TRIAL BY MEDIA

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The subjects of 'trial by media' or prejudiced due to 'pre-trial' publications by the media is closely linked with Article 19(1)(a) which guarantees the fundamental right of 'freedom of speech and expression' ,and the extent to which that right can be reasonably restricted under Article 19 (2) by law for the purpose of contempt of Court and for maintaining due process to protect liberty. The basic issue is about balancing the freedom of speech and expression on one hand and undue interference with administration of justice within the framework of the Contempt of Courts Act, 1971, as permitted by Article 19(2). This should be done without unduly restricting the rights of the suspects/accused under Article 21 of the Constitution of India for a fair trial.

There is no difficulty in stating that under our Constitution, the Fundamental Right of freedom of speech and expression can, by law, be restricted for purposes of Contempt of Court. However, this can be done only by the law passed by the legislature and the restrictions that can be imposed on the freedom must be 'reasonable'. If the restriction imposed by any law relating to Contempt of Court is unreasonable, it is liable to be struck down by the Courts on the ground that the restriction is not proportionate to the object sought to be achieved by the restriction.

As at present, the provisions of Section 3 of the Contempt of Courts Act, 1971 restricts the freedom of speech and expression –which includes the freedom of the media, both print and electronic-if any publication interferes with or obstructs or tends to obstruct, the course of justice in connection with any civil or criminal proceedings which is actually 'pending' in a Court at the time of the publication. The Explanation below Section 3 defines 'pendency' of a judicial proceeding. So far as a criminal proceeding is concerned, we have to refer to sub clause (B) of clause (a) of Explanation which reads:
"(B) In the case of 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, which 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 proceedings relates----------"

Therefore under Section 3 of the Act, the starting point of the pendency of the case is only from the stage where the Court actually gets involved when a charge-sheet or challan is filed under Section 173 of the Code of Criminal Procedure,1973 or when the criminal court issues summons or warrant against the accused. Any

publication before such events if it interferes or tends to interfere with rights of the suspects or accused for a fair trial is not contempt because Section 3 (2) starts with the words:

"Notwithstanding anything to the contrary contained in this Act or any other law for the time being in force".

Two questions arise for consideration:
(1) Whether the provisions of Section 3(2) of the Contempt of the Courts Act, 1971 read with the Explanation below that Section are in violation of due process as guaranteed by Article 21 of the Constitution of India, in so far as that grant immunity to prejudicial publication made before filling of the chargesheet/challan?

(2) If the answer to Question No. 1 is in affirmative, whether the Explanation to Section 3 has to be and can be modified by shifting the starting point of "pendency" of a criminal proceeding to the anterior stage of arrest and whether such is changed in the law would amount to an unreasonable restriction on freedom of speech guaranteed under Article 19(1)(a) of the Constitution?

So far as the first Question is concerned, as at present, if a publication which is made before filing of a charge sheet or challan, interferes or tends to interfere with the course of justice in connection with a criminal proceeding, the rights of a person who has been arrested and in respect of whom the prejudicial publication is made, are not protected by the law of Contempt of Court. But, if such publications are prejudicial to the suspect or accused, will they not offend the principle of due process rights of a suspects or an accused as applicable in criminal cases and as declared by the Supreme Court in Maneka Gandhi v. Union of India: AIR 1978 SC 597?

Article 21 guarantees that "No person shall be deprived of his life or personal liberty except according to the procedure established by law." As is well known, overruling the earlier view in A. K. Gopalan v. State of Madras: AIR 1950 SC 27, the Supreme Court held in Maneka Gandhi's case that the "procedure established by law" must be a law which is fair, just and equitable and which is not arbitrary or violative of Article 14 of the Constitution of India.

If indeed a publication is one which admittedly interferes or tends to interfere or obstructs or tends to obstruct the "course of justice" in a criminal proceeding, in respect of a person under arrest [see Section 3 (1)], but the law gives it immunity under Section 3(2) because the publication was made before the filing of the charge sheet/challan, is such a procedure fair, just and equitable?

In several counter countries, U.K., Australia, New Zealand etc, any publication made in the print or electronic media, after a person's arrest, stating the person

arrested has had previous conviction, or that he has confessed to the crime during investigation or that he is indeed guilty and the publication of his photograph etc., are treated as prejudicial and as violative of due process required for a suspect who has to face a criminal trial. It is accepted that such publication can prejudice the minds of jurors and even judges (where jury is not necessary). The impact on judges has been elaborately discussed in Chapter III of this report. The Supreme Court of India has indeed accepted more than one case the judges may be 'subconsciously' prejudiced against the suspect/accused. We have indeed referred to some opinion to the contrary expressed by courts in USA, where the freedom of speech and expression is without wider than in our country. In USA the restrictions are narrow; they must only satisfy the test of 'clear and present danger'.

In India, restrictions can be broader and can be imposed, if they are "reasonable". Restrictions intended to protect the administration of justice from interference can be included in the Contempt Law of our country under Article 19 (2), if they are 'reasonable'. It is even accepted in our country that actual prejudice of judges is not necessary for proving contempt. It is sufficient if there is substantial risk of prejudice. The principle that "justice must not only be done but must be seen to be done" applies from the point of view of public perception as to the judges being subconsciously prejudiced as has been accepted in UK and Australia.

In view of the above, such a publication made in respect of person who is arrested but in respect of whom a charge sheet or challan has not yet been filed in a Court, prejudice or may be assumed by the public to have prejudiced the judge, and in that case a procedure, such as the one permitted by Section 3 (2) read with Explanation of Contempt of Courts Act, 1971, does not prescribe a procedure which is fair, justice and equitable, and is arbitrary and will offend Article 14 of the Constitution.

Contempt Law which protect the' administration of justice' and the 'course of justice' doesnot accept undue interference with the due process of justice and the due process includes non-interference with the rights of a suspect/accused for an impartial trial. Thus, Contempt of Court law protects the person who is arrested and is likely to face a criminal trial. No publication can be made by way of referring to previous convictions, character or confessions etc., which may cause prejudice to such persons in the trial of an imminent criminal case. Such a procedure, therefore, would interfere or tend to interfere or obstruct or tend to obstruct the course of justice.

Once arrest is made, a person is liable to be produced in Court within 24 hours. If, at that stage, a publication is made about his character, past record of convictions or alleged confessions, it may subconsciously affect the Magistrate who may have to decide whether to grant or refuse to grant bail, or as to what conditions have to

be imposed or whether the person should be remanded to police custody or it should be a judicial remand. Further, if after a publication, a bail order goes against the arrested person, public may perceive that the publication must have subconsciously affected the Magistrate's mind.

The Contempt of Courts Act, 1971 can therefore be validly amended to say that such prejudicial publication made even after arrest and before filing of charge sheet/challan will also amount to undue interference with administration of justice and hence would be contempt and such a restriction is 'reasonable' and proportionate to the object, protection of rights of the rights of the arrested person and the administration of justice.

So far as Question 2. is concerned, if the contempt law in Section 3 is to be amended, as proposed above, so as to treat publications of the manner referred to above made even after arrest and but before filing of charge or challan, as liable to contempt by redefining the Explanation (B) to deem that a criminal charge is "pending" from the stage of arrest, then will such a law unreasonably restrict the right to freedom of speech and expression guaranteed under Article 19 (1) (a) and will it fall outside the reasonable limits permissible under Article 19 (2)?

If a restriction on the freedom of speech and expression is intended by the legislature to protect the administration of justice or the course of justice which requires to be meted out to a subject under arrest, and if but for the immunity granted for such publications, it would admittedly interfere or tend to interfere with the course of justice, then from the point of view of the person under arrest, such a restriction cannot be said to be unreasonable within Article 19 (2). Such a restriction on freedom of speech and expression under Article 19 (2) cannot be said to be violative of Article 19 (1) (a). It is reasonable because, in fact, it is absolutely necessary as per fair due process after Maneka Gandhi, for the purpose ofprotecting the administration of justice which includes protection of the rights of a person under arrest who is entitled to a procedure which is fair, equitable and just under Article 21 and which is consistent with Article 14. The restriction is reasonable if intended to prevent prejudice on the part of the judge or intended to prevent any impression of prejudice in the minds of the public as to prejudice in the mind of judges. This is a straight answer.

Article 19 (2) raises a question of 'proportionality'of a restriction that may be imposed by law such as the Contempt of Court Act, 1971.

The provisions of the Contempt of Court Act, 1971, if they treat as contempt, publications made after the filing of a first information report, then in view of SurendraMohantyv. State of Orissa (1961) (quoted in A. K. Gopalanv.Noordeen 1969 (2) SCC 7341) such a provision would be an unreasonable restrictions on the freedom of publications. But, if the proposal is that the prejudicial publications

made after the date of arrest is contempt, that, according to A. K Gopalanv.Noordeen is not an unreasonable restriction on the freedom of publication.

Secondly, it is now well settled that the right to freedom of speech and expression under Article 19 (1) is not absolute. The Constitution itself permits in Article 19 (2) restrictions to be imposed on that right if they are reasonable. Article 19 (2) says:
"Nothing in sub-clause (a) of Clause (1) shall affect the operation of any existing law, or prevent the State from making any law, in so far as such law imposes reasonable restrictions on the exercise of the right conferred by the said sub-clause in the interests of or in relation to Contempt of Court..."

The Indian Supreme Court has repeatedly held that this freedom is not absolute. Even in USA, it has been so accepted. The difference only is that in USA, the principle is of 'clear and present' danger while our Constitution permits 'reasonable' restrictions.
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The freedom of the media not being absolute, media persons connected with the print and electronic media have to be equipped with sufficient inputs as to the width of the right under Article 19(1)(a) and about what is not permitted to be published under Article 19(2). Aspects of Constitutional law, human rights, protection and life and liberty, law relating to defamation and Contempt of Court are important from the media point of view. It is necessary that the syllabus in Journalism should cover the various aspects of law referred to above. It is also necessary to have Diploma and Degree Course in Journalism and the Law.

There is today 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 prejudicial impact on the suspects, accused, witnesses and even Judges and in general, on the administration of justice. According to our law, a suspect/accused is entitled to a fair procedure and is presumed to be innocent till proved guilty in a Court of Law. None can be allowed to prejudge or prejudice his case by the time it goes to trial.

If media exercise an unrestricted or rather unregulated freedom in publishing information about a criminal case and prejudices the mind of the public and those who are to adjudicate on the guilt of the accused and if it project a suspect or an accused as if he has already been adjudged guilty well before the trial in court, there can be serious prejudice to the accused. Infact, even if ultimately the person is acquitted after the due process in courts, such an acquittal may not help the accused to rebuild his lost image in society.

If excessive publicity in tyhe 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. Other issues about the privacy rights of the individuals or defendant may also arise. Public figures, with slender rights against defamation are more in danger and more vulnerable in the hands of the media, after the judgement in R. Rajagopal v. State of Tamil Nadu: AIR 1995 SC 264.

Suspects and accused apart, even victims and witnesses suffer from excessive publicity and invasion of their privacy rights. Police are presented in poor light by the media and their morale too suffers. the day after the report of crime is published, media says 'police have no cue'. Then, whatever gossip the media gathers about the line of investigation by the official agencies, it gives such publicity in respect of the information that the person who has indeed committed the crime, can move away to safer places. The pressure on the police form media day by day builds up and reaches a stage where police feel compelled to say something or the other in public to protect their reputation. Sometimes when, under such pressure, police come forward with a story that they have nabbed a suspect a suspect and that he has confessed, the 'Breaking News' items starts and few in the media appears to know that under the law, confession to police is not admissible in a criminal trial. Once the confession is published by both the police and the media, the suspect's future is finished. When he retracts form the confession before the Magistrate, the public imagine that the person is a liar. The whole procedure of due process is thus getting distorted and confused.
The media also creates other problems for the witnesses. If the identity of witnesses is published, there is danger is a danger of the witnesses coming under pressure both form the accused or his associates as well as from from the police. At the earliest stage, the witnesses want to retract and get out of the muddle. Witness protection is then a serious casualty. This leads about the question about the admissibility of hostile witness evidence and whether the law should be amended to prevent witnesses changing their statements. Again, if the suspects pictures are shown in the media, problems can arise during 'identification parades' conducted under the Code of Criminal Procedure for identifying the accused.

Sometimes, the media conducts parallel investigations and points its finger at persons who may indeed be innocent. It tries to find faults with the investigation process even before it is completed and this raises suspicions in the minds of the public about the efficiency of the official investigation machinery.

The print and electronic media have gone fierce competition, that a multitude of cameras are flashed at the suspects or the accused and the Police are not even allowed to take the suspects or accused from their transport vehicles into the Courts or vice versa. The Press Council of India issues guidelines from time to time and in some cases, it does take action. But, even if apologies are directed to be published, they are published in such a way that either they are not apologies or the apologies are published in the papers at places which are not very prominent.

Apart from these circumstances, basically there is greater need to strike a right balance between freedom of speech and expression of the media on the one hand and the due process rights of the suspects and accused. Article 19(1)(a) , Article 19(2) , Article 21 and Article 14 of the Constitution play a very important role in striking an even balance. As we shall be showing in the ensuing chapters, the present Contempt of Courts Act 1971 requires some changes in view of the law that has been declared by the Supreme Court atleast in two leading cases, referred to above, namely A.K.Gopalan v. Noordeen 1969(2)SCC 734 and Maneka Gandhi v. Union of IndiaAIR 1978 SC 597. These judgments have struck a balance between competing fundamental rights.
Publications in the media at the pre trial stage can affect the rights of the accused for a fair trial. Such publications may relate to previous convictions of the accused, or about his general character or about his alleged confession to the police etc.

In the context of a parallel investigation which was undertaken pending arrest and trial in the Court, the Supreme Court before the 1971 Act was enacted, referred to 'trial by press'. In **Saibal v. B.K.Sen (AIR 1961 SC 633) ,**when it observed :
"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 the investigation. This is because, trial by newspapers, when a trial by one of the regular tribunal is going on, must be prevented. The basis of this view is that such action on the part of the newspaper tends to interfere with the course of justice."

The words "tends to interfere with the course of justice" used by the Supreme Court in the above case are quite significant.

In the light of the human rights concepts referred to above and the provision of our Constitution and the Contempt of Courts Act 1971, the question arises whether any publication of matters regarding suspects or accused can amount to Contempt of Court not only when it is made during the pendency of a Criminal Case(i.e. after

the charge sheet is filed) but before that event, e.g. once the person is arrested and criminal proceedings are "imminent".

The word 'imminent' does not mean merely that the chargesheet must be filed in Court 'immediately' after arrest. 'Imminent' here means the '**reasonable liklihood'** of the filing of the charge sheetwhether immediately or in a reasonable time. If the word 'imminent' should mean "immediate", than in all cases where there are delays and investigation such as when investigation is entrusted to the CBI or the ACB in the States, there could be a free license to issue pre judicial publications. That can be the law. 'Imminents' in our view really means 'reasonable liklihood' or filing of charge sheet.

This is not to say that once arrest is made, the media is obliged to make no publication at all. What the law requires is that they should not, while making publications, prejudice the case of the suspects by referring to his character, prior convictions, confessions, photographs(where identify is in question) or describe him as guilty or innocent. Furthur, Section 3 grants immunity to publications made without knowledge of the pendency of the Criminal proceedings.

'Imminence' inrespect of person who is 'arrested' means that he is "most likely" to be charged sheeted. Furthur, 'arrest' is important in another sense because of the 24 hours rule. This is a Constitutional requirement that the person arrested has to be produced before the magistrate within 24 hours of arrest. Today the word 'imminent' is understood as being a stage when a person comes within the Constitutional protection of A court after arrest .
The following observations of Borrie& Lowe are quite important in the context of India of balancing Article 19(1)(a) and Article 21. The authors say:
"The timing provisions under para 4 are not as generous to the news media as the phillimore committee recommendations, which was that the sub-judiced period should begin only when the person was charged or a summon served. However, despite the difficulties adverted to above it is submitted that the Act gets the timing about right. Paragraph 4 strikes a reasonable compromise between the Phillimore Committee's proposals, which would not have protected a trial from the real risk of prejudice that publicity prior to the charge can cause, and the undesirable uncertainty of the Common Law position. Indeed, it was the extraordinary publicity which followed the arrest of Peter Sutcliffe in January, 1981, which began even before he had been charged with the 'Yoprkshire Ripper' murders, which doomed any attempt in the later stages of the Bill to ease the subjudice provisions and follow the Phillomore recommendations. Paragraph 4 should have had the advantage of creating a uniform and reasonable certain starting point applicable to England and Wales, Scotland and Northern Ireland. However, as we have seen, this statutory certainty has undermined by the continuing operation of the Common Law, with its concept of 'imminent' for "intentional contempt".