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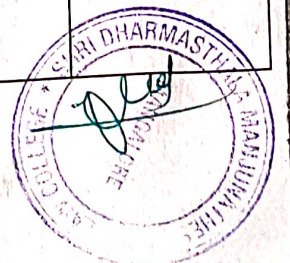
FREEDOM OF MEDIA IN INDIA

(Peer Reviewed)



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Res Sub-Judice and Trial by Media in India at a Glance

Dr. Ashwini P*

Abstract

In India Media is one of the freest organs in the world in terms of legal constraints. Freedom of speech and expression incorporated under Constitution of India in Article 19 (1) (a) stands as an important facilitator for the extensive arrangement in a democracy. Pandith Jawaharlal Nehru, the first Prime Minister of independent India remarked that, "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 press¹." Unfortunately, he could not foresee the danger involved in the 'administration of justice' being the very essence of principles of natural justice and the rule of law nor been expected its involvement in such reporting beyond its limit and ethics. To effectuate the vision of Mr. Nehru², the media has been adduced with many freedoms and immunities compared to the other three organs of the government, so that media *inter-alia* press being considered as fourth pillar of democracy stands strong and tall. However, Lord Atkin relates notion of power with liberty because according to him liberty does corrupt into license and is prone to be abused³. Freedom of expression is not absolute, unlimited or unfettered and in all circumstances⁴ and may not be an unrestricted freedom so that can lead to uncontrolled license⁵. At this juncture the paper analyses and examines the role of media in upholding process of administration of justice and limits of media in Judicial reporting's.

Key Words: *Media, Administration of Justice, Open justice rule, Freedom of Speech and Expression, Trial.*

Introduction

Media plays a significant role in the modern world as it is an imperative source of information striving to mould public opinion, belief and outlook. Media has become the medium of interaction and gateway of spatial knowledge. With the advent in technology,

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¹S. Devesh Tripathi, *Trial By Media Prejudicing The Sub-Judice*, Retrieved from http://www.rmlnlua.ac.in/webj/devesh_article.pdf, visited on 18th October 2021

² The then first Prime Minister of independent India

³ *Express Newspapers Vs. U.O.I.*, (1997) 1 SCC 133

⁴ Ibid

⁵ Supra Note 1



print and electronic media have gained importance in terms of making freedom of press more significant. Media creates awareness about socio-political and economic events around the globe. The manner in which media disseminates information creates desirable expression and sentiments. Freedom of press is guaranteed under the Constitution of India and historically press freedom has been debated in every democratic country. It is a right that goes beyond an individual freedom of expression. The Constitution of India declares, 'All citizens shall have the right-(a) to freedom of speech and expression...' ⁶ and also clarifies that this right is not absolute, but subject to reasonable restrictions imposed by law in the interest of sovereignty and integrity of India, 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 offence ⁷. In our country freedom of press flows from Article 19(1)(a) of the Constitution of India. Freedom of press was created by our founding fathers to work as a protector in purveying information.

Media, subjects the entire justice system and the judicial processes to public scrutiny. Media is considered to be the watchdog of society and catalyst of reforms. It is considered to be the fourth pillar of the democracy after legislature, executive and judiciary. For the smooth functioning of democracy media impliedly claims the right to investigate, reveal, expose and criticize to create a constructive check ⁸. Correspondingly, media has a duty to responsible and accountable journalism. Free and robust reporting, criticism and debate contribute to public understanding of the rule of law and for a better comprehension of the entire justice system. In a democracy the public has a right to know and to be informed from which stems freedom of the press. Media has to take utmost precaution while publishing news and cases pending before court as it would lead to trial by media. The investigative role of press has been useful to set right the mal-administration of government, exposing crimes and unlawful acts and disseminating information of public interest. But the expression public interest has no fixed connotation. Trial ⁹ by media has become an acute problem with the ever expanding role of media. The phenomenal growth in technology ensures quick flow of information ¹⁰.

⁶ Article 19(1) (a) of Indian Constitution

⁷ Clause 2 of Article 19 of Indian Constitution

⁸ Article 19(1)(a),

⁹The word 'Trial' has been defined as a formal judicial examination of evidence

¹⁰ Manasyika S , *A Critical Study on Trial by Media*, retrieved from <http://archives.christuniversity.in>, visited on 12th April 2



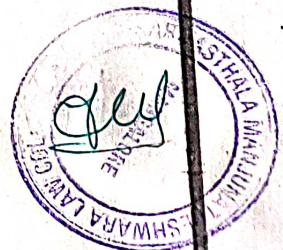
The advent of electronic media, extensive media coverage and opening up of too many media channels in all medium and string of criminal and high profile cases have led to changes in publication pattern which are likely to have pre-judicial impact on the suspects, accused, witnesses, judges and on general administration of justice. Citizens have right to know and media is a gateway to channel the voice of masses. Media has reinforced its role, through which criminal justice hierarchy system is known. Media reincarnates public perception of order and disorder in the society. Sensationalism of media coverage have led to heated debates between free speech and fair trial as claimed by those who shore up for free press on one hand and right to individual's fair trial as proclaimed by the judiciary. Media demands for unrestricted freedom of expression in disseminating information about a case prejudicing the construction of criminal stories which are more sensationalized than committed looking more like entertainment rather than truth. Media has to balance its stance with regard to framing of their coverage, as reporting a specific criminal event, impacts construction of public drama and leads to media trial affecting society's representation of judicial efficiency. Media has a tendency to steal the version of law, crime, and justice, social and political scenario. The criminal justice hearing in particular has a greater amount of news worthiness attracting extensive media focus. Media upholds public interest and constantly engages itself in search and prevalence of truth remarkable to run a free and smooth democracy however it cannot exemplify to act as public proxy in demand for justice. The concept of judicial independence and impartiality is a condition precedent to the sacrosanct principle of due process of law that the right of the accused to the fair trial should be observed¹¹.

In the view of Mr. Andrew Belsey in his article verifies that media has onerous responsibility to ensure that facts are verified and matter is extensively investigated, analysed, researched and only salient critical information is collected and rendered to its readers and public in general. Journalists and ethics are two distinct facilitators in a democracy¹². While the journalists promotes functioning and discussions in a democracy the media have certain code of ethics, virtues, fairness, balanced reporting to follow as a restive institution which are crucial for the smooth functioning of democratic process, sidelining the temptation of salacious storytelling and to present what is in public interest rather than what public is interested in¹³.

¹¹ Supra Note 10

¹² *Mother Dairy Foods & Processing Ltd v. Zee Telefilms*, AIR 2005 Delhi 195

¹³ Supra Note 10



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If press covers stories as its whims and fancies, it creates a deep impression in the minds of the reader based on their coverage steering public opinion about guilt or innocence of the accused or suspect. This kind of adverse public opinion, desirable sentiments of mass voices or outraging harmony of a community about a trial interferes with the functioning of judicial process. Legal complexities may arise when there is an unwanted interference with administration of justice, hindering Constitutional protection of right to fair trial. Then the question arises if restrictions of such publications are ordered in order to protect fair trial, would it lead to abridgment of free speech or curbing of freedom of press and dichotomy of free speech and fair trial. Thereby, an attempt has been made through this paper to address all these issues. Thus the question to be addressed in this paper is the extent to which the battle ground of media freedom today has new frontiers that incorporates media trial and entrails into taking stock in the realm of new media arena demanding a need to cautiously consider the issue of trial by media, interference with administration of justice and right to fair trial besides addressing the questions appurtenant thereto¹⁴.

Open Justice Rule

In simple terms Open Justice Rule means *'holding court proceeding in public'*. Openness and Public access to what transpires in court is a basic feature of democracy as it restores public confidence in judiciary. Thus, it is being animated as a starting point in establishing a relation between court proceeding and media. The concept of justice being administered in open is an age old tradition and is open to public and press. The basic principle of open court is that administration of justice must be open to scrutiny except in exceptional cases. Justice manifests as a multi-dimensional principle ensuring openness, publicity, attainment of truth, right of access to fair and accurate reports of proceeding conducted in open court. However no right is absolute, in certain exceptional cases trial is held behind closed doors. The need for publicity to achieve justice was laid by Jeremy Bentham in the following words as *"publicity ensures scrutiny of administration of justice"*¹⁵.

Transparency must be maintained while reporting judicial proceeding as justice must not only be done it must be seen to be done, but openness must be safeguarded. The same rationale being followed by Justice S.M., Bachawat in *Neeraj Sridhar Mirajkar Vs. State of*

¹⁴ Supra Note 10
¹⁵ *Scott Vs Scott*, (1913) AC 417



*Maharashtra*¹⁶, judicial proceedings must be in open as it is a universal principle, open justice enhances public knowledge and ensures administration of justice, however to safeguard openness and due course of justice exceptions shall be placed. The objective being a person facing trial must be given legal assistance in consonance of Indian Constitution¹⁷. Court may restrict publicity of proceeding in the interest of justice if satisfied beyond reasonable doubt and apprehensions that end of justice would be defeated if tried in open court. If necessary, Court can invoke inherent power under Article 129 and Article 215 of Indian Constitution can prohibit publications of court proceedings or evidences of case outside court by media. Right to open justice is not absolute and can be restricted in certain exceptional cases¹⁸.

Exceptions to the Rule of Open Justice

The fundamental principle of open justice yields exceptions and it can be placed only in the interest of administration of justice. Court rooms are not just a ready source of facts for the media. Paramount importance in a democracy is always given to freedom of speech, open justice, right to access. However, when there is adverse apprehension on the presumption of innocence or anything disproportional to fair trial then it exemplifies limits in discretion of open justice. Media devices as a translator between court proceeding and general public. Thus it has to maintain accountability, transparency while reporting. Broadly, hearing of pre- trial proceeding in chambers and in-camera proceeding are two exceptions recognised being general power of court¹⁹.

Free speech and right to fair trial runs parallel to open justice but however both have the effect of imposing restrictions when it disturbs justice. Another important proponent of suppression is privacy as there is a keen interest revolving round the identity of the accused, perpetration of crime, victims, witness, and national security. In *Australian Securities and Investment Commission Vs Rich*²⁰, laid certain considerations that qualify principle of open justice- prematurity, trial by media, ambush, misleading reports, commercial confidentiality are some of the qualifications to principle of open justice. There are few strict situations where reporting, court proceedings are restricted to maintain right to fair trial in order to avoid prejudice and need for fairness of trial. Therefore, media needs to create a balance

¹⁶ AIR 1967 SC 1
¹⁷ Article 21 of Indian Constitution
¹⁸ *Kehar Singh Vs State*, AIR 1988 SC 1883
¹⁹ *Supra Note 10*²⁰ (2001) 51 NSWLR 643



while reporting the need for fair trial and upholding the principle of open justice to reconcile the created tensions. Over the years, revolution of communication has taken place be it in the field of news, internet, televised broadcast, podcasts etc. paving way for new hurdles to erode fairness of trial²¹.

Doctrine of Postponement

In US, free speech is not attributed with restraints as it is an absolute right. However, with changing scenario and after cases like *O.J. Simpson*²² gave birth to the concept of neutralizing technique. As an exceptional cases court resorted to neutralizing techniques i.e. change of venue, reversal of conviction, voir dire, ordering re-trial to overcome the effect of prejudicial publicity. In *Anita Whitney Vs California*²³ US Court observed that to believe that the danger apprehended is real and imminent there must be a direct nexus or probability of serious injury to the state.

In UK, in the light of *Sunday Times Vs US*²⁴, to achieve a balance between fair trial and rights of media, section 4(2) of 1981 UK Act was enacted expressly empowering the courts to pass postponement orders of publication or parts of publication for certain period as to avoid serious prejudice, substantial risk causing to the administration of justice to safeguard fairness of trial and to prevent possible contempt.

Supreme Court of India not only strictly enshrines fundamental rights but also plays a vital role in balancing different fundamental rights. Several judicial pronouncements are traced on prior restraints in the case of *Brij Bhushan Vs State of Delhi*²⁵, *Virendra Vs State of Punjab*²⁶ as balancing Article 19(1)(a) and pre-censorship was seen. In *K.A. Abbas Vs UOI*²⁷, Court upheld prior restraint. In *Neeraj Mirajkar Vs State of Maharashtra*²⁸, postponement orders were upheld in case it conflicts with principles of open justice. Courts with inherent powers could pass orders temporarily prohibiting the publication of proceedings in the media.

²¹ Supra Note 10

²² *State Vs Simpson*, No. BA 097211 (Cal. Super.Ct filed July 22 1994)

²³ 274 US 357 (1927)

²⁴ (1979), Series A No. 30, 14 EHRR 229

²⁵ AIR 1950 SC 129

²⁶ AIR 1957 896

²⁷ AIR 1971 481

²⁸ AIR 1967 SC 1



In *Reliance Petrochemicals Limited Vs Proprietors of Indian Express Newspaper Bombay Pvt Ltd*²⁹, Supreme Court expounded the validity of issue of debenture which was published in an article in spite of being an sub-judice matter. The court restrained the press from publishing articles, i.e. prior restraint was ordered by the court on the grounds that it interfered with the administration of justice. The Court looked into the US doctrine of clear and present danger test. Thus postponement orders for temporary period is recognised as an inherent power of court to meet the ends of justice and such orders could not be held to violate Article 19(1) (a).

Thereby to balance free press and free trial it is important to balance public confidence, when freedom of speech and expression outweighs the balance of public importance hindering administration of justice or fair trial postponement orders may be an option but there can be no abstract theory regarding this. Right to know puts a greater responsibility on the media as they take the responsibility of informing the public, thus holding accountability to the information they deliver. In *Sahara India Real Estate Vs Securities Exchange Board of India*³⁰, confidential proposals sent by both counsels appeared on television channels. Court observed that there is an increasing incidence of reporting of sub-judice matters not only affecting merits of the case, sentiments of parties but also tampering administration of justice. This case stressed on the need for framing guidelines on media reporting and to set directions to the extent of pre-trial publicity on matters that are sub-judice. A five judge bench headed by Chief Justice JH., Kapadia laid down that guidelines on media coverage and publications cannot be construed, however only principle of postponement order can be laid as affected parties can seek order for matter sub-judice or when there is substantial risk of prejudice, that too on case by case basis, thus declined to frame guidelines for media coverage and publication for court proceedings. Neutralising technique is not prohibitive in nature as it is an essential requisite to balance freedom of speech and expression and right to fair trial for proper administration of justice³¹.

The Contempt of Courts Act, 1971 is an important tool to protect institution of administration of justice though not expressly mentioned falls under Article 19(2) of Indian Constitution read with article 129 & 215 of Indian Constitution. Indian Courts have recognised postponement orders and it clearly falls under Article 19(2) as it is essential to

²⁹ AIR 1989 SC 190

³⁰ 9 (2012) 10 SCC 603

³¹ 200th Law Commission Report



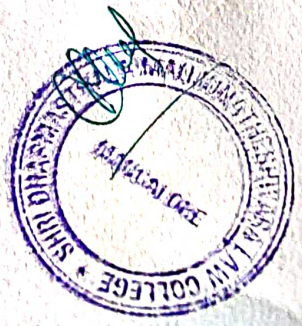
weigh equal rights in case of pre-judicial, pre-trial publicity which is having a tempering effect on the due course of justice³². The test of reasonableness must be laid as the rationale behind the reliance of postponement order is that publications must not create real, present, danger and substantial risk of prejudice to fairness of trial, administration of justice. It is observed as a preventive measure and not a punitive measure, to balance competing rights only if neutralizing techniques do not fill parameters, postponement orders may be passed on actual publications only for a short or temporary period of time³³.

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. 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

³² Supra Note 10

³³ Ibid



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reasonable discrimination³⁴. 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 previous image. Such kind of exposure provided to them is likely to jeopardize all these cherished rights accompanying liberty. 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'³⁵. 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'³⁶ of accused and suspects. It should be legally permissible to pass restraint order on the media³⁷.

Effect of Trial by Media on 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 publicity, a view which was not accepted in the House of Lords. 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

³⁴ Supra Note 10

³⁵ Supra Note 1

³⁶ Article 21 of the Indian Constitution

³⁷ Ibid



tides and currents which engulf the rest of men, do not turn aside in their course and pass the Judges by"³⁸. Hon'ble Justice D. M. Dharmadhikari, Chairman, M. P. Human Rights Commission also 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 biased³⁹.

Trial by Media: A Boon or a Curse

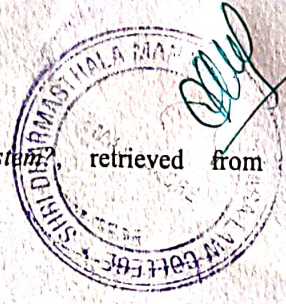
From the above such research, it has been clear that the media trials have had more of a negative impact than a positive one. The media has to be properly regulated by the courts. While a media which has been controlled by the government is not good for democracy, the implications and the result of unaccounted publications are even more damaging not just to the reputation of the person but also to the judgment imposed by the courts. Therefore, media trials have only served to help the people in only very few instances but that does not happen in all the cases, thus it is necessary to have restrictions imposed on it. Media, as referred to by many as the eyes and ears of the general public. It forms the backbone of our society. And a responsible media is expected to take into consideration the reliance entrusted on it by the general public and confidence and faith entrusted whereby common man/public blindly accepts the truth of the news published by media. This actually calls for the existence of a responsible media. No freedom, however sacred it may be, can be absolute. This is also true of press freedom. Not only the freedom of press is subject to the laws of the land, such as contempt and libel, but also is responsible to the society it serves. It should accept certain responsibilities in the discharge of its function⁴⁰.

The press has an obligation voluntary and selfimposed that in presentation of truthful news and fair comment it adheres to certain norms of decency and decorum, and that it does not indulge in vulgarity, obscenity, character assassination, violation of citizen's privacy and incitement to offence, disorder and disintegration of the country. The media strongly feels bitter about this sub judice rule and complain that Courts during the course of a hearing tend to interpret the sub judice rule. However, there is an urgent need to liberalize the sub judice

³⁸ Supra Note 1

³⁹ Ibid

⁴⁰ Bhaswath Prakash, *Trial By Media - A Threat to Our Judicial System*, retrieved from <https://www.legalserviceindia.com/>, visited on 12th April 2022



rule, applying it only in important cases that will likely influence the trial and not to any act that might have the remote possibility of influencing it. Another main constraint on stings and trials by media is the public interest. If public interest is missing and either self or manipulative interests surface, the media loses its ground and invites the rage of the court. Norms that should be followed by the Media for any Media Trial to avoid any Issues on the Path of Justice under the Constitution.

Suggestions

While acting as a responsible media, it should follow certain norms in reporting of a crime or any news related to the same⁴¹:

- Accuracy of the case shall be maintained and verified before the same is reported/published and read of all.
- Every caution shall be undertaken to avoid any writing that is opinion based i.e. either favoring or defaming any person/party.
- Right to privacy shall not be interfered with.
- Accuracy is of utmost importance while reporting court proceedings.
- Reports based on mere suspicion or personal opinion shall not be published.
- The heading shall not be purposely made sensational or provocative; it must be apt for the matter printed under it.

Conclusion

Constitutionally, the press in India has no special rights, said Dr Ambedkar. But a free press is a political imperative for democracy to survive. In a criminal trial, the prosecution and the accused have the right to a fair trial. Between free speech and fair trial, the borders are sometimes crossed and the rules breached, leading to devastating consequences to individuals and institutions. The 'tele-terror' should not be allowed to meddle with a trial in accordance with the law. The digital violence in itself is a breach of peace.

Trial by the media is not merely a legal issue. It is also a political problem. On the one hand, it derails the lawmen from the legal track. On the other, it also distracts the

⁴¹ Supra Note 39

⁴² Ibid



laymen, the 'public in the republic', from crucial issues like economic disasters, unemployment or the growing unfreedom. Authoritarian regimes always have invisible ministries for distraction which manifest through the media that they hire. Democracy requires perpetual vigilance.

The media outlets, instead of trying the case, need to closely watch the institutional and processual deficits. There are striking illustrations where the media has played a positive and proactive role. Censorship can inhibit such fine facets of a free press. A judicious balance has to be struck⁴³.

