

TRIAL BY MEDIA: A NEED TO REGULATE FREEDOM OF PRESS*

Hon'ble Mr. Justice G. S. Singhvi**

When the Constitution of India was being drafted, the members of the Constituent Assembly were very much mindful of the challenges of governance and societal changes, which were likely to take place in the coming decades. The debates of the Constituent Assembly which lasted for three years, culminated in evolving a set of rights recognized by persons of various castes and creeds transcending national, social, and cultural boundaries. The framers of the Constitution had shown great statesmanship and farsightedness. At the conclusion of the debate, Dr. B. R. Ambedkar, Chairman of the Constitution Drafting Committee, said: "I feel that the Constitution is workable; it is flexible and it is strong enough to hold the country together both in peacetime and in wartime. Indeed, if I may say so, if things go wrong under the new Constitution, what we will have to say is that men were vile."

Although the theme of social revolution runs through the entire structure of the Constitution, Parts III and IV - Fundamental Rights and Directive Principles of State Policy - perceived as the conscience of the Constitution, because they provide the base for human rights and human development policies for governance. The Constitution ensures that the fundamental rights are guaranteed as a matter of legal obligation rather than as a political concession. These are basic human rights, and have been interpreted as civil, political, economic, social and cultural rights. Articles 12-35 of Part III elaborate on the fundamental rights. Articles 36-51 outline the framers' vision for good governance and they constitute the Directive Principles of State Policy. By 42nd amendment, Article 51-A was added to the Constitution to make explicit what was implicit in the Preamble and other parts of the Constitution.

For citizens, we have specially provided for freedom of speech and expression including freedom of the press, to settle at any place of one's own choice, and freedom to engage in any trade,

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profession or business. These rights are virtually absolute subject to certain overriding exceptions to maintain sovereignty and territorial integrity of the country, security of the State and friendly relations with foreign States *etc.* The Constitution gives full protection of life and personal liberty to all, including aliens and these rights are also enforceable, through courts.

The question whether a separate provision should be made for freedom of press was extensively debated in the Constituent Assembly in the backdrop of first amendment to Constitution of the United States of America, and it was decided that there is no need for separate provision because the guarantee of freedom of speech and expression enshrined in Article 19(1)(a) is wide enough to include the press. This is evidenced from the following statement of Dr. B. R. Ambedkar: “The press is merely another way of stating an individual or a citizen. The press has no special rights which are not to be given or which are not to be exercised by the citizen in his individual capacity. The editor of a press or the manager is all citizens and therefore when they choose to write in newspapers, they are merely exercising their right of expression; and in my judgment therefore no special mention is necessary of the freedom of the press at all.”

The importance of this freedom was emphasized by the first Prime Minister of India, Pandit Jawaharlal Nehru in the following words: “I should rather have a completely free press, with all the dangers involved in the wrong use of that freedom, than a suppressed or regulated press.”

The importance of the freedom of press in parliamentary democracy was and again recognized, stated, re-stated, and confirmed by the Superior courts despite the fact that Article 19(1)(a) does not contain any specific enumeration of this freedom. As and when called upon to do so, the courts have annulled the legislative instruments and administrative actions which seek to impinge on the freedom of press, because it was realized that this freedom is absolutely imperative for the system of parliamentary democracy envisaged in the Constitution. *Romesh Thappar v. State of Madras*¹ is one of the earliest cases in which the Supreme Court struck down the ban imposed by the Government of Madras on the entry and circulation of the journal, *Cross Roads*, which was printed and published by the petitioner. The Supreme Court held that Section 9(l-A) of the Madras

¹ AIR 1950 SC 124.

Maintenance of Public Order Act, 1949 was violative of Article 19(1)(a) and does not fall within the ambit of any of the exceptions specified in Article 19(2). The Court held that the right to freedom of speech and expression is paramount and that nothing short of a danger to the foundations of the State or a threat to its overthrow could justify a curtailment of the right to freedom of speech and expression.

In *LIC v. Manubhai Shah*², the Supreme Court reiterated that the freedom of speech and expression must be broadly construed to include the freedom to circulate one's views by word of mouth, or in writing, or through audio visual media. This includes the right to propagate one's views through the print or other media. The Apex Court observed: "Freedom to air one's view is the lifeline of any democratic institution and any attempt to stifle, or suffocate, or gag this right would sound a death knell to democracy and would held usher in autocracy or dictatorship."

While recognizing that the freedom which includes the right to air one's views, the Supreme Court also unequivocally held that the right to respond or the right of rebuttal is a part of the concept of freedom. That case arose out of the publication of an article by the trustee of a consumer rights organization. In that article, the so-called unfair practices adopted by the Life Insurance Corporation were criticized. The Corporation responded to the article and challenged the criticism. The trustee then published rejoinder, which also appeared in the same newspaper. In the meanwhile, the author of the counter got published his views in *Yogakshema*, an in-house magazine of the Life Insurance Corporation. When the trustee wanted to publish his rejoinder in the same magazine, his request was turned down. The Gujarat High Court held that the right of the trustee to get the rejoinder published in the same magazine was part of his right to freedom of speech and expression. While approving the judgment of the High Court, the Supreme Court held: "The trustee's fundamental right of speech and expression entitled him to insist that his view on the subject should reach readers so that they have a complete picture rather than a lopsided or distorted one. The Court held that the LIC, a 'monopolistic state instrumentality' which survived on public funds could not act in an arbitrary manner on the ground that it was a matter of exclusive privilege to publish or refuse to publish in an in-house magazine."

The Court, however, clarified that an individual does not have

² (1992) 3 SCC 637.

an absolute right to compel a public institution to publish whatever he forwarded for publication.

A journey through the maze of the judgments shows that the Supreme Court has recognized diverse facets of the concept of freedom of speech and expression, both in regard to the contents of the speech and expression, and in regard to the means through which communication takes place. It covers the right to express oneself by words of mouth writing, printing, picture, or in any other manner, the right to circulate, the right to criticize, the right to receive information, the right to expression beyond national boundaries, the right to report proceedings of the court and legislature, the right to advertise, the right of rebuttal *etc.* The communication of ideas can be through any medium *i.e.*, newspaper, magazine or movie.

The judgment of the Full Bench of Bombay High Court in *Anand Chintamani v. State of Maharashtra*³ is illustrative of how the courts have recognized the right to freely express one's opinion on even most controversial matters as an integral part of the freedom of speech and expression. The Full Bench, while quashing an order of forfeiture under Section 95(1) of the Code of Criminal Procedure, 1973 in respect of *Me Nathuram Godse Boltoy*, a play critical of Mahatma Gandhi, upheld the right to criticize: "Tolerance of diversity of viewpoints and the acceptance of the freedom to express of those, whose thinking may not accord with the mainstream, are cardinal values which lie at the very foundation of a democratic form of government. A society wedded to the rule of law, cannot trample upon the rights of those who assert views which may be regarded as unpopular or contrary to the views shared by a majority. The law does not have to accept the stories would tarnish the image of the High Court."

The Division Bench, after considering the various facets of the concept of freedom of speech and expression, quashed the gag order and declared that the right of the newspapers to publish stories regarding the scam cannot be curtailed on the spacious ground that it would affect the image of the superior Judiciary. The Court recognized that the right of the newspapers to bring truth before the public cannot be abridged on the pretext of protecting members of the superior Judiciary whose names had been figured in the scam.

The extensive meaning given by the courts to the right of

³ (2002) 2 Mah L J 14.

freedom of speech and expression has of late generated great debate in the context of trial by media and the possibility of newspaper influencing the outcome of the court cases. A glaring incident of trial by media is the *Parliament Attack* case⁴, wherein the police called a press conference just one week after the attack during the course of which, accused Mohd. Afzal incriminated himself in front of the national media. The media played an excessive and negative role in shaping the public conscience before Afzal was even tried.⁵ Similarly, S. A. R. Geelani, one of the co-accused in the *Parliament Attack* case⁶, was initially sentenced to death for his alleged involvement despite an overwhelming lack of evidence. Large sections of the Indian media portrayed him as a dangerous and trained terrorist. On appeal, the Delhi High Court reversed his conviction and described the prosecution case absurd and tragic.⁷ This attitude of media is indeed highly objectionable.

How can we forget to give a mention of the *Double Murder Story*⁸ which has seen trial and conviction by media, in an extended, unrestrained and unrelenting form? Coming out of jail where he was held for fifty days on suspicion of murdering his own daughter, dentist Rajesh Talwar was seen and heard pleading to the media to let him spend time with his family. In the close of two months that it took for the investigation to deem the victim's father innocent, the media speculated day in and day out about the father's guilt, about the reputation of the young girl, in the process tarnishing reputations all round. The longer it took for the case to be satisfactorily solved, the longer media lived off it in the most incredible manner possible. The competitive commercialization of the press and electronic media also calls for intense debate.

A group of 40 distinguished legal experts and media representatives convened by the International Commission of Jurists (ICJ), at its Center for the Independence of Judges and Lawyer (CIJL), and the Spanish Committee of UNICEF met in Madrid, Spain between 18th -20th of January 1994. The 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

⁴ *State v. Mohd. Afzal and Others*, 107 (2003) DLT 385.

⁵ Trial by Media at www.hrhc.net accessed on 3rd March 2008.

⁶ *Ibid.*

⁷ *Ibid.*

⁸ *The Arushi Murder case; Nupur Talwar v. Central Bureau of Investigation and Another*, AIR 2012 SC 1921.

independence of Judiciary.

2. To formulate principles addressing the relationship between freedom of expression and judicial independence.

The group of media representatives and jurists while the freedom of the media which is an integral part of freedom of expression, is essential in a democratic society governed by the rule of law; and that is the responsibility of judges to recognize and give effect to freedom of the media by applying a basic presumption in their favour and by permitting only such restrictions on freedom of media as are authorized by the International Covenant on Civil and Political Rights are specified in precise law, emphasized that: "The media have an obligation to respect the rights of individual, protected by the International Covenant on Civil and Political Right and the independence of the Judiciary."

After long debate, the Commission drafted what are recognized as minimum standards of freedom of expression. These are-

1. Freedom of expression (as defined in Article 19 of the Covenant), including the freedom of the media- constitutes one of the essential foundations of every society which claims to be democratic. It is the function and right of the media to gather and convey information to the public and to 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 *Siracusa Principles*, 1984 on the limitation and derogation provisions in the International Covenant on Civil and Political Rights.⁹
3. The right to comment on administration of justice shall not be subject to any special restrictions.

The Commission emphasized the need of maintaining in 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.

In India, the Legislature itself recognized the need of protecting media against the threat of contempt proceeding by

⁹ U N Document E/Constitution/4/1984/4.

incorporating Section 3 in the Contempt of Courts Act, 1971. Even pre-trial publications have been granted immunity under Section 3(2) and *Explanation*. However, parallel investigations have not been favourably viewed by the courts. In *Saibal v. B.K. Sen*¹⁰ the Supreme Court said: "It would be mischievous for a newspaper to systematically conduct an independent investigation into a crime for which a man has been arrested and to publish the results of that investigation. This is because, trial by newspapers, when a trial by one of the regular tribunals of the country is going on, must be prevented. The basis for this view is that such action on the part of a newspaper tends to interfere with the course of justice."

Today, our 'Media Studios' have literally turned to be a courtroom for all purposes. The facts of the particular case in all their lurid details, full particulars – correct or otherwise - the various steps and stages of police investigation, freely embroidered with subjective comments and observations are presented, evidence discussed, expert opinion sought, even the public is given an opportunity to participate in this process. They can send in their views by sms or by logging on to the channel's website. The conclusion tending either to pronounce on the guilt of certain persons or on the motives of the investigators are being splashed in the mass media. What role is the media playing here? Today, one will be forced to admit, though reluctantly and with regret, that there exists a system of parallel justice administration in the country. Isn't this plain megalomania, which feels nobody can question their actions? One wonders.

Following the judgment in the *Priyadarshini Matoo* case¹¹, the television channels are on a new high. Their leading lights want endorsement of their belief that television, with its sms polls, can now help galvanize justice. In a premier English news channel, it was seen asking: "Do you believe in the Judiciary, or do you believe Judiciary needs a push from media?" On another channel, the presenter was seen haranguing his audience: "Does it require public pressure for the wheels of justice to move?" These two are purportedly discussing trial by media; but the subject is: would there have been justice without our intervention?

The Fourth Estate can bully their way into anybody's life and be voyeuristic about it. They can point fingers at anyone and they can cast aspersions on any institution in the name of the

¹⁰ AIR 1961 SC 633.

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

fundamental right granted to them. Every constitutional and statutory right including privacy of individuals have been trampled upon with impunity by this class. The fundamental rights of the accused in a case pending before the courts are merely thrown to dogs and spitted upon. The 'doctrine of innocence until proven guilty' is openly flouted and the fundamental right of the accused 'to have a fair trial' is put to dust. One's fundamental right should not be used as a tool to transgress upon those of others. Our journalistic road rollers should remember that freedom for anyone in the country is within the framework of the Constitution. Anybody trying to trespass this will need to be put in place and media is no exception to this.

The Speaker of the Lok Sabha, Shri Somnath Chatterjee made a noticeable observation in the context of freedom of press. He said: "Freedom of the press, a cherished fundamental right in the country, is subject to reasonable restrictions as contemplated by the Constitution itself. It cannot and does not comprise deliberately, tendentious and motivated attacks on the great institutions of this Republic, and their officers and functionaries. Freedom of the press does not also contemplate making reckless allegations, devoid of the truth and lacking in *bone fides*. In the name of exercising freedom of the press, there cannot be trial by press in which it plays the role of both the accuser and judge. Freedom of the press also encompasses the fundamental duties of the press. These call for showing respect for others and responsible behavior, and cannot permit denigration of constitutional bodies and institutions and their important segments."

The freedom of press in the context of trial of criminal cases came to be considered by the Supreme Court of India in the judgment in the *State of Maharashtra v. Rajendra Jawanmal Gandhi*¹². This Court expressed its displeasure over the phenomenon, which it called as 'trial by press, electronic media or public agitation'. Further, the Hon'ble Supreme Court in 2005 when faced with such a situation in the case of *M. P. Lohia v. State of West Bengal*¹³ took a similar view and echoed these lines: ". . . This type of articles appearing in the media would certainly interfere with the administration of justice. We deprecate this practice and caution the publisher, editor and journalists who were responsible for the said article against indulging in such trial by media when the issue sub-judice."

¹² 1997(8) SCC 386.

¹³ AIR 2005 SC 790.

In *Express Newspaper Pvt. Ltd. v. Union of India*¹⁴, the Supreme Court even while upholding the freedom of speech, which our Court has always unfailingly guarded, also added: “This freedom is not absolute and unlimited at all times and under all circumstances, but is subject to the restriction contained in Article 19(2). That must be so because unrestricted freedom of speech and expression which includes the freedom of press and is wholly free from restraints, amounts to uncontrolled license which would lead to disaster and anarchy, and it would be hazardous to ignore the vital importance of our social and national interest in public order and security of the State.”

In *State of Kerala v. Poothala Aboobacker*¹⁵, the High Court of Kerala observed: “The Fourth Estate does not seem to realize the irreparable damage inflicted on the victims of crimes and the alleged culprits and those close to them through the sensationalized journalistic adventures. Truth is very often surpassed, exaggerated or distorted to add flavour and spice to the stories. Trial by media can do more harm the good to the society at large. Instances are not rare when test parades are reduced to mere farce due to the injudicious publicity given to the alleged assailants by publishing their photographs. Every such act of adventurism exerts unnecessary pressure on the Courts which are to eventually try the alleged offenders. The fickle minded public which has been conditioned to believe a particular version through a calculated process of media indoctrination will be loath to accept a different conclusion. Hence, if the court who finally tries the alleged culprit were to ultimately record an order of acquittal for want of legal evidence before it, it may not be out of place for the public at large to conclude that the verdict of the court is wrong. They may even attribute motives in the presiding judge. No disciplined society which believes in the rule of law can afford such state of affairs to come to stay. We wish to express our strong displeasure at the increasing trend of investigation lapses and trial by media in respect of matters which are sub-judice. After the case under investigation is seized by the court, it is not open to the investigation agency or other busy-bodies to give their own versions about a crime and influence the mind of the public without realizing the worth, or otherwise of what has been collected during investigation and placed before the court concerned. Lapses in this regard will be viewed very seriously and the erring police officers and media persons will be proceeded against appropriately.”

¹⁴ AIR 1986 SC 872.

¹⁵ 2006(2) KLD (Cr 1 482).

The Court further issued directions that: “The Registry shall forward an extract of this judgment to the Director General of Prosecutions for suitable prophylactic measures to ensure that recurrence of such lapses does not take place.”

Thus, it is true that the media forms the backbone of a democratic society. It subjects the functioning of all public institutions to public scrutiny, and makes them answerable and accountable to the public to whom they have to serve. It also plays an important role in assisting in administration of justice. However, it cannot be ignored that at times the media fails to exercise the freedom of press conferred upon it by the Constitution in ‘public interest’ as pointed out above. It neglects the real and core issues which the society is facing. It forgets its social responsibility towards the people. It is for this reason that a need arises to regulate this freedom of press.

A responsible media is the handmaiden of effective judicial administration¹⁶. Free and robust reporting, criticism and debate should be there which contributes to public understanding of rule of law and a better comprehension of the entire justice system.



¹⁶ Nariman, Fali S., Are Impediments to Free Expression in the Interest of Justice, *CJL Yearbook*, Vol 4, 1995.