

**DISPUTE RESOLUTION IN BROADCASTING & CYBER
SECTORS – ISSUES AND WAY FORWARD.**

9th FEBRUARY, 2019, HOTEL FIDALGO, PANAJI GOA

1. Hon'ble Mr. Justice Uday Lalit, Judge Supreme Court of India; Hon'ble Mr. Justice Shiva Kirti Singh, Former Judge Supreme Court of India and Chairperson of TDSAT; other dignitaries on the dais, off the dais, ladies and gentlemen.

2. We are extremely glad that you have bestowed on Goa, the honour of hosting this seminar of seminal of importance. So on behalf of the Hon'ble Chief Justice of Bombay High Court Shri Justice Naresh H. Patil and my esteemed colleagues at Goa, I extend to you all, a very hearty welcome. I am quite sure that you have chosen this venue right.

3. But I am not quite sure of your choice of inviting me to speak, even briefly at today's seminar. This is because, by and large, mostly large, I am regarded as DCI - Digitally

Challenged Individual. If any researchers are undertaking any serious studies, on say, the capacity of technology to generate mental blocks or whether AI -Artificial Intelligence can survive in a medium bereft of DI- (Digital Intelligence) then I should prove a fine specimen for this kind of research.

4. Having sounded this caveat, I must say and acknowledge that even from the perspective of technologically challenged individual like me, both telecommunication and broadcasting have radically transformed the world that we live in. We are inextricably interlinked to technology. We are virtually glued to our cell phones, computers, TV sets all day long. These technologies, by now, have virtually become an extension of our body, our personalities and even our identity.

5. When I read Alvin Toffler's *Future Shock*, almost 30 years ago, I thoroughly enjoyed it, but only as a science fiction. Little did I realize that the future, on supersonic wings of technology, would arrive so fast. Technology today has

miniaturized the globe. Vast oceans have shrunk and distant countries are as close as nearby countries. To borrow words from William S. Cohen, Former Secretary of Defense, US

“The world is today not much bigger than a ball, a small ball, spinning on the finger of science and it is going faster and faster and our leaders are confounded by the terrifying velocity of advancement that comes growling at us. The question then is how to deal with these events when they are coming in so fast and we have to be so wise ?”

6. It was T. S. Eliot, who had raised this very issue many years ago, when he said : Where is the knowledge that comes from information ? And where is the wisdom that comes from knowledge ? We are now living in this information age. We have more information available to us than at any time in the history of mankind. Are we any closer to becoming wise with our achievements or are we being irresponsible ?

7. T.S. Eliot's question is of most relevance today. This is because the technology which is coming growling at us, is more or less neutral. Whether it turns out to be an useful servant or a dangerous master depends on how we deal with technology. This in turn depends upon our perspective on the fundamental issues and values when it comes to dealing with technology. Therefore, unless there is conceptual clarity on such issues, the way forward, may either turn out to be a mirage or may not take us very far. In order to know where we are going, we must not forget from where we have come from. And that is importance of fundamental values.

8. For instance, as of date, there is no conceptual clarity as to the nature and extent of the precise stake of different stakeholders when we consider the technology in telecommunication and broadcasting sector. One of the theories posited is that such technology, being product or species of intellectual property, major stake must be vested in Industry, which would include to a certain extent, the

investors, inventors and innovators. Therefore, it is mainly Industry which must formulate policy when it comes to this technology. In short, it is the Industry which must call the shots. These theorists therefore argue for total absence of State control. At the highest they concede a very minimal level of regulation. Thus far, but no further, they say.

9. But then the other perspective is that technology, particularly in the sector of telecommunication and broadcasting thrives on airwaves or bandwidth which is now by and large accepted as a common material resource; which vests in the people. These theorists also highlight the stake of million of consumers in this industry. They therefore, argue that people, the consumers, must also have a significant say when it comes to formulation of policy in this significant sector. They argue for healthy regulation over the aspects like pricing and quality viewership.

10. Since Airwaves and Bandwidth is by now

acknowledged as a common material resource, the Public Trust Doctrine is certainly attracted. There may be a difference in the application of this doctrine in environmental jurisprudence and in the context of distribution of common material resources. But the difference is only of the degree. All that I say is that there are some fundamental jurisprudential issues which must inform the dispute resolution in the telecommunication and broadcasting sectors.

11. In matters of dispute resolution in these sectors, as perhaps in several other sectors as well, you will appreciate that there is a delicate balance which decision maker has to achieve or at least must strive to achieve. The interests of the Industry have to be identified and protected by demarcating the sometimes thin line between Control and Regulation. At the same time, the decision maker has to ensure that the Industry does not exploit the consumers, who, on account of several factors, are unable to present any united front against the excesses of the Industry. The decision maker has to ensure

that absolute control, in the name of the Regulation does not suppress creativity and technological advancement in these vital sectors. At the same time, the decision maker has to also ensure that the licence to use the scarce airwaves or bandwidth does not degenerate into a licence to exploit the consumers. Finally, the dispute resolution agencies must strive that this boon of technology, this useful servant does not transform into a bane, a dangerous master.

12. Take for instance, the broadcasting sector. TV channels virtually addict the consumers to a particular show or serial. There are scientific reports that missing a show or missing a part of the serial can even induce bio-chemical changes in the body on account of severe anxiety or frustration. The channels, having secured such dedicated viewership then proceed to interrupt the show or serials by introducing excessive advertisements which the captive consumers are virtually forced to bear with, whether they like them or not, whether the content of such advertisements is

conducive to their holistic well being or not.

13. Industry justifies this by arguing that production and broadcasting of quality content costs a lot of money and such money, can only be earned through advertising. Industry argues that this is price which the consumers must pay for quality content at no extra monetary cost to the consumers. The consumers, which, to a great extent, are an unorganized sector, argue that too much of advertisements, severely affects the quality of viewership and amounts to exploitation.

14. The TRAI steps in with “*Quantitative advertisement Regulations*” to rein in advertisement time to 12 minutes per clock hour and this raises several legal and constitutional issues.

15. Is the TRAI legally competent to make such Regulations? If so, are the Regulations excessive, disproportionate or unreasonable? Are such Regulations an unauthorised encroachment on the right to free speech,

guaranteed by Article 19(1)(a) of the Constitution ? Is “*Commercial Speech*” is at all protected under Article 19(1)(a) of Constitution ? *Humdard Dawakhana* principle states that it is not, but *TATA PRESS* principle says that it is; The US Supreme Court by and large accepts that even commercial speech is protected under the First amendment to their Constitution but points out that the degree of protection to commercial speech need not be the same as the degree of protection afforded to non commercial speech. The policy makers have to ultimately decide whether to permit the market forces to sort out such issues, as advocated by Nobel Laureate Hayek or whether Regulation is a must in such matters, as advocated by John Maynard Keynes, yet another eminent economist. Though, decision makers are normally unconcerned with policy, once the policy is reflected in the form of Statutory Regulation, the principle of judicial review accepted under our Constitution, obliges the Courts to rule upon the constitutionality or otherwise of such Regulation when questioned before the competent Courts of law. Again,

even the Courts have to adopt a balancing exercise.

16. The Dispute Regulation Authorities, when dealing with the concrete cases which come up before them, unfortunately, do not have too much time to reflect upon the jurisprudential or philosophical issues, which such cases invariably raise. Therefore, it is extremely important to have seminars like the present one, where some serious deliberations can take place on such matters in an environment which is truly conducive to such serious deliberations. That is the true significance and importance of today's deliberations.

17. Seminars and deliberations such as these, are manifestations that we acknowledge the responsibility of our generation. This world, this earth is not an inheritance from our parents but rather, this is something that we have borrowed from our children. Therefore, we all owe a responsibility, a sacred responsibility to hold this world, this earth, in trust for our children.

18. To borrow from Yuval Noah Harari: *“In a world deluged by irrelevant information, clarity is power. In theory, anybody can join the debate about the future of humanity, but it is so hard to maintain a clear vision. Frequently, we do not even notice that a debate is going on, or what the key questions are. Billions of us can hardly afford the luxury of investigating, because we have more pressing things to do: we have to go to work, take care of the kids, or look after elderly parents. Unfortunately, history gives no discounts. If the future of humanity is decided in your absence, because you are too busy feeding and clothing your kids, you and they will not be exempt from the consequences. This is very unfair; but who said history was fair ?”*

19. In conclusion let me leave with you an idea from John Gardner's book *“Recovery of Confidence”* written perhaps in 1960s. He speaks about the institutions being caught in a savage crossfire between *unloving critics* and *uncritical lovers*. On the one hand, you have these *unloving*

critics, people who see absolutely no good in the current state of affairs and will do everything they can to criticize and tear it down. On the other hand, there are *uncritical lovers* who hold on desperately to the “*status quo*”. These people go to any extent to resist change. John Gardner suggests that we have to become *loving critics* and that means we have to be open to the winds of change and embrace them as we hold on to what is fundamentally important to us.

20. From the deliberation to follow, if we succeed in producing even a handful of *loving critics*, to borrow Gardner's phrase, I think we can say with confidence, that the way forward is bright and not bleak. If our hopes have been liars, then our fears may as well turn out to be dupes.

21. Thank you very much for your kindness and patience.

(Justice M. S. Sonak)