

## A CRITICAL ANALYSIS OF TRIAL BY MEDIA

\*NEHA DAS

### Introduction

*'Information is the currency of democracy.'* Apart from the three organs of the Government, media also forms a cornerstone in a democratic society. As its etymology ('medium') suggests, media is the mechanism through which public opinion is moulded and information is disseminated to the society at large. With the advance of technology, media is not only restricted to television, radio or newspapers but also includes the internet, which is yet another powerful source to bring about awareness and in turn, strengthen the society. Justice Markandey Katju, has also reaffirmed the significant role of media in transforming India into a industrial society from an archaic one.<sup>1</sup> Media creates awareness about socio-political and economic events around the globe. The manner in which media disseminates information creates desirable expression and sentiments.<sup>2</sup>

Article 19(1)(a)<sup>3</sup> of the Constitution of India declares that all citizens shall have the right to freedom of speech and expression which is not an absolute right and is subject to reasonable restrictions imposed by law in relation to contempt of Court, defamation or incitement to offence.<sup>4</sup> Freedom of press flows from Article 19(1)(a) of the Constitution of India. The main objective of our founding fathers to advance such freedom to press was to protect the purveying of information.

### Concept of Trial by Media

Trial by media can be explained to be the coverage by media which arouses desirable sentiments, creating media frenzy and negative dramatized miniseries regarding criminal justice system, in effect, invoking infotainment (information coupled with entertainment) around a

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<sup>1</sup> Justice Markandey Katju, *The Role the Media should be playing in India*, The Hindu, November 5, 2011.

<sup>2</sup> *Trial by Media: Looking Beyond The Pale of Legality*, Civil Services Times Magazine, (Jul.12.2001), available at <http://www.civilservicestimes.com>.

<sup>3</sup> INDIA CONST. art. 19.

<sup>4</sup> H.M. Seervai., *Constitutional Law of India* 723 (Universal Law Publishing Co Vole 1, 4<sup>th</sup> Ed; 1991).

criminal case.<sup>5</sup> The advent of media in all respects has a pre-judicial impact on the accused, suspect, judges, witnesses and the administration of justice in general. The sensationalized coverage of events by the media has given rise to extreme arguments on the debate between free speech and an individual's right to fair trial as advocated by the judiciary.<sup>6</sup> There is a growing tendency on the part of media to incorporate the version of law, crime and justice in a political and social scenario. The concept of independence and impartiality of the judiciary is an essential prerequisite for the due process of law and the right to a free trial should be guaranteed to an accused.<sup>7</sup>

The rat race between cable channels for breaking news thereby the accused getting labeled prior to the commencement of the investigation impairs the right to fair trial and prejudicially impacts the administration of justice.<sup>8</sup> The efficiency of the legal system increases multi fold when guilt is proved by procedure established by law and not with intrusion of external factors in the due process. The judiciary has time and again emphasized the preservation of freedom of press to criticize and has subjected to scrutiny the functioning and administration of the judicial process. The only reasonable restriction imposed is the abuse of the freedom guaranteed to the press as absolute freedom corrupts.<sup>9</sup> The media has been constantly toiling to unearth the truth in most cases and has played a central role in delivering justice in the infamous Jessica Lal Case<sup>10</sup>, Matoo Case<sup>11</sup>, Nitish Kataria Case<sup>12</sup> and the Nirbhaya Case<sup>13</sup>. There needs to be a clear and distinct balance between the freedom of press and right to fair trial in the interplay of

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<sup>5</sup> Helena Machado & Filipe Santos, *The Disappearance of Madeleine Mc Cann: Public Drama and Trial by Media in the Portuguese Press*, *Crime Media Culture*, (5(2)c146-147).

<sup>6</sup> 200<sup>th</sup> Report of the Law Commission on "Trial by Media: Free Speech v Free Trial Under Criminal Procedure (Amendments to the Contempt of Court Act, 1971)".

<sup>7</sup> Ibid.

<sup>8</sup> Ibid.

<sup>9</sup> *Stroble v. California* 343 US 181 1952.

<sup>10</sup> *Manu Sharma v. State of Delhi*, (1010) 6 SCC 1.

<sup>11</sup> *Santosh Kumar Singh v. State through CBI*, (2010) 9 SCC 747.

<sup>12</sup> *Vikas Yadav v. State of U.P.*, [2016 SCC OnLine SC 1088](#).

<sup>13</sup> *Mukesh v. State of NCT for Delhi*, (2013) 2 SCC 587.

litigation and media.<sup>14</sup> What is necessary is that the media should not indulge in investigative reporting but should rather concentrate on informative reporting without conducting any parallel investigative trial which infringe constitutional rights.

It is the duty of the media to ensure that the information that it provides does not infringe the right of the accused nor unduly influences the judicial system in any manner whatsoever.<sup>15</sup> Media has been seen to create a hysteria among the public citizenry in high profile cases like the Sheena Bora murder case<sup>16</sup> or the Arushi Talwar case<sup>17</sup>, to name a few, wherein a controversial reporting of the proceeding was done with a critical and unnecessary scrutiny of the victim's personal life. Media has been overriding the function of the judiciary by assuming a superior role than what is accorded to it by conducting parallel investigation in quest of evidence and thereby branding the accused or the suspect based on their past conviction records and drawing conclusions by covering articles at every stage of a sub judice case.<sup>18</sup> Such extreme publicized coverage of cases by the media is naturally bound to influence the judiciary as Justice Frankfurter rightly observes that judges are no super human so such irresponsible media investigation ought to affect the rational course of determination thereby hindering the due administration of justice.

Media trial gives rise to a paradox between right to fair trial and the freedom of press. There is no justification for investigative journalism unless done in the interest of public and the actions are bonafide or the justification of truth. In the case of *RK Anand v Registrar*<sup>19</sup>, the concept of media trial was defined for the first time by the court to mean "*Impact of extensive pre-trial publicity and coverage on a person's reputation thereby creating a widespread perception of guilt regardless of the verdict given in the court of law*".

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<sup>14</sup> Navajyoti Samanta, *Trial by Media-The Jessica Lal Case*, Social Science Research Network, (March 2008), available at SSRN: <http://papers.ssrn.com>.

<sup>15</sup> Madhavi Diwan Goradia, *Facets of Media Laws and Indian Constitution*, (Anmol Publications Pvt. Ltd, New Delhi 2005).

<sup>16</sup> *Pratim Alias Peter Mukherjea v. Union Of India*, 2016 SCC Online Bom 9938.

<sup>17</sup> *Dr. Rajesh Talwar And Another v. Central Bureau Of Investigation*, 2013 (82) ACC 303.

<sup>18</sup> Arpan Banerjee, *Judicial Safeguards Against "Trial By Media": Should Blasi's "Checking Value" Theory Apply In India?* Vol. 2, p. 28, *Journal of Media Law & Ethics*, (2010).

<sup>19</sup> 8 SCC 106 (DEL.2609).

### Scope of the constitutional provision of Freedom of Speech and Expression

Article 19(1)(a) of the Constitution of India guarantees to every citizen the freedom of speech and expression while Article 19(2) envisages the various reasonable restrictions that the general provision under Article 19(1) is subjected to. With regard to trial by media, the restrictions imposed is in the interest of the security of nation, sovereignty and integrity of the State, public order or in relation to contempt of court, defamation or incitement to offence.<sup>20</sup> The restrictions are a proof that freedom of speech and expression is not an absolute right. There should be a clear balance between the right to fair trial and right to free speech. Trial by media is an offshoot of the rights that flow from Article 19(1)(a) which provide for the freedom of press. The provisions under Article 19(1) should not be read in isolation but in consonance with Article 19(2) which would facilitate the administration of justice which the laws relating to contempt seek to balance by imposing restrictions on prejudicial publications. Freedom of press is pivotal because of the check and balance system that it ensures by restraining the abuse of power in a democracy. The restrictions imposed do not have a set standard to measure the reasonableness but such limitations are deemed to pass the test of reasonableness if they are in no way excessive or disproportionate<sup>21</sup>, subject to the facts, circumstances and merit of each case.<sup>22</sup>

The inclusion of the terms '*liberty of thought, expression and belief*' in the Preamble of the Constitution of India by the founding fathers of our nation signifies the protection of freedom of speech and expression. No special privilege was accorded to the press. Dr. B.R. Ambedkar opined that press is yet another way to express an individual's beliefs<sup>23</sup> and the Constitution of India from its very inception, delayed no further in declaring the freedom of press as a derivative of the freedom of speech and expression.

The '*direct and inevitable effect test*' was established in the Express Newspaper Case<sup>24</sup>, wherein the Court held that a restriction cannot be imposed on the press which would amount to

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<sup>20</sup> P.M. Bakshi, *Press Law: An Introduction*, (BTFRI Publications, 1985).

<sup>21</sup> Chintamani Rao v. State of Madhya Pradesh, AIR 1951 SC 118.

<sup>22</sup> Gujarat Water Supply v. Unique Erectors, AIR 1989 973.

<sup>23</sup> Constituent Assembly Debates Vol VII, p.786 (1.12.1948).

<sup>24</sup> Express Newspaper v. Union of India, AIR 1958 SC 578.

a have a direct impact on its freedom of circulation. In *LIC v Manubhai D Shah*<sup>25</sup>, it was held that it is important to extend to the media the right to freely express its views, sans which would result in a dictatorship and would defeat the whole purpose of a democracy. The right to privacy must also be looked into when media is exercising its right to free speech.<sup>26</sup> For the smooth operation of the due process of justice, it is necessary for the press to exercise its freedom of publication cautiously and responsibly.<sup>27</sup>

### **Judicial interpretation of trial by media**

The phenomenon of media trial is attached with various nuances and complexities which can be inferred from the judicial pronouncements explaining the scope and the facets to trial by media. A major lapse in the reporting by media was observed in the Mumbai Terror Attack Case<sup>28</sup> where the coverage by media risked the security of nation by spilling out details about the life of security personnel, police and hostages. Media has been involved in the enhancement of the Target Rating Points (TRP) in a nasty manner thereby contributing to the menace of trial by media. Unless in the interest of the public or for dismantling the truth, the reputation of an individual cannot be jeopardized by the media. Notwithstanding the verdict of the court, the individual's social life is tarnished.<sup>29</sup>

In *Rajendra Sail v Madhya Pradesh High Court Bar Association*<sup>30</sup>, it was held that it is extremely necessary in the current scenario to check for publications which are contentious in nature. Court can invoke contempt proceedings against the media house which tend to interfere with the due course of justice and their right to free speech is not absolute. This was the ruling in *Court on it's own Motion v The Publisher, Times of India*<sup>31</sup>.

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<sup>25</sup> AIR (1992) SCC.

<sup>26</sup> R Rajagopal v. State of Tamil Nadu, AIR 1995 264.

<sup>27</sup> Harimburg, *Free Press v Free Trial: The combination of Mr. Justice Frankfurter*, U.Pitt.L.Rev, (1965).

<sup>28</sup> Mohammed Ajmal Amir Kasab v. State of Maharashtra, AIR 2012 9 SCC 1.

<sup>29</sup> *Kartongen Kemi Och Forvaltning AB v. State through CBI*, (2004) 72 DRJ 693.

<sup>30</sup> (2005) 6 SCC 109.

<sup>31</sup> Civil Writ Petition Number 7160 of (2013).

In *Harijay Singh v Vijay Kumar*<sup>32</sup>, it was held that freedom of the press is not at a higher pedestal than what is guaranteed to freedom of speech and expression. The right of the media to propagate its views is subject to restrictions. One of the effective tools to curb unlimited power in the hands of the media is the Court's power to initiate contempt proceedings. Broadcasting the half-baked version by portraying only one side of the story should be strictly checked against since media caters to a huge audience. This was held in *M.P Lohia v State of West Bengal*<sup>33</sup>. The role of the media was strictly defined in *Rao Harnarain v Gumori Ram*<sup>34</sup> to report matters and not adjudicate *sub judice* cases. However, if the criticism made by the media is fair, then it wouldn't amount to contempt.<sup>35</sup>

There is a fierce unhealthy competition among the media operators to break the news to the public thereby putting at stake the interest of the public and hindering the trial in court<sup>36</sup>. Thus, the courts have to entail a rather greater pro-active role by positively intervening and keeping a check on external factors that tend to interfere in criminal trial.

### **Right to fair trial**

Right to equality underlies with it the Right to fair trial which is an adjunct of Article 21<sup>37</sup> of the Indian Constitution and is a guarantor against any kind of discriminatory action<sup>38</sup> made against the accused or suspect at any stage of the trial. In this way, equal treatment before law is fostered. This was held in *Maneka Gandhi v Union of India*<sup>39</sup>. Further the right to remain silent is a constitutional privilege under Article 20(3)<sup>40</sup> of the Indian Constitution which enshrines the

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<sup>32</sup> (1996) 6 SCC 466.

<sup>33</sup> (2005) 2 SCC 686.

<sup>34</sup> AIR 1958 P&H 273.

<sup>35</sup> *Ram Dayal v. State of UP*, AIR 1978 SC 921.

<sup>36</sup> *Ram Jethmalani & D.S.Chopra, Media Law*, (Thomson Reuters, Vol 1, 2<sup>nd</sup> Ed; 2014).

<sup>37</sup> INDIA CONST. art. 21.

<sup>38</sup> *Ibid.*

<sup>39</sup> AIR 1978 SC 597.

<sup>40</sup> INDIA CONST. art. 20, cl. 3.

right of an accused against self incrimination<sup>41</sup>. No person accused of any offence shall be compelled to be a witness against himself. Section 316, 315, 313 and 161(2) of the Code of Criminal Procedure Code and various provisions of the Evidence Act, further substantiate on similar lines by giving immunity and protection to an accused at any stage of the trial<sup>42</sup>. Media interfering in a proceeding and affecting the right of an individual to be presumed innocent is gross miscarriage of justice.

The importance of the fundamental right of presumption of innocence was emphasized in *Visakha v State of Rajasthan*<sup>43</sup>. In *P.N Krishna Lal v Government of Kerala*<sup>44</sup>, principle of 'Presumption of innocence' was established to be a part and parcel of a good number of covenants of Indian law. However, the media, with complete disregard to this sacrosanct principle of criminal law oversteps its boundaries by apprehending a suspect or accused in a trial as the 'convict' which completely clouds a free trial with bias. It was held in the case of *National Legal Services Authority v Union of India* that it is the court's duty to interpret the law of the land without being influenced by the public sentiment aroused by the media.<sup>45</sup> It is important to categorize the stages of a criminal trial into pre trial, actual trial and post trial, as they entail a chain of action and playing with the right at one stage would amount to adverse repercussions thereby drifting the trial and misleading the due process of law<sup>46</sup>.

### **Law of contempt**

The genesis of the law of contempt dates back to 1921. The meaning of 'Contempt' has seen a shift from a restrictive definition as an offence against the sovereign to an exhaustive definition to ensure the administration of justice without any undue interference.<sup>47</sup> The general meaning of the term contempt includes any act which shows disgrace, wilful disobedience or any act in

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<sup>41</sup> Ibid.

<sup>42</sup> CODE.CROM PROC. 1973.

<sup>43</sup> AIR 1980 1579.

<sup>44</sup> 2009 CriLJ 2974.

<sup>45</sup> AIR 2014 SC 1863.

<sup>46</sup> Consultation Paper of Media Law, Government of India, Law Commission of India, 2014 May.

<sup>47</sup> Contempt Power of Court, [www.legalserviceindia.com/article](http://www.legalserviceindia.com/article), last visited on Aug 24, 2018.

violation of the order of a court tending to lower the dignity of the court.<sup>48</sup> The legislative intent behind the law of contempt is to ensure the due process of justice and secure the sanctity and authority of the judiciary by empowering the court with inherent power to hold an individual for contempt if found obstructing the administration of justice. There have been developments made to the law of contempt of a tremendous magnitude, to act as a powerful mechanism to secure justice.<sup>49</sup> In *Govind Shai v State of U.P.*<sup>50</sup>, court emphasized that contempt applied to any conduct that tends to lower the authority of the court or interferes and prejudices fair trial of a proceeding, either pending or imminent.<sup>51</sup>

With the increasing reports of cases of contempt, the Contempt of Court Act, 1952 was subject to scrutiny and a committee named Sanyal Committee was appointed to look into the same. The committee examined the legislation in question and made recommendations along with a draft bill for codification. The primary issue that was analysed was the need to ensure administration of justice and its conflict with freedom of press. The main recommendation was pertaining to the judicial proceeding wherein the knowledge of judicial proceeding came to become a defense to a publisher. This clearly highlighted the importance given to the freedom of press over other issues. The committee further suggested to uphold the continuance of the term 'imminent proceedings' which would attract liability on account of interference. In the case of *Padmawathi Devi v R.K. Karanjia*<sup>52</sup>, the filing of an FIR was considered to be the starting point of the pendency of a judicial proceeding and would amount to sub judice reporting<sup>53</sup>. Great reliance on *A.K Gopalan v Noordeen*<sup>54</sup> by the Sanyal Committee<sup>55</sup> was observed wherein lodging of First Information Report (FIR) was not considered to be the starting point of

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<sup>48</sup> Justice Tek Chand, *The Law of Contempt of Court and Legislature*, (University Book Agency Allahabad 4<sup>th</sup> Ed, 1997).

<sup>49</sup> Gordon Borrie & Nigel Lowe, *The Law of Contempt*, (Butterworth & co. Publishers Ltd., 1973).

<sup>50</sup> AIR 1968 SC 1513.

<sup>51</sup> *In Re Subrahmanyam* AIR 1953 Mad 422.

<sup>52</sup> AIR 1963 MP 61.

<sup>53</sup> *Surendra Mohanty v. State of Odisha*, CrI App No 107(56), *RK Garg v. SA Azad*, AIR 1967 AIJ 37.

<sup>54</sup> AIR 1969 2 SCC 734.

<sup>55</sup> Sanyal Committee Report 1963.



pendency of trial nor was it considered to be imminent as a proceeding is said to be imminent only after the arrest takes place. Owing to the shortcomings in the report submitted by the Sanyal Committee, the Joint Parliamentary Committee was constituted which suggested major changes which was incorporated in the Contempt of Courts Act, 1971. Thus trial by media, prejudicing administration of justice and scandalous reporting on sub judice matter were considered to be serious offenses for which the Contempt legislation carried remedies.

Article 129<sup>56</sup> and 215<sup>57</sup> of the Constitution of India empower the Supreme Court and the High Court with inherent power to initiate contempt proceedings against anyone hindering the administration of justice. In *J.R Prasad v Prashant Bhushan*<sup>58</sup>, the aforementioned provision is not independent of Article 19(1)(a) and there is reliance laid on the freedom of speech and expression as held otherwise in *Re Vinay Chandra Mishra*.<sup>59</sup> Under the Contempt of Courts Act, 1971<sup>60</sup>, contempt is classified into both criminal and civil. Section 2(c) of the Act defines 'contempt' to include:

1. *Scandalizing the court*
2. *Interference with the due course of any judicial proceeding*
3. *Interference with the administration of justice*

Section 2(c) includes the term 'publication' which is applicable to all the above mentioned heads of contempt. This implies that any publication that unnecessarily intervenes or interferes with the judiciary or lowers the confidence of the public by misrepresentation of sub judice matters would amount to contempt of court. Any publication which is contentious in nature leading to a media trial would attract contempt proceedings and a limitation can be imposed on

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<sup>56</sup> INDIA CONST. art. 129.

<sup>57</sup> INDIA CONST. art. 215.

<sup>58</sup> (2001) 6 SCC 735.

<sup>59</sup> (1995) SC 2348

<sup>60</sup> The Contempt of Courts Act, 1971, Acts of Parliament, 1971 (India).

the freedom of the press.<sup>61</sup> To not only protect the judiciary but also to uphold the confidence of the public, the Contempt of Courts Act, 1971 was passed.<sup>62</sup>

Section 4 of the Contempt of Courts Act, 1971 provide for the exceptions to contempt which include publication of fair and accurate report of the judicial proceeding which grants immunity to the press from being held for contempt.<sup>63</sup>

Fair reporting is subjective and should be determined on a case to case basis. A one sided report of the act must not be presented to the public. Section 5 of the Act immunizes the media from contempt for reporting of a fair and reasoned criticism made in good faith and made in the greater interest of the society. As long as the statement made is done in bonafide intention and is truthful in all aspect, Section 13(b) of the Act grants immunity for any such publication<sup>64</sup>. The Press Council Act, 1978 has laid down guidelines and restrictions on the media on reporting matters that are sub judice by way of norms and an ethical code. However, these guidelines are limited in their scope and applicability as they are not legally binding.

### **Conclusion and Suggestion**

Media needs to turn to statute, legal principles, legal judgements and guidelines in order to put away litany of ban and restrictions. Reporters need to develop an informed attitude and understanding with regard to procedure of reporting of court proceeding. A rather more feasible option is to implement strict punitive actions to punish and prevent publication that surpass Article 19(2) to (6) hindering the administration of justice by over weighing Article 19(1)(a). Court should impose punitive measure under the Contempt of Courts Act, 1971 to have a deterrent effect on sensationalized coverage of news. This is a strict liability approach as

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<sup>61</sup> Law in Perspective: *Media Reporting And Contempt of Court: The Law Revisited* (Feb.13, 2011),<http://legalperspectives.blogspot.com/2011/02/media-reporting-and-contempt-of-court.html> last visited on Aug 20, 2018.

<sup>62</sup> D.C. Saxena v. Chief Justice of India, Id, 216.

<sup>63</sup> (1984)CriLJ 481 DEL.

<sup>64</sup> Indian Law Institute, *Restatement of Indian Law Contempt of Court*, (Saurabh Printers Pvt. Ltd 1<sup>st</sup> Ed, 2011).

followed in the UK and US legal system, laid down as the Bench-Bar-Press guidelines<sup>65</sup>, to mitigate the effects of pre trial publicity.

Further, journalists ought to be given proper training in certain aspects of law relating to freedom of speech and the restrictions imposed therein, law of defamation and contempt.<sup>66</sup> It must be included in the syllabus for journalism and special diploma on the inter-relation between law and journalism must be taught.

According to Section 3 of the Contempt of Courts Act, 1971, a judicial proceeding is said to be pending in case of a civil proceeding on the institution by way of filing of a complaint and in a criminal proceeding, under the Code of Criminal Procedure, 1898, when the charge sheet is filed or when the court issues summons or warrant against the accused or when the Court takes cognizance of the matter, until the case is finally decided including appeals or revision petitions.<sup>67</sup> Thus, the definition of 'publication' under the law of contempt gives complete immunity to the media to make publications regarding the case or relating to the character of the accused during the pre-trial stage. Even if the reporting is prejudicially affecting the case but is done before the filing of the charge sheet, the media cannot be held liable for contempt and can get away even after tainting the reputation of the accused. This is a serious and grave lacuna in the existing law as with the advent of technology, the highest degree of investigative journalism is observed during the pre-trial stage of the criminal proceeding.

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<sup>65</sup> Bench-Bar-Press Committee of Washington, available at [www.courts.wa.gov/prog](http://www.courts.wa.gov/prog).

<sup>66</sup> 200<sup>th</sup> Report of the Law Commission on “*Trial by Media: Free Speech v Free Trial Under Criminal Procedure* (Amendments to the Contempt of Court Act, 1971)”.

<sup>67</sup> Justice Tek Chand, *The Law of Contempt of Court and Legislature*, (University Book Agency Allahabad 4<sup>th</sup> Ed, 1997).