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Real Time Reporting and it's Impact on Fair Trial

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ABSTRACT

Judiciary and Media are the third and fourth pillars of every democracy in the world. Every Country endeavours to balance free press vis-a-vis the provisions of a fair trial. The idea of live reporting via social media in India has been a matter of debate for a long time. Real-time updates of hearings on social media are today a reality. The bone of contention that this presents is that will live reporting violate the process of a fair trial?

Keeping the importance of the same in mind the researcher by virtue of the paper aims The Relationship between Media, Judiciary and administration of justice along with the provisions of fair trial vis-à-vis freedom of media.

Keywords: *Media, Judiciary, Fair Trial, Rights of Accused, Freedom of Expression, Media Trial.*

I. INTRODUCTION

The ends of law are to provide justice and the assurance that each accused must get a free and impartial trial, the denial of a fair trial is in turn nothing less than the denial of justice. [3] When a citizen has apprehension based on some fact, that he would not get a fair trial in a court of law, then it's the duty of the said court to remove the apprehension and provide him fair trial and protect his Fundamental Rights. [4]

The word '*trial*' is not defined anywhere in Criminal Procedure Code ("CrPC"). A Criminal trial is a judicial examination of the facts in the case process in the discovering truth to decide the facts in issues to arrive at a just decision of the controlling question being the guilt or innocence of the accused.[5]

Sanjay Gandhi and another v. Ms. Rani Jethmalani[6] , emphasized the necessity to ensure fair trial, observing as:

> "*Assurance of a fair trial is the first imperative of the dispensation of justice and the*

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[3] Khokan Debamma v. State of Tripura, Criminal Petition No. 29 of 2010, Guwahati High Court.
[4] *Sushil Sharma v. The State (Delhi Administration) and Ors, 1996 CriLJ 3944*
[5] Duni Chand v. Godawari, Cr.MMO No. 349 of 2016, Himachal Pradesh High Court.
[6] Sanjay Gandhi and another v. Ms. Rani Jethmalani , 1979 (4) SCC 167.

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> *central criterion for the court to consider when a motion for transfer is made is not the hypersensitivity or relative convenience of a party or easy availability of legal services or like mini-grievances. Something more substantial, more compelling, more imperilling, from the point of view of public justice and its attendant environment, is necessitous if the Court is to exercise its power of transfer. This is the cardinal principle although the circumstances may be myriad and vary from case to case. We have to test the petitioner's grounds on this touchstone bearing in mind to harass the parties and from that angle the court may weigh the circumstances. A more serious ground which disturbs us in more ways than one is the alleged absence of congenial atmosphere for a fair and impartial trial.*"

A further question that arises is the aspect of ethics and journalism. To quote the Delhi High Court in the case of *Mother Dairy Foods and Processing v. Zee Telefilms*[7],

> "*While journalists are distinctive facilitators for the democratic process to function without hindrance the media has to follow the virtues of 'accuracy, honesty, truth, objectivity, fairness, balanced reporting, respect or autonomy of ordinary people'. These are all part of the democratic process. But practical considerations, namely, pursuit of successful career, promotion to be obtained, compulsion of meeting deadlines and satisfying Media Managers by meeting growth targets, are recognized as factors for the 'temptation to print trivial stories salaciously presented'. In the temptation to sell stories, what is presented is what 'public is interested in' rather than 'what is in public interest*".

The end result of career pursuits in media in turn leads to the creation of a barrier in the justice system. The rights of the accused and the witnesses or victims suffer a grave invasion of privacy leading to an obstacle in the process of dispensing justice.[8] The indirect affect is on the police system that feels compelled because of the media pressure to come out with some theory regarding the crime. Therefore, there is a lack of balance between Articles 19, 21 and 14 in terms of between the media and the accused respectively.

The Law Commission In its 200th Report has observed that a result of the above-mentioned issue results in

> "*The whole procedure of due process is thus getting distorted and confused. The media also creates other problems for witnesses. If the identity of witnesses is*

[7] Mother Dairy Foods and Processing v. Zee Telefilms, AIR 2005 Delhi 195.
[8] Justice K.S. Puttaswamy v. Union of India, (2017) 10 SCC 1.

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> *published, there is danger of the witnesses coming under pressure both from the accused or his associates as well as from the police, leading to the witnesses wanting to retract and get out of the muddle. Witness protection is then a serious casualty. This leads to the question about the admissibility of hostile witness evidence and whether the law should be amended to prevent witnesses changing their statements. Again, if the suspect's pictures are shown in the media, problems can arise during 'identification parades' conducted under the CrPC for identifying the accused. Another important aspect is that each media house is aligned to a political party that it serves.*"[9]

More often than not the media conducts parallel investigations.[10] It may in the process point fingers at people that may be innocent. It finds faults with investigation even before the completion of the same. The print and electronic media have gone into fierce competition. Multitudes of cameras are flashed at the suspects or the accused. Police are not even allowed to take the suspects or accused from their transport vehicles into the courts or vice versa.[11] The media involvement leads to at times contamination of forensics on the crime scene. The Police has failed to stop media from entering the crime scene and it has often led to destruction of DNA and fingerprints that hamper the quality of justice and the accused goes scot free due to lack of evidence.[12]

Associate Professor of Journalism and Public Relations at Bond University, Jane Johnston, identifies four primary issues upon which concerns about tweeting from court are based[13]:

1) *Interruption of proceeding*
2) *140 Characters cannot reflect context*
3) *Temptation to use camera in smartphone*
4) *The capacity to people not aware about laws of contempt of court or defamation to be allowed to tweet*

The Andhra Pradesh High Court in *Labour Liberation Front v. State of Andhra Pradesh*[14] observed that "*once an incident involving prominent person or institution takes place, the*

[9] Law Commission of India, "Trial by Media Free Speech And Fair Trial Under Criminal Procedure Code, 1973" 15 (2006).
[10] Manu Sharma v. State (NCT of Delhi), 2010 (6) SCC 1.
[11] Law Commission of India, "Trial by Media Free Speech And Fair Trial Under Criminal Procedure Code, 1973" 15 (2006).
[12] Nupur Talwar v. Central Bureau of Investigation, (2012) 11 SCC 465.
[13] Keyzer, P. Johnston, J, & Pearson, 'The Courts and the Media: Challenges in the Era of Digital and Social Media' 41, 45 (Halstead Press, 2012).
[14] Labour Liberation Front v. State of Andhra Pradesh, 2005 (1) ALT 740.

media is swings into action, virtually leaving very little for the prosecution or the Courts".[15] Justice Katju and P. Sainath have attacked the media for focusing attention on "*non-issues*" and "*trying to divert attention of the people from the real issues to non-issues*"[16] and "*stifling of smaller voices*".[17] The pertinent question is who will watch the watchdog as it abdicates its role as an educator in favour of being an entertainer[18] A line between informing and entertaining must be drawn.

It is agreed that wrongful acquittals are not desired in any society and they hamper the confidence of the society in the judicial system. However, the conviction of an innocent person is much worse and the consequences far greater.[19]

The media accusing people based on their own theories without producing a shred of evidence against them lead to the creation of their guilt in the minds of the public. Due to this prejudice created even after the acquittal these people lose their good repute and name in society.[20]

Dating back to the Independence struggle we have fought very hard to gain the freedom of expression as a fundamental right but such a right is not absolute, while we are granted the freedom under Article 19(1) (a)[21] in the same breath reasonable restrictions have been imposed on this right in the interest of various matters, one of which is fair administration of justice which is even mentioned by the Contempt of Courts Act, 1971.[22]

There needs to be regulation on the freedom of publishing information about a criminal case on the Media that does not create a prejudice in the minds of the public. If excessive publicity in the media about a suspect or an accused before trial prejudices a fair trial or results in characterizing him as a person who had indeed committed the crime, it amounts to undue interference with the "*administration of justice*", calling for proceedings for contempt of court against the media. [23]

Apart from these circumstances, basically there is greater need to strike a right balance between freedom of speech and expression of the media on the one hand and the due process rights of the suspect and accused. A fair trial for the purpose of the paper means via 'due

[15] Labour Liberation Front v. State of Andhra Pradesh, 2005 (1) ALT 740.
[16] Markandey Katju, "Ideal and reality:Media's role in India", The Hindu, August 19, 2008.
[17] Sainath, "Lost the Compass?" Outllook India, October 17, 2005.
[18] Ramachandra Guha, "Watching the Watchdog-Time for the press to look within", The Telegraph, May 10, 2008.
[19] Kali Ram v. State of H.P., (1973) 2 SCC 808.
[20] R.K. Anand v. Delhi High Court, (2009) 8 SCC 106.
[21] Constitution of India, 1950, Part III, Article 19 (1)(a).
[22] Contempt of Courts Act, 1971.
[23] M.P. Lohia v. State of West Bengal, 2005(2) SCC 686.

process of law' i.e. not arbitrary or does not violate Article 14 as has been laid down in *Maneka Gandhi v. Union of India*.[24]

II. COMPONENTS OF A FAIR TRIAL VITIATED VIS-À-VIS MEDIA.

1) IMPARTIALITY:

Bias may be defined as a preconceived opinion of a predisposition or predetermination to decide a case or an issue in a particular manner, so much so that such predisposition doesn't leave the mind open to conviction.[25] The judges must render his duties without biasness. [26]It can be determined when the judge has any interest in the case.[27]. It's in fact, a condition of mind, which sways judgment and render the judge unable to exercise impartiality in a particular case.[28]

This biasness is taken away by Section 479 of the code of criminal procedure. Section 479 provides; No judge or magistrate shall, except with the permission of the court to which an appeal lies from his court, try or commit for trail any case to or in which he is a party, or personally interested, and no judge or magistrate shall hear an appeal from any judgment or order passed or made by himself.[29]

In the case of *Zahira Habibullah Sheikh and another v. State of Gujarat and others*[30], the Hon'ble Apex court observed that:

> "*Each one has an inbuilt right to be dealt with fairly in a criminal trial. Denial of a fair trial is as much injustice to the accused as it is to the victim and to society. Fair trial obviously would mean a trial before an impartial judge, a fair prosecutor and an atmosphere of judicial calm. Fair trial means a trial in which bias or prejudice for or against the accused, the witness or the cause which is being tried, is eliminated*."

The question popping out is that will the effect of live reporting and real time tweeting create bias or hamper a fair trial by creating a bias.

It appears that it was accepted by the Supreme Court that Judges are likely to be "subconsciously" influenced[31]

[24] Maneka Gandhi v. Union of India ,AIR 1978 SC 597.
[25] A.V.Bellarmin v. Mr.V.Santhakumaran Nair, (2015) 4 LW 443.
[26] A.V.Bellarmin v. Mr.V.Santhakumaran Nair, (2015) 4 LW 443.
[27] Contempt of Court : Offences against Administration of Justice 42(Canadian Law Reform Commission, Working Paper 20, 1977)
[28] State of W.B.v. Shivananda Pathak, (1998) 5 SCC 513.
[29] Code of Criminal Procedure, 1973, Section 479.
[30] Zahira Habibullah Sheikh and another v. State of Gujarat and ors., 2006 (3) SCC 374
[31] Attorney General v. BBC, 1981 AC 303 (HL)

In Holmes in Abrams v. U.S[32], Justice Frankfurter observed,

> *"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."*

In *P.C. Sen (in Re)* the Supreme Court observed,[33] "*No distinction is, in our judgment, warranted that comment on a pending case or abuse of a party may amount to contempt when the case is triable with the aid of a Jury and not when it is triable by a Judge or Judges.*".[34]

In *Union of India v. Naveen Jindal*[35], it was clearly held that the US First Amendment is in absolute whereas the right under Article 19(1)(a) can be restricted as permitted in Article 19(2)(a).

In *M.P. Lohia v. State of West Bengal*[36], the facts were that a woman committed suicide in Calcutta in her parents' house but a case was filed against the husband and in-laws under the Indian Penal Code for murder alleging that it was a case of dowry death. The husband (appellant in the Supreme Court) had filed a number of documents to prove that the woman was a schizophrenic psychotic patient. The parents of the woman filed documents to prove their allegations of demand for dowry by the accused. The trial was yet to commence. The Courts below refused bail. The Supreme Court granted interim bail to the accused and while passing the final orders, referred very critically to certain news items in the Calcutta magazine. The Court deprecated, two articles published in the magazine in a one-sided manner setting out only the allegations made by the woman's parents but not referring to the documents filed by the accused to prove that the lady was a schizophrenic.

The Supreme Court observed:

> "*These types of articles appearing in the media would certainly interfere with the course of administration of justice." The Court deprecated the articles and cautioned the Publisher, Editor and Journalist who were responsible for the said articles against "indulging in such trial by media when the issue is sub-judice.*"

And observed that all others should take note of the displeasure expressed by the Court.

[32] Holmes in Abrams v. U.S (1919) 250 US 616; see also Nebraska Press Association v. Hugh Stuart , (1976) 427 US 539
[33] P.C. Sen (in Re), AIR 1970 SC 1821.
[34] P.C. Sen (in Re), AIR 1970 SC 1821.
[35] Union of India v. Naveen Jindal, 2004(2) SCC 510
[36] M.P. Lohia v. State of West Bengal, 2005(2) SCC 686

The Punjab High Court in *Rao Harnarain v. Gumori Ram*[37] 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 Orissa High Court in *Bijoyananda v. Bala Kush*[38] observed that

"*the responsibility of the press is greater than the responsibility of an individual because the press has a larger audience. The freedom of the press should not degenerate into a licence to attack litigants and close the door of justice nor can it include any unrestricted liberty to damage the reputation of respectable persons.*"

In *Harijai Singh v. Vijay Kumar*[39], the Supreme Court stated that

"*the press or journalists enjoy no special right of freedom of expression and the guarantee of this freedom was the same as available to every citizen. The press does not enjoy any special privilege or immunity from law. Summarizing the position, it will be seen that the right to free speech in US is absolute and no restraint order against publication is possible unless there is 'clear and present danger' to the right itself. But, the position in India is different. The right to free speech is not absolute as in US but is conditional and restricted by Article 19(2).*"

In 2010, the UK Ministry of Justice published a research report "*Are Juries Fair?*"[40]. The research, which involved examining 62 cases involving 688 jurors at various Crown Courts in England, concluded that juries were fair, efficient and effective. However, it did find evidence of jurors using the internet to access information on their cases. More jurors admitted to having seen information on the internet than actually searching it out, but all jurors who admitted looking for information said they had done so online. While only five per cent of jurors in standard cases (those lasting less than two weeks with little media coverage) admitted looking for information online, the rate amongst those hearing high-profile cases (those lasting weeks or more with substantial pre-trial and in-trial media coverage) was almost three times higher. The research report stated that, perhaps unsurprisingly, jurors serving on longer, high profile cases were almost seven times more likely (70%) to recall media coverage of their case than jurors serving on standard cases (11%).

In *Dimas-Martinez v. State*[41], the Arkansas Supreme Court considered the effect of a juror's

[37] Rao Harnarain v. Gumori Ram, AIR 1958 Punjab 273
[38] Bijoyananda v. Bala Kush, AIR 1953 Orissa 249
[39] Harijai Singh v. Vijay Kumar, 1996(6) SCC 466
[40] Cheryl Thomas, "Are Juries Fari?", Ministry of Justice (United Kingdom), Ministry of Justice Research Series 1/10, February 2010.
[41] Dimas-Martinez v. State, No. CR 11-5, 2011 WL 6091330.

mid-trial Tweets in a criminal case that resulted in a death sentence. The juror's Tweets included comments such as "*Choices to be made. Hearts to be broken. We each define the great line.*"

Counsel alerted the trial judge to the Tweets, and the juror admitted to his misconduct. The trial judge admonished the juror to stop Tweeting, but did not remove the juror, who subsequently continued to Tweet. The jury returned a verdict of guilty, upon which the trial court imposed a sentence of death.[42] The trial court denied the defendant's motion for a new trial. On appeal, the Arkansas Supreme Court reversed, explaining,

> "*This court has recognized the importance that jurors not be allowed to post musings, thoughts, or any other information about trials on any online forums. The possibility for prejudice is simply too high. Such a fact is underscored in this case because one of the juror's Twitter followers was a reporter. Thus, the media had advance notice that the jury had completed its sentencing deliberations before an official announcement was made to the court. This is simply unacceptable, and the circuit court's failure to acknowledge this juror's inability to follow the court's directions was an abuse of discretion*".[43]

Treating a publication as criminal contempt under Section 2(c) of the Contempt of Courts Act, 1971 where the Court comes to the conclusion that the publication as to matters pending in Court 'tends' to interfere {vide Section 2(c)(iii)} with the administration of justice, amounts to a reasonable restriction on free speech. The view obtaining in USA that trained Judges or even jurors are not influenced by publication in the media as stated by the majority in Nebraska was not accepted in England in *Attorney General v. BBC*[44] by Lord Dilhorne who stated that Judges and Jurors may be influenced subconsciously and Judges could not claim to be super human was quoted by the Supreme Court in Reliance Petrochemicals[45]. In what manner they are so influenced may not be visible from their judgment, but they may be influenced subconsciously.

Even in US, Justice Frankfurter has accepted that Judges and Jurors are likely to be influenced[46]. The view of the Indian Supreme Court even earlier in P.C. Sen (in Re)[47] was that Judges and Jurors are likely to be influenced and that view in the Anglo-Saxon law

[42] Dimas-Martinez v. State, No. CR 11-5, 2011 WL 6091330.
[43] Dimas-Martinez v. State, No. CR 11-5, 2011 WL 6091330.
[44] Supra 29
[45] Reliance Petrochemicals Ltd. v. Proprietors of Indian Express, 1988(4) SCC 592
[46] Supra30
[47] Supra 25

appears to have been preferred by the Supreme Court in Reliance[48] case.

The Irish Law Commission in its Consultation paper[49], on Contempt of Court observed similarly. The Canadian Law Reform Commission[50] also took the view that, while Judges may generally be impervious to influence, the possibility of such influence could not be ruled out altogether, and that in the case of Judicial officers, the sub-judice rule served an important function of protecting public perception of impartiality which was supported by NSW law commission[51] report as well.

2) PRESUMPTION OF INNOCENCE:

Presumption of innocence is the cardinal principle of criminal justice system.[52] The accused enjoys this right under various conventions. Our criminal law and criminal jurisprudence are based on the premise that the guilt of any person charged in a court of law has to be proved beyond reasonable doubt and that the accused is presumed to be innocent unless the contrary is proved in public, in a court of law, observing all the legal safeguards to an accused.[53] Article 11 of UDHR[54] provides everyone charged with a penal offence has the right to be presumed innocent until proved guilty according to the law in a public trail and when he has had all the guarantees necessary for his defence.

Article 14(2) of ICCPR[55] States everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law.

Article 6(2) of European Convention on Human Rights[56] [hereinafter as ECHR] provides everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.

According to Article 8(2) of American Convention on Human Rights[57] provides every person accused of criminal offence has a right to be presumed innocent so long as his guilt has been proved according to law.

The principle of presumption of innocence is recognized in USA since from 1895. The

[48] Supra 43
[49] Consultation Paper on Contempt of Court 115 (Law Reform Commission, 1991)
[50] Supra 25
[51] New South Wales Law Commission, 'Contempt by Publication'Australia, Paper No.3' 100, (2000)
[52] Sunil Kumar Sharma v. State (CBI), 139 (2007) DLT 407
[53] Sunil Kumar Sharma v. State (CBI), 139 (2007) DLT 407
[54] Universal Declaration of Human Rights, 1948, Article 11
[55] The International Covenant on Civil and Political Rights, 1966, Article 14(2)
[56] European Convention on Human Rights, 1953, Article 6(2)
[57] American Convention on Human Rights, 1969, Article 8(2)

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Supreme Court of USA in the case of *Coffin v United States*[58] held,

> "*Presumption of innocence in favour of the accused is the undoubted law, axiomatic and elementary, and its enforcement lies at the foundation of the administration of our criminal law. It's to be noted that the presumption of innocence has reached up to the level of fundamental rights due to 'due process' clause.*"

in India in the case of *Vinod Solanki v Union of India*[59] observed that

> "*presumption of innocence may not be treated to be the fundamental right within the meaning of article 21 of the Constitution. The presumption of innocence means that the burden of proof lies on prosecution and he is supposed to prove beyond reasonable doubt. If there is any doubt the benefit goes to the accused."*

While Part III of the Constitution of India does not specifically deal with freedom of the press or other electronic media, the rights associated with these are ingrained in the freedom of speech and expression as guaranteed under Article 19(1)(a) of our Constitution.[60] However, this right is not an absolute one. Article 19(2) imposes 'reasonable restrictions' on the ambit of Article 19(1)(a) as it provides that " Nothing in sub-clause (a) of clause (1) shall affect the operation of any existing law, or prevent the State from making any law, in so far as such law imposes reasonable restrictions on the exercise of the right conferred by the said sub-clause, in the interest of the sovereignty and integrity of India, the security of the State, friendly relations with foreign States, public order, decency or morality, or in relation to contempt of court, defamation or incitement to an offence"[61]

Focussing on the aspect of 'contempt of court law', a reading of Article 19(1)(a) and 19(2) would imply that for proper administration of justice by the 'due course of justice' as required for a fair trial requires the imposition of limitations on the freedom of speech and expression. The right to proper administration of justice has further been elucidated under Article 21 of the Constitution which states that *"No person shall be deprived of his life or personal liberty except according to procedure established by law"*. The concept of the aforesaid administration of justice has been explicated upon in the case of *Maneka Gandhi vs. Union of India*[62] as being fair, just, equitable and not arbitrary. The scope of Articles 19(1)(a) and 19(2) have been expounded upon through a series of cases. In *Life Insurance*

[58] Coffin v. United States, 156 U.S. 432 (1895)
[59] Vinod Solanki v Union of India, 2008 (16) SCC 537
[60] Romesh Thaper v. State of Madras, 1950 AIR 124; see also Brij Bhushan v. State of Delhi, 1950 AIR 129
[61] Constitution of India, 1950, Part III, Article,19(2)
[62] Supra 22

Corporation of India vs. Manubhai D Shah[63] it was observed that "*the freedom of speech and expression as under Article 19(1)(a) is the right to express oneself freely, by word of mouth, writing, printing, pictures or electronic media or any other manner.*"

The Supreme Court had previously held in *Romesh Thapar vs. State of Madras*[64]:

> *"the right under Article 19(1)(a) includes the freedom of ideas, their publication and circulation. This right also includes the right to acquire and impart ideas and information of matters of common interest, although the freedom of speech as expressed under Article 19(1) (a) guarantees an individual the express and basic inherent right to express himself freely and coherently about his right to freedom of expression, yet there ought to be severe limitations placed on such unrestricted freedom."*

The Apex Court listed certain exceptions wherein such an otherwise-absolute fundamental right to freedom could be curtailed. So, in invoking the obiter dicta enunciated by the US Supreme Court in the case of *Lovell v. The City of Griffin*[65] and ruled that although the freedom of speech is an absolute and relative freedom central to the upholding of certain democratic values, if a law is passed that places severe restrictions on free speech based on considerate parameters such as(but not limited to) public safety, law and order issues-cum-problems, decency and morality, sovereignty of the State, foreign business relations between two countries or court orders passing a decree for the restraint of such free speech due to sensitivity of certain matters (e.g. a high-profile ongoing case, due to which a gag in the form of censorship on media printing and publication by the media is concerned) etc., only then would such reasonable restrictions be imposed which would curtail such absolute freedoms ex parte the press's right to publish read-worthy articles[66].

The Apex Court in *Sahara India Real Estate Corporation Ltd. and Ors. v. Securities and Exchange Board of India and Anr.*[67], constituted the five judge Constitution Bench when, during the pendency of appeal despite the interim order of the Court, some newspapers published proceedings of the court, laid down appropriate guidelines with regard to reporting in electronic and print media of matters which is sub judies in Court including public disclosure of documents forming part of Court proceedings and also the manner and extent of

[63] Life Insurance Corporation of India v. Manubhai D Shah, 1992 (3) SCC 637
[64] Romesh Thapar v. State of Madras, 1950 SCR 594
[65] Lovell v. The City of Griffin, 303 U.S. 444 (1938)
[66] Hamdard Dawakhana v. Union of India, 1960 (2) SCR 671
[67] Sahara India Real Estate Corporation Ltd. and Ors. v. Securities and Exchange Board of India and Anr. (2012) 10 SCC 603.

publicity to be given by print/electronic media of pleadings/documents filed in proceeding in Court which are pending and not yet adjudicated upon and the court suggested the following measure which was Prior restraint.

While Open Justice is the cornerstone of our judicial system, it is not absolute and can be restricted by the court in its inherent jurisdiction as done in Mirajkar's case if the necessities of administration of justice so demand. Therefore, orders prohibiting publication for a temporary period during the course of trial are permissible under the inherent powers of the court whenever the court is satisfied that interest of justice so requires without offending Art. 19(1)(a).

In the case of *Secretary, Ministry of Information and Broadcasting vs. Cricket Association of West Bengal*[68], the Apex Court has deemed that the right to telecast includes the right to educate and inform and to be educated and informed, the former being the right of the telecaster and the latter the right of the viewer and this right to disseminate and receive information through all types of media, whether print, electronic or audio-visual. Keeping these in mind, the question arises whether trial by press or electronic media is in the interest of fair trial. The Supreme Court has answered this in the negative in the case of *State of Maharashtra v. Rajendra Jawanmal Gandhi*[69] stating that trial by press or electronic media or by way of public agitation is a grave miscarriage of justice as it is, in its essence, the antithesis of rule of law and that Judges must guard themselves against such pressure. There must not be an occasion that arises wherein the publicity attached to certain matters through electronic media or press has tended to dilute the emphasis on fair trial and the basic principles of jurisprudence.

This brings us to the issue of whether such acts of live reporting of cases and use of electronic media such as Tweeting, being effective tools of dissemination of information are a right under Article 19(1)(a)[70] or are going against the principles of fair trials and the basic presumption of innocence of the defendant and thus a contempt of Court. To explore this issue, the definition of 'criminal contempt' as provided under Contempt of Courts Act, 1971 must be examined. Section 2(c)[71] defines criminal contempt as "publication, (whether by words, spoken or written or by signs, or by visible representations, or otherwise), of any matter or the doing of any other act whatsoever which (…) (ii) prejudices or interferes or tends to interfere with the due course of any judicial proceedings; or (iii) interferes or tends to

[68] Ministry of Information and Broadcasting vs. Cricket Association of West Bengal, 1995 (2) SCC 161
[69] State of Maharashtra v. Rajendra Jawanmal Gandhi, (1993) 2 SCC 622
[70] Constitution of India, 1950, Part III, Article 19(a)
[71] Contempt of Courts Act, 1971, Sec 2(c)

interfere with or obstructs or tends to obstruct, the administration of justice in any manner". Section 3(1)[72] of the Contempt of Courts Act however allows for "innocent publication if the publisher had no reasonable grounds for believing that the proceeding was pending". Pendency as under Section 3 envisages the starting point of a criminal proceeding to be the point when a charge sheet or challan is filed or a Court summons or warrant is issued, reducing the importance of the 'pre-trial' period. Thus, publications via electronic media at the pre-trial stage could potentially affect the rights of the accused for a fair trial as such publications could relate to any previous convictions, his character or any alleged confessions made to the police. In such a case, such publications via electronic social media would not only lead a constitutional violation of the rights of the accused but also his basic human rights.

This leads to the pertinent issue of what kind of publications are prejudicial to the suspect or accused as it would attempt to draw the line on the kind of media publications are causing a direct obstruction to criminal proceedings. Any publications concerning the character of the accused is the foremost reason for obstruction. As observed in **Borrie and Lowe**[73]

"*Publications which tend to excite 'feelings of hostility' against the accused amount to contempt because they tend to induce the Court to be biased. Such 'hostile feelings' can be most easily induced by commenting unfavourably upon the character of the accused. These also can be influenced on the Jury. Such publications amount to gross contempt because they bring to the notice of the Jury facts very damaging to the accused, which they are not entitled to know, and which have a tendency to create bias against the accused.*"

Publication of past criminal records also leads to a substantial risk of serious prejudice due to the popular belief that it is more likely for an accused to be charged if he has a criminal record and less likely if he has no record[74]. Except under exceptional circumstances the press should refrain from publishing criminal records of any accused, witness or alleged co-conspirator. Publications of confessions before a trial are also highly prejudicial as it would affect the Court's impartiality and lead to serious contempt. For instance, in *R v. Clarke, ex p Crippen*[75], Crippen was arrested in

[72] Contempt of Courts Act, 1971, Sec 3(1)
[73] Borrie and Lowe, Commentary on Contempt of Court, 132 (Lexis Nexis Butterworths Law, UK, 3rd Ed., 1996)
[74] AG(NSW) v. Willisee, (1980) (2) NSWLR 143 (150)
[75] R v. Clarke, ex p Crippen, (1910) 103 LT 636

Canada but not formally charged, but a publication appeared in England in Daily Chronicle, as cabled by its foreign correspondent, that "*Crippen admitted in the presence of witnesses that he had killed his wife but denied the act of murder*". The publication was treated as contempt. Any publication reflecting or commenting on the merits of the case leads to a serious miscarriage of criminal procedure as such act amounts to the publication usurping the function of the Court without the safeguards outlined by the Criminal Procedure Code.

As held in *Shamim v. Zinat*[76], wherein an article was published in a magazine pending an appeal against conviction for murder expressing opinion on the merits of the case. The High Court held that it amounts to contempt of court because it is an interference into the course of justice.

Publications relating to alleged confessions to police would be considered prejudicial as confessions to police are not admissible. Criticism or imputation on the accounts of the accused would severely interfere with the proceedings as it could contribute not only to a prejudice to the case of the prosecution but also deter current or future witnesses. Generally, adverse comments on the witness as it would add to the reluctance of witnesses to appear in Court. Even interviews with witnesses being published would amount to contempt as it would be contempt to publish evidence which the witness may give later in Court. A newspaper publishing the results before or during a trial, obtained from their own private investigation is perhaps the foremost example of obstruction to criminal proceedings. There is no guarantee that the facts published by the newspaper are true, there being no opportunity to cross-examine or to have the evidence corroborated. Furthermore, there is no guarantee that the published facts will be admitted at the trial, if it amounted to hearsay. Section 327 of the Code makes provision for open courts for public hearing but it also gives discretion to the presiding judge or magistrate that if he thinks fit, he can deny the access of the public generally or any particular person to the court during disclosure of indecent matter or when there is likelihood of a disturbance or for any other reasonable cause.

In *State of Punjab v. Gurmit*[77] the court held that the undue publicity is evidently harmful to the unfortunate women victims of rape and such other sexual offences. Such publicity would mar their future in many ways and may make their life miserable in society. Section 327(2)

[76] Shamim v. Zinat 1971 Crl L5 1586 (All)
[77] State of Punjab v. Gurmit,1996 AIR 1393

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provide that the inquiry into and trial of rape or an offence under Section 376, 376-A, 376-B, 376-C or 376-D of the Indian Penal Code shall be conducted *in camera*.

III. CRITIQUE & CONCLUSION

In relation to the idea that tweeting journalists might disrupt proceedings, the nature of the process itself suggests the contrary. In fact, it seems more likely that a journalist typing quietly on a laptop would cause no more distractions to the court than one scribbling on a notepad, and far less than one constantly leaving so they can tweet outside.[78] It is obvious that a 140 character Tweet will never achieve the level of detail of a full court report or broadcast. For those who believe the media already focuses too much on sensational details and fails to report comprehensively, the shorter word count is hardly likely to inspire confidence. Of course, in the case of Twitter, journalists are able to create hashtags in order to make their tweets easily searchable, arguably creating a more complete report.[79] However, there is no guarantee that individual tweets would not be read in isolation or be re-tweeted by to a wider audience. South Australia's Victims of Crime Commissioner Michael O'Connell has also warned that Tweeting carries with it the risk of "making a case sound more sinister", emphasising the need for stronger laws to protect the privacy and rights of victims.[80] On the other hand, the Supreme Court of Victoria's decision to take to Twitter to report its own decisions clearly reflects its belief that 140 characters is enough to accurately reflect the outcome of a case. In the United Kingdom, Lord Judge's practice guidance on live, text base reporting presumes that journalists tweeting during court cases are using their devices for the purpose of producing fair and accurate reports but can we compare the same level of professionalism in India where sensationalism is the idea for Media Houses. Trained journalists also typically have a strong understanding of legal restrictions that already exist on court reporting, whether in print, broadcast or online. Of course, not all court reporters – or, indeed, citizen journalists or members of the public - may choose to use Twitter inside courtrooms. However, the fact that that they could simply leave the room and tweet from outside without breaching the law also brings into question the utility of the proposed restrictions.

[78] Adriana C. Cervantes, 'Will Twitter Be Following You in the Courtroom?: Why Reporters Should Be Allowed to Broadcast During Courtroom Proceedings' 33 HCELJ 152 (2011)
[79] Keyzer, P. Johnston, J, & Pearson, 'The Courts and the Media: Challenges in the Era of Digital and Social Media' 55, 65. (Halstead Press, 2012).
[80] Sean Fewster, "South Australian lawyers say live tweeting from the court room is OK" (17 July 2012) Adelaide Now, available at: http://www.adelaidenow.com.au/news/ south-australia/south-australian-lawyers-say-live-tweeting-from-the-court-room-is-ok/story-e6frea83-12264285261877 (Last Visited on: 15th October, 2018)

As Burd and Horan note, such prejudicial publicity is only a click away for the "*Googling juror*".[81] While the courts have numerous mechanisms to help prevent prejudicial publicity affecting jury trials – such as suppression orders and contempt laws, and jury directions to prevent juror misconduct like conducting Internet searches – several commentators believe these remedies have become less effective in the digital age. Some even propose trials by judge alone in certain cases.[82]

Chief Justice of Canada, the Right Honourable Beverley McLachlin's observation is pertinent: *"If witness or juror contamination is a concern with television, is it not even more so with ubiquitous social media accessed or received automatically via a hand-held device?"*[83] This issue is yet to be satisfactorily addressed.

The attorney General of United Kingdom on the other hand is concerned that the Contempt of Court Act 1981 does not "*protect against trials by social media*", mainly because very few of the general public know anything about the law.[84]

"*Every defendant in this country is entitled to a fair trial where a verdict is delivered based on the evidence heard in court*," said Attorney General Wright in a canned statement, describing the Contempt of Court Act as

> "*designed to prevent trial by media."…."The evidence submitted to this Call for Evidence will form the basis of a report prepared by the Attorney General's Office and inform a consideration of what changes, if any, are needed to strike a balance between the rights of the individual to express their views via social media and the protection of fairness in criminal proceedings*"[85]

In UK it is a contempt of court, punishable by a two-year prison sentence, to publish anything that causes a substantial risk of serious prejudice to court proceedings. This includes things such as the defendant's previous crimes. The rough idea is that the defendant should be tried on the facts of the case rather than his or her personal history. The contempt risk is supposed to be judged on the likelihood of jurors (or potential jurors) being able to find information

[81] Roxanne Burd and Jacqueline Horan, "Protecting the right to a fair trial in the 21st century – has trial by jury been caught in the world wide web?" 36 CrLJ 103, 106(2012)
[82] Keyzer, P. Johnston, J, & Pearson, 'The Courts and the Media: Challenges in the Era of Digital and Social Media' 101, 119 (Halstead Press, 2012).
[83] Keyzer, P. Johnston, J, & Pearson, 'The Courts and the Media: Challenges in the Era of Digital and Social Media' 24, 33. (Halstead Press, 2012).
[84] Government of U.K., Attorney General's Office, 'Attorney General seeks evidence on the impact of social media on criminal trials', (15 September 2017), https://www.gov.uk/ (Last visited on October 20th, 2018).
[85] Ibid.

about a case that is not presented in court, though in the internet era courts take a harsh line about appearance of that information anywhere at all.[86]

In India the bench, headed by Chief Justice of India S.H. Kapadia, said that if publishing news related to a trial would *"create a real and substantial risk of prejudice to the proper administration of justice or to the fairness of trial*", the court could grant a postponement order, temporarily gagging electronic or print media from reporting on the case.[87]

Serious concerns have been raised about the effect that the recording of witnesses will have on the quality of their testimony and the chilling effect it may have on their willingness to report and give evidence. The knowledge that their evidence is being filmed may make witnesses more nervous and hesitant and this, in turn, may affect an assessment of the witness's credibility or reliability. Even where the witness becomes accustomed to the filming, the first impression of the witness on the fact finder is often important. In addition to these concerns, were the footage to be broadcast "*live*" there is the potential for the evidence of a witness to be viewed by and to influence another witness. Other concerns include the potential for some participants to perform to the camera. Many submissions raised concerns that the reliability of a witness's testimony may be compromised if other testimony is available for viewing prior to the witness giving evidence. Social media was noted by one respondent as potentially exacerbating this problem as public coverage on sites like Facebook or Twitter during the course of a proceeding may cause witnesses to consciously or unconsciously alter their evidence. Many submissions supported the view that most witnesses find giving evidence nerve-racking and that the presence of a camera and the knowledge that their evidence will be broadcast to the world at large would be a source of stress. Various respondents expressed concern that the broadcasting of court proceedings would increase witnesses' anxiety when testifying and may affect their decision to give evidence or the quality of their evidence if they choose to testify. For example the Office of the Director of Public Prosecutions in Queensland reported that its experience is that witnesses are usually reluctant to testify and often anxious about court procedures and the consequences of testifying. It submitted:

> "*It is often the case that a witness will become particularly alarmed and sometimes very anxious when they understand that their name will be used in Court and may be published. The prospect of any broadcast of their voice and/or image must only*

[86]Gareth Corfield, 'UK attorney general plans crackdown on 'trial by social media' , (15th September, 2017) available at: https://www.theregister.co.uk/2017/09/15/attorney_general_contempt_court_call/ (Last visited on: 17th October, 2018)

[87] Sahara India Real Estate Corpn. Ltd. v. SEBI, (2012) 10 SCC 603

> *heighten the prospect of those types of reactions. Witnesses who usually do not have a real choice about testifying should not be placed in a position where they are subject to more discomfort than is necessary*".

In the *Pistorius* case[88], the defendant's lawyer reported a difficulty in engaging expert witnesses because of their concern that images of them giving their evidence would be broadcast to the world. Whilst they did not mind their opinions being scrutinised and criticised by their professional peers and tested under cross-examination, they were not prepared to run the risk of having to defend themselves and their opinions in public from people who had seen their evidence on television. Some of the experts who were prepared to give evidence in that case declined to be filmed.

In relation to England, Wales and Scotland, guidelines have been issued by the House of Lords regarding usage of laptops and handheld devices in court, which clarifies that that representatives of the media and legal commentators may use such text-based devices to communicate from courts without having to apply to the courts to do so, whereas members of the public should make a formal or informal application if they wish to use such devices. It also acknowledged the danger such usage of text based devices. To quote the Lord Chief Justice of England and Wales, 2011,

> "*Without being exhaustive, the danger to the administration of justice is likely to be at its most acute in the context of criminal trials e.g., where witnesses who are out of court may be informed of what has already happened in court and so coached or briefed before they then give evidence, or where information posted on, for instance, Twitter about inadmissible evidence may influence members of a jury. However, the danger is not confined to criminal proceedings; in civil and sometimes family proceedings, simultaneous reporting from the courtroom may create pressure on witnesses, distracting or worrying them.*"

It thus leaves the usage of these devices to the discretion of the presiding Judge as extensive use of text based devices could also cause distractions in the proceedings. Scottish Courts currently require the permission of the court for usage of devices that allow for live text-based communication. Live updating on Twitter from a Scottish court was allowed for the first time for the sentencing of former MSP Tommy Sheridan in 2011 with the trial judge

[88] The Director of Public Prosecutions, Gauteng v Oscar Leonard Carl Pistorius, (950/2016) [2017] ZASCA 158

Lord Bracadale ruled that journalists could send tweets from the hearing at the High Court in Glasgow[89].

Thus, as technology changes and social media sites grow in popularity, courts will continue to face the challenge of adopting new rules to address the problems created by such technology. New court rules and procedures relating to technology need to be in place to protect the right to a fair trial, impartial jury, and the public trust and confidence in the judiciary[90].

There should be preventative measures such as judicial ethics rules, admonitions for the jury, and clearly laid out punishments for violators are the appropriate measures to address the impact of social media on the judicial system, to ensure the upholding of basic principles of fair trial in in the administration of justice.

When looking at live tweeting from Courts the following should be kept under check to provide the accused with a fair trial

(1) Publications concerning the character of accused or previous conclusions:

Publication of past criminal record is recognized as a serious contempt, satisfying the 'substantial risk of serious prejudice' test used in Section 4(2) of the U.K Act of 1981 as well as under Common Law.[91]

In was held in *AG(NSW) v. Willisee*[92] that there is "*popular and deeply rooted belief that it is more likely that an accused person committed the crime charged if he has a criminal record, and less likely if he has no record*"

The need to prevent prejudice caused by past criminal record is one of the 'most deeply rooted and zealously guarded principles of the criminal law'[93] and such evidence will have to be treated as inadmissible.[94]

(2) Publication of Confessions :

Though a confession to police is inadmissible in law still publications of confessions before

[89]Graham Ross , "Role of the Media in Criminal Trials", (2nd August, 2012) available at http://www.parliament.scot/ResearchBriefingsAndFactsheets/S4/SB_12-50.pdf, (Las t visited on 22nd October, 2018)

[90] Emily M. Janoski-Haehlen, "The Courts Are All A 'Twitter': The Implications of Social Media Use in the Courts", 46 Val. U. L. Rev. 43 (2011). Available at: http://scholar.valpo.edu/vulr/vol46/iss1/2

[91] United Kingdom Contempt of Court Act, 1981, Section 4 (2); see also CONTEMPT OF COURT: Summary for non-specialists 5-6 (Law Commission (U.K.), 2015)

[92] AG(NSW) v. Willisee, (1980) (2) NSWLR 143 (150); See also Gisborne Herald Co. Ltd. v. Solicitor General, 1995(3) NLLR 563 (569) (CA).

[93] Per Viscount Sankey in Maxwell v. DPP, (1935) AC 309(317)

[94] R v. Parke, (1903) (2) KB 432

trial are treated as highly prejudicial and affecting the Court's impartiality and amount to serious contempt.[95]

(3) Publications which comment or reflect upon the merits of the case :

This is indeed the extreme form of '*trial by media*' since the media usurps the function of the Court without the safeguards of procedure, right to cross-examine etc. Such publications prejudge the facts and influence the Court, witnesses and others. Though to write the facts and the charges is not contempt and that shall be allowed.[96]

In *AG v. News Group Newspapers Ltd*[97] it was held that *"the publication of guilt amounted to contempt."*

(4) Photographs :

Apart from publication of photographs interfering with the procedure of identification of the accused, there is also the likelihood of such publication giving a colour of guilt with added emphasis

In *Attorney General v. Tonks*[98] it was held

> "*If a photograph of an accused person is broadcast in a newspaper immediately after he is arrested, then such of the witnesses who have not then seen him, may quite unconsciously be led into the belief that the accused as photographed is the person they saw. The fact that a witness claiming to identify the accused person, has seen a photograph of him before identifying him, gives the defence an excuse for questioning the soundness of the witness's identification*"

(5) Police activities :

It can be perfectly proper to publish references to police activity surrounding a crime, such as the various searches, questioning of suspects and any arrest that may be made but it should not be thought that there is an automatic immunity in so doing.[99]

In *AG (NSW) v. TCN Channel Nine Pty Ltd* [100] it was observed that

> "*as a general rule, we regard it grossly offensive to the principles embodied in this aspect of the law, and to the proper administration of justice, for police to display for the benefit*

[95] R v. Clarke, (1910) 103 LT 636
[96] R v. Payne, 1896(1) QB 577
[97] AG v. News Group Newspapers Ltd, 1988(2) AllER 906
[98] Attorney General v. Tonks, 1934 NZLR 141 (FC), see also Attorney General (NSW) v. Time Inc Magazineco Ltd : (Unrep. CA 40331/94 dated 15th September 1994)
[99] Borrie and Lowe, Commentary on Contempt of Court, 151 (Lexis Nexis Butterworths Law, UK, 3rd Ed., 1996)
[100] AG (NSW) v. TCN Channel Nine Pty Ltd, (1990) 20 NSWLR 368

of the media, persons in the course of being questioned or led round the scene of a crime".

(6) Creating an atmosphere of prejudice:

In *M.P. Lohia v. State of West Bengal*[101], to which we have earlier referred, the Supreme Court seriously deprecated a one sided article in a newspaper in which the allegations made by the parents of the wife in an alleged dowry death case were published but the record filed by the accused that his wife` was schizophrenic were not published. These publication create a pressurised atmosphere before the Judge

In *R v. Hutchison , ex p McMahon*[102]:, a news film whose caption implied a charge which was more serious than the actual charge was held to be contempt.

(7) Premature publication of evidence:

Assuming investigation journalism is permissible, if that is continued after criminal proceedings become 'active' and a person has been arrested, and if by virtue of the private investigation, the person is described as guilty or innocent, such a publication can prejudice the courts, the witnesses and the public and can amount to contempt

In *R v. Evening Standard, ex p DPP*[103], the Court found that certain newspapers '*had entered deliberately and systematically on a course which was described as criminal investigation*'. The defence of the newspaper was that they had a duty to elucidate the facts. This defence was rejected:

"While the police or the Criminal Investigation Department were to pursue their investigation in silence and with all reticence and reserve, being careful to say nothing to prejudice the trial of the case, whether from the point of view of the prosecution or …. of the defence, it had come to be somehow for some reason the duty of newspapers to employ independent staff of amateur detectives…."

To publish results of such investigations could prejudice a fair trial and will therefore amount to contempt.

The freedom of the media not being absolute, media persons connected with the print and electronic media have to be equipped with sufficient inputs as to the width of the right under Art 19(1)(a) and about what is not permitted to be published under Art 19(2). Aspects of constitutional law, human rights, protection of life and liberty, law relating to defamation and

[101] M.P. Lohia v. State of West Bengal, AIR 2005 SC 790
[102] R v. Hutchison , ex p McMahon, 1936 (2) All ER 1514
[103] R v. Evening Standard, ex p DPP,(1924) 40 TLR 833

Contempt of Court are important from the media point of view. It is necessary that the syllabus in Journalism should cover the various aspects of law referred to above.

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