

JUDICIAL INTERVENTION IN THE *SUB JUDICE*- THE EMERGING ISSUES OF TRIAL BY MEDIA

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Introduction

A great man once wisely said that 'with great power comes great responsibility'. This quote is widely applicable to media, in its various forms and manners. The power that lies in the hands of the media to either build up a man's reputation from scratch or to discredit him and injure his reputation, needs to be used wisely and in a responsible manner.

Generally a pending litigation against a person, especially in a criminal case, often results in loss of face of that person. A final verdict by the Judiciary, leading to his acquittal or sentencing, thus also decides what his future standing would be in the society in terms of his repute. Nobody, not even the media, can decide the fate of that person and the case which is sub-judice, before such a final judicial pronouncement. However, in many instances it has been seen that in controversial cases that grab the attention of the media and public both, the media crosses its permissible limit from reporting the case and this often concludes in scrutinizing the case in detail and pronouncing a parallel judgment to that of the judiciary.

In India, the Executive, Legislature and Judiciary are considered to be the three pillars of democracy. The Constitution of the country through its implied provisions lays down the principal of separation of powers which enumerates that all the organs of the organization should work independently but interdependently.¹ In essence, such a doctrine implies that no one organ should usurp the powers of the other but should work in harmony with each other. Hence, taking into account that media is considered to be the fourth pillar of democracy, it is only logical that media should not excessively interfere in the working of the other organs. Therefore, the parallel

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¹ Article 52 and 53 of the Constitution of India expressly lay down the Executive powers of the Union. Further Article 50 of the Constitution puts an obligation on the State to separate the judiciary and the executive.

judgment pronounced by the media in this regard clearly violates the essence of democracy which is separation of powers.

Apart from this implied deduction that trial by media violates the doctrines of separation of powers there are other consequences that such a trial by media brings along. Trial by media innocence, impartial judges, no prejudice or bias against the accused etc are violated if such a parallel scrutiny of the case is done. Media trial of a particular case leads to open discussion and debate which results in blatant violation of these facets of fair trial. The opinion of the media persons on the case, combined with the views and polls of the public, consequently lead to a decision being made amongst themselves regarding the guilty and innocent. Therefore even before the actual arguments are made by the lawyers or before the evidences or witnesses are examined, the case is decided in the public forum. This leads to violation of the principle of presumption of innocence i.e a person is innocent until proven guilty, which is the cardinal principle on which the entire criminal jurisprudence of the country is based on. Further, such opinions on the questions of culpability and innocence also have a subconscious effect on the minds of the Judges and may affect their impartiality and might create prejudice in their minds. Hence, media trial of a case, in all probability results in right to fair trial being compromised. Additionally, Article 10 of Universal Declaration of Human Rights, 1948 declares that everyone is entitled to a fair and public hearing by an independent and impartial tribunal, in the determination of his legal rights and obligation and of any criminal charges against him.² Media trial in a case would thus imply grave contravention of laws not only on a national level but also on an international scale.

Such violation of laws and interference in the judicial process eventually results in miscarriage of justice. This view was observed and upheld in the case of *Y.V Hanumantha Rao v. K.R Pattabhiraman and Anr*³ where it was stated that:

When litigation is pending before a Court, no one shall comment on it in such a way there is a real and substantial danger of prejudice to the trial of the action, as for instance by influence on the Judge, the witnesses or by prejudicing mankind in general against a party to the cause. Even if the person making the comment

² Megha Maji, *Fair Trial under Section 304 of CrPC*, February 9, 2015, available at <http://www.legalservicesindia.com/article/article/fair-trial-under-section-304-of-crpc-1759-1.html>.

³ AIR 1975 AP 30.

honestly believes it to be true, still it is a contempt of Court if he prejudices the truth before it is ascertained in the proceedings.

The negative effects of the same can be highlighted in cases like the Aarushi Talwar murder case which were affected by the phenomenon of media trial. In the Aarushi Talwar murder case, the parents of the girl, who have now been charged with her murder, claimed that media created a perception about them in the public which damaged their case and also the dignity of their family, especially of that of their daughter.⁴ Irrespective of the fact whether the parents are actually guilty of the crime, there are merits in what she has said. Due to the sensational and insensitive media coverage in the case, the parents had already lost the case ahead of the verdict.⁵ Further, much of the very few evidence which existed was said to be destroyed because of trampling of the media persons all over the evidence. Many have remarked that the legal process in this case seemed a mere formality as the trial by media had already declared the Talwars guilty.⁶ The trial was thus always one sided; all thanks to the media coverage which was termed as unethical.

However, just like every coin has two sides, none of which are more right or wrong than the other, though media by conducting such parallel trial has a negative façade to it, still it also plays a very important and inevitable role in the society; that of an informant. This basic need for gathering and disseminating information is the key rationale behind existence of media as an entity itself. All this is keeping in tune with or in furtherance of the right to freedom of speech and expression which the Constitution of India provides to the media. Free speech and expression has been characterized as “the very life of civil liberty” in the Constituent Assembly Debates.⁷ Freedom of press is one of the main constituents of this right. It is not only the right of the media but it is also their duty to inform the general public about the various happenings in a true and unbiased manner. Such a role played by media has helped many a times in the past to bring out so many scams into light; some of which would not have even come into limelight otherwise. One of such main scams was the 2G spectrum scam. It was the media who played the sole role in bringing out the fact that the then Telecom Minister A Raja had

⁴ BBC News, *Aarushi Talwar : India's 'most talked about 'murder verdict*, 25 Nov. 2013, available at <http://www.bbc.com/news/world-asia-india-24987305>.

⁵ *Ibid.*

⁶ Shohini Ghosh, *All but lynched by the media*, *The Hindu*, May 20, 2013, avail. at <http://www.thehindu.com/opinion/op-ed/all-but-lynched-by-the-media/article4724980.ece>.

⁷ Constituent Assembly Debates: Official Report, (Delhi, 1946-1950), VII, p. 18.

divided the spectrum on first cum first serve basis, ignoring the TRAI recommendations on the same. None of the other regulatory mechanisms which were put into force were effective. It was only the media which played a positive role and brought out such grave cases of corruption.

There is also an obligation on them to perform their duties in an accountable and responsible manner. When to fulfil this obligation, media crosses its line from being an informant and starts interfering and intervening in the functions of the other organs, fingers are raised on them. When they intervene in the cases that are sub-judice in the courts, problems mentioned earlier crop up.

The Constitution of India expressly lays down that freedom of speech and expression can be restricted only as per the grounds given under Article 19(2). This raises a few questions. Whether right to fair trial is a valid reason for regulating or restricting the matters which are sub-judice in courts? When issues concerning right to fair trial and right to free speech are raised, which one constitutionally has superior authority? The answer however is that none of these rights supersede each other.⁸ There is no final decision laid down by the Courts in this regard and also there is no straightjacket solution to the same. Hence, when such questions are raised it is often seen what serves better in the interest of public and the needful is done by the courts as per the facts and circumstances.

However, in the recent times due to the increasing role of the media in the society, India has, deriving on the laws on this subject laid down by other countries laid down certain norms and guidelines to provide clarity and uncertainty on this issue. Before that it is essential to see the laws regarding the same in the other countries where such issues have been already decided.

Other Jurisdictions

In the United States, the debate over such trial by media first sparked in the case of *U.S President Bill Clinton's impeachment trial* and *prosecutor Kenneth Starr's investigation*.⁹ In this case the media openly reported the commentary from the lawyers which was said to influence the opinion of the Judges. The other landmark and high

⁸ Press Laws Guide, *Fair Trial*, The Hoot, available at <http://www.thehoot.org/web/home/cyber2.php?cid=51&sid=6286>.

⁹ Legal News: News Hour with Jim Lehrer" (Transcript). Public Broadcasting System (PBS). 19 October 1998. Retrieved 12 March 2011.

profile like *Sheppard's* case¹⁰, *the O.J. Simpson Trial*¹¹ and *the Duke Lacrosse* case in the US were also majorly negatively affected due to such trial by media.

In 1971 in the case of *New York Times Co. v. United States*¹² the Court held that the concept of 'prior restraint' of the media was unconstitutional in nature. It also laid down that there was a heavy burden on the govt, to show enforcement of such prior restraint.¹³ Further in 1976 in *Nebraska Press Association v. Stuart*¹⁴ the Court held that any attempt to censor the media through prior restraints were unconstitutional.¹⁵ Thus in essence first amendment has, in an implied way, gained supremacy, over the right to trial.

The United Kingdom on the other hand, has made it clear that though free speech as a right is upheld, the powers given to such freedom would not extend to prejudicing of the trials.¹⁶ Thus as soon as a suspect is charged or arrested, the Contempt of Court Act of 1948 is activated: publication of material that creates a substantial risk of serious prejudice to the forthcoming proceedings is a criminal offense.¹⁷ Prior restraint can be enforced in such cases only under exceptional circumstances.

Hence as seen the laws around the world with regard to media trial are contrasting in nature in their entirety. India has derived its norms and guidelines on the basis of these.

Trial by Media in India

Trial by Media is defined as the "impact of television and newspaper coverage on a person's reputation by creating a widespread perception of guilt regardless of any verdict in a court of law"¹⁸. Many a times media itself starts a separate investigation, builds a public

¹⁰ Sheppard v. Maxwell, 384 U.S. 333 (1966); see Joanne Brandwood, You Say 'Fair Trial' and I.

¹¹ State v. Simpson, No. BA-097211 (Cal. Super. Ct. filed July 22, 1994).

¹² 403 U.S. 703.

¹³ Legal Information Institute, *New York Times Co. v. United States*, Cornell University Law School, available at <https://www.law.cornell.edu/supremecourt/text/403/713>.

¹⁴ 427 U.S. 539 (1976).

¹⁵ Reporters Committee, *The First Amendment Handbook :Prior Restraints*, available at <http://www.rcfp.org/first-amendment-handbook/introduction-fair-trials-national-security-law-enforcement-investigations>.

¹⁶ Gavin Phillipson, *Trial by Media : The Betrayal of the First Amendments's Purpose*, Duke Law Journal, available at <http://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=1492&context=lcp>.

¹⁷ *Ibid.*

¹⁸ R.K. Anand v. Registrar 8 SCC 106 (Del. 2009).

opinion against the accused even before the court takes cognizance of the case.

Unlike the west till 1990's state had monopoly in television broadcasting in India, a "*somnolent and widely discredited*" government channel was India's only television news source for many years¹⁹. Recently new television channels flourished; today there are over 200 private news channels in India. This has led to a "welter of exposes" being broadcast on television²⁰.

Trial by Media faces many legal issues in our Country today which we shall now discuss.

Freedom of Press, Trial by Media, Fair Trial and Tarnished Reputations - Battle among Fundamental Rights.

Pandit Jawahar Lal Nehru had once said: "*I would rather have a completely free press with all the dangers involved in the wrong use of that freedom than a suppressed or regulated press*".²¹ Supreme Court of India has recognized the freedom of press under the aegis of freedom of speech given in Article 19(1)(a) of the Constitution of India. Further Art. 19(2) permits the state to make laws imposing "reasonable restrictions" on this right.²² Classically, John Stuart mill justified Freedom of Speech as an aid to discover truth²³. But Mill also did not propagate absolute freedom of speech; he said freedom of speech could be restricted by imposing moral or legal sanctions if it caused harm to others.

Supreme Court deciding on the scope of freedom of press recognized it as "*an essential prerequisite of a democratic form of government*" and regarded it as "*the mother of all other liberties in a democratic society*"²⁴. It was stated in *Hamdard Dawakhana v. Union of India*²⁵

¹⁹ Khozem Merchant, *The television Revolution: India's New Information Order* (Reuter Foundation Paper 42, University of Oxford).

²⁰ Praveen Swami, *Breaking News: The Media Revolution*, in *The State of India's Democracy* 177 (Sumit Ganguly, Larry J. Diamond & Marc. F Plattner, eds., 2007).

²¹ *Mr. Nehru's declaration in the course of a speech delivered on 20th June 1916 in protest against the Press Act, 2010*).

²² Under Article 19(2), the State may restrict the rights conferred by Article 19 by making, "any law, in so far as such law imposes reasonable restrictions ... 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".

²³ See John Stuart Mill, on Liberty 33-4, 63 (1859).

²⁴ In Re: Vijay Kumar 6 SCC 466 (1996).

²⁵ 2 SCR 671 (1960).

that the right includes the right to acquire and impart ideas and information about matters of common interest.

Indian Justice System is based on the two plinths of “*guilt to be proved beyond reasonable doubt*” and ‘*presumption of innocence until proven guilty*’²⁶ Right to Fair trial flows from Article 21 of the Constitution to be read with Article 14. Supreme Court also affirmed that “an accused has a right to fair trial”²⁷. He has a right to defend himself as a part of his human as also fundamental right as enshrined under Article 21 of the Constitution. Right to fair trial includes the right to be tried before an unbiased or prejudiced judge. It entitles a litigant to adjudication of a cause by a judge who is perceptibly and demonstrably unbiased and without prejudice²⁸ includes a bundle of other rights like the right to a public trial, the right to legal representation, the right to speedy trial, the right to be present during trial and examine witness.

Denial of a fair trial is as tantamount to causing injustice to the accused. It would obviously mean a trial before an impartial judge, a fair prosecutor and atmosphere of judicial calm. Fair trial means a trial in which bias or prejudice for or against the accused, the witness or the cause which is being tried is eliminated²⁹.

This is where the conflict between the two fundamental rights arises. The question is if media trial subconsciously affects the judge’s mind than it comprises with the principles of fair trial. The Supreme Court of India in this regard is in consonance with the view taken by English Courts. It said that judges like ordinary human beings are fallible and may be influenced subconsciously and Judges could not claim to be super human was quoted by the Supreme Court in *Reliance Petrochemicals*³⁰. In what manner they are so influenced may not be visible from their judgment, but they may be influenced subconsciously. Also even if it creates a doubt in the mind of public that this decision was taken because of the bias created against the accused, it compromises with the principle that it also matters that

²⁶ Article 14, paras 2 and 7 of International Covenant on Civil and Political Rights, 1996: “2. *Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law.* 7. *No one shall be liable to be tried or punished again for an offence for which he has already been finally convicted or acquitted in accordance with the law and penal procedure of each country, Article 11 of the Universal Declaration of Human Rights : (1) Everyone charged with a penal offence has the right to be presumed proved guilty according to law in a public trial at which he has had all the guarantees for his defence”.*

²⁷ *T. Nagappa v. Y.R Muralidhar*, 6 SCALE 642 (2008).

²⁸ *Bhajan Lal, Chief Minister, Haryana v. Jindal Strips Ltd.*

²⁹ *Zahira Habibullah Sheikh v. State of Gujrat*, 4 SCC 158 (2004).

³⁰ *Reliance Petrochemicals Ltd. v. Proprietors of Indian Express*, 4 SCC 592 (1988).

justice is not only done but it should seem to be done. Also extensive media trial affects other rights that are covered under the Right to Fair Trial like too much pressure from the media might discourage the lawyers to take up the case of the accused or dissuade the police from carrying out investigation. A recent case in this respect is of *Reliance Infocom murder case of its employee*, where due to media reports; the prime accused in the murder absconded. Renowned lawyer Ram Jhethmalani faced a lot of media sensationalism when he agreed to defend Manu Sharm. In the serial killings in Noida, Due to extensive media coverage of police investigation, the owner of the house where the corps were found, Mohinder Singh Pandher and his domestic help Surendra Kohli, the prime suspects of having committed these crimes bore the brunt of sensational journalism. Influenced by the media coverage, much of it proclaiming that the two men had confessed to the killings, the local bar association announced that it had decided that no advocate from Noida would defend them in Court³¹. Sometimes the lives of witness are compromised. Confessions before the police many a times cause Breaking News features but little do they highlight that such confessions are not admissible before the Court.

Another fundamental right that stands in dispute is the right to reputation. It is recognized is an integral part of one's life³². It is a facet of right to life of a citizen under Article 21 of the Constitution of India³³. And media trial is fatal to this fundamental right even if the accused is found guilty after the trial is over. Thus eventually damage to a person's image in the society is done nevertheless.

Immunity under the Contempt of Court Act

Under the Contempt of Court Act, 1971, any publication that interferes with or obstructs or tends to obstruct, the course of justice in connection with any civil or criminal proceeding, which is actually 'pending', only then it constitutes contempt of court under the Act. Under section 3(2), sub clause (B) of clause a of explanation, 'pending' has been defined as "in the case of a criminal proceeding, under the code of Criminal Procedure, 1898 (5 of 1898) or any other law- (i) *where it relates to the commission of an offence, when the charge sheet is filed; or when the court issues a summon or warrant, as the case*

³¹ Trial by Media, April 27, 2007. HRF/164/07, <http://www.hrhc.net/sahrdc/hrfeatures/HRF164.htm> (last visited on September 2009).

³² State of Bihar v. Lal Krishna Advani, AIR 3357 (SC 2000).

³³ Board of Trustees of the port of Bombay v. Dilipkumar Raghavendranath Nadkarni and Ors., MANU/SC/0184/1982.

may be, against the accused." The act also exempts from liability the publication of a "fair and accurate report of a judicial proceeding"³⁴. In 2006, the Act was amended to allow "truth....in public interest" as a defence to a charge of contempt³⁵.

It is correct that contempt of court is one of the ground on which reasonable restriction can be imposed on the freedom of speech. The problem does not lie in media's exposing the lacuna of a bad investigation by cops, mal-performance of the duties ordained to the civil servants but the eye-brows start to raise when media ultra vires its jurisdiction and does what it must not do. The position of law earlier to this was stated in as "when litigation is pending before a court, no one shall comment on it in such a way there is a real and substantial danger of prejudice to the trial of the action, as for instance by influence on the Judge, the witness or by prejudicing mankind in general against a party to the cause. Even if the person making it believes it to be true, still it is a contempt of Court if he prejudices the truth before it is as-certained in the proceedings"³⁶. Supreme Court strongly deprecated the media for interfering with the administration of justice by publishing one-sided articles touching on merits of cases pending in the courts³⁷.

Delhi High Court in a recently stated that mere reporting of court proceedings would not tantamount to contempt. The High Court further held that it was for the Court itself to decide whether the publication constituted contempt and the same could not be raised by the party³⁸.

The Court also held that contempt jurisdiction is exercised by the court wherein there is deliberate or wilful disobedience of the orders of the court or in anything which undermines the majesty of the court. The mere newspaper report or write up raising some grievance in the opinion of this court will not enable to exercise the contempt jurisdiction³⁹.

So the position of law as we speak of today with respect to Freedom of Press in conflict with Fair Trial is that restriction on media trial is necessary so that the people may not have a wrong perception of the

³⁴ Contempt of Court Act S. 4.

³⁵ Contempt of Courts Act 1971 S. 13(2), amended by Contempt of Courts (Amendment) Act 2006 S.2.

³⁶ Y.V. Hanumantha Rao v. K.R Pattabhiram and Anr., AIR 1821 (SC 1975).

³⁷ M.P Lohia v. State of West Bengal, 2 SCC 686 (2005).

³⁸ Nehru Memorial Museum & Library Society v. Dr. N. Balakrishnan, 174 DLT 12 (2010).

³⁹ *Ibid.*

administration of Justice System. What lies at the core of the issue is the need to check prejudicial effect caused by a sensational reporting of the sub-judice matter.

Doctrine of Public Interest

India has been known for its fierce and fiery journalism. India media has influenced the course of many high profile cases. Supreme Court has expounded another fundamental right behind the freedom of press that is the people's right to know. Press exercising freedom of press actually performs the function to provide, comprehensive and objective information of all aspects of the country's political, social, economic and cultural life. It plays the role of an educator and moulds public opinion. For instance in *the Bofors* case Supreme Court recounted the merits of media publicity, "those who know about the incident may come forward with information, it prevents perjury by placing witness under public gaze and reduces crime through the public expression of disapproval for crime and last but not the least it promotes the public discussion of important issues.

Court also has accepted that a tinge of sensationalism, entertainment and anxiety is essential in a newspaper report otherwise it would have been the gazette of India. Recently apex court distanced itself from interfering with free expression of the media by rejecting the plea to lay down guidelines for sting operations. This case is cited as one of the first in the history as analytical judicial pronouncement has been made supporting the genuine, transparent and public interest media trial. Soon after this another media trial judgement came as morale booster to constructive media trial of course with some cautions and limitations. Upholding "public interest" the supreme court said, "looking at the matter from a silently different angle we ask the simple question, what would have been in greater public interest to allow the attempt a suborn a witness, with the object to undermine a criminal trial, like quietly behind the veil of secrecy or to bring out the mischief in full public gaze? To our mind the answer is obvious⁴⁰. Supreme added a word of caution, "if the trial by media or string makes prejudicial pre-judgment as to guilt or otherwise of accused, it could definitely attract the provisions of contempt of Court. a major constraint on strings and trial by media is the public interest. Again a very important case in point is *Sahara India Real Estate Corporation Ltd. and Ors.v. Securities and Exchange Board of India and Anr*⁴¹ where the court gave power to judges to order postponement of publication on a case to case basis, where

⁴⁰ R.K. Anand v. Registrar of Delhi High Court, 8 SCC 106 (2009).

⁴¹ 10 SCC 603 (2012).

there is a real and substantive risk of prejudice to fairness of the trial or administration of justice.

These judgments highlight the importance given to freedom of press in today's world. They show that media trial is not being dubbed as a crime of interference with the administration of justice under the law of contempt of court in India anymore. They are a sign of great relief to the media and as morale booster to positive and constructive media trial.

Conclusion

The Role of Media in Contemporary India has been of both negative and positive. It is this activism that culprits of hit and run cases, bribery, corrupt politicians are behind bars in high profile cases and it is also this activism that when crosses line becomes interference in administration of justice. On the power of media, a U.S appellate Court judge learned Hand observed: "*The hand that rules the press, the radio, the screen, and the far-spread magazine, rules the country*".

Various case laws in the recent past highlight that judicial sentiment towards trial by media is not of complete disgust rather it has accepted that in most of the cases trial by media has played a constructive role.

We recommend a few changes in this regard. First of all the definition of pending in Contempt of Court needs to be changed in the Contempt of Court Act, 1971. Contempt act is poses a reasonable restriction on freedom of press. The lacuna is that it comes into picture as soon as case becomes pending. Though a lot of times what has been seen are that media trial becomes apparent as soon as the arrest is made. It is more frivolous and common in cases of influential people as it fetches TRP ratings. In order to ensure that this does not happen, the suggestion given by the Law Commission Report 200th should be incorporated and the section should be amended. So the restriction that such a publication that is prejudicial towards the accused shall operate from the time of arrest.

Media acts as the alter ego of the society and though backing of law to regulate its conduct is essential, rather that stringent laws it should be a more of a self regulated body. Like while presenting facts it must give their context and discuss their pros and cons to enable people to grasp properly their significance and to form their informed vies to them.

Further the Court in cases of conflict between Freedom of Press and other Fundamental Rights should take the approach that ensures that administration of justice is not compromised. Media has to understand that its responsibility is greater than that of an individual and hence it cannot be granted a license to attack litigants and the duty of a journalist is to report cases and adjudicate them. Lastly in the light of the stance of the Supreme Court in *Sahara Real Estate Case*, postponement orders be narrowed down by introducing guidelines/parameters such as kind of publication to be covered, categories of proceedings etc.

Thus freedom of press in our country is a qualified right and will continue to be so.

