



Right to Privacy in Sting Operations of Media

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The strength and importance of media in a democracy is well recognized. Article 19(1) (a) of the Indian Constitution, which gives freedom of speech and expression includes within its ambit, freedom of press. The existence of a free, independent and powerful media is the cornerstone of a democracy, especially of a highly mixed society like India. Media is not only a medium to express one's feelings, opinions and views, but it is also responsible and instrumental for building opinions and views on various topics of regional, national and international agenda. The pivotal role of the media is its ability to mobilize the thinking process of millions. The increased role of the media in today's globalized and tech-savvy world was aptly put in the words of Justice Learned Hand of the United States Supreme Court when he said, "The hand that rules the press, the radio, the screen and the far spread magazine, rules the country".

Democracy is the rule of the people, a system which has three strong pillars. But as Indian society today has become somewhat unstable on its 3 legs- the executive, the legislature and the judiciary, the guarantee of Article 19 (1)(a) has given rise to a fourth pillar known as media or press. It plays the vital role of a conscious keeper, a watchdog of the functionaries of society and attempts to attend to the wrongs in our system, by bringing them to the knowledge of all,

hoping for correction. It is indisputable that in many dimensions the unprecedented media revolution has resulted in great gains for the general public. Even the judicial wing of the state has benefited from the ethical and fearless journalism and taken suo-moto cognizance of the matters in various cases after relying on their reports and news highlighting grave violations of human rights. The criminal justice system in this country has many lacunae which are used by the rich and powerful to go scot-free. Figures speak for themselves in this case as does the conviction rate in our country which is abysmally low at 4 percent. In such circumstances the media plays a crucial role in not only mobilizing public opinion but bringing to light injustices which most likely would have gone unnoticed otherwise.

However, there are always two sides of a coin. With this increased role and importance attached to the media, the need for its accountability and professionalism in reportage can not be emphasized enough. In a civil society no right to freedom, howsoever invaluable it might be, can be considered absolute, unlimited, or unqualified in all circumstances. The freedom of the media, like any other freedom recognized under the Constitution has to be exercised within reasonable boundaries. With great power comes great responsibility. Similarly, the freedom under



Article 19(1) (a) is correlative with the duty not to violate any law.

Every institution is liable to be abused, and every liberty, if left unbridled, has the tendency to become a license which would lead to disorder and anarchy. This is the threshold on which we are standing today. Television channels in a bid to increase their Television Rating Point (TRP) ratings are resorting to sensationalized journalism with a view to earn a competitive edge over the others. Sting operations have now become the order of the day. They are a part of the hectic pace at which the media is evolving, carrying with every sting as much promise as risk. However, though technology cannot be thwarted but it has its limits. It can not be denied that it is of practical importance that a precarious balance between the fundamental right to expression and the right to one's privacy be maintained. The second practice which has become more of a daily occurrence now is that of media trials. Something which was started to show to the public at large the truth about cases has now become a practice interfering dangerously with the justice delivery system. Both are tools frequented by the media. And both highlight the enormous need of what is called 'responsible journalism'.

Sting operations vs. Right to privacy

Television channels have started a series of investigative attempts with hidden cameras and other espionage devices. The advent of miniaturized audio and video technology, specially the pinhole camera technology, enables one to clandestinely make a video/audio recording of a conversation and actions of individuals. Such equipment generally has four components— the miniaturized camera, often of a size of a 25 paisa coin or even smaller (pin top size), a miniature video recording device, a cord to transmit the signals and a battery cell. The use of the cord can be avoided through wireless transmissions.

In law enforcement, a sting operation is an operation designed to catch a person committing a crime by means of deception. A typical sting will have a law-enforcement officer or cooperative member of the public play a role as criminal partner or potential victim and go along with a suspect's actions to gather evidence of the suspect's wrongdoing. Now the moot question that arises is whether it is for the media to act as the "law enforcement agency".

The carrying out of a sting operation may be an expression of the right to free press but it carries with it an indomitable duty to respect the privacy of others. The individual who is the subject of a press or television 'item' has his or her personality, his or her reputation or career dashed to the ground after the media exposure. He too has a fundamental right to live with liberty, dignity and respect and a right to privacy guaranteed to him under Article 21 of the Indian Constitution.

The movement towards the recognition of "Right to Privacy" in India started with *Kharak Singh vs. State of Uttar Pradesh and Others*, wherein the apex court observed that it is true that our constitution does not expressly declare a "Right to Privacy" as fundamental right, but the said right is an essential ingredient of personal liberty. After an elaborate appraisal of this right in *Gobind v. State of Madhya Pradesh and Another*, it has been fully incorporated under the umbrella of right to life and personal liberty by the humanistic expansion of the Article 21 of the Constitution.

Today, it is being witnessed that the over-inquisitive media, which is a product of over-commercialization, is severely encroaching the individual's "Right to Privacy" by crossing the boundaries of its freedom. Yet another observation of the court which touched this aspect of violation of right to privacy of the individuals is found in the judgment of the Andhra Pradesh High Court in



Labour Liberation Front v. State of Andhra Pradesh. The Court observed as follows:

"Once an incident involving prominent person or institution takes place, the media is swinging into action and virtually leaving very little for the prosecution or the Courts to examine the matter. Recently, it has assumed dangerous proportions, to the extent of intruding into the very privacy of individuals. Gross abuse of technological advancements and the unhealthy competition in the field of journalism resulted in obliteration of norms or commitment to the noble profession. The freedom of speech and expression, which is the bedrock of journalism, is subjected to gross abuse. It must not be forgotten that only those who maintain restraint can exercise rights and freedoms effectively."

In *Mr. X v. Hospital Z* the Supreme Court held that the right to privacy may, apart from contract, also arise out of a particular specific relationship, which may be commercial, matrimonial or even political. Public disclosure of even true private facts may amount to an invasion of the right to privacy.

The following observations of the Supreme Court in *R. Rajagopal and Another v. State of Tamil Nadu and Others* are true reminiscence of the limits of freedom of press with respect to the right to privacy.

"A citizen has a right to safeguard the privacy of his own, his family, marriage, procreation, motherhood, child bearing and education among other matters. No one can publish anything concerning the above matters without his consent - whether truthful or otherwise and whether laudatory or critical. If he does so, he would be violating the right to privacy of the person concerned and would be liable in an action for damages. Position may, however, be different, if a person voluntarily thrusts himself into

controversy or voluntarily invites or raises a controversy."

U.S. law enforcement agencies use sting operations to target any entry point, which is being knowingly used to introduce proceeds of crime into the financial system. Sting operations have therefore been used against such entry points as car dealerships, restaurants, bookmakers, cheque-cashing services, pawnshops, and even churches. The justification for undercover operations generally has been expressed as follows:

"Covert investigative techniques are often the most efficient, effective and, in the case of the most virulent strains of criminality, such as organized and major drug related crime, the only practical way of obtaining evidence for the purposes of prosecuting and convicting those responsible."

However, former U.S. Chief Justice Earl Warren in *Sherman vs. United States* made an important observation stating that "a line must be drawn between a trap for the unwary innocent and a trap for the unwary criminal."

On the other hand, the authorities of the United Kingdom have set down a defined and set code for the commission of undercover operations.

The ability to do great good rarely comes without some power to do harm, and the free press is no exception to this general rule. The press should do what it can to minimize the abuse of power (self-scrutiny can help and so can competition), but we should also try to understand with clarity why and how press freedom can enrich human lives, enhance public justice, and even help to promote economic and social development. Technology is being used by the media to throw light upon "truths" which may never have been known to the public at large.



However, the use of technology in a rightful manner is what needs to be adequately emphasized upon and proper guidelines be framed for the same.

Media trial vs. Right to free and fair trial

Trial by media has created a “problem” because it involves a tug of war between two conflicting principles – free press and free trial, in both of which the public are vitally interested. The freedom of the press stems from the right of the public in a democracy to be involved on the issues of the day, which affect them. This is the justification for investigative and campaign journalism.

At the same time, the “Right to Fair Trial”, i.e., a trial uninfluenced by extraneous pressures is recognized as a basic tenet of justice in India. Provisions aimed at safeguarding this right are contained under the Contempt of Courts Act, 1971 and under Articles 129 and 215 (Contempt Jurisdiction-Power of Supreme Court and High Court to punish for Contempt of itself respectively) of the Constitution of India. Of particular concern to the media are restrictions which are imposed on the discussion or publication of matters relating to the merits of a case pending before a Court. A journalist may thus be liable for contempt of Court if he publishes anything which might prejudice a ‘fair trial’ or anything which impairs the impartiality of the Court to decide a cause on its merits, whether the proceedings before the Court be a criminal or civil proceeding.

A number of decisions of the U.S Supreme Court confirm the potential dangerous impact the media could have upon trials. In the case of Billie Sol Estes, the U.S. Supreme Court set aside the conviction of a Texas financier for denial of his constitutional rights of due process of law as during the pre-trial hearing extensive and obtrusive television coverage took place. The Court laid down a rule that televising of notorious

criminal trials is indeed prohibited by the “Due process of Law” clause of Amendment Fourteen.

In another case of Dr. Samuel H. Sheppard, the Court held that prejudicial publicity had denied him a fair trial. Referring to the televised trials of Michael Jackson and O.J. Simpson, Justice Michael Kirby stated:

"The judiciary which becomes caught up in such entertainment, by the public televising of its process, will struggle (sometimes successfully, sometimes not) to maintain the dignity and justice that is the accused's due. But these are not the media's concerns. Jurists should be in no doubt that the media's concerns are entertainment, money-making and, ultimately, the assertion of the media's power."

In England too, the House of Lords in the celebrated case of Attorney General vs. British Broadcasting Corporation (BBC) has agreed that media trials affect the judges despite the claim of judicial superiority over human frailty and it was observed that a man may not be able to put that which he has seen, heard or read entirely out of his mind and that he may be subconsciously affected by it. The Courts and Tribunals have been specially set up to deal with the cases and they have expertise to decide the matters according to the procedure established by the law. Media's trial is just like awarding sentence before giving the verdict at the first instance. The court held that it is important to understand that any other authority cannot usurp the functions of the courts in a civilized society.

Similarly there have been a plethora of cases in India on the point. The observations of the Delhi High Court in Bofors Case or Kartongen Kemi Och Forvaltning AB and Ors. vs. State through CBI are very much relevant, as the Court weighed in favour of the accused's right of fair trial while calculating the role of media in streamlining the criminal justice system:



"It is said and to great extent correctly that through media publicity those who know about the incident may come forward with information, it prevents perjury by placing witnesses under public gaze and it reduces crime through the public expression of disapproval for crime and last but not the least it promotes the public discussion of important issues. All this is done in the interest of freedom of communication and right of information little realizing that right to a fair trial is equally valuable." Such a right has been emphatically recognized by the European Court of Human Rights:

Again it cannot be excluded that the public becoming accustomed to the regular spectacle of pseudo trials in the news media might in the long run have nefarious consequences for the acceptance of the courts as the proper forum for the settlement of legal disputes.

The ever-increasing tendency to use media while the matter is sub-judice has been frowned down by the courts including the Supreme Court of India on the several occasions. In *State of Maharashtra vs. Rajendra Jawanmal Gandhi*, the Supreme Court observed:

"There is procedure established by law governing the conduct of trial of a person accused of an offence. A trial by press, electronic media or public agitation is very antithesis of rule of law. It can well lead to miscarriage of justice. A judge has to guard himself against any such pressure and is to be guided strictly by rules of law. If he finds the person guilty of an offence he is then to address himself to the question of sentence to be awarded to him in accordance with the provisions of law."

The position was most aptly summed up in the words of Justice H.R.Khanna: -

"Certain aspects of a case are so much highlighted by the press that the publicity gives rise to strong public emotions. The inevitable effect

of that is to prejudice the case of one party or the other for a fair trial. We must consider the question as to what extent are restraints necessary and have to be exercised by the press with a view to preserving the purity of judicial process. At the same time, we have to guard against another danger. A person cannot, as I said speaking for a Full Bench of the Delhi High Court in 1969, by starting some kind of judicial proceedings in respect of matter of vital public importance stifle all public discussions of that matter on pain of contempt of court. A line to balance the whole thing has to be drawn at some point. It also seems necessary in exercising the power of contempt of court or legislature vis-à-vis the press that no hyper-sensitivity is shown and due account is taken of the proper functioning of a free press in a democratic society. This is vital for ensuring the health of democracy. At the same time the press must also keep in view its responsibility and see that nothing is done as may bring the courts or the legislature into disrepute and make the people lose faith in these institutions."

The Hon'ble Supreme Court in the case of *Rajendra Sail Vs. Madhya Pradesh High Court Bar Association and Others*, observed that for rule of law and orderly society, a free responsible press and an independent judiciary are both indispensable and both have to be, therefore, protected. The aim and duty of both is to bring out the truth. And it is well known that the truth is often found in shades of grey. Therefore the role of both can not be but emphasized enough, especially in a "new India", where the public is becoming more aware and sensitive to its surroundings than ever before. The only way of orderly functioning is to maintain the delicate balance between the two. The country can not function without two of the pillars its people trust the most.

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