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## **MEDIA TRIALS: INVESTIGATIVE JOURNALISM VS. RIGHT TO FAIR TRIAL**

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### **ABSTRACT**

With the coming into existence of television, cable networks, internet and social media, the publicity of offences has reached alarming proportions. This may result in innocents being condemned for no reason or the accused persons may not get the right to fair trial. Where the constitution guarantees the freedom of press, the right to fair trial or the right to life of an accused person cannot be compromised. Media is regarded as the “eyes and ears of the general public”. Trial by media has become a common norm in today’s society. Sometimes even judges are compelled to make a decision as per the public opinion which is a result of media trials. The famous Judge of American Supreme Court Cardozo J. in his book, “Nature of Judicial Process” mentions that,

“The great tides and currents which engulf the rest of men do not turn aside in their course and pass the judges by. Even these forces are seldom fully in consciousness. They lie so near the surface, however, that their existence with the recognition of their power. Deep below consciousness are other forces, the likes and the dislikes, the predilections and the prejudices, the complex instincts and emotion and habits and convictions, which make the man, whether he be litigant or judge... There has been a certain lack of candour in much of the discussions of the theme or rather perhaps in the refusal to discuss it, as if judges must lose respect and confidence by the reminder that they are subject to human limitations...”

Acting as public court, media starts its own investigation and forms public opinion. It can also not be denied that for the smooth functioning of a democratic society, freedom of press is necessary, but from recent times the freedom of expression is being misused and it acts as a hindrance to the right of fair trial of an accused person. This paper attempts to elaborate the media trials versus the right to fair trial. The paper also deals with the comparative study of media trials in various jurisdictions of the world, and the Indian position on Media trials.

## I. Introduction

In democratic states, press or media is considered as the fourth pillar. We know the three organs of the government i.e. legislature, executive and judiciary, are separate and independent of each other. The press or media being considered as the fourth pillar, it can be said that it is at par with the other three organs which are separate and independent of each other. Media is a platform which acts as a medium through which ideas and communication is possible between societies. These ideas act as a basis of participation and debate in society.

The three organs of the government viz. the legislature, the executive and the judiciary derive their powers and authority from the Constitution of India. Similarly the Press/Media also derive its authority from the constitution of India. Our Constitution contains an elaborate list of fundamental rights from Article 12 to 35 in the Part III of the Constitution. Article 19 provides for certain freedoms, among these freedoms Article 19(1) (a) provides for freedom of speech and expression. Freedom of press is not specifically mentioned in any provision of the Constitution but is a derivative of the freedom of speech and expression. As no freedoms can be absolute, therefore Article 19(2) provides certain restrictions<sup>12</sup>.

The Criminal law and criminal jurisprudence of our country is based on the doctrine that the guilt of any person charged in a court of law has to be proved beyond reasonable doubt and that an accused is always to be presumed innocent unless he is proved guilty in a court of law after observing all the legal safeguards of an accused. Apart from this the accused has a right to remain silent also because an accused is protected against self incrimination<sup>2</sup>.

## II. International Instruments regarding freedom of expression and Press

It is necessary to go into some fundamental principles regarding this as laid down in various human rights instruments.

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<sup>1</sup> Nothing in sub clause (a) of clause (1) shall affect the operation of any existing law, or prevent the state from making any law, insofar as such law imposes reasonable restrictions on the exercise of the right conferred by the said sub clause, in the interest of the sovereignty and integrity of India, the security of the state, the friendly relations with foreign states, public order, decency or morality, or in relation to contempt of courts, defamation or incitement to an offence.

<sup>2</sup> <sup>th</sup> Report on Article 20(3) of the Constitution of India and the Right to remain Silent, *available at:* [www.lawcommissionofindia.nic.in](http://www.lawcommissionofindia.nic.in)

## II.1. the universal Declaration of human rights 1948<sup>3</sup>

Article 3 of the UDHR states that, “Everyone has the right to life, liberty and security of person”.

Article 10 which deals with the rights of an accused, state that,

“Everyone is entitled in full equity to a fair and public hearing by an independent and impartial tribunal in the determination of his rights and obligations and of any criminal charge against him”.

Article 11 which deals with the right to be presumed innocent, states that,

“(1) every one charged with a penal offence has the right to be presumed innocent until proven guilty according to a law in a public trial at which he has all the guarantees necessary for his defense

(2) No one shall be held guilty of any penal offence on account of any act or omission which did not constitute a penal offence, under National or International law, at the time it was committed. Nor shall a heavier penalty be imposed than the one that is applicable at the time the penal offence is committed.”

Article 12 which deals with a person's privacy rights states that,

“No one shall be subject to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honor and reputation. Everyone has the right to protection of the law against such interference and attacks”.

With regard to the freedom of expression, Article 19 of the Universal Declaration of human rights states that,

“Everyone has the right to freedom of opinion and expression: this right includes freedom to hold opinions without interference and to seek receive and impart information and ideas through any media regardless of frontiers”.

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<sup>3</sup> The Universal Declaration of Human Rights, 1948, available at: <https://www.un.org/universaldeclaration>.

## **II.2. International Covenant on Civil and Political Rights, 1966**

India ratified the ICCPR in 1976. Article 14(2) states that,

“Everyone charged with a criminal offence shall have the right to be presumed innocent until proven guilty according to law”.

Article 14 (3) cl. (g) states that,

“A person is not to be compelled to testify against himself or to confess guilt”

Article 15 of the ICCPR states that,

“No person shall be punished for an act which was not an offence when it was committed”.

## **II.3. European Convention**

Article 10(1) of the European Convention for the Protection of Human rights and fundamental freedoms 1950 lays down the same rights as are laid down in Article 19 of the Universal Declaration of human rights. However restrictions are provided in Article 10(2), which are as “the exercise of these freedoms since it carries duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society in the interest of national security, territorial integrity or public safety, for the prevention of disorder of crime, for the protection of health or morals for the protection of reputation of others, for preventing the disclosure of information received in confidence or for maintaining the authority and in particularly of the judiciary”. This right is read along with these rights as laid down in various articles of the convention.

- Article 2, which lays down that, "everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law".
- Article 5 lays down that, "everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with as prescribed by law. Cl. (a) refers to lawful detention of a person after conviction by a competent court. Cls. (b) to (f) deal with manner of arrest and detention".
- Article 6 of the Convention deals with the right to fair trial, It lays down that,

"(1) In determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law...

(2) Everyone charged with a criminal offence has the following minimum rights:

- a. To be informed promptly, in a language which he understands and in detail of the nature and cause of accusation against him;
- b. To have adequate time and facilities for the preparation of his defense;
- c. To defend himself in person or through legal assistance of his own choosing or if he has not sufficient means to pay for legal assistance, to be given it free when the interest of justice so require;
- d. To examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him and;
- e. To have the free assistance of an interpreter if he cannot understand or speak the language used in court."

- Article 8 of the Convention states that,

"Everyone has the right to respect for his private and family life, his home and his correspondence."

#### **II.4. the Madrid Principles on the Relationship between the Media and Judicial Independence (1994)**

In January 1994 the International Commission of Jurists setup a group of 40 distinguished and legal experts and media representatives who met in Madrid Spain. The main objectives of the meeting were:

1. To examine the relationship between the Media and Judicial Independence as guaranteed by the 1985 UN Principles on the independence of judiciary.
2. To formulate principles addressing the relationship between freedom of expression and judicial independence.

The group of media representatives and the Jurists held in the preamble that “the freedom of media which is an integral part of freedom of expression is essential in a democratic society governed by the rule of law and that it is the responsibility of judges to recognize and give effect to freedom of media by applying a basic presumption in their favor and by permitting only such restrictions on the freedom of media as are authorized by the international covenant on civil and political rights”. The group emphasized that,

“The media has an obligation to respect the rights of individuals, protected by the international covenant and the independence of judiciary”.

The basic principles of the Madrid Convention are:

“1. Freedom of expression including the freedom of media constitutes one of the essential foundations of every society which claims to be democratic. It is the right and function of media to gather and convey the information to the public and comment on the Administration of justice, including cases before, during and after trial, without violating the presumption of innocence.

2. This principle can only be departed from in the circumstances envisaged in the international covenant on civil and political rights, as interpreted by “the 1984 Siracusa principles on the limitation and derogation provisions in the international covenant on civil and political rights”.

3. The right to comment on the Administration of justice shall not be subject to any special restrictions.

4. The basic principles don't require a right to broadcast or record court proceedings. Where this is permitted, the basic principles shall remain applicable.

Some strategies for implementation were also provided.

Para 1 states that, the judges should receive guidance in dealing with the press and the judge shall be encouraged to assist the press by providing summary of long or complete judgment of matters of public interest.

Para 2 says that, judges shall not be forbidden to answer questions from the press, etc.

Para 3 is of most significance, and states, the balance between independence of judiciary, freedom of press, and respect of the rights of the individual particularly of minors and other persons in need of special protection is difficult to achieve”.

### **III. Whether Media Trials affect the judgment of judges**

A question which arises is that can a publication or news highlighted by media “unconsciously influence judges and whether judges as human beings are not susceptible to such indirect influences, at least sub consciously or unconsciously?”

There are many views on this point. One view is American view which lays down that, “judges are not liable to be influenced by the media publications”. Another view is the Anglo- Saxon view, which states that, “judges at any rate may still be subconsciously (though not consciously) influenced and members of the public may think that judges are influenced by such publications and such a situation it has been held attracts the principle that, justice may not only be done but must be seen to be done”.

It appears that the Supreme Court of India has accepted the Anglo-Saxon view. It can be found in the judgment in *Reliance Petro Chemicals Ltd vs. Proprietors of Indian Express News Papers*<sup>4</sup>. The acceptance of Anglo- Saxon view can be seen from the case of *P.C. Sen*<sup>5</sup>, which was relied upon by the Court in the *Reliance Petro Chemicals* case. The Supreme Court has held that, “no distinction is in our judgment warranted that comment on a pending case or abuse of a party may amount to contempt when the case is tri-able with the aid of a jury and not when it is triable by a judge or judges”. This case was a case, where by way of a writ petition; a civil action was pending in Calcutta High court. A radio broadcast was made by the Chief Minister of West Bengal regarding the west Bengal Milk products control order 1965, the High Court held the Chief Minister guilty of “contempt for justifying the control order” but did not award any punishment to him. The Supreme Court on appeal, agreed with the high court that, “the speech of the Chief Minister was ex facie calculated to interfere with the administration of justice”. In the judgment, the Supreme Court held that, the action of the Chief Minister was likely to interfere with the administration of justice by influencing a judge or judges.

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<sup>4</sup> *Reliance Petro Chemicals Ltd vs. Proprietors of Indian Express News Papers*, (1989) A.I.R. SC 190, (1988) 4 SCC 592

<sup>5</sup> *In re P.C. Sen*, A.I.R 1970 SC 1821, 1970, CriLJ 1525.

The Supreme Court in *Reliance Petro Chemicals Ltd.* referred to Article 19(1) (a), which deals with the freedom of speech and expression as well as the limitations/restrictions stated in Article 19(2). The court laid down that, “the American Constitution does not contain any provision for imposition of reasonable restrictions by law. It adverted to the absolute terms in which the U.S First Amendment dealing with the freedom of speech and expression is couched and to the theory of real and present danger which was evoked by the U.S Courts as the only inherent limitation on that right in that country”.

The Supreme Court stated that, “though the freedom of speech and expression is not limited in the American Constitution, the case of India with regard to the freedom of speech and expression is different in India because certain limitations are provided itself in the Constitution”.

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The Supreme Court further observed that<sup>6</sup>,

“In America in view of the absolute terms of the first amendment, unlike the conditional right of freedom of freedom of speech under the Indian Constitution, it would be worthwhile to bear in mind the present and imminent danger theory”.

Benjamin Cardozo who is known as one of the greatest judges of the American Supreme court, in his book “*Nature of the Judicial Process*”<sup>7</sup> says that,

“The great tides and currents which engulf the rest of men do not turn aside in their course and pass the judges by. Even these forces are seldom fully in consciousness. They lie so near the surface, however, that their existence with the recognition of their power. Deep below consciousness are other forces, the likes and the dislikes, the predilections and the prejudices, the complex instincts and emotion and habits and convictions, which make the man, whether he be litigant or judge... There has been a certain lack of candour in much of the discussions of the theme or rather perhaps in the refusal to discuss it, as if judges must lose respect and confidence by the reminder that they are subject to human limitations...”

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<sup>6</sup> P.605, Para 15.

<sup>7</sup> Benjamin N. Cardozo, *The Nature of Judicial Process*, 1921. <sup>8</sup> *Rideau v. Louisiana*: 373 U.S. 723 (1963)



In his famous quotation, Cardozo has stated that,

“Nonetheless if there is anything of reality in my analysis of the Judicial Process, they don't stand aloof on these chill and distant heights; ... The great tides and currents which engulf the rest of men, do not turn aside in their course, and pass the judges by”.

#### **IV. Media trials in other Jurisdictions 1. United states of America**

In American Constitution, freedom of press is an absolute right and is not subjected to restrictions. Therefore in America, it is unlawful to interfere with media freedom when the media is reporting or even commenting on going trials. If prejudice is resulted to the proceedings by irresponsible media, the American legal system does not provide for sanctions.

In *Rideau v. Louisiana*<sup>8</sup>, the American Supreme Court laid down the “test of presumed prejudice”. The case involved the robbery of a bank, the kidnapping of three of the bank employees, and murder of one of them. An interview of the accused, Rideau was telecasted for three days, wherein he was shown with the Sheriff in the jail, confessing to his guilt.

Rideau's counsel requested for change in the venue of the trial on the ground that the interview so telecasted had adversely affected his right to a fair trial. The trial court had denied the prayer. The Supreme Court said: “Under our Constitution, guarantee of due process, a person accused of committing a crime is vouchsafed basic minimal rights. Among these are the right to counsel, the right to plead not guilty, and the right to be tried in a courtroom presided over by a Judge. In this case, the Court presumed the prejudice caused by the broadcasting of the interview.”

In *Sheppard v. Maxwell*<sup>8</sup>, the Supreme Court of United States was asked to consider

Whether Sheppard was deprived of a fair trial in his state conviction for the second-degree murder of his wife, because of the trial judge's failure to protect Sheppard sufficiently from the massive, pervasive and prejudicial publicity that attended his prosecution.

Speaking for the Court, Clark, J. concluded that Sheppard did not receive a fair trial consistent with the due process clause of the Fourteenth Amendment and, therefore, reverse the judgment.

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<sup>8</sup> *Sheppard vs. Maxwell*, 384 U.S. 333 (1966)

The Court laid down the test of reasonable likelihood of prejudicial news prior to the trial preventing a fair trial. If such reasonable likelihood exists, then the conviction should be overturned. The Court, hence, shifted from the test of presumed prejudice to the test of reasonable likelihood.

In *Murphy v. Florida*<sup>9</sup>, the Supreme Court was seized of the issue, whether the petitioner [Murphy] was denied a fair trial because members of the jury had learned from news accounts about a prior felony conviction or certain facts about the crime with which he was charged.

Speaking through Marshall, J. the Court observed that Juror exposure to information about a State defendant's prior convictions or to news accounts of the crime with which he is charged do not alone presumptively deprive defendant of due process; such exposure must be viewed with the totality of the circumstances to determine whether the trial was fundamentally unfair. It, thus, laid down the test of totality of circumstances in order to determine whether the pretrial publicity had adversely affected the fairness of the trial or not.

Moreover, in *Moyola v. Alabama*<sup>10</sup>, the Court opined that one seeking to have his conviction nullified on the ground that he was denied a fair trial by an impartial jury due to adverse pretrial publicity ordinarily must demonstrate an actual, identifiable prejudice attributable to that publicity on the part of members of his jury. Hence, the accused has to prove that the newspaper coverage so saturated and tainted the county populace that any subsequent proceedings in that country would have been unavoidably poisoned by it. One can, thus, see the changing stand of the Supreme Court of United States from presumed prejudice to reasonable likelihood to totality of circumstances and of the Circuit demanding that the accused should demonstrate an actual, identifiable prejudice attributable to that publicity.

The American courts have created different yardsticks, as they are skeptical about the adverse impact of pre-trial publicity on a trial. The American courts have gone on to believe that light impressions carried by the Jury would yield to the testimony presented at the trial. Hence, pretrial publicity does not adversely affect a fair trial. Therefore, the press should be given a free hand to cover the crime and the trial.

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<sup>9</sup> *Murphy vs. Florida*, 421 U.S. 794 (1975)

<sup>10</sup> *Moyola vs. Alabama*, 326 U.S 501 (1946)

**United Kingdom:**

In United Kingdom, the “Contempt of Courts Act 1981” under Sec 4 (2) provide that, “courts are expressly empowered to postpone publication of any report of the proceedings or any part of the proceedings for such period as the court thinks fit for avoiding a substantial risk of prejudice to the administration of justice in those proceedings”.

While the American courts have favored the press over the accused, the British courts have thought vice versa.

Laws, J. in *R. v. Lord Chancellor*<sup>11</sup>, observed, “Indeed, the right to a fair trial is as near to an absolute right as any which I can envisage”. The English courts very well recognize “the potential threat to justice posed by unrestrained publicity. Certain information, especially reports of confessions made by criminal defendants and details of defendant’s prior convictions, is considered inherently prejudicial. Courts tend to halt prosecutions when detrimental publicity interferes with criminal trials. If the rules of evidence preclude the production of particular facts during trial, and members of the jury are exposed to those same facts, British courts simply assume that justice has been compromised”. Thus, the English courts follow the test of “presumed prejudice” to hold that pre-trial publicity has violated the right to fair trial.

In *Attorney General v. Guardian Newspapers Ltd.*<sup>12</sup> Collins, J. observed that “in assessing whether there has been a violation, courts must determine whether the risk of prejudice from the publication is both immediate and serious. The courts must consider the nature of the published material and its presentation, the timing of the publication, the likelihood of its coming to the attention of jurors or potential jurors, the likely impact on the jury and the ability of the jury to abide by any judicial directions which seek to neutralize any prejudice”.

**Canada:**

The “Canadian Charter of Rights 1982”<sup>13</sup> under Sec. 2(b) read with Sec. 1 – Section 2(b) deals with “freedom of press, and on the other hand section 1 impose ‘reasonable limits prescribed

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<sup>11</sup> *R (UNISON) Vs. Lord Chancellor*, (2017) UKSG 51.

<sup>12</sup> *Attorney General vs. Guardian Newspapers Ltd.*, 1 AC 109.

<sup>13</sup> “The Canadian Charter of Rights and Freedoms is a bill of rights entrenched in the Constitution of Canada, forming the first part of the Constitution Act, 1982”, available at: [https:// www.justice.gc.ca](https://www.justice.gc.ca)

by law'. The Canadian law provides that when there is conflict between two protected rights, both require a balance to be achieved so that both rights can be balanced. The Canadian Courts have, thus, shortened the distance between the US legal experience and the common-law experiences in other countries".

## **V. Indian Position on Media Trials**

The constitution of India does not separately refer to the freedom of the press or the electronic media in part III. As mentioned above, the freedom of press is a derivative of the freedom of speech and expression as laid down in Article 19(1) (a). None of the freedoms in India are absolute, but are subject to reasonable restrictions and these restrictions are themselves provided in the Constitution or other Statutes as the case may be. The restrictions of Article 19 (1) (a) are provided in Article 19 (2).

Clause 2 lays down that, "Nothing in sub cl. (a) of cl.(1) shall affect the operation of any existing law, or prevent the state from making any law, insofar as such law imposes reasonable restrictions on the exercise of the right conferred by the said sub clause, in the interest of the sovereignty and integrity of India, the security of the state, the friendly relations with foreign states, public order, decency or morality, or in relation to contempt of courts, defamation or incitement of an offence.

"Contempt of courts law" deals with the non interference with the "Administration of justice" and that is how "the due course of justice" that is required for a fair trial, can require imposition of limitations on the freedom of speech and expression.

Article 20 cl. 1 of the constitution states that no person shall be convicted of any offence except for violation of the law in force at the time of the commission of the act charged as an offence and not be subjected to a penalty greater than that which might have been inflicted under the law in force at the time of the commission of the offence.

Article 20 cl. 2 states that, no person shall be prosecuted and punished for the same offence more than once.

Article 20 cl.3 is important and it deals with the right against self incrimination. It states,

“No person accused of any offence shall be compelled to be a witness against himself”.

Article 21 is the important article which guarantees the right to life and liberty. It reads, “no person shall be deprived of his life or personal liberty except according to procedure established by law”.

The Supreme Court in *Maneka Gandhi case*<sup>14</sup> interpreted the words “according to procedure established by law” as requiring a procedure which is fair, just and equitable and not arbitrary.

### **Contempt of courts act, 1971**

Regarding the interference with the criminal law, sections 2 and 3 of the contempt of courts act, 1971 are relevant. Criminal contempt is defined as the publication, (whether by words spoken or written or by signs or by visible representation, or otherwise), of any matter or the doing of any act whatsoever which prejudices or interferes or tends to interfere with the due course of any judicial proceedings; or

Interferes or tends to interfere with the due course of any judicial proceedings; or Interferes or tends to interfere with or obstructs or tends to obstruct, the administration of justice in any manner.

Section 3(1) provides for exemptions, the following are exempted

“Section 3. Innocent publication and distribution of matter not contempt

(1) a person shall not be guilty of contempt of courts on the ground that he has published (whether by words spoken or by signs or by visible representations or otherwise) any manner 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 at the time of publication, if at that time he had no reasonable grounds for believing that the proceeding was pending.

(2) Notwithstanding anything to the contrary contained in this act or any other law for the time being in force, the publication of any such matter as is mentioned in sub s.(1) in connection

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<sup>14</sup> *Maneka Gandhi vs. Union of India*, (1978) A.I.R 597, 1978 SCR (2) 621

with any civil or criminal proceedings which is not pending at the time of publication and shall not be deemed to constitute contempt of courts.

(3) A person shall not be guilty of contempt of court on the ground that he has distributed a publication containing any such matter as is mentioned in sub-section (1), if at the time of distribution he had no reasonable grounds for believing that it contained or was likely to contain any such matter as aforesaid:

Provided that this sub-section shall not apply in respect of the distribution of

(i) any publication which is a book or paper printed or published otherwise than in conformity with the rules contained in section 3 of the Press and Registration of Books Act, 1867 (25 of 1867);

(ii) Any publication which is a newspaper published otherwise than in conformity with the rules contained in section 5 of the said Act.

**Explanation:** For the purposes of this section, a judicial proceeding

(a) Is said to be pending;

(A) In the case of a civil proceeding, when it is instituted by the filing of a plaint or otherwise,

(B) In the case of a criminal proceeding under the Code of Criminal Procedure, 1898 (5 of 1898), or any other law

(i) where it relates to the commission of an offence, when the charge-sheet or challan is filed, or when the court issues summons or warrant, as the case may be, against the accused, and

(ii) In any other case, when the court takes cognizance of the matter to which the proceeding relates, and in the case of a civil or criminal proceeding, shall be deemed to continue to be pending until it is heard and finally decided, that is to say, in a case where an appeal or revision is competent, until the appeal or revision is heard and finally decided or, where no appeal or revision is preferred, until the period of limitation prescribed for such appeal or revision has expired;

(b) Which has been heard and finally decided shall not be deemed to be pending merely by reason of the fact that proceedings for the execution of the decree, order or sentence passed therein are pending.

Section 4 protects fair and accurate reporting of judicial proceedings.

Section 7 states that, when publication of information relating to proceedings in chambers or in camera is not contempt, except in certain cases which are enumerated in that section.”

### **The Press Council of India Norms of Journalistic Conduct Norm**

1 states:

“1. Accuracy and fairness

(i) The press shall eschew publication of inaccurate, baseless, graceless, misleading or distorted material. All sides of the core issue or subject should be reported. Unjustified rumours and surmises should not be set forth as facts.”

While dealing with investigative journalism, Norm 26(f) states:

“The reporter must not approach the matter or the issue under investigation, in a manner as though he were the prosecutor or counsel for the prosecution. The reporters approach should be fair, accurate and balanced. All facts properly checked up, both for and against the core issues, should be distinctly and separately stated, free from any one sided inferences or unfair comments. The tone and tenor of the report and its language should be sober, decent and dignified, and not needlessly offensive, barbed, derisive or castigatory, particularly while commenting on the version of the person whose alleged activity or misconduct is being investigated. Nor should the investigative reporter conduct the proceedings and pronounce his verdict of guilt or innocence against the person whose alleged criminal acts and conduct were investigated, in a manner as if he were a court trying the accused”.

Norm 26(g) unequivocally states:

“In all proceedings including the investigation, presentation and publication of the report, the investigative journalist/newspaper should be guided by the paramount principle of criminal

jurisprudence, that a person is innocent unless the offence alleged against him is proved beyond doubt by independent, reliable evidence”.

The Press Council has further prescribed the cautions to be observed while criticizing judicial acts.

Norm 12(a) states as under:

“Caution in criticizing judicial acts

(i) Except where the court sits in-camera or directs otherwise, it is open to a newspaper to report pending judicial proceedings, in a fair, accurate and reasonable manner. But it shall not publish anything which, in its direct and immediate effect, creates a substantial risk of obstructing, impeding or prejudicing seriously the due administration of justice; or is in the nature of a running commentary or debate, or records the papers own findings, conjectures, reflection or comments on issues, sub-judice and which may amount to abrogation to the newspaper the functions of the court; or regarding the personal character of the accused standing trial on a charge of committing a crime.

(ii) Newspaper shall not as a matter of caution, publish or comment on evidence collected as a result of investigative journalism, when, after the accused is arrested and charged, the court becomes seized of the case. Nor should they reveal, comment upon or evaluate a confession allegedly made by the accused”.

“In case these norms are followed in letter and spirit, the controversy between freedom of the press and the right of accused of fair trial would itself subside. However, these norms have been followed more in breach than in adherence.”

The consequences of the media overstepping these norms are not too far to imagine. Already the 17th Law Commission has suo motu taken up the topic of “Trial by Media: Free Speech and Fair Trial under Criminal Procedure Code, 1973.”

In its 200th Report, the Law Commission has “opined that today there is a feeling that in view of the extensive use of the television and cable services, the whole pattern of publication of news has changed and several such publications are likely to have a prejudicial impact on the suspects, accused, witnesses and even Judges and in general on the administration of justice. It said that publications which interfered or tend to interfere with the administration of justice



would amount to criminal contempt under the Contempt of Courts Act, 1971. It further suggested that “if in order to preclude such interference, the provisions of the Contempt of Courts Act were to impose reasonable restrictions on freedom of speech, such restrictions would be valid. Since Section 3(2) of the Contempt of Court Act claims that a criminal proceeding is said to be pending, where it relates to the commission of an offence, when the charge-sheet or challan is filed, the Law Commission has suggested this part of the section be amended to lay down that the criminal proceeding is said to begin from the moment of arrest of the offender. It has further suggested that publications with reference to character of the accused, previous convictions, confessions, judging the guilt or the innocence of the accused or discrediting witnesses could also be considered as criminal contempt. It further suggested that the power to restrain the press from publishing or broadcasting or telecasting adverse reports about a criminal case should be given to the High Courts. Although the said Report has not been accepted by Parliament, but the recommendation of the Report are possible pointers to the future scenario involving the freedom of the press?”

In a budding democracy like ours, the judiciary and the press have a crucial role to play. Both have to uphold the constitutional philosophy and the rule of law. The judiciary and the press have to supplement each other. While the people have a right to be informed, the individual has the right to be protected and defended in a criminal case. Although it is said that the right of an individual should give way to the right of the community, but in criminal justice system, it is the right of the accused, which is paramount. His presumption of innocence cannot be sacrificed at the altar of freedom of speech and expression. To do so, would be to turn the entire criminal justice system on its head; it would violate Article 21 of Constitution of India, which is the heart and soul of our Constitution. If the rule of law is to be protected and promoted, administration of justice has to be given preference over the freedom of speech and expression as enjoyed by the press.

Trial by media in India is a recent phenomenon. Hence, we find “sporadic obiter, but no concrete ratio decidendi”. With the increasing technology, the role of media has become quite easy particularly with the help of internet. By sitting at homes or studios, media has assumed the role of janta adalat, they make their verdicts loud and clear when the matter is still pending in the courts. This has the tendency to result in maladministration of justice. The famous maxim that, “let a thousand guilty persons be free but never should one innocent person be punished” is hampered with when media assumes the role of Courts. In 2013, Khurdhid Anwar a 55 year

old social activist committed suicide, after the Indian TV channel 'India TV' aired its investigation into a case of alleged rape in Delhi. The Channel dictated the accused Khurshid Anwar as guilty. The TV channel used the words such as "*India TV ladega iss ladki ko insaaf dilaane ki jung*" and "*Iske saath ku karm karne waale ko inzaam tak pahuchaye*". His suicide was a result of the allegations and the immature judgment by the reporters made on national TV.

In *Reliance Petrochemicals Ltd. v. Proprietors of Indian Express Newspapers, Bombay (P) Ltd.*, the Hon'ble Supreme Court partly dealt with the issue of freedom of press and administration of justice. Dealing with an adverse article published in the Indian Express with regard to the public issues of Reliance Petrochemicals, "the Supreme Court had restrained all the six respondents from publishing any article, comment, report or editorial in any of the issues of the Indian Express or their related publications questioning the legality or validity of any of the consents, approvals or permissions to the [said issue of debentures]. The issue raised was about the continuation of such injunction especially when the shares had been oversubscribed though the day of allotment had not yet expired and before the allotment the subscribers could withdraw their subscriptions". The Apex Court held:

"There must be reasonable ground to believe that the danger apprehended in continuance of the injunction is real and imminent. This test is acceptable on the basis of balance of convenience.

However, the Supreme Court has not yet found or laid down any formula or test to determine how the balance of convenience in a situation of this type, or how the real and imminent danger should be judged in case of prevention by injunction of publication of an article in a pending matter. But the Court did caution that public interest demands that there should be no interference with judicial process and the effect of the judicial decision should not be preempted or circumvented by public agitation or publications".

In *State of Maharashtra v. Rajendra Jawanmal Gandhi*<sup>15</sup>, while dealing with a case of alleged attempt to rape a minor, the Apex Court observed:

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<sup>15</sup> *State of Maharashtra vs. Rajendra Jawanmal Gandhi*, (1997), 8 SCC 386, 1997 INSC 0855

“A trial by press, electronic media or public agitation is the very antithesis of the rule of law. It can well lead to miscarriage of justice. A Judge has to guard himself against any such pressure and he is to be guided strictly by the rules of law”.

In *M.P. Lohia v. State of W.B.*<sup>16</sup> the Hon’ble Supreme Court dealt with a case where a trial for dowry death was sub-judice, when an article appeared in a magazine *Saga*, entitled *Doomed by Dowry*. The article was based on the interview of the family of the deceased, giving version of the tragedy and extensively quoting the father of the deceased as to his version of the case. The Apex Court observed:

“We have no hesitation that these types 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 were responsible for the said article against indulging in such trial by media when the issue is sub judice”. However, the matter was treated as closed by the court rather than taking it further.

In *Manu Sharma v. State (NCT of Delhi)*<sup>17</sup>, the Apex Court has extensively observed about the danger of trial by media. It opined as under:

“There is danger of serious risk of prejudice if the media exercises an unrestricted and unregulated freedom such that it publishes photographs of the suspects or the accused before the identification parades are constituted or if the media publishes statements which outrightly hold the suspect or the accused guilty even before such an order has been passed by the court. Despite the significance of the print and electronic media in the present day, it is not only desirable but the least that is expected of the persons at the helm of affairs in the field, to ensure that trial by media does not hamper fair investigation by the investigating agency and more importantly does not prejudice the right of defense of the accused in any manner whatsoever. It will amount to travesty of justice if either of this causes impediments in the accepted judicious and fair investigation and trial”.

It further held:

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<sup>16</sup> *M.P. Lohia vs. State of West Bengal*, 2005 (2) SCC 686

<sup>17</sup> *Manu Sharma v. State (NCT of Delhi)*, (2010) 6 SCC 1

“Presumption of innocence of an accused is a legal presumption and should not be destroyed at the very threshold through the process of media trial and that too when the investigation is pending. In that event, it would be opposed to the very basic rule of law and would impinge upon the protection granted to an accused under Article 21 of the Constitution.

In *Anukul Chandra Pradhan v. Union of India*<sup>18</sup>, it was held that,

“It is essential for the maintenance of dignity of the courts and is one of the cardinal principles of the rule of law in a free democratic country that the criticism or even the reporting particularly, in sub judice matters must be subjected to check and balances so as not to interfere with the administration of justice.”

In the 2012 Delhi gang rape case widely known as ‘Nirbhaya case’ the media has taken up the role of an activist but has reported cases of sexual offence insensitively and without due diligence. The recent NUJS law intern case and Tehelka case are other instances in which the media has become self proclaimed justice system by labeling and making unsubstantiated allegations. One of the articles ‘trial and error’ has very precisely explained this: -

“Part of the legacy of the December 2012 Delhi gang rape is a newly activist media that is both a symptom and a cause of the increased public revulsion against such cases. Laudable as it may be, this media activism is also disquieting, and not just because it might partially be fuelled by a competitive rush to attract larger audiences. Even when well intentioned, recent coverage of sexual violence has tended to degenerate rapidly into a series of trials by media, with the media arrogating to itself and the public the powers of both judge and jury. As a consequence, the media has chipped away at the already precarious agency of assault victims, and also undermined the possibility of justice being delivered.”<sup>20</sup>

The recent case of suicide by Sushant Singh Rajput in 2020 created a conflict between the rights of the accused and the rights of journalists. The accused Rhea was sentenced by media trials and was harassed and ridiculed publicly, thereby violating her fundamental rights as well as the principle of natural justice i.e. innocent until proven guilty. The Bombay high court in the instant case even admitted that media trials were being conducted. It even gave guidelines to

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<sup>18</sup> *Anukul Chandra Pradhan v. Union of India & Ors.* Writ Petition (Criminal) No. 137 of 1996. <sup>20</sup> Supriya Roy’s, Trial and error; available at: <https://www.caravanmagazine.com>.

the media as to how reporting should be done on matters of death and suicide. Despite guidelines the court did not award any punishment to the violators so as to discourage the practice of trial by media.

In the recent times, media reports some things even before the police has found about it. This investigative journalism is good in a participative democracy, but it should be kept in mind that the hindrance by media in the fair trials is more harmful for the sustenance of democracy. While media has a freedom of expression and investigation, the right to privacy and the right to fair trial of an individual should not be compromised. The essence of every democracy is the balancing of interest, so a balance must be maintained between the right to the media to investigative journalism and the right of the individual to fair trial.

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