



Right To Fair Trial V. Freedom Of Media: The Conflict

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Abstract: *The various reasonable restrictions that can be placed on the media in terms of freedom of press. As far as the interface between freedom of media and fair trial is considered, the main issue of Trial by Media comes into existence, which is a menace created due to the increasing importance of media in our lives. If the media interferes with the process of administration of justice by way of a prejudicial publication, such an act can impact the accused for the better or the worse. In this Paper, the author aims to explain how the two distinct yet connected topics of freedom of media and free trial overlap and create the effect of media trial. There is a thin line between the freedom of speech and expression of the media and contempt of court by the media, by way of media trial.*

Key Words: Media trial, administration, justice, speech and expression, increasing, interferes.

Before 2006, Section 3 (2) of the Act, "full immunity was granted to the publications even though they were prejudicially interfering with the course of administration of a criminal case, if by the date of the publication, no challan or charge sheet was filed or no warrant was issued. These publications would amount to contempt only if a challan or charge sheet or summon or warrant had been issued by the court before the publication. However, questions were arising with respect to whether prejudicial publications which were made after filing of a First Information Report. In 19611, the Supreme Court ruled that an FIR is not the starting point of a criminal proceeding. As a result of this, prejudicial publications made after filing of an FIR got immunity".

Later in A.K Gopalan v. Nordeen² the Supreme Court held "that a publication made after the arrest of a person would amount to contempt too, if it prejudiced the suspect or the accused. This position of law adopted by the Supreme Court is similar to the one that exists in the United Kingdom where arrest is considered as the starting point of pendency of criminal proceedings". In the leading case of Hall v. Associated Newspaper³ "a similar position of law was reiterated. The 24-hour rule was followed in this case, whereby once a person is arrested, he comes within the care of the court and he has to be produced before the court within 24 hours. The same rationale has been followed under

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Article 22(2)4 of the Constitution. The main reason for fixing arrest as the beginning of pendency of proceedings is that after a person's arrest if a publication is made which affects his reputation, it can also have an adverse effect on his bail".

THE RATIONALE OF CRIMINAL CONTEMPT- The purpose of "contempt jurisdiction is to protect the interests of the public, which could be negatively impacted if the authority of the court is undermined and public faith in the fair and impartial administration of justice is diminished".⁵ It is not the purpose of this measure to shield judges from imputations or criticisms leveled against them personally. The public has a significant interest in the administration of justice that is both efficient and well-organized. It is the responsibility of the court to safeguard the public's interests in the proper administration of justice. In order to fulfill this responsibility, the court has been granted the authority to commit individuals for contempt of court.

In a free society some criticism of the judiciary is inevitable. This is especially so at the time when there is a growing appreciation of the inescapable choices which fall to judges. It is naïve to expect that commentators will be silent about such choices. Just as decisions of the other branches of the government attract criticism and occasional calumny, important and controversial decision of the courts will inevitably do the same. Into this milieu has been injected the technology of the modern



media of communication.⁶ The media encourage conflict, dramatic visual image, and demands for instant solutions. Uncomfortably for the judiciary, they are locked into a profession whose mission is to serve the ages, not the instant sound bites or spin considered appropriate to most of the actors in the other branches of the government and most of the contemporary media. Generally, judges cannot answer back. At least most cannot do so in effective fora. From inexperience their attempts to respond sometimes result in compounding their problems and demeaning their office.⁷

Judges are not immune from criticism either in respect of their judicial conduct or their conduct in a purely private capacity. But they have clause for concern when criticism of them are ill-informed or entirely without foundation, and may have a tendency to undermine public confidence in judicial institutions. Further, Supreme Court has also held imputations of dishonesty and lack of integrity on the part of judge would amount to scandalizing the judge and the judiciary.⁸

THE TEST OF EROSION OF PUBLIC CONFIDENCE- On the one hand is the democratic right to free speech, expression and criticism; on the other hand is the necessity to shield the judicial system from indignity. What then, is the dividing line between criticism and contempt?

The erosion of public confidence is the primary criterion that the court in India considers when making decisions about matters pertaining to criminal contempt. The distinction between an attack on a single judge, which might amount to little more than slander against the judge, and contempt of court has been emphasized by the courts on multiple occasions. "While the former may merely be wrong done to the judge personally, the latter seeks to interfere with and denigrate the course of justice and is a wrong done to the public.⁹ However in *D. C Saxena v Hon'ble the Chief Justice of India*¹⁰ this distinction became blurred as the Supreme Court held that the libel against a Judge can constitute criminal contempt if the imputation is of such gravity that it erodes public confidence in the system". The court held:

"Any personal attack upon a judge in

connection with the office he holds is dealt with under law of libel and slander. Yet defamatory publication concerning the judge as a judge brings the court of judges into contempt a serious impediment to justice and an inroad on the majesty of justice. Any caricature of judge calculates to lower the dignity of the court would destroy, undermine or tend to undermine public confidence in the administration of justice or the majesty of justice."¹¹

In *"Bajendra Sail v M.P High Court Bar Assn.*¹² The Supreme Court held that the criticism must always be dignified and that motive must never be attributed; the judgements of the courts are public documents and can be commented upon, analysed and criticised, but in a dignified manner without attributing motives. Before placing before public, whether on print or electronic media, all concerned have to see whether such criticism has crossed the limit aforesaid and if it has then resist every temptation to make it public".¹³

CONSTITUTIONAL SCENARIO- Every citizen in India possesses a fundamental right to freedom of speech and expression, which is guaranteed by the Constitution of India.¹⁴ The right, according to the interpretation of the Supreme Court, also includes the freedom of the press.¹⁵ On the other hand, the Constitution does not prohibit the passing of legislation that place "reasonable restrictions" on the exercise of this freedom. One example of such a reasonable restriction would be a statute criminalizing disobedience to a court order.¹⁶ In circumstances when there are allegations of bias in the media, the law of contempt of court becomes an extremely important legal concept. When Indian courts have punished the press for pre-empting trials-which hasn't happened very often-they have invariably done so in accordance with the statute of contempt. This is despite the fact that such instances have been uncommon. Legal provisions on the offense of contempt of court can be found in India's constitution and in legislation like the Indian Penal Code. These provisions can be found in many places throughout the document. As a result, the Indian parliament decided to try to codify the contempt statute by passing the Contempt of Courts Act in 1971 (which will be referred to simply as "the Act"



from this point forward). It is stated in the legislation that it is an enactment, and not in derogation of the laws that were previously in place.¹⁷ However, transgressors can and have been punished by Indian courts in the past. In a nutshell, the Supreme Court has decided that the jurisdiction to penalize those who disobey the law is an inherent one for a superior court of record and hence cannot be limited by any other status.¹⁸

IMMUNITY UNDER THE CONTEMPT OF COURT ACT, 1971- Sections 3, 4, 5 and 6 (respectively) of the Act have set out certain exceptions which would not amount to contempt of court under Section 2 (c). They are as follows:

I. If "the person making the publication of any matter which interferes or tends to interfere with, or obstructs or tends to obstruct, the course of justice in connection with any civil or criminal proceeding pending, had no reasonable reason to believe that the proceeding was pending. A publication, which is made when a criminal or civil proceeding is not pending, doesn't amount to contempt of court".

II. Fair and accurate reporting of judicial proceedings cannot be considered as contempt of court.

III. Any type of fair criticism of judicial act is also exempted.

IV. A person shall not be liable for contempt if complaints against a presiding officer in good faith.

Further, explanation to Section 3 (2) has provided immunity to such publications which are made in the pre-trial phase. The explanation states that pendency begins only when the challan or charge sheet is filed or when a warrant or summon is issued and not from when a person is arrested, which is in a way contrary to Article 22 (2). This is one of the biggest issues that are being faced by the current act, which is contrary to the case laws that have been decided by the Supreme Court as has been mentioned earlier.

DUE PROCESS, INCLUDING FREEDOM OF THE PRESS AND CONTEMPT OF COURT, IN ORDER TO PROTECT LIBERTY- The concept of a "trial by media" or unfair treatment as a result of "pre-trial" publications by the media has a strong connection to both Article 19(1)(a), which guarantees

the fundamental right to freedom of speech and expression, and Article 19(2), which addresses the extent to which this right can be reasonably restricted by law for the purposes of avoiding contempt of court and maintaining a due process of law in order to protect liberty. Article 19(1)(a) guarantees the right to freedom of speech and expression. The obvious challenge here is to find a middle ground between, on the one hand, the right to freedom of speech and expression, and, on the other, the risk of violating the Contempt of Courts Act of 1971 by interfering excessively with the administration of justice. Article 21 requires that the rights of an accused person to receive a fair trial, as guaranteed by the article, be maintained.

Two main issues¹⁹ arise for consideration with respect to Section 3 (2) of the Act:

1. Whether the explanation to Section 3 (2) of the Act is in violation of the due process as guaranteed by Article 21; as it grants immunity to prejudicial publication made before the filing of the charge sheet/challan?

2. If the first question is answered in the affirmative then, can the meaning of pendency within Section 3 (2) be amended to begin at the point of arrest? Or whether such an amendment would amount to violation of a freedom of speech under Article 19 (1)(a)?

Article 21 provides that no person can be deprived of his liberty without a due process of law. The court has in the case of *Maneka Gandhi v. UOI*²⁰ held that this process of law under Article 21 has to be fair, just and equitable.

It will be helpful to contrast the position in various concurrent jurisdictions, in order to understand why arrest should be the point of beginning of pendency of a proceeding.

In U.K, Australia and New Zealand, publications made after the arrest of a person, stating his previous convictions or confessions are held to be prejudicial as they interfere with the administration of justice. The courts in India have accepted a similar approach too, as has been mentioned earlier. Hence, it has been argued by a number of jurists since long that the meaning of pendency under Section 3 (2) of the Act needs to be amended so as to make it



consistent with the rights guaranteed under the Constitution.²¹

MEDIA TRIAL AND DEFAMATION-

Sometimes trial by media becomes the media verdict and when such incidents happen, it is likely to be treated as defamation in context to media trial. There are numerous incidents which has exhibited the closed interlinking between media trail and defamation.

RIGHT TO REPUTATION AND DIGNITY-

Article 19 of the International Covenant on Civil and Political Rights, 1965, enunciates, "Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice." However, the exercise of such rights carries with it special duties and responsibilities and the same may be subject to certain restriction like respect for the rights or reputation of others. Right to reputation is an integral part of one's life.²²

During the hearing of the PIL that had been filed by "Surat Singh in the Arushi Talwar" murder case before the Supreme Court, Justices Altamas Kabir and Markandey Katju made the following observation:

"Nobody is trying to gag the media. They must play a responsible role. By investigation, the media must not do anything which will prejudice anything which will prejudice either the prosecution or the accused. Sometimes the entire focus is lost. A person is found guilty even before the trial takes place. See what happened in this (Arushi) case. Till today what is the evidence against anyone? We will lay down guidelines on media coverage. We are not concerned about media criticizing us. Let media say anything about us, we are not perturbed. Our shoulder are broad enough and we will ignore it (the criticism). We are for media freedom. What are we saying is there is no absolute freedom."²³

In one more instance of one "Gopaldas Bajaj of Mumbai, The Supreme Court has decided that an individual's standing is an indivisible piece of his key right to life and freedom and consequently, the police and different specialists with the ability to

confine ought to be exceptionally certain of their realities against the person prior to bringing him into preventive detention and housing him into prison".

"If a person is sent to jail, then even if he is subsequently released, his reputation may be irreparably tarnished."

Said the bench of Justice Altamas Kabir and Markandey Katju while quashing the preventive detention of one Gopaldas Bajaj of Mumbai under the Conservation of Foreign Exchange and Preventive of Smuggling Activities Act.

DEFAMATION- Section 499 of the Indian Penal Code expressly provides for defamation. If the person intends to harm the reputation of another or hurt the sentiments of another or his family members then, it shall amount to defamation. It shall also amount to defamation if some imputations regarding the company or association are made in any regard. An indirect statement which harms the reputation of the persons or lowers the moral or character of the person shall also be considered under the definition of defamation. Accusation in good faith shall not be considered to be defamation. Punishment for defamation is provided under section 500 of Indian Penal Code.

In the grossly negligent cases or cases where reporting is done maliciously with ulterior motives statutory bodies like Press Council of India or non- statutory bodies like News Broadcasting Standards Authority should have power to recommend in such cases.²⁵ A procedure should be adopted¹⁶² at least in the cases in relation to criminal complaints arising out of media reports where if the court is not inclined to strike down Section 499 of IPC.

DEFAMATION v. REPUTATION- In *Shaikh Zahid Mukhtar v State of Maharashtra*²⁶, the Bombay High Court in a landmark decision "earlier this month declared Sections 5D & 9B of the Maharashtra Animal Preservation Act, 1976 (as amended in 1995 with presidential assent on March 4, 2015) unconstitutional. While Justice Oka dealt with Section 5D among others, Justice S.C. Gupte dealt exclusively with Section 9B. Section 5D crafted a crime to have in one's possession in Maharashtra flesh of cow, bull or bullock slaughtered outside its



territory. Justice Oka held that the impugned section is ultra vires the Constitution as it violates right to privacy under Article 21. Interestingly while it is debatable that Article 21 includes right to privacy, in Para 176 and 193, Justice Oka has crafted a new constitutional right ; a right to eat. Para 176 holds that state cannot control what a citizen does in his house which is his own castle except if contrary to law and that it cannot be prevented to consume and possess a particular type of food. In Para 193 Justice Oka has penned that Article 21 includes right to lead a meaningful life. For a meaningful life a citizen will have to eat food of his choice of which he has a right except if the food is injurious to health. The paragraph ends with holding that even if it was assumed that there was no right to privacy, interference with right to food violates personal liberty guaranteed by the Constitution. Section 9B shifted the onus to prove innocence (reverse burden) on the accused of slaughter, transport, export, sale, purchase and possession of bovine flesh. In Para 203, Justice Gupte expressly compared procedure established by law to due process and adopted procedural and substantive due process to quash the impugned section".

REFERENCES

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2. 1969 [2] SCC 734.
3. [1978] SLT 241 [Scotland].
4. "Every person who is arrested and detained in custody shall be produced before the nearest magistrate within a period of twenty four hours of such arrest excluding the time necessary for the journey from the place of arrest to the court of the magistrate and no such person shall be detained in custody beyond the said period without the authority of a magistrate."
5. Brahma Pakash Sharma v State of UP, AIR 1954 SC 10; Baradakanta Mishra v Registrar of Orissa High Court, [1974] 1 SCC 374; S Mulgaokar, Re [1978] 3 SCC 339
6. J Kirby Michael AC CMJ, Attack on Judges- A Universal Phenomenon, 5th January, 1998.
7. Ibid
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10. AIR [1996] SC 2481.
11. Ibid.
12. [2005] 6 SCC 109.
13. Ibid.
14. Indian Constitution Art 19 [1][a]
15. See, e.g Benette Coleman v Union of India, AIR [1973] SC 106
16. Indian Constitution, Art 19[2]
17. The Contempt of Courts Act, 1971, s 22
18. Pallav Sheth v Custodine [2001] 7 SCC549, per Kirpal J [para 30-32]
19. Jain [n 4]
20. State of UP v Naresh, [2011] 4 SCC 324 para 27.
21. The 200th LCI Report has suggested an amendment, where by "any civil or criminal proceeding pending at the time of the publication" has to be replaced by the "any civil or criminal proceeding active at the time of the publication."
22. State of Bihar v Lal Krishna Advani, AIR 2003 SC 3357, 2003[3] BLJR 2020, JT 2003[Suppl 1] SC 335, 2003[7] SC ALE 524, [2003] 8 SCC 361; State of Jammu and Kashmir and Ors v Bakshi Gulam Mohammad and Anr MANU/SC/0050/1966; Smt Kiran Bedi and Jinder Singh v Committee of Inquiry ad Anr, MANU/SC/0512/1989
23. J. Venkatesan, Apex Court to lay down coverage norms, <http://www.thehindu.com/2008/08/19/stories/2008081957360100.htm> [Last accessed on 2nd June 2018]
24. Section 500 in The Indian Penal Code:



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| Punishment for defamation.-Whoever defames another shall be punished with simple imprisonment for a term which may extend to two years, or with fine, or with both. | 25. | Shreya Singhal v Union of India: 2015 [5] SCC 1 |
| | 26. | Bom HC 2015[5731] |
