

TRIAL BY MEDIA

PREJUDICING THE SUB-JUDICE

PROLOGUE

The media in India is one of the freest in the world in terms of legal constraints. Freedom of expression incorporated in her Constitution in Article 19(1) remains an important facilitator for widespread engagement within a democratic atmosphere. As beautifully remarked by the first Prime Minister of independent India Pandit Jawaharlal Nehru - “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.” But that great man could not foresee the danger involved in the ‘administration of justice’ which is the very essence of the natural justice and the rule of law or rather he would not have expected the press to get involved into something which is beyond its limit and ethics too. To realize the vision of Mr. Nehru, the media has been provided with many freedoms and immunities so that this fourth pillar of democracy stands tall and strong. But what Lord Atkin relates with power is also well placed with the notion of liberty. Liberty does corrupt into license and is prone to be abused. Every institution is liable to be abused, and every liberty, if left unbridled, has the tendency to become a license which would lead to disorder and anarchy¹. It has to be remembered that freedom of expression is not absolute, unlimited or unfettered and in all circumstances, as giving on an unrestricted freedom of the speech and expression, would amount to uncontrolled license.

Media has now reincarnated itself into a ‘public court’ (Janta Adalat) and has started interfering into court proceedings. It completely overlooks the vital gap between an accused and a convict keeping at stake the golden principles of ‘*presumption of innocence until proven guilty*’ and ‘*guilt beyond reasonable doubt*’. Now, what we observe is media trial where the media itself does a separate investigation, builds a public opinion against the accused even before the court takes cognizance of the case. By this way, it prejudices the public and sometimes even judges and as a result the accused, that should be assumed innocent, is presumed as a criminal leaving all his rights and liberty unredressed. If excessive publicity in the media about a suspect or an accused before trial prejudices a fair trial or

¹ *Express Newspapers Vs. U.O.I.*, (1997) 1 SCC 133. See also *re:Harijai Singh and re:Vijayakumar*, AIR 1997 SC 73 wherein the Supreme Court of India has observed that the freedom of press is regarded as “*the mother of all liberties in a democratic society*”.

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results in characterizing him as a person who had indeed committed the crime, it amounts to undue interference with the “administration of justice”, calling for proceedings for contempt of court against the media. Unfortunately, rules designed to regulate journalistic conduct are inadequate to prevent the encroachment of civil rights.

FREE SPEECH VS FAIR TRIAL

In the criminal justice system, which we have been following, the guilt is to be proved beyond reasonable doubt and the law is governed by senses and not by emotions. While displaying our emotions, the media and the masses forget that it puts tremendous pressure on the judge presiding over the case. How can we expect a fair judgment from a judge who is under such tremendous pressure from all sections of the society? A person is presumed to be innocent unless he is held guilty by the competent court, but here the trend is to declare a person guilty right at the time of arrest. The media is there to report facts or news and raise public issues; it is not there to pass judgments.

The print and electronic media have gone into fierce and ruthless competition, as we call them ‘*aggressive journalism*’ that a multitude of cameras are flashed at the suspects or the accused and the police are not even allowed to take the suspects or accused from their transport vehicles into the courts or vice versa. The Press Council of India issues guidelines from time to time and in some cases, it does take action. But, even if ‘apologies’ are directed to be published; they are published in such a way that either they are not apologies or the apologies are published in the papers at places which are not very prominent. The most objectionable part, and unfortunate too, of the recently incarnated role of media is that the coverage of a sensational crime and its adducing of ‘evidence’ begins very early, mostly even before the person who will eventually preside over the trial even takes cognizance of the offence, and secondly that the media is not bound by the traditional rules of evidence which regulate what material can, and cannot be used to convict an accused. In fact, the Right to Justice of a victim can often be compromised in other ways as well, especially in Rape and Sexual Assault cases, in which often, the past sexual history of a prosecutrix may find its way into newspapers. Secondly, the media treats seasoned criminal and the ordinary one, sometimes even the innocents, alike without any reasonable discrimination. They are treated as a ‘television item’ keeping at stake the reputation and image. Even if they are acquitted by the court on the grounds of proof beyond reasonable doubt, they cannot resurrect their

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previous image. Such kind of exposure provided to them is likely to jeopardize all these cherished rights accompanying liberty.²

Earlier, journalism was not under pressure to push up TRP ratings or sales. So the journalists did their work with serious intent and conviction, with courage and integrity. They did not pronounce people guilty without making a serious attempt to study the charges, investigate them, and come to their own independent conclusions, without fear or favor. They did not blindly print what law enforcers claimed, what the bureaucracy said or what politicians planted on to them. That is why people trusted them. But now we are seeing a different self-acquired role of media in form of 'media trial'. Everyone manipulates the media to serve their own interests or hurt their rivals. The problem does not lie in media's exposing the lacuna of a bad investigation by cops, or mal-performance of the duties ordained to the civil servants but the eye-brows start to raise when the media *ultra vires* its legitimate jurisdiction and does what it must not do. Be it highlighting the *sub-judice* issues into public keeping at stake the sanctity of judicial procedures and '*right to life with dignity*' of accused and suspects. The media trial has now moved on to media verdict and media punishment which is no doubt an illegitimate use of freedom and transgressing the prudent demarcation of legal boundaries. It is necessary to check prejudicial publicity of the subject matter pending before a court. It should be legally permissible to pass restraint order on the media.

RIGHT TO A FAIR TRIAL

Right to a fair trial is absolute right of every individual within the territorial limits of India vide articles 14 and 20, 21 and 22 of the Constitution. Needless to say right to a fair trial is more important as it is an absolute right which flows from Article 21 of the constitution to be read with Article 14. Freedom of speech and expression incorporated under Article 19 (1)(a) has been put under 'reasonable restriction' subject to Article 19 (2) and Section 2 (c) of the Contempt of Court Act. One's life with dignity is always given a priority in comparison to one's right to freedom of speech and expression. Media should also ponder upon these facts. Fair trial is not purely private benefit for an accused – the public's confidence in the integrity of the justice system is crucial.³ The right to a fair trial is at the heart of the Indian criminal justice system. It encompasses several other rights including the right to be presumed innocent until proven guilty, the right not to be compelled to be a witness against oneself, 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 witnesses, etc. In the case of

² Jagannadha Rao, *Fair Trial and Free Press: Law's Response to Trial by Media*, p. 26.

³ *Gisborne Herald Co. Ltd. V. Solicitor General*, 1995 (3) NZLR 563 (CA)

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Zahira Habibullah Sheikh v. State of Gujarat,⁴ the Supreme Court explained that a “fair trial obviously would 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 witnesses, or the cause which is being tried is eliminated.”

RIGHT TO BE LEGALLY REPRESENTED

Through media trail, we have started to create pressure on the lawyers even — to not take up cases of accused, thus forcing these accused to go to trial without any defense. Is this not against the principles of natural justice? Every person has a right to get himself represented by a lawyer of his choice and put his point before the adjudicating court and no one has the right to debar him from doing so. For an instance, when eminent lawyer Ram Jethmalani decided to defend Manu Sharma, a prime accused in a murder case, he was subject to public derision. A senior editor of the television news channel CNN-IBN called the decision to represent Sharma an attempt to “defend the indefensible”. This was only one example of the media-instigated campaign against the accused.⁵ As we all knew that in that case we had one of the best lawyers of the country, Gopal Subramaniam, appearing for the state and the case of Manu was handed to some mediocre lawyer. Media went hammer in tongues when Mr. Jethmalani took the case and posed him as a villain. Don’t we want to give equal opportunity to the defense to prove its case, or have we lost faith in the judiciary? The media have to understand their limit before it becomes too late.

Suspects and accused apart, even victims and witnesses suffer from excessive publicity and invasion of their privacy rights. Police are presented in poor light by the media and their morale too suffers. The day after the report of crime is published; media says ‘Police have no clue’. Then, whatever gossips the media gathers about the line of investigation by the official agencies, it gives such publicity in respect of the information that the person who has indeed committed the crime, can move away to safer places. The pressure on the police from media day by day builds up and reaches a stage where police feel compelled to say something or the other in public to protect their reputation. Sometimes when, under such pressure, police come forward with a story that they have nabbed a suspect and that he has confessed, the ‘*Breaking News*’ items start and few in the media appear to know that under the law, confession to police is not admissible in a criminal trial. Once the

⁴ *Zahira Habibullah Sheikh v. State of Gujarat*, [(2004) 4 SCC 158]

⁵ <http://www.hrdc.net/sahrdc/hrfeatures/HRF164.htm> accessed on 10th June 2008.

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confession is published by both the police and the media, the suspect's future is finished. When he retracts from the confession before the Magistrate, the public imagine that the person is a liar. The whole procedure of due process is thus getting distorted and confused. The media also creates other problems for witnesses. If the identity of witnesses is published, there is danger of the witnesses coming under pressure both from the accused or his associates as well as from the police. At the earliest stage, the witnesses want to retract and get out of the muddle. Witness protection is then a serious casualty. This leads to the question about the admissibility of hostile witness evidence and whether the law should be amended to prevent witnesses changing their statements. Again, if the suspect's pictures are shown in the media, problems can arise during 'identification parades' conducted under the Code of Criminal Procedure for identifying the accused.

SUBCONSCIOUS EFFECT ON THE JUDGES

Another worrying factor and one of the major allegations upon 'media trial' is prejudicing the judges presiding over a particular case. The American view appears to be that Jurors and Judges are not liable to be influenced by media publication, while the Anglo-Saxon view is that Judges, at any rate may still be subconsciously (though not consciously) influenced and members of the public may think that Judges are influenced by such publications under such a situation. Therefore, Lord Denning stated in the Court of Appeal that Judges will not be influenced by the media publicity⁶, a view which was not accepted in the House of Lords.⁷ Cardozo, one of the greatest Judges of the American Supreme Court, referring to the "*forces which enter into the conclusions of Judges*" observed that "*the great tides and currents which engulf the rest of men, do not turn aside in their course and pass the Judges by*".⁸ Hon'ble Justice D. M. Dharmadhikari, Chairman, M. P. Human Rights Commission also

⁶ *Attorney General v. BBC* : 1981 AC 303 (CA), p. 315.

⁷ *Supra* note 3.

⁸ '*Nature of the Judicial Process*' , Lecture IV, Adherence to Precedent. *The Subconscious Element in the Judicial Process*, 1921, Yale University Press.

The full text of the passage in the above essay of Cardozo reads thus:

"Even these forces are seldom fully in consciousness. They lie so near the surface, however, that their existence and influence are not likely to be disclaimed. But the subject is not exhausted with the recognition of their power. Deep below consciousness are other forces, the likes and the dislikes, the predilections and the prejudices, the complex instincts and emotion and habits and convictions, which make the man, whether he be litigant or Judge There has been a certain lack of candor in much of the discussions of the theme or rather perhaps in the refusal to discuss it, as if Judges must lose respect and confidence by the reminder that they are subject to human limitations"

Cardozo then stated in a very famous quotation, "None the less, if there is anything of reality in my analysis of the Judicial Process, they do not stand aloof on these chill and distant heights; ... The great tides and currents which engulf the rest of men, do not turn aside in their course, and pass the Judges by".

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asserted that there is always a chance that judges get influenced by the flowing air of remarks made upon a particular controversy. The media presents the case in such a manner to the public that if a judge passes an order against the “media verdict”, he or she is deemed either as corrupt or biased.

JUSTIFICATION BY MEDIA

We have a rich tradition of fiercely independent journalism. In fact, all the big scams were busted by the press. The law enforcers merely followed them up. The poorly paid journalist must be credited for extracting those information which looked inaccessible for the top vigilance teams of the country. That is how HDW(Howaldswerske) marine case and Bofors hit the headlines. That is how we found out that Narasimha Rao had bribed the Jharkhand Mukti Morcha MPs and Satish Sharma and Buta Singh had brokered the deal. The media did us proud at every juncture of our political juncture.

There is increasing and intense public focus on Courts and the cases filed therein. Whether reported in daily newspaper or in electronic media, Indians avidly devour this information, since they are curious about what happens in Court. Now that the Courts have come under the media’s microscope, they are likely to remain there forever. As with most changes both positive and negative consequences have flowed from this. A Positive by-product of changes spurred by the media and addressed by the Courts is that more Indians are aware of their constitutional rights than ever before. The media strongly resents this *sub judice* rule and complains that Courts during the course of a hearing tend to interpret the *sub judice* rule quite strictly to prohibit any discussion of the issues before the Court even if they are engaging public attention. In their opinion such a restriction could be applied more legitimately to situations where a jury of lay people is involved. After the abolition of the jury system when decisions are made by professional judges who are trained not to be influenced by happenings outside the Court there is less of a justification for a strict application of the rule. There is, therefore, an urgent need to liberalize the *sub judice* rule, invoking it only in cases of an obvious intent to influence the trial and not to any act that might have the remote possibility of influencing it.

LAW COMMISSION S 200TH REPORT

The most reckoning research on the positive and negative aspects of media trial has been elaborated in 200th report of the Law Commission entitled *Trial by Media: Free Speech vs.*

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Fair Trial Under Criminal Procedure (Amendments to the Contempt of Court Act, 1971) that has made recommendations to address the damaging effect of sensationalized news reports on the administration of justice. While the report has yet to be made public, news reports indicate that the Commission has recommended prohibiting publication of anything that is prejudicial towards the accused — a restriction that shall operate from the time of arrest. It also reportedly recommends that the High Court be empowered to direct postponement of publication or telecast in criminal cases. The report noted that at present, under Section 3 (2) of the Contempt of Court Act, such publications would be contempt only if a charge sheet had been filed in a criminal case. The Commission has suggested that the starting point of a criminal case should be from the time of arrest of an accused and not from the time of filing of the charge sheet. In the perception of the Commission such an amendment would prevent the media from prejudging or prejudicing the case. Another controversial recommendation suggested was to empower the High Court to direct a print or an electronic media to postpone publication or telecast pertaining to a criminal case and to restrain the media from resorting to such publication or telecast. The 17th Law Commission has made recommendations to the Centre to enact a law to prevent the media from reporting anything prejudicial to the rights of the accused in criminal cases from the time of arrest, during investigation and trial.

EPILOGUE

Any institution, be it legislature, executive, judiciary or bureaucracy, is liable to be abused if it exceeds its legitimate jurisdiction and functions. But sometimes these *ultra vires* activities are blessing in disguise as is the case of judicial activism. Media trial is also an appreciable effort along with the revolutionary sting operations as it keeps a close watch over the investigations and activities of police administration and executive. But there must be a reasonable self-restriction over its arena and due emphasis should be given to the fair trial and court procedures must be respected with adequate sense of responsibility. Media should acknowledge the fact that whatever they publish has a great impact over the spectator. Therefore, it is the moral duty of media to show the truth and that too at the right time. While the print media has reached at a saturation stage where it is aware of legal guidelines and ethical limits but the electronic media is experimenting and is relying upon ‘trial and error’ method for what to show and more importantly what not to. The time will come when electronic media will also be well regulated by self-censored guidelines and we shall retain a ‘*completely free press*’, the dream of our first Prime Minister and that too without any danger involved.