

The Fourth K.S. Rajamony Memorial Public Law Lecture

on

'The Constitution, the media and the Courts'

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By Justice K.G. Balakrishnan, Chief Justice of India

"Were it left to me to decide whether we should have a government without newspapers or newspapers without a government, I should not hesitate a moment to prefer the latter."

Ladies and Gentlemen,

The above statement by James Madison, one of the architects of the US Constitution, reflects the essential position that the media occupies in a society. Madison gave it the highest regard when he preferred the role of the media over that of the government. Its importance, therefore, in the context of preservation and protection of rights and freedoms is immense, and it is perhaps the most important medium of mass expression. The media enables the sentiments of the people to be conveyed both domestically and internationally. It highlights the collective grievances of the people as well as the deplorable plight of certain individuals or groups of individuals. It also serves as an informed critic of government policies and attracts intellectual attention to the most pressing issues in all walks of life. This is essential in a democracy, for utmost secrecy in

administration of justice is also undesired. Jeremy Bentham warned against secrecy in the administration of justice in the following words:

In the darkness of secrecy, sinister interest and evil in every shape have full swing. Only in proportion as publicity has place can any of the checks applicable to judicial injustice operate. Where there is no publicity there is no justice. Publicity is the very soul of justice. It is the keenest spur to exertion and the surest of all guards against improbity. It keeps the judge himself while trying under trial.

Therefore, the need of the hour is to envisage a system by which the media has reasonable access to material, and it uses such material responsibly, with sufficient legal safeguards to prevent misuse. A balance between what may be published with deference to reasonable secrecy is required.

The media is thus a sentinel of democratic freedoms. There have been numerous instances around the world where the media has performed a yeoman's service in uniting the country against many social evils and problems that required immediate attention. In *Indian Express Newspapers v. Union of India*, the court pointed out that:

"in today's free world freedom of press is the heart of social and political intercourse. The press has now assumed the role of the public educator making

formal and non formal education possible in a large scale particularly in the developing world...The purpose of the press is to advance the public interest by publishing facts and opinions without which a democratic electorate cannot make responsible judgments.”

However, any institution that enjoys such confidence is also burdened with great accountability and responsibility, for without these ideals underpinning every endeavor; the faith of the people in such an institution can be put to great test, and may be questioned. It is the responsibility of every individual associated with the media to act responsibly with a sense of duty towards the society and the nation. The media should be in a position to command the respect of the people and not demand it.

Journalism, a service oriented profession, entails great responsibility. Journalists are vigilant watchdogs of civil liberties, and are required to make critical scrutiny and careful questioning of various aspects of our daily life, in order to generate healthy public debates that would help augmenting the way we perceive existence in society today. In this endeavor, the Constitution of India guarantees the Freedom of Speech and Expression to every individual, and especially the media, both print and electronic. This liberty forms the cornerstone for the successful functioning of any democracy. It has been protected time and

again by the courts. In *Romesh Thappar v. State of Madras*,¹ the Supreme Court recognized the need to protect this fundamental liberty in the following words:

"...very narrow and stringent limits have been set to permissible legislative abridgement of the right of free speech and expression and this was doubtless due to the realization that freedom of speech and of the press lay at the foundation of all democratic organizations, for without free political discussion and no public education, so essential for the proper functioning of the processes of popular government, is possible."

The right of the media to report important court processes and proceedings emanates from the right of the citizens to know, to educate and to be educated about the truth. However, along with this right also comes a great sense of duty, a duty that's implied by the Constitution. It is a duty to report fairly, objectively and accurately. Any digression from this duty attracts restrictions and limitations that protect the rights of individuals. This balance of rights and duties is implicit in the Constitution itself. It seeks to protect veiled heroism on the face that may often be villainy at heart. To borrow the phraseology of Chief Justice Stevens in *Nebraska Press Association v. Stuarts*²:

"It is a disturbing development in our country that the media and some men in the trade of traducement are escalatingly scandalizing judges with flippant or

¹ (1950) SCR 594

² (1976) 96 Sup Ct 2791

motivated write-ups, wearing a pro-bono public veil and mood and provocative mock challenge. The court shall not mediate nor hesitate but shall do stern justice to such 'professional contemnors, not shrink because they are scurrilous, influential or incorrigible'.

The above statement, reflecting the frustration of the court at the publication of inaccurate, baseless, graceless or misleading material regarding judges, can be generalized to include the courts, an accused or any other individual or institution involved with the functioning of the justice delivery mechanism anywhere in the world. Whenever there is a clash or conflict of rights and duties, the courts try to balance competing claims of public interest. Whenever the media oversteps its framework of responsibility, the court restricts it, by balancing the people's right to know with the interest of justice, which may require reasonable restrictions to be placed on the right to know.

The judiciary, as the upholder and protector of the right to freedom of speech and expression of the media and has zealously safeguarded this right against invasion by other branches of the government, whenever it has occurred. The media, in their turn, should allow the judiciary to dispense justice free from external pressures in all cases. Journalists should appreciate that the publication of any matter which prejudices or interferes or tends to interfere with the due course of any judicial proceeding or which interferes with the administration of justice may be treated as contempt. "Freedom of press" should not be given

such a meaning, that it results in curtailing the freedoms of the very public the press is supposed to serve. It would be interesting herein to set out the principles issued by the *American Press Council*, which comprehensively explain what the expression “freedom of press” means:

First, the freedom of the press to publish is the freedom of people to be informed. This is the justification for upholding press freedom as an essential feature of a democratic society. This freedom, won in centuries of struggle against political and commercial interests, includes the right of a newspaper to publish what it reasonably considers to be news, without fear or fervor, and the right to comment fairly upon it.

Second, the freedom of the press is important more because of the obligation it entails towards the people than because of the rights it gives to the press. Freedom of the press carries with it an equivalent responsibility to the public. Liberty does not mean license. Thus, in dealing with complaints, the Council will give first and important consideration to what it perceives to be in the public interest.

Therefore, although openness and free access to courts of justice is an entitlement arising out of this fundamental right, the interests and privacy of litigants, witnesses and others associated with a particular matter must also be protected. This is the balance of fundamental rights and freedoms that every free

society has to consider. The manner in which modern media and telecommunications can intrude into a person's life and cause embarrassing and damaging publicity if left unhindered is alarming. The tendency of newspapers and news channels to give unverified accounts is a development that raises a lot of concern, and is a danger to a free, fair and constitutional judicial process. The method of "trial by media" by which the media canvasses and conveys public opinion in favor of one side or the other has become increasingly frequent in recent times, particularly in criminal matters, where the accused is perceived guilty not only against the individual but also against the society, which often leads to societal outrage, before the person has even begun his trial in the court of law. This phenomenon questions the very premise on which our judicial system is based- the right of every party involved in a court proceeding, civil or criminal, to have his case adjudicated in a manner that is free, fair and unbiased. During the celebrated O.J. Simpson case, it was observed by a commentator, Laura Alber that:

"If O.J. Simpson was guilty; the media was responsible for his acquittal."

She was referring to the overwhelming public opinion which favored the "not guilty" verdict. Even in India, many cases exist where the media has conducted elaborate interviews and discussions regarding the guilt of an accused in a manner that created public pressure, rather than public opinion. It is thus necessary to have publicity, but that which is responsible and unbiased. The 17th Law Commission, in the 200th Report relating to trial by media, observed:

"Today there is 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 a prejudicial impact on the suspects, accused, witnesses and even judges 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."

In the US, the courts have consistently frowned upon media reports prejudging issues pending in a court of law. Orders restricting the media are considered valid, and guidelines have been laid down by the US Supreme Court for determining circumstances in which "gag orders" may be issued by courts. The US Supreme Court has even granted *de novo* trials in cases where it appeared that adverse media coverage may have impaired the right of the accused to have a fair trial. In *Estate v. State of Texas*,³ the US Supreme Court held that the trial had been vitiated by extensive news photography which was permitted throughout, and live coverage by both radio and television. The Court refuted the contention that the nature of the trial being a public trial, limitations could not be placed upon the media's coverage of the same. Chief Justice Earl Warren, delivering the majority opinion, opined:

"...the public trial provision of the Sixth Amendment is a 'guarantee to an accused' designed to safeguard against any attempt to employ our courts as

³ 381 US 532

instruments of persecution. Clearly the openness of the proceedings provides other benefits as well. It arguably improves the quality of testimony, it may induce unknown witness to come forward with the relevant testimony, it may move all trial participants to perform their duties conscientiously, and it gives the public the opportunity to observe the courts in the performance of their duties and to determine whether they are performing adequately... A public trial is a necessary component of an accused's right to fair trial and the concept of public trial cannot be used to defend conditions which prevent the trial process from providing a fair and reliable determination of guilt."

This issue has also received the attention of the Supreme Court of India, which has consistently expressed concern towards possible prejudice to a party due to pre-judging of issues by the media. Particularly, in criminal cases, often, photographs are shown on television, hypotheses made and comments generated, which, at times, seem to point towards a particular person, who, it appears, has been assumed to be guilty. Till the trial has concluded and judgment rendered, it is unfair for the media to present the guilt of the accused. Such a biased approach is prone to cause harm to the concerned persons. In *Saibal Kumar v. B.K. Sen*,⁴ the Court observed thus:

"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

⁴ (1961) 3 SCR 460

newspapers, when a trial by one of the regular tribunals of the country is going on, must be prevented. The basis for this view is that such action on the part of a newspaper tends to interfere with the course of justice, whether the investigation tends to prejudice the accused or the prosecution”.

In many other cases, such as *M.P. Lohia v. State of West Bengal*,⁵ the court has warned the media against indulging in public trials when the matter is *sub judice*. 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 even a few District Courts are freely available to the general public through the Judgment Information System (JUDIS) a user-friendly website. In the coming years, 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 because that could impinge on the rights of parties to receive a fair trial.

⁵ (2005) 2 SCC 686

Besides the Law Commission's proposal for changes to the law of contempt in the 200th report on 'trial by media', the long-term solution lies in respect of self-regulation by both the media and the judiciary. The influential media agencies 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 the absence of a prompt legislative intervention, the judiciary can take the lead in framing guidelines for reporting on *sub judice* matters.

With these words, I hope that I have been able to convey the significance of the inter-relationship between judicial functions and the media's newsgathering functions, both of which are bound by constitutional values. I am grateful for the opportunity to speak here today.