

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

**At the High Court of Orissa, Cuttack (August 30, 2008)**

**Inaugural address by Justice K.G. Balakrishnan,  
Chief Justice of India**

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**I. Introduction**

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

Today's programme is part of a series of workshops which have been organized in different locations in order to encourage a vigorous dialogue and debate on the role of the mass media with respect to the administration of justice in our country. The prevalence of an independent judiciary and a free press are essential features of a robust democratic order. One can only commend the role of the organized media in ensuring that information about different kinds of governmental action, including judicial proceedings is made easily accessible to the common man.

In recent years, 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 has also been continuously growing in our country. This ever-expanding readership and viewership coupled with the use of communication technologies has given our media organizations an

unprecedented role in shaping popular opinions and preferences. 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 intensely 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 is also linked to intrusive practices during newsgathering which often impede the privacy of the people who are the subject of such coverage. The problem finds its worst manifestation when the media extensively covers matters *sub judice* and publishes information and opinions which are clearly prejudicial to the interests of the parties and vitiates 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."*<sup>1</sup>

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<sup>1</sup> 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)

## II. Key issues in the reporting of judicial proceedings by the media

However, before commenting on the contentious issue of 'trial by media' I would like to briefly outline the broad categories of concerns with respect to the reporting of court proceedings by the media. They can be stated as follows:

- First and foremost, there is an obligation on the media agencies to ensure fair and accurate reporting of 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.
- Secondly, in some kinds of cases there is a compelling need to protect the identity and privacy of parties in order to safeguard their interests and ensure a fair trial. Ordinarily judicial proceedings should be open to public scrutiny, but there is a need to check the same in some circumstances. For instance news agencies should not disclose the identity of victims of sexual offences.<sup>2</sup> 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. The *Madrid principles on the relationship between the media and judicial independence* (1994) expressly

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

allow for the preservation by law of secrecy during investigation of crimes even when such investigation forms a part of the judicial process.<sup>3</sup> 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* (1984) stipulates:

*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 subject-matter of today’s discussion 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

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<sup>3</sup> For a discussion of the *Madrid Principles*, see 200<sup>th</sup> 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

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.<sup>4</sup> The problem was articulated in *Saibal Kumar v. B.K. Sen*,<sup>5</sup> wherein our Supreme 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 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.”*

While pervasive media coverage clearly shapes popular opinions, one could ask the question as to 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 of the 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*

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

<sup>5</sup> (1961) 3 SCR 460

*Corporation*.<sup>6</sup> 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*,<sup>7</sup> he observed:

*“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.”*

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<sup>6</sup> 1981 AC 303 (HL)

<sup>7</sup> (1946) 328 US 331

### **III. Legal strategies for tackling ‘trial by media’**

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 may be 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 freedom of 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 impact the presentation of evidence 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.<sup>8</sup> Even the use of methods such as injunctions, 'gag orders' and orders for 'postponement of publication' is not common in our country. In fact a question can be raised about the efficacy and deterrent effect of the existing contempt powers in light of the increasingly profit-oriented activities of media agencies, which compete amongst themselves to get more attention from readers and viewers.<sup>9</sup>

An important question addressed in the 200<sup>th</sup> Report of the Law Commission of India on 'Trial by media' deals with 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 '*if any publication interferes with or obstructs with or*

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<sup>8</sup> The general principle that Courts cannot impose 'prior restraints' on publications by the media was articulated 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

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

*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 protects the publication if the person who made the publication had no reasonable grounds for believing that the proceeding related to the subject-matter was pending 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 amendment proposed by the Law Commission suggests that the word 'pending' requires clarification and it is suggested 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 the case is only from the stage where 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 can be done to the accused by publication. If a restriction on the freedom of speech and expression is intended by the legislature to protect the course 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*,<sup>10</sup> that the filing of an FIR (First Information Report) cannot be treated as a

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<sup>10</sup> 1969 (2) SCC 734

starting point of criminal proceedings and that any publication made at that stage will not be deemed to be interfering or tending to interfere or 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

#### **IV. Concluding remarks**

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 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, since that could impinge on the rights of parties to receive a fair trial.<sup>11</sup>

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 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 many cases, such as *M.P. Lohia v. State of West Bengal*,<sup>12</sup> the Supreme Court has warned the media against indulging in public trials when the matter is *sub judice*. In fact, a matter is presently pending before the Supreme Court where the bench has issued notices with the intention of framing guidelines to regulate the reporting on *sub judice* matters. With these words I hope that today's discussions prove to be fruitful.

Thank You!

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<sup>11</sup> 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)

<sup>12</sup> (2005) 2 SCC 686