TELECOM DISPUTES SETTLEMENT & APPELLATE TRIBUNAL
NEW DELHI
17TH JULY, 2012

Appeal No.1 of 2012
(With M.A. No.20 of 2012)

Aditya Thackeray ... Appellant

Vs.

Telecom Regulatory Authority of India ... Respondent

BEFORE:
HON'BLE MR. JUSTICE S.B. SINHA, CHAIRPERSON
HON'BLE MR.P.K. RASTOGI, MEMBER

For Petitioner : Mr. Navin Chawla, Advocate
Mr. Anil Punj, Advocate

For Respondent : Mr. Meet Malhotra, Sr. Advocate
Mr. Saket Singh, Advocate
Mr. Ravi S.S. Chauhan, Advocate

J U D G E M E N T

Validity and/or legality of a Regulation known as The Telecom Commercial Communications Customer Preference Regulations, 2010 ("the 2010 Regulations") as amended by the Telecom Commercial

Communications Customer Preference (8th Amendment) Regulations, 2011 is in question in this appeal.

Factual Background:-

2. The Appellant is a citizen of India. He is also the President of Yuvasena, a unit of Shivsena - a recognized political party.

He contends that he undertakes a wide spectrum of issues related to youth in the areas of education, sports, employment, social issues etc.

For achieving the said object of the Association, the Appellant is said to be in need of remaining in constant touch and communicate with his followers and associates, which is possible only by taking aid of modern technology i.e. through internet and SMSs which are important tools for spreading the news and informations by the Appellant and its Association.

The Regulations

3. On or about 11.5.2010, a Consultation Paper on Review of Telecom Unsolicited Commercial Communications Regulations was issued by the Respondent, wherein inter-alia it was stated :-

> ***"2.12. Effective control on Telemarketing calls/SMS/MMS***
>
> *2.12.1. Voice calls and SMSs from telemarketers can be effectively controlled if some automatic control can be inbuilt in the system. The possibility of allocation of separate number level to telemarketers was considered by a committee earlier, which expressed the view that allocation of separate number level may not be feasible as it will result in inefficient utilization of telecom numbering resources.*

2.12.2. Unsolicited commercial voice calls can be drastically controlled if telemarketers use only National Do Call Registry (NDCR) data. Since NDCR data will be provided to all registered telemarketers, there is high possibility that such telemarketers will make calls only to subscribers willing to receive such calls. Unregistered telemarketers may still arrange subscriber database and make UCC calls even to those subscribers who are not registered with NDCR. They are likely to use either fixed line or mobile phones to make telemarketing calls. Number of calls likely to be made by such telemarketers per day will be high. It may technically be possible to restrict maximum number of calls per day from a telephone number. Such restriction may be sufficiently high so that normal user is not get affected. These restrictions may be removed for a high usage subscriber on submitting an affidavit declaring that —These telecom resources are not used for any telemarketing purpose. Details of calls from these numbers can effectively be used to control UCC calls. Such restrictions on maximum number of calls per day will make use of telephone unsuitable for telemarketing purpose will encourage them to register as telemarketer with DoT. Once registered as telemarketer, there will be no restrictions on number of calls per day. This may help to effectively restrict operation of unregistered telemarketers.

2.12.3. Unsolicited commercial SMSs can be controlled using second screening at SMSC. Service providers can be mandated to use NDCR data to ensure that content aggregators send bulk SMS to only those customers registered on NDCR. All bulk SMSs addressed to those not registered on NDCR may be dropped. A maximum limit of SMSs per day can also be fixed to ensure normal mobile phone is not used to send UCC messages.

2.12.4. Do you agree that maximum number of calls as well as SMS per day from a telephone number (wireless as well as wireline) can be

technically controlled to force telemarketers to register with DoT? What other options you see will help to effectively control telemarketers?

2.12.5. Do you envisage that second screening at SMSC as proposed in para 2.12.3 will effectively control unsolicited SMSs? Give your comments with justification."

4. By reason of the 2010 Amending Regulations, the following clause was inserted :-

"(a) every Originating Access Provider shall ensure that no telecom resource is provided to a telemarketer unless has registered itself with the Authority and has entered into an agreement with Originating Access Provider, in accordance with the provisions in Schedule IV to these regulations;"

"(k) no Access Provider shall provide to any person, other than a telemarketer registered as per regulation 14, any tariff plan or SMS package in any form such as special recharge voucher, student pack, seasonal pack etc. permitting sending of more than one hundred SMS per day per SIM except on 'blackout days' and additional days as may be specified by the Authority by direction issued from time to time and all such SMS packages already provided to any such person shall not be renewed after their expiry:"

Transactional Messages, however, were excluded from the purview of the said rigour.

5. The TRAI issued an Explanatory Memorandum on the said Regulations, the relevant paragraphs whereof are as under : -

"1. Unsolicited Commercial Communications (UCC) are a major cause of disturbance and inconvenience for telecom users in recent times. These communications invade the privacy of individuals. With growth in telecom services in the country and fall in telecom tariffs, telecommunications is now increasingly being used as a tool to advertise and market various products. TRAI has been receiving for some time now, complaints from telecom customers on the subject of UCC. In order to curb Unsolicited Commercial Communications, the Telecom Regulatory Authority of India (TRAI) notified the Telecom Unsolicited Commercial Communications Regulations, 2007 dated 5th June, 2007, which put in place a framework for controlling unsolicited commercial communications. It envisaged establishment of a National Do Not Call (NDNC) Registry to facilitate registration of requests from customers who do not wish to receive UCC. To improve the effectiveness of the framework, the Authority had subsequently amended these regulations by issue of the Telecom Unsolicited Commercial Communications (Amendment) Regulations, 2008 (1 of 2008) dated 17th March, 2008 and had imposed financial disincentives for non-compliance of regulatory provisions by the telecom service providers. The principal regulations were further amended by the Telecom Unsolicited Commercial Communications (Second Amendment) Regulations, 2008 dated 21st October, 2008, simplifying the customer enrolment process, smoothening the system for redressal of complaints related to UCC and imposing financial disincentives on Access Providers for non-compliance with regulatory provisions.

2. Despite various measures taken by the Authority for curbing Unsolicited Commercial Communications, dissatisfaction on this account among telecom customers continues. Although the number of unsolicited commercial voice calls has decreased to some extent, the number of unsolicited SMS has increased. Till March 2010, a total of 3,40,231 complaints regarding receipt of unsolicited calls and SMS have been received. About 65,000 complaints are received every month. This is

just the tip of the iceberg as many customers do not lodge UCC complaints. Overall, there is every indication that the framework that has been put in place to curb UCC has been less than effective and needs revision.

3. With rapid growth in telemarketing activity in the country, the problem has also grown in dimension. As per a recent study by Ernst and Young, India's BPO market was about USD 1.6 billion in 2008, and with a CAGR of 38%, is expected to reach USD 6 billion in FY 2012, with a maximum addressable opportunity of USD 16-19 billion. Customer interactive services, including sales and marketing contribute about 70% to domestic BPO revenues. The sector employ about 7,00,000 persons.

7. The object of this regulation is to provide an effective mechanism for curbing Unsolicited Commercial Communications. The Telecom Commercial Communications Customer Preference Regulations, 2010 have been framed keeping in view the interest of the customers and telemarketers while ensuring effective implementation. The main features of the Telecom Commercial Communications Customer Preference Regulations, 2010 are as follows:

(i) Options to customer to exercise his preference

(ii) A simple and easy procedure for exercising option by the customer

(iii) Easy registration of the telemarketer with effective identification

(iv) Sharing of National Customer Preference Register with service providers and telemarketers so that telephone databases can be effectively scrubbed before initiating telemarketing activities

(v) Filtering and auto-blocking of calls and SMS to customers according to their options, if any

(vi) Disconnection of telecom resources of defaulting telemarketers and blacklisting to ensure that they do not get any telecom resources from any other access provider

(vii) Adequate provision to effectively implement the provisions of the Regulations"

5. Sub-regulation (2) of regulation 20 of the principal regulations reads as under :-

(a) for clause (k), the following clause shall be substituted, namely:-

"(k) no Access Provider shall provide to any person, other than a telemarketer or an entity sending transactional message, any tariff plan or SMS package in any form such as special recharge voucher, student pack, seasonal pack etc. permitting sending of more than one hundred SMS per day per SIM except on 'blackout days' and additional days as may be specified by the Authority by direction issued from time to time and all such SMS packages already provided to any such person shall not be renewed after their expiry:

Provided that all SMS packages already provided to a customer other than to a telemarketer shall be discontinued on coming into force of these regulations;

Explanation: For the purpose of this sub-clause, 'blackout days' means the days on which free or concessional calls or SMS are not applicable."

(b) After second proviso to clause (ka), the following proviso shall be inserted, namely:-

"Provided also that the limit of one hundred SMS per day per SIM shall not apply to a telemarketer or entity sending transactional messages;"

6. By reason of an amendment in the year 2011, the following clause was inserted after sub-regulation (2) of Regulation 20 :-

"(ka) no Access Provider shall permit sending of more than one hundred SMS per day per SIM:
Provided that in case of post paid telephone number the Access Provider shall not permit more than three thousand SMS per SIM per month:
Provided further that in case of post paid telephone number, the Access Provider shall not permit sending of more than one hundred SMS per day per SIM from a date to be notified by the Authority;

(kb) the Authority may by direction, from time to time, specify the category of SMS which shall be excluded from the limit of one hundred SMS per day per SIM:

Provided that before permitting a customer to send specified category of SMS beyond the limit of one hundred SMS per day per SIM, the Access Provider shall obtain an undertaking from such customer that he shall not use such telephone number for sending any commercial communications:

Provided further that the Access Provider shall enter, in the list maintained in the National Telemarketer Register, the telephone number, name and address of the customer, category of exempted SMS and date of permitting sending of SMS beyond limit of one hundred SMS per day per SIM and the said list shall be updated every Monday."

7. By reason of the 8th Amendment, the said clause was substituted in the following terms :-

"(i) for the words "one hundred SMS per day per SIM", the words "two hundred SMS per day per SIM";
(ii) in first proviso, for the words "three thousand SMS per SIM per month" the words "six thousand SMS per SIM per month"; and
(iii) in second and third provisos, for the words "one hundred SMS per day per SIM", the words "two hundred SMS per day per SIM", ---
shall be substituted;"

8. By reason of 2011 Regulations, Clause AA was amended, wherewith also an Explanatory Memorandum was issued, the relevant paragraph being paragraph 18 thereof reads as under :-

> *"18. The Authority is also aware that unsolicited commercial communications can be/are being sent by unregistered telemarketers. Such messages can be sent by any person and they are essentially in the category of P2P communications. However, in order to curb such messages, the Authority has decided that no Access Providers shall provide any SMS packages in any form (through voucher, student pack, seasonal pack etc) permitting sending of more than 100 SMS per day per SIM except on blackout days or days specially notified by TRAI. Any such package already in use shall be withdrawn w.e.f 31.12.2010. Provisions have also been made to disconnect the telecom resources after giving a notice if it is found that telemarketing activities are being done form the unregistered telemarketer."*

Submissions :

9. Mr. Navin Chawla, learned counsel for the Appellant would contend :-

(i) Sending of SMSs, being a mode of communication, any cap put thereupon would be contrary to the fundamental freedom of speech and expression as envisioned in Article 19(1)(a) of Constitution of India and does not constitute a reasonable restriction within the meaning of Clause 2 thereof;

(ii) In making the said Regulations, the Respondent has not maintained transparency as was required in terms of Sub-section 4 of Section 11 of the Telecom Regulatory Authority of

India Act, 1997 (hereinafter called and referred to as 'the Act') in so far as :-

(i) no procedure has been followed; and

(ii) despite a prevalent practice, no hearing had been given to the stakeholders as to why such a cap should be put and if so, to what extent;

(iii) The number of the SMSs which can be sent, whether 100 or 200 per day, having not been ascertained on the basis of any principle, the same must be held to be arbitrary in nature;

(iv) In terms of Section 21 of the General Clauses Act, although the TRAI had the jurisdiction to amend the said Regulations, the restrictions laid down therein, namely that for the said purpose, the same procedures which have been specified or required to be followed, having not been complied with; the 2011 amendment must fall through;

(v) If the Respondent proceeded on the basis that the original Regulations having already contained such a prohibitaion being Clause 20(2)(a), then it was not necessary for it to amend the said Regulations;

(vi) The Explanatory Memorandum issued by the Regulator fortifies that there was necessity to amend the regulations having regard to the fact that an amendment carried out by a Statutory Authority must not be presumed either to be superfluous or unnecessary;

(vii) There having been no prohibition for any customer to send non-commercial SMSs, as would appear from the 7th Amendment, and whereby transactional message being excluded, the impugned Regulations must be held to be bad in law.

10. Mr. Meet Malhotra, learned senior counsel appearing on behalf of the Respondent, on the other hand, would urge :-

(a) The Regulations relating to business of telecommunication being licenced and regulated and, the service provided thereunder being subject to reasonable restrictions, the impugned regulations must be held to be valid in law;

(b) Airwaves or Spectrum being public property, the same has to be used in the interest of public and the conflicting interests with regard thereto must be balanced.

In particular, having regard to the fact that the primary purpose and object of the Regulator being prevention of using commercial use of SMS, it would not be correct to contend that the Appellant had an absolute right of freedom of speech and expression, much less using the platform of airwaves;

(c) Such exercise of right being violative of the right of 'Privacy' of other citizens as envisaged under Article 21, the same shall prevail over a right under Article 19(1)(a) thereof;

(d) The 2007 Regulations relating to unsolicited commercial communications having not been proved effective, a need was felt to bring in a new regulatory framework, and with that end in view only the impugned amendments have been brought about;

(e) For the purpose of achieving the aforementioned object, an elaborate consultation process was undertaken, wherein one of the issues put to the stakeholders was limiting the number of SMSs per Sim card per day, whereupon comments were received from 342 stakeholders and upon analyzing the responses received, the 2010 Regulations were issued putting a restriction of 100 SMS per day per 'sim' to reduce the possibility of the customers misusing their mobile phones and indulging in telemarketing activities by sending unsolicited bulk SMS for commercial purpose;

(f) The Petitioner, who is not a service provider, ought to have disclosed as to how and in what manner he is affected adversely and, thus, this Tribunal may not go into any academic question;

(g) After the 2010 Regulations were issued, a large number of representations were received by the Regulator; on consideration whereof the cap on the number of SMS was increased from 100 to 200 per day; although it is true that in relation thereto, no fresh consultation process was resorted to.

(h) Right to impose restrictions is not only controlled by Clause 2 but also availability of the airwaves;

Relevant Constitutional Provisions

11. Articles 19(1)(a), 19(1)(g), 19(2), and Article 19(6) of the Constitution of India read as under :-

> ***"19. Protection of certain rights regarding freedom of speech, etc.—****(1) All citizens shall have the right—*
>
> *(a) to freedom of speech and expression;*
>
> *(g) to practise any profession, or to carry on any occupation, trade or business.*
>
> *(2) Nothing in sub-clause (a) of clause (1) shall affect the operation of any existing law, or prevent the State from making any law, in so far as such law imposes reasonable restrictions on the exercise of the right conferred by the said sub-clause in the interests of the sovereignty and integrity of India, the security of the State, friendly relations with foreign States, public order, decency or morality, or in relation to contempt of court, defamation or incitement to an offence.*
>
> *(6) Nothing in sub-clause (g) of the said clause shall affect the operation of any existing law in so far as it imposes, or prevent the State from making any law imposing, in the interests of the general public, reasonable restrictions on the exercise of the right conferred by the said sub-clause, and, in particular, nothing in the said sub-clause shall affect the operation of any existing law in so far as it relates to, or prevent the State from making any law relating to,—*

(i) the professional or technical qualifications necessary for practising any profession or carrying on any occupation, trade or business, or

(ii) the carrying on by the State, or by a corporation owned or controlled by the State, of any trade, business, industry or service, whether to the exclusion, complete or partial, of citizens or otherwise."

The Extent of Jurisdiction of this Tribunal

12. What would be the width of the jurisdiction of this Tribunal while hearing an appeal from a decision, order or direction of the regulator has been considered by a Three Judge Bench of the Supreme Court of India in COAI Vs. Union of India reported in (2003) 3 SCC 186.

In that case, the decision of this Tribunal was set aside by the Supreme Court of India on the premise that power of this Tribunal is not akin to power of judicial review but wider than it.

It was opined :-

"42. Sub-section (7) of Section 14-A confers a wide jurisdiction upon the Tribunal. The Tribunal being an expert body is entitled to exercise its appellate jurisdiction both on fact as also in law over a decision or order/decision/direction of the authority. Its power to examine the correctness, legality or propriety of the order passed by the authority as also in relation to the dispute must be held to be a wide one.

43. The learned TDSAT should have borne in mind that its decision on fact and law is final and appeal lies to this Court in terms of Section 18 of the Act only on substantial questions of law. It, therefore, was

obliged to determine the questions of law and facts so as to enable this Court to consider the matter if any substantial question of law arises on the face of the judgment.

44. Furthermore, the question as to whether the procedural requirements have not been fulfilled had not been gone into by the learned TDSAT."

Re: Direction of the Delhi High Court

Re: Jurisdiction

13. In this appeal, the jurisdiction of this tribunal is not in question.

In any event, the appellant has preferred this appeal not only on the ground of validity or legality of the 2011 regulations, but also questioned the decision making process.

14. The question of constitutionality and various other contentions relating to the decision making process for a composite appeal it is difficult to see as to how the jurisdiction of this Tribunal can be bifurcated into two, namely to hear the appeal so far as the contention of the appellant that the procedures laid down under section 11 of the TRAI Act has not been followed and on the other hand, asking the petitioner to move a writ petition only against the legality and/or validity of the regulations.

The Constitution of India, does not envisage such a situation.

15. We may notice that by reason of the Section 113 of the Code of Civil Procedure, 1908, the jurisdiction of the civil court is barred, and the

provisions of the Code of Civil Procedure is made not applicable so far as this Tribunal is concerned. This Tribunal therefore cannot also make a reference to the High Court in the absence of any jurisdiction with regard thereto being provided for in the 1997 Act.

The order issued by the TRAI, as would appear from the discussions made hereinafter is in the nature of a direction and not a subordinate legislation. It may have the force of the law, but it is not a law within Article 19 (2) of the Constitution of India.

17. The scope of review of finding of law and finding of facts has been dealt with in S.A. De' Smith's Judicial Review of Administrative Action.

So far as scope of judicial review vis-à-vis the findings of a Tribunal is concerned, one of the propositions laid down was as under :-

> *"The concept of error of law includes the giving of reasons that are bad in law or (if there is a duty to give reasons) inconsistent, unintelligible 42 or, it would seem, substantially inadequate. It includes also the application of a wrong legal test to the facts found, taking irrelevant considerations into account and failing to take relevant considerations into account, exercising a discretion on the basis of any other incorrect legal principles, misdirection as to the burden of proof, and wrongful admission or exclusion of evidence, as well as arriving at a conclusion without any supporting evidence."*

The said principle was reiterated in the Fifth Edition of the said treatise. However, in the Sixth Edition onwards, keeping in view the changes in the law in the United Kingdom pursuant to the recommendations made by the Laggert Commission, whereby at least one appeal was provided against the decision of this Tribunal, the said proposition was not reiterated presumably because it was not necessary.

18. We may notice that recently the Supreme Court of India in Abhishek Goenka Vs. Union of India reported in 2012 (5) SCC 1 stated the law thus :-

> *"The concept of 'regulatory retime' has to be understood and applied by the Courts, within the four corners of law, but not substituting their own views, for the views of the expert bodies like the appellate court."*

The Apex Court, therefore, recognizes that when an appeal is maintainable against the decision of a regulator, the scope is much wider than the power of judicial review.

Moreover, the Constitution of India is the Suprema Lex. All laws are required to be interpreted in the light of the provisions contained therein.]

The Regulations – Whether 'law'

19. At the outset, a question arises as to whether the impugned Regulations would be a law within the meaning of Clause 2 of Article 19 of the Constitution.

20. Law within the meaning of Article 19(2) is distinct and separate from the 'law' within the meaning of Article 13 of the Constitution of India.

Law may include a subordinate legislation.

(See Vishambhar Dayal vs. State of U.P. (1982) 1 SCC 39 and Narender Kumar Vs. Union of India AIR 1960 SC 430.)

21. When a restriction is imposed, what is required to be seen is the substance of the legislation in as much as the Legislature cannot indirectly take away or abridge the fundamental right which it cannot do directly.]

22. The Respondent exercises two different functions/powers; one in terms of Section 11 of the Act and the other is a regulation making power under Section 36 thereof.

Indisputably, regulations validly made by the Respondent would be a subordinate legislation. However, in some decisions it has been held that the power exercised by the Respondent in terms of Section 11(1)(b) of the TRAI Act is not a subordinate legislation.

23. TRAI is a statutory body. Its functions and exercise of power must, therefore, be confined to four corners of the statute. The two functions, namely under Section 11 and the other under Section 36 are not intertwined. We are not concerned as to whether in a given situation the two fields would overlap with each other. We may notice a few of the decisions covering the field.

24. The question as to whether the access deficit charges was a regulation within the meaning of Section 36 of the Act or it is merely a statutory function under Section 11(1)(b), came for consideration before the Delhi High Court in Writ Petition (Civil) No. 2838 of 2005 – Telecom Regulatory Authority of India Vs. Telecom Disputes Settlement & Appellate Tribunal and Another (TDSAT Compendium, Supreme Court and High Court Cases, Page 376). Gita Mittel, J of the Delhi High Court opined :-

> *"62. Access Deficit Charge which is the subject matter of the grievance is a deficit arising due to rental revenue being below cost based rental minus any net surplus revenue on local calls as well as minus any government financial support provided to operators. The power to do so is to be found in the provisions of Section 11(1)(b) of the TRAI Act whereunder the TRAI is empowered to fix the terms and conditions of interconnectivity between the service provider, in short technical compatibility and effective interconnection between the service providers and ensures compliance of the terms and conditions of the licence. Perusal of the regulation which was impugned before the TDSAT itself shows that the TRAI has itself stated that by the "regulation" it is intended to fix the terms and conditions of the interconnectivity and to ensure a effective interconnection between the different service providers, regulate arrangement amongst them of sharing their revenue derived from providing telecommunication services.*
>
> *63. For this reason also, it would appear that the impugned decision of the respondents is in the nature of an exercise of the executive jurisdiction of the respondents and is not a legislative exercise.*

64. Examination of the provisions of Section 36 whereby the TRAI is empowered to make regulations shows that it is specifically mentioned therein that regulations would be made by notification in respect of the subjects set out therein. Section 36(2)(e) empowers the TRAI to make regulations in respect of the subject matter of Section 11(1)(b)(viii) and Section 11(1)(c) of the Act. In this view of the matter, I have no manner of doubt that the TRAI can validly make regulations in respect of only such subject matters which have been specifically specified under Section 36 of the enactment. It is necessary to bear in mind the spirit, intendment and purpose of the TRAI Act, 1997 and the functions which the authority is required to discharge. Both the Appellate Forum and the TRAI consist of experts who are required to go into technical questions which arise for consideration. The Appellate Authority is specifically empowered to hear and dispose of appeals against directions, decisions and orders of the TRAI.

65. In this view of the matter, it cannot possibly be successfully contended that an issue relating to the fixation of the access deficit charges cannot be agitated before the TDSAT which is specifically empowered to hear such grievance under the provisions of Section 14(b) of the TRAI Act, 1997.

66. It is the contention of the petitioner to the effect that TRAI can make regulations in respect of all its functions under all statutory provisions and that the jurisdiction of the TDSAT to examine disputes in respect thereof would be barred. If this objection were to be sustained, it would not be open to any person to impugn any action of the petitioner on the ground that the same was an exercise of legislative powers under the statute. Such could never has been the intention of the legislature. The result, in case such a contention was to be sustained, would be that the jurisdiction of TDSAT to examine the disputes being raised by different persons including service providers would be ousted in almost all the cases inasmuch as the TDSAT has been held to be legally incapable of

examining the vires of the statutory provisions and subordinate legislation which confer power and jurisdiction on the tribunal.

67. There is no dispute whatsoever that the questions raised by the respondent MTNL are factual and technical matters. The issue relates to the fixation of an appropriate figure as the access deficit charge is based on a complicated matrix of facts and figures. Dispute has been raised by the MTNL that its entitlement to the access deficit charges has been wrongly reduced. A close examination of the statutory scheme would show that the legislature has clearly differentiated between statutory provisions which will require framing and notifications of regulations and those for which power has been conferred to issue directions."

It was furthermore held:

"70. In the instant case there is no manner of doubt that the TRAI was fully competent to issue directions in respect of the access deficit charges for which it has been statutorily empowered. Therefore, I find force in the contentions on behalf of the respondents to the effect that merely because it has notified its decision as a regulations and may even have followed the same procedure to give effect to the same, it cannot have the effect of converting such directions into statutory regulations. I find that the real purpose of the TRAI was to give effect to a decision taken under Section 11 of the Act and, therefore, there is no prohibition to the maintainability of the appeal before the TDSAT."

It was opined:

"The legal position that emerges from the discussion may be summarized thus : If a statute imposes a liability and creates an effective machinery for deciding questions of law or fact arising in regard to that liability, it may, by necessary implication, bar the maintainability of a civil suit in respect of the said liability. A statute

may also confer exclusive jurisdiction on the authorities constituting the said machinery to decide finally a jurisdictional fact thereby excluding by necessary implication the jurisdiction of a civil court in that regard."

25. It was, thus opined that access deficit charge would come within the ambit of expression "Terms & Conditions of Interconnectivity" between the service providers and, thus, any decision or direction in respect thereof is appealable before this Tribunal, curbs on SMSs having been impugned by the TRAI in exercise of its power under Section 11 of the Act and not under Section 36 thereof.

We are informed at the Bar that correctness of the said decision is now pending consideration before the Supreme Court of India.

26. We may, however, notice that this Tribunal in Appeal No.6 of 2006 – Bharat Sanchar Nigam Limited Vs. TRAI & Ors. disposed of on 29.9.2010 referring to a large number of decisions of the Supreme Court of India as also of this Tribunal, held :-

"63. It is our considered view that labeling a direction concerning interconnectivity purported to have been issued under Section 36 read with Section 11 of the Act would not be decisive. The Courts must enquire into the source of the power of the concerned statutory authority, as it is well settled that wrong mentioning of a provision would in such cases shall be inconsequential. [See Securities & Exchange Board of India Vs. Ajay Agarwal - 2010(2) SCALE 680]"

27. Although in this case the lack of jurisdiction of this Tribunal has not been raised but we have referred to the decision of Delhi High Court as also this Tribunal only for the purpose of showing that power exercised by the Regulator under Section 11(1)(b) of the Act is not a 'Law' within the meaning of Article 19 of the Constitution of India.

It is, therefore, difficult to hold that the TRAI in discharge of its statutory functions with a view to protect the interest of consumers can frame regulations, being in the nature of a delegated legislation.

28. Mr. Malhotra would contend that the source of power is not under challenge by the Appellant. He is not correct in contending so.

In fact, the process of making the impugned regulation has been challenged on the ground that transparency, as is required in terms of sub-Section 4 of Section 11 of the TRAI Act, has been violated.

This Tribunal in BSNL Vs. TRAI (supra) opined that Section 11(4) is a part of the principles of natural justice.

In MSO Alliance Vs. TRAI – Appeal No.9 of 2006 disposed of on 15.01.2009 where the stakeholders were not informed, the transparency clause was found to have been violated.

Yet again, in Petition No.286 (C) of 2011 COAI Vs. Union of India by an order dated 31.3.2009 this Tribunal has set aside the order impugned on the ground that the proper consultation process were not resorted to.

29. It may be true that some consumers were heard but they were heard only on the specific plea that curbing of telemarketing is necessary. While doing so, some suggestions were made that the number of SMSs may be regulated to curb telemarketing. It was in that situation, 2010 Amendment Regulations were framed.

No question was raised as to whether the numbers of SMSs were restricted between a bonafide consumer and a bonafide customer, which has got nothing to do with telemarketing.

29. We may incidentally notice that the Court of Administrative Justice (Economic & Investment Service Disputes), Seventh Circuit, Cairo in *Foundation for Freedom of Thought and Expression v. The Executive Director, NTRA & Ors.*, Case No. 1430 of 65 by an order dated 27/11/2010 has issued a ruling cancelling of the decree imposing restrictions on bulk SMS by National Telecommunication Regulatory Authority (NTRA) of Egypt.

The right to receive SMSs, therein, has been held to be a Human Right apart from Right of Expression and Free Speech.

Procedural power of amendment

30. It is not in dispute that while carrying out the amendment in the year 2011, no Consultation Paper was floated afresh. The views of the stakeholders were not obtained. No pubic hearing was resorted to.

Admittedly, Respondent increased the number of SMSs from 100 to 200 per day on the basis of representations received from the student community.

31. Section 21 (b) of the General Clauses Act enables a statutory authority to amend the law subject of-course to compliance of the requirements thereof.

The said provision reads thus :-

> *" Power to issue, to include power to add to, amend, vary or rescind, notifications, orders, rules or bye- laws.- Where, by any 3[Central Act] or Regulation, a power to 4[issue notifications,] orders, rules, or bye- laws is conferred, then that power includes a power, exercisable in the like manner and subject to the like sanction and conditions (if any), to add to, amend, vary or rescind any 5[notifications,] orders, rules or bye- laws so 6[issued]."*

32. A bare perusal of the aforementioned provision would clearly go to show that the jurisdiction to amend a law can be exercised subject to the procedures laid down therein being followed. It is not necessary to hold that by reason of the said procedure, the Regulations would become bad in law. However, this merely indicates as to how the statutory authority had been dealing with a crucial aspect of the matter. However, it was also necessary to obtain empirical data to establish as to how the restrictions imposed on the fundamental right of a citizen of India could achieve its purpose.

33. Mr. Chawla has placed strong reliance upon a judgment of the Supreme Court in *D.S. Nakara v. Union of India,* (1983) 1 SCC 305 to contend that law does not contemplate arbitrary fixation of a cut-off number of calls.

34. We do not think that the said contention is correct. For all practical purposes, a cut-off date is required to be fixed so long the same has some nexus which is relevant for the purpose therefor. Article 14 of the Constitution of India cannot be said to be violated. D.S. Nakara (Supra) has been distinguished by the Supreme Court of India in a large number of later decisions.

We may notice that the Apex Court itself observed as follows :-

> *"But the principle that when a certain date or eligibility criteria is selected with reference to legislative or executive measure which has the pernicious tendency of dividing an otherwise homogeneous class and the choice of beneficiaries of the legislative/executive action becomes selective, the division or classification made by choice of date or eligibility criteria must have some relation to the objects sought to be achieved. And apart from the first test that the division must be referable to some rational principle, if the choice of the date or classification is wholly unrelated to the objects sought to be achieved, it cannot be upheld on the specious plea that was the choice of the Legislature."*

Constitutionality Issue

35. At the outset, we may place on record that on a plain reading of the relevant Constitutional provisions, it is evident that whereas reasonable

restrictions on the exercise of the right of freedom of speech and expression can be imposed in the interest of the sovereignty and integrity of India, the security of State, friendly relations with foreign States, public order, decency or morality, or in relation to contempt of court, defamations or inducement to an offence, Clause 6 empowers the State to impose restrictions to carry out any trade, business, industry or service inter-alia in the interest of general public.

36. So far as the contentions of Mr. Meet Malhotra that Article 19(1)(a) is intertwined with Article 19(1)(g) is concerned, suffice it to point out that the Petitioner has not filed this appeal in his capacity as a service provider (which he is not), but as a consumer.

He does not seek to exercise his right of occupation, profession or trade or business in telecom but his general right as a citizen of India, which indisputably includes right to freedom of speech and expression.

37. It is also relevant to mention that the Preamble to The 1997 Act inter-alia enjoins a duty upon the Regulator to make regulations not only in the interest of the service providers but also in the interest of the consumers.

38. In a case of this nature, this Tribunal is not concerned with the control of commercial telemarketing. Indisputably, the Regulator has a right to do so; the necessary corollary whereof would be that such a prohibition can be extended to prescription of ways and means to put curbs on commercial telemarketing not only directly but also indirectly.

39. When a citizen of India complains of infringement of his fundamental right, it would be preposterous to suggest that technological development has not reached such a stage where it may be possible for the Regulator to lay down some other machinery for ascertaining such misuse.

Some Precedents

40. With the aforementioned backdrop in mind, we may notice the decision of the Apex Court in *Cricket Association of Bengal (supra)*.

The Court speaking through P.B. Sawant, J. opined that the right to freedom of speech and expression also includes the right to educate, to inform and to entertain and also the right to be educated, informed and entertained.

The said right also was held to be that of the viewers of a Television Channel.

Holding that the frequencies are public property, it was opined that the same should be used for meeting public interest.

41. Upholding the right of the public to view a live telecast of a cricket match, upon referring to a large number of its earlier decisions as also those rendered by the U.S. Supreme Court including in Jackson ex p 96 US 727 (1838) and Lovell Vs. City of Griffin 303 US 444 (1938), the Court opined as under :-

"So long as the possibility of its being applied for purposes not sanctioned by the Constitution cannot be ruled out, it may be held to be wholly unconstitutional and void. In other words, clause (2) of Article 19 having allowed the imposition of restrictions on the freedom of speech and expression only in cases where danger to the State is involved, an enactment which is capable of being applied to cases where no such danger could arise, cannot be held to be constitutional and valid to any extent."

Sakal Papers (P) Ltd. Vs. Union of India (1962) 3 SCR 842 was considered in the following terms :-

"The Court held that Article 19(2) did not permit the State to abridge the said right in the interest of general public. The Court also held that the State could not make a law which directly restricted one guaranteed freedom for securing the better enjoyment of another freedom. Freedom of speech could not be restricted for the purpose of regulating the commercial aspect of the activities of newspapers."

42. So far as the matter relating to the political field is concerned, it was stated :-

"It is the only vehicle of political discourse so essential to democracy."

Right to communicate was held to include the right to do so through any media that is available whether print or electronic or audio-visual. The burden to show that restrictions were necessary and/or otherwise reasonable was held to be on the authority justifying the same.

'Sports' was also held to be a part of 'Education'.

43. So far as airwaves/frequencies as a public property is concerned vis-à-vis the limited availability thereof, it was held :-

> *"they have to be used in the best interest of the society and this can be done either by a central authority by establishing its own broadcasting network or regulating the grant of licences to other agencies, including the private agencies."*

It was stated :-

> *"They control the sole agency of telecasting. They are also armed with the provisions of Article 19(2) and the powers of pre-censorship under the Cinematograph Act and Rules. The only limitation on the said right is, therefore, the limitation of resources and the need to use them for the benefit of all."*

It was furthermore opined :-

> *"It cannot be denied that the right to freedom of speech and expression under Article 19(1)(a) includes the right to disseminate information by the best possible method through an agency of one's choice so long as the engagement of such agency is not in contravention of Article 19(2) of the Constitution and does not amount to improper or unwarranted use of the frequencies."*

Jeevan Reddy, J., who wrote a separate but largely a concurring judgment, stated the law thus :-

> *"(c) Section 4 of the Indian Telegraph Act must be understood and construed in the light of Article 19(1)(a). So read and understood, it is only a regulatory provision. If a person applies for a licence for telecasting or broadcasting his speech and expression – in this case the*

game of cricket – the appropriate authority is bound to grant such licence unless it can seek refuge under a law made in terms of clause (2) of Article 19. The appropriate authority cannot also impose such conditions as would nullify or defeat the guaranteed freedom. The conditions to be imposed should be reasonable and relevant to the grant."

"(f) With the technological advance and the availability of a large number of frequencies and channels, being provided by the increasing number of satellites, the argument of limited frequencies and/or scarce resource is no longer tenable."

44. Mr. Malhotra would contend that upon true analysis of the decision of the Supreme Court of India in Cricket Association of Bengal (Supra), it would appear that:-

(a) there is no absolute right to propagate one's views singularly;

(b) the contents of the views are also subject to Regulations keeping in view the uniqueness of the media;

(c) the business of broadcasting is subject to higher regulations than print media;

(d) right of a viewer is also required to be taken into consideration for the purpose of putting cap on the number of messages;

(e) expressions of one's views from a public platform must serve the public interest;

(f) both right to send and right to receive SMSs are not absolute rights;

(g) the extent of wrong in that behalf may have to be considered when it become excess and wrongly emanates from access to right;

(h) no consumer can be forced to receive a large number of messages which would be intrusive in nature;

(i) even in United States, the right of Freedom of Expression is not considered to be an absolute right;

(j) with a view to preserve propriety as a motivating factor, freedom to receive a communication being also a fundamental right, the same can also be subjected to Regulation;

(k) SMS like broadcasting infuse into the homes of the receivers.

(l) the restrictions sought to be imposed are not under a subordinate legislation but by way of the functions of a statutory authority.

45. The learned counsel, in support of the said contention, has drawn our attention to the following findings:-

".....b) Airwaves constitute public property and must be utilized for advancing public good. No individual has a right to utilize them at his choice and pleasure and for the purposes of his choice including profit. The right of free speech guaranteed by Article 19 (1) (a) does not include the right to use airwaves, which are public property. The airwaves can be used by a citizen for the purpose of broadcasting only when allowed to do so by a statute and in accordance with such statute. Airwaves

being public property, it is the duty of the State to see that airwaves are so utilized as to advance the free speech right of the citizens which is served by ensuring plurality and diversity of views, opinions and ideas. This is imperative in every democracy where freedom of speech is assured. The free speech right guaranteed to every citizen of this country does not encompass the right to use these airwaves at his choosing. Conceding such a right would be detrimental to the free speech rights of the body of citizens in as much as only a privileged few - powerful economic, commercial and political interests - would come to dominate the media. By manipulating the news, views and information, by indulging in misinformation and disinformation, to suit their commercial or other interests, they would be harming - and not serving - the principle of plurality and diversity of views, news, ideas and opinions.…"

46. The aforementioned observations by and large have no application to the facts involved in the instant case.

Frequencies are allotted to the licensees under Section 4 of the Indian Telegraph Act. They enter into contract with the customers. So far as citizens who have nothing to do with commercial dealings between the operators pay for availing SMS services.

They do not have any business relationship between the senders and the receivers of the business. No consideration passes between them.

In other words, the services are availed by the consumers inter-se. The services used by the consumers themselves are part of enjoyment of their rights of Freedom of Expression and Speech. The Regulator does not and in law cannot exercise its right over the contents thereof or the timings.

47. It may be true that Article 19(1)(a) in the constitutional context does not confer an absolute right on a citizen, it being subject to reasonable restrictions.

48. Before, however, proceeding to consider the other submissions made by learned counsel for the parties, we may notice that CAB (Supra) has been followed in Union of India Vs. Motion Picture Association (1999) 6 SCC 150, stating :-

> ***"13.*** *Undoubtedly, free speech is the foundation of a democratic society. A free exchange of ideas, dissemination of information without restraints, dissemination of knowledge, airing of differing viewpoints, debating and forming one's own views and expressing them, are the basic indicia of a free society. This freedom alone makes it possible for people to formulate their own views and opinions on a proper basis and to exercise their social, economic and political rights in a free society in an informed manner. Restraints on this right, therefore, have been jealously watched by the courts."*

In A. Suresh Vs. State of Tamil Nadu reported in AIR 1997 SC 1889, it was stated :-

> *"Newspaper Industry enjoys two of the fundamental rights, namely the freedom of speech and expression guaranteed under Article 19(1)(a) and the freedom to engage in any profession, occupation, trade, industry or business guaranteed under Article 19(1)(g) of the Constitution, the first because it is concerned with the field of expression and communication and the second because communication has become an occupation or profession and because there is an invasion of trade, business and industry into that field where freedom of expression is being exercised. While there can be no tax on the right*

to exercise freedom of expression, tax is leviable on profession, occupation, trade, business and industry. Hence tax is leviable on newspaper industry. But when such tax transgresses into the field of freedom of expression and stifles that freedom, it becomes unconstitutional. As long as it is within reasonable limits and does not impede freedom of expression it will not be contravening the limitation of Article 19(2). The delicate task of determining when it crosses from the area of profession, occupation, trade, business or industry into the area of freedom of expression and interferes with that freedom is entrusted to the Courts."

49. Reliance has been placed by Mr. Malhotra on a judgment of the Delhi High Court in *Star India Pvt. Ltd. v. Telecom Regulatory Authority of India* reported in 146 (2008) Delhi Law Times 455. The question, which arose for consideration therein was as to whether the Respondent herein has jurisdiction to fix tariffs in regard to Broadcasters. The Right of the Respondent in that behalf was questioned on the ground that the broadcasters have a fundamental right of Freedom of Speech and Expression.

The said contention was negated by a Division Bench of the said High Court in the following terms :-

"Their Lordships have also pithily opined that the objective in the mind of the broadcaster has to be determined in order to arrive at an assessment of whether a broadcast should be seen as an activity envisaged by Article 19(1)(a) and accordingly protected to the extent set out in Article 19(2). The number of broadcasters has increased to such a manifold extent that sharing of airwaves, which constitute national wealth, has become an ever expanding problem. This paucity perforce

demands profound consideration of the nature of broadcasted programmes, namely, whether they will fall within the genre of freedom of speech and expression or whether they are but another trade or business. It is trite that whereas the extent of the freedom of speech and expression is almost untrammeled, as it should be, reasonable restrictions can be placed on the right to practice any profession or to carry on any occupation, trade or business. It is, therefore, only to be expected that the Petitioners should prefer that their activities are seen as manifestations of the freedom of speech and expression rather than trade and commerce thereby minimizing State control or interference."

50. The said decision, therefore, runs counter to the submission of Mr. Malhotra as it has clearly been laid down that the approaches of the Court would be different when the purpose and object, for which the said right was invoked, it comes within the Freedom of Speech and Expression or further their trade or business. In the aforementioned backdrop only, the decision of A. Suresh (Supra) was referred to.

51. CAB (Supra) has, however, been distinguished in *People's Union for Civil Liberties v. Union of India* reported in (2004) 2 SCC 476, by the Apex Court on the premise that right to speech does not carry with it an unrestricted right to gather of informations otherwise prohibited under the Atomic Energy Act.

It was observed :-

"9. *Where the Court applies the test of 'proximate and direct nexus with the expression', the Court also has to keep in mind that the restriction should be founded on the principle of least invasiveness, i.e., the restriction should be imposed in a manner and to the extent which is unavoidable in a given situation. The Court would also take into*

consideration whether the anticipated event would or would not be intrinsically dangerous to public interest."

52. The importance of the fundamental right of expression and freedom of speech has been highlighted in a large number of decisions.

We may notice some of them. In *Chief Information Commissioner & Anr. v. State of Manipur & Anr.,* Civil Appeal No.10787-10788 of 2011 decided on 12.12.2011, the Right of Information Act was found by the Supreme Court of India to be an intrinsic part of the fundamental right of speech and expression being basically founded under right to know.

In Re: Ramlila Maidan Incident (2012) 5 SCC 1, the Apex Court opined :-

"Further, there is a direct and not merely implied responsibility upon the Government to function openly and in public interest. The Right to Information itself emerges from the right to freedom of speech and expression. Unlike an individual, the State owns a multi-dimensional responsibility. It has to maintain and ensure security of the State as well as the social and public order. It has to give utmost regard to the right to freedom of speech and expression which a citizen or a group of citizens may assert. The State also has a duty to provide security and protection to the persons who wish to attend such assembly at the invitation of the person who is exercising his right to freedom of speech or otherwise."

Yet recently, in *Desiya Murpokku Dravida Kazhagam & Anr. v. The Election Commission of India,* (2011) 4 SCC 224, it was opined as under :-

"40. *A political party is nothing but an association of individuals pursuing certain shared beliefs. Article 19(1)(c) confers a fundamental right on all citizens to form associations or associate with organisations of their choice. Article 19(1)(a) confers a fundamental right on the citizens of the freedom of speech and expression. The amplitude of the right takes within its sweep, the right to believe and propagate ideas whether they are cultural, political or personal. Discussion and debate of ideas is a part of free speech. This Court in Romesh Thapper v. State of Madras, AIR 1950 SC 124 as under:*

".....without free political discussion no public education, so essential for the proper functioning of the processes of popular government, is possible."

Therefore, all the citizens have a fundamental right to associate for the advancement of political beliefs and opinions held by them and can either form or join a political party of their choice. Political parties are, no doubt, not citizens, but their members are generally citizens. Therefore, any restriction imposed on political parties would directly affect the fundamental rights of its members."

53. It may be of some importance to notice that the American Jurisprudence of Restriction on fundamental right of Freedom of Speech has been held to be not applicable in the Indian scenario keeping in view the provisions of Clause 2 of Article 19 of the Constitution of India.

In Re: Ramlila Maidan Incident (Supra), the Supreme Court of India categorically held that what is needed is to adopt a balancing of interest in 'approach'. It was stated :-

"3. Shortly thereafter, as a result of widening of the power of judicial review, the US Supreme Court preferred to test each case on the touchstone of the rule of "clear and present danger" [Ed.: The "clear and

present danger" test was laid down by Holmes, J. in Schenck v. United States, 63 L Ed 470 : 249 US 47 (1919) for deciding whether a restriction on free speech was constitutionally valid.] . However, application of this rule was unable to withstand the pace of development of law and, therefore, through its judicial pronouncements, the US Supreme Court applied the doctrine of "balancing of interests". The cases relating to speech did not simply involve the rights of the offending speaker but typically they presented a clash of several rights or a conflict between individual rights and necessary functions of the Government. Frankfurter, J. often applied the abovementioned balancing formula and concluded that "while the court has emphasised the importance of 'free speech', it has recognised that free speech is not in itself a touchstone. The Constitution is not unmindful of other important interests, such as public order, if free expression of ideas is not found to be the overbalancing considerations." [Ed.: See in this regard observations of Frankfurter, J. in Niemotko v. Maryland, 95 L Ed 267, at 276 : 340 US 268, at 282 (1951).]

4. The "balancing of interests" approach is basically derived from Roscoe Pound's theories of social engineering. Pound had insisted that his structure of public, social and individual interests are all, in fact, individual interests looked at from different points of view for the purpose of clarity. Therefore, in order to make the system work properly, it is essential that when interests are balanced, all claims must be translated into the same level and carefully labelled. Thus, a social interest may not be balanced against individual interest, but only against another social interest. The author points out that throughout the heyday of the "clear and present danger" and "preferred position" doctrines, the language of balancing, weighing or accommodating interests was employed as an integral part of the libertarian position. (Freedom of Speech: The Supreme Court and Judicial Review, by Martin Shapiro, 1966."

54. Referring to *S. Rajan v. Jagjivan Ram* (1989) 2 SCC 572, the Court noticed that the anticipated event should not be remote, conjectural or updated, and must have the direct nexus with the expression to hold :-

> *"28. Where the court applies the test of "proximate and direct nexus with the expression", the court also has to keep in mind that the restriction should be founded on the principle of least invasiveness i.e. the restriction should be imposed in a manner and to the extent which is unavoidable in a given situation. The court would also take into consideration whether the anticipated event would or would not be intrinsically dangerous to public interest."*

The Court, however, opined as to what would be the reasonable restriction would depend upon the facts and circumstances of each case. It furthermore referred to *Romesh Thapar v. State of Madras*, AIR 1950 SC 124 to opine that local breaches of public orders were no ground to restrict the freedom of speech guaranteed by the Constitution.

We would examine this aspect of the matter, so far as the fact of the present case is concerned, a little latter.

55. The Hon'ble Delhi High Court recently in *Telecom Watchdog v. Union of India & Anr.*, W.P.(C) No. 8529 of 2011 disposed of on 13.07.2012 has held that the impugned regulations are unconstitutional.

Even the right to lie is also protected by freedom of speech and expression as has been held by the United States Supreme Court in a 6:3 decision in *United States v. Alvarez 567 U. S. _ (2012).* It was opined:

"Freedom of speech and thought flows not from the beneficence of the state but from the inalienable rights of the person. And suppression of speech by the government can make exposure of falsity more difficult, not less so. Society has the right and civic duty to engage in open, dynamic, rational discourse. These ends are not well served when the government seeks to orchestrate public discussion through content-based mandates."

It was further stated:

"We must therefore ask whether it is possible substantially to achieve the Government's objective in less burdensome ways. In my view, the answer to this question is "yes." Some potential First Amendment threats can be alleviated by interpreting the statute to require knowledge of falsity, etc. Supra, at 3–4. But other First Amendment risks, primarily risks flowing from breadth of coverage, remain. Supra, at 4–5, 7–8. As is indicated by the limitations on the scope of the many other kinds of statutes regulating false factual speech, supra, at 5–7, it should be possible significantly to diminish or eliminate these remaining risks by enacting a similar but more finely tailored statute. For example, not all military awards are alike. Congress might determine that some warrant greater protection than others. And a more finely tailored statute might, as other kinds of statutes prohibiting false factual statements have done, insist upon a showing that the false statement caused specific harm or at least was material, or focus its coverage on lies most likely to be harmful or on contexts where such lies are most likely to cause harm.

I recognize that in some contexts, particularly political contexts, such a narrowing will not always be easy to achieve. In the political arena a false statement is more likely to make a behavioral difference (say, by leading the listeners to vote for the speaker) but at the same time criminal prosecution is particularly dangerous (say, by radically

changing a potential election result) and consequently can more easily result in censorship of speakers and their ideas. Thus, the statute may have to be significantly narrowed in its applications. Some lower courts have upheld the constitutionality of roughly comparable but narrowly tailored statutes in political contexts. See, e.g., United We Stand America, Inc. v. United We Stand, America New York, Inc., 128 F. 3d 86, 93 (CA2 1997) (upholding against First Amendment challenge application of Lanham Act to a political organization); Treasure of the Committee to Elect Gerald D. Lostracco v. Fox, 150 Mich. App. 617, 389 N. W. 2d 446 (1986) (upholding under First Amendment statute prohibiting campaign material falsely claiming that one is an incumbent). Without expressing any view on the validity of those cases, I would also note, like the plurality, that in this area more accurate information will normally counteract the lie. And an accurate, publicly available register of military awards, easily obtainable by political opponents, may well adequately protect the integrity of an award against those who would falsely claim to have earned it. See ante, at 17–18. And so it is likely that a more narrowly tailored statute combined with such information-disseminating devices will effectively serve Congress' end.

The Government has provided no convincing explanation as to why a more finely tailored statute would not work. In my own view, such a statute could significantly reduce the threat of First Amendment harm while permitting the statute to achieve its important protective objective. That being so, I find the statute as presently drafted works disproportionate constitutional harm. It consequently fails intermediate scrutiny, and so violates the First Amendment."

Right of Privacy Issue

56. The question would be as to whether in terms of the Regulations, it infringes the right of privacy of a receiver of SMS message directly.

The answer thereto must be rendered in the negative.

(See Sukhna Nand Sarwar Dinesh Kumar Vs. Union of India (1982) 2 SCC 150).

57. The reasonableness of restrictions is required to be determined in an objective manner. Affecting a person harshly as opposed to the term 'unreasonably', would not invalidate the legislation.

58. In this case we are not concerned with the right of the licensor to allocate frequencies. Frequency of 'Spectrum' is also not in issue. Put pithily, it is not within the province of the Regulator.

Any issue, so far as the same relates to the right of the consumers inter-se is concerned, it is doubtful whether the Regulator is entitled to issue any direction in exercise of its jurisdiction under Section 11(1)(b)(v) of the TRAI Act, 1997 to protect the interest of the consumer.

Such interest of consumer is required to be protected vis-à-vis the service provider.

59. The questions are: -

(a) Whether the Regulator in the name of protecting the right of the consumers is otherwise entitled to and competent to balance the right of a sender of SMS as also the right of receiver of SMS vis-à-vis his right of privacy?

(b) Whether in a situation of this nature, right of a consumer to communicate his views to a group of consumers and the recipients thereof on their part having a similar right in terms of Article 19(1)(a) itself, the Regulations will affect the right of privacy as envisaged under Article 21 of the Constitution of India? If that be so, which one will prevail, will it be 19(1)(a) right or Article 21 right?

(c) The time and content of the SMS being not the subject matter of Regulations, whether Article 19(1)(a) right can be curtailed only by fixing the number thereof?

60. Right of a consumer to send SMSs cannot be equated with a right of a broadcaster.

In this case, this Tribunal is concerned with the right of the consumers inter-se. If regulations are sought to be imposed on a consumer not only to send more than 200 SMS per day but also to receive SMS, the right to communicate and the right to receive such communication from citizens to citizens being affected, it was required to be considered from a different angle.

In a given situation, indisputably, the restriction does not extend to the contents or the time of sending messages. The restriction is confined only to the number.

61. The Regulator, even assuming that it has some discretion in the matter, was required to ensure that the same may not be abused.

The principle of natural justice, as adumbrated under Section 11(4) of the Act is a part of the reasonable restriction doctrine.

62. By issuing the Regulations, it is difficult to say that the purport and object of the Constitution makers, as contained in Clause 2 of Article 19, has been fulfilled.

It is technologically possible for the operators to monitor the operations of a telemarketer whether required or otherwise.

The Regulator in the name of putting a check on operators dealing in illegal telemarketing cannot impose restrictions on genuine users of SMs services.

The object of the Regulator is said to be to prevent misuse of commercial telemarketing.

63. The telemarketers are supposed to be registered.

If some of them are not and have been taking recourse to illegality, steps can be taken to curb the same effectively. If a law is violated, the violator can be punished.

Likely violation of law by unauthorized telemarketer cannot be a ground to restrict the fundamental right of a citizen of India, the consumer in this case.

Making of regulation does not extend to exercising of Police power; more so when it is aimed at curbing a fundamental right of free speech.

While restrictions in the interest of general public are permissible so far as other Fundamental Rights are concerned, it is not in respect of Fundamental Right of Freedom of Speech and Expression.

To this effect, the restrictions imposed by Judge made laws by the Courts of United States, having regard to clause 2 of Article 19 of the Constitution are not and have been held by the Apex Court to be inapplicable.

(See Cricket Assn. of Bengal (Supra).)

Privacy Issue

64. Whereas, subject to the restrictions imposed in terms of Clause 2 of the Article 19 of the Constitution of India, a citizen of India has a fundamental right of expression, so far as the right of a receiver to receive SMS is concerned, would it be violative of his fundamental right under Article 21 of the constitution of India?

Right of privacy merely indicates a quality of life. By reason of communication of a message, unless it touches upon obscenity or morality or is otherwise defamatory, does not intrude any home as such.

Such intrusion, however, has otherwise been made permissible.

Even thereby, another important right, namely right to sleep is not touched upon.

65. Right of privacy is undoubtedly a very valuable right. But in a case of this nature those who do not want to be disturbed by telemarketers, need not get themselves registered with 'Do Call' Registry.

There is nothing to show that a vast majority of the mobile users do not want any SMs from their relatives, friends, colleagues, educators and their political leaders.

No empirical study in this behalf had been carried out.

Thus, whether such a restriction could be imposed in the interest of general public is not backed up by any data. Even the process of a sample survey by any independent agency has been resorted to.

The TRAI should have borne in mind that making of any legislation curbing fundamental right of a citizen being a difficult task, it was required to proceed cautiously. It must have the jurisdiction therefor.

66. We may notice that the TRAI itself in its Explanatory Memorandum stated :-

> *"14. Stakeholders also pointed out exponential increase in unsolicited commercial communications through SMS and desired effective measures to control unsolicited SMS. In this regard, it is noted that telemarketers buy bulk SMS from Access Providers at nominal cost and send these SMS to customers. In many cases, telemarketers hire leased lines to push SMSs to customers. Customers who are registered with the NDNC Registry also receive such SMS. A need was therefore felt to explore possibilities to modify the existing regulatory framework or to bring in a new regulatory framework to effectively control Unsolicited Commercial Communications.*

15. The matter was taken up with the Department of Telecommunications and a separate number series has been obtained for telemarketing purposes from mobile number series, out of which service providers can allot numbers to their telemarketers for making voice calls. Further analysis revealed that technical solutions are available to effectively control unsolicited commercial SMSs. Accordingly, provisions have been made such that all telemarketers ensure scrubbing of numbers using their own arrangement and all Access Providers ensure filtering of unsolicited commercial calls and SMS so that no call or SMS is sent to any customer registered on NCPR unless he has opted for it."

67. It is, therefore, evident that an effective control of unsolicited commercial SMSs was possible to be tackled technologically. In fact, so far as detection of operation of grey market is concerned, the licenced operators have been mandated to monitor the calls received from a particular number or to a particular number closely and refer the same to the DoT for appropriate action. The difficulty faced by the Respondent in curbing the unsolicited calls, in our opinion, cannot by itself be treated to be so insurmountable despite availability of technological solution so as to impose a restriction on the fundamental right of a citizen of India.

68. Moreover, a consumer has a right to maintain confidentiality with regard to his phone number, in which event he would not pass on the said information to another consumer. Regulator has not made the publication of the directory of telephones mandatory. No operator, therefore, does so. If it passes on the said confidential information to some commercial operators

illegally and for consideration, the Government can take appropriate action in this behalf.

69. Mr. Malhotra would urge that 'Right to not to be disturbed' is also a fundamental right in terms of Article 21 of the Constitution of India. Strong reliance in this behalf has been placed on the decision of the Supreme Court of India in *Re: Noise Pollution, Implementation of the Laws for Restricting Use of Loudspeakers and High Volume Producing Sound Systems* reported in AIR 2005 SC 3136. Whereas there cannot be any doubt or dispute that Article 21 provides that the right of person to human dignity would include a meaningful and complete life and anyone who wishes to live in peace, comfort and quiet within his house has a right to prevent the noise as pollutant reaching him.

It was in the aforementioned backdrop, Lahoti J., (as the Learned Chief Justice then was), stated the law thus :-

> *"10. Those who make noise often take shelter behind Article 19(1)(a) pleading freedom of speech and right to expression. Undoubtedly, the freedom of speech and right to expression are fundamental rights but the rights are not absolute. Nobody can claim a fundamental right to create noise by amplifying the sound of his speech with the help of loudspeakers. While one has a right to speech, others have a right to listen or decline to listen. Nobody can be compelled to listen and nobody can claim that he has a right to make his voice trespass into the ears or mind of others. Nobody can indulge into aural aggression. If anyone increases his volume of speech and that too with the assistance of*

artificial devices so as to compulsorily expose unwilling persons to hear a noise raised to unpleasant or obnoxious levels then the person speaking is violating the right of others to a peaceful, comfortable and pollution-free life guaranteed by Article 21. Article 19 cannot be pressed into service for defeating the fundamental right guaranteed by Article 21."

70. It is one thing to say that although a person has a right to expression but the same does not mean that prohibition to create noise so as not only to create disturbance to others and in fact creates nuisance by violating a law within the meaning of Clause 2 of Article 19 of the Constitution of India must sub-serve another fundamental right namely Article 21, cannot be imposed but, in a case of this nature it would not apply when another citizen, who has equally a fundamental right to be informed makes no complaint thereabout, still would lose his right to be informed.

71. A person, who does not want any message from another, at the first instance may not disclose his mobile number and get himself registered as a 'private' number as a result whereof he would not receive any call or message. Secondly, if he does not wish to be disturbed at a particular time or on particular days, he may switch off his mobile. Reliance on Article 21 of the Constitution of India by the Respondent is, therefore, misplaced.

72. So far as submission of Mr. Malhotra that a person cannot be bombarded with messages is concerned, it may depend upon the object and purport thereof. Whereas the Regulator may be right in protecting the interest of the consumers by imposing restriction on the telemarketers, it

must be noticed that transactional messages have been exempted. A bank is, therefore, entitled to send any number of messages to its customers; although in practice it may not.

On some days in a year, as for example on the eve of some festivals or New Year (called as 'Blackout days'), the restrictions are put on hold both by the Regulator and the operators.

On certain days in a year, therefore, unlimited messages can be sent or received. It may be possible to communicate with another person through internet. The Legislature has not found any necessity to put any restriction in that behalf.

The purpose for which the said purported Regulations have been made is not achieved.

73. As noticed heretobefore, relying on or on the basis of the decision of the Supreme Court of India in A. Suresh (Supra), Mr. Malhotra submitted that the said right would undergo a sea change if the right of Speech is intertwined with the Right to Carry on Trade or Business. Such a contention cannot be accepted for more than one reason, firstly, because it is not a case where the Petitioner has rested this petition on his right to carry on any trade or business or occupation. He is not a telemarketer. It is not the case of the Respondent that the Petitioner has been set up with the telemarketers. It is also not a case that the messages sent by him to other consumers have anything to do with or even indirectly connected with the telemarketing.]

Frequency Issue

74. It was urged before us that the medium of air-waves (Spectrum) is a public property and regulated by an authority/by the Respondent. Air-wave is, undoubtedly, a public property. A public property like airwaves keeping in view the doctrine of Public Trust as noticed recently by the Supreme Court of India in Center for Public Interest Litigation Vs. Union of India reported in (2012) 2 SCALE 550 must, therefore, be distributed in such a manner, which would bring the highest price.

Once, however, the spectrum is validly allocated to a holder of licence, it is for the licensee to make full use of it.

It enters into a contract with the consumers providing a right to him to make as many calls as he likes and to send as many messages as he desires. For doing so the consumer has to pay a price. So long the spectrum allocated to a licensee is put to use, not only the operator earns revenue, but also the Central Government as it has a share in it.

75. Use of mobile phones and consequential use of spectrum, therefore, generates revenue, which can be put to use for public good.

It is, therefore, not correct to contend that the citizen of India would have no inherent right to use public property.

Observations made in CAB (supra) to the said effect, which we have noticed heretobefore, and upon which strong reliance has been placed by Mr. Malhotra, with respect, is all out of context.

76. If only on the aforementioned premise, the number of SMS is restricted, the Regulator tomorrow may impose a restriction on Voice Call.

Compared to Voice Call, the length of text of message may be short and meaningful; whereas the length of the voice call may not be.

77. There is another aspect of the matter, which cannot be lost sight of. The consumer intending to send more than 200 SMSs per day, can do so by taking as many as 9 Sim Cards of same operators or different operators. We say so because obtaining of 10 or more Sim Cards from one operator would amount to 'bulk connection' and, thus, would be subject to monitoring.

78. On a query made by us, Mr. Meet Malhotra contended that sending of SMSs through internet would be restricted if the Sim Card therefor has been obtained from a telecom operator and then, the loophole can be plugged.

By no means whatsoever, the purported right of privacy of another citizen to receive the SMSs would be infringed as thereafter a multipronged action was required to be taken.

79. When a question of balancing the interest arises before a statutory authority, it is necessary that the relevant questions are posed and answered, viz.

(a) Whose interest is sought to be protected?

(b) What is the nature of interest?

(c) How and in what manner such interest or right is to be protected vis-à-vis the interest of others?

(d) Whether restrictions imposed on exercise of constitutional rights by a citizen of India can be a subject matter of restriction only for the purpose of purported protection of interest of a section of citizen; although some other or further mode can be taken recourse to?

80. To take recourse to the balancing of interest is a delicate task.

More so when, by reason thereof the fundamental rights of a citizen is restricted. Only in a situation of that nature, the statutory authority is required to weigh the respective cases of both the groups.

It is now almost well settled that ordinarily, intrusion into the fundamental right of the citizen of India, howsoever small it may be, should not be permitted, as a small intrusion, may, in future become a bigger intrusion.

81. Respondent, on the one hand, seeks to put a curb on commercial telemarketing only. It did not intend to put a curb on an SMS by a bonafide consumer to another *bonafide* consumer.

***Locus-Standi* of the Petitioner**

82. Submission of Mr. Malhotra is that the Petitioner has not placed before this Tribunal sufficient materials to show that he has been sending more than 200 SMSs per day to his followers and thus, he has suffered adversely by reason of the impugned regulations.

Strong reliance in this behalf has been placed on Bank of Baroda Vs. R. Nagachaya Devi reported in AIR 1989 SC 2105. In that case, the Apex Court was considering a case where the petitioner therein had raised a question of discrimination. It was held that the allegations of violations of Article 14 base must be specific, clear and unambiguous and must contain sufficient reasons.

It was observed :-

> *"8. It is true that in the Bank of India's case (AIR 1988 SC 151) this Court did not examine these aspects as to the unconstitutionality of S.4(e). Only the insufficiency and, indeed, the irrelevance of the test applied for holding that S.4(e) as discriminatory, were pointed out. While we are sensible of the anxious concern of the learned Judge for the acuteness and magnitude of the problem of agricultural indebtedness it appears to us that even if the question had not been trammeled by a decision of this Court, it would be appropriate to examine the*

question in a properly constituted action where pleas challenging the vires of the provision had been properly raised and urged."

83. A distinction must, moreover, be made between a fundamental right of a citizen as envisioned under Article 19 and a fundamental right of a person as envisioned under Article 14. The allegation of discrimination or arbitrariness may depend upon the factual matrix or the legal question involved in each case.

It is furthermore a trite law that whereas there is a presumption of constitutionality, so far as Article 14 is concerned; there is no such presumption with regard to a 'law' made under Clause 2 of Article 19; the reason being that the onus of proof is upon the maker of the law that the impugned legislation imposes a reasonable restriction.

84. Even otherwise, a legislation which is ex-facie unconstitutional, the onus of proof would be on the State to show that the same is constitutional.

It is not a case where jurisdiction of this Tribunal has been invoked for the purpose of an academic exercise.

85. We may notice that in Ramlila Maidan Incident *(supra),* there are ample materials were brought on record to show that the entire movement was generated by the organizers through use of SMSs or internet. The said movement could not have been possible unless a large number of SMSs could be created.

86. A situation might have arisen and the organizers could have asked their followers throughout India to hold a march in protest against the said incident. We, therefore, are of the opinion that it was not essential for the Petitioner to show that how his right under Article 19 is violated.

87. **Summary of Finding**

1. Regulation is not a law within the meaning of Article 19 (2) of the Constitution of India.
2. Power of the appellate court is not only to consider the decision making process but also the merit of the decision.
3. Assuming it is a law – by reason of the Regulations, the TRAI was not only restricting the telemarketers but also the bonafide users.

   It is the later part which is vulnerable.
4. A citizen's right to propagate his views, communicate the same and the fellow citizen's right to receive is absolute and only subject to reasonable restrictions as envisaged under Article 19(2) of the Constitution of India.
5. The onus to prove that the restrictions are reasonable and otherwise come within the purview of Clause 2 of Article 19 is on the State.
6. While regulating the service providers vis-à-vis the telemarketer is valid, it cannot impose a restriction on the citizen's right under Article 19 (1) (a) indirectly which it cannot do directly.

It cannot bring under the same grinder 'telemarketer' and citizen in the guise of curbing telemarketing.

7. In absence of any control over the contents of message and the time during which they can be sent the Regulations could not restrict the number of SMSs in the name of privacy.

8. There is nothing on record to show that any citizen had raised any objection with regard to number of SMSs sent by other citizen and thereby his right of privacy has been infringed. Even no issue was raised in the Consultation paper.

9. The Regulator cannot do indirectly what it could not do directly.

10. Sec 21 of the General Clauses Act would not be attracted in this case as the impugned statutory order is not a subordinate legislation.

88. For the reasons aforementioned, the appeal must be allowed.

The impugned order is set aside.

In the facts and circumstances of this case, however, there shall be no order as to costs.

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(S.B. Sinha)

Chairperson

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(P.K. Rastogi)

Member

rkc