

## **Trial by Media: Fair or Foul Play**

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### **I) INTRODUCTION**

***"The media's the most powerful entity on earth. They have the power to make the innocent guilty and to make the guilty innocent, and that's power, because they control the minds of the masses."***

**- Malcolm X**

Media is regarded as one of the pillars of democracy. Media has wide ranging roles in the society. Media plays a vital role in moulding the opinion of the society and it is capable of changing the whole viewpoint through which people perceive various events. The media can be commended for starting a trend where the media plays an active role in bringing the accused to hook.

Freedom of media is the freedom of people as they should be informed of public matters. It is thus needless to emphasise that a free and a healthy press is indispensable to the functioning of democracy. In a democratic set up there has to be active participation of people in all affairs of their community and the state. It is their right to be kept informed about the current political social, economic and cultural life as well as the burning topics and important issues of the day in order to enable them to consider forming broad opinion in which they are being managed, tackled and administered by the government and their functionaries. To achieve this objective people need a clear and truthful account of events, so that they may form their own opinion and offer their own comments and viewpoints on such matters and issues and select their future course of action.

Electronic media now plays a major role in stirring public opinion. It is this potency to reach the public that entails that all the channels understand and realise the heavy responsibility that is thrust on them and that there is no case for possible misuse.<sup>1</sup> In *Surya Prakash Khatri v. Smt. Madhu Trehan*<sup>2</sup> the Supreme Court equated the power of the press to nuclear power stating that ' it can create and it can destroy. The Apex Court also stated that it is imperative for the media to exercise due care and caution before

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<sup>1</sup> Court on its Own Motion Vs. States, 146(2008), DLT429, 2008(100), DRJ144

<sup>2</sup> 92 (2001), DLT 665

publication of a potentially damaging piece is published. It cannot be doubted that the media is well within its rightful domain when it seeks to use tools of investigative journalism to bring us face to face with the ugly underbelly of the society. But such right must be used cautiously.

## II) Importance of Fair Trial

In *Subhash Chander v S. M Aggarwal*<sup>3</sup> the Delhi High Court stated that one of the most valuable rights of our citizens is to get a fair and impartial trial free from an atmosphere of prejudice. This right makes it obligatory upon the State not to deprive any person of his life or personal liberty except according to the procedures established by law. If accused have a right to a fair trial then it necessarily follows that they must have a right to be tried in an atmosphere free from prejudice or else the trial may be vitiated on this ground alone." Further in *Zahira Habibullah Sheikh v. State of Gujarat*<sup>4</sup>, the Supreme Court explained that a fair trial 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.

## III) Media and Fair Trials:

As a disseminator of public opinion, media has been instrumental in helping victims of crimes getting justice, when opaque bureaucracy and rampant corruption stifles prosecution of the powerful. The media played an unparalleled role in the Jessica Lal murder case. The media was successful in criticising the trial court's acquittal of the son of a police inspector who raped and killed Priyadarshini Mattoo. Fearless media campaigns have unravelled ugly truths about Khap Panchayats. Such instances run into the hundreds, at national and local level.

There are though limits on the freedom of the press. In *Mother Dairy Foods & Processing Ltd v. Zee Telefilms* <sup>5</sup>it was recognised that while journalists and media are 'distinctive facilitators' and they must follow the virtues of accuracy, honesty, truth, objectivity and fairness. The court finally concluded that often the media conveys what the 'public is interested in' rather than what is in 'public interest'.

## IV) Media and Justice:

"The tension between the courts and the media revolves around two general concerns. The first is that there should be no 'trial by media'; and the second is that it is not for the press or anyone else to 'prejudge' a case. Justice demands that people should be tried by courts of law and not be pilloried by the press."<sup>6</sup>

In *M.P. Lohia v. State of W.B. and Anr*<sup>7</sup>freedom of speech and expression sometimes may amount to interference with the administration of justice as the articles appearing in the

<sup>3</sup> Subhash Chander vs. S.M. Aggarwal, 25(1984), DLT52

<sup>4</sup> (2004), 4 SCC, 158

<sup>5</sup> AIR, 2005, Delhi, 195

<sup>6</sup> Bijoyananda vs. Bala Kush AIR 1953 Orissa 249

<sup>7</sup> (2005) 2 SCC 686,

media could be prejudicial. The liberty of the press is subordinate to the administration of justice. The plain duty of a journalist is the reporting and not adjudicating cases.<sup>8</sup>

A popular argument in favour of the media is the people's right to know. Referring to the Reynold's<sup>9</sup> the Delhi High Court has clearly explained in the administration of justice, no balancing act is permissible. It is not permissible to contend that the public interest or the right to know outweighs the administration of justice. Such a view may shake the very structural foundations of an impartial justice delivery system.<sup>10</sup> Media does not know what harm it is doing by having a parallel trial and reporting the proceedings in a manner by giving the news which are detrimental sometimes to the accused who is facing trial and sometimes even to the prosecution.<sup>11</sup>

### **Pre-Trial Impact:**

Pre-trial publicity regularly brings about the most criticizing wellspring of partiality. A legitimate translation of the Contempt of Courts Act read with the Article 19 (2) constrains the extent of Contempt of Courts to matters relating to the Court. Much of pre-trial publicity which is definitely not secured can't under our constitutional regime be confined. In the grounds included in Article 19(2) the ground of 'administration of justice' is a striking non-attendant.

### **Impact on the court:**

The kind of media trial which is going on in this country creates bias not only in the minds of the general public but also vitiates the atmosphere and this certainly has the tendency to put pressure on the Magistrate or the Sessions Judge or on the court, while taking decisions, which is not a healthy sign for development of criminal jurisprudence. Media does not know what harm it is doing by having a parallel trial and reporting the proceedings in a manner by giving the news which are detrimental sometimes to the accused who is facing trial and sometimes even to the prosecution. Judges are also human beings and when hue and cry is made by the media it is possible that the equilibrium of a Judge is also disturbed. It is therefore time that under the garb of freedom of press the parallel proceedings of media in criminal trial should stop.<sup>12</sup>

S.A.R. Geelani, one of Afzal's co-defendants in the Parliament attack case, was initially sentenced to death for his alleged involvement despite an overwhelming lack of evidence. Large sections of the Indian media portrayed him as a dangerous and trained terrorist. On appeal, the Delhi High Court overturned Geelani's conviction. The prosecution's case was described as "at best, absurd and tragic". including in some cases, a deprivation of the right to legal representation. Many times, it intimidates lawyers into refusing to represent accused persons.

<sup>8</sup> Harnarain vs. Gumori Ram AIR 1958 Punjab 273

<sup>9</sup> Reynolds vs. Times Newspapers Ltd. [1999] 4 All ER 609

<sup>10</sup> Court on its own motion Vs. Respondent: State and Ors.151(2008)DLT695

<sup>11</sup> Indian Council of Legal Aid and Advice vs. State, WP 'No. 17595/2006, decided on 27th November, 2006

<sup>12</sup> Indian Council of Legal Aid and Advice v. State, WP 'No. 17595/2006, decided on 27th November, 2006

The police investigations of 'serial-killings' in Noida in the outskirts of New Delhi, received extensive media coverage. Much of the media coverage proclaimed that Mohinder Singh Pandher, and his domestic help Surendra Kohli, had already confessed to the killings. Consequently, the local Bar Association announced that it had decided that no advocate from

Noida would defend either of the accused. Likewise, when eminent lawyer Ram Jethmalani decided to defend Manu Sharma, a prime accused in a murder case, he was subject to public derision.

The gruesome 26/11 attacks on Mumbai resulted in country wide panic in India. Once his photos were released Mohammed Ajmal Amir Kasab became the most hated figure in India. For fear of public anger Kasab could not get a lawyer to defend him. Once he did, the lawyer was eventually forced to terminate his representation owing to the barrage of the media's cameras and questions. In the absence of proper legal representation Kasab's trial ran the risk of being vitiated. The lawyer's feared that the media would condemn them for guilt by association. There can be no better example to prove that the trial by media indeed is the very

Antithesis of rule of law<sup>13</sup>

Interference with the administration of justice may also be occasioned through conduct which carries a substantial risk of influencing a witness in an improper manner.<sup>14</sup> Pre - investigation media publicity also renders effective investigation procedures useless. Test identification parades conducted under the CRPC are rendered useless if the witness has been exposed to the images of the persons comprising the parade. The idea of the parade is to test the veracity of the witness on the question of his capability to identify, among other persons, an unknown person whom the witness had seen at the time of occurrence.<sup>15</sup> The witness must not have seen the accused in the intervening period. As held by the Supreme Court<sup>16</sup>, the identification of witnesses in court would be vague and meaningless, if the witnesses had a chance of seeing the accused beforehand.

Quoting *Jeremy Bentham*, on secrecy in the administration of justice,

"In the darkness of secrecy, sinister interest and evil in every shape are in full swing. Only in proportion as publicity has place can any of the checks applicable to judicial injustice Operate. Where there is no publicity, there is no justice. Publicity is the very soul of justice.

It is the keenest spur to exertion and the surest of all guards against improbity. It keeps The judge himself while trying under trial."<sup>17</sup>

<sup>13</sup> State of Maharashtra v. Rajendra Jawanmal: (1997) 8 SCC 386

<sup>14</sup> CJ Miller, *Contempt of Court*. (3rd ed) Oxford University Press Oxford 2000 at 324

<sup>15</sup> Kanan v. State of Kerala 1979 Cr.L.J. 919.

<sup>16</sup> Shaikh Umar Ahmed Shaikh and Anr.v. State of Maharashtra(1998) 5 SCC 103; Simon and Ors. v. State of Karnataka, JT2004(2)SC124.

<sup>17</sup> K.G. Balakrishnan, *The Constitution, The Media And The Courts*, The Fourth K.S. Rajamony Memorial Public Law Lecture, Kerala, [www.supremecourtindia.nic.in/new\\_links/9%5B1%5D.8.08.rajamony.pdf](http://www.supremecourtindia.nic.in/new_links/9%5B1%5D.8.08.rajamony.pdf) (Last visited on 16th Oct 2014)

**Post- trial Impact:**

The outcome of a major case is widely publicised in the media. Many high profile cases often go to the higher courts either for appeal or for confirmation of sentence. In this regard

“Showering praise on a judgment while its confirmation was sub-Judice would certainly amount to creating prejudice in the mind of the general public and would make the task of the court very difficult. In such a case if the High Court comes to a different conclusion it will be faced with an additional burden of dispelling the impression from the public mind that the approach adopted by the lower court was correct.”<sup>18</sup>

The Supreme Court in the case of *R.K. Anandev, Delhi High Court*<sup>19</sup> clearly stated it would be a sad day for the court to employ the media for setting its own house in order and the media too would not relish the role of being the snoopers for the Court. Media should perform the acts of journalism and not as a special agency for the Court.

**V) Laws Relating to Electronic Media:**

Another avenue to look to for to fend of prejudice caused by trial by media is the Cable Television Networks (Regulation) Act, 1995 and the Rules framed there under. This act states in explicit terms that all transmission,<sup>20</sup> including advertisement<sup>21</sup> must conform to a code prescribed in the Cable Television Networks Rules, 1994 which states that no programme shall be carried on the cable network which amounts to ‘contempt of court’.<sup>22</sup> Although this stands as a valid legislation, no new remedies have been offered to combat trial by media.

**Non-Effectiveness of the Laws Regulating the Media:**

Under the Press Council Act, 1978, the Press Council of India is established, with the objectives to “preserve the freedom of the Press and to maintain and improve the standards of newspapers and news agencies in India”.<sup>23</sup> To achieve these objectives, it must “ensure on the part of newspapers, news agencies and journalists, the maintenance of high standards of public taste and foster a due sense of both the rights and responsibilities of citizenship”<sup>24</sup> and “encourage the growth of a sense of responsibility and public service among all those engaged in the profession of journalism”.<sup>25</sup>

The Council, also, enjoys powers to censure. If someone believes that a news agency has committed any professional misconduct, the Council can, if they agree with the complainant, “warn, admonish or censure the newspaper”, or direct the newspaper to, “publish the contradiction of the complainant in its forthcoming issue” under Section 14(1) of the Press Council Act, 1978. Given that these measures must be implemented after the production of news materials, and don't include especially brutal disciplines,

<sup>18</sup> Subhash Chander v. S.M. Aggarwal: 25(1984)DLT52 .

<sup>19</sup> Manu Sharma Vs. State (NCT of Delhi) 2010(2)ACR1645(SC), AIR2010SC2352

<sup>20</sup> Section 5, Cable Television Networks (Regulation) Act, 1995

<sup>21</sup> Section 6, Cable Television Networks (Regulation) Act, 1995

<sup>22</sup> Rule 6 (f), Cable Television Networks Rules, 1994

<sup>23</sup> Press Council Act, 1978, Section 13(1).

<sup>24</sup> Press Council Act, 1978, Section 13(2) (c).

<sup>25</sup> Press Council Act, 1978, Section 13(2) (d).

their adequacy in keeping the distribution of biased reports has all the earmarks of being restricted.

In *Ajay Goswami v. Union of India*<sup>26</sup>, the shortcomings of the powers of the Press Council were highlighted:

Section 14 of the Press Council Act, 1978 empowers the Press Council only to warn, admonish or censure newspapers or news agencies and that it has no jurisdiction over the electronic media and that the Press Council enjoys only the authority of declaratory adjudication with its power limited to giving directions to the answering respondents arraigned before it to publish particulars relating to its enquiry and adjudication. It, however, has no further authority to ensure that its directions are complied with and its observations implemented by the erring parties. Lack of punitive powers with the Press Council of India has tied its hands in exercising control over the erring publications.<sup>27</sup> the PCI likewise has criminal contempt powers to confine the distribution of biased media reports. On the other hand, the PCI can just practice its contempt powers regarding pending civil or criminal cases. This limit does not consider the degree to which pre-trial reporting can affect the administration of justice.

## VI) Conclusion:

From the above account it becomes clear that the media had a more negative influence rather than a positive effect (except for a few exceptions here and there). The media has to be properly regulated by the courts. The media cannot be granted a free hand in the court proceedings as they are not some sporting event. The law commission also has come up with a report on '*Trial by Media: Free Speech vs. Fair Trial* under Criminal Procedure (Amendments to the Contempt of Court Act, 1971)'. The report is still pending in the Parliament as such the researcher could not get a copy of the report. It will be available to the public once it is presented in the Parliament.

The most suitable way to regulate the media will be to exercise the contempt jurisdiction of the court to punish those who violate the basic code of conduct. The use of contempt powers against the media channels and newspapers by courts have been approved by the Supreme Court in a number of cases as has been pointed out earlier. The media cannot be allowed freedom of speech and expression to an extent as to prejudice the trial itself.

What lessons does the Jessica Lal fiasco teach us? There is definitely a case for intensifying efforts to upgrade the quality of policing. There is at the same time a need to improve judicial performance. For instance, the Jessica trial took nearly seven years to get completed. Hardly anyone has commented on this. Will it be unreasonable to demand that this should be taken up by the Delhi High Court as a kind of case study to find out why there was such delay? The public would like to satisfy themselves that the failure was not because of judicial lethargy, but rather because of several extraneous factors such as police indifference and wanton delaying tactics on the part of the defence. The current popular perception is that judicial accountability is an unrealisable dream. It is for the judiciary to prove this perception wrong.

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<sup>26</sup> (2007) 1, SCC 143.

<sup>27</sup> *State of Maharashtra v. Rajendra Jawanmal*: (1997) 8 SCC 386

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."<sup>28</sup> A trial by press, electronic media or public agitation is the very antithesis of the rule of law. It can only lead to miscarriage of justice.<sup>29</sup>

In *MP Lohia v. State of West Bengal*<sup>30</sup>, the Apex Court, admonishing the media, stated, "We have no hesitation that this type of articles appearing in the media would certainly interfere with the administration of justice. We deprecate this practice and caution the publisher, editor and the journalist who was responsible for the said article against indulging in such trial by media when the issue is sub-judice."<sup>31</sup>

It might be enlightening to examine how other countries combat the ramifications of 'trial-by-media'. Most countries admit that such practices undermine the authority of courts and result in loss of confidence in the judicial system.

The courts in India have taken a similar view. The Punjab High Court in *Rao Harnarain v. Gumori Ram*<sup>32</sup> stated that "Liberty of the press is subordinate to the administration of justice. The plain duty of a journalist is the reporting and not the adjudication of cases."

The Orissa High Court in *Bijoyananda v. Bala Kush*<sup>33</sup> observed that – "the responsibility of the press is greater than the responsibility of an individual because the press has a larger audience. The freedom of the press should not degenerate into a licence to attack litigants and close the door of justice nor can it include any unrestricted liberty to damage the reputation of respectable persons." It would be ideal if the Supreme Court of India gives a stamp to approval to this harmonious construction.

Media and public opinion are the most important pillars of a democracy and thus it needs to be understood cautiously that the media does not cross the thin line between their right to express and the right of the accused to fair trial, by deciding on matters in trial and thus encroaching upon the proper functioning of the constitutional mechanisms. Time and again, the courts have expressed their concern over the 'trial by media' and said that the functions of the court could not be usurped by any other authority in a civilized society. Bofors case is a nefarious example which manifestly demonstrates how the trial and justice by media can cause irreparable, irreversible and incalculable harm to the reputation of a person and shunning of his family, relatives and friends by the society and such a person is ostracised, humiliated and convicted without trial. The most noticeably bad impact of these irresponsible acts of the media is that they frequently wind up in impacting the judges. This is against the constitution as the judges ought to be autonomous and ought not be influenced by any outside conclusion. At the same time media frequently makes such clamour with respect to specific cases that it practically gets to be outlandish for a judge to overlook it and may get impacted.

<sup>28</sup> Gary A. Hengstler, The Media's Role in Changing the Face of U.S. Courts, <http://usinfo.state.gov/journals/itdhr/0503/ijde/hengstler.htm> (Last visited on October 20, 2008); See also A.P. Shah, Judges and Media – Inter-Relationship, [www.indlaw.com/bc/JusticeAPShahpaper.doc](http://www.indlaw.com/bc/JusticeAPShahpaper.doc) (Last visited on 10th Oct 2014).

<sup>29</sup> *State of Maharashtra v. Rajendra Jawanmal Gandhi*, (1997) 8 SCC 386.

<sup>30</sup> 2005 (2) SCC 686.

<sup>31</sup> (1996) 6 SCC 466

<sup>32</sup> AIR 1958 Punjab 273.

<sup>33</sup> AIR 1953 Orissa 249.

The above analysis reveals us the gravity of the situation as it persists in India. An ideal proposal will be that the Indian press and the Indian people are not at present democratic enough to allow the press to intrude in the judicial process. What will an ideal proposition is to not allowing the media trial at this moment. It's definitely an ideal proposition to allow controlled media reporting of the cases once the media is supposed to come out of the profit and sensational considerations. The media has to play the role of a facilitator rather than tilting the scales in favour of one or the other party.

It is needless to say that this paradox between the laws of the land and the conduct of media cannot be changed by a magical wand or restraining regulations, but can only be changed by the way of self-correction and understanding the importance and the difference between making the truth available to the public and influencing thoughts by exaggerating matters.

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