

Judiciary & Media

Need for Balance

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&

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On Freedom of Press & Media

“[I]n order to be deserving of freedom, the press must show itself worthy of it. A free press must be a responsible press. The power of the press is great. It must not abuse its power.”

- Lord Denning M.R.

*In British Steel Corporation v.
Granada Television [1981]*

“...[I]n balancing the competing interests, the freedom of speech and of the press has priority... no professional judge would be influenced in the least by any criticism that appeared in the newspapers, even if he read them, or on the television, even if he watched it”.

- Lord Denning M.R.

In Attorney General v. BBC [1981]

All we would ask is that those who criticise us will remember that, from the nature of our office, we cannot reply to their criticism. We cannot enter into public controversy. Still less into political controversy. We must rely on our conduct itself to be its own vindication. Exposed as we are to the winds of critic, nothing which is said by this person or that nothing which is written by this pen or that, will deter us from doing what we believe is right; nor, I would add, from saying what the occasion requires provided that it is pertinent to the matter at hand. Silence is not an option when things are ill done.

Lord Denning M.R.

As reported in *R. v. Metropolitan Police Commissioner ex p. Blackburn* (1968) 2 All England Reporter 319

“We must meet the challenge rather than wish it were not before us.”

William J. Brennan, Jr.

Former Justice of the US Supreme Court

Zahira Habibullah Sheikh v. State of Gujarat (2004)

While highlighting the undue influence of the State on trial proceedings, the Supreme Court identified five basics of a fair and free trial – **impartial judge, fair prosecutor, atmosphere of judicial calm, no bias against the accused, victim or cause of the case, and lastly, witnesses should not be coerced, bribed, threatened or otherwise influenced in any way.**

It is a strong argument that media trials abandon all five of these basic elements, thereby capsizing the process.

Report of the 200th Law Commission of India (August 2006)

- Report recommended that it is necessary to train media personnel in certain aspects of law, such as the width of the right under **Article 19(1)(a)** and about what is not permitted to be published under **Article 19(2)**.
- Media persons would also be required to know aspects of constitutional law, human rights, protection of life and liberty and the law on contempt

Some Media Guidelines in India

- Press Council of India's Norms on Journalistic Conduct
- NBSA Code of Ethics and Broadcasting Standard, 2008
- Additional NBSA Guidelines
- Guidelines on Reportage of Cases of Sexual Assault
- Guidelines for Accreditation by Delhi High Court
- Guidelines for Registration of Legal Correspondents for Reporting the Proceedings, Judgments & Orders of Punjab & Haryana High Court
- Norms for Accreditation of Legal Correspondents in the High Court of Kerala
- Norms for Accreditation of Legal Correspondents in the High Court of Himachal Pradesh

International Conventions on Freedom of Media

- The United Nations Educational, Scientific and Cultural Organisation (UNESCO) recognised the responsibility of nations to promote a free and balanced media in the **Mass Media Declaration of 1978**.
- The Declaration affirms the important role the media plays in the *“strengthening of peace and international understanding [and in] promoting human rights and to countering racialism, apartheid and incitement to war.”*
- **UNGA Resolution 59(I)**, passed on **14th December 1946**, states that *“[F]reedom of information requires as an indispensable element the willingness and capacity to employ its privileges without abuse. It requires as a basic discipline the moral obligation to seek the facts without prejudice and to spread the knowledge without malicious intent.”*

The Madrid Principles

- The Madrid Principles on the **Relationship between Media and Judicial Independence (1994)** was conceived by a group of 40 distinguished legal experts and media representatives from the International Commission of Jurists (ICJ) at its Centre for Independence of Judges and Lawyers (CIJL) and the Spanish Committee of UNICEF in Madrid, Spain.
- **The objectives of the meeting were:**
 - To examine the relationship between the media and judicial independence as guaranteed by the 1985 UN Principles on the Independence of Judiciary.
 - To formulate principles addressing the relationship between freedom of expression and judicial independence.

Preamble to the Madrid Principles

- **Freedom of Media**, which is an **integral part** of **freedom of expression**, is essential in a **democratic society** governed by the Rule of Law. It is the responsibility of judges to recognise and give effect to freedom of the media by applying a basic presumption in their favour and by permitting only such restrictions on freedom of media as are authorised by the International Covenant on Civil and Political Rights (*“International Covenant”*) [ICCPR] and are specified in precise laws.
- The media have an **obligation** to respect the **rights** of individuals, protected by the International Covenant, and the independence of the judiciary.
- These principles are drafted as minimum standards and do may not be used to detract from existing higher standards of protection of the freedom of expression.”

The Basic Principle

- Freedom of expression (including freedom of the media) constitutes one of the essential foundations of every society which claims to be **democratic**. It is the function and right of the media to gather and convey information to the public and to comment on the administration of justice, including cases before, during and after trial, without violating the presumption of innocence.
- This principle can only be departed from in the circumstances envisaged in the ICCPR, as interpreted by the **1984 Siracusa Principles** on the Limitation and Derogation Provisions in the ICCPR.
- The right to comment on the administration of justice shall not be subject to any special restrictions.

Cases involving the Media in India

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R.K. Anand v. Registrar, Delhi High Court

- Viewed as a lost opportunity for the judiciary to ensure a fair and free trial to every citizen and to provide fundamental guarantees against arbitrariness.
- Delhi High Court certainly did right by the public in holding both I.U. Khan (Special Public Prosecutor) and R.K. Anand (Defence Counsel) in contempt. However, it did not consider it necessary to discuss the role of NDTV or the question of NDTV's responsibility and liability under the Contempt of Courts Act, 1971.

“[W]hat we find completely inexplicable is why, at least at the beginning of the proceeding, the High Court did not put NDTV, along with the two appellants, in the array of contemnors.”

R. K. Anand v. Registrar, Delhi High Court

“The appellants might have taken the stand that not only the sting recordings but their respective responses shown by the TV channel were fake and doctored. In such an event the TV channel would have been required to be subjected to the strictest proof of electronic materials on which its programmes were based and, in case it failed to establish their genuineness and correctness, it would have been equally guilty, if not more, of serious contempt of court and other offences. By all reckoning, at the time of initiation of the proceeding, the place of NDTV was along with the appellants facing the charge of contempt. Such a course would have put the proceeding on a more even keel and given it a more balance appearance.”

R.K. Anand v. Registrar, Delhi High Court

Shashi Tharoor v. Arnab Goswami (2017)

- Suit filed by the Plaintiff seeking compensation and damages from the Defendants for making defamatory remarks against the Plaintiff as well as for permanent injunction restraining the defendants from reporting any news or broadcasting any show related to the death of Mrs. Sunanda Pushkar till completion of the investigation and also to restrain the defendant from maligning and defaming the plaintiff in any manner.
- The Delhi High Court in this case was mindful of the need to strike a balance between the right to free speech against the right to fair trial. The Court held that *“the defendants have the right to air their stories and the same cannot be curbed, but it has to be tempered and balanced.”*
- The Court refrained from passing any further orders in the matter on the assurance by the defendant that he will show restraint in the future.

“[I]t is the function and right of the media to gather and convey information to the public and to comment on the administration of justice, including cases before, during and after trial, without violating the presumption of innocence. In fact, presumption of innocence and a fair trial are at the heart of criminal jurisprudence and in a way important facets of a democratic polity that is governed by rule of law. Journalists are free to investigate but they cannot pronounce anyone guilty and / or prejudge the trial. The grant of the fairest of the opportunity to the accused to prove his innocence is the object of every fair trial. Conducting a fair trial is beneficial both to the accused as well as to the society. A conviction resulting from unfair trial is contrary to the concept of justice.”

Shashi Tharoor v. Arnab Goswami (2017), para 41

Indu Jain v. Forbes Incorporated (2007)

Principles identified by the Delhi High Court on the media's freedom of publication versus an individual's **right to privacy**:

- *“Public or general interest in the matter published has to be more than mere idle curiosity.*
- *Public figures like public officials play an influential role in ordering society. They have access to mass media communication both to influence the policy and to counter criticism of their views and activities. The citizen has a legitimate and substantial interest in the conduct of such persons and the freedom of press extends to engaging in uninhibited debate about the involvement of public figures in public issues and events.*
- *Right to privacy that rests in an individual may be waived by him by express or implied consent or lot by a course of conduct which estops its assertions. Such implication may be deduced from the conduct of the parties and the surrounding circumstances.*

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- *A public person or personage is one who by his standing, accomplishment, fame, mode of life or by adopting a profession or calling which gives the public a legitimate interest in his doings, affairs and character has so become a public figure and thereby relinquishes at least a part of his privacy.*
- *The standard to be adopted for assessing as to whether the published material infracts the right to privacy of any individual is that of an ordinary man of common sense and prudence and not an out of ordinary or hyper-sensitive man.*
- *Even though in this country, the freedom of press does not have presumptive priority as in some other jurisdictions including the United States of America, however the importance of a free media of communication to a healthy democracy has to receive sufficient importance and emphasis.*
- *In evaluating a relief to be granted in respect of a complaint against infraction of the right to privacy against freedom of press and the right of public to disclosure of newsworthy information. Such consideration may entail the interest of the community and the court has to balance the proportionality of interfering with one right against the proportionality of impact by infraction of the other.*

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The publication has to be judged as a whole and news items, advertisements and published matter cannot be read without the accompanying message that is purported to be conveyed to the public. Pre-publication censorship may not be countenanced in the scheme of the constitutional framework unless it is established that the publication has been made with reckless disregard for the truth, publication shall not be normally prohibited.”

Prosecution of Journalists for Crimes of Incitement

Famous trials in International Criminal Law

The Nuremberg Trials (1947)

- The **International Military Tribunal** at Nuremberg, which was set up to hear cases of **war crimes** against the Nazi government officials of the Third Reich in Germany, conducted the first international trials on media-related incitement against two individuals, **Hans Fritzsche & Julius Streicher**, for their role in disseminating material that fuelled the Holocaust in **World War II Germany**.
- Hans Fritzsche was acquitted on account of his position. The Tribunal viewed him as a mere conduit to the press, a secondary figure in the Nazi leadership hierarchy.
- However, Julius Streicher, who was editor-in-chief of an anti-Semitic newspaper *Der Stürmer*, was **charged** with **incitement** of the persecution of the Jews for his numerous publications calling for the extermination of the Jewish race.

Prosecutor v. Nahimana (2003)

- This case is famously known as the **Rwandan Media Trial**. **Three** media executives were tried before the **International Criminal Tribunal** for Rwanda for their roles in managing RTLM, an influential Rwandan media station.
- RTLM regularly broadcasted hateful and genocidal content against the Tutsis with an intent to inflame the *Hutu* population.
- The executives were indicted on various charges of genocide, crimes against humanity, conspiracy to commit genocide, and most importantly, “*direct and public incitement to commit genocide*” for the part that they played in the **Rwandan 1994 genocide**.
- All three defendants were found **guilty** of genocide for the speech disseminated through their media outlets.

Restrictions on the Media in India

Freedom of the press in India is unfettered with **three** distinct exceptions:

- **Defamation** – injury to a person’s reputation [Sections 499, 500, 502 IPC]
- **Incitement to offence** – added to Article 19(2) under the First Amendment to the Constitution
- **Contempt** – Contempt of Courts Act, 1971 – publication of material to:
 - *bring a court or judge into disrepute; or*
 - *obstruct or interfere with the due course of justice or lawful process of the court*
- The courts also issue **postponement orders; privacy injunctions** in specific cases

Specific Legal Provisions regulating Media Reporting

- A number of laws regulate the reporting of particular legal proceedings to different extents.
- **These provisions may:**
 - **Criminalise** the disclosure of the victim's identity
 - **Censure** a publication that lowers the **reputation** of the child, or
 - **Enable** the judge to require the proceedings to be held *in camera*, and
 - **Impose** a complete **ban** on the publication of the proceedings.

Legal Provisions in Detail

- **Section 228A, IPC, 1860** – makes it a criminal offence to disclose the identity of the victim of offences under Sections 376, 376A, 376B, 376C, 376D or 376E. The offence is punishable with imprisonment of either description for a term which may extend to two years and also a fine.
- **Section 23, POCSO Act, 2012** – describes the procedure for the media and states that no person shall make any report which may have the effect of lowering a child's reputation without having complete and authentic information.
- **Section 23(2), POCSO Act, 2012** – mirrors the offence under Section 228A of the IPC in the context of POCSO Act, 2012
- **Section 44(3), UAPA, 1967** – gives the Court the power to order that all or any of the proceedings pending before such a court shall not be published in any manner, where it believes that such a decision would be in the public interest.

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- **Order XXXII Rule 2 CPC, 1908** – provides that where the suit or proceedings relates to matters concerning the family, the Court would have the discretion to conduct the proceedings in camera if it so desires, and where the parties to such proceedings make an application for the same, it shall be conducted in camera.
- **Section 22, Hindu Marriage Act, 1955; Section 43, Parsi Marriage and Divorce Act, 1936; Section 33, Special Marriage Act, 1954; Section 11, Family Courts Act, 1984** – provides that every suit filed under this act shall be tried in camera and that it shall not be lawful for any person to print or publish any matter in relation to any such case.
- **Section 16, Protection of Women from Domestic Violence Act, 2006** – provides that if the Magistrate considers that the circumstances of the case so warrant, and if either party to the proceedings so desires, the Magistrate may conduct the proceeding under this act in camera.

Why is a Principled Media Necessary?

- **Firstly**, judicial proceedings are an important state function where accurate reporting is the **only meaningful form of accountability**.
 - *Judges are independent of the Government and cannot be censored.*
 - *The Parliament is restricted by Article 121 from discussing the conduct of any judge of a constitutional court in discharging his duties.*
- **Secondly**, for the lay person, understanding formal court proceedings and judgments is a daunting task
- **Thirdly**, unlike other organs and private individuals, the judiciary cannot respond to erroneous reporting.

Therefore, it is essential that the media reports, court proceedings, in a fair, accurate and responsible manner.

Thank You