

MEDIA TRIAL IN INDIAN LEGAL SYSTEM AS A FUSION OF INQUISITORIAL SYSTEM OF ADMINISTRATION OF JUSTICE: THE WAY AHEAD

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Abstract

In this research paper the author displays how media trial resembles an inquisitorial system, wherein, conduct of the trial is largely in the hands of the media. By delving into the debate of free speech vs. free trial, the research paper unearths the other side of the story about how trial by media impedes the judicial process? It cites examples from modern day criminal proceedings and confirms that an unrestricted media plagues the judiciary and engages in contempt of courts every day. At the same time, author also tries to establish about, how ‘media trial made psychology’ affects the judgments and judicial process in the country? And how it affects the administration of justice? This paper also deals with the legal scenario of other legal systems like USA, UK and France and comparative study of media regulations. It also suggest about the way ahead, for regulating the affairs of media, at national and international level.

Keywords: Media, Trial by Media, Inquisitorial System, Adversarial System, Judicial Process

Introduction:

“When your case is weak, take it to the media, instead of the court.”¹

Many times we all are witnesses to what is shown on the television screen every day when persons under arrest or taken into custody are brought to the court or are taken back to prison or jail. A mass of media persons gather and do not allow the accused and the police to even move. The suspects under arrest are described as if they are already declared guilty. Press freedom in India is a cherishable fundamental right but it is not absolute. It is subject to restriction and limitations mentioned under Article 19 of the Indian Constitution.

Media is often regarded as the fourth pillar of democracy. Freedom of media is the freedom of people to be informed about matters. Therefore, a free and healthy press is indispensable for functioning of a democracy. Since democracy means making of the government by the people and to have active participation in the community decision, it becomes the duty of the press and media to make the people aware of important issues. It is why freedom of speech and expression, as contained in Article 19 (1) of the Indian Constitution, has been held to implicitly include freedom of press and media.² In **Romesh Thappar vs. State of Madras**³ it was held by Apex Court of India that freedom of speech and expression includes freedom of propagation of ideas, and that freedom is ensured by the freedom of circulation towards media including print and electronic. However, the liberty guaranteed by Article 19 (1) is not absolute, owing to the fact that reasonable restrictions are permitted by sub-clause (2) of the same Article. In constitutional democracies, courts and the press are usually seen as working together to ensure integrity and accountability in public life. However, many times there is friction between the two institutions in India. The question is that does ‘trial

¹ Quote by Thomas Sowell, available at <http://www.pakistantoday.com.pk/2012/05/28/comment/columns/media-trial-or-fair-trial/>, Last visited on 25.06.2014.

² Indian Express Newspapers vs. Union of India, 1985 SCR (2) 287, AIR 1986 SC 515, MANU/SC/0406/ 1984.

³ AIR 1950 SC 124.

by media' truly exist as a phenomenon?, and if so, do the courts have the power under the Constitution to rein in the media and vice versa, are the questions being debated.⁴

At the outset it would be important to take into consideration the role which media is playing in current days in India. In **Sidhartha Vashisht vs. State (NCT of Delhi)**⁵ which is the famous Jessica Law murder case where Manu Sharma was tried and convicted for murder. In this case on the role of media, court held that there is danger of serious risk of prejudice if the media exercises an unrestricted and unregulated freedom such as 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. At other instance, the case of those accused of attacking the Indian Parliament, especially that of **S.A.R. Geelani**⁶ is clear example of how severely the rights of an accused are compromised on account of questionable action of the law enforcement agencies and the media.

Despite the significance of the print and electronic media in the present day, it is not only desirable but 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.⁷ It will amount to travesty of justice if either of this causes impediments in the accepted judicious and fair investigation and trial.⁸ It is also significant to note that trial by media influences the judicial process. Most of the time judges are influenced by the media trial and have some prejudices about the cases which come before the bench. In such situation in judicial process we can see some elements of inquisitorial system⁹ of administration of justice.

There is yet another important question to be answered and that is how much does judicial process influence the freedom of press? The Hon'ble Supreme of India in the case, **Sahara India Real Estate Corporation Ltd. and Ors. vs. Securities and Exchange Board of India and Another**¹⁰ constituted the five judge Constitution Bench when during the pendency of appeal despite the interim order of the Court some of the news papers published the proceedings of the judgment, the Hon'ble Court laid down appropriate guidelines with regard to reporting in electronic and print media of matters which is sub judice in Court including public disclosure of documents forming part of Court proceedings and also the manner and extent of publicity to be given by print/electronic media of pleadings/documents filed in proceeding in Court which are pending and not yet adjudicated upon and the court suggested following measures:

⁴ Nikhil Kanekal (Mint), *Why Kapadia's SC is putting the Media on Trial* (10 April 2012), <http://www.legallyindia.com/201204102720/Law-firms/explained-why-kapadias-sc-is-putting-the-media-on-trial>, Last visited on 02.07.2014.

⁵ AIR 2010 SC 2352.

⁶ State (NCT of Delhi) vs. Navjot Sandhu @ Afsal Guru & Others, (2005) 11 SCC 600. Geelani was arrested and before being produced before a court, he was forced to speak at a "press conference" called by the Delhi Police, where, the latter alleged, he had read out a 'confession' he had voluntarily made to them immediately after his arrest.

⁷ It is significant to note that in many cases where trial is ongoing in courts, media shows news on TV channels or in newspapers about the outcome of trial. Even, media initiates on its own, cases where persons are arrested, examined and verdicts are pronounced.

⁸ Ram Jethmalani and D.S. Chopra, *Cases and Material on Media Trail*, Thompson Reuters, New Delhi (First Edn. 2012), at p. 982.

⁹ In the inquisitorial system, the judge, in essence, conducts public inquisition/investigation of crime. The judge can question witnesses, interrogates suspects, orders searches for other or further investigations, and finally declare the verdict and decide on the penalty. Their role is not to prosecute the accused, but to gather facts to reach the correct verdict, and as such their duty is to look for any and all evidence, incriminating or exculpatory. Moreover, in inquisitorial system, there is no such thing as plea. Even if the accused declare himself to be guilty of crime, the judge may declare the accused not guilty if the judge believes there is evidence to indicate that the accused is innocent.

¹⁰ (2012) 10 SCC 603.

1. Prior Restraint

“Open Justice” is the cornerstone of our judicial system. It instills faith in the judicial and legal system. However, the right to open justice is not absolute. It can be restricted by the court in its inherent jurisdiction as done in *Mirajkar’s case*¹¹ if the necessities of administration of justice so demand. That, such orders prohibiting publication for a temporary period during the course of trial are permissible under the inherent powers of the court whenever the court is satisfied that interest of justice so requires. Such a temporary prohibition of publication of court proceedings in the media under the inherent powers of the court cannot be said to offend Article 19(1) (a).¹²

2. Contempt of Court Act, 1971

The media has a right to know what is happening in courts and to disseminate the information to the public which enhances the public confidence in the transparency of court proceedings. As stated above, sometimes, fair and accurate reporting of the trial (say a murder trial) would nonetheless give rise to substantial risk of prejudice not in the pending trial but in the later or connected trial. In such cases, there is no other practical means short of postponement orders that is capable of avoiding such risk of prejudice to the later or connected trial. The inaccuracy of reporting of court proceedings will be contempt only if it can be said on the facts of a particular case, to amount to substantial interference with the administration of justice. The reason behind Section 4 of Contempt of Court Act, 1971 is to grant a privilege in favor of the person who makes the publication provided it is fair and accurate. This is based on the presumption of “open justice” in courts.¹³

3. Order of Postponement of publication

Right to freedom of expression under the First Amendment in US is absolute which is not so under Indian Constitution in view of such right getting restricted by the test of reasonableness and in view of the Heads of Restrictions under Article 19(2). Thus, the clash model is more suitable to American Constitution rather than Indian or Canadian jurisprudence, since First Amendment has no equivalent of Article 19(2) or Section 1 of the Canadian Charter. This has led the American Courts, in certain cases, to evolve techniques or methods to be applied in cases where on account of excessive prejudicial publicity, there is usurpation of court’s functions. These are techniques such as retrials being ordered, change of venue, ordering acquittals even at the Appellate stage, etc. In our view, orders of postponement of publications/ publicity in appropriate cases, as indicated above, keeping in mind the timing (the stage at which it should be ordered), its duration and the right of appeal to challenge such orders is just a neutralizing device, when no other alternative such as change of venue or postponement of trial is available, evolved by courts as a preventive measure to protect the press from getting prosecuted for contempt and also to prevent administration of justice from getting perverted or prejudiced.¹⁴

4. Right to approach the High Court or Supreme Court

In the light of the law enunciated hereinabove, anyone, be an accused or an aggrieved person, who genuinely apprehends on the basis of the content of the publication and its effect, an infringement of his/ her rights under Article 21 to a fair trial and all that it comprehends, would be entitled to approach an appropriate Writ Court and seek an order of postponement of the offending publication/broadcast or postponement of

¹¹*Naresh Shridhar Mirajkar vs. State of Maharashtra AIR 1967 SC 1.*

¹²(2012) 10 SCC 603.

¹³*Ibid.*

¹⁴(2012) 10 SCC 603.

reporting of certain phases of the trial (including identity of the victim or the witness or the complainant), and that the Court may grant such preventive relief, on a balancing of the right to a fair trial and Article 19(1)(a) rights, bearing in mind the abovementioned principles of necessity and proportionality and keeping in mind that such orders of postponement should be for short duration and should be applied only in cases of real and substantial risk of prejudice to the proper administration of justice or to the fairness of trial.¹⁵

Moreover, we can say that the Justice system may have stagnated for many years but rapidly changing socio-economic conditions of civilized nations have subjected another vital democratic institution, the media, to vast structural changes. According to criminal jurisprudence, a suspect/accused is entitled to a fair trial¹⁶ and is presumed to be innocent till proven guilty by a Court of law. No one can be allowed to prejudge or prejudice his case till the completion of trial. However, media on account of excessive coverage goes beyond its domain and publishes and covers interviews of witness or relative of a victim and prejudices the issue of conviction of the accused while the matter is sub judice or pending adjudication in a Court of law. This has a tendency to prejudice the mind of Court, prosecutor and general public at large.

In this research article the author demonstrates how media trial resembles an inquisitorial system, wherein, conduct of the trial is largely in the hands of the media¹⁷, often the news anchor when it is being broadcast live. By delving into the debate of free speech vs. free trial the research paper unearths the other side of the story, how trial by media impedes the judicial process? It cites examples from modern day criminal proceedings and confirms that an unrestricted media plagues the judiciary and engages in contempt of courts every day.

The Universal Declaration of Human Rights and Media:

The UN Human Rights Commission, formed in 1946 in the aftermath of World War II and it had the express purpose of preparing an international bill of rights that would describe the human rights component of the UN Charter. In 1948, the General Assembly adopted the Commission's declaration, the Universal Declaration of Human Rights (UDHR). The Universal Declaration sets out individuals' basic civil and political rights, including the rights to life, security of one's person, fair trial, freedom of movement, and freedom of religion and expression. With respect to free speech, the Universal Declaration provides, "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 and regardless of frontiers."¹⁸ However, this right is not absolute. According to the Universal Declaration, countries may place restrictions "solely for the purpose of securing respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society."¹⁹ It is apparent from the provision of UDHR that it has recognized the freedom of individual related to speech and expression along with the freedom of expression through any media. Nevertheless UDHR is silent about the rights of electronic and print media and its aggressive publication, news and TV shows.

¹⁵*Ibid.*

¹⁶ Fair trial obviously mean a trial before an impartial Judge, a fair prosecutor and atmosphere of judicial calm. Fair trial means a trial in which bias or prejudice for or against the accused, the witnesses, or the cause which is being tried is eliminated. *See Zahira Habibullah Sheikh & Another vs. State of Gujarat* (2004) 4 SCC 158.

¹⁷*See Adversarial and Inquisitorial Systems: A Brief Overview of Key Features*, Law Commission of New Zealand, at p. 2.

¹⁸ Article 19, Universal Declaration of Human Rights, 1948 adopted by United Nations.

¹⁹ Article 29 (2), Universal Declaration of Human Rights, 1948 adopted by United Nations.

Media and Inquisitorial Model:

Following the liberalization of economies around the world, many independent news channels have been born.²⁰ One consequence of this institutional imbalance has been the pre-emptive news coverage of pending trials. The media has exposed attempts, by the rich and powerful to subvert justice. In this part the author demonstrates how the trial by media resembles the inquisitorial model of judicial procedure.

A Primer on Inquisitorial System:

Inquisitorial procedure, in law, is one of the two methods of exposing evidence in court (the other being the adversary procedure).²¹ The inquisitorial system is typical of countries that base their legal systems on civil or Roman law.²²

Under the inquisitorial procedure, the pretrial hearing for bringing a possible indictment is usually under the control of a judge whose responsibilities include the investigation of all aspects of the case, whether favorable or unfavorable to either the prosecution or defense.²³ The inquisitorial system is generally described as a system that aims to get to the truth of the matter through extensive investigation and examination of all evidence.²⁴ The judge conducting the trial in this system determines what questions to ask and defines the scope of the case under a highly structured and rigid code of rules²⁵ in contrast to the adversarial system that seeks the truth by pitting the parties against each other in the hope that competition will reveal it.²⁶

Trail by Media: An Inquisitorial System in Costume:

In the inquisitorial system, the presiding judge is not a passive recipient of information. Rather, the presiding judge is primarily responsible for supervising the gathering of the evidence necessary to resolve the case.²⁷ He or she actively steers the search for evidence and questions the witnesses, including the respondent or defendant. Attorneys play a more passive role, suggesting routes of inquiry for the presiding judge and following the judge's questioning with questioning of their own. Attorney questioning is often brief because the judge tries to solicit all relevant questions.

This system of conducting trial can often be seen on televised news. It is pertinent to note that by parading the men before the media, news anchors have taken the role of prosecutor and judge. The latter finds them guilty even before the former are charged with any criminal offence. This is a serious violation of their fundamental rights including a right to a fair trial. In the inquisitorial system, the rules of admissibility of evidence allow the judge to act more like an inquisitor than an arbiter of justice. Similarly the news anchors

²⁰ BBC, ITV, Channel 4, Channel 5, SKY and UKTV are some leading channels in UK. Al Jazeera America in USA; Aaj Tak, India News, ABP News, NDTV India etc. are some leading news channels in India.

²¹ In the Adversary System, two or more opposing parties gather evidence and present the evidence, and their arguments, to a judge or jury. The judge or jury knows nothing of litigation until the parties present their cases to the decision maker.

²² Most European and Latin American countries use the inquisitorial legal system. For example Italy, uses a blend of adversarial and inquisitorial legal system.

²³ *Inquisitorial Procedure*, Encyclopedia Britannica, <http://www.britannica.com/EBchecked/topic/288956/inquisitorial-procedure>, Last visited on 02.07.2014.

²⁴ *Appendix B: A Comparison of the Inquisitorial and Adversarial System*, Ministry of Justice, Government of New Zealand, <http://www.justice.govt.nz/publications/global-publications/a/alternative-pre-trial-and-trial-processes-for-child-witnesses-in-new-zealands-criminal-justice-system/appendix-b-a-comparison-of-the-inquisitorial-and-adversarial-systems>, Last visited on 28.06.2014.

²⁵ *Inquisitorial System*, The Business Dictionary, <http://www.businessdictionary.com/definition/Inquisitorial-system.html>, Last visited on 28.06.2014.

²⁶ *Inquisitorial System*, The Free Dictionary, <http://www.thefreedictionary.com/Inquisitorial+system>, Last visited on 28.06.2014.

²⁷ *Ibid.*

produce evidence themselves and in full view of the nation declare that they have found the accused guilty without even permitting him to speak.

Trial of Cases in the Media

As remarked by the first Prime Minister of independent India, Pandit Jawaharlal Nehru, "I would rather have a completely free press with all the dangers involved in the wrong use of that freedom than a suppressed or regulated press".²⁸ To realize the vision of Mr. Nehru, the media has been provided with many freedoms and immunities so that this fourth pillar of democracy stands tall and strong. But what Lord Atkin relates with power is also well placed with the notion of liberty. Liberty does corrupt into license and is prone to be abused. Every institution is liable to be abused, and every liberty, if left unbridled, has the tendency to become a license which would lead to disorder and anarchy.²⁹

Origin of Media Trials

Trial by media is a phrase popular in the late 20th century and early 21st century to describe the impact of television and newspaper coverage on a person's reputation by creating a widespread perception of guilt or innocence before, or after, a verdict in a court of law.³⁰ In contrast, the flourishing on new television channels has been a comparatively recent phenomenon in India. Today, as a consequence of economic liberalization, there are over 200 private news channels in India. This has led to a 'welter of exposes' being broadcast on television.³¹ It has become more difficult for the rich and powerful to indulge in criminal acts without being subject to public scrutiny. A good example of this changed scenario is the disparate coverage of inter-religious violence during the 1980s and the present decade.

Sensationalizing of High Profile Cases through Media

It is significant to note here that in current scenario media has made a business out of covering high profile trials.³² The print and electronic media have gone into fierce and ruthless competition, as we call them 'aggressive journalism' that a multitude of cameras are flashed at the suspects or the accused. The most objectionable part, and unfortunate too, of the recently incarnated role of media is that the coverage of a sensational crime and its adducing of 'evidence' begins very early, mostly even before the person who will eventually preside over the trial even takes cognizance of the offence, and secondly that the media is not bound by the traditional rules of evidence which regulate what material can, and cannot be used to convict an accused.³³ In fact, the Right to Justice of victim can often be compromised in other way as well, especially in Rape and Sexual Assault cases, in which often, the past sexual history of a prosecutrix may find its way into newspapers. Secondly, the media treats seasoned criminal and ordinary one, sometimes even the innocents, alike without any reasonable discrimination.³⁴ They are treated as a 'television item'

²⁸ University Institute of Animation and Multimedia, *Mr. Nehru's declaration in the course of a speech delivered on June 1916 in the protest against the Press Act, 1910*, <http://www.chandigarhuniiversity.ac.in/academics/usb/>, (ppt), Last visited on 28.06.2014.

²⁹ *Express Newspapers vs. Union of India*, (1997) 1 SCC 133, See also, *In Re: Harijai Singh and Anr. vs. In Re: Vijaykumar*, AIR 1997 SC 73 wherein the Supreme Court of India observed that the freedom of press is regarded as "the mother of all other liberties" in a democratic society.

³⁰ Wikipedia, http://en.wikipedia.org/wiki/Trial_by_media, Last visited on 28.06.2014.

³¹ Praveen Swami, "Breaking News: The Media Revolution", in Sumit Ganguly, Larry J. Diamond and Marc F. Plattner, eds., (2007), at p. 176. Available at, <http://books.google.co.in/books>, Last visited on 29.06.2014.

³² History records extensive media coverage of trials including the trials involving John Peter Zenger in 1735, Aaron Burr in 1807, Lizzy Borden in 1892, John Scopes in 1925, O.J. Simpson in 1995 and Scooter Libby in 2007.

³³ Santrupt Satapathy, *Trial by Media*, Law Wire, 30.06.2013, available at, <http://www.lawinfowire.com/articleinfo/trial-by-media>, Last visited on 01.07.2014.

³⁴ *Ibid.*

keeping at stake the reputation and image. Even if they are acquitted by the court on the grounds of proof beyond reasonable doubt, they cannot resurrect their previous image. Such kind of exposure provided to them is likely to jeopardize all these cherished rights accompanying liberty.

Intervening in Judicial Process

Though media coverage can sometimes assist law enforcement officers in solving crimes³⁵, many times, the media conducts parallel investigations and points its finger at persons who may indeed be innocent. It tries to find fault 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.³⁶ Evidently, media coverage may endanger the fair administration of justice, another cornerstone of democracy.³⁷

For example, Maria Susairaj was tried and sentenced to three years' imprisonment for concealing evidence in the murder of Neeraj Grover but media frenziedly demanded stronger punishment. Clearly, this is an interference with an ongoing judicial process.³⁸ Private news channels have been accusers, investigators, participants in fomenting public agitations, and almost judicial forums in the bizarre discussions they hold, with opinionated anchors pushing the discussions to preconceived conclusions. They have grossly overstepped their role as purveyors of news and opinion. There is role for the TV on issues of public policy, of which corruption and other such issues are a part, especially when the government is as it is now, a colluder with the violators of the law. But with criminal cases in court, and when the court has passed judgment, the media should have no role till the process is complete.³⁹

Trial by Media vs. Freedom of the Press

It is significant to note here that one of the mistakes a lot of people make believing that uncensored speech is the most free, when in reality, managed civil conversation is actually the freer speech. Free speech is enhanced by civility. In words of Blackstone 'the liberty of press indeed essential to the nature of a free State. Every free man has an undoubted right to say what sentiment he pleased before the public, to forbid this is to destroy the freedom of the press. But if he published what is improper, mischievous or illegal he must take the consequence of his own temerity.'⁴⁰

Free Speech against Fair Trial

Parties have a constitutional right to have a fair trial in the court of law, by an impartial tribunal, uninfluenced by newspaper dictation or popular clamor. Under Article 19 (1) (a) of the Constitution, the rights of the freedom of Press have been recognized as Fundamental Rights and under Article 21 of the Constitution the accused/suspect and under trial and the Civil litigant have Fundamental Right to have a free and fair trial.⁴¹ One's life with dignity is always given a priority in comparison to one's right to freedom of speech and expression. Media should also take this observation into consideration. Fair trial is not purely

³⁵ Gerhard O.W. Mueller, *Problems Posed by Publicity to Crime and Criminal Proceedings*, 110 U. PA. L. Rev.1 (1961).

³⁶ Law Commission of India, *Trial by Media: Report on Free Speech and Fair Trial under Criminal Procedure Code (1973)*, Report No. 200, (August, 2006). Also available at, <http://lawcommissionofindia.nic.in/reports/rep200.pdf>, Last visited on 06.07.2014.

³⁷ Susan Hanley Duncan, *Pretrial Publicity in High Profile Trials: An Integrated Approach to Protecting the Right to a Fair Trial and the Right to Privacy*, 34 Ohio U.N.L. Rev. 755, 757.

³⁸ S.L. Rao, *Trial by Media-Television should have no Role when Criminal Cases are in Court*, The Telegraph, July 25, 2011, available at, http://www.telegraphindia.com/1110725/jsp/opinion/story_14234123.jsp, Last visited on 07.07.2014.

³⁹ *Ibid.*

⁴⁰ Raj Parashar, *Trial by Media- A Legal Dilemma*, available at <http://www.lawyersclubindia.com/articles/Trial-by-media-a-legal-dilemma-4944.asp#.U7vEj6O15kg>, Last visited on 07.07.2014.

⁴¹ Maneka Gandhi vs. Union of India AIR 1978 SC 597.

private benefit for an accused but it is a tool to achieve public confidence in the integrity of administration of justice.

Pillai vs. Kerala⁴² was a seminal Indian case where a defendant argued that biased media coverage could prejudice a trial. A person is presumed to be innocent unless he is held guilty by the competent court, but here the trend is to declare a person guilty right at the time of arrest. The media is there to report facts or news and raise public issues; it is not there to pass judgments. Therefore right to free trial essentially trumps right to free speech and expression. Hence we can say that to facilitate free trial is more important and the free speech can be regulated for the same.

The Law of Contempt of Court

When we see the overview of English Legal System we can find out at its foundation that English law requires open and public court proceedings. Sometimes however, the open court rule and freedom of speech principles collide with fairness in individual proceedings. The law of contempt seeks to balance the right to a fair trial against freedom of speech and open justice principles. In British India, the contempt jurisdiction of courts was based not on any statute or enactment, but on the assumption that it was an inherent power of a court of record.⁴³ The Constitution reaffirmed this. The Constitution designates the Supreme Court and the High Courts as courts of record and gives them the power to punish for contempt of court.⁴⁴

The law relating to contempt of Court is well settled. Any act done or writing published which is calculated to bring a Court or a Judge into contempt, or to lower this authority, or to interfere with the due course of justice or the lawful process of the Court, is a contempt of Court. The enactment of the Contempt of Courts Act 1971 saw the detailed codification of the law of contempt in India. The Act splits the offense of contempt of court into civil and criminal offenses. While civil contempt pertains to the non-compliance of court orders, criminal contempt is defined to include the publication of matter which prejudices or interferes with the due course of any pending judicial proceeding, or interferes with or obstructs the administration of justice.⁴⁵

In **Bijoyananda vs. Balakrishna**⁴⁶ the publication of an editorial deploring a defendant as a 'bribe giver' was held to be in contempt of court. The Court stated that it would not allow cases 'to be tried by newspapers.' In **Leo Roy Frey vs. Prasad**,⁴⁷ a newspaper referred to two defendants as 'smugglers' without inserting the adjective 'alleged.' The Court held that this technically amounted to contempt, although the contemnors were pardoned after an apology.

Efficacy of Media Trials

What we observe about 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. In this way, it prejudices the public and sometimes even judges and as a result the accused, who should be assumed innocent, is presumed as a criminal leaving all his rights and liberty unredressed. If there is excessive publicity in the media about a suspect or an accused before trial, it prejudices a fair trial or results in characterizing him as a person who had indeed not committed the crime; it amounts to undue interference with the 'administration of justice', It

⁴² (2000) 7 SCC 129.

⁴³ K. Balasankaran Nair, *Law of Contempt of Court in India*, 27-9 (2004), in 2 JMLE 42 (2010).

⁴⁴ The Constitution of India, Art. 129, 215.

⁴⁵ Contempt of Courts Act, 1971 S. 2 (c).

⁴⁶ AIR 1953 (Ori.) 249.

⁴⁷ AIR 1958 P H 377.

ensue proceedings for contempt of court against the media. Unfortunately, rules designed to regulate journalistic conduct are inadequate to prevent the encroachment of civil rights.

Subconscious Effect on Judges through Media: A Jurisprudential Overview

Benjamin N. Cordozo in his book entitled 'The Nature of the Judicial Process' says:

"I have spoken of the forces of which judges avowedly avail to shape the form and content of their judgments. Even these forces are seldom fully in consciousness. They lie so near the surface, however, that their existence and influence are not likely to be disclaimed. But the subject is not exhausted with the recognition of their power. Deep below consciousness are other forces, the likes and the dislikes, the predilections and the prejudices, the complex of instincts and emotions and habits and convictions, which make the man, whether he be litigant or judge....."⁴⁸

It is apparent from the philosophy of Cordozo that there are some effects of the emotions, likes and dislikes and other things on the mind of judges. If media is establishing some facts through different channels or newspapers, it leaves some subconscious, though not conscious, effect on the judges and many times it becomes threat for the justice delivery system.

The American view appears to be that Jurors and Judges are not liable to be influenced by media publication, while the Anglo-Saxon view is 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 must not only be done but must be seen to be done.'⁴⁹ The Anglo-Saxon view appears to have been accepted by the Indian Supreme Court as in **Re: P.C. Sen**⁵⁰ the Supreme Court observed '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 triable with the aid of a Jury and not when it is triable by a Judge or Judges.'⁵¹ It appears that it was accepted by the Supreme Court that Judges are likely to be 'subconsciously' influenced.

No judge fit to be one is likely to be influenced consciously, except by what he sees or hears in Court and by what is judicially appropriate for his deliberations.⁵² The Judiciary, according to Justice Frankfurter could not function properly if what the press does is reasonably calculated to disturb the judicial judgment in its duty and capacity to act solely on the basis of what is before the Court.⁵³

Effect on Public through Media

While the trial judge is directly and personally responsible for maintaining the dignity and decorum of the courtroom proceedings, the media's interests do not involve issues of fair trial and due process. Rather, the media's interests involve issues of public information, ratings, and financial benefits from conducting their own trial on television.⁵⁴ Media plays a vital role in molding the opinion of the society and it is capable of

⁴⁸ Benjamin N. Cordozo, *The Nature of the Judicial Process*, Universal Law Publishing Co. Pvt. Ltd., Delhi, (Fifth Indian Reprint, 2004), at p. 167.

⁴⁹ Law Commission of India, *Trial by Media: Report on Free Speech and Fair Trial under Criminal Procedure Code (1973)*, Report No. 200, (August, 2006). Also available at, <http://lawcommissionofindia.nic.in/reports/rep200.pdf>, Last visited on 06.07.2014.

⁵⁰ AIR 1970 SC 1821.

⁵¹ *Id.* at p. 1829.

⁵² John D. Pennekamp vs. State of Florida (1946) 328 US 331.

⁵³ *Ibid.*

⁵⁴ Hon. Cynthia Stevens Kent & Hon. Sharen Wilson, *Media and the Courts in Presiding Over a Capital Case: A Benchbook for Judges* (2010), at p. 69, available at <http://www.judges.org/capitalcasesresources/bookpdf/Chapter%204%20Media%20and%20the%20Courts.pdf>, Last visited on 08.07.2014.

changing the whole viewpoint through which people perceive various events. They blatantly violate the code of free trial and sell their story to boost their TRP, leaving far reaching injury to the reputation of the accused.

In the temptation to sell stories, what is presented is what 'public is interested in' rather than 'what is in public interest'.⁵⁵ Police is presented in poor light by the media and their morale too suffers. The media trial has now moved on to media verdict and media punishment which is no doubt an illegitimate use of freedom and transgressing the prudent demarcation of legal boundaries. It is necessary to check prejudicial publicity of the subject matter pending before a court. It should be legally permissible to pass restraint order on the media.

Brief Overview of Media Regulation in Different Countries

UK

In UK, media and this branch of law has created a 'problem' because it involves a tug of war between two conflicting principles of free press and free trial, in both of which the interest of public at large is involved. The importance of freedom of press was beautifully discussed by English Court in the case of **A.G. vs. Times Newspaper**⁵⁶ in the following words:

"People cannot adequately influence the decisions which affect their lives unless they can be adequately informed on the facts and arguments relevant to the decisions. Much of such fact-finding and argumentation necessarily has to be conducted vicariously, the public press being a principal instrument. This is the justification for investigative and campaign journalism."⁵⁷

This freedom of the Press emerges from the right of the public to be informed on the issues of the day, which affect them and it is important in democratic set up of government.

Investigatory function of the Press has been found to be useful not only against governmental maladministration but also against crimes and other unlawful acts committed by individuals. It has been pointed out that but for such investigation by the Press, many of the offences against society would not have come to light at all.⁵⁸ It has been observed rightly by the English Court:

"It is sometimes largely because of facts discovered and brought to light by the press that criminals are brought to justice. The private individual is adequately protected by the law of libel should defamatory statements published about him be untrue, or if any defamatory comment made about him is unfair."⁵⁹

France

Most of the media law and policy in France is developed by the national government assuming a central role in the marketplace of media activity.⁶⁰ At the heart of central government is the concept of a state. In France the national government is not just an adjudicator of media policy, but is also a competitor in the marketplace of media consumption. The government does this by directly funding and supervising public

⁵⁵ Mother Dairy Foods & Processing Ltd. vs. Zee Telefilms, AIR 2005 Delhi 195.

⁵⁶ (1973) 3 All ER 54 (77) HL.

⁵⁷ *Ibid.*

⁵⁸ R. vs. Savundranayagan, (1968) 3 All ER 439 (441) CA.

⁵⁹ *Ibid.*

⁶⁰ Robert McKenzie, *Comparing Media Regulation Between France, the USA, Mexico and Ghana*, available at <http://www.juridicas.unam.mx/publica/rev/comlawj/cont/6/arc/arc5.htm>, Last visited on 08.07.2014.

broadcasters to provide content that meets cultural objectives. This situation in which the government regulates culture on both public and private television and for radio broadcasters is a defining feature of the media system in France.⁶¹ In France, the governmental role in media is of prime importance.

In France, a press statute enacted in 1881 granted the print media freedom from government regulation by guaranteeing freedom of opinion and the right to publish.⁶² Similarly, the Internet is not regulated by a central government-related agency in France. However, broadcast media are actively regulated in France by the national government, though the nature of this regulatory area has changed. For decades, all broadcast media were exclusively owned, operated and regulated by the national government. But after 1982, the National Assembly enacted a law based on the principle that “freedom of communication is free”.⁶³ That law opened up the possibility for broadcast media to be owned and operated by private companies, and it established that broadcast companies need not to pay a license fee for the right to use radio and television frequencies.⁶⁴

USA

In the contemporary media age, under the pressure of the 24/7 news environment, a fiercely competitive mass-media market, and the extraordinary cult of celebrity, we should be ready to ask afresh, does unrestrained media freedom now always serve the goals of free speech? The answer given here is an emphatic no: the uses the media makes of its freedom can often directly undermine the values underlying the right to free speech. The state’s duty is to secure equal respect for the basic rights of all, and the foundations of a democratic society, among which must be the rule of law, a vital aspect of which is the right to a fair trial.⁶⁵

Thus, although media freedom should be strongly upheld when the media is carrying out its proper function in a democracy, when it is not doing so, and particularly when it is attacking the basic freedoms of others, courts should not hesitate to rein it in. As Lichtenberg put it in an article:

Unlike freedom of speech, to certain aspects of which our commitment must be virtually unconditional, freedom of the press should be contingent on the degree to which it promotes certain values at the core of our interest in freedom of expression generally. Freedom of the press, in other words, is an instrumental good: it is good if it does certain things and not especially good (not good enough to justify special protections, anyway) otherwise.⁶⁶

The relevance of this insight for the fair trial and free speech debate is evident in the following brief survey.

In the United States, media regulation is developed mainly by the Federal Communications Commission, but also by the legislative branch (the Senate and the House of Representatives) and, to some extent, the Supreme Court. Behind the design of this fragmented approach to media regulation is the notion that there

⁶¹ Robert McKenzie, *Comparing Media Regulation Between France, the USA, Mexico and Ghana*, available at, <http://www.juridicas.unam.mx/publica/rev/comlawj/cont/6/arc/arc5.htm>, Last visited on 08.07.2014.

⁶² *Ibid.*

⁶³ *Ibid.*

⁶⁴ *Ibid.*

⁶⁵ See Helen Fenwick & Gavin Phillipson, *Media Freedom under the Human Rights Act*, (2006), at p. 20-32. See for details <http://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=1492&context=lcp>, Last visited on 08.07.2014.

⁶⁶ Judith Lichtenberg, *Foundations and Limits of Freedom of the Press*, 16 Phil. & Pub. Affs., (1987), at p. 333.

should be a check and balance system between the branches of government. Media regulation in the United States follows a libertarian outlook that there should be minimal central government involved in the day-to-day operations of media organizations.⁶⁷ This situation of a primarily commercial marketplace of broadcasters in which there is minimal government interference is a distinctive feature of the media system in the United States.⁶⁸

In the United States, newspapers and the Internet are not licensed or regulated by a central government-related agency. Both newspaper and Internet content have been protected from regulation by the First Amendment, a 1788 Congressional Act creating several amendments to the Constitution. The First Amendment also serves as a guiding principle for the legal outlook toward the broadcast media, but it has not been afforded the same level of freedom as the print media. The rationale for this distinction has been that the broadcast media should be more accountable to public interests than the print media because the former is subject to less competition than the print media. This conclusion is derived from the argument that the broadcast frequency spectrum can only accommodate a finite number of radio and television channels, whereas there is virtually unlimited space to distribute print media. However, the proliferation of cable and satellite radio and television channels has diminished the “scarcity of space” argument to the extent that some regulations covering media ownership were relaxed by the Telecommunications Act of 1996.⁶⁹

There is continuing concern in the United States about the kind of media storms that swirl around high-profile criminal proceedings such as the Sam Sheppard case.⁷⁰ It is significant to note that the grotesque media “carnival” influence tremendously sober and impartial investigation process and it happen nowhere in Western world other than the United States.⁷¹

Table: Comparing the Regulation of Media in Different Countries

Area	Government Bodies	Media Regulated	Priority Content	Enforcement Options
India	ICT, TRAI, CBFC, ASCI, PCI ⁷²	Information and Communication Technology, Telecommunication, Film, Advertisements, Newspapers	Public Information, Minor, Social and Political Opinion	Fines

⁶⁷ Robert McKenzie, *Comparing Media Regulation Between France, the USA, Mexico and Ghana*, available at <http://www.juridicas.unam.mx/publica/rev/comlawj/cont/6/arc/arc5.htm>, Last visited on 08.07.2014.

⁶⁸ *Ibid.*

⁶⁹ Gavin Phillipson, *Trial by Media: The Betrayal of the First Amendment's Purpose*, at p. 15, available at <http://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=1492&context=lcp>, Last visited on 08.07.2014.

⁷⁰ Sheppard vs. Maxwell, (1966) U.S. 333 (U.S.A.).

⁷¹ Gavin Phillipson, *Trial by Media: The Betrayal of the First Amendment's Purpose*, at p. 15, available at <http://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=1492&context=lcp>, Last visited on 08.07.2014.

⁷² ICT- Information and Communication Technology, TRAI- Telecom Regulatory Authority of India, CBFC- Central Board for Film Certification, ASCI- Advertising Standards Council of India, PCI- Press Council of India.

UK	ITC, RA ⁷³	Television, Radio	Public Policy, Minor	Suspension or Revocation of Licenses
France	CSA ⁷⁴	Radio, Television	Political Pluralism, Minors, Television Advertising, French Language	Fines, Acknowledgement of Non-compliance
USA	FCC ⁷⁵	Radio, Television	Indecency, Advertising by a non-commercial broadcasters, Children	Fines, License Revocation

It is significant to note that each of the four countries has government regulation of the media located in very different agencies, with different concentrations of power, and with different connections to governmental authority. Each of the four countries has government regulation that responds to a different set of conditions in each nation. It could be surmised that the main conditions impinging media regulation include: commerce in the United States, culture in France, social development in India and public policy in UK.

Conclusion and Suggestions

Need to Reform Criminal Justice System

Balancing between the rights of people to know and presumption of the accused to be innocent till he is found guilty by a competent court, has become inevitable but neck to neck competition regarding publication and coverage among various media houses having a tendency to interfere with administration of justice has become matter of concern for legislature as well as judiciary. In India, the growing phenomenon of activist media coverage of criminal trials has seen some positive outcomes. It is even arguable that until India's rotten criminal justice system is reformed, the judiciary must tolerate journalistic vigilantism. Nonetheless, I have advocated a slight tilting of the balance away from the right to free speech and towards the right of an accused to a fair trial. A journalist must not be given an absolute free reign to declare an accused person as innocent or guilty. Thus, the Indian judiciary must be a little more assertive and do more than merely make disapproving statements directed at the media.

⁷³ITC- Independent Television Commission, RA-Radio Authority.

⁷⁴CSA or Conseil Supérieur de L'Audiovisuel (roughly translated as Supreme Audiovisual Council).

⁷⁵FCC- Federal Communications Commission.

Indian courts have held that biased media coverage does not merit a retrial, a position that I have supported. But this also means that courts must not abandon the use of suo motu contempt powers as an alternative, post-dissemination safeguard against media trials. If a journalist goes overboard while commenting on a pending trial, courts can consider imposing 'soft' sanctions. In more serious cases involving false publications 'hard' sanctions can be imposed.

Need of systematic and scientifically developed Law at National Level

Moreover, aggressive media trial is influencing the judicial process consequently establishing prejudice in the minds of judges about the fact of the cases and it is nothing but the trying cases like inquisitorial system of administration of justice. It is important to note here that there must be some demarcation of the power of media. Our Apex court tried to provide the guidelines in the case of **Sahara India Real Estate Corporation Ltd. and Ors. vs. Securities and Exchange Board of India and Another**, but there must be systematic and scientifically developed law on the subjects otherwise interference of media in judicial process will be in continuation.

Moreover, freedom of the media and independence of the judiciary are two of the most important indices of democracy in a country. It is essential to preserve both. Flexible press and submissive judiciary are the first step in the process of extinguishment of democratic lights. It is essential that points of conflict between the two should as far as possible, be avoided.

Need to Eliminate Adverse Effect

The judiciary's role in our society is to prevent injustice. The system carries out this role by guaranteeing to a defendant a fair trial. As the courtroom door is opened to the endless reaches of the media, the dignity of the proceedings simultaneously begins to falter. Cameras trivialize the proceedings by placing the crucial issues of a criminal trial into a tabloid-like atmosphere with the result of sensationalizing certain aspects of the trial instead of focusing on the administration of justice. Cameras thwart the dignity of the proceedings by causing witnesses to focus more on their actions than the issues at hand. Cameras produce biases within the television audience that have profound effects upon the defendant. Until the media can eliminate these adverse effects, television should remain outside of the courtroom.

Need of International Model Law on Media

It is important to take into consideration, that different countries are having different legal norms to regulate the media. Countries like, USA has given free hand to media intercourse in their territory. Other countries like UK, France and India have vigorous laws to regulate the media activities along with the vigilant judicial organs. However, in countries like India and USA there is aggressive journalism and many cases which are sub judice before the courts, are tried by the print and electronic media. In such background, we can say that it has tremendous impact on even judicial organs of the governments. In such backdrop, there is need of one International Model Law on Media like UNCITRAL⁷⁶ Model Law, especially for regulation of media and their rights and obligations.

⁷⁶United Nations Commission on International Trade Law.