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TITLE OF THE PAPER
Freedom of Airwaves-Recent Trends of Judicial Activism in India

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ABSTRACT

FREEDOM OF AIRWAVES - RECENT TRENDS OF JUDICIAL ACTIVISM IN INDIA

The institutional set-up of independence of judiciary in India, the wide discretionary powers it exercises and the inevitable gaps in fragmentary legislations give ample scope for Justices to apply activism in their judgements. The Indian judiciary has found the fertile field for judicial innovations and explorations under Art.19 (1) (a) read with Art.19 (2) of the Indian constitution, which guarantees to all the citizens freedom of speech and expression with reasonable restrictions thereof. One such decision where Judicial activist alacrity is manifest is Secretary, Ministry of Information & Broadcasting Vs. Cricket Association of Bengal. This judgment of far-reaching consequences requires a thorough scrutiny especially by the media persons.

Justice P.B.Sawanth and S.Mohan J declared that Airwaves or frequencies are the public property. Every citizen has a fundamental right to use the best means of imparting and receiving information as such to have an access to telecasting for this purpose, subject, however, to the social controls. The Union Government was directed to take immediate steps to establish an independent public authority in order to control and regulate the Airwaves. Justice P.Jeevan Reddy in his separate but Concurrent Judgement observed that games providing entertainment are modes of expressions, hence, they are protected under Art.19 (1) (a). However, right to establish and operate private TV
FREEDOM OF AIRWAVES - RECENT TRENDS OF JUDICIAL ACTIVISM IN INDIA

- Dr. V. Durga Bhavani

A jurimetric analysis of methodology of justicing confirms the proposition that the appellate Justices normative output creates law and not merely declares. The Blackstonian dogma that the Judges never made the law and they are only depositories of it, yielded to the gradual evolution of judicial creativity transcending the limitations of self restraint. The function of a Judge is not always an arid, mechanical or disinterested applications of the known law or to preserve status-quo (Jaffe, 1969:170).

The institutional setup of the independence of judiciary, position of discretionary powers and inevitable gaps in fragmentary legislations give ample scope for Justices to arrogate for themselves the power of lawmaking in decisional process.

The pattern of Indian Judicial system moulded on the lines of USA and UK facilitate the use of processual justice to humanise law. The Indian Judges never concealed their creative alacrity and prodigious volume of judgements of Indian Supreme Court reveals that the Indian Judges do engage in self-conscious articulation in expanding the frontiers of law giving more content to the fundamental rights and reforming and ordering Social, Economic fabric of the society. Judicial activism is manifest especially in the field of individual freedoms. While scanning through the high watermarks of judicial valor from
Maneka Gandhi’s Case to the recent Hawala Case, one would wonder that the Indian Supreme Court is actively discharging supervisory executive functions and legislative responsibilities.

The Indian judiciary has found a fertile field for judicial innovations and explorations under Art. 19 which guarantees six fundamental freedoms which are bulwark of any democratic nation.

Art. 19 (1) (a) which guarantees to all the citizens of India freedom of speech and expression is not only valuable in itself but is the very basis for any democratic functioning which proceeds on the premise of free exchange of thought. The word ‘expression’ under Art. 19 implies in itself the freedom of press and other media and in particular exemplified right to information and right to know. In its widest amplitude it includes freedom to hold opinions without interference and to seek, receive, and impart information and ideas through any media regardless of frontiers. The recent Supreme Court’s ruling in a landmark judgement in Secretary, Ministry of Information and Broadcasting v. Cricket Association of Bengal ((1995) 2 SCC 161) was the culmination of judicial thinking over the impact of electronic media on the exercise of the right under Art. 19 (1) (a). It may be pertinent to note that, it was not a sudden development but a continuation of the thread left by earlier decisions.

The vital Judgement, Secretary, Ministry of Information and Broadcasting v. Cricket Association of Bengal declared that the Airwaves are public property and the citizen of India has the fundamental right to impart as well as receive information and for that purpose as a right to access for broadcasting. However,
the Court observed that as in the case of freedom of press the above right is subject to reasonable restrictions under Art. 19 (2) and also upon the availability of broadcasting frequencies. This significant Judgement with far reaching consequences requires a thorough scrutiny by the media persons especially those belonging to broadcast media.

BACKDROP OF THE CASE

The instant case, arose over a dispute with regard to royalty on telecasting Hero Cup International Cricket Tournament in Calcutta in 1993 organised by Cricket Association of Bengal (CAB). CAB and Doordarshan failed to reach an agreement on the prices for the sale of worldwide television rights for telecasting the matches consequent upon which the CAB has entered into a contract with Travel World Image (TWI), an internationally reputed telecasting agency. On the otherhand, Doordarshan asserted monopoly over the rights to transmit the signals and warn that unless it is paid Rs.5 lakh per match uplinking facilities will not be provided to TWI. This action was challenged by CAB and Board of Control of Cricket in India (BCCI) in a writ petition filed before Calcutta High Court. The Calcutta High Court has given an interim direction leaving telecasting rights inside India to Doordarshan and outside rights to TWI. Thus the controversy is temporarily sealed and by the time the clients reached the Supreme Court, the matter has become mostly of academic importance. The main issue centred round the question whether the Governmental agencies can claim monopoly over creating and telecasting terrestrial signals and what are the
rights of listeners, viewers and broadcasters in this regard.

ANALOGOUS POSITION IN AMERICA

It was aptly laid down by Justice Bhagavathi that Art. 19 of the Indian Constitution has its roots in the First Amendment of the American Constitution.

Thus, naturally one would tend to examine the above Amendment in its interpretative analogy to see the position. The series of decisions in America are favourably disposed of towards recognising the right of the viewers and listeners under the First Amendment of the American Constitution in *Red Lion Broadcasting Company v. Federal Communication Commission* and *US v. Radio, Television News Directors Association* (395 US 367:23 L Ed 2d 371) has pointed out that the purpose of the First Amendment was to preserve an uninhibited market place of ideas in which truth will ultimately prevail, rather than to countenance monopolization of market whether by the Government or private individual. It recognized that people as a whole retain their interests in free speech by Radio etc. However, it was cautious in saying that the Government is permitted to put restraints on licenses in favour of others who want to exercise their freedom through these media. The American Court was also cautious when it said that the electronic media intruded into home under more pervasive in affecting privacy and it is all the more difficult control than when compared to the print media.
THE JUDGEMENT

Justice P.B.Sawanth speaking for himself and S.Mohan, J declared that the Airwaves or frequencies are the public property. The citizen has a fundamental right to use the best means of imparting and receiving information and as such to have an access to telecasting for this purpose. However, the use of such public property has to be controlled and regulated by a public authority in the interest of the public and to prevent the invasion of rights. Exercise of such right is subject to limitations by the very nature of the property involved and the limitations laid down under Art. 19 (2). The Central Government was also directed to take immediate steps to establish an independent autonomous public authority having representatives from all the sections and interests of the society inorder to control and regulate the Air Waves.

Justice B.P.Jeevan Reddy in his separate and concurrent Judgement observed that the games like Cricket provide for entertainment and providing entertainment implied under Art. 19 (1) (a) subject however to competing societal interests. He viewed that the license or permission to establish TV transmissions without any conditions is not as a matter of right flowing from Art 19 (1) (a). He firmly stated that right to establish and operates a private TV station is not enshrined under Art 19 (1) (a) and it is a matter of policy to be decided by the Parliament. He added that Art 19 (1) (a) read with Art 19 (2) doesnot permit monopoly either by the state or private individual in the broadcasting media as permitted under Art 19 (1) (g) read with 19 (6) with regard to any business.
He proclaimed that Airwaves constitute public property but he said it must be utilised for advancing public good and no individual has a right to utilize them at his choice and pleasure. The Airwaves can be used by a citizen for the purpose of broadcasting only when allowed to do so by a statute and rules made there under. One of the important points highlighted by Justice P.B. Jeevan Reddy was that the broadcasting media are inherently different from press and one should not draw the analogy of press which would be misleading and inappropriate.

He opined that the broadcasting media should be under the control of public as distinct from the Government and such public statutory corporation(s) should ensure in partiality. As an obiter, he felt that the Indian Telegraphic Act 1885 was totally inadequate to govern fastchanging broadcasting media and it is imperative on the part of the Parliament to make a new law placing the broadcasting media in the hands of a public statutory Corporation.

Till such arrangements are made, he recommended that the nodal ministry of AIR and Doordarshan should dispose of the cases on merit, keeping in view the public interest.

AN APPRAISAL

On perusal of the above opinions, it would appear than the Judgement of Justice B.P. Jeevan Reddy is more comprehensive that the Judgements of the Justice P.B. Sawanth on behalf of himself and S. Mohan JJ.

Logical conclusion coming from these Judgements is that it is a big leap in the direction of removing the electronic media
from the shackles of Governmental monopoly. However, it should not be confused as stating that everyone is free to establish and telecast the electronic signals unrestricted. Infact, the dictum is in favour of licensing through an independent impartial representative public body. It is now imperative on the part of the Parliament to immediately pass a legislation establishing such body.

It may be noted here that the abortive Prasara Bharathi Act is squarely inadequate in the changed circumstances and in these days electronics revolution totally impinging into individual privacy. The Supreme Court dictum envisages a better autonomous body than the authority envisaged under Prasara Bharathi Act.

For the first time, the Judgement went to the extent of recognising the right to access to the Airwaves subject, however to the restrictions under Art 19 (2) availability of frequencies, competing societal interests. The Court has taken an interesting interpretation in declaring Airwaves as public property thus infact leaving it to be regulated in the public interest and actually blocking individual to utilize it to his own pleasure as profit.

It may be noted that the Justices are carried away by the American analogy, eventhough there are vital differences between Indian and American Constitutional systems. American Constition doesn’t provide for specific restrictions on the right to freedom of speech and press and certain restrictions were interpreted by the Supreme Court of America. Where as the Indian Constitution specifically provide for restrictions under Art 19 (2) and such
is the case, it would generally inappropriate especially when Justice B.P. Jeevan Reddy maintained that Broadcasting media should be treated differently from the press taking cue from the decision of American Supreme Court. Freedom of Press is not expressly stated under Indian Constitution (unlike the American Constitution) and it is implied in the terms "expression" under Art 19 (1) (a). Similarly broadcasting media are also come with in the purview of the word "expression" whether it is the press or broadcasting media they are subject to reasonable restrictions under Art 19 (2). Thus they have the same analogy. It would be logically incorrect to say that they have different analogy. An extension of this argument leads to another inconsistency in the judgement of Justice B.P. Jeevan Reddy who stated that right to establish and operate TV Stations is not a part of Art 19 (1) (a). Just like institutional setup of press is essential to the free exercise of freedom of press, the institutional setup of TV Centres is essential for the exercise of right to the transmission of the views through Airwaves. Such a constitutional right can not be left to the vagaries of the legislature. However, such a right can always be reasonably respected under various grounds of Art 19 (2).

CONCLUSION

Flow of information through Airwaves is an essential human right which cannot be sacrificed at the altar of inadequacies. There is a considerable lag of legislations when compared with a pace of techni-tronic-advancements in the field of information and Communications. For an effective democratic functioning legislative preparedness for future development is imperative.
Legislative lethargy gives scope for the exercise of judicial discretion with resultant activist as in the present case. However, it may be noted that interpretivism is constricted to the issues of the case and judicial reforming involves considerable delay. In the modern Welfare State, one would applaud reformative conscious activist libertarian Justices rather than the status-quo neutralist Judges. But that is not an excuse for legislative inertia.

Inspite of the Judicial dictum the parliament in India is yet to shape an enactment to regulate Airwaves, the public property. The Parliament in its wisdom should try to pass a comprehensive legislation without deliberately leaving the loopholes and with the conscious of public interest lest the gaint empires of media magnets may dominate mass communication through Airwaves and try to extend misinformation. As has been rightly described, once again India falls into the clutches of the cultural imperialism of multinalitonals. Even in the instant case, the case was austensibly fought on behalf of a foreign agency. One has to remember the concern of the judges that what is paramount is the right of viewers and listeners and not the right of broadcasters.

REFERENCES


   Sunil Batra v. Delhi Administration, AIR 1978 SC 1575.


3. Indira Jaya Singh v. Union of India. AIR 1989 Bom 25 observed that the right equally covers the freedom of other media. A citizen cannot enjoy the freedom of speech and expression if he is not permitted to express his views freely through media even when he is invited to use these media. In an earlier decision, Odyssey Communications (P) Ltd. v. Lokavidyan Sanghatana. AIR 1988 SC 1642, the Supreme Court observed that a citizen’s right to exhibit films on television is similar to the right of a citizen to publish the views through any other media.

See also LIC v. Professor Manubhai D. Shah. (1992) 3 SCC 637. The Supreme Court observed that every citizen of this free country has right to air his/her views through the printing and electronic media subject of course to permissible restrictions imposed under Art. 19 (2).


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Channels is not enshrined under Art. 19 (1) (a) and it is a matter of policy to be decided by the Parliament. He observed that Art. 19 (1) (a) read with 19 (2) does not permit monopoly either by the state or a private individual. He declared that Airwaves constitute public property. It shall be utilised only for public good and private individual has no right to use them at his choice and pleasure. He made a significant observation that the broadcasting media are inherently different from the press and one should not draw the analogy of press which would be misleading and inappropriate.

There is no doubt that this decision is a big leap in the direction of removing electronic media from the shackles of governmental monopoly but it does not mean that the private individual is free to establish and telecast the electronic signal unrestricted. The dictum is in favour of licensing through independent, impartial representative public body.