

TRIAL BY MEDIA: A THREAT TO FAIR TRIAL

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Abstract

Free press and independent judiciary are institutions that are sine qua non for the maintenance of the rule of law. These are the very foundation of a democratic society. Both of these, therefore, need to be jealously preserved and protected. The press, on the other hand, is a harbinger of public interest, and through its critical eye the affairs of public are carried on objectively as per the proclaimed principles, and not arbitrarily for meeting the vested interests. The resolution of such conflicts is always a delicate matter. The burden ultimately travel down the Shoulders of the judiciary, for the simple reason that in a democracy, the enforcement of the law and the adjudication of disputes arising the law will ordinarily reach the courts in some form or other and at some time or other. The delicacy of the controversy so arising becomes all the more marked where the organ of the state with which the conflict arises is the judiciary itself. Media has now reincarnated itself into a 'public court' (Janta Adalat) and has started interfering into court proceedings. By this way, it prejudices the public and sometimes even judges and as a result the accused, that should be assumed innocent is presumed as a criminal leaving all his rights and liberty underdressed.

Keywords – Media , Law, Supreme court, Fair trial

1. INTRODUCTION

“The tension between the COWIS and the media revolves around two general concerns. The first is that there should be no ‘trial by media’, and the second is that it is not for the press or anyone

else to ‘prejudge’ a case. Justice demands that people

should be tried by courts of law and not be pilloried by the press. It completely overlooks the vital gap between an accused and a convict keeping at stake the golden principles of presumption of innocence until proven guilty’ and ‘guilt beyond reasonable doubt’.

Now, what we observe is media trial where the media itself does a separate investigation, builds a public opinion against the accused even before the court takes cognizance of the case. If excessive publicity in the media about a suspect or an accused before trial prejudices a fair trial or results in characterizing him as a person who had indeed committed the crime, it amounts to undue interference with the “administration of justice” calling for proceedings for contempt of court against the media.

Indian press has a long history spreading over the last two hundred years. There were a series of enactments, ever since the days of East India Company directed against the press. So much was the importance and significance of this right that the framers of the Constitution in their very first resolution committed themselves to secure for the people of India the right to ‘freedom of thought, expression, belief, faith, etc.

2. FREE SPEECH V. FAIR TRIAL

2.1 FREE SPEECH-

The right to free speech is necessary development of individual’s personality and individual self- expression, (b) for a system of self government and representative democracy,

and (c) for the search of truth. Article 19 of the International Covenant on Civil and Political Rights, 1966, embodies the right to freedom of speech, that is, “everyone shall have the right to hold opinions without interference” and the ‘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’. Nonetheless, this freedom comes with a rider that the exercise of this right comes with “special duties and responsibilities” and is subject to “the rights or reputations of others”. The right to free speech is necessary(a) As per Article 19 of the International Covenant on Civil and Political Rights, 1966:

1. Everyone shall have the right to hold opinions without interference.
2. 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.
3. The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:
 - (a) For respect of the rights or reputations of others;
 - (b) For the protection of national security or of public order (order public), or of public health or morals.

3. CASE STUDIES

Justice Patanjali Shastri in *Romesh Thapper v. State of Madras* underlined the Special role of press in a democratic organization. For without free political discussion no public education, so essential for the proper functioning of the process of the popular government is possible. He further observed that there could be no doubt that freedom of speech and expression included freedom of propagation of ideas, and that freedom is ensured by the freedom of circulation. Liberty of circulation is an essential

ingredient of that freedom as the liberty of publications. Indeed without circulation the publication would be of little value. This freedom is not confined to ones own views but extends to the circulation of views also.

The Supreme Court declared unconstitutional an order issued under section 7 of the East Punjab Safety Act of 1950 which directed the editor and publisher of the newspaper *Organiser* to submit for scrutiny, in duplicate and before publication, all communal matters and news and views about Pakistan including photographs and cartoons.

The court held that the imposition of pre-censorship on a journal is a restriction on the liberty of the press, which is an essential part of the freedom of speech and expression guaranteed under article 19(i) (a) of the Constitution; and that the imposition of restriction on the grounds of public safety and maintenance of public order is not embraced by article 19(2).¹

The amendment added to article 19 (2) the word ‘reasonable’ in respect of permissible legislative restrictions on the right of freedom of speech and expression, and provided for three additional grounds that would permit the imposition of legislative restrictions, namely, (i) friendly relations with foreign states; (ii) public order; and (m) incitement of an offence. Over the course of time, it was noticed that some political parties and disgruntled elements were agitating for secession from India. To stop such nefarious acts, article 19(2) was further amended via the Constitution (Sixteenth Amendment) Act of 1963, which inserted ‘the sovereignty and integrity of India’ as another basis for curbing freedom of expression and conferred adequate power on the government to preserve and maintain this. Thus, article 19(2) now enables the legislature to impose reasonable restrictions in the public interest on the right of freedom of speech and expression on the following grounds:

- (a) security of the state;
- (b) friendly relations with foreign states;
- (c) public order;
- (d) decency or morality;

¹*Brij Bhushan v. State of Delhi*, 1950 AIR 129, 1950 SCR 605

- (e) contempt of court;
- (f) defamation;
- (g) incitement to an offence; and
- (h) sovereignty and integrity of India.

The current scenario is that freedom of press is not absolute. It can be restricted provided three distinct and independent prerequisites are satisfied.

- 1) The restriction imposed must have the authority of law to support it. Freedom of the press cannot be curtailed by executive orders or administrative instructions which lack the sanction of law
- 2) The law must fall squarely within one or more heads of restrictions specified in Art 19(2). Restrictions on freedom of speech and expression cannot be imposed on such omnibus grounds as 'in the interest of the general public'.

3) The restrictions must be reasonable and must not be excessive. The validity of restrictions imposed is justifiable and open for Judicial review by the Indian courts. Freedom of press does not occupy a preferred position in the Indian Constitution which does not recognize a hierarchy of rights. There are however dicta of the Supreme Court describing this freedom as 'the Ark of the Covenant of Democracy' 14. The most precious of all freedoms guaranteed by our Constitution. In its landmark judgment in the case of Sakal Papers" the Supreme Court ruled that Art 19(2) of our Constitution permits imposition of reasonable restrictions under the heads specified in Art 19(2) and on no other grounds. Freedom of the press cannot be curtailed, like the freedom to carry on business, in the interest of the general public.

Indian Express Newspapers (Bombay) Pvt. Ltd. v. Union of India, petitioners contended that the impugned levy of duty on imported newsprint was excessive and had the direct effect of crippling the freedom of speech and expression and the carrying on of the business of publishing newspapers as it had led to an increase in the price of newspapers resulting in reduction of their circulation.

Accepting the plea, Supreme Court observed that levying a tax on newspaper industry should not be an overburden on newspapers which constitute the fourth estate of the country. Nor

should it single out newspaper industry for harsh treatment. A wise administrator should realize that imposition of tax like the customs duty on the newsprint is an imposition on knowledge and would virtually amount to a burden on a man for being literate.

The Supreme Court of India, in Life Insurance Corporation of India v. Manubhai D Shah has stated that the "freedom of speech and expression" in Article 19(1)(a) means the right to express one's convictions and opinions freely, by word of mouth, writing, printing, pictures or electronic media or in any other manner.²

Another aspect of freedom of press is interviewing the prisoners condemned to death if they are willing to be interviewed. In Smt. Prabha Dutt v Union of India, the President had declined to commute the death sentence to life imprisonment; the convicted prisoners were willing to be interviewed. The court ruled that the denial of right to the petitioner press reporter to interview these condemned prisoners, in the absence of any weighty considerations in writing, was not justified. The right to know news and information regarding administration of the Government is included in the freedom of press. But this right is not absolute and restrictions can be imposed on it in the interest of the society and the individual from which the press obtains information. They can obtain information from an individual when he voluntarily agrees to give such information.

4.FREE AND FAIR TRIAL-

Every civilized nation must have one thing common in their criminal justice administration system that is minimum fair trial rights to every accused person irrespective of his or her status. It is settled in common law and also adopted by other countries too that criminal prosecution starts with 'presumption of innocence' and the guilt must be proved beyond reasonable doubt. Free and fair trial has been defined as "a trial by a neutral and fair Court, conducted so as to accord each party the due process rights required applicable by law; of a criminal trial, that the defendant's constitutional rights have been respected." The right to a fair trial is seen as an

²Life Insurance Corporation of India v. Manubhai D Shah 1992 (3) S.C.R. 595 AIR 171

essential right in all countries respecting the rule of law; a trial in these countries that is deemed unfair will be typically restarted, or its verdict quashed. Article 11 of the Universal Declaration deals with the right to be presumed innocent and reads thus:

“Article 11 (I) Everyone charged with a penal offence has the right to ‘be presumed innocent until proved guilty according to law in a public trial at which he has all the guarantees necessary for his defence.

(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 14 of the International Covenant on Civil and Political Rights (hereinafter as ICCPR) reaffirmed the objects of UDHR and provides that

“Everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law.”

The Supreme Court explained that a “fair trial [obviously] would mean a trial before an impartial Judge, a fair prosecutor and an atmosphere of judicial calm. Fair trial means a trial in which bias or prejudice for or against the accused, the witness, or the cause which is being tried is eliminated.”³

5. PRINCIPLES OF FAIR TRIAL-

The system adopted by the Criminal Procedure Code, 1973 (hereinafter referred as the Code) is the adversary system based on the accusatorial method. In adversarial system responsibility for the production of evidence is placed on the opposing party that is prosecutions with the judge acting as a neutral referee between the parties. This system of criminal trial assumes that the state, on one hand, by using its investigative agencies and government counsels will prosecute the wrongdoer who, on the other

hand, will also take recourse of best counsels to challenge and counter the evidences of the prosecution. But if we take a close look of the Code then we will find that there are some provisions which negate the strict adherence of the adversarial trial system. In *Himanshu Singh Sabharwal v. State of M.P. and Ors.*⁴ the apex court observed that if fair trial envisaged under the Code is not imparted to the parties and court has reasons to believe that prosecuting agency or prosecutor is not acting in the requisite manner the court can exercise its power under section 311 of the Code or under section 165 of the Indian Evidence Act, 1872 to call in for the material witness and procure the relevant documents so as to sub serve the cause of justice. Though the concept of adversary trial system is diluted in the Code but still this system is praised not only because of the protection it accords the accused but also because its competitive style of presenting evidence and argument is thought to produce a more accurate result than an inquisitorial system where the judge monopolizes evidence taking. The judiciary has also advocated the role of presiding judge as a participant in the trial rather than a mere spectator in order to be an effective instrument in dispense of justice.⁵

6. PRESUMPTION OF INNOCENCE

The principle that the accused person is presumed to be innocent unless his guilt is proved beyond reasonable doubt is of cardinal importance in the administration of justice. This notion is incorporated as a right of accused person under many Conventions. Actually this principle is based on legal adage that it is better that ten criminals escape than that one innocent person is wrongfully convicted.

This principle was recognized by the United States (hereinafter as US) way back in 1895 in one case it was held that ‘the principle that there is a presumption of innocence in favour of the accused is the undoubted law, axiomatic and elementary, and its enforcement lies at the foundation of the administration of our criminal law...’ It is worth noting that the US Supreme Court has raised the presumption of innocence

³Zahira Habibullah Sheikh v. State of Gujarat (Cri. L] 2855 (2004))

⁴MANU/SC/1193/2008

⁵Ram Chander v. State of Haryana, (1981) 3 SCC 191

to the level of a fundamental right by reading it into the 'due process' clause.⁶

The Supreme Court observed "it is no doubt true that wrongful acquittals are undesirable and shake the confidence of the people in the judicial system, much worse; however is the wrongful conviction of an innocent person. The consequences of the conviction of an innocent person are far more serious and its reverberations cannot be felt in a civilized society." It is the duty of the prosecutor and defence counsel as well as all public authorities involved in a case to maintain the presumption of innocence by refraining from pre-judging the outcome of the trial.⁷

The basic institutional framework enabling the enjoyment of the right to a fair trial is that proceedings in any criminal case are to be conducted by a competent, independent and impartial court. In a criminal trial, as the state is the prosecuting party and the investigating machinery is also limb of the state, it is of utmost significance and importance that the judiciary is unchained of all suspicion of executive influence and control, direct or indirect. In this regard section 6 of the Code is relevant which separates courts of Executive Magistrates from the courts of Judicial Magistrates. Article 50 of the Indian Constitution also imposes similar duty on the state to take steps to separate the judiciary from the executive.

Fair trial also requires public hearing in an open court. Article 14(1) of the ICCPR also guarantees the right to a public hearing, as one of the essential elements of the concept of a fair trial. But there are some exceptions to this rule provided under article 14(1). It says that the press and public may be excluded from all or any part of a trial for reasons or morals, public order or national security in a democratic society or when the interest of the private lives of the parties so requires or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interest of justice. It is a right not belonging to the parties only, but also to the general public

in a democratic society. The right to a public hearing means that the hearing should as a rule is conducted orally and publicly, without a specific request by the parties to that effect. A judgment is considered to have been made public either when it was orally pronounced in court or when it was published, or when it was made public by a combination of those methods. Section 327 of the Code makes provision for open courts for public hearing but it also gives discretion to the presiding judge or magistrate that if he thinks fit, he can deny the access of the public generally or any particular person to the court. The provisions regarding the venue or place of inquiry or trial are contained in sections 177 to 189 of the Code. It is general rule that every offence is to be inquired into or tried by a court within whose local jurisdiction it was committed. The apex court observed that the public confidence in the administration of justice is of such great significance that there can be no two opinions on the broad proposition that in discharging their functions as judicial tribunals, courts must generally hears causes in open court and must permit public admission to the court.⁸

Section 479 provides that "no judge or magistrate shall, except with the permission of the court to which an appeal lies from his court, try or commit for trial any case to or in which he is a party, or personally interested, and no judge or magistrate shall hear an appeal from any judgment or order passed or made by himself."

7.AID OF COUNSEL-

Lawyers in criminal courts are necessities, not luxuries. The requirement of fair trial involves two things: a) an opportunity to the accused to secure a counsel of his own choice, and b) the duty of the state to provide a counsel to the accused in certain cases. The Supreme Court of United States held that the 6th Amendment's guarantee of counsel to indigent defendants was so fundamental and essential to a fair trial that the due process clause required states to provide counsel to all indigent defendants in felony cases.⁹

⁶Coffin v. United States, 156 U.S. 432 (1895)

⁷Kali Ram v. State of H.P. 1973 SCC(Cri)1048

⁸Naresh Sridhar Mirajkar v. State of Maharashtra, 1967 AIR, 1 1966 SCR (3) 744

⁹Gideon v. Wainwright, 372 U.S. 335 (1963)

Justice Sutherland of the Supreme Court of United States gave classic expression to the plight of the unguided individual entangled in a criminal process. The passage is worth to cite here. He said “even the intelligent and educated layman has small or sometimes no skill in the science of law. If charged with crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of the counsel he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. In India, right to counsel is recognized as fundamental right of an arrested person under article 22(1) which provides, inter alia, no person shall be denied the right to consult, and to be defended by, a legal practitioner of his choice. Sections 303 and 304 of the Code are manifestation of this constitutional mandate.¹⁰

8.CONCLUSION

The fundamental principle involved was the “people’s right to know”. Freedom of speech and expression should receive generous support from all those who believe in the participation of the people in the administration. The court noted that with a view to checking malpractices interfering with the free flow of information, democratic constitutions the world over make provisions guaranteeing freedom of speech and expression and laying down the limits of interference therewith.

It was held that the right of an indigent person to be provided with a lawyer at state’s expenses is an essential ingredient of article 21, for no procedure can be just and fair which does not make available legal services to an accused person who is too poor to pay for a lawyer.¹¹ In this context a difference is to be noted as between article 21 of the Constitution and section 304 of the Code. Article 21 as interpreted by the Supreme Court in *Khatri v. State of Bihar* the mandatory obligation to provide free legal aid arise in every criminal

case against an indigent accused, whether the trial is before a Magistrate or Sessions Judge.

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