

**Regional Workshop on ‘*Reporting of Court proceedings
by media and administration of justice*’**

**At the High Court of Maharashtra and Goa,
Mumbai (October 19, 2008)**

Address by Justice K.G. Balakrishnan, Chief Justice of India

My esteemed colleagues, members of the bar and friends from the press –

Today’s session is part of a series of workshops which are being organized in different parts of the country with the objective of prompting a vigorous dialogue on the role of the mass media in respect of the administration of justice. The existence of an independent judiciary and a free press are essential features of a robust constitutional democracy. The organized media is undoubtedly performing a vital role by ensuring that information about different kinds of governmental action, including judicial proceedings is made easily available to ordinary citizens.

Especially in the last two decades, the advent of cable television, local radio networks and the internet has greatly enhanced the reach and impact of the mass media. The circulation of newspapers and magazines in English as well as the various vernacular languages has also been continuously growing in our country. This ever-expanding readership and viewership coupled with the use of modern technologies for newsgathering has given media organizations an unprecedented role in shaping popular opinions. It

goes without saying that a free press creates an informed citizenry and thereby deepens the functioning of democratic institutions. However, media freedom also entails a certain degree of responsibility. In an increasingly competitive market for grabbing the attention of viewers and readers, media reports often turn to distortion of facts and sensationalisation. The pursuit of commercial interests also motivates the use of intrusive newsgathering practices which tend to impede the privacy of the people who are the subject of such coverage. The problem finds its worst manifestation when the media extensively covers *sub judice* matters by publishing information and opinions that are clearly prejudicial to the interests of the parties involved in litigation pending before the Courts. This raises concerns about the protection of the constitutional right of the parties to receive a fair trial. This problem is especially acute in respect of criminal trials and matters involving celebrities, where media reporting can swing popular sentiments either way. Hence, this trend calls for a balance between the constitutional guarantees of 'freedom of press' on one hand and the 'right to fair trial' on the other. To restate the issue in the words of Mark R. Stabile, an academic:

*"Just as one does not have the freedom to falsely shout 'fire' in a crowded theater, one should not have the right to proclaim 'guilty' in the arena of public opinion, trampling the fair trial rights of the accused in the ensuing stampede."*¹

¹ Cited from: Mark R. Stabile, 'Free Press-Fair Trial: Can They Be Reconciled in a Highly Publicized Criminal Case?', 79 *Georgia Law Journal* 337 (1990)

However, before touching on the main contentious issue of 'trial by media', I would like to outline some of the broad concerns arising out of the reporting of judicial proceedings.

- Firstly, there is a professional and moral obligation on the media agencies to ensure fair and accurate reporting of court proceedings. This is a cause for concern since it is a very common occurrence to come across news-reports wherein statements made by judges and lawyers in the courtroom are distorted and cited without an explanation of their context. Courtroom litigation is essentially a dialectic process which requires judges and lawyers to examine issues from critical standpoints. On many occasions journalists misrepresent such critical inquiry as indicative of the personal beliefs of a judge or a lawyer. This creates a distorted public perception of the individuals involved in judging and arguing in cases. For example, a law officer may be required to defend a faulty governmental policy or a criminal defence lawyer may be confronted with compelling evidence of guilt. Under such circumstances the lawyers' task is to argue their case to the best of their ability and their failure to get favourable decisions from the bench do not necessarily reflect on their legal acumen. However, media reports of judicial proceedings tend to be in the 'win-loss' mould and are highly selective in reporting the relevant facts.

- Secondly, in some kinds of cases there is a compelling need to protect the identity and privacy of parties. The same may be required in order to ensure their security and protect their interests apart from ensuring a fair trial. Ordinarily judicial proceedings should be open to public scrutiny, but there is a need to restrain the same under certain circumstances. For instance media reports should not disclose the identity of victims of sexual offences.² Furthermore, our procedural laws provide for *in camera* proceedings in family-related disputes as well as in rape trials so as to protect the victims as well as the witnesses from undue pressure in the courtroom setting. The *Madrid principles on the relationship between the media and judicial independence* (1994) expressly allow for legal measures for the preservation of secrecy during investigation of crimes even when such investigation forms a part of the judicial process.³ The preference for secrecy in such circumstances must be regarded as mainly for the benefit of persons who are suspected or accused and to preserve the ‘presumption of innocence’. In respect of the interface between media freedom and criminal law, one of the *Siracusa principles* articulated in 1984, lays down the following:

² This observation was made in *R. Rajagopal & Anr. v. State of Tamil Nadu*, (1994) 6 SCC 632

³ For a discussion of the *Madrid Principles*, see 200th Report of the Law Commission of India on ‘Trial by Media – Free speech and Fair trial under Criminal Procedure Code, 1973’ (New Delhi: August 2006) at p. 29-35

All trials shall be public unless the Court determines in accordance with law that:

- (a) the press or the public should be excluded from all or part of a trial on the basis of specific findings announced in open Court showing that the interest of private lives of the parties or their families or of juveniles so requires; or*
 - (b) the exclusion is strictly necessary to avoid publicity prejudicial to the fairness of the trial or endangering public morals, public order or national security in a democratic society.*
- The third major concern which is also the core issue for today's deliberations is the need to check prejudice against parties which can arise as a consequence of reporting on *sub judice* matters. Particularly, in criminal cases, photographs are shown on television, hypotheses made and inferences are drawn, which at times, seem to point towards a particular person, who may have been assumed to be guilty.⁴ The problem was articulated by our Supreme Court many years ago in *Saibal Kumar v. B.K. Sen*,⁵ wherein it was observed as follows:

“No doubt, 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

⁴ See generally: Mark J. Geragos, ‘The thirteenth juror: Media coverage of supersized trials’, 39 *Loyola of Los Angeles Law Review* 1167 (December 2006)

⁵ (1961) 3 SCR 460

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, whether the investigation tends to prejudice the accused or the prosecution.”

While pervasive media coverage clearly shapes popular opinions, one could ask whether the same affects professionally trained judges. Unlike the American legal system which provides for ‘trial by jury’, wherein the jury members may be swayed by media coverage, our judicial system relies exclusively on the competence and impartiality of the trial judge. It is possible to argue for unrestrained media coverage of court proceedings on the ground that the same will not affect the decisions of competent judges. This issue became the subject-matter of conflicting opinions delivered by Lord Denning and Lord Dilhorne in *Attorney General v. British Broadcasting Corporation*.⁶ While Lord Denning opined that a professional judge will not be influenced by media coverage which affects laymen, Lord Dilhorne rebutted this conception of ‘judicial superiority’. The same issue had been commented upon by Justice Felix Frankfurter many years earlier who reasoned that the judiciary 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. In *John D. Pennekamp v. State of Florida*,⁷ he observed:

⁶ 1981 AC 303 (HL)

⁷ (1946) 328 US 331

“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. However, Judges are also human and we know better than did our forbears how powerful is the pull of the unconscious and how treacherous the rational process --- and since Judges, however stalwart, are human, the delicate task of administering justice ought not to be made unduly difficult by irresponsible print. The power to punish for contempt of court is a safeguard not for Judges as persons but for the functions which they exercise. It is a condition of that function – indispensable in a free society – that in a particular controversy pending before a court and awaiting judgment, human beings, however strong, should not be torn from their moorings of impartiality by the undertone of extraneous influence. In securing freedom of speech, the Constitution hardly meant to create the right to influence Judges and Jurors.”

The main legal remedy against the problem of prejudicial reporting on *sub judice* matters is that of the power of judges to punish for contempt. Article 19(2) enumerates ‘Contempt of Courts’ as a ground for placing reasonable restrictions on the freedom of speech. The Contempt of Courts Act, 1971 lays down the power of judges to punish for criminal contempt in instances of scandalizing the court, prejudicial acts and the obstruction of justice. While the statutory grounds give a fair leeway for judges to act against prejudicial reporting, it must be remembered that the provision of contempt powers is a punitive remedy based on the idea of deterrence. For instance, Courts can proceed to punish journalists for

irresponsible reporting, but they cannot undo the impact of prejudicial reporting. Even in instances where individuals accused of serious crimes may have been cleared in court, they could face social ostracisation thereafter on account of the adverse media coverage during the pendency of the trial.

The representatives of the press have repeatedly argued that some judges are inclined to misuse contempt powers in order to deflect personal criticisms rather than serve the interests of justice. It has been stated in some quarters that the use of contempt powers has a 'chilling effect' on the constitutional guarantee of free speech. It must be remembered that as a norm, the press in our country is given a fair degree of access to judicial proceedings and it is only in exceptional circumstances that the same is curtailed to protect the interests of parties. Furthermore, the power of criminal contempt is used only when it is perceived that the nature of media coverage is likely to effect the appreciation of evidence and argumentation in a case and impede the impartiality of judges.

In our legal system, the courts do not have any power to impose 'prior restraints' on the publication of prejudicial material during the pendency of court proceedings.⁸ Even the use of civil remedies such as injunctions, 'gag orders' and orders for 'postponement of publication' is not common in our country. In fact a

⁸ The general proposition prohibiting Courts from imposing 'prior restraints' on publications by the news media was laid down in *R. Rajagopal & Anr. v. State of Tamil Nadu*, (1994) 6 SCC 632; Reliance was placed on the decision of the US Supreme Court in *Nebraska Press Association v. Hugh Stuart*, (1976) 427 US 539

counter-argument can be made by raising serious doubts about the efficacy and deterrence of the existing contempt powers. In the backdrop of the increasingly profit-oriented activities of media organisations, there is lesser incentive for them to maintain ethical standards in reporting when they are continuously competing amongst themselves to get more attention from readers and viewers.⁹

An important question addressed in the *200th Report of the Law Commission of India* on 'Trial by media' relates to the ambiguity in the Contempt of Courts Act, 1971 over the stage at which a matter can be considered *sub judice*. Legislative certainty on the issue would be beneficial, since the media agencies will then be able to regulate their own coverage over matters where such a stage has been crossed. Section 3 of the Contempt of Courts Act, 1971 restricts the freedom of speech and expression which includes both freedom of the media, both printed and electronic. The threshold for the same is prescribed in the following words:

'If any publication interferes with or obstructs with or tends to obstruct the course of justice in connection with any civil or criminal proceeding which is actually pending'.

Further, Section 3(1) of the Act incorporates the 'innocent publication' rule which provides a defence in so far as the person who made the publication had no reasonable grounds for believing that a judicial proceeding related to the subject-matter was pending

⁹ See generally: David B. Sentelle, 'The Courts and the Media', 48 *Federal Lawyer* 24 (September 2001)

at the time. At present, Section 3(2) of the Act allows unrestricted freedom of publication, granting immunity from contempt if there is no civil or criminal proceeding actually '*pending*' in a court at the time of publication. The suggestion put forward by the Law Commission of India is that the exact meaning of the word '*pending*' requires clarification and it has been proposed that under Section 3(1) of the Act the word '*pending*' should be substituted by the word '*active*'.

Under the existing law, the starting point of the pendency of a criminal proceeding is only from the stage when the court actually gets involved i.e. when a charge-sheet or challan is filed under Section 173 of the Code of Criminal Procedure. However, any prejudicial publication before such stage does not come within the purview of the power to punish for contempt. It must be reiterated that even before the case comes to the Court, it is quite possible that substantial injustice may have been done to the accused by way of publication of facts and inferences.

If a restriction on the freedom of speech and expression is intended by the legislature to prevent the 'obstruction of justice', some clarification is required as to what the word '*pending*' really means. In respect of judicial precedents on the point, the Supreme Court had ruled in *A.K. Gopalan v. Noordeen*,¹⁰ that the filing of an FIR (First Information Report) cannot be treated as the starting point of a judicial proceeding and that any publication made at that stage will not be deemed to be interfering or tending to interfere or

¹⁰ 1969 (2) SCC 734

obstructing or tending to obstruct the course of justice in a criminal proceeding. It was ruled that criminal proceedings begin at the point of arrest, and following that logic one can argue in the present day that the media should be prevented from making prejudicial reports after such stage. However, even the threshold of identifying the time of arrest as the beginning of judicial proceedings will not serve the purpose of tackling prejudicial reporting in civil cases

Even though the inter-related questions of 'trial by media' and the use of contempt powers by judges are contentious and require a wider discussion, we can all safely agree on the need to facilitate accurate reporting of court proceedings at all levels. At present, the orders and judgments of the Supreme Court, the various High Courts and some selected District Courts are freely available to the general public through the Judgment Information System (JUDIS) that functions through a user-friendly website. Under the 'Implementation of E-Courts project' there are plans to ensure that the orders and judgments of courts and tribunals at all levels will be made easily accessible online. Apart from this there is a continued push for the use of technology in the courtroom such as audio-visual recording of arguments and the maintenance of video archives for subsequent reference by judges, researchers and journalists. However, we must also be conscious about the use of technology in the future, since it will not be appropriate to broadcast judicial proceedings in a manner

akin to those of the legislature, since that could impinge on the rights of parties to receive a fair trial.¹¹

Besides the proposed changes to the law of contempt, the long-term solution lies in respect of self-regulation by both the media and the judiciary. The editorial teams at media organisations must promote the best practices for newsgathering and emphasise the importance of maintaining ethical standards for the coverage of judicial proceedings. The guidelines framed by bodies such as the Press Council of India, the Editors' Guild of India do touch on these issues – such as cross-checking and verifying facts before reporting, refraining from sensationalisation and not commenting on *sub judice* matters. In many cases, such as *M.P. Lohia v. State of West Bengal*,¹² the Supreme Court has warned the media against indulging in public trials when the matter is *sub judice*. In the absence of a prompt legislative intervention, the judiciary can possibly take the lead in framing guidelines for reporting on *sub judice* matters. However, it would be even better if the representatives from the press were to evolve a 'self-regulation' based model for the same. With these words I hope that today's discussions will be fruitful for all the parties who have a stake in these issues.

Thank You!

¹¹ See generally: Daniel Stepniak, 'Technology and public access to audio-visual coverage and recordings of court proceedings: Implications for common law jurisdictions', 12 *William and Mary Bill of Rights Journal* 791 (April 2004)

¹² (2005) 2 SCC 686