

A brief jurisprudential analysis of “Brown v. Entertainment Merchants Association” and its proximity with China’s real name network system

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Abstract

Brown v. Entertainment Merchants Association (2011) is a landmark case in the US constitutional law history. It has redefined the basic human right of freedom of speech. Although the decision is a recent one but it is a depiction of jurisprudential development. It has strong linkage with China’s proposition of Real Name Network System.

Keywords: Brown v. Entertainment Merchants Association, natural law, positive law, pragmatism, Real Name Network System

Introduction

In 2011, US Supreme Court struck down a 2005 California law. In 2005, California banned the sale of certain video games to the children without parental supervision [2, 33]. The main reason was that the games were containing violent and inappropriate material. It is an undeniable fact that video games do contain violent content. The games like, Resident Evil, Taken Series, Mortal Kombat, Call of Duty and many others, have killings, use of weapons, and showing of blood and rage. The Californian law aimed at safeguarding the minor from this and shifting the liability to parents.

US Supreme Court declared the law null and void on the basis of restriction on freedom of speech. The Supreme Court had declared that video games are protected under the right of free speech [1]. The views of judges were different, although linked with each other but with different explanations and interpretations. They thoroughly compared video games with other media and more they emphasized on proper regulations and social education on broader level than micro level restrictions.

The above mentioned case is interesting in a way that it involves many theories of jurisprudence. Some of these theories were applied completely when deciding this case and some were thoroughly negated, but there are gray areas that involve many aspects of jurisprudence and a mixture, rather an amalgamation of theories is there to open new horizons in the field of jurisprudence to look at and think for.

It is quite obvious that US Supreme Court has totally negated the “Positive Theory of Law” that laws coming from sovereign must be and shall always be followed or more specifically, positive law may be characterized as “law actually and specifically enacted or adopted by proper authority for the government of an organized jural society” [2].

The decision is a denial of the view that the sovereign (in this case legislature of California) must be obeyed habitually and laws should be backed by threat of sanctions (in this case punishment or fine). The decision has practically separated the sovereign and will of general public into different categories,

and perhaps a clear statement that merely elected by the votes of general public does not allow any legislature to make any laws which is contrary to the will of general public.

On the other hand this decision can be called as a Natural Law influenced decision. The philosophy of natural law says that certain rights and values are inherent by virtue of human nature, and universally cognizable through human nature [4, 5]. The basis of decision is freedom of speech, which is not only a recognized human right in modern days but also a subject of ancient primitive natural law. The major issue is that whether freedom of speech involves creating and selling of violent video games? As far as developing a video game and confining it to oneself or may be to a limited number of audience, then yes it falls under the category of freedom of speech. The complexity arises when it comes to selling it to minors. One can sell anything of his “own” and technically one can buy something which is affordable for him, but selling video games to minors which can cause damage to their mental health is a wise thing to do or not?

The theory of natural law is beautifully applied here and shows a bright side of human rationale and thinking. The decision tells us that video games follow a system of self-rating. It classifies games into different categories and tells us that for which age group they are suitable. This decision hereby is a great expression of advocacy of free human will and not only freedom of speech but also freedom of choice.

It seems a far-fetched idea that there is involvement of pragmatism and capitalism in this decision, but a link can be found. Pragmatism says that everything is valuable according to its practical use and success. Pragmatism rejects the idea that the function of thought is to describe, represent, or mirror reality [2]. So selling and buying video games is useful and practical for the purpose of entertainment and market economy [3, 4, 5]. Although it is not the basic idea discussed but if to be looked deep and thoroughly then there is a connection. So the practicality of keeping youth busy, providing them entertainment and keeping the market economy going, and adding another source to capital development is definitely

subjected to pragmatism. It is just like function of a thought is to reflect and describe reality.

Social control and deterrence is basically a subject of crime and punishment but it is also applicable on other situations as well. Social control refers to control and make the rating system of games better and educate children to differentiate between good and bad. Deterrence on the other hand requires parental supervision and it is important to consider that deterrence can lead to social deviance and may cause a greater harm to society.

Now there is a question that society should be regulated by norms, laws or social behavior? It is true that social norms most of the time become laws but what if there is a separation between them or a thin line division. Briefly speaking the above mentioned case law is an example of evolution of legal system from positivism to naturalism. The law made by Californian legislature was will of the sovereign and by nullifying it on the basis of restriction over freedom of speech is true and honest application of natural law. The laws should be according to the will of people. The regularization and system of categorization shall also be according to the will of people. It is also a debatable issue that what is the will of general public? It is simple that general public want to have everything free but with certain rules and regulations. Restrictions of irrational nature are against the nature of human beings, like if some parents do not like video games then it means not any kind of video games for kids? As far as concept of freedom of speech is concerned, the concept is variable from time to time and society to society. No doubt the concept and idea is universal but it is very much dependent upon the geo-political dimensions. There is countless number of acts and activities acceptable now a day, were not even allowed in the past. It is easy to say that concept is changing and somewhat progressing with every passing day.

There are many examples. In some societies, pornography is legal and allowed with age restrictions and in some societies without even age restrictions^[1]. There are rules and regulations that deal with this phenomenon in accordance with the will of general public and that should be respected. This decision is basically a win of naturalism over positivism and it will encourage the legislatures to make regulations instead of strict restrictions.

One of the examples is ban on eating beef and slaughtering of cows in different states of India^[1, 2, 3, 4, 5, 6]. It is clearly an abomination of people's right to choose food. Restriction like this cannot last long just because it is against the human nature and a violation of human right of free choice (as far as it is not harmful to anyone physically).

This decision has also strengthened the views and basis of pragmatism as far as capital economy is concerned. It is not about morals and morality; it is about rationality and advantages. Anything that brings money in the system and strengthens the economy shall be seen as a positive thing and must be adopted.

These kinds of decisions are very important as far as legal world is concerned. It is not about one country and one legal system. It is about development of a certain phenomenon in whole world. It is not merely a win of naturalism over positivism but it shows growing concern of legal systems about the will of general public over strictness of legislature.

China's Real Name Network System.

A real name system is a system in which a user who wants to register an online account, shall and must use his/her real name instead of a fake online pseudonym, so in case of a law breaking or mostly online fraud the real identity of culprit shall be available.

It comes under the vast application and subject of cyber laws or more cyber rules and regulations worldwide. It is just a proposition in China but many social media websites around the world have partially started this kind of verification, for example Facebook is asking for a valid passport identity or driving license etc. for authentication in case there is some kind of suspicion of a fake account or fraud.

In China, right now it is just a proposition but a really progressive thought to control the cyber setup^[1]. There is already a new set of rules and regulations in China about true advertising and it is also applicable on internet or web advertising. So bringing in the true identity of every other web client will ultimately cause less spread of false information. This policy is actually a method to save general public from any potential fraud. The decision of US Supreme Court apparently seems in contradiction of this policy, if we consider having a pseudonym as freedom of speech but in broader sense it is in compliance with this policy. It is not a deterrent method but a smooth way of showing state's concern for general public and saving them from any potential cyber fraud. It can be compared with the system of rating video games. It is going to be the set of rules and regulations that can prevent society from a greater harm.

The decision of US Supreme Court is basically to promote freedom of speech at macro level, freeing it from the boundaries of micro and minor hurdles and obstacles. It is to accept the change in society and actually is the validation of accepting the process of change. It is success of naturalism over positivism. The legislatures should take in consideration the will of public before creating or giving effect to any law. It fairly favors the change in society, and norms and ethics of any society, making it more liberal and accepting rather than being strict and close.

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