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ADDRESSING NET NEUTRALITY THROUGH THE LENS OF COMPELLED SPEECH

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Abstract—Amongst all the recent debates about the need for regulation in various sectors, the issue of net neutrality has presented itself as one of the most important topics with many stakeholders who are directly interested in the manner in which this debate is concluded. An important aspect of the net neutrality debate is the question of whether imposing net neutrality on Internet Service Providers infringes on their right to freedom of speech and expression. This paper attempts to answer this question. While the freedom of speech argument has predominantly been used by the Internet Service Providers to argue for greater flexibility in allowing who should get access to use their platform, the author argues that this argument is based on a very narrow perception of the right to freedom of speech. The aim of this paper is twofold. First, to develop a holistic understanding of the concept of freedom of speech and expression and second, to show how net neutrality as a concept does not violate this right.

I. INTRODUCTION

While the jurisprudence on net neutrality is still growing, and it is virtually non-existent in India, the debate has reached a point where lobbyists and critics have attempted to make every possible argument for or against it. Of the arguments advanced, the free speech argument is "particularly compelling",[1] because there remains a dearth of precedent or even academic discussion pertaining to the free speech issues arising from net neutrality.[2] In fact, the American First

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1 Alexander Owens, *Protecting Free Speech In The Digital Age: Does The Fcc's Net Neutrality Order Violate The First Amendment?*, 23 TEMP. POL. & CIV. RTS. L. REV. 209 (2013).

2 *See* Sara Jerome, *Net Neutrality Fight Turns to First Amendment*, NATL J. (2009) (describing proponents and opponents of net neutrality looking to analogous, non-Internet related cases to

Amendment argument may very well be internet service providers' (hereinafter "ISPs") best argument to convince the US Supreme Court that net neutrality is unconstitutional.[3] However, I put forth that the same right– that of free speech and expression – may be used to make a sound argument for upholding net neutrality.

Compelled speech is, seemingly, quite antithetical to the discourse on rights relating to free speech. While a large amount of the scrutiny of Article 19(1)(a) of the Constitution of India (hereinafter "Constitution") has been with reference to the restrictions on speech and expression, and the constitutionality thereof, the discussion on compelled speech does quite the opposite. This flows from the premise that while expression ought not to be thwarted by the State, it should not be compelled either, "… for at the heart of the First Amendment is the notion that an individual should be free to believe as he will, and that in a free society one's beliefs should be shaped by his mind and his conscience rather than coerced by the State".[4]

In this paper, I argue that granting freedom to ISPs to regulate what will be available on their platforms, and at what speed, will amount to a violation of Article 19(1)(a) of the Constitution. Part II of the paper will discuss the doctrine of compelled speech, and show that commercial speech gives a large leeway for the State (assuming throughout this paper that the definition of 'State' is not under scrutiny) to constitutionally compel speech, which forms the first premise. The second premise, will show that any act by the State that compels not only speech, but even the perception of any speech (*say*, by hearing or reading), will come under the ambit of Article 19(1)(a) scrutiny. This will bring forth the main issue, portrayed in Parts III and IV, which is, when exactly can the compulsion of speech be permitted, and if a proposed move that quashes net neutrality is constitutionally sound. Part III will primarily analyse whether the State may compel ISPs to portray all data in a neutral manner. The last part, Part IV, will deal with the compelled speech from the consumers' perspective, and show that allowing ISPs to regulate data will lead to the lack of choice and hinder information dissemination, thus violating their right to speech in itself.

II. WHAT IS COMPELLED SPEECH

A. Compelled Ideological and Political Speech

The discourse on compelled speech can only be given an apt foundation by discussing the jurisprudence developed in the United States of America. Interestingly, the doctrine has developed not as a commercial speech aspect in the USA, but as an ideological and political one. The roots for the argument

support their free speech arguments).

3 Owens, *supra* note 1.

4 Abood v. Detroit Board of Education, 52 L Ed 2d 261 : 431 US 209, 234 (1977).

against the compulsion of speech are nestled in ideological cases where a religious group refused to allow the State compulsion regarding certain 'speech' that they were ideologically against. This religious group was primarily, the Jehovah's Witnesses, which forms a religious denomination that believes, *inter alia*, that one must "refrain from all pledges of allegiance to earthly governments"[5]. Hence, followers of this denomination refrain from paying their formal respects to any entity other than that validated by their religious beliefs, and this has first tested the compelled speech doctrine in the USA. For instance, in a case wherein a resolution made it mandatory for children of a Jehovah's Witness to pledge allegiance to the confederate flag, the Court struck it down, terming such action to come within the ambit of compelled speech.[6]

Similarly, when a Jehovah's Witness refused to carry a state motto on his license plate and was penalised by the State, the Court invalidated the penalising statute, stating that such compulsion of carrying a motto was compelled speech, which is unconstitutional.[7] We gather a snippet of the compelled speech doctrine from this case:

> [T]he right of freedom of thought protected by the First Amendment against state action includes both the right to speak freely and the right to refrain from speaking at all …The right to speak and the right to refrain from speaking are complementary components of the broader concept of 'individual freedom of mind'.[8]

These cases can be compared to an uncannily similar Indian case, which arose when children of a Jehovah's Witness were made to stand and sing the national anthem, The Court struck down the mandatory rule as going against the freedom of religion under Articles 25 and 26 of the Constitution.[9] While compelled speech was not expressly referred to in this case, I find the similarity in issues warrants its inclusion in this discussion.

Moving from ideological to political speech, a statute warranting a right to reply of an ostensibly defamed person in the newspaper that published the defamatory material was struck down, as it compelled the editor to proceed against the paper's right of expression.[10] Apart from these political and ideological perspectives to compelled speech, it is pertinent at this juncture to delve into commercial speech, where we notice that compulsion of speech is sometimes inevitable.

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5 Sarah Barringer Gordon, *The Spirit of the Law: Religious Voices and the Constitution in Modern America* 16 (2010).

6 West Virginia State Board of Education v. Barnette, 87 L Ed 1628 : 319 US 624 (1943).

7 Wooley v. Maynard, 51 L Ed 2d 752 : 430 US 705 (1977) (hereinafter "Wooley").

8 Wooley, 51 L Ed 2d 752 : 430 US 705 (1977).

9 Bijoe Emmanuel v. State of Kerala, (1986) 3 SCC 615.

10 Miami Herald Publishing Co. v. L. Tornillo, 41 L Ed 2d 730 : 418 US 241, 244 (1974) (hereinafter "Miami Herald Publishing").

B. Compelled Commercial Speech

The compelled speech doctrine has been extrapolated to commercial speech in the USA,[11] where two differing strands of compelled commercial speech include: (a) Cases related to corporations where a state may require warnings on advertisements for products or services;[12] and (b) Compelled-subsidy cases, in which individuals are not compelled to speak, but rather to subsidise a private message with which they disagree.[13]

In India, the question of commercial speech has received much analysis, from the aspect of whether it can even qualify for protection under Article 19(1)(a) of the Constitution,[14] to the question of when it can be compelled.[15] While I will not delve into the detailed analysis of why courts have *indeed* held that commercial speech falls under the ambit of Article 19(1)(a),[16] it is pertinent to note that commercial speech has been declared to be constitutionally capable of being compelled in certain cases.

The strongest argument for this allowance is the fact that most commercial speech, such as labelling or advertisements, is used for the dissemination of information.[17] This flows from the rationale behind protecting commercial speech as a right itself: commercial transactions in a free enterprise economy to be intelligent and well informed, and better market-regulation as a product of information dissemination.[18] This dissemination of information can include, for instance, the dietary or health warnings of a product. Hence, a cigarette manufacturer cannot refuse to print a health-warning on each cigarette pack by calling it a compulsion of speech by the State.[19] While this is, indeed, a compulsion, it seeks to allow the consumer to make an informed choice. This is especially important, as this is a form of commercial speech, and symmetrical information dissemination is most desirable with regard to such speech. Similarly, if a packaged-food manufacturer attempts to argue that the State is compelling speech insofar as the mandatory labelling of nutritional value is concerned, a strong rebuttal would be information dissemination. This means that the compulsion of speech in this case would, in fact, aid the protection of *commercial* free speech, as it ensures that

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[11] Stephen Miller, *Historic Signs, Commercial Speech, and the Limits of Preservation*, 25(2) JOURNAL OF LAND USE & ENVIRONMENTAL LAW 227 (2010).

[12] Zauderer v. Office of Disciplinary Counsel of the Supreme Court of Ohio, 85 L Ed 2d 652 : 471 US 626, 651 (1985).

[13] Johanns v. Livestock Mktg. Assn., 2005 SCC OnLine US SC 36 : 544 US 550 (2005) (permitting the government to anonymously advertise for the beef industry).

[14] Hamdard Dawakhana v. Union of India, AIR 1960 SC 554.

[15] Ozair Husain v. Union of India, 2002 SCC OnLine Del 1265 : AIR 2003 Del 103 (hereinafter "Ozair Husain").

[16] Tata Press Ltd. v. MTNL, (1995) 5 SCC 139 (hereinafter "Tata Mahanagar Limited").

[17] Tata Mahanagar Limited, (1995) 5 SCC 139.

[18] Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council Inc., 48 L Ed 2d 346 : 425 US 748 (1976).

[19] Ozair Husain, 2002 SCC OnLine Del 1265 : AIR 2003 Del 103.

the consumers are well informed of their choices. So, there have been instances where speech has been compelled in the name of 'information dissemination'. Hence it is imperative for the reader to appreciate that not all compelled speech is disallowed by the courts, and commercial speech especially, has been brought under this ambit. However, a key factor also to be noted is that in all these cases, free flow of information plays a pivotal role.

III. COMPELLED SPEECH AS AN AID TO THE FREEDOM OF SPEECH AND EXPRESSION

In this part of the paper, I will attempt to tackle the arguments of the ISPs: that any restriction by the State to uphold net neutrality will be violative of the ISP's freedom of speech. The most compelling argument of ISPs is on the basis that they, being the speakers, ought to be given the right to speak or allow anyone they choose to speak on their platform, as though they endorse some opinions over others. Hence, according to them, net neutrality forces them to be platforms for even those opinions they do not support.

In *Buckley* v. *R. Valeo*,[20] the Court had held that "*the concept that government may restrict the speech of some in order to enhance the relative voice of others is wholly foreign to the First Amendment*". Hence, according to this reasoning, the government ought not to restrict the freedom of speech of readers or consumers only to enhance that of the ISPs. A mere citation of *Buckley* seems sufficient to demolish the ISPs' argument. However, I shall attempt to take the argument against the ISPs' even further. This is mainly because this case takes recourse to others' rights being a reason to curtail the ISP's (ostensible) rights. However, I shall try and show that while the ISP may have the freedom of speech (without delving into whether it truly can be a speaker), this freedom is not unassailable.

In India, several cases have laid down the law of the land; that the right to receive information falls under the ambit of the right to freedom of speech and expression under Article 19(1)(a).[21] These have mostly been cases wherein the freedom of speech of the press has been restricted, and courts in this regard have maintained that any unreasonable restriction on the circulation of information, thus restricting such information from being disseminated, is unconstitutional.[22] However, most of these opinions have been of the dissenting opinion of such judgments.[23] For instance, in *Bennett Coleman & Co.* v. *Union of India*,[24] Justice Mathew dissented stating:

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[20] Buckley v. R. Valeo, 46 L Ed 2d 659 : 424 US 1 (1976) (hereinafter "Buckley").

[21] Union of India v. Assn. for Democratic Reforms, (2002) 5 SCC 294 (hereinafter "Association for Democratic Reforms"); Indian Express Newspapers (Bombay) (P) Ltd. v. Union of India, (1985) 1 SCC 641 (hereinafter "Indian Express").

[22] Indian Express, (1985) 1 SCC 641.

[23] See Sakal Papers (P) Ltd. v. Union of India, AIR 1962 SC 305 : (1962) 3 SCR 842.

[24] Bennett Coleman & Co. v. Union of India, (1972) 2 SCC 788 : AIR 1973 SC 106.

> A constitutional prohibition against governmental restriction on the expression is effective only if the Constitution ensures an adequate opportunity for discussion … Any scheme of distribution of newsprint which would make the freedom of speech a reality by making it possible the dissemination of ideas as news with as many different facets and colours as possible would not violate the fundamental right of the freedom of speech of the petitioners.

While these words of Justice Mathew were only part of the dissenting opinion, with the passage of time, the Court has gradually taken an opposing view to that expressed in *Sakal Papers* and *Bennett Coleman*, and has adopted Justice Mathew's opinion. For instance, in *Union of India* v. *Motion Picture Assn*.[25], the Court while upholding various provisions of the Cinematograph Act that compelled 'speech' by filmmakers while showcasing their film (which included showing videos with social messages during intervals) on the basis that earmarking

> … a small portion of time of this entertainment medium for the purpose of showing scientific, educational or documentary films, or for showing news films has to be looked at in this context of promoting dissemination of ideas, information and knowledge to the masses so that there may be an informed debate and decision making on public issues. Clearly, the impugned provisions are designed to further free speech and expression and not to curtail it.

Similarly, *Ozair Husain*[26] has also shown that speech may be argued to be compelled in the cases where there ought to be information dissemination, to enable the freedom of choice. In both these cases, the dissemination of information through compelling speech was viewed to be as vital an aspect of the freedom of speech as the speech itself.

However, the above cases did not actually state that all possible opinions ought to be put forth in the marketplace of ideas. They merely stressed on information dissemination. Thus arose the question of the reasons behind information dissemination. *LIC v. Manubhai D. Shah* took that one step further, and emphasised the need for differing and varied options available for public discourse.[27] Here, the Court upheld a right of reply in an in-house magazine,

> … because fairness demanded that both view points were placed before the readers, however limited be their number, to enable them to draw their own conclusions and unreasonable

[25] Union of India v. Motion Picture Assn., (1999) 6 SCC 150.
[26] Ozair Husain, 2002 SCC OnLine Del 1265 : AIR 2003 Del 103.
[27] LIC v. Manubhai D. Shah, (1992) 3 SCC 637.

> because there was no logic or proper justification for refusing publication … the respondent's fundamental right of speech and expression clearly entitled him to insist that his views on the subject should reach those who read the magazine so that they have a complete picture before them and not a one sided or distorted one.

In fact, this case is a contrast to *Miami Herald Publishing*,[28] where a US Court had struck down a statute requiring newspapers to print replies from politicians who had been criticised in its editorial pages, finding that such a form of compelled speech fell far short of passing strict scrutiny, which was applied due to the law's content-based nature. Hence, as far as India is concerned, information dissemination and the freedom of choice highlight any compelled speech argument. Thus, even if carrying certain websites that an ISP does not favour amounts to compelled speech, it is indeed permissible due to the two above factors acting as a justification for such compulsion.

IV. COMPELLED PERCEPTION AND THE FREEDOM TO CHOOSE

In this part of the paper, I will not view the ISPs as the subjects of Article 19(1)(a), but the consumers. By showing that straying from net neutrality will result in the lack of choice in the marketplace of ideas, I will argue that consumers would be compelled to perceive certain information. Hence, this right to perceive, too, must be safeguarded under Article 19(1)(a).

To establish this, I will delve into the argument that, perception falls within the ambit of speech. Hence, following this proposition, such perception when compelled, amounts to compelled speech (which I will term as "compelled perception" for clarity).[29] Finally, I will argue that if such compelled perception results in the loss of information dissemination, resulting in the lack of freedom of choice, then it is legally unsound.

The right to perception of any kind, such as hearing or seeing, falls within the ambit of Article 19(1)(a): In India, several cases have laid down the law of the land; that the right to receive information falls under the ambit of the right to freedom of speech and expression under Article 19(1)(a).[30] In *Association for Democratic Reforms,* where the right to know the details of candidates for election was argued to be instrumental in the vote, which was a form of the right

[28] Miami Herald Publishing, 41 L Ed 2d 730 : 418 US 241, 244 (1974).

[29] While the idea of compelled perception as applicable to net neutrality and in the context of this paper is original, I would like to acknowledge that the idea of 'compelled perception' has been advanced in Peter Ferony, *Constitutional Law—From Goblins To Graveyards: The Problem of Paternalism in Compelled Perception*, 35 W. NEW ENG. L. REV. 205 (2013).

[30] Assn. for Democratic Reforms, (2002) 5 SCC 294; Indian Express, (1985) 1 SCC 641.

to freedom of speech and expression. Moreover, many scholars have argued that compelling what one perceived amounted to compelled speech and hence ought to be within constitutional limits. For instance, a Texas legislation which makes viewing a sonogram just before abortion, has been argued to be compelled perception.[31] In this case, it was argued, and rightly so, that mandating that a pregnant woman must view the sonogram of the foetus before an abortion, amounted to compelled speech, as such perception fell under the ambit of speech. Hence, these instances show that it is not merely the 'speaker' *per se* who may exercise free speech rights, but also the one who perceives. Just as an argument can be made against compelled 'speech', it can also be made against compelled perception.

Applying this rationale to the issue of net neutrality, I urge the reader to envision a future where Airtel is allowed to block access to, say, a consumer protection website that has published a damning critique of their allegedly lacklustre services. Imagine an internet where Reliance Telecom does not reveal pages which portray the severe violations of Reliance Trends as far as labour laws are concerned. Clearly, the problem is far from being just the free speech concern of the ISPs. Hence, while the ISPs may make a free speech argument on the lines of any regulation on their material being a dent on their rights, they fail to see the opposite view. A lack of regulation will inarguably see an imminent end in the destruction of free speech rights of the receivers, be it the readers, the listeners, or the consumers. As the argument in this paper has shown that free speech entails not merely the speaking of, or publishing of any material, a more nuanced approach is the need of the hour. ISPs cannot claim free speech to be a one-way street, as the receiving of information is as vital to the free speech discourse as the dissemination of information.

[31] Ferony, *supra* note 29.