

MEDIA TRIAL: FREEDOM OF SPEECH v. FAIR TRIAL

Prerana Priyanshu¹

Abstract

The journalistic landscape of India has been battered by a spate of fallacious media trials in the recent times, accentuating an indispensable need for changes in this scenario of 'Yellow Journalism'. This essay titled 'Media Trial: Freedom of Speech v. Fair Trial' highlights the position of the media, in influencing the opinions and knowledge of the people, the onus on the media by virtue of exercising the said powerful position, the misuse of this status and its consequences, including the unheard condemnation of the accused, a subconscious bias which seeps into the discretion of the judges and their decisions. The essay also foregrounds many news extracts, judgements and examples in order to support the aforementioned hypothesis. The Freedom of Speech and Expression vide Art. 19(1), is being misused to impede in the justice administration of the courts. The Principle of 'Fair Trial' and the sub judice rule are the two most pivotal pillars of the criminal justice system which is being overlooked by the media. Another violation of the Principles of Natural justice by media is disallowing the accused to be legally represented before the court by pressuring the defence lawyer to withdraw if that goes against the unwarranted verdict of the media. Finally, the importance of self-restraint by the media is emphasized as liberty does corrupt into license and is prone to be abused.

Keywords: Fair Trial, Misuse of Freedom of Speech, Effect on Judges, Justification by Media.

Introduction

*"All I know is just what I read in the papers, and that's an alibi for my ignorance."
— Will Roger*

As 1.25 billion Indians celebrate their 66th Republic Day, one must not disregard the immense freedom that is exercised by its media, both print and electronic. This 'Freedom of Speech and Expression' is finely incorporated in Article 19(1) of the Constitution of India which is the enabler for the far-flung participations in such a formidable democratic atmosphere. But in a country that does not limit the freedom provided to its men, is a sure victim to a pandemonium. It is for this reason that the Constitution of India, through Article 19(2), provides for reasonable restrictions on the exercise of freedom of speech and expression. These restrictions are in the

¹ 3rdYear, Rajiv Gandhi National University of Law, Bhadson Road, Sidhuwal, Patiala, Punjab, India, (Email) ls.prerna93@gmail.com

interest of sovereignty, integrity, security, decency, morality and public order. It takes the act of contempt of court and incitement to serious offence, but does not refer to interference with 'administration of justice' which is clearly referred to in the definition of 'criminal contempt' in Sec. 2 of the Contempt of Courts Act, 1971. In view of the extensive use of the print and cable services by the media personnel, the whole pattern of publication of news has changed and majority of these publications are likely to have prejudicial impact on the public, the suspects, the accused, witnesses and even judges and most profoundly, on the administration of justice. India at present lives the baneful reality where her media poses danger to the 'administration of justice' which is the cornerstone of the precept of Natural Justice and the Rule of Law by stepping beyond its boundaries and ethics. It has unfortunately come to a stage where the People are the sheep and the media is the shepherd.

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 anarchy². The media has failed to acknowledge the pivotal line between an accused and a convict which subconsciously chokes the functioning of the doctrine of *audi alteram partem*, that is, to hear the other side. This means that any person who maybe arrested, rightfully deserves to be behind the bars as a criminal and the general public tends to blindly believe the media cacophony and becomes too impatient to let the law take its course. As beautifully remarked by author Dan Brown in his book- "Media is the right arm of anarchy". Indian media in particular, has taken the form of a 'Jan Adalat' or a 'Populace Court' as it continues to intervene the *res sub judice*. In light of this, the two golden principles of natural justice is forgotten, that is, 'presumption of innocence until proven guilty' and 'guilt beyond reasonable doubt'. Now, the media for meeting its famish for "Breaking News" has adopted the trend of undertaking a separate investigation, which builds up public opinion about the accused even before the court takes cognisance of the case. In one such case where a religious preacher Asaram Bapu, who had been accused of sexually assaulting a schoolgirl, blamed the media for his arrest as his lawyer who cited 'trail by media' in the court said - "It is because of you, the media, that the police hurriedly completed the investigation and my client was arrested."³ It can be seen that by this manner, the public opinion and even the judges are prejudiced and the accused who should have been assumed to be innocent

²*Express Newspapers Vs. U.O.I.*, (1997) 1 SCC 133

³Retrieved from <http://www.ndtv.com/article/india/sexual-assault-case-asaram-bapu-blames-media-for-arrest-413883> on 11th Jan. 2016 at 04:00 P.M.

in limine, becomes a criminal, stripped of his rights. This clearly amounts to undue influence on the administration of justice but sadly there aren't adequate laws to prevent such encroachment of civil rights by conduct of journalism.

Misuse of Freedom of Speech

Another serious and criticisable issue at hand is the participation of the media in the coverage of sensational crimes, where they begin to cite the so called "evidences" in the very beginning, even before the person who is to adjudicate takes cognisance of the offence. This is unfortunate because the media is not well versed and not bound by the traditional rules of citing evidences that tell about what is and what is not substantial as an evidence to convict an accused. Therefore, more often than not, the Right to Justice is taken away from the victim. This kind of compromise of the Right to Justice can be seen when the media treats an accused or ordinary criminal equal to a seasoned criminal or a felon, without making any plausible distinction with adequate investigation into the matter. They are treated as 'Breaking News Items' keeping their reputation and right to live with dignity at stake. The electronic media which has reached every home now puts the accused on trial and convicts them without giving a chance to other side resulting in to complete demolition of character of the individual and reputation of his family, and there is no way to retrieve the same even after acquittal from court as it would not be given the same or any publicity by the media. This means even if they are acquitted by the court, they remain guilty in the eyes of the public and find it difficult to revive their erstwhile image. It is to be pointed out that media trial has moved to media verdict, which is beyond doubt the misuse of the freedom and transgression of their legal limits. Therefore, the courts must take actions against such activities by passing restrain orders against the media. Several examples can be cited in this context. It is highlighted in the recent case where the allegations of misconduct were labelled against two former Supreme Court judges. One against Justice A.K. Ganguly where media had a field day and worked overtime to destroy his reputation and made him resign from all the posts which he was holding and disgraced him before anything could be proved against him. Another case was that of Justice Swatantra Kumar facing the similar allegation, but only so, in this case he continued to head Green Tribunal, while the matter was still under investigation. The difference between the two cases was that, the first thing Justice Swatantra Kumar did was to get a stay against media trial from Delhi High Court. It is fair to say that media trial is not only illegal but immoral as well. The media trial has direct impact on the functioning of investigating agency as it works under pressure to arrest the accused without proper evidence

and lay the charge sheet sometimes with inadequate evidences to escape the prying media pressure. Hence, the quality of investigation is directly affected and it has also got direct impact on functioning of judiciary as well especially in early stages like grant of bail.

In the recent times, with the introduction of the concept of Target Rating Points or TRP, journalism works under great pressure. TRP ratings are the gross rating points delivered by a media source to a specific target audience. Prior to this, the journalist had worked with integrity, braveness and free from undue bias or preconceived opinions. They did not do the job of labelling people guilty or a felon without making a serious and bona fide attempt to study the charges and investigating them, and come to autonomous conclusions. That is the reason people trusted them. But lately due to this nerve-racking pressure to increase the TRP scales, electronic media is witnessing ruthless competition. In order to stay at the top of their business, the electronic media had incarnated into an aggressive form with a large multitude of camera flashes and madness of huddling questions around the accused that even the police is unable to take them from their vehicles to the court rooms and vice-versa. In order to remove this form of aggression, the Press Council of India issues guidelines and norms for journalistic conduct, and has succeeded in taking action in certain cases. Besides this, the Press Council of India even publishes apologies in certain cases.

Fair Trail

The 'Right to Fair Trial' flows from the wider sense of the Right to Life and Personal Liberty guaranteed under Article 21 of the Constitution of India. It is an integral part of the criminal judicial system in India. The Right to Fair Trial covers many other rights that include the right to be presumed innocent unless proved guilty, not being compelled to be a witness against oneself and the doctrine of Double Jeopardy, and this right is no less important than the other six Fundamental Rights. Therefore, the Right to a fair trial is an absolute right of every individual within the territory of India vide articles 14, 20, 21 and 22 of the Constitution of India. The prominent status of the Articles 20, that is, Right to Protection in respect of conviction for offences, and Article 21, can be understood from the fact that these crucial rights cannot be suspended even during an Emergency, as mentioned in the Constitution itself. Fair trial is not purely private benefit for an accused – the public's confidence in the integrity of the justice

system is crucial.⁴ In the specific case of *Zahira Habibullah Sheikh v. State of Gujarat*⁵, the Supreme Court explained that a "Fair trial 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 witnesses, or the cause which is being tried is eliminated." Most recently media drew flak in the reporting of murder of Aarushi Talwar, when it took precedence over the court and reported that the victim's own father Dr. Rajesh Talwar, and possibly her mother Nupur Talwar were involved in her murder. Although, when the CBI investigated the matter it was found that Rajesh was not the killer, but it was too late for him to get rid from the shadow of guilt casted upon him and it was a damage beyond repair.

In context to the aforementioned principle of 'Fair Trial', the provision of the '24 Hour Rule' mentioned under Article 22(2) of the Indian Constitution is of great relevance. It states that every person who is arrested and detained in custody shall be produced, within 24 hours, to the nearest Magistrate. The arrest of the accused is fixed in the beginning itself and this is because if any media publication is made after the arrest, pertaining to the person's character, previous convictions or confessions (if any), the person's case will be prejudiced and discriminatory even in the bail proceedings when issues arise as to whether bail is to be granted or rejected, or as to what conditions are to be imposed and whether there is a need for police or judicial remand. Such publications may also affect the subsequent trial that takes place. This point of view was broadly emphasized in the year 1978, by the Supreme Court in *Maneka Gandhi v. Union of India*⁶ in order to alter the law as it stood before 1978, to say that so far as liberty is referred to in Art. 21, the 'procedure established by law' in Art. 21 must be a fair, just and done by a reasonable procedure.

Right to be Legally Represented

Another perturbing consequence of media trial that goes unmarked is the enormous amount of pressure put on the lawyers to not take up the case of the accused, thus forcing these accused to go to trial without any defence. Is this not in complete violation of the Principles of Natural Justice? Every person has a right to be legally represented by a lawyer of his choice and, through the same, put his point before the adjudicating court and no one can debar him from doing so. The pressure on the lawyers only multiplies once he has decided to advocate the trial for the

⁴ *Gisborne Herald Co. Ltd. V. Solicitor General*, 1995 (3) NZLR 563 (CA)

⁵ *Zahira Habibullah Sheikh v. State of Gujarat*, [(2004) 4 SCC 158]

⁶ *Maneka Gandhi v. Union of India* AIR 1978 SC 597

accused (especially in a sensational case), he has to take the plunge with his reputation. In an interesting case, the media was questioning the morality of celebrated senior lawyer Mr. Ram Jethmalani in having accepted the brief and for having appeared for accused Manu Sharma in Jessica Lal Case, clearly failing to understand its own role and that of other stake holders in criminal justice system. 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.⁷ As a result of this, one of the most celebrated lawyer of the country Mr. Gopal Subramaniam appeared on behalf of the state and the case from Manu Sharma’s side was handed over to a mediocre lawyer. Have we lost all faith in the judiciary that we dread the thought of giving equal opportunity to defend? During the 26/11 trial, Abbas Kazmi, the lawyer of Ajmal Kasab, who was the main suspect in the case, said that he was deeply hurt and distressed with the harassment meted out to him, by the media (largely) and the Public Prosecutor. The media and the prosecutor foregrounded the fact that Mr. Kazmi and the accused belonged to the same religious sect, and made it work in their benefit by calling him a “Terrorist Lawyer” and equating him to the main conspirators in the case.

Lawyer and suspects aside, even the victims and witnesses face excessive publicity and invasion of their privacy. The victims and their families, in mostly rape cases, have a difficult time protecting and concealing their identities with the constant harassment by the media. Some of the media houses gain the audacity to personally make calls to the victim or the witness in order to extract information relating to the case, albeit at the cost of the security. The media also creates other problems for witnesses. If the identity of the witness is published, it poses a great danger of the witness coming under pressure both from the accused as well as from the police. At the earliest stage itself, the witnesses get threatened and try to retract and get out of the muddle. Witness protection becomes a serious casualty in such situations. Police are presented in poor light by the media and their morale suffers, too. As early as a day after the report of crime is published, media flashes the news saying that ‘Police have no clue’. The pressure on the police from media builds up day by day and reaches a point where police is compelled undertake a hasty investigation and sometimes make ‘statements for shield’ in public, to protect their reputation and calm the sully ongoing clamour. Several examples can be given. In ‘Vote for Cash’ scam where the allegations were labelled against some Members of Parliament for demand of bribe for voting in favour of Manmohan Singh government. Several Members of Parliament

⁷ Retrieved from <http://www.hrhc.net/sahrdc/hrfeatures/HRF164.htm> on 13th Jan. 2016 at 10:00P.M.

were arrested and the chargesheets were laid in hurry to escape the media pressure, but later on the court discharged them on grounds of not finding enough evidence to even frame charges before the trial.

Subconscious effect on the Judges

There have been many grievances against the media in the past, but of the major allegations on 'Media Trial' is of prejudicing the judges presiding over a particular case. There is a difference of opinion between the Americans and the Anglo-Saxons regarding this matter. While the former believe that Judges are not liable to be influenced by media publication, the latter are of the view that Judges may still be subconsciously influenced by such publications. 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 Lords⁸. The Supreme Court in *State of Maharashtra v. Rajendra Jawanmal Gandhi*⁹ observed that has held that a trial by press, electronic media or by way of a public agitation is the very anti-thesis of rule of law and can lead to miscarriage of justice and a Judge is to guard himself against such 'pressure'. There is always a great possibility that the flowing air of remarks made upon a specific controversy, creates a general perspective about the case, and hence the judge presiding over the trial may bend to such public opinion. 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. In *Anukul Chandra Pradhan vs. Union of India*¹⁰, the Supreme Court observed that "No occasion should arise for an impression that the publicity attached to these matters has tended to dilute the emphasis on the essentials of a fair trial and the basic principles of jurisprudence including the presumption of innocence of the accused unless found guilty at the end of the trial". Judges get influenced by the accusations labelled in print media and electronic media and the accused are almost treated as convicts and even the basic rights like right to be granted bail are denied. The seriousness of the undue influence of the media should be encompassed by Section 2(c) of the Contempt of Courts Act, 1971 that states, 'Prejudices or interference or tend to interfere with due course of any judicial proceeding' as an act of contempt.

Justification by the Press

⁸ *Attorney General v. BBC : 1981 AC 303 (CA), p. 315*

⁹ *State of Maharashtra v. Rajendra Jawanmal Gandhi : 1997 (8)SCC 386.*

¹⁰ *1996(6) SCC 354*

Not unlike most countries of the world, India too has a rich culture of fiercely independent media which is rightly termed as the 'Forth Pillar of Democracy'. Despite certain derogatory arguments against it, the role of the media has proved to be pivotal in the functioning of the country on democratic lines. Media has a role in ensuring that everyone is heard and especially those who don't have a voice in the corridors of power. Apart from this, many of the big scams were busted by the press and the law enforcers merely followed them up. The underpaid journalist should be credited for extracting those cleverly concealed information and data which looked inaccessible for the top vigilance teams of the country. It is due to the hardwork and courage of these journalists who kept a weather eye open for disarrays of the governmental systems, that many of the big scams such as the HDW (Howaldswerske) Marine Case, Bofors, and most recently, the Coalgate Scam hit the headlines.

Earlier, only fewer of general public took interest in the Court procedures and the cases files therein. But within the past decade, there is a growing and intense focus on the Courts and its cases. Whether reported in daily newspaper or in electronic media, Indians enthusiastically devour this information, since they have become curious about what happens in Court. Thus, the Courts have inevitability come under the 'microscopic watch' of the media. There are two consequences to this – Positive and Negative. The Positive by-product of this is that more and more Indians become aware of their constitutional rights, than they were ever before. It is for this reason that the media strongly resents the Rule of *sub judice*. The *sub judice* rule regulates the publication of matters which are under consideration by the court and publication of material which is *sub judice* comprises contempt of court, a crime which is punishable by a fine and/or imprisonment. The press complains that Courts during the course of a hearing tend to interpret the *sub judice* rule in a stringent manner to prohibit any discussion of the issues before the Court, even if they require public attention. There is, therefore, a need to reasonably 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.

200th Report of the Law Commission

The most reckoning and carefully evaluated research on the various aspects of media trial has been elaborated in 200th report of the Law Commission entitled 'Trial by Media: Free Speech vs. 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 justice process. This committee headed by Justice M. Jagannadha Rao had suo moto taken up the subject having regard to the extensive prejudicial coverage of crime and information about suspects and accused, both in the print and electronic media.

The committee report recommended that journalists need to be trained in certain aspects of law relating to freedom of speech in Art. 19(1)(a) and the restrictions which are permissible under Art. 19(2) of the Constitution, human rights, law of defamation and contempt. It also suggested incorporation of these subjects in the syllabus for journalism and special diploma or degree courses on journalism. The Report also mentions in what publications can be prejudicial if made after a person is arrested and made recommendations for amending the Provisions of the Contempt of Courts Act, 1971 which talks about using 'active' and 'arrest' in sec 3 and 'real risk of serious prejudice' in new sec 14A. The Commission also 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 yet noteworthy recommendation suggested was to empower the High Court to pass 'postponement' orders (on the lines of Sec. 4(2) of the UK Act, 1981) to a print or an electronic media to prorogue publication or telecast pertaining to a criminal case and to restrain the media from resorting to such publication or telecast. The committee report concluded with the view that there is considerable interference with the due administration of criminal justice and this will have to be remedied by Parliament.

Methodology

The researcher has used doctrinal method of research and has used both Primary sources, like interviews with lawyers and media personnel, and Secondary sources, like books, websites and Case Laws, for the purpose of research.

Observations

On the basis of the research work, it can be that observed that journalism in India has been clobbered by a spate of fallacious media trials in the recent times and this menace takes place under the pretence of rightful exercise of Freedom of Speech. So far, the State and Judiciary have

only fallen victim to its harmful effects and have time and again, failed to curb this phenomenon as Media cannot be forgotten for its positive role in a democracy like India, but at times like these, it can only be described as a ' Devil in Disguise'.

Conclusion

The media has an onus in ensuring that everyone is heard regardless of status in the hierarchy of power, but without proper mechanism to enforce the guidelines under which it should work, it takes over the role of both the investigating agency as well as the court and causes miscarriage of justice on several occasions. It takes the role of the investigator and adjudicator, resulting in the misbalance in the administration of justice. But sometimes these *ultra vires* activities are blessing in disguise as there is 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 simultaneously, media should acknowledge the fact that whatever they publish has a great impact over the spectator. Thus, the role of media has to be confined to factual reporting of cases and not building public opinion either in the favour of accused or complainant lest it causes the miscarriage of justice, and the role of media should be monitored closely and exemplary punishment should be given for deviations from the same.

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