

# ZERO-RATING, NET NEUTRALITY AND THE PROGRESSIVE REALISATION OF HUMAN RIGHTS

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## I. INTRODUCTION

The net neutrality debate today, specifically with respect to zero-rating, is invariably characterised as a clash between the noble aspiration to universalise access on one hand,<sup>1</sup> and a handful of “core values of the internet” on the other.<sup>2</sup> Such framing makes for a lively dialogue – neutrality proponents can extol the virtues of an “open internet”,<sup>3</sup> and can argue that access universalisation is impossible, and therefore any failed attempt toward that goal is not worth the risk of permanently altering the nature of the network.<sup>4</sup> The most imaginative strand of reasoning in the entire discussion is the claim that some of the so-called “core design values” (such as the end-to-end nature of the network) have long ceased to be a part of the internet’s architecture, and therefore cannot be placed on a pedestal for perpetual preservation.<sup>5</sup>

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<sup>1</sup> Roslyn Layton, *IGF highlights how developing countries use zero rating programs to drive Internet adoption*, TECH POLICY DAILY, <http://www.techpolicydaily.com/communications/igf-zero-rating-programs/> (last updated Sept. 6, 2014).

<sup>2</sup> See, e.g., the discussion surrounding Facebook’s dubiously christened “Free Basics” platform. Suhrith Parthasarathy, *Access at the cost of Net neutrality?* THE HINDU, Oct. 8, 2015.

<sup>3</sup> Tim Wu, *Closing Time for the Open Internet*, THE NEW YORKER, Jan. 15, 2014.

<sup>4</sup> Vipul Karan Singh, *Permit zero-rating schemes for a limited period*, THE FINANCIAL EXPRESS, Jul. 9, 2015.

<sup>5</sup> Lessig and McChesney, for example, have argued that an architecture in which decisions are made solely at the nodes while the network itself is made up of “dumb pipes”. See Lawrence Lessig and Robert McChesney, *No Tolls on the Internet*, WASHINGTON POST, Jun. 8, 2006. One response to this is that networks became smart long before the net neutrality debate heated up. See Joe Weinman, *Why the “stupid network” isn’t our destiny after all*, GIGAOM, <https://gigaom.com/2012/12/15/why-the-stupid-network-isnt-our-destiny-after-all/> (last updated Dec. 15, 2012).

In its essence, current scholarship on zero-rating is oriented towards presenting the subject as a clash between competing but more or less co-equal interests.<sup>6</sup> Proponents of net neutrality argue that zero-rating would stifle innovation<sup>7</sup> and distort consumer choice to create internet oligopolies<sup>8</sup> – in a nutshell, that the practice is “anti-competitive, patronizing, and counter-productive”.<sup>9</sup> Advocates of zero-rating need only point to the virtues of universal internet access – bridging the digital divide,<sup>10</sup> as it were. It is possible, however, to re-articulate these values in terms that could transcend such a clash of interests. The choice between complete adherence to the principles of net neutrality on the one hand, and zero-rating some contention the other, can be made easier by reframing the debate between norms that are hierarchically related. This is the utility offered by a human rights perspective to the discourse around zero-rating – it makes it possible to obviate the current debate by characterising it as a clash between unequal norms in which one has to clearly trump the other.

Over this article, I argue that it is possible to carry out such a reformulation, and that this reformulation results in the subordination of some values to greater human rights claims. In Part I, I attempt to establish that internet access is fundamentally linked to the effective delivery of several human rights. In Part II, a model that optimises the realisation of the human rights claims previously enumerated is outlined. In Part III, the circumstances under which the human rights approach would be incompatible with the zero-rating debate is examined, which is then used to further refine the model.

Before we begin, I must set out a caveat.<sup>11</sup> It must be emphasised that the primary thrust of this article is not that there exists a *legal* justification for zero-rating. Human rights standards derive their importance not just from

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<sup>6</sup> The Centre for Internet and Society, Bangalore, provides us with an excellent example. See Geetha Hariharan, *The Hazards of a Non-neutral Internet*, THE CENTRE FOR INTERNET AND SOCIETY, <http://cis-india.org/internet-governance/blog/the-week-april-18-2015-geetha-hariharan-hazards-of-non-neutral-internet> (last updated Apr. 18, 2015).

<sup>7</sup> Marcus Wohlsen, *Free mobile data plans are going to crush the start-up economy*, WIRED, <http://www.wired.com/2014/08/free-mobile-data-plans-are-going-to-crush-the-startup-economy/> (last updated Jan. 8, 2014).

<sup>8</sup> Jason Koebler, *So this is how net neutrality dies*, MOTHERBOARD, <http://motherboard.vice.com/read/so-this-is-how-net-neutrality-dies> (last updated Nov. 19, 2015).

<sup>9</sup> Susan Crawford, *Zero for Conduct*, MEDIUM, <https://medium.com/backchannel/less-than-zero-199bcb05a868#.es734hctb> (last updated Jan. 7, 2015).

<sup>10</sup> The term “digital divide” has been the subject of consistent criticism for its lack of emphasis on the socio-economic nature of the problem. See Govindan Parayil, *The Digital Divide and Increasing Returns: Contradictions of Informational Capitalism*, 21(1) INFORMATION SOCIETY 41, 48 (2005).

<sup>11</sup> Whether this is a carefully nuanced position or a cowardly cop-out is, of course, for the reader to decide.

the fact that they are paramount legal obligations (Kelsenian *grundnorms*, if you will) but also from the fact that they are paramount policy obligations – no governmental policy can be said to be legitimate unless it operates in optimal consonance with them. The upshot of this distinction is that although governments may not be *legally required* to permit or encourage zero-rating (for reasons such as the non-state nature of most ISPs, for example), it would still be appropriate from a policy perspective for them to do so.

Re-framing the net neutrality debate in the language of human rights is vitally important, especially if one buys into the Dworkinian view of rights as “trumps”.<sup>12</sup> Dworkin (and his intellectual predecessors, such as J.S. Mill)<sup>13</sup> advocated the view that rights-based justifications occupied a superior position relative to non-rights objectives such as market efficiency and ordinary public policy considerations.

In addition, more recent scholarship has argued that while rights are themselves hierarchically higher than non-rights considerations, there also exists a hierarchy *inter se* among them, much like an ace wins out over a knave despite the fact that both are trumps.<sup>14</sup> Given that international standards represent the most basic and universally accepted versions of human rights, it follows that even among trumps, policy decisions that can be linked to the realisation of human rights guaranteed by binding international treaties such as the ICCPR and the ICESCR must claim priority.

## II. IS THERE A RIGHT TO INTERNET ACCESS?

In order for us to justify zero-rating as a difficult way to achieve important human rights goals, we must first establish that these goals exist in the first place. Many before me have asked whether there exists a right to access the internet, and many have answered this question in several ways. Vint Cerf famously wrote an opinion piece titled “Internet access is not a human right”,<sup>15</sup> while fellow internet pioneer Tim Berners-Lee appears to be in clear disagreement.<sup>16</sup>

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<sup>12</sup> Ronald Dworkin, *Rights as Trumps* in Jeremy Waldron, *THEORIES OF RIGHTS* (1984).

<sup>13</sup> In Mill’s words, “If all mankind minus one were of one opinion, mankind would be no more justified in silencing that one person than he, if he had the power, would be in silencing mankind.” See J.S. Mill, *ON LIBERTY AND OTHER ESSAYS* 20 (S. Collini ed., 1989).

<sup>14</sup> Alan Gewirth, *Are there any absolute rights?* in Jeremy Waldron, *THEORIES OF RIGHTS* (1984).

<sup>15</sup> Vinton Cerf, *Internet access is not a human right*, *THE NEW YORK TIMES*, Jan. 4, 2012.

<sup>16</sup> In expressing such disagreement, however, Berners-Lee does two things that are remarkably relevant to our discussion – he emphasizes the need to break down economic barriers to access on the one hand, while simultaneously expressing a commitment to net neutrality

## A. Locating a Right of Access: Three Approaches

In this section, I argue that it is possible to argue that there exists a human right to access the internet, and that such a right can find its roots in three distinct strands of reasoning.

## B. Internet Access as a Civil and Political Right

It is possible to argue that internet access is inseparable from the right to form informed opinions (as under Art. 19(1) of the International Covenant on Civil and Political Rights) and the freedom of expression (as under Art. 19(2) of the ICCPR and Art. 19 of the Universal Declaration of Human Rights), as also the right to associate with other human beings (as under Art. 22 of the ICCPR and Art. 20(1) of the UDHR).<sup>17</sup> The internet serves to democratise speech in more than one way. The internet protects speech in an unprecedented way – by cloaking the speaker in anonymity, it allows the free expression of views that would normally incur the wrath of regimes, both governmental and societal. The anonymity afforded by the network is vital to the protection of subaltern speech – arguably speech that is in greatest need of protection.<sup>18</sup> The link between online expression and offline democratisation is self-evident, and has been recognised by the UN's Special Rapporteur on the Freedom of Expression and Opinion.<sup>19</sup>

The second important feature of the internet is the virtual eradication of entry barriers to publication. By allowing everyone with access to the network to create and disseminate content at virtually no cost, the internet revolutionises the freedom to *broadcast* opinions and expression. Anonymity and ease of publishing are important because while these features possess substantial value for mainstream speech, their true attraction lies in the

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on the other. “It’s time to recognize the internet as a basic human right. That means guaranteeing affordable access for all, ensuring internet packets are delivered without commercial or political discrimination, and protecting the privacy and freedom of web users regardless of where they live.”, quoted in *World Wide Web inventor says Internet should be ‘human right’*, MASHABLE, <http://mashable.com/2014/12/11/tim-berners-lee-net-neutrality/#rUM8nl.nh5qa> (last updated Dec. 11, 2014).

<sup>17</sup> Scott Edwards, *Is Internet Access a Human Right?*, AMNESTY INTERNATIONAL BLOG, <http://blog.amnestyusa.org/business/is-internet-access-a-human-right/> (last updated Jan. 10, 2012).

<sup>18</sup> Bruce Bimber, *The Internet and Political Transformation: Populism, Community and Accelerated Pluralism*, 31(1) POLITY 133 (1998).

<sup>19</sup> Frank La Rue, *Report of the Special Rapporteur on the protection and promotion of the right to freedom of opinion and expression*, Frank La Rue, UNITED NATIONS HUMAN RIGHTS COUNCIL, May 16, 2011, UN Doc. A/HRC/17/27.

emancipatory potential they represent for subaltern speech.<sup>20</sup> The interplay between these two factors – anonymity and ease of publication – is of crucial importance. A publishing syndicate that charged a few thousand dollars to print anonymous pamphlets would be just as useless to the activist citizen as an open publisher that printed and disseminated literature for no charge, on the sole condition that the author remain identifiable. For this reason, any variant of internet access that does not provide *both* anonymity and ease of publication cannot claim to realise civil and political rights in the manner outlined in this paper.

### C. Internet Access as an Economic, Social and Cultural Right

Another articulation of a right to internet access is based on the assumption that the internet is essential for its economic, social and cultural attributes. The effect of internet access on the right to education (Art. 26 of the UDHR, Art. 13 of the International Covenant on Economic, Social and Cultural Rights) has been well-documented in Europe,<sup>21</sup> with the European Parliament even adopting a recommendation stating that ensuring universal internet access could be equated to universalising the right to education.<sup>22</sup>

‘Access to Knowledge’ scholarship suggests that access to the internet has a transformative effect on A2K in three ways: *first*, it amplifies the reach and efficiency of traditional forms of knowledge transfer; *second*, it makes knowledge available on demand; *third*, it allows individuals to tap into the wisdom of groups, a sort of “global knowledge commons” that would otherwise never have existed.<sup>23</sup>

Access to the internet also allows (and in some cases is essential to) the realisation of other values framed in human rights rhetoric, such as the “right to science and culture”,<sup>24</sup> or the right to access marketplaces.<sup>25</sup>

<sup>20</sup> For a brilliant example of such potential being realised on the ground, see Claude Marks and Rob McBride, *Recovering, Amplifying and Networking the Voices of the Disappeared – Political Prisoners on Internet Media*, 30(2) SOCIAL JUSTICE 135 (2003).

<sup>21</sup> See, e.g., Paul De Hert and Dariusz Kloza, *Internet (access) as a new fundamental right. Inflating the current rights framework?* 3 EUROPEAN J. OF L. & TECH. 3 (2012).

<sup>22</sup> *European Parliament recommendation of 26 March 2009 to the Council on strengthening security and fundamental freedoms on the Internet*, EUROPEAN PARLIAMENT, Document ID: P6\_TA (2009)0194.

<sup>23</sup> Lea Shaver, *Defining and Measuring A2K: A Blueprint for an Index of Access to Knowledge*, 4 I/S: J.L. & POL’YFOR INFO. SOC’Y 235, 247 (2008).

<sup>24</sup> Lea Shaver, *The Right to Science and Culture*, 2010(1) WISC. L. REV. 121 (2010).

<sup>25</sup> Nicola Lucchi, *Freedom of expression and the right of access to the Internet: A new fundamental right?* in ROUTLEDGE HANDBOOK OF MEDIA LAW 157 (Monroe E. Price, et. al. eds., 2013).

### D. Internet Access as a Participative Right

Another way to assert the existence of a right to internet access is by arguing that the advent of ICTs has fundamentally altered the manner in which the entire constellation of pre-existing rights can be exercised. The current rights paradigm presupposes a vast number of features that characterise the physical world, but which may not exist in the digital world. With the movement of people, societies and institutions to the digital world, the absence of these features may necessitate a radical re-articulation of the rights that already exist.

Jack Balkin makes a proto-argument on these lines in the context of the freedom of expression – he argues that new technologies such as the internet are not merely *linked* to the freedom of expression, but *redefine* it (by “changing the social conditions of speech”), necessitating the evolution of new norms to adequately guarantee the right.<sup>26</sup> In a world where freedom of expression is premised upon access to the medium, it is obvious that barriers to the latter would unquestionably restrict the former.

It would appear that Balkin’s argument can be broadened significantly to prompt a rethinking of the very notion of *participation* in society. The right to participate in society is both instrumental to the exercise of other rights (such as freedom of speech and association), and also an *a priori* right, on its own merits. The UDHR recognises this in Art. 27(1), and the manner in which mass migration to digital societies affects pre-existing rights can be best explained through an example. We can use the metaphor of the town hall or village square – earlier human rights frameworks only articulated a right to public participation, and did not specifically provide for a right to access public spaces, because geographical freedoms (including the right of free movement) in the real world ensured that everyone could reasonably reach nearby public spaces and make themselves heard. With the advent of digital societies (or “information societies”), however, the right of free participation in society and culture becomes conditional upon the ability of individuals to *access* these public spaces. In short, digital societies require that the conditions implicit or presumed in pre-existing rights be made explicit separately. This is a line of reasoning that has close parallels to “incompletely theorised agreements” in constitutional law, where it has been used to (consciously or otherwise) “discover” new rights.<sup>27</sup>

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<sup>26</sup> Jack Balkin, *Digital Speech and Democratic Culture: A Theory of Freedom of Expression for the Information Society*, 74 N.Y.U. L. REV. 1 (2004); Jack Balkin, *How Rights Change: Freedom of Speech in the Digital Era*, 26(1) SYDNEY L. REV. 5 (2004).

<sup>27</sup> Cass Sunstein, *Incompletely Theorised Agreements*, 108(7) HARV. L. REV. 1733 (1995).

## E. Conceptual Problems Surrounding the Access Right

The current debate on whether there exists a human right to internet access is largely centred on state interventions that curtail it.<sup>28</sup> This brings with it two subsidiary problems: *first*, human rights obligations are perceived to rest exclusively upon states; *second*, these obligations are seen to be merely negative duties. The former is outside the scope of this article, since we embarked on this journey on the understanding that we were looking for *policy* justifications, rather than *legal* justifications for zero-rating.<sup>29</sup> As for the latter, it must be said that although large parts of the human rights debate currently revolve around the right against disconnection (such as the French HADOPI legislation<sup>30</sup>),<sup>31</sup> there remains significant backing for the existence of a positive obligation to universalise internet access.<sup>32</sup> Further, several states have interpreted their human rights obligations as inclusive of such a duty.<sup>33</sup> The most striking example can be seen in the Greek constitution, which asserts that “*All persons have the right to participate in the Information Society. Facilitation of access to electronically transmitted information, as well as of the production, exchange and diffusion thereof, constitutes an obligation of the State, always in observance of the guarantees of articles 9, 9A and 19.*”<sup>34</sup>

It is possible to argue that the standards governing human rights delivery are applicable to the universalisation of internet access even without presupposing an independent human right of access, since internet access has been recognised to be an essential component of the human rights regime as a whole.<sup>35</sup>

<sup>28</sup> La Rue, *supra* n. 19 at ¶¶28-59.

<sup>29</sup> Nevertheless, there is a case to be made for human rights obligations to accrue to private actors. One way in which this can be achieved is to impose a positive obligation on States Parties to ensure that private parties are prevented from infringing these human rights, as exemplified by the UNHRC in the context of the right to privacy and the prohibition on torture. See CCPR General Comment 31: *Nature of the General Legal Obligation on States Parties to the Covenant*, UNITED NATIONS HUMAN RIGHTS COMMITTEE, UN Doc. CCPR/C/21/Rev.1/Add.13 (2004) at ¶8.

<sup>30</sup> Siraj Dattoo, *France drops controversial ‘Hadopi law’ after spending millions*, THE GUARDIAN, Jul. 9, 2013.

<sup>31</sup> Nicolas Suzor and Brian Fitzgerald, *The Legitimacy of Graduated Response Schemes in Copyright Law*, 34(1) UNSW L. REV. 1 (2011).

<sup>32</sup> La Rue, *supra* n. 19 at ¶¶60-66.

<sup>33</sup> See, e.g., Bobbie Johnson, *Finland makes broadband access a legal right*, THE GUARDIAN, Oct. 14, 2009; see also Sentence 12790 of the Constitutional Chamber of the Supreme Court of Costa Rica, Jul. 30, 2010, [http://200.91.68.20/pj/scij/busqueda/jurisprudencia/jur\\_texto\\_sentencia.asp?nValor2=483874&tem1=013141&param7=0&lResultado=3&nValor1=1&strTipM=T&strLib=LIB](http://200.91.68.20/pj/scij/busqueda/jurisprudencia/jur_texto_sentencia.asp?nValor2=483874&tem1=013141&param7=0&lResultado=3&nValor1=1&strTipM=T&strLib=LIB) (last accessed Nov. 22, 2015).

<sup>34</sup> Article 5A of the Constitution of Greece, as revised by the parliamentary resolution of April 6, 2001.

<sup>35</sup> David Fidler, *Cyberspace and human rights*, in RESEARCH HANDBOOK ON INTERNATIONAL LAW AND CYBERSPACE 94 (Nicholas Tsagourias and Russell Buchan eds., 2015).

### III. ZERO-RATING AS PROGRESSIVE REALISATION

#### A. Unpacking Progressive realisation

The principle of progressive realisation, enshrined in Art. 2(1) of the ICESCR,<sup>36</sup> allows states a certain amount of flexibility in their obligation to guarantee the rights contained in the Covenant when contrasted with the traditional “immediate and absolute” realisation standard.<sup>37</sup> Three features of the progressive realisation standard are of paramount importance to its applicability in the context of zero-rating and internet access universalisation.

*First*, it entails immediate and tangible progress towards rights realisation. This requirement implies that states are under an obligation to ensure that regardless of overall economic constraints, resources at any specific point in time must be optimally utilised to maximise the realisation of the right.<sup>38</sup>

*Second*, it creates a strong presumption of non-compliance where retrogressive measures are imposed. Regression can be in either of two forms – regression of results or normative regression. Regression of results occurs when state policy remains constant, but the delivery of right-realising public goods declines qualitatively or quantitatively. Normative regression simply refers to a situation in which the realisation of a right is restricted through a change that limits the application of the state policy that enabled such realisation in the first place.<sup>39</sup> Retrogressive measures must be justified by the state taking them<sup>40</sup> as being necessary in the face of exceptional circumstances.<sup>41</sup> Significantly, one situation that appears to permit retrogressive

<sup>36</sup> Art. 2(1) states as follows: “Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.”

<sup>37</sup> CESCR General Comment 3, *The nature of States parties obligations*, UNITED NATIONS HUMAN RIGHTS COUNCIL, Dec. 14, 1990.

<sup>38</sup> Principle 23, THE LIMBURG PRINCIPLES ON THE IMPLEMENTATION OF THE INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS (1987). CESCR General Comment 13, *The right to education*, UNITED NATIONS HUMAN RIGHTS COUNCIL, UN Doc. E/C.12/1999/10 (1999).

<sup>39</sup> Christian Courtis (ed.), NI UN PASO ATRAS. LA PROHIBICION DE REGRESIVIDAD EN MATERIA DE DERECHOS SOCIALES (2006).

<sup>40</sup> *Supra* n. 34 at ¶9.

<sup>41</sup> CESCR General Comment 14, *The Right to the Highest Attainable Standard of Health*, UNITED NATIONS HUMAN RIGHTS COUNCIL, UN Doc. E/C.12/2000/4 (2000) at ¶34.

measures would be where such retrogression is necessary to achieve equity in the realisation of the right.<sup>42</sup>

*Third*, it places an obligation on states to institute special measures for vulnerable and disadvantaged groups.<sup>43</sup> While this obligation has primarily been articulated in the context of marginalised groups such as persons with disabilities,<sup>44</sup> it does not preclude the application of a positive duty upon states to create tailored measures that enable other disproportionately disadvantaged groups to realise their rights.<sup>45</sup>

Before we apply the standard to zero-rating, one final point needs to be addressed. In the previous section, I argued that the right of internet access could be articulated as a civil-political right as well as a socio-economic right. However, throughout this section, we have primarily seen progressive realisation as a standard applicable only to socio-economic rights. Does this mean that civil-political rights are not progressively realisable? This is not so. Recent scholarship has acknowledged that civil-political rights are resource-dependent<sup>46</sup> in the same way as socio-economic rights are,<sup>47</sup> and therefore subject to being progressively achieved.<sup>48</sup>

## B. Applying the Doctrine to Zero-rating

We can now examine whether compliance with the (moral, if not legal) duty to progressively realise the right to internet access can be achieved by zero-rating content on the web. The definition of zero-rating that I use is as follows: *zero-rating is the provision of a pre-defined set of web services and applications at zero cost to the subscriber*. Neither do I interrogate the

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<sup>42</sup> SANDRA LIEBENBERG, *SOCIO-ECONOMIC RIGHTS ADJUDICATION UNDER A TRANSFORMATIVE CONSTITUTION* 189 (2010).

<sup>43</sup> Lillian Chenwi, *Unpacking “progressive realisation”, its relation to resources, minimum core and reasonableness, and some methodological considerations for assessing compliance*, 46(3) *DE JURE* 742 (2013).

<sup>44</sup> *CESCR General Comment 5, Persons with Disabilities*, UNITED NATIONS HUMAN RIGHTS COUNCIL, UN Doc. E/1995/22 (1994) at ¶9.

<sup>45</sup> *Govt. of the Republic of South Africa v. Grootboom*, 2000 ZACC 19 (Constitutional Court of South Africa).

<sup>46</sup> M. MAGDALENA SEPULVEDA, *THE NATURE OF THE OBLIGATIONS UNDER THE INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS* 311 (2003).

<sup>47</sup> HENRY SHUE, *BASIC RIGHTS: SUBSISTENCE, AFFLUENCE, AND US FOREIGN POLICY* 13 (1996); MARK TUSHNET, *WEAK COURTS, STRONG RIGHTS: JUDICIAL REVIEW AND SOCIAL WELFARE RIGHTS IN COMPARATIVE CONSTITUTIONAL LAW* 227 (2008).

<sup>48</sup> “*The fact that the full realization of most economic, social and cultural rights can only be achieved progressively, which in fact also applies to most civil and political rights, does not alter the nature of the legal obligation of States which requires that certain steps be taken immediately and others as soon as possible.*” (emphasis supplied) *Maastricht Guidelines on Violations of Economic, Social and Cultural Rights* (1997) at ¶8.

secondary question of how zero-rating implementations are funded – they could be through ad revenue,<sup>49</sup> government subsidies to ISPs, private bargains in which the content provider pays the access provider,<sup>50</sup> or purely philanthropic initiatives with no exchange of payment whatsoever.<sup>51</sup> Nor do I seek to question the assumption that access providers face significant infrastructure costs that preclude them from universalising access without passing on the cost of connection to either the subscriber or the content provider.

In its essence, my claim is that in the situation that we are faced with right now, zero-rating content is a way to comply with our duty to progressively realise the right to internet access. Having understood that it is impossible to realise the right overnight to its fullest extent, we must ask ourselves if our human rights obligations are still discharged by instantly universalising access to some parts of the internet by zero-rating them.

It is here that each feature of progressive realisation earlier outlined comes into its own. The demand for tangible progress, when coupled with the obligation to maximise rights realisation, imposes upon governments the moral duty to encourage zero-rating since it represents tangible progress for marginalised groups.<sup>52</sup> The prohibition on regression is important for two reasons. *First*, because it ensures that access providers cannot engage in willy-nilly withdrawal of services (thus creating a regression of results), and because it ensures that governments cannot reduce budgetary allocations to full access universalisation projects (thus creating a normative regression) without adequate justification. *Second*, because it explicitly allows governments to implement ostensibly retrogressive measures (such as encouraging the proliferation of ‘walled gardens’) if such measures serve to enhance the ‘equitable’ realisation of the right. Finally, the obligation on states to

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<sup>49</sup> See, e.g., Opera Software’s Sponsored Web Pass. <http://www.operasoftware.com/products/operators/sponsored-web-pass> (last accessed Nov. 22, 2015).

<sup>50</sup> See, e.g., AT&T’s Sponsored Data. <http://www.att.com/att/sponsoreddata/en/index.html> (last accessed Nov. 22, 2015).

<sup>51</sup> See, e.g., Wikipedia Zero, Erik Moeller, *Wikipedia Zero and Net Neutrality: Protecting the Internet as a Public Space*, WIKIMEDIA BLOG, <http://blog.wikimedia.org/2014/08/01/wikipedia-zero-and-net-neutrality-protecting-the-internet/> (last updated Aug. 1, 2014).

<sup>52</sup> There is also an ethical argument to be made here in favour of zero-rating. The claim that zero-rating must be discouraged since it would make an insignificant difference to the lives of marginalised subscribers while simultaneously upsetting an abstractly defined “core fabric” of the internet is untenable, since it suffers from a size illusion. Abstract competing considerations such as the “core values” of the network have no *a priori* value when weighed against the tangible rights claims of individuals, and the mere fact that providing access to a small subset of the internet will make an insignificant difference does not undermine the duty to enhance the realisation (no matter how insignificantly) of human rights. See Jonathan Glover, *It makes no difference whether or not I do it*, in APPLIED ETHICS 125, 127 (Peter Singer ed., 1986).

implement targeted measures to enable vulnerable communities to realise their right fits in perfectly with the core mission of zero-rating initiatives.

In the worst case scenario, zero-rating would act as a sort of differential tax on internet access, with the privileged effectively paying the costs of access universalisation either directly (in the form of increased monetary costs to fund a government subsidy, or increased content costs brought about by the need for content providers to pass on the costs of zero-rating to paying consumers) or indirectly (in the form of suffering distortions to competition or innovation in the internet marketplace). I believe that such costs are justified, because a reduction in the value of the internet or an increase in the cost of connectivity for paying subscribers in order to increase access for hitherto marginalised groups is well within the scope of enhancing the ‘equitable’ realisation of the right to internet access.

In summary, then, compliance with the obligation of progressive realisation renders it necessary for governments to encourage zero-rated content delivery because such delivery promises to bring in tangible progress, because progressive realisation protects subscribers from abuse by providers through its prohibition on regressive measures, and because the universalisation of internet access would further the equitable realisation of human rights despite the costs incurred by paying subscribers.

#### IV. AVOIDING THE GIFT OF THE MAGI

Over the course of this exercise, however, we must be careful not to miss the forest for the trees.<sup>53</sup> Universalisation of internet access will be meaningless if the manner in which such it is conducted kills the very values that internet access represents. Access universalisation is a means to an end, and the end will most certainly be defeated if we build a world in which every individual has access to *an* internet<sup>54</sup> that does not, in any way, enable her to realise her freedom of expression, right to education, or right to participate effectively in the information society. This may not be the only point of failure for a universalisation model based on zero-rating, but it is certainly an immediate mission failure if access universalisation renders the internet devoid of

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<sup>53</sup> The title of this section is a reference to O’Henry’s short story, in which a husband and wife present each other with hair accessories and a watch chain by selling off their hair and wristwatch respectively in a touching but otherwise utterly useless display of affection. We must remember that posterity will not forgive us for making the same mistake in discharging human rights imperatives as easily as Jim and Della Dillingham forgave each other on Christmas Eve.

<sup>54</sup> As opposed to “*the* internet”.

the very values sought to be universalised. We must therefore ask ourselves what these values are, and whether they may be seriously jeopardised by zero-rating.

With respect to the internet's role in enhancing the realisation of the freedom of expression, we have identified two essential attributes – user anonymity and the lowering of barriers to publication. Existing zero-rating platforms (such as Facebook's Internet.org)<sup>55</sup> have certainly come under heavy criticism for their architectural rejection of anonymity-enhancing tools such as encryption. However, there is nothing to prevent the legislation of these values into the system – zero-rating (or its viability, economic or otherwise) is not conditional upon the rejection of anonymity. Indeed, encryption has been embraced (to a limited extent) by the very ventures that were criticised for rejecting it.<sup>56</sup> As for barriers to publication, nothing about zero-rating puts it in conflict with allowing subscribers to amplify their voice on the internet. ISPs gain nothing from narrowing the reach of content on the internet – zero-rating is essentially a “last mile” distributive problem that has nothing to do with how far content travels within the worldwide network. While legislation could prevent anonymity from being compromised in zero-rated services, I submit that market forces will ensure that the most populous social networks are always within the reach of zero-rated content consumers. This is because ISP interests are served by giving consumers what they want, and there exists adequate competition in the market for large social networks and blogging platforms that allow for wide publication, so that any of them should be able to persuade access providers to zero-rate their services. In any event, the widespread mirroring and archiving on the internet means that content is rarely tied down to the website in which it originated, meaning that the selection of zero-rated websites by any individual access provider should exercise no influence on the reach of the content accessed or disseminated on the provider's network.

With respect to the right to education and A2K concerns, the success of the Wikipedia Zero project<sup>57</sup> must surely be evidence enough that if properly executed, zero-rating could prove to be the most important A2K

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<sup>55</sup> Shruti Dhapola, *Net Neutrality debate: Facebook's Internet.org has privacy, security issues*, THE INDIAN EXPRESS, May 7, 2015.

<sup>56</sup> Russell Bandom, *Facebook enables web encryption for Internet.org*, THE VERGE, <http://www.theverge.com/2015/9/24/9388399/facebook-internet-dot-org-web-encryption-security> (last updated Sept. 24, 2015).

<sup>57</sup> Paul Sawers, *Wikipedia Zero arrives in India, dropping mobile data charges for 60m Aircel subscribers*, THE NEXT WEB, <http://thenextweb.com/media/2013/07/25/wikipedia-zero-arrives-in-india-dropping-mobile-data-charges-for-60m-aircel-subscribers/> (last updated Jul. 25, 2013).

tool yet developed in collecting, preserving and disseminating community knowledge.

The most interesting conflict between zero-rating and the rights sought to be guaranteed through it arises when we speak of the participative value of internet access. If access universalisation is predicated upon the establishment of ‘walled gardens’, then how can we ensure that these walls do not prevent the inhabitants of our information society from reaching out into ‘public spaces’ on the internet? Admittedly, this presents a challenge insofar as it necessitates a delineation and separation of public and private spaces online. While there exists a school of thought which holds that it is impossible to effect such a distinction,<sup>58</sup> there remains an argument to be made that such distinctions can be made on a case-by-case basis, through an examination of the potential for public participation that any given space on the internet offers.<sup>59</sup> Governmental regulation of zero-rating can make such case-by-case decisions under pre-existing adjudicatory framework.<sup>60</sup>

On the whole, therefore, it is possible to establish that there exists a strong argument to be made in favour of zero-rating being a way for states to comply with their progressive realisation obligations under the international human rights regime, especially given that it can be executed without fundamentally altering the values of the internet sought to be universalised.

## V. CONCLUSION

The claim that zero-rating is intrinsically linked with the discharge of fundamental human rights obligations has the potential to drastically alter the net neutrality debate. If it is successful (and I believe that it is), then it effectively frees us from the burden of having to engage with the effect zero-rating will have on competition, or innovation, or the “nature of the internet”. This is because human rights claims occupy a higher position in our legal, moral and political imagination than vague claims of market efficiency or innovation incentivization. Further, arguments that zero-rating would undermine

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<sup>58</sup> See, e.g., Georgia Bullen, “Public” Space, Civic Engagement and the Internet, MEDIUM, <https://medium.com/@georgiamoon/public-space-civic-engagement-and-the-internet-39f43b1e0c31#9g8oc344p> (last updated Dec. 17, 2014).

<sup>59</sup> DIANA SACO, CYBERING DEMOCRACY: PUBLIC SPACE AND THE INTERNET (2002).

<sup>60</sup> One example of such a framework is the *ex ante* evaluation suggested by the TRAI in its report. Sneha Johari, *Zero rating should be equal for all content providers: Govt Committee on Net Neutrality*, MEDIANAMA, <http://www.medianama.com/2015/07/223-zerorating-contentproviders-equal/> (last updated Jul. 20, 2015).

consumer interests by concentrating power in the hands of access providers would still be unable to compete with human rights claims.

Once we have established that there exists a right to access the internet, and that this right can best be progressively realised by the universal delivery of zero-rated content, then it follows that we must encourage zero-rating regardless of its pernicious effects on consumer choice, competition, efficiency, innovation or power, since all these competing claims are subordinate to our fundamental duty to progressively realise basic human rights.