

COMMONWEALTH LAW CONFERENCE

GLASGOW

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14.00 to 15.30 Hours

Session - C10

Trial By Media

The right to freely express opinions and participate in public debate is the keystone of any democratic arc. It is an inseparable component of democracy and could even be perceived as the gateway to other fundamental liberties, without which, there could be no freedom, or right against exploitation, or even equality. The curtailment of this right, imposes a restriction on the right to be informed, since the freedom of speech and expression that is guaranteed in the Indian Constitution includes the freedom of circulation, the sanction of the Media, or the liberty to propagate one's view or expression, which is inherent in that freedom.

Freedom of speech and expression is guaranteed in Article 19(1)(a), which falls within Part III, or the Fundamental Rights Chapter of the Indian Constitution. Part III of the Indian Constitution, contains those inalienable rights that are inherent to every individual, irrespective of their race, caste, creed, sex, etc. Fundamental rights are regarded as the highest law of the land, a Magna Carta, in an Indian context, and hence command the strongest protection in the eyes of the law. The presence of Article 19(1)(a) in Part III of the Constitution, demonstrates the value that the Constitution places on free speech and expression.

The Media in India enjoys a great deal of freedom. We, like every other Nation, have an interesting combination of responsible journalism on the one hand, and the Media that feels the burden of filling the 24 hour news cycle such that our newspapers and channels are bombarded incessantly by the catastrophe du jour on the other. In order to provide equilibrium to the freedoms granted in Article 19(1)(a), Article 19(2) of the Indian Constitution contains restrictions that can be imposed by the State on the right to freedom of

speech and expression. These restrictions can be imposed by law made by Parliament, within the purview of eight grounds set out in Article 19(2), that are; the sovereignty and integrity of India, the security of the State, friendly relations with foreign states, public order, decency or morality, Contempt of Court, defamation, and incitement to an offence.

The Indian Supreme Court has consistently ruled that there can be many kinds of restraints on free speech and it has tested these restraints from time to time, both with a view to ensure that there is no curtailment of the freedom of expression, as well as to ensure that the Media should not be allowed to overstep its bounds at the expense of an innocent litigant.

A recent decision of the Indian Supreme Court in *Shreya Singhal vs. Union of India*, delivered on the 24th of March 2015, has struck down the controversial Section 66 A of the Information Technology Act, 2000. The Section provided for the punishment of any person, who sent, by means of a computer resource or communication device, any information that was grossly offensive or of a menacing character. It also made punishable, the dissemination of false information, causing annoyance, inconvenience, danger, obstruction, insult, injury, criminal intimidation, enmity, hatred and ill-will. The punishment prescribed in the Section was up to 3 years of imprisonment along with a fine. Taking exception to certain messages that were posted on a Facebook account, proceedings under Section 66 A were instituted against many young persons. The Section was challenged on the ground that it violated the fundamental right to free speech and expression and did not come within any of the exceptions referred to in Section 19(2). The Court, noting that the Section was vague and bald and would enable law enforcement authorities to invoke the provision with a great deal of subjectivity, struck it down and held it to be unconstitutional, thereby conveying a strong message that constitutional freedoms such as the freedom of speech in India are guarded zealously by Constitutional Courts, which would not hesitate to invalidate Parliamentary laws that are aimed at denying constitutionally guaranteed freedoms.

While it has become somewhat customary for newspapers and columns to sensationalize the news at the expense of many an innocent subject, the law does offer protection to those that are at the receiving end of the pen that is in this case most certainly mightier than the sword. Perhaps the most dreaded professional hazard for a Media person in India is the threat of defamation. Defamation falls within Article 19(2), and as such it is a constitutional limitation on the right to freedom of expression. As a protection that has been explicitly saved by Article 19(2), an individual would be well within his rights, to impose this constitutional restriction on information published by the Media. Protection against defamation under Indian law, can be both under the auspices of a Civil Suit demanding

compensation as well as under Section 499 of the Indian Penal Code as a criminal charge, such that the victims of such a claim would have a twofold remedy, to sue for damages, as well as to prosecute the defamer.

The right to Privacy in India is guaranteed under Article 19 (the right to freedom) and Article 21 (the right to life) of the Indian Constitution. Courts in India have interpreted the right to privacy as implicit, or as an essential ingredient in the right to life. It was in the case of *People's Union for Civil Liberties vs. Union of India* [(1997) 1 SCC 301], in the context of considering whether wire tapping was an infringement of a citizen's right to privacy, that the Supreme Court held that the right to privacy was derived from both Articles 19 and 21, as when a person was talking on the phone, he was exercising his right to freedom of speech which, being confidential, also required the protection of his right to privacy under Article 21.

Media trial by the Press and electronic media is commonplace in most democracies. The difficulty in the job of the Court is to draw a fine line of distinction between reporting what transpires in Court in the course of Trial and making a comment thereon. Often, in the course of investigation, "juicy details" of the facts gathered and comments from a cross section of society are widely disseminated in the Media. In most cases, the scope of investigative journalism has stretched so far and wide, that before the facts can be investigated by a State Agency and the investigation can reach its lawful conclusion, an innocent party is hung, drawn and quartered on the metaphorical noose of the free press.

A classic example of such alternate investigation being undertaken by the Media is in the case of *MP Lohia vs. the State of West Bengal* [(2005) 2 SCC 686], where the Supreme Court strongly deprecated the Media for publishing an article after interviewing the family of a girl that was suspected of being killed in a dowry death incident and drawing conclusions as to the guilt of a suspect and publishing the offensive article while the matter was sub judice. It held that the freedom of speech and expression, might sometimes amount to interference with the administration of justice, as articles appearing in the Media could be prejudicial to an ongoing Trial.

In recent times, a number of high profile rape cases have attracted wide media attention in India. Scant regard is paid to the right of privacy of the victim and the witnesses. It has gone so far that Courts have had to step in and pass gag orders. In one case, relating to a reputed Senior Advocate of the Supreme Court, the Media carried graphic details of certain allegations of sexual abuse by him, necessitating the person involved, to move the Delhi High Court and obtain a restraining order against the Media.

In a more recent development, a few weeks ago, an upcoming young civil servant was found hanging in his own apartment, leading to widespread speculation in the Media that the Officer was honest and that his death had been deliberately caused by persons with vested interests in investigations being conducted by him.

On the floor of the Legislative Assembly, the Chief Minister of the State made certain statements, indicating that the Officer had taken his own life, due to certain difficulties he faced in his private life, involved his wife and another lady colleague. Such reactions were widely condemned, as they tended to interfere with the course of an investigation, and also indicate the free set mind of the State Government to obfuscate facts and to shield persons who were being investigated by the deceased Officer.

A national clamour in the case, led to the President of the Indian National Congress making a suggestion to the Chief Minister, who also belongs to the same Political Party, to order an investigation by the central investigation agency, namely the Central Bureau of Investigation, which is not an Agency under the control of the State. Perhaps this would not have happened, had it not been for the wide media coverage the incident received in India.

The bravado of the Media has extended so far, that the Supreme Court in the recent judgment of *Sahara India Real Estate Corporation Ltd. and Ors. Vs. Securities and Exchange Board of India* [(2012) 10 SCC 603] held, that in cases where Media interference could hamper the effective continuance of a Trial, Courts could order the postponement of Media reporting on a matter that is sub judice, keeping in mind whether there is a real and substantial risk of prejudice to the fairness of a Trial or to the proper administration of justice, necessity and proportionality in the case. It held that the balancing test for an Order of postponement for a limited period was to weigh the public's right to information through the Media against the litigant party's right to have an independent judicial verdict.

Another aspect of the complicated relationship between the judicial system and the Media is that of Contempt of Court. While coverage of proceedings is important to keep people informed, it cannot extend so far as to hamper the administration of justice. Contempt of Court, both Civil and Criminal, falls within the restrictions imposed on the freedom of speech under Article 19(2). Restrictions within the auspices of Contempt of Court are therefore not only given Constitutional protection, they are also the subject matter of Parliamentary legislation, in the form of the Contempt of Courts Act, 1971. While Civil Contempt involves wilfully disobeying a judgment or direction of the Court, Criminal

Contempt is more ambiguously defined. Criminal Contempt aims at punishing those acts, which no doubt interfere with judicial proceedings, but also those that “scandalize” the Court, and thereby lower its authority. The conundrum is therefore in what constitutes scandalizing the Court, which is open to judicial interpretation. It naturally follows, that it is up to the Judge to distinguish legitimate criticism from criticism, which would demean a Courts dignity. Worthy of note, in this context would be the judgment in the case of *Siddhartha Vashisht vs. The State* [(2010) 6 SCC 1], a highly sensationalized case as it involved the murder of Ms. Jessica Lal, a model who was suspected to have been murdered by the son of a Member of Parliament. It garnered so much attention that photographs of the suspects and accused were aired on televisions before state investigators could even conduct identification parades. A sting operation was conducted by a news magazine during the pendency of the Trial, which revealed that the father of the Accused was shown to have bribed the witnesses in the case in order to protect his son. The furore surrounding the case was such that the Media had practically convicted the accused before the instigation was complete, as a result of which the faith of the public in the justice system plummeted to an abysmal degree. Such publicity begs the question of what is its effect on a Judge that is trying the case and being constantly bombarded by reports on television on a subject matter of which he is to naturally be unbiased. Perhaps the Media’s defence is that the public has a right to know, and hence it is in public interest, but the question remains, that at what cost.

Another case in which a sting operation was the preferred choice of Media sleuthing was that of *RK Anand vs. Registrar Delhi High Court* [(2009) 8 SCC 106] in which the Court, denouncing the Media’s interference held that the role of the Media was to perform the act of journalism, and not to be the special investigative agency of the Court.

While the Media does have a very important role to play in a constitutional democracy, the above experiences show that to some extent, the law can step in, but largely it is for the Media to play an effective role without venturing into judicial territory. The Media watchdog in India, which is the Press Council of India has not been able to effectively play a constructive role in regulating the Media, as a result of which the Media has been allowed free reign to run amok in the journalistic sphere, free of the responsibility that should come with the power it wields in society.