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# Conflict between Freedom of Speech and Expression and Right to Reputation in the Light of Media Trials

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## ABSTRACT

*Journalism in India has been battered by fallacious media trials in recent times. The paper analyses the extent of freedom of speech and expression exercised by media. Titled 'Conflict of Freedom of Speech and Expression and Right to Reputation in the light of Media Trials', media trials have affected the right to reputation and dignity of an accused by bludgeoning a person's character by misleading the public through half-truths and unverified claims. Under the garb of freedom of speech and expression, the media has infringed on the natural process of a fair trial by subconsciously affecting the judge's opinion of the accused. The over-arching effect of media is such that even after the acquittal of the accused, the widespread perception of guilt does not wither away. This paper critically analyses the right to reputation as a fundamental right of an individual and the right to freedom of speech and expression of the media. Freedom of speech and expression is the life of a democracy but it is subjected to certain restrictions and has been provided for in the paper. Moreover, the right to reputation in the UK and the freedom of the press in the US have been included to analyze the stance with respect to India.*

**Keywords:** *Freedom of Speech and Expression, Infringement of Fundamental Rights, Media Trial, Right to Dignity, Right to Reputation.*

## I. INTRODUCTION

Democracy is known to rest on three pillars, that is legislature, judiciary and executive. Article 19(1)(a) of the Indian Constitution that guarantees the fundamental right of freedom of expression and speech led to the rise of media or press informally being known as the fourth pillar of democracy in India. It is also popularly called the fourth estate of democracy.<sup>2</sup> Media acts as the watchdog of the functionaries of society as it helps in ensuring the transparent

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<sup>2</sup> Sudanshu Rajan, *Media and Judiciary: Revitalization of Democracy*, Vol. 57,415,416,2015.

working of the other three pillars of democracy by providing information to all.<sup>3</sup> However due to media becoming an increasingly commercial and competitive market, the need to grab attention and viewers for TRP has increased manifold. This has led to the sensationalisation of news and distortion of facts.<sup>4</sup>

Media is recognised as the ‘public watchdog’<sup>5</sup> of a democracy. Resonating free speech with the discovery of truth leads to societal progress<sup>6</sup>, which is the ultimate objective of the fourth pillar of democracy. As the ‘eyes and ears of the general public’<sup>7</sup>, it is their duty to investigate and report incidents where there is an abuse of power. Since most people rely on the media to be their principal source of information about crime<sup>8</sup>, it should be unbiased and should not tamper the facts of an issue and should impart information to common people<sup>9</sup> in an unbiased manner.

The colloquial term ‘Trial by Media’ has been popularized to indicate the judicial term taken by media where it assigns itself the adjudicatory process.<sup>10</sup> This phrase gained popularity in the late 20<sup>th</sup> century or early 21<sup>st</sup> century<sup>11</sup>. It is used to describe the impact of television, radio or newspaper coverage and newspapers coverage on person’s reputation by creating a widespread perception of guilt or innocence regardless of a court of law’s verdict<sup>12</sup>. In *R.K Anand v. Delhi High Court*<sup>13</sup> the Supreme court observed the term trial by media to mean “*the impact of television and newspaper coverage on a person’s reputation by creating a widespread perception of guilt regardless of any verdict in a court of law. During high publicity cases, the media are often accused of provoking an atmosphere of public hysteria akin to a lynch mob which not only makes a fair trial impossible but means that regardless of the result of the trial, in public perception the accused is already held guilty and would not be able to live the rest of their life without intense public scrutiny*”.

If a trial is biased due to the excessive publicity of the trial by the media, where a suspect or accused is seen as a person who has committed a crime, proceedings for contempt of court can

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<sup>3</sup> Nimisha Jha, *Constitutionality of Media Trials in India: A Detailed Analysis*, available at <<https://www.lawctopus.com/academike/media-trials-india/>>.

<sup>4</sup> *Right to Privacy in Sting Operations of Media*.

<sup>5</sup> *Observer and Guardian v. UK* (1992) 14 EHRR 153, para 59.

<sup>6</sup> John Stuart Mill, *On Liberty* (1859).

<sup>7</sup> Sir John Donaldson MR in *A-G v. Guardian Newspapers Ltd (No. 2)* [1990] 1 AC 109. 183, CA.

<sup>8</sup> Surette, R. (1998); *Media, crime, and criminal justice: Images and realities* (2nd ed.). New York: Wadsworth Publishing.

<sup>9</sup> *Dalban v. Romania*, [GC] App no 28114/95, (ECtHR, 28 September 1999).

<sup>10</sup> Arunav Talukdar, *Media Trial and Right to Freedom of Speech and Expression: An Analysis*.

<sup>11</sup> Anamika Ray, *Media Glare or Media Trial: Ethical Dilemma between two estates of Indian Democracy*, Vol. 5, Online Journal of Communication and Media Technologies, Issue-2, Apr 2015.

<sup>12</sup> Prerana Priyanshu, *Media Trial: Freedom of Speech v. Fair Trial*, L, Volume 3, IJLLJS Issue 1 284.

<sup>13</sup> *R. K. Anand v. Delhi High Court*, (2009) 8 SCC 106.

be called against the media as there is undue interference with the administration of justice.<sup>14</sup> Former Chief Justice of India, Y.K. Sabharwal expressed his concern over media trials and stated “*If this continues, there can't be any conviction. Judges are confused because the media has already given a verdict.*”

## II. MEDIA TRIAL AND FUNDAMENTAL RIGHTS

Every judicial system in the world protects the right of an accused to a fair trial<sup>15</sup> and is presumed innocent until proven guilty in a court of law<sup>16</sup>. The Right to a Fair Trial flows through Article 14, 20, 21 and 22 of the Indian Constitution.<sup>17</sup> Lately, media interference and technical complexities have derailed and curtailed the jurists' ability to deliver fair verdicts.<sup>18</sup> The media has failed to recognise the thin line which differentiates between an accused and a convict and thus, undermines the principles of natural justice (‘presumption of innocence until proven guilty’ and ‘guilt beyond reasonable doubt’) and the doctrine of *Audi alteram partem*. In the Indian sub-continent, several television channels started to flourish during 1990s from when the term media trial emerged eventually.<sup>19</sup> Media Trial tends to threaten the right to a fair trial. In this light, the right of an accused to a fair hearing is hampered because the media cacophonously drums its own biased agenda, thereby disturbing the rule of law. In the Indian context, the media continues to obviate *res sub judice* for meeting the famish of ‘breaking news’ in order to gain TRPs and viewership.

The media has been gifted with the ‘Freedom of Speech and Expression’ under Article 19(1) of the Constitution of India. However, Article 19 is prima facie less tolerant of freedom of speech.<sup>20</sup> In a case<sup>21</sup>, Patanjali Shastri, CJ, observed that “*Freedom of speech & of the press lay at the foundation of all democratic organization, for without free political discussion no public education, so essential for the proper functioning of the process of popular government, is possible.*” However, any institution which is left unbridled is likely to abuse the license of liberty granted to them which leads to disorder and anarchy<sup>22</sup>. Therefore, the right to freedom

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<sup>14</sup> Law Commission of India, *Trial by Media: Free Speech and Fair Trial under Criminal Procedure Code, 1973*, No. 200 (August 2006).

<sup>15</sup> Section 21, Human Right Act, 2004.

<sup>16</sup> Art 14 (2) of the International Covenant on Civil and Political Rights (Universal Declaration of Human Rights).

<sup>17</sup> *Zahira Habibullah Sheikh v. State of Gujarat*, (2006) 3 SCC 374, page 395.

<sup>18</sup> Arthur Gross-Schaefer, Sona Gala, Joel Block, Warren Terry, Lee Feldman; *Are Media Interference and Technical Complexities Crippling the Ability of Juries to Deliver Fair Verdicts?* Journal of Law, Business Ethics; Vol. 20.

<sup>19</sup> Prof. Amartya Sen, *Broadcasting Sector & Policy*, <<http://www.nalsarpro.org/ML/Modules/Module%203/Chapter%20L.pdf>>

<sup>20</sup> HM Seervai, *Constitutional Law of India: A Critical Commentary*, 4th Edition, Universal Law Publishing Co. Ltd.

<sup>21</sup> *Romesh Thappar v. State of Madras*, AIR 1950 SC 124:1950 SCR 594.

<sup>22</sup> *Express Newspapers Vs. UOI*, (1997) 1 SCC 133.

of speech and expression is capped through the 'reasonable restrictions' that are imposed by Article 19(2). In India, the freedom of press is nowhere expressly mentioned<sup>23</sup> but can be construed from Art. 19(1)(a)<sup>24</sup>. It is regarded as a "*species of which freedom of expression is a genus*<sup>25</sup>". In *Life Insurance Corporation v. Manubhai D Shah*<sup>26</sup>, the Supreme Court stated that 'Freedom of Speech and Expression' means the right to express one's opinions and convictions freely, by words, writing, printing, pictures, electronic media or by any other manner. The Freedom of Speech, although guaranteed, is not absolute, unlike the USA.

### III. RIGHT TO REPUTATION AS A FUNDAMENTAL RIGHT

Based on fundamental values of freedom and equality, human rights have always represented a constitutive element of a democratic country. Human rights are granted to every individual as individual rights trumps over state interests.<sup>27</sup> They are designed to protect the individual from unwarranted interferences in crucial aspects of their life. Only in rare instances, when strict requirements of necessity and proportionality are met, can a state limit human rights to protect, for instance, public order or national security.<sup>28</sup> Article 21 of the Indian Constitution provides a person protection of life and personal liberty.<sup>29</sup> The ambit of Right to life under Article 21 is wide and far-reaching.<sup>30</sup> Personal liberty guaranteed under Article 21 has broad dimensions.<sup>31</sup> It covers a wide amplitude of rights.<sup>32</sup> In the famous case of *Board of Trustees of the Port of Bombay v. D.R. Nadkarni*<sup>33</sup>, the Apex Court opined: "*The expression 'life' does not merely connote animal existence or a continued drudgery through life. The expression 'life' has a much wider meaning. Where, therefore, the outcome of a departmental enquiry is likely to adversely affect the reputation or livelihood of a person, some of the finer graces of human civilisation which make life worth living would be jeopardised and the same can be put in jeopardy only by law which inheres fair procedures.*" By reading Article 21 along with Directive Principles of State policy, a large number of human rights have been implied by the

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<sup>23</sup> *Romesh Thappar v. State of Madras*, AIR 1950 SC 124:1950 SCR 594.

<sup>24</sup> *Printers (Mysore) Ltd. V. Assistant Commercial Tax Officer*, (1994) 2 SCC 434.

<sup>25</sup> *Sakal Papers v. Union of India*, AIR 1962 SC 305:(1962) 3SCR 842.

<sup>26</sup> *Life Insurance Corporation of India v. Manubhai D Shah*, 1992 (3) SCC 637.

<sup>27</sup> Ronald Dworkin, Rights as Trumps, in *Theories of Rights*; 152, 153- 67 (Jeremy Waldron ed., 1984) (arguing that rights have priority over considerations of utility).

<sup>28</sup> Stijn Smet, *Freedom of Expression and the Right to Reputation: Human Rights in Conflict*, 26 Am. U. Int'l L. Rev. 183 (2010).

<sup>29</sup> *India Const.*, Art. 21.

<sup>30</sup> *Olga Tellis v. Bombay Municipal Corporation*; (1985) 3 SCC 545.

<sup>31</sup> M P Jain, *Indian Constitutional Law*; (8<sup>th</sup>, 2018).

<sup>32</sup> *Maneka Gandhi v. UOI* (1978) 1 SCC 248.

<sup>33</sup> *Board of Trustees of the Port of Bombay v. D.R. Nadkarni*, 1983 AIR 109, 1983 SCR (1) 828.

Supreme Court<sup>34</sup> like Right to live with human dignity<sup>35</sup> Right to Shelter<sup>36</sup>, Right to health and social justice of workers<sup>37</sup>.

Right to Reputation is one such human right that has been articulated through judicial precedents in the Indian Constitutional jurisprudence. The Supreme Court has stated that a right which has not been explicitly stated as a Fundamental Right in the Constitution can also be treated as a Fundamental Right.<sup>38</sup> One feature of Right to Life guaranteed by Article 21 is Right to Reputation.<sup>39</sup> It is a facet of the right to life<sup>40</sup> of a citizen under Art. 21 of the Constitution<sup>41</sup> and nobody has the right to denigrate others' right to reputation<sup>42</sup>. It is "*not only the salt of life, but also the purest treasure and the most precious perfume of life. It is extremely delicate and a cherished value this side of the grave. It is a revenue generator for the present as well as for the posterity*"<sup>43</sup>. No one should be subjected to arbitrary interference with his privacy, honour and reputation.

The Courts should adhere to normative principles while dealing with matters that are likely to affect a person's reputation.<sup>44</sup> Compensation has to be adequately provided for loss of reputation.<sup>45</sup> An individual's right to reputation must be protected at all costs. Moreover, there needs to be a balance maintained between the right to speech and expression and right to reputation. In Blackstone's Commentary of the Laws of England<sup>46</sup>, it has been stated that a person's reputation is a part of the right of personal security This was reiterated by the Supreme Court of India in *Kiran Bedi v. Committee of Inquiry*.<sup>47</sup> Every bodily sense and physical attribute is also included in the legal term 'person', apart from the physical body.<sup>48</sup>

The Right to reputation has shifted from a private interest to a convention right.<sup>49</sup> The Right guaranteed under Article 19 for the freedom of expression and the right to have opinions is subject to Right to Reputation as recognized by the International Covenant on Civil and

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<sup>34</sup>Supra, note 5.

<sup>35</sup> *Bandhua Mukti Morcha v. UOI*; AIR 1984 SC 802.

<sup>36</sup> *Chameli Singh v. State of Uttar Pradesh*, AIR 1996 SC 1051.

<sup>37</sup> *Consumer Education and Research Centre v. UOI*, AIR 1995 SC 922.

<sup>38</sup> Supra, note 5.

<sup>39</sup> *Mehmood Nayyar Azam v. State of Chattisgarh*.

<sup>40</sup> *Om Prakash Chautala v. Kanwar Bhan*, (2014) 5 SCC 417.

<sup>41</sup> *State of Bihar v. Lal Krishna Advani & Ors.*, (2003) 8 SCC 361.

<sup>42</sup> *Subramanian Swamy v. UOI Ministry of Law and Ors.*, (2016) 7 SCC 221.

<sup>43</sup> *Vishwanath S/o. Sitaram Agrawal v. Sau. Sarla Vishwanath Agrawal*; MANU/SC/0513/2012.

<sup>44</sup> *Ibid.*

<sup>45</sup> *Ram Lakhan Singh v. State of UP*; (2015) 16 SCC 715.

<sup>46</sup> Vol. I, Blackstone, *Commentaries on the laws of England*, 101, 4th Edn.

<sup>47</sup> *Kiran Bedi v. Committee of Inquiry*, (1989) 1 SCC 494.

<sup>48</sup> Vol. 70, *Corpus Juris Secundum*, 68.

<sup>49</sup> *Stijn Smet, Freedom of Expression and the Right to Reputation: Human Rights in Conflict*, 26 Am. U. Int'l L. Rev. 183(2010).

Political Rights.<sup>50</sup>

The Supreme Court of India held that a person cannot be subjected to an arbitrary interference with his reputation.<sup>51</sup> Reputation is an inseparable right of an individual.<sup>52</sup>

#### IV. FREEDOM OF THE PRESS: NOT ABSOLUTE

In India, the freedom of press is not absolute or uncontrolled and in the interest of the general society, reasonable restrictions are imposed. This imposition is the effect of past Constitutional Assembly debates, which reflects the philosophy of John Mill's harm principle.<sup>53</sup> Freedom of press is important but should not be at the cost of an individual's or society's right of living with dignity, which includes the right to reputation. "The freedom of speech protected under Article 19(1) (a) of the Constitution has to be carefully and cautiously used, so as to avoid interference with the administration of justice and leading to undesirable results in the matters sub judice before the courts."<sup>54</sup> Certain limitations and regulations may be deemed necessary for the protection of public welfare and thus, there needs to be a balance between freedom of speech and expression and protecting the interests of the general public, public order, decency or morality and of other public interests. Thus, reasonable restrictions under Article 19(2) are imposed by the legislature with respect to the following- sovereignty and integrity of India; security of the State; friendly relations with foreign States; public order; decency or morality; contempt of court; defamation; and incitement to an offence.<sup>55</sup>

Ideally, it is difficult to give an exact definition to the word "reasonable".<sup>56</sup> There is also no test prescribed to be followed to adjudge reasonability in a given case. The extent of reasonableness depends upon the merits of each case and no abstract or general pattern of reasonableness can be laid down as applicable in all scenarios.<sup>57</sup> There are certain statutory provisions which restrict the Freedom of Speech and Expression, such as the Contempt of Courts Act, 1971. The Supreme Court in a matter observed that:

*"We wish to emphasize that under the cover of freedom of speech and expression no party can be given a license to misrepresent the proceedings and orders of the Court and deliberately paint an absolutely wrong and incomplete picture which has the tendency to scandalize the Court and bring it into dispute or ridicule. Indeed, freedom*

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<sup>50</sup> International Covenant on Civil Rights and Political rights, 1966, art. 19.

<sup>51</sup> International Covenant on Civil Rights and Political rights, 1966, art. 17.

<sup>52</sup> *Subramanian Swamy v. Union of India*, (2016) 7 SCC 221.

<sup>53</sup> *Constituent Assembly Debates*, Vol. XI-XII 727 Nov. 21, 1949 (AC Guha).

<sup>54</sup> *Manu Sharma v. State (NCT of Delhi)*, (2010) 6 SCC 1, 110.

<sup>55</sup> VN Shukla, *Constitution of India*, 13<sup>th</sup> Edition, Eastern Book Company, Lucknow.

<sup>56</sup> *Anwar v. State of Jammu and Kashmir*, AIR 1971 SC 337: (1971) 3 SCC 104.

<sup>57</sup> *State of Madras v. VG Row*, AIR 1952 SC 196: 1952 SCR 597.

*of speech and expression is 'life blood of democracy' but this freedom is subject to certain qualifications. An offence of scandalizing the Court per se is one such qualification.*"<sup>58</sup>

For the press, the limits (reasonable restrictions) range from 'Right to Privacy' to 'Right to Reputation' to 'Contempt of Court'. The yardstick for the press to verify the stories before publication, either in the written form or by live telecasting, is high because they have the resources to produce legitimate stories and checking the veracity of facts.<sup>59</sup>

Similarly, the privacy of an individual cannot be infringed by posting libellous or slanderous statements and the press has to be answerable in law for such an offence<sup>60</sup>.

## V. CONTEMPT OF COURT, 1971

The roots of the contempt law in India can be traced back to the pre-independence era when the colonial government ruled over the country. In 1867, the power of contempt of court was recognised in *Re: Abdool and Mehtab*<sup>61</sup> by Peacock C.J. who stated that "*there can be no doubt that every court of record has the power of summarily punishing for contempt.*" The first act that recognised the offence of contempt was the Contempt of Court Act of 1926. Section 2 of the Act proclaimed the right on High Courts to punish subordinate courts for contempt of court. While this act was in existence, certain states followed their own enactment. Soon, the Act was replaced by the Contempt of Court Act, 1952 which widened the scope and ambit of powers of what can be contained under the High Court's purview<sup>62</sup>.

To consolidate and amend the law relating to contempt of court, a Bill was introduced in the Lok Sabha on Apr 1, 1960. A committee was established under the leadership of Mr. H.N. Sanyal, known as the *Sanyal committee*, to scrutinize the law and point out the culpability and necessary changes that must be invigorated in the Act. After a series of deliberations, the Contempt of Court Act, 1971 was enacted, which replaced and repealed the earlier existing Acts. The Act of 1971 segregated contempt in two different heads, namely, civil and criminal. Civil Contempt of Court is defined as a "*willful disobedience to any judgment, decree, direction, order, writ or other process of a court or willful breach of an undertaking given to a court*"<sup>63</sup> and Criminal Contempt of Court has been defined as any publication (either written

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<sup>58</sup> *Narmada Bachao Andolan v. Union of India*, AIR 1999 SC 3345, 3347: (1999) 8 SCC 308.

<sup>59</sup> *Reynolds v. Times Newspaper*, (2001) 2 AC 127.

<sup>60</sup> Arunav Talukdar, *Media Trial and Right to Freedom of Speech and Expression: An Analysis*.

<sup>61</sup> Karan Dinesh Singh Rawat, *Know the History of Contempt of Court in India*, available at <<http://abclive.in/history-of-contempt-of-court-in-india/>>, assessed on 7<sup>th</sup> Feb, 2020.

<sup>62</sup> Available at <[https://shodhganga.inflibnet.ac.in/bitstream/10603/188914/13/13\\_appendix.pdf](https://shodhganga.inflibnet.ac.in/bitstream/10603/188914/13/13_appendix.pdf)>.

<sup>63</sup> Section 2(b) of the Contempt of Court Act, 1971.



or through words or signs or otherwise) which scandalizes or tends to lower the authority of the court<sup>64</sup>, interferes or prejudices with the judicial proceedings of the Court<sup>65</sup>, or tends to obstruct the course of justice in any manner would be punished. But the above classification is not exhaustive.<sup>66</sup>

In pending cases, trial by media is tantamount to contempt of court<sup>67</sup>. No newspaper can assume the role of an investigator and declare an accused to be guilty or not of an offence. The media would be liable for any communication which interferes with the administration of justice and any person publishing such matter would be liable for contempt of court.

In *Saibal Kumar Gupta and others v. B.K. Sen and Others*<sup>68</sup>, the Supreme Court held that a newspaper conducting an independent investigation into a crime for which the accused is arrested and to publish the result of such an investigation would be 'mischievous' and would impede with the process of justice.

## VI. MEDIA TRIAL AGAINST RIGHT TO REPUTATION

Media Trials have popularised a phenomenon which does not focus on "public interest" but rather "what the public is interested in".<sup>69</sup> This affects a judge's ability to impart free and impartial judgements and are affected by the prejudicial media coverage of an issue. The judges are susceptible to media coverage and this contention has been echoed by Justice Frankfurter in *Pennekamp v. Florida*<sup>70</sup>, where he said that judges were "also human" and could be influenced unconsciously by news reports. This not only affects the fair trial that an accused deserves but also leads to public sensitivity towards an issue, which causes emotional fallibility in a judge's opinions.

A disturbing ramification of 'Media Trial' is the amount of pressure that a lawyer undertakes from the huge public outcry that compels them not to take up a case that defends an accused which result in denial of natural justice and the Right to a Fair Trial to an accused. In one such case, the media questioned the morality of the veteran lawyer, Ram Jethmalani, when he represented the accused, Mr. Manu Sharma, in the Jessica Lal case, and called his attempt to

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<sup>64</sup> Section 2 (c) (i) of the Contempt of Court Act, 1971.

<sup>65</sup> Section 2 (c) (ii) of the Contempt of Court Act, 1971.

<sup>66</sup> K.G. Balakrislinan, *Reporting of Court Proceedings by Media and the Administration of Justice*, Public Law, July 2010, p. 14.

<sup>67</sup> Available at <<https://www.thehindu.com/news/national/kerala/trial-by-media-is-contempt-of-court/article7491331.ece>>, assessed on 7<sup>th</sup> Feb, 2020.

<sup>68</sup> *Saibal Kumar Gupta v. B.K. Sen*, AIR 1961 SC 633.

<sup>69</sup> Prerana Priyanshu, *Freedom Media Trial: Freedom of Speech v. Fair Trial*, 3 IJLLJS (2015), pg. 90.

<sup>70</sup> 328 U.S. 331, 357 (1946).

defend the accused as an attempt to “defend the indefensible<sup>71</sup>”.

The struggle between defamation laws (to protect Right to Reputation) and free press has evolved through generations of legal confrontation<sup>72</sup>. Thus, there needs to be an appropriate balance that is struck between Freedom of Speech and Expression and Right to Reputation.<sup>73</sup> Media interferes with an individual’s right to respect<sup>74</sup> and unjustly hounds their right to privacy, and trial by press leads to miscarriage of justice. The Punjab High Court in a case<sup>75</sup> stated that, “*Liberty of the press is subordinate to the administration of justice. The plain duty of a journalist is the reporting and not the adjudication of cases.*” The responsibility of press is greater as it influences the minds of the people and can degenerate and cause damage to the reputation of respectable persons. The Right to Reputation cannot be crucified to uphold the Freedom of Speech and Expression. A person’s dignity is what gives credibility and essence to life and stripping away of such a dignity would amount to denial of right to life.<sup>76</sup> Reputation is a nobility that makes a man feel proud of their posterity and is something that a conscientious man would never bargain for even for the most virtuous things.

An instance which shows the implications of media trials is the *OJ Simpsons case* which invited a lot of pre-trial publicity. It is considered to be the most publicised event in the American history.<sup>77</sup> Media news coverage of criminal cases sometimes contain prejudicial information which is legally inadmissible at trial and is disseminated to the public.<sup>78</sup> It creates an emotionally charged descriptive of crime<sup>79</sup> and brings out negative statements about a defendant’s character or reputation<sup>80</sup>. This creates an impact in the eyes of the public and sensitivises the issue to an egregious extent.

A journalist should be careful while reporting so as to prevent the risk of being hauled up by the law for infringing an individual’s privacy. The 200<sup>th</sup> Law Commission Report<sup>81</sup> has even recommended to debar the media from reporting anything prejudicial to the rights on an accused in criminal cases. It is so because this leads to a negative impact on administration of

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<sup>71</sup> Retrieved from <<http://www.hrdc.net/sahrdc/hrfeatures/HRF164.htm>> on 5<sup>th</sup> Feb, 2020.

<sup>72</sup> Kahane, *Colonial Origins of Our Free Press*, 62 A.B.A.J. 202 (1976).

<sup>73</sup> A.G. Noorani, *The Right to Reputation*, Economic and Political Weekly, Vol 21, No. 4 (Jan 25, 1986), p. 149.

<sup>74</sup> Law Commission of India, 200<sup>th</sup> Report on *Trial by Media: Free Speech versus Fair Trial under Criminal Procedure Code*, 1973 (Aug, 2006).

<sup>75</sup> *Rao Harnarain v. Gumori Ram*, AIR 1958 Punjab 273.

<sup>76</sup> Shilpi Jain and Kaustubh Dighde, *Right to Dignity in India*, (2019) PL (HR) Feb 93

<sup>77</sup> Retrieved from <<https://www.biography.com/news/oj-simpson-trial-timeline>>

<sup>78</sup> Daftary-Kapur, Penrod, O’Connor & Wallace, 2014; Imrich et al., 1995.

<sup>79</sup> Shirin Bakshay, Craig Haney; *The Media’s impact on the right of a fair trial: A content analysis of pretrial publicity in capital cases*; Psychology, Public Policy and Law; Vol. 24.

<sup>80</sup> *Ibid.*

<sup>81</sup> *Supra*, citation no. 45.

justice and is a violation of the doctrine of *audi alterem partem*, which means ‘hear to the other side’.

However, in certain cases, the impact of media’s frontal role in transparency and bringing out justice is highly commendable. Some examples are the *Jessica Lal case* where media’s activism<sup>82</sup> led to a nationwide campaign that ensued justice for the victim wherein the Delhi High Court and the Supreme Court criticised the Trial Court’s decision of acquittal as “positively perverse”<sup>83</sup> and upheld conviction of the accused.

Most recently, the *Nirbhaya Rape Case* in 2012<sup>84</sup> and the *Kathua Rape Case* in 2018<sup>85</sup> are examples where media’s intrusion in pre-trial has helped bring justice and has been lauded by the courts as well. But there are cases where the media has tarnished the reputation of an otherwise innocent family<sup>86</sup> (*Aarushi Talwar Murder case*) by blaming the victim’s parents for their daughter’s murder. In yet another case, the media, without investigation and in lack of evidence, and by cherry-picking facts declared Mr. Shashi Tharoor as the murderer in the *Sundanda Pushkar Murder case*<sup>87</sup> with a blatantly sordid narrative. Such examples clearly highlight that though the media has sometimes been the harbinger of change, but trial by media has led to miserably failed in curtailing to bring about a prior judgement before the conduct of a trial in most criminal cases.

## VII. CRITICAL ANALYSIS

To understand the freedom of press, reasonable restrictions or an emphasis on right to reputation better, the situation in the UK and the USA have been analysed.

- **CONDITION IN THE UK**

The courts in the United Kingdom while determining matters in relation to the right to reputation carefully examine Article 8<sup>88</sup> of the European Convention on Human Rights which

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<sup>82</sup> Somini Sengupta, *Acquittal in Killing Unleashes Ire at India’s Rich*, NY Times, Mar 13, 2006, available at <<https://www.nytimes.com/2006/03/13/world/asia/acquittal-in-killing-unleashes-ire-at-indias-rich.html>>, assessed on 6<sup>th</sup> Feb, 2020.

<sup>83</sup> Arpan Banerjee, *Judicial Safeguards against Trial by Media: Should Blasi’s Checking Value Theory Apply in India*, 2 U. Balt. J. Media L. & Ethics 28 (2010).

<sup>84</sup> Rishikesh Kumar Gautam & Sonalee Nargunde, *The Delhi Gang Rape: The role of Media in Justice*, International Journal of Research, Vol-1, Issue 8, 2014.

<sup>85</sup> Hakeem Irfan Rashid, *Kathua rape case: Activist, who led campaign for justice, hails verdict as win for democracy & judiciary*, available at <<https://economictimes.indiatimes.com/news/politics-and-nation/kathua-rape-case-activist-who-led-campaign-for-justice-hails-verdict-as-win-for-democracy-judiciary/articleshow/69733378.cms>>, assessed on 6<sup>th</sup> Feb, 2020.

<sup>86</sup> Anjali Puri, *The Talwars Were Innocent. The Rest of Us are Guilty*, available at <<https://thewire.in/featured/talwars-innocent-rest-us-guilty>>, assessed on 6<sup>th</sup> Feb, 2020.

<sup>87</sup> Shehzad Poonawalla, *In defence of Shashi Tharoor*, available at <<https://www.news18.com/news/politics/in-defence-of-shashi-tharoor-736044.html>>, assessed on 6<sup>th</sup> Feb, 2020 .

<sup>88</sup> European Convention on Human Rights, 1950; Art. 8

guarantees freedom of expression and Article 10<sup>89</sup> of the convention discussing the right to personal liberty which includes right to reputation.<sup>90</sup> Furthermore, The English judges traditionally attached a lot of importance to reputation which is evident in English libel law and the ECHR reinforced the inviolability of reputation.<sup>91</sup>

- **CONDITION IN THE US**

James Madison, one of the founding fathers of the US Constitution called the freedom of press as '*one of the greatest bulwarks of liberty*'<sup>92</sup>. Freedom of Speech and Expression is the bedrock on which democracy is cradled. Under the First Amendment of the United States' Constitution, Americans enjoy the freedom of press which was adopted on December 15, 1791 as their 'Bill of Rights'.<sup>93</sup>

United States ranks 48<sup>th</sup> on the World Freedom Press Index which shows that they have a balanced state of freedom of speech and expression of the media and also curtail unnecessary obstructions and interventions in the judicial proceedings of the Court.

For a country like India, US can act like a role model, given that without even curtailing the right of speech, they have a balanced representation of both, which is what the Indian media and jurisprudence should strive for.

In the USA, the First Amendment protects a free press. It basically limits the power of the government to interfere with the dissemination of information and opinion. It eliminates the fear of censorship by government or punishment while obtaining and publishing any information or opinion. This freedom is applicable to all kinds of broadcast and printed material, like books, magazines, newspaper, radio, television, etc.<sup>94</sup> This view is extrapolated by the US Supreme Court which views that the freedom of speech includes more than merely serving as a "*neutral conduit of information between the people and their elected leaders or as a neutral form of debate*".<sup>95</sup>

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<sup>89</sup> *Ibid*

<sup>90</sup> Eric Barendt, *Balancing Freedom of Expression and the Right to Reputation: Reflections on Reynolds and Reportage*, 63 N. Ir. Legal Q. 59 (2012).

<sup>91</sup> Richard Garnett & Megan Richadson, *Libel Tourism or Just Redress: Reconciling the (English) Right to Reputation with the (American) Right to Free Speech in Cross-Border Libel Cases*, 5 J. Priv. Int'l L. 471 (2009).

<sup>92</sup> Michael Miller, We Must Protect 'One of the Greatest Bulwarks of Liberty', <<https://www.law.com/newyorklawjournal/2019/04/30/we-must-protect-one-of-the-greatest-bulwarks-of-liberty/?sreturn=20200107093757>>, assessed on 7<sup>th</sup> Feb, 2020.

<sup>93</sup> Available at <<https://www.history.com/topics/united-states-constitution/freedom-of-the-press>>.

<sup>94</sup> Arunav Talukdar, *Media Trial and Right to Freedom of Speech and Expression: An Analysis*.

<sup>95</sup> MP Jain, *Indian Constitution Law*, Eighth Edition, LexiNexis.

## VIII. MEDIA TRIALS AND RIGHT TO REPUTATION IN INDIA

The ideals of a democracy lie in the concept of justice, equity and good conscience. A trial by media vehemently destroys such concepts and sabotages the notion of liberty that has been bestowed to us by the Constitution, which cherishes and embarks upon us the spirit of liberty, equality and fraternity, the ideology envisioned by our forefathers who created a dynamic and evolving document which could survive the efflux of time. In order to maintain viewership and increase their TRPs, the media has an inclination to label the accused as the culprit with no culpability. This is an abrogation of the fundamental rights, one of them being the right to reputation and living a life with dignity, which is guaranteed under Article 21 of the Indian Constitution and is the heart and soul of the Constitution. Even after the acquittal of the accused, the stigma around the person does not completely disappear in the eyes of the public as the proceedings of acquittal do not find the same coverage as the pre-trial by the media. By that time, the media moves on to propagate another false lie or showcase half-truths.

## IX. EXTENT OF FREEDOM OF SPEECH AND EXPRESSION

Ideally, the media has caused more harm than what has been gained in some substantial cases. The media should refrain from reporting anything at all before a criminal trial takes place, right from the time of the arrest of the accused till the final trial takes place. Moreover, the courts must be allowed to dictate to the media that the publication of the trial should be subverted till the final outcome of the case.

Not just in criminal cases, the media has affected the mindset of the people by publishing and telecasting false and untrue stories that lack veracity. India ranks 140<sup>th</sup> out of 180 countries on the World Press Freedom Index<sup>96</sup>. In a country where journalists are slain<sup>97</sup> because certain extremist right-wing organisations were affronted by a ‘leftist opinion’, where people are lynched because of what they eat, and where dismemberment occurs when certain slogans are not chanted<sup>98</sup>, it shows the sorry state of journalism where reporting is biased, toppled with hate speech and reeks of favouritism. In such a state, the reporting is factually incorrect and therefore, the information provided cannot be regarded as ‘free and fair’. Therefore, trusting the media with transparency in reporting is a prevaricate lie.

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<sup>96</sup> Available at < <https://rsf.org/en/2019-world-press-freedom-index-cycle-fear> > , assessed on 7<sup>th</sup> Feb,2020.

<sup>97</sup> Naveen Menezes, *A year after Gauri Lankesh murder, SIT in final stage of probe*, available at < <https://economictimes.indiatimes.com/news/politics-and-nation/a-year-after-gauri-lankesh-murder-sit-in-final-stage-of-probe/articleshow/65680874.cms?from=mdr> >, assessed on 7<sup>th</sup> Feb, 2020.

<sup>98</sup> Geeta Pandey, *Jai Shri Ram: The Hindu chant that became a murder cry*, BBC News, available at < <https://www.bbc.com/news/world-asia-india-48882053> >, assessed on 7<sup>th</sup> Feb, 2020.

Communication is a human right which must be protected at all costs. There is an ardent need in the present times to balance the freedom of speech and expression and the right to live with dignity, which includes the right to protect one's reputation. Therefore, it is necessary to invalidate trial by media so that the right to a fair trial is maintained. In a democracy, everyone has the right to speak their minds and free speech must be resonated by individuals. As John Stuart Mill rightly said, "*If all mankind minus one, were of one opinion, and only one person was of the contrary opinion, mankind would be no more justified in silencing that one person, than he, if he had the power, would be justified in silencing mankind.*" Freedom of speech and expression is an essential fundamental right of a citizen. As for the media houses and journalists, they should refrain from making personal comments and let their own opinions cloud their duty as professionals in cases so that transparency can be maintained at all costs.

## **X. CONCLUSION AND RECOMMENDATIONS**

In any democracy, and especially true for a country like India where the media beats around the bush and runs pursuits of character assassination round the clock, it becomes imperative to have stricter implementation of laws because merely enacting laws with no implementation outside paper work is futile. We need to have a body which looks after but does not absolutely control the media in terms of criminal and high-profile cases. Moreover, there needs to be a mechanism which looks into the news that is published by verifying the authenticity of the data. In cases where the trial by court is ongoing, the whistle-blowers should be strictly discouraged and fined in case sensitive information from within the courtroom is leaked to the media, which could affect the fair trial that an accused rightly deserves. In case such information is somehow published by the media, the Courts must impose a heavy penalty on them, not just to act as a deterrent but also to protect the right of a fair trial. Moreover, when the media has defamed the reputation of an individual which is not true, they should issue a notice and showcase on their channels repeatedly that the matter has been bent beyond proportions and issue a public apology. If this is implemented in its true spirit, the media would think twice before reporting untrue facts and not intervene with the judicial proceedings

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