya Singhal v. Union of India*, (2015) 5 SCC 1 : AIR 2015 SC 1523.

²⁶ Dawn Nunziato *Supra* note 14; see also Laura Stein, *Speech Rights in America: The First Amendment, Democracy and the Media* (2006); Gautam Bhatia *Supra* note 21, 257-280

²⁷ An example of this phenomenon is the private agreement made by Penguin India with certain religious fundamentalist groups to pulp all copies of *The Hindus: An Alternative History*, a book by American Indologist, Wendy Doniger, and in the decision of renowned Tamil writer, Perumal Murugan, to stop writing in face of threats of violence from other private citizens. See, Jason Burke, *Outcry as Penguin India pulps 'alternative' history of Hindus*, 13 February 2014, available at <<https://www.theguardian.com/world/2014/>

the larger concern of the breakdown of the rule of law and require a broader discussion on State and constitutional legitimacy, which is beyond the scope of the present paper. However, I outline this thread because it is important to distinguish it from a second thread of private censorship cases which relate to the rise of powerful media firms that control the content and distribution channels for the citizen.²⁸

This second thread concerns the ability of private entities, in their role as market participants, to censor and distort speech and expression within the public sphere, based on commercial considerations like competition and advertising revenue. In India, this private influence on the public sphere was recognised as problematic by the First Press Commission Report²⁹ way back in 1954, which noted that the market dominance of certain privately owned newspapers could be detrimental to the freedom of expression of other citizens.³⁰ Since then, there have been several judicial and policy discussions in the context of different media to address this issue of private power over public speech.³¹ The exercise of this power has implications for freedom of expression in two ways:

- (i) Direct discrimination: This refers the use of power to distort the free expression of certain citizens over others by preventing them from expressing themselves or communicating to other individuals or the public at large. Typical examples of such discrimination include *censorship* of certain speech or expression by the private entity, usually for directly or indirectly fulfilling commercial ends. It has a direct discriminatory impact through the restriction of expression by certain citizens or entities over others.
- (ii) Indirect discrimination: As the nomenclature suggests, indirect discrimination refers to a more indirect interference in freedom of expression of certain citizens over others. An example of this might be

feb/13/indian-conservatives-penguin-hindus-book>, *last accessed* 03 January 2017. See also, Gautam Bhatia, *The Fault in Our Speech*, 07 July 2016, available at <<http://www.thehindu.com/opinion/lead/perumal-murugan-book-controversy-and-madras-high-court/article8816396.ece>>, (last accessed 03 January 2017)

²⁸ Robert W. McChesney and Dan Schiller, *The Political Economy of International Communications*, United Nations Research Institute for Social Development (October 2003), available at <[http://www.unrisd.org/UNRISD/website/document.nsf/d2a23ad-2d50cb2a280256eb300385855/c9dcba6c7db78c2ac1256bdf0049a774/\\$FILE/mcchesne.pdf](http://www.unrisd.org/UNRISD/website/document.nsf/d2a23ad-2d50cb2a280256eb300385855/c9dcba6c7db78c2ac1256bdf0049a774/$FILE/mcchesne.pdf)>, (last accessed 7 January 2017).

²⁹ Government of India, *First Press Commission Report* (1954).

³⁰ *Sakal Papers (P) Ltd. v. Union of India*, AIR 1962 SC 305.

³¹ See for example, *Bennett Coleman & Co. v. Union of India*, (1972) 2 SCC 788 : AIR 1973 SC 106; *Indian Express Newspapers (Bombay) (P) Ltd. v. Union of India*, (1985) 1 SCC 641 : AIR 1986 SC 515; *Ministry of Information and Broadcasting, Govt. of India v. Cricket Assn. of Bengal*, (1995) 2 SCC 161 : AIR 1995 SC 1236.

the promotion (and consequent indirect hindrance) to the circulation of certain speech or expression by the concerned private entity, usually for directly or indirectly fulfilling commercial ends. In the digital context, this can mean the promotion of certain kinds of content over others by making them more visible in search results or on social media³² or the preferential treatment of content from certain sources over others.³³ But it can also include practices of network traffic management.³⁴ Unlike direct discrimination, it is less clear whether indirect discrimination is harmful or advantageous to citizens.³⁵

Private power can thus interfere in freedom of expression by perpetuating discrimination. This issue of the power of private entities to control public speech has come into even starker focus since early 2000s with the widespread use of digital media.³⁶ One key feature of the internet is its highly decentralised architecture rooted in the end-to-end principle.³⁷ While this architecture is argued to have huge democratic potential,³⁸ it also implies that private network owners like Internet Service Providers (ISPs) have the power to control how and what information flows on the networks they own. In other words, network owners can block certain digital expression (negative discrimination), or offer certain content only for a higher or lower price in relation to other content (positive discrimination). This power can and has been exercised by private network owners in the past for commercial ends.³⁹

³² See for example, Emily Bell, *Why Facebook's news feed changes are bad news for democracy*, The Guardian, 21 January 2018, available at <https://www.theguardian.com/media/media-blog/2018/jan/21/why-facebook-news-feed-changes-bad-news-democracy>, (last accessed 14 February 2018).

³³ See for example, Kelsey Campbell-Dollaghan, *Netflix Agrees to Pay Comcast for Access to Its Broadband Network*, Gizmodo, 23 February 2014, available at <https://gizmodo.com/report-netflix-agrees-to-pay-comcast-for-access-to-bro-1529115565>, (last accessed 14 February 2018).

³⁴ Edward W. Felten, *Nuts and Bolts of Net Neutrality 6-7* (2006), available at <https://www.cs.princeton.edu/courses/archive/fall09/cos109/neutrality.pdf>, (last accessed 14 February 2018).

³⁵ Christopher T. Marsden *Supra* note 20, 83-104.

³⁶ See generally, Jonathan Zittrain, *The Future of the Internet* (2008); Lawrence Lessig, *Code Version: 2.0* (2006).

³⁷ *Supra* note 20, 29.

³⁸ See Jack M. Balkin, *Digital Speech And Democratic Culture: A Theory of Freedom of Expression For The Information Society*, 79 NOTES U. L. REV. 6-9 (2004), arguing that the original internet architecture has a unique democratic potential. This is however a contested argument. See Laura DeNardis, *Protocol Politics: The Globalisation of Internet Governance* (2009), and Alexander Galloway, *Protocol: How Control Exists after Decentralisation* (2004), for arguments on how the original internet architecture is complicit in perpetuating undemocratic power over the internet.

³⁹ *Supra* note 15.

B. The Capitalist Theory of Free Speech and its Obliviousness to Private Discrimination

It may be argued that the exercise of power by private network owners for directly or indirectly discriminating speech and expression flowing on their networks is perfectly permissible because these networks constitute their private property. Accordingly, it is the imposition of a net neutrality regulation on such private network owners that will, in fact, lead to a violation of the freedom of expression. Such arguments are based on what American legal scholar, Jack Balkin has termed the “capitalist theory of free speech.” According to Balkin, the capitalist theory identifies freedom of speech with the ownership of distribution networks for digital content.⁴⁰ In other words, freedom of expression under this theory is thought to be protected when the owners of speech distribution networks are not subject to any restrictions.

Balkin notes that among other areas, the capitalist theory has been influential in the judicial interpretation of digital telecommunications law in the United States.⁴¹ Consequently, telecommunications companies including ISPs and cable broadband providers have successfully argued in American courts that State regulation which curbs their power to discriminate what or how content flows on their networks stands in violation of their freedom of expression as speakers and editors.⁴² This judicial trend has also been attributed to a “negative conception”⁴³ of the First Amendment to the American Constitution.⁴⁴ A negative conception refers to the interpretation of freedom of speech and expression as a negative liberty, whereby the only obligation of the State is to not unlawfully interfere in arenas where public speech, expression and exchange of ideas occur. Such conception finds its beginnings in legal formalism.⁴⁵ Consequently, the First Amendment has often been interpreted as an obligation by the State to not regulate media firms on grounds that are outside of the considerations of upholding a free market.⁴⁶ In the process, the property rights of the media firms are reinforced to the

⁴⁰ Jack M. Balkin, *Digital Speech And Democratic Culture: A Theory of Freedom of Expression For The Information Society*, 79 *NOTES U. L. REV.* 19 (2004).

⁴¹ See, for example, *Time Warner Entertainment Co. v. Federal Communications Commission*, 240 F 3d 1126, 1136, 1139 (DC Cir 2001); *Comcast Cablevision Inc. v. Broward County*, 124 F Supp 2d 685, 694 (SD Fla 2000); *US West Inc. v. United States*, 48 F 3d 1092, 1095 (9th Cir 1994); *Chesapeake & Potomac Telephone Co. v. United States*, 42 F 3d 181, 202 (4th Cir 1994).

⁴² *Ibid.*

⁴³ Dawn Nunziato *Supra* note 14, 24.

⁴⁴ The relevant portion of the First Amendment to the U.S. Constitution reads: “Congress shall make no law abridging the freedom of speech, or of the press.”

⁴⁵ Dawn Nunziato *Supra* note 14, 36.

⁴⁶ Laura Stein, *Speech Rights in America: The First Amendment, Democracy and the Media* 33-36 (2006).

exclusion of everyone else in all circumstances, as such an interpretation allows the media firm to do what it pleases over the networks it owns. The capitalist theory of free speech thus remains the overarching philosophy of this negative conception of freedom of expression.

However, the manifestation of the capitalist theory of free speech is hardly limited to American jurisprudence. In India as well, some of the most crucial judgments on freedom of speech and expression seem rooted in the capitalist theory. The Supreme Court judgment in *Sakal Papers (P) Ltd. v. Union of India*⁴⁷ is one example. *Sakal* concerned a State regulation that prescribed a minimum price below which big newspapers could not be sold. Such fixing of minimum price was done so that small newspapers, which could not easily attract advertising revenue, would not be driven out of business by big newspapers like *Sakal*, which could. The rationale of the regulation, therefore, was to “prevent unfair competition amongst newspapers”⁴⁸ and “to prevent the rise of monopolistic combines so that newspapers may have fair opportunities of freer discussion.”⁴⁹ One of the questions before the Court consequently was whether the regulation stood in violation of the big newspapers’ Constitutional freedom of speech and expression? This question arose since such fixing of minimum price would make them more expensive and therefore likely to curtail the volume of their circulation. The Supreme Court employed a formalistic mode of interpretation to conclude that the newspapers’ right to circulate as much volume as they wanted was an essential part of the freedom of speech and expression.⁵⁰ On that basis, it held that the intervention of the impugned State regulation, even though it was in the interest of creating fair opportunities for freer discussion, was not constitutionally permissible since it would encroach upon these newspapers’ private networks of circulation.⁵¹

Under this judicial rationale, irrespective of the objective of State intervention, it is only a State policy which maintains a hands-off outlook to newspapers’ circulation networks that will survive *Sakal’s* constitutional test of free speech.⁵² Consequently, this rationale also serves to strengthen

⁴⁷ *Sakal Papers Case Supra* note 30.

⁴⁸ *Sakal Papers Case Supra* note 30, ¶11.

⁴⁹ *Ibid.*

⁵⁰ *Sakal Papers Case Supra* note 30, ¶31.

⁵¹ *Sakal Papers Case Supra* note 30, ¶42.

⁵² For an in-depth analysis of *Sakal*, see, Gautam Bhatia, *Sakal Papers v. Union of India – I: Why Do We Have The Freedom of Speech?*, 02 August 2013, available at <<https://indconlawphil.wordpress.com/2013/08/02/sakal-papers-v-union-of-india-why-do-we-have-the-freedom-of-speech/>>, (last accessed 08 January 2017); Gautam Bhatia, *Sakal Papers II: An Addendum – what is the Government permitted to do?*, 03 August 2013, available at <<https://indconlawphil.wordpress.com/2013/08/03/>>

the idea of property rights which private newspapers claim in their circulation networks, to the exclusion of everyone else, including the State. In this way, the rationale of the *Sakal* also reflects the capitalist theory of the freedom of speech.

The question to ask for our analysis is whether the philosophical groundings of the capitalist theory are adequate for the protection of freedom of expression on the internet? The answer seems obvious. Since the capitalist theory roots the idea of free speech in ownership of the channels of communication, it would hardly view any kind of discrimination by private entities who own these channels as a violation of free speech. If the principle of net neutrality is understood to impose legal obligation of non-discrimination of expression that flows even on the private owner of broadband networks or other internet infrastructure⁵³, and therefore constitutes interference by the State in privately-owned media networks, it would constitute a free speech violation within the philosophical framework of the capitalist theory.

C. Addressing Private Forms of Discrimination through Democratic Culture of Expression

What we have seen so far is that capitalist theory's hypersensitivity to the power of the State to disrupt communication in private spaces makes it totally oblivious to the ways in which private economic power operating through markets can corrupt democratic processes.⁵⁴ This obliviousness also manifests itself in Indian jurisprudence in judgments like *Sakal*, which though traditionally hailed as landmark for the protection of freedom of expression⁵⁵, has been criticised by more recent scholarship for this reason.⁵⁶

It is to combat this obliviousness, particularly in the digital context,⁵⁷ that Jack Balkin evolves his theory of democratic culture.⁵⁸ The emphasis of this

sakal-papers-an-addendum-what-is-the-government-permitted-to-do/>, (last accessed 08 January 2017); Gautam Bhatia, *Sakal Newspapers v. Union of India – I: Why Do We Have The Freedom of Speech?*, 02 August 2013, available at <<https://indconlawphil.wordpress.com/2013/08/02/sakal-papers-v-union-of-india-why-do-we-have-the-freedom-of-speech/>>, (last accessed 08 January 2017); Gautam Bhatia, *Free Speech and Newspaper Regulation- III: What does it mean to "abridge"?*, 23 August 2013, available at <<https://indconlawphil.wordpress.com/2013/08/23/free-speech-and-newspaper-regulation-iii-what-does-it-mean-to-abridge/>>, (last accessed 08 January 2017).

⁵³ Tim Wu *Supra* note 9.

⁵⁴ Laura Stein *Supra* note 46, 16.

⁵⁵ H.M. Seervai, *Constitutional Law of India: A Critical Commentary*, Vol. 1 454 (1983).

⁵⁶ See for example, Smarika Kumar, *Concentration of Media Ownership and the Imagination of Free Speech*, 51 ECONOMIC AND POLITICAL WEEKLY, 128-131 (2016); Gautam Bhatia, *Offend, Shock, or Disturb* 22-24(2016).

⁵⁷ Jonathan Zittrain *Supra* note 36; Balkin *Supra* note 40.

⁵⁸ Balkin *Supra* note 40, 31.

theory lies on understanding free speech as a principle larger than democracy in the narrow sense of voting and elections as well as larger even than democracy in the sense of public deliberation about issues of public concern. The theory posits the concept of free speech not merely at the level of governance or government, but at the level of culture.⁵⁹ This broad conception of free speech allows one to move beyond the exercise of the freedom only in the public sphere, viz., against the State like the capitalist theory focuses on. By connecting free speech to a democratic culture, the theory of democratic culture thus gives us a philosophical framework to recognize, conceptualise and limit private economic power over freedom of expression.

In jurisprudential analysis, the theory of democratic culture manifests itself in the development of an affirmative conception of freedom of speech, which instead of legal formalism, is rooted in balance of interests approach.⁶⁰ According to this approach, State intervention in private media infrastructure is best understood by perceiving the former as a tool through which the interests of those who are seeking to regulate versus the interests of those whose expression is to be regulated, are sought to be balanced.⁶¹ Based on this, it has been argued that the doctrines of public forum, state action, fairness, common carriage, and must-carry obligations in American jurisprudence all contribute to solidifying the affirmative conception of freedom of speech, and consequently, the arguments for upholding net neutrality in law and policy making.⁶²

Indian jurisprudence has also borrowed some of these, like the state action doctrine⁶³ and fairness doctrine from American jurisprudence⁶⁴, and some others, like the common carriage principle from English jurisprudence.⁶⁵ The affirmative conception of freedom of speech is also found in Indian jurisprudence,⁶⁶ notably in Justice Mathew's dissent in *Bennett Coleman &*

⁵⁹ Balkin *Supra* note 40, 32.

⁶⁰ Dawn Nunziato *Supra* note 14, 36.

⁶¹ *Ibid.*

⁶² Dawn Nunziato *Supra* note 14, see Chapter 3 generally.

⁶³ See for example, *Board of Control for Cricket in India v. Cricket Assn. of Bihar*, (2015) 3 SCC 251, *Inter Media Publishing Ltd. v. State of Kerala*, 2015 SCC OnLine Ker 18656.

⁶⁴ See for example, *Bennett Coleman & Co. v. Union of India*, (1972) 2 SCC 788 : AIR 1973 SC 106; *Ministry of Information and Broadcasting, Govt. of India v. Cricket Assn. of Bengal*, (1995) 2 SCC 161 : AIR 1995 SC 1236.

⁶⁵ *Saghir Ahmad v. State of U.P.*, AIR 1954 SC 728; see also, Bhairav Acharya, *Net Neutrality and the Law of Common Carriage*, 16 January 2015, available at <<http://cis-india.org/internet-governance/blog/net-neutrality-law-of-common-carriage.pdf>>, (last accessed 08 January 2017).

⁶⁶ Smarika Kumar, *Governing Speech on the Internet: From the Free Market Policy to a Controlled 'Public Sphere'* 28 August 2015, available at <http://cis-india.org/raw/blog_governing-speech-on-the-internet>, (last accessed 08 January 2017).

Co. v. Union of India, and in the Supreme Court judgment in *Ministry of Information & Broadcasting, Govt. of India v. Cricket Assn. of Bengal*.⁶⁷

Drawing upon the democratic culture theory, arguments have also been made in literature that legal recognition of the net neutrality principle in India would preserve the affirmative conception of the freedom of speech, which would be in consonance with Article 19(1)(a) of the Constitution.⁶⁸ Since net neutrality is a principle of non-discrimination⁶⁹, it allows for State intervention in privately-owned internet infrastructure to prevent private forms of discrimination.⁷⁰ This is necessary to enable and strengthen individual participation in all cultural exchanges that occur on the internet, which as per the theory of democratic culture, is essential to the idea of freedom of speech and expression. Thus in contrast to the capitalist theory, the principle of net neutrality becomes not just compatible with the protection of freedom of expression, but also essential to protect it.⁷¹

D. Democratic Culture and Direct Discrimination: The Formulation of Negative Net Neutrality

Across the world, many legal and policy interventions addressing private discrimination of speech and expression on internet through deployment of the net neutrality principle have already been made. The first of such net neutrality law in the world was Act 20453, *Ley que establece la neutralidad de la red para consumidores y usuarios de Internet*, which was passed by the Chilean national legislature in 2010. The law lays down that internet service providers “cannot arbitrarily block, interfere, discriminate, obstruct or restrict user’s right to use, send, receive or offer” internet content.⁷² This was followed by the enactment of *Marco Civil da Internet*⁷³ by the Brazilian Senate in 2014, which among other things, lays down, “when providing internet connectivity, free or at a cost, as well as, in the transmission, switching or routing, it is prohibited to block, monitor, filter or analyze the

⁶⁷ Bennett Coleman Case *Supra* note 64. For a detailed analysis of these cases and how they reflect the affirmative conception of freedom of speech, see Smarika Kumar, *Concentration of Media Ownership and the Imagination of Free Speech*, 51 *ECONOMIC AND POLITICAL WEEKLY*, 128-131 (2016); Gautam Bhatia, *Offend, Shock, or Disturb* 294-297(2016).

⁶⁸ See, for example, Gautam Bhatia, *Offend, Shock, or Disturb* 315-320(2016); Smarika Kumar, *Net Neutrality for a Web of Equals*, 18 April 2015, available at <<http://www.the-hinducentre.com/the-arena/current-issues/article7117145.ece>>, (last accessed 08 January 2017).

⁶⁹ Tim Wu *Supra* note 9.

⁷⁰ Nikhil Pahwa *Supra* note 15; see also Jonathan Zittrain *supra* note 36.

⁷¹ Gautam Bhatia *Supra* note 21, 19.

⁷² State of Chile, Act 20453, Article 24H (2010).

⁷³ State of Brazil, Act 12965 (2014).

*content of data packets.*⁷⁴ Other South American countries like Colombia and Peru have also been active in developing net neutrality legislations.⁷⁵

Though there are differences,⁷⁶ one will note that the emphasis in these earliest net neutrality laws is upon prevention of a particular kind of private discrimination, viz., direct discrimination. Such interpretation of net neutrality has been termed as “negative net neutrality” in legal literature.⁷⁷

In February 2015, this concept of negative net neutrality was translated by the U.S. Telecommunications Regulator, FCC, into two basic principles as part of the “bright-line rules”⁷⁸ in its Open Internet Order⁷⁹: First, the principle of no blocking, which lays down that broadband providers may not block access to legal content, applications, services, or non-harmful devices.⁸⁰ Second, the principle of no throttling, which lays down that broadband providers may not impair or degrade lawful Internet traffic on the basis of content, applications, services, or non-harmful devices.⁸¹ In November 2015, the European Union also adopted the Regulation on Open Internet Access⁸² which incorporates the principles of no blocking and no throttling in the EU Digital Single Market⁸³, thus broadly enshrining the concept of negative net neutrality.

⁷⁴ State of Brazil *Supra* note 73, Chapter 3, Section I., Article 9, §3.

⁷⁵ Patricia Adriana Vargas-Leon, *Net Neutrality: An Overview of Enacted Laws in South America in NET NEUTRALITY COMPENDIUM: HUMAN RIGHTS, FREE COMPETITION AND THE FUTURE OF THE INTERNET* (eds. Belli and de Filippi), 109-123 (2016).

⁷⁶ Patricia Adriana Vargas-Leon *Supra* note 75, 110.

⁷⁷ Christopher T. Marsden *Supra* note 20, 22-30; see also, Milton Mueller et al, *Net Neutrality as Global Principle for Internet Governance* (2007), available at <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2798314>, last accessed 08 January 2017; Christian Sandvig, *Network Neutrality Is The New Common Carriage* (2007), available at <http://www-personal.umich.edu/~csandvig/research/Sandvig--Network_neutrality_is_the_new_common_carriage.pdf>, last accessed 08 January 2017; Edward W. Felten, *Nuts and Bolts of Net Neutrality* (2006), available at <<https://www.cs.princetonoteedu/courses/archive/fall09/cos109/neutrality.pdf>>, (last accessed 08 January 2017).

⁷⁸ Federal Communications Commission (USA), *Open Internet* (2015), available at <<https://www.fcc.gov/general/open-internet>>, (last accessed 08 January 2017).

⁷⁹ Federal Communications Commission (USA), *Open Internet Order*, FCC 15-24 (2015), available at <https://apps.fcc.gov/edocs_public/attachmatch/FCC-15-24A1.pdf>, (last accessed 08 January 2017).

⁸⁰ Federal Communications Commission (USA) *Supra* note 79, 7.

⁸¹ *Ibid.*

⁸² Regulation (EU) 2015/2120 of the European Parliament and of the Council of 25 November 2015 laying down measures concerning open internet access and amending Directive 2002/22/EC on universal service and users' rights relating to electronic communications networks and services and Regulation (EU) No 531/2012 on roaming on public mobile communications networks within the Union (2015).

⁸³ Digital Single Market (EU), *Open Internet* (2015), available at <<https://ec.europa.eu/digital-single-market/en/open-internet-net-neutrality>>, (last accessed 08 January 2017).

In India, the telecommunications regulator TRAI also issued Recommendations on Net Neutrality in November 2017 after extensive public consultations.⁸⁴ The Recommendations prohibit “*any form of discrimination, restriction or interference in the treatment of content including practices like blocking, degrading, slowing down,*”⁸⁵ thus embodying the principle of negative net neutrality.

E. Unpacking Zero Rating: Democratic Culture and Indirect Discrimination

However while essential, is this principle of negative net neutrality *enough* to protect freedom of expression online? To answer this, one needs to return to the philosophical framework of democratic culture to analyse what it really means to have free expression.

According to the theory of democratic culture, individual participation is an essential part of freedom of expression,⁸⁶ which implies having access to the media technologies (in this case, the internet) which make such participation possible. To this end, Balkin argues that freedom of expression means “*giving everyone – not just a small number of people who own dominant modes of mass communication, but ordinary people, too – the chance to use technology to participate.*”⁸⁷ In this manner, the democratic culture theory recognises the right of all citizens to have an opportunity to access the internet as an essential part of the freedom of speech and expression.

Zero-rated services claim to provide and enhance exactly this opportunity for internet access by providing internet content free of data cost, and thus eliminating the digital divide. Read in conjunction with the democratic culture theory, this claim can thereby also be understood as a claim to enhance freedom of expression on the internet.

However, the problem is that this claim is only made possible through private discriminatory practices whereby certain content is eliminated from the scope of the zero-rated service, and certain other content favoured, viz. through indirect discrimination. However, such indirect discrimination is argued to enhance the experience of the internet usage by improving some accessibility. The improvement of Quality of Service (QoS) has been one of the most prominent examples of such indirect discrimination. QoS

⁸⁴ Telecom Regulatory Authority of India, *Recommendations on Net Neutrality*, 28 November 2017, 2-3.

⁸⁵ Telecom Regulatory Authority of India *Supra* note 84, 30.

⁸⁶ Jack M. Balkin *Supra* note 40, 40-42.

⁸⁷ Jack M. Balkin *Supra* note 40, 42.

improvement has been a prominent objective of internet engineering for a long time now,⁸⁸ and became especially relevant for internet users with the advent of the so-called “specialised services” like internet video, P2P, and online gaming, which consume large bandwidths and require reliable flow of data packet traffic⁸⁹ - in other words, better QoS. Often, the deployment of better QoS for specialised services has meant some erosion of absolute non-discrimination principles which negative net neutrality may prescribe.⁹⁰ Mirroring this phenomenon, the business model of mobile internet zero-rating allows the Mobile Network Operator (MNO) to discriminate between different internet content services to provide some for a reduced price or for ‘free.’⁹¹ Thus, like specialised internet services, zero-rating is also a phenomenon that imbibes private indirect discrimination⁹², which can undermine online freedom of expression.

Private indirect discrimination thus seems to both enhance and undermine citizens’ accessibility to the internet. It is in this background that the concept of ‘positive net neutrality’ has been formulated, which allows for certain discriminatory practices like offering higher QoS for higher prices as long as it is conducted on fair, reasonable, and equal terms to all.⁹³ The EU Regulation on Open Internet Access embodies the positive net neutrality principle by allowing for “*reasonable traffic management*”⁹⁴ and the offer of specialised services that are optimised to “*meet requirements of the content, applications or services for a specific level of quality,*” as long as it they are not offered in “*detriment of the availability or general quality of internet access services for end-users.*”⁹⁵ On the other hand, positive net neutrality is not recognised under the FCC’s bright line rules of 2015 which make a blanket prohibition on paid prioritisation of internet traffic by the ISP under their third principle.⁹⁶ In its Recommendations on Net Neutrality, TRAI leans towards the EU model in recognizing a principle of positive net

⁸⁸ Christopher T. Marsden *Supra* note 20, 58.

⁸⁹ Edward W. Felten *Supra* note 34.

⁹⁰ Nikhil Pahwa *Supra* note 15

⁹¹ It should however be noted that even though zero-rating apps might be offered for free in the sense of free from need for monetary consideration by the service-user, other kinds of consideration in the form of personal data alienation from the user are nevertheless made. See for discussion on this point, Christopher T. Marsden, *Network Neutrality: A Research Guide*, in RESEARCH HANDBOOK ON GOVERNANCE OF THE INTERNET (ed. Ian Brown) 440-444 (2012).

⁹² Christopher T. Marsden, *Zero Rating and Mobile Net Neutrality* in NET NEUTRALITY COMPENDIUM: HUMAN RIGHTS, FREE COMPETITION AND THE FUTURE OF THE INTERNET (eds. Belli and de Filippi), 245 (2016).

⁹³ Christopher T. Marsden *Supra* note 20, 43.

⁹⁴ Regulation (EU) 2015/2120 *Supra* note 82, Articles 3(3) & 3(4).

⁹⁵ Regulation (EU) 2015/2120 *Supra* note 82, Articles 3(5).

⁹⁶ Federal Communications Commission (USA) *Supra* note 79, 8.

neutrality by also allowing exceptions for “reasonable traffic management practices”⁹⁷ and for specialized services as long as they are “not detrimental to the availability and overall quality of internet access service.”⁹⁸

However, positive net neutrality in these instances has been specific to the addressing the advantages and disadvantages of indirect discrimination in the cases of traffic management, paid prioritization of content and specialized services.⁹⁹ What concept of net neutrality is needed to govern the consequences of indirect discrimination created by zero-rated practices? To address indirect discrimination created by zero-rating, TRAI issued a Regulation in February 2016 that prohibits the differential pricing of data services on the basis of source and content.¹⁰⁰ As a corollary, it also prohibits zero-rating practices. But what should one then make of the claim that zero-rating also improves internet accessibility? How can one make sense of this paradox where zero rating seems to both enhance opportunities to connect to (a portion of) the internet as well as perpetuate indirect private control over the citizens’ expression online? What conception of net neutrality can create an effective legal response for this scenario? To answer this question, one needs to first clarify what exactly is meant by internet accessibility in this context and how it relates to indirect private discrimination. Subsequently, what precise aspects of freedom of expression are impacted by such lack of access to the internet? To address this, I map the relationship between these understandings of internet access as indirect discrimination in law and policy debates concerning net neutrality and zero rating in India in the next section.

III. ZERO RATING: MAPPING DEBATES AROUND MEDIA ACCESS

A. Meanings of Internet (In)Access

In public policy debates concerning net neutrality and zero-rating, the precise scope of the barriers to internet access, and therefore the meaning of internet access itself, has not always been clear. Because of this, net neutrality

⁹⁷ Telecom Regulatory Authority of India *Supra* note 84, 30.

⁹⁸ Telecom Regulatory Authority of India *Supra* note 84, 29.

⁹⁹ In addition, TRAI in its recommendations on net neutrality addresses indirect discrimination in the context of content delivery networks by excluding it from its net neutrality obligations, *see in this regard*, Telecom Regulatory Authority of India *Supra* note 84, 20-23.

¹⁰⁰ Telecom Regulatory Authority of India, *Prohibition of Discriminatory Tariffs For Data Services Regulations*, No. 2 of 2016.

discussions tend to mix up different understandings of access to the internet, often offering solutions from merely a competition law framework,¹⁰¹ or from only a negative net neutrality perspective, when the problems concerning freedom of expression in its context are much wider. Consequently in the present section, I start by delineating the different kinds of internet (in) access which are faced by citizens that a comprehensive idea of freedom of expression must distinguish in the context of net neutrality.

The precise way in which the lack of internet access is experienced by the citizen relates to the manner in which private indirect discrimination over her speech or expression may be exercised. Many of these factors which result in the lack of internet access contribute to the digital divide. These factors and their relationship to private indirect discrimination of speech and expression are discussed below:

i. Access limited by price

Often, citizens are unable to access the internet simply because they are not able to afford the data price at which internet is offered by any MNO. This creates a situation whereby access to the internet is limited by price. Such lack of access perpetuates indirect discrimination between those who have the financial capability to access the internet and those who don't by preferring the circulation of speech of the former over the latter. Zero-rating, even as it perpetuates other forms of private discrimination,¹⁰² is a business model which claims to provide solution to such lack of access.¹⁰³

ii. Access limited by QoS

Access limited by QoS refers to a situation where citizens are not able to access content on internet because the quality of service is less than desirable. This results in indirect discrimination between those who have access to better QoS and those who do not, by preferring the circulation of speech online and receipt of information from the internet by the former over the latter.

¹⁰¹ See, for example, Barbara van Schewick, *Network Neutrality and Quality of Service: What A Non-Discrimination Rule Should Look Like*, 67 STANFORD L. REV. 14 (2015).

¹⁰² Nikhil Pahwa, *A Change of Name To Free Basics Does Not Make Facebook's Zero Rating Service Neutral*, 25 September 2015, available at <<http://www.medianama.com/2015/09/223-free-basics-internet-net-neutrality/>>, last accessed 08 January 2017; Mahesh Murthy, *Poor Internet for Poor People: Why Facebook's Internet.org Amounts To Economic Racism*, 17 April 2015, available at <<https://qz.com/385821/poor-internet-for-poor-people-why-facebooks-internet-org-amounts-to-economic-racism/>>, (last accessed 08 January 2017).

¹⁰³ Mark Zuckerberg, Facebook post, (April 17, 2015), available at <<https://www.facebook.com/zuck/posts/10102033678947881>>, (last accessed 14 February 2018).

Internet access is often limited by QoS by lost data connections or a congested bandwidth or bad traffic management, and most remarkably affects internet experiences which consume high bandwidth in the context of specialised services like video streaming, P2P, hi-res images or online gaming.¹⁰⁴ Better network management practices can be a solution to this. One such proposed solution is the paid prioritisation of content, which even as it perpetuates other forms of private discrimination,¹⁰⁵ is a business model which claims to offer a solution to this QoS-limited barrier to internet access.¹⁰⁶

iii. Access limited by infrastructure

This refers to a situation whereby the physical (mobile) network infrastructure which is necessary for making internet possible is itself not available in the geographical area where the citizen resides in. Often, especially in developing countries, the infrastructure is absent due to limited State resources¹⁰⁷ or the disinterest of MNOs in extending their services to these areas because they are not seen as commercially viable ventures. This results in indirect discrimination by preferring the speech of those who have access to such infrastructure over those who don't, for example, by preferring the online expression of urban residents over rural ones. Project Loon and Facebook Aquila are some business models, which even as they perpetuate other forms of private discrimination,¹⁰⁸ claim to offer a solution in situations when access is limited by infrastructure.¹⁰⁹

I term the first of these three varieties of lack of access as structural barriers to internet access (more generally, structural barriers to media access)

¹⁰⁴ Christopher T. Marsden *Supra* note 20, 3, 22.

¹⁰⁵ Zachary M. Seward, *Read Netflix's Plea to Ban 'fast lanes' on the Internet*, Quartz, 16 July 2014, available at <<https://qz.com/235736/read-netflixs-plea-to-ban-paid-fast-lanes-on-the-internet/>>, last accessed 14 February 2018.

¹⁰⁶ Gene Marks, *Netflix and Youtube Now Consume 50% of the Internet As The Argument for Net Neutrality Weakens*, 24 November 2014, available at <<http://www.forbes.com/sites/quickerbetteertech/2014/11/24/netflix-and-youtube-now-consume-50-of-the-internet-as-the-argument-for-net-neutrality-weakens/#57666a427982>>, (last accessed 08 January 2017).

¹⁰⁷ Jeffrey James, *Digital Interactions in Developing Countries: An Economic Perspective* 15 (2013).

¹⁰⁸ Stuart Dredge, *Bill Gates Criticises Google's Project Loon Initiative*, 9 August 2013, available at <<https://www.theguardian.com/technology/2013/aug/09/bill-gates-google-project-loon>>, (last accessed 08 January 2017).

¹⁰⁹ Dieter Bohn, *Google Unveils Project Loon*, 14 June 2013, available at <<http://www.theverge.com/2013/6/14/4432262/google-unveils-project-loon-ballon-powered-internet-for-the-entire>>, last accessed 08 January 2017; Cade Metz, *Facebook's Giant Internet Beaming Drone Finally Takes Flight*, 21 July 2016, available at <<https://www.wired.com/2016/07/facebooks-giant-internet-beaming-drone-finally-takes-flight/>>, (last accessed 08 January 2017).

because they relate to infrastructural problems in the media access ecology. However as discussed below, there are still more ways in which internet access may be hindered.

iv. Access limited by cost

When the citizen is unable to make their content or application available to others on the internet because they encounter significant cost barriers that go over connecting to the basic internet architecture, then their access is limited by cost. This kind of lack of internet access perpetuates indirect discrimination by preferring those who can afford to pay for better circulation of their speech and those who cannot. Such discrimination is most clearly visible in situations of paid prioritisation where a content provider has to pay the MNO more than mere internet connection charges to make their content available on the MNO network.¹¹⁰ Conversely, internet access limited by cost is also observed in the issue of differential pricing whereby the MNO charges different rates for different applications, depending on the kind of application it is.¹¹¹

It is necessary to distinguish between internet access limited by cost and that limited by price, since in the case of access limited by cost, it is the MNO that decides to charge extra for a particular kind of application or content, which exceeds the data charges incurred by the consumers. But in the case of access limited by price, the data price itself is unaffordable.

v. Access limited by social and cultural factors

Cultural and social factors like digital literacy,¹¹² familiarity with English,¹¹³ and caste barriers,¹¹⁴ to name a few, also play a significant role in curtailing citizens' internet access. This results in indirect discrimination by preferring the speech of those who are not hindered by these socio-cultural factors in accessing the technology over those who are.

¹¹⁰ Sean Hollister, *Netflix Accuses Comcast of Charging Twice for the Same Internet Content*, The Verge, April 24, 2014, available at <<http://www.theverge.com/2014/4/24/5650406/netflix-accuses-comcast-of-double-dipping-with-isp-toll>> (last accessed 3 January 2017).

¹¹¹ Nikhil Pahwa, *Airtel Wants To Ruin The Internet By Bringing In A Digital VIP Culture*, Scroll.in, 7 April 2015, available at <<https://scroll.in/article/718820/airtel-wants-to-ruin-the-internet-by-bringing-in-a-digital-vip-culture>> (last accessed 3 January 2017).

¹¹² Centre for Communication and Development Studies, *Towards Digital Inclusion: Barriers to Internet Access for Economically and Socially Excluded Urban Communities* 100 (2015), available at <http://netpehchaanotein/download/barriers_to_internet_access.pdf>, (last accessed 08 January 2017).

¹¹³ *Ibid.*

¹¹⁴ Sandeep Mertia, *Rural Social Media- A Meta-Digital Divide* (2014), available at <<http://sarai.net/rural-social-media-a-meta-digital-divide/>>, (last accessed 08 January 2017).

The factors outlined here are all dominant problems which hinder internet access in India, and are also important factors contributing to the digital divide across the global south generally.¹¹⁵ Of course, a citizen's access to internet might be encumbered in all these ways, or through a combination of them. But for the purposes of the present paper, I focus on the structural barriers to internet access, and cost barriers to internet access, and refrain from dealing in detail with the limitation of internet access by social and cultural factors since it requires the formulation of certain peculiar cultural and social contexts which are beyond its scope.

How exactly do these different barriers to access to internet map on to the vocabulary of freedom of speech and expression online? Specifically, how are free speech arguments formulated law and policy debates to critique or advocate for indirect discrimination practices like zero-rating? I address this question in what follows by examining policy debates on net neutrality and zero rating in India.

B. Structural Media Access: Arguments for Expanding Access Limited by Pricing

The TRAI Consultation Paper on Free Data outlines the debate concerning zero-rating in India, stating that a key argument claimed for zero-rating is that it will serve as an effective tool to increase internet penetration,¹¹⁶ which is also found important for the advancement of developmental goals¹¹⁷ and the reduction of the digital divide.¹¹⁸ In the same vein, the Explanatory Memorandum to TRAI's February 2016 Regulation on Differential Pricing also recognises that zero-rated services, which are a form of differential pricing, "*appear to make overall internet access more affordable.*"¹¹⁹ Such arguments see the value of zero-rated apps in expanding internet access limited by price, and therefore improving structural media access generally.

Similar legal arguments have been made in case of other media in Indian jurisprudence: *Sakal*, which has been critiqued for its inability to recognise private discrimination of speech and expression¹²⁰, was actually also a case

¹¹⁵ International Telecommunications Union, *Measuring the Information Society Report 177-199* (2016), available at <https://www.itu.int/en/ITU-D/Statistics/Documents/publications/misr2016/MISR2016-w4.pdf>, (*last accessed* 14 February 2018).

¹¹⁶ Telecom Regulatory Authority of India, *Consultation Paper on Free Data*, 19 May 2016, ¶18.

¹¹⁷ Department of Telecommunications, Ministry of Information & Broadcasting, Government of India, *Net Neutrality DoT Committee Report*, ¶1.2 (2015).

¹¹⁸ International Telecommunications Union *Supra* note 115.

¹¹⁹ Telecom Regulatory Authority of India *Supra* note 116, ¶5.

¹²⁰ *Sakal Papers Case Supra* note 30.

where the Supreme Court recognised the importance of expanding media access limited by price. As one would recall, in that case, the Government had argued that the impugned regulation limiting number of newspaper pages was necessary to prevent indirect discrimination by the big newspapers.

The Court however held that the government regulation stood in violation of freedom of speech and expression, among other things recognising that the increase in newspaper prices mandated by it would reduce citizens' access to the newspaper.¹²¹ This means that the regulation would limit access of citizens to the newspapers on the basis of price. This limitation of access by price has a corresponding effect on the media creators as well. In *Sakal*, this happens when the inability of the citizens to purchase the newspapers due to high prices, viz. (in)access limited by price, leads to a reduction in the ability of the newspaper owners and editors to circulate their opinions and views.¹²² The Court found this aspect of the impugned regulation to be in violation of Article 19(1)(a) since it hindered "*the right to circulate one's views to all whom one can reach or care to reach.*"¹²³

In this manner, the argument in that indirect discrimination of citizens' will enhance freedom of expression through strengthening structural media access, has been successfully made in legal debates in India. Can the *Sakal* argument then also provide guidance about how to govern indirect discriminatory practices like zero-rating? One needs to examine the entire picture to answer this.

C. Media Diversity: Arguments for Expanding Access limited by Cost

Examining the entire picture suggests that while the judgment in *Sakal* argues for enhancing structural media access by limiting price barriers to media access, it was also found on the capitalist theory, which stays oblivious to private discrimination of free speech and expression.¹²⁴ This obliviousness to private discrimination is manifested specifically in its obliteration of arguments concerning cost barriers to media access. The judgment is dismissive of the Government argument that the market power of the big newspapers prohibited the smaller newspapers for accessing their audience because they

¹²¹ Sakal Papers Case *Supra* note 30, ¶34.

¹²² *Supra* note 30.

¹²³ *Supra* note 30, ¶41.

¹²⁴ See *supra* Section II.B. for a discussion on this point.

could not cover costs for the same.¹²⁵ This situation actually hurts another aspect of freedom of speech and expression, viz., media diversity.¹²⁶

Media diversity finds manifestation as an important part of freedom of speech and expression in many jurisdictions around the world, though they all have different approaches to understanding and achieving it.¹²⁷ In India, certain aspects of media diversity have been recognised by the Supreme Court as an integral part of Article 19(1)(a) of the Constitution in context of television media in the *Cricket Assn. case*.¹²⁸

In policy debates concerning net neutrality as well, the concern that zero-rating practices increase cost barriers to internet access can be found. The TRAI Explanatory Memorandum to the Regulation on Differential Pricing outlines this argument:

*“Several stakeholders have highlighted the potential anti-competitive effects of allowing differential pricing. It is argued that this will create an uneven playing field among content providers and service providers or those that have the benefit of large networks will find themselves in a much stronger bargaining position as compared to new or smaller businesses. This may create significant entry barriers and thus harm competition and innovation.”*¹²⁹

Zero-rating can thus potentially create an uneven playing field between large networks and large content providers which have stronger position in the market, as compared to start-ups and smaller businesses. This kind of situation which limits access to the internet by cost between would create an anti-competitive situation since dominant firms in the market have stronger bargaining power to negotiate with MNOs on favourable terms to use the latter’s networks, as compared to smaller content creators, which increases

¹²⁵ *Ibid.*

¹²⁶ For a detailed discussion on this argument, see Smarika Kumar, *Net Neutrality for a Web of Equals*, 18 April 2015, available at <<http://www.thehinducentre.com/the-arena/current-issues/article7117145.ece>>, (last accessed 08 January 2017); see also, Smarika Kumar, *How Internet.org presents an Opportunity to rethink Freedom of Speech*, Medianama, 16 February 2015, available at <<https://www.medianama.com/2015/02/223-how-internet-org-presents-an-opportunity-to-rethink-freedom-of-speech-by-smarika-kumar-alternative-law-forum/>> (last accessed 14 February 2018).

¹²⁷ J. Van Cuilenburg, *Diversity Revisited: Towards a Critical Rational Model of Media Diversity* 40-45 in *THE MEDIA IN QUESTION: POPULAR CULTURES AND PUBLIC INTERESTS* (eds. Brants, Hermes, van Zoonen (1998).

¹²⁸ *Ministry of Information and Broadcasting, Govt. of India v. Cricket Assn. of Bengal*, (1995) 2 SCC 161 : AIR 1995 SC 1236, ¶82.

¹²⁹ Telecom Regulatory Authority of India, *Explanatory Memorandum to Prohibition of Discriminatory Tariffs For Data Services Regulations*, No. 2 of 2016, ¶20, ¶5.

the latter's cost barriers to internet access.¹³⁰ However, it should be noted that the use of the word "competition" here acts only as a metaphor, and does not refer to "competition" as defined under a competition law framework. This is not to say that competition law-related issues do not exist in the zero-rating context. But when concerns about dominant power of MNOs and of large content providers are being voiced, it is not competition law which is being referred to.¹³¹

Such arguments that critique zero-rating on the reasoning that it increases cost barriers to internet access, can be understood to recognise the adverse impact that it has on media source diversity,¹³² which is an important part of the freedom of speech and expression under the democratic culture theory. In this light, the use of the *Sakal* reasoning to argue that zero-rating practices, or indirect discrimination generally, enhance freedom of speech and expression rings false, or at least, fragmentary.

However, this analysis heralds two significant realisations that have implications for formulating an effective principle of net neutrality: First, that indirect discriminatory practices like zero-rating do undermine one crucial aspect of freedom of expression, viz. media (source) diversity by increasing cost barriers to media access, even as they strengthen another aspect of freedom of expression, viz., structural media access by lowering price barriers to media access. The paradox of private indirect discrimination is thus produced by pitching these two essential aspects of freedom of speech and expression against each other.

Second, that the paradox of private indirect discrimination and the nature of problems raised by zero-rating in the free speech context is not novel or specific to the internet, but has already been encountered and discussed in unresolved debates in the context of older media, like newspapers. It points to a need to consider the larger history of media regulation to address the regulatory problems around zero-rating practices.

How can these two realisations help us formulate a principle of net neutrality which comprehensively responds to the demands of the freedom of speech and expression in a world rampant with indirect discriminatory

¹³⁰ Barbara van Schewick, *The Case for Rebooting the Network Neutrality Debate*, 6 May 2014, available at <<https://www.theatlantic.com/technology/archive/2014/05/the-case-for-rebooting-the-network-neutrality-debate/361809/>>, last accessed 08 January 2017.

¹³¹ Barbara van Schewick *Supra* note 101, 28.

¹³² Vibodh Parthasarathi, *Net Neutrality: Key To Media Diversity*, 30 October 2015, available at <<http://www.financialexpress.com/opinion/column-net-neutrality-key-to-media-diversity/158732/>>, (last accessed 08 January 2017).

practices like zero-rating? I attempt to address this question in the next section.

IV. RETHINKING GOVERNANCE DESIGN PRINCIPLES FOR FREE EXPRESSION

A. Delinking of Media Diversity and Structural Media Access as a Problem

The paradox that zero-rating practices undermine media diversity on the one hand, and strengthen structural media access on the other leads to a deadlock in formulating regulation for it which responds to freedom of expression. But why does this paradox exist? I argue that it has its roots in the delinking of the governance frameworks that deal with media diversity and with structural media access.

In independent India, this phenomenon of delinking can be traced to legal debates about newspapers. It has already been discussed how the Supreme Court's reasoning in *Sakal* acknowledges structural media access but obliterates media diversity from its discourse on freedom of speech and expression. However, even critiques of *Sakal*¹³³ illustrate the same folly when they employ Justice Mathew's dissent in *Bennett Coleman* to make a case for media source diversity. Unlike *Sakal*, the latter acknowledges media diversity as an essential part of freedom of expression while acknowledging that private indirect discrimination can increase cost barriers to access.¹³⁴ However, it completely overlooks issues of structural media access. Consequently critique and scholarship which build on this dissent also implicitly treat the issues of structural media access and media diversity as two delinked issues which are separable from the discourse of freedom of speech and expression.

In policy debates around net neutrality as well, there is a strong tendency to argue for the separation of issues of media diversity from issues of structural media access.¹³⁵ The proponents of zero-rating services argue that they help enhance structural media access through provision of free basic internet

¹³³ Smarika Kumar *Supra* note 56.

¹³⁴ See Justice Mathew's dissent in *Bennett Coleman & Co. v. Union of India*, (1972) 2 SCC 788 : AIR 1973 SC 106. For in-depth analysis of how the dissent acknowledges media (source) diversity as essential to freedom of expression, see Smarika Kumar, *Concentration of Media Ownership and the Imagination of Free Speech*, 51ECONOMIC AND POLITICAL WEEKLY, 128-131 (2016).

¹³⁵ Barbara Van Schewick *Supra* note 101.

services,¹³⁶ while ignoring their implications for media diversity. In a similar way, critics of zero-rating realise the adverse impact it has for media diversity, acknowledging it as a free speech issue,¹³⁷ but argue for the separation of this issue from the problem of structural media access. For example, noted net neutrality scholar Barbara van Schewick writes that issues of offering differential treatment for online expression, which would relate to media diversity, and issues of (not) charging for the same, which would relate to structural media access, “*are driven by different sets of policy considerations, which should be considered and evaluated separately.*”¹³⁸ On this assumption, she builds a framework for net neutrality regulation, which seeks to preserve the media diversity aspect of freedom of speech and expression, while at the same time, separating the issue of structural internet access therein. This framework has been implicitly endorsed by several civil society actors in India and also explicitly by the TRAI in framing its regulation on differential pricing.¹³⁹ It is also in this vein that TRAI initiated separate consultations¹⁴⁰ and recommendations¹⁴¹ on free data, splitting this discourse from its consultations¹⁴² and recommendations¹⁴³ on net neutrality, thus also delinking the issue of access limited by price from the issue of erosion of source diversity.

While a conception of net neutrality which separates the issues of media diversity and structural media access, might work to foster freedom of speech and expression in developed countries, the same cannot be said for the global south. This is simply because the problem of structural internet (in)access in developed countries is of a different nature than in developing countries. For instance, insofar as USA faces price barriers to internet access, it is due to monopolistic combines¹⁴⁴, which is not true for India, which has

¹³⁶ Mark Zuckerberg *Supra* note 103.

¹³⁷ Barbara Van Schewick *Supra* note 101, 18.

¹³⁸ Barbara Van Schewick *Supra* note 101, 14.

¹³⁹ Cricket Assn. of Bengal Case *Supra* note 128, ¶27.

¹⁴⁰ Telecom Regulatory Authority of India *Supra* note 116.

¹⁴¹ Telecom Regulatory Authority of India, *Recommendations on Encouraging Data Usage in Rural Areas through Provisioning of Free Data*, 19 December 2016; Telecom Regulatory Authority of India, *Recommendations on Encouraging Data Usage in Rural Areas through Provisioning of Free Data*, 29 November 2017.

¹⁴² Telecom Regulatory Authority of India, *Pre-Consultation Paper on Net Neutrality*, 30 May 2016; Telecom Regulatory Authority of India, *Consultation Paper on Net Neutrality*, 4 January 2017

¹⁴³ *Supra* note 84.

¹⁴⁴ Christopher S. Yoo, *Deregulation v. Reregulation of Telecommunications: A Clash of Regulatory Paradigms* 856-859 (2011), available at <http://scholarship.law.upennoteedu/cgi/viewcontent.cgi?article=1410&context=faculty_scholarship>, (last accessed 08 January 2017).

a fairly competitive MNO market.¹⁴⁵ Structural barriers to internet access in India, as in other developing countries, primarily stem from a lack of capital resources: low per capita incomes lead to price barriers to access¹⁴⁶, and a combination of corrupt practices in granting MNO licenses¹⁴⁷ and capital scarcity in the economy leads to access limited by QoS and infrastructure since in that scenario, neither the State nor the market can invest in Next-Generation Networks or in effectively expanding MNO networks to the entire populace. These issues of capital scarcity are not as acute in developed countries, where can afford to separate the issue of structural media (in) access from media diversity on the internet.

But in the context of the global south, the objective of expanding structural internet access becomes a complicated problem of resource allocation within the economy. In such a scenario, governance mechanisms must define whether the scarce capital resources needed for the expansion of structural internet access should be allocated by a State mechanism like planning or by the forces of a free market, or by a mixed mechanism which combines the two, and if the third, it must define what exactly the parameters of such a combination are, as well. This problem of resource allocation is also the broad question which cropped up in the Newspaper Cases,¹⁴⁸ as it has been in the case of zero-rating on mobile internet.

In this way, the delinking of media diversity and structural media access and the exclusion of either from considerations of freedom of expression results in an unambitious law and policy discourse for the global south. Though such a discourse is thankfully cognizant of the spectre of private discrimination, it is still constructed in the rather simplistic and mutually exclusive binary of citizen interests versus big media interests: Media diversity is correctly recognised as a citizen interest, but price barriers to media access – another essential citizen interest – is kept outside of the scope of the discussion, and vice-versa. This results in a lack of recognition of the complex intertwined nature of citizens’ interest in freedom of speech and

¹⁴⁵ Here, I use “monopolistic” and “competitive” from a competition law framework, and not a media diversity framework; on the point of competitiveness of India’s mobile market, see also, V. Sridhar, *Modeling the Growth of Mobile Telephony Services in India*, 10 *Vision: The Journal of Business Perspective* (2006).

¹⁴⁶ Centre for Communication and Development Studies *Supra* note 112.

¹⁴⁷ Paranjay Guha Thakurta and Aditi Roy Ghatak, *The Immaculate Conception of Reliance Jio*, 04 March 2016, available at <<https://thewire.in/23620/the-immaculate-conception-of-reliance-jio/>>, (last accessed 08 January 2017).

¹⁴⁸ The Supreme Court judgments in *Sakal Papers (P) Ltd. v. Union of India* AIR 1962 SC 305, *Bennett Coleman & Co. v. Union of India*, (1972) 2 SCC 788 : AIR 1973 SC 106; *Indian Express Newspapers (Bombay) (P) Ltd. v. Union of India*, (1985) 1 SCC 641 : AIR 1986 SC 515 are often referred to as the ‘Newspaper Cases’ in literature.

expression.¹⁴⁹ Consequently, proposed frameworks for governance tend to operate upon only a partial consideration of citizens' interest in freedom of speech and expression. This also means that two important principles of freedom of speech and expression, viz. media diversity and structural media access, which should ideally go hand-in-hand, instead find themselves on opposite sides and in conflict with each other in governance debates. It results in said paradox of private discriminatory practices like zero-rating that hinders design of a comprehensive governance framework for free expression online.

B. Formulating a Freedom of Expression-Oriented Concept of Net Neutrality

The inadequacy of net neutrality interpretation in addressing all forms of private discrimination of online speech and expression can also be attributed to the delinking of the issues of media diversity and structural media access. It takes into account what has been described as private direct discrimination and thus embodies the principle of negative net neutrality, but as far as private indirect discrimination is concerned, it only accounts for the issue of lack of access limited by cost. Both the issues of lack of structural media access and limitation of access due to socio-cultural factors are kept out of the ambit of the net neutrality conception produced in the wake of said delinking. One can observe this in TRAI's recommended conception of net neutrality which excludes from its ambit, specialised services that are QoS-optimised for specific content, protocols or user equipment.¹⁵⁰

However, much like negative net neutrality, the conception of positive net neutrality underlying TRAI's Recommendations on Net Neutrality is also unable to respond to all forms of private discrimination of speech and expression. By separating the issue of zero-rating and free data from this discussion on net neutrality, TRAI's positive net neutrality conception is unable to envisage the lack of structural media access as a problem of indirect discrimination. Consequently, the fact that specialised services create indirect discrimination by preferring the speech, expression and the ability to receive information online of those with the capability to pay for higher QoS (access limited by QoS) or with the capability to pay for internet at all (access limited by price) – both of which contribute to lack of structural

¹⁴⁹ For a detailed discussion on how citizens' interest in free speech and expression are entangled with the interests of private media companies and the State, see Smarika Kumar, *Five Net Neutrality Myths Busted*, The Hoot, 4 January 2016, available at <<http://www.thehoot.org/media-watch/digital-media/five-net-neutrality-myths-busted-9095>> (last accessed 14 February 2018).

¹⁵⁰ Barbara Van Schewick *Supra* note 101, 31

media access- remains unrecognised. One can argue that TRAI tries to address issues of structural media access through its recommendations on free data¹⁵¹, and thus is not entirely insensitive to the issue. But it should be noted that these recommendations are limited to only short-term internet access schemes with a focus on the narrow category of first-time internet users in rural areas¹⁵², rather than the larger category of users whose access is limited by price, QoS, and infrastructure. As a result, it does not regard such lack of access as a form of discrimination or locate it within the wider context of freedom of expression.

This is in contrast to its delinked yet mirrored context of zero-rating,¹⁵³ which TRAI legitimately understands as a free speech issue and recognises as discriminatory.¹⁵⁴ Such a position implies that even as it remains unresponsive to indirect discrimination inhered through lack of structural media access, TRAI's 'positive net neutrality' stays sensitive to indirect discrimination by hindering the opportunity for all citizens to be equally heard without cost constraints (access limited by cost).

I outline these points not to suggest via a regulation-heavy approach that like zero-rated services, specialised services should also be banned as discriminatory under a freedom of expression-oriented conception of net neutrality. Nor is my intention to propose the neoliberal path of regulation 'Lite'. Rather, it is to argue that a comprehensively responsive net neutrality-based framework of governance must take a nuanced approach to determine the modalities of what constitutes discrimination on the basis of speech and expression. Such nuance can be achieved only by relinking the issues of media diversity and structural media access and bringing them together under the discourse of right to freedom of speech and expression under Article 19(1)(a).

As mapped before, our experience of designing regulatory frameworks for older media technologies like newspapers warns us that we need to take a more nuanced approach in developing new governance designs for freedom of expression on the internet: Considering that structural media access and media diversity are intimately intertwined issues, one needs to bring discussions concerning media diversity and structural media access together if one wants to develop a legal mechanism which effectively and comprehensively protects citizens' freedom of expression in the digital age. To recognise these

¹⁵¹ *Supra* note 116

¹⁵² Telecom Regulatory Authority of India, *Recommendations on Encouraging Data Usage in Rural Areas through Provisioning of Free Data*, 29 November 2017, 10-12.

¹⁵³ Christopher T. Marsden *Supra* note 92.

¹⁵⁴ Cricket Assn. of Bengal Case *Supra* note 128.

two aspects as essential parts of freedom of expression is to address all forms of private indirect discrimination on the basis of speech and expression. Without addressing all these different forms of indirect discrimination, one cannot eliminate the paradox of zero-rating whereby the principles of structural media access and media diversity become pitted against each other, and at least one needs to be ignored or prioritised against the other to yield a feasible governance framework. A freedom of expression-oriented conception of net neutrality then needs to account for all forms of discrimination – private and public, direct and indirect, and the various forms of indirect discrimination – within its own discourse.

V. CONCLUSION

In this paper, I have attempted to develop a theoretical framework for illustrating the limitations of current law and policy understandings of net neutrality. I have illustrated how both the concepts of negative net neutrality and positive net neutrality, even when considered together, fail to effectively respond to the challenges of freedom of speech and expression in global south contexts generally and in India particularly. To do this, I have outlined the different barriers to media and internet access that are faced more acutely by citizens in the global south, and illustrated how they perpetuate various forms of private indirect discrimination of speech and expression of citizens. I have then linked these forms of discrimination to long-standing issues of media diversity and structural media access using various conceptions of freedom of speech and expression under Article 19(1)(a) of the Constitution.

In all this, my main argument has been that the delinking of principles of media diversity and structural media access in the freedom of expression discourse has been consistent not just in net neutrality debates concerning the internet, but also in debates concerning older media like newspapers. This is a sign that issues like net neutrality are not rooted in the novelty of internet architecture, but rather in the conceptual poverty of our ideas about freedom of expression. Consequently, only a conceptual enrichment through relinking of the principles of structural media access and media diversity under the umbrella of freedom of expression can lead to the formulation of a concept of net neutrality that is capable of comprehensively responding to internet access issues in India. In this light, while the regulatory framework in India has laudably accomplished a lot to address issues of private discrimination online, it still has a long way to go.