

JUDGES' INTERACTION WITH MEDIA: UNDERSTANDING THE IMPACT

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Abstract:

Judges are seen for much too long to exercise restraint when it comes to interaction with media. But changing times have observed the dilution of this restraint in the backdrop of absence of any clear cut regulations with respect to Indian judges' interaction with press. The essay studies the possible impacts of judge-media communication, importance of restraint outside court, accommodates varying opinions on the issue and attempts to draw a bar as to what interaction is permissive and what is restrictive. The essay, conclusively has stressed on striking the balance between the culture of judicial restraint and judicial activism in the face-off between judiciary and media. The focus is to allow healthy conversation within the limits of judicial integrity and judicial ethics. The interaction should be a responsible one so that constitutional machinery and public faith in judiciary is not thrown into the wind.

Keywords: Judiciary, media, impact of Judge-media interaction, judicial integrity, judicial restraint, judicial activism, institutional ethics, constitutional machinery, public faith.

This should not have happened but it has and there might be strong reasons for them¹.

-Justice (Retd.) A.K. Ganguly

An year has passed since the surprising interaction of four dissenting senior judges with media caught much attention, bringing the judges under ethical scanner. The judges' so-called media-trial raises a very pertinent question in understanding the changing position of Indian Judicial

¹@ANI, Twitter (Jan. 12, 2018), <https://twitter.com/ANI/status/951770958125187072> (The statement was made in reference to the four senior judges' 'press conference' on January 12 to express their 'great anguish and concern' about the state of affairs within judiciary).

System - is holding out grievances by dissenting judges by involving the media, a rightful act? The fresh wave of accusation of selective mining (bench-fixing) of high profile cases and preparing biased case roster became the staple for media to feed on. Amid all this one thing is clear that the all-time morally upright judiciary is having hiccups in preserving its righteousness. And this has forced everyone in the legal fraternity and beyond to understand and analyse the impact of judges' interaction with media.

Contemporary times have witnessed that judges who talk to media do more harm than good. Judiciary is not a populist platform. The reason the judges have secured tenure and salary protection (even during emergency) is that they don't feel the need to be popular.² A Judicial system is one integrated organic body which is expected to work in unison while carrying out the rule of law and principles of natural justice. A trial by press, electronic media...is a very antithesis of rule of law.³ It is a sad state of affairs that a small number of twenty-four judges⁴ failed to sort their internal issues in private. Indeed, for much too long, apprehensions on opaque⁵ functioning of judiciary has been made but holding a press conference and whistle-blowing against a CJI's arbitrary way of functioning opens more doors of problems than it claims to shut down. In the world of twenty four-seven media, impressions carry far more weight than reality. Now the citizens have realized that the august-body is no more a united house. Such is the impact!

It has been emphasized and re-emphasized many times for judges to give wide berth to media in order to maintain their institutional integrity. The Judge-led activism or revolt hurt the Supreme Court adopted Charter of ethics called 'Restatement of Values of Judicial Life'.⁶ The interaction of Judges with media prima-facie violates the cannon numbered six and nine which mentions- 'a Judge should practice a degree of aloofness consistent with the dignity of his office', and 'a Judge is expected to let his judgments speak for themselves. He shall not give

²The Reporters Committee for Freedom of the Press, *Secret Justice: Judicial Speech* (2004), 4.

³ *State of Maharashtra v. R.J. Gandhi*, A.I.R. 1997 S.C. 398

⁴*List of Supreme Court Judges*, DEPARTMENT OF JUSTICE (Apr.1, 2018), <http://doj.gov.in/appointment-of-judges/list-supreme-court-judges>

⁵Rajdeep Sardesai, *Judiciary has functioned like a cosy, opaque club for too long*, HINDUSTAN TIMES (Jan. 19, 2018), www.hindustantimes.com/columns/our-judiciary-has-functioned-like-a-cosy-opaque-club-for-too-long/story-1sK3Q0phV2ruDbYk6bNRzN.html

⁶Chief Justices Conference of India, *Reinstatement of Values of Judicial Life (Code of Conduct)(1999)*. The Charter serves as a guide to be observed by Judges, essential for independent, strong and respected judiciary, indispensable in the impartial administration of justice.

interviews to the media'. The rationale is to uphold the independence, impartiality and strong foothold of judicial institution.

The Bangalore Principles of Judicial Conduct too has underlined the importance of impartiality not only in decisions but also in procedures.⁷ One such procedure that deals with the judge-media interaction is- 'A judge shall not knowingly, while a proceeding is before, or could come before, the judge, make any comment that might reasonably be expected to affect the outcome of such proceeding or impair the manifest fairness of the process. Nor shall the judge make any comment in public or otherwise that might affect the fair trial of any person or issue'. Therefore any act done or any such activism by a judge in his official or personal capacity which taints or blurs this perception of credibility is to be avoided.

When legal pundits opine that judges should refuse to talk to media-persons, it isn't without substance. 'Falsus in uno, falsus in omnibus', although not wholly true 'but it does lead one to suspicion. It's a universal human experience. If someone lies to you once, how much else can you credit as the truth?'⁸ It not only taints judges' place value but also their face value. When a judge writes scandalous material against judges of the High Courts and the apex court in an open letter, his public utterances turn the judicial system into a laughing stock. The local and even foreign media, unmindful of the damage it is causing to the judicial institution, merrily ride the wave.⁹ Such acts prove a body blow to faith of citizens in the judiciary and interfere in the administration of justice.

It is futile to think of excellence in judiciary unless the judges-howsoever highly or howsoever lowly placed- were to follow the canons of judicial ethics.¹⁰ The participation of a judge, in a feisty debate in a leading newspaper on the merits of one of his own judgments and delivering extra-judicial clarification is uncommon and against the trend of restraint. That the decision of the Court when it is cited as a precedent in subsequent cases, ought to be interpreted on its own terms and not on the basis of any extra-judicial clarifications that may be issued subsequently is the underlying rationale behind the isolation from media. Not only does it raise eyebrows on

⁷Judicial Group on Strengthening Judicial Integrity, *The Bangalore Draft Code of Judicial Conduct*(2002).

⁸Secret Justice: Judicial Speech, *supra* note 2, at 5.

⁹Re, Justice C.S. Karnan v. State, (2017) 7SCC 1. The Justice Karnan episode serves as a cautionary tale.

¹⁰Justice R.C. Lahoti, *Canons of Judicial Ethics*, LAW RESOURCE INDIA (Apr. 17, 2018), indialawyers.wordpress.com/canons-of-judicial-ethics/ in a first M.C. Setalvad Memorial Lecture in Feb, 2005.

the question of individual propriety, but also contain possible portents of the slowly changing nature of Indian higher judiciary.¹¹

To err is to human and a judge being a human isn't a foolproof system in itself. A judge is not a mechanical but an abstract entity which entails the interplay of emotions, concepts, ideologies, passions, predilections, prejudices, philosophy, morality, conscience and what not. Judges cannot escape the current of subjectivity any more than other mortals. 'We may try to see things as objectively as we please. None the less, we can never see them with any eyes except our own', quoted American Justice Benjamin Cardozo in his book *The Nature of the Judicial Process* (1921)¹². It would be something if working of judiciary was *a priori* but it is not the case. Under such circumstances, a judge, howsoever exacting in standards, may get deviated while communicating with media. Even an inadvertent error could prove disastrous. After all, it cannot be our stand that the judicial system of India is so perfect that it is beyond error.

Notwithstanding what is said above, the fact remains that the canons of ethical behaviour can not be straitjacketed. Judges are not mere mechanical entity to follow what Roscoe Pound called *mechanical jurisprudence*. They have right to interpret the laws within the framework of constitutional values. If any judge (having indubious moral record in the past) interacts with media, it cannot be rejected lock, stock and barrel. The act cannot be completely ignored, for Constitution does not belong to one body but there are other stakeholders true to judicial and constitutional values. Whilst recognizing the golden value of judicial silence, there may be times when the judge who speaks out performs a priceless service to the community.¹³

Judges are free to speak generally about the law in scholarly articles (even through social media) and to conduct informational briefings to journalists covering a case, provided they stick to their lane and do not disclose their views on the merits.¹⁴ While the interaction with media helps in exploration of politico-legal relationship and understanding the socio dynamics, there is no way such transparency is deemed as the invitation of corruption or infringement of independence. Imagine the future of laws if the guardian of the law-making and implementing

¹¹Arghya Sengupta, *A case for judicial lockjaw*, THE HINDU (Feb. 27, 2012), <http://www.thehindu.com/opinion/lead/a-case-for-judicial-lockjaw/article2935696.ece>

¹²BENJAMIN CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 13 (Universal Law Publishing Co. Pvt. Ltd. 2011).

¹³Justice Margaret McMurdo, *Should Judges Speak Out Or Shut Up?*, SUPREME COURT OF QUEENS LIBRARY (Apr. 22, 2018), <http://classic.austlii.edu.au/au/journals/QLdJSchol/2001/49.pdf>

¹⁴Secret Justice: Judicial Speech, *supra* note 2, at 3.

body shut out himself completely from media. It will result into lifeless reading of statutes and legal procedures resulting into stalemate where there will be no basic structure, no public interest litigation, no due procedure of law, no curative petition, and no justice. Access to the judge can greatly enhance the quality and accuracy of a reporter's story, provided there is a better line of communication between judges and journalists.¹⁵ As the Court has emphasized even appearances may be of certain importance as 'justice must not only be done, it must also be seen to be done'.¹⁶

Media being the fourth pillar of democracy is made so to give strength and longevity to democracy. It acts as a surrogate for the public. But considering the dubious nature of contemporary media, it would be too much to ask for media to have same access to judges as they do to politicians, celebrities and other who's who. However merely sitting over the issue and speculating over the impact will not benefit anyone. *Prophecy, however honest, is generally a poor substitute for experience.*¹⁷ The nature of relationship of judges with media can be revisited, reinterpreted and revised to an extent where it does not prove deleterious to judicial propriety and integrity. That court best serves the law which recognizes that the rules of law which grew up in a remote generation may, in the fullness of experience, be found to serve another generation badly, and which discards the old rule when it finds the another rule of law represents what should be according to the established and settled judgment of society, wrote Justice Wheeler in *Dwy v. Connecticut*.¹⁸

The judges of England during early twentieth century were strictly governed by the Kilmuir principles that 'So long as a Judge keeps silent his reputation for wisdom and impartiality remains unassailable', the principles though later liquidated under the Lord Chancellor MacKay, extra-judicial silence pursued. On the contrary, in the United States of America, whose Supreme Court is an overtly political institution, notwithstanding Justice Frankfurter's wise advocacy of restraint, judges have a long history of writing or speaking extra-judicially¹⁹. Both the models if followed in letter and spirit can create extremities. While the former (judicial restraint) kills the dynamism inside the judicial institution and makes it a caged-parrot, the latter (judicial activism) disturbs the balance of power between judiciary and executive, and

¹⁵Secret Justice: Judicial Speech, *supra* note 2, at 4.

¹⁶R v Sussex Justices, Ex parte McCarthy (1924) Eng. Rep. 233 (KB).

¹⁷West Ohio Gas Co. v. Public Utilities Commission (No.2), 294 U.S. 79,82 (1935).

¹⁸Dwy v. Connecticut Co., 89 Conn. 74, 99 (1915).

¹⁹Arghya Sengupta, *A case for judicial lockjaw*, THE HINDU, (Feb. 27, 2012), www.thehindu.com/opinion/lead/a-case-for-judicial-lockjaw/article2935696.ece

makes the judiciary pro-political body and affect the principle of separation of power²⁰. Complete activism or complete restraint is not only impossible- it is undesirable.²¹ So blindly following either will not help much. 'Our course of advance...is neither a straight line nor a curve. It is a series of dots and dashes. Progress comes...by successive compromises often between extremes...' ²²

From the above discussion, it can be realized that the interaction of judges with media cannot be gauged through the standards of right or wrong, welcomed or frowned upon, transparent or independent, permissive or restrictive... Before taking sides, the 'nature' and 'degree' of interaction has to be taken into consideration and that it should not violate the grundnorm of judiciary that is delivery of complete justice in all its spheres. The interaction should not be self-immolatory. Judicial independence should not be sacrificed at the altar of executive motive through unwarranted exposure to media. The popular sentiments and passion should not feed the judges. The judiciary, as the Supreme Court has pronounced 'cannot have two standards, one in the court and another outside the court. They must have only one standard of rectitude, honesty and integrity. They cannot act even remotely unworthy of the office they occupy'.²³ This should be the cornerstone of any interaction between judges and the media.

The apolitical image of Indian Judicial System is known and celebrated around the world for its institutional integrity and it is second to none. Even a miniscule act of Judiciary is viewed through magnifying lenses of the media and hence, the world (thanks to globalisation and digitalization). While it is impossible for judge today to completely avoid media, caution must be exercised during judge-media interaction. As sometimes the issue is too abstruse to common public that letting it out will end in fiasco. It is understood that as much as right to accurate reporting and freedom of press is important, the right to fair trial cannot and must not be ignored. To create a balance between the two and inculcate the respect towards legal and working relationship between media and judiciary, periodical organization of workshop

²⁰INDIA CONST. art. 50.

²¹Aharon Barak wrote about restraint and activism in his essay titled- Activism & Self Restraint, which found mention in a book CONSTITUTIONALISM, HUMAN RIGHTS & THE RULE OF LAW (ESSAYS IN HONOUR OF SOLI J. SORABJEE) 239 (Universal Law Publishing Co. Pvt. Ltd. 2005).

²²Benjamin Cardozo, *Selected writings of Benjamin Cardozo*, DIGITAL LIBRARY OF INDIA (Jan.25, 2017), https://archive.org/stream/in.ernet.dli.2015.275703/2015.275703.Selected-Writings_djvu.txt

²³Daya Shankar v. High Court of Allahabad, (1987) 3 SCC 1

See, e.g., Tarak Singh v. Jyoti Basu, (2005) 1 SCC 201 (Integrity is the hallmark of judicial discipline, apart from others. It is high time the judiciary took utmost care to see that the temple of justice does not crack from inside, which will lead to a catastrophe in the judicial-delivery system resulting in the failure of public confidence in the system. It must be remembered that woodpeckers inside pose a larger threat than the storm outside).

including the stakeholders can prove to be a healthy option. Let there be an in-house system-judicial or administrative-to regulate it in addition to the practice of self regulation and self-restraint. This independent system in the form of independent ethics committee will guide the judges on interaction with media and the nature of pronouncements permitted or restricted. The committee should form rules keeping in mind the judge's right to freedom of speech and expression²⁴. The freedom should be subjected to judicial integrity and judicial independence which is affirmed in the oath by judges²⁵ mentioned in third schedule of Indian Constitution that is 'performing the duties' of office 'without fear or favour, affection or ill-will'. This caution can be sensed in the statement of Universal Declaration of Human Rights too while chalking out principles of independent judiciary. It states members of the judiciary are like other citizens entitled to freedom of expression, belief, association and assembly; provided, however, that in exercising such rights, judges shall always conduct themselves in such a manner as to preserve the dignity of their office and the impartiality and independence of the judiciary.²⁶ The formation of judicial ethics enforcement committee will make sure that judges adhere to the principles of independent ethics committee and avoid any bias, partiality or controversy. The case of any violation if arises should be duly reported and recorded. This will not bite upon the doctrine of judicial independence, and self-image, but will enhance it, resulting into matured, harmonious and mutually beneficial judge-media interaction.

²⁴INDIA CONST. art. 19, cl. 1.

²⁵INDIA CONST. art. 124, cl. 6.

²⁶Office of High Commissioner, *Basic Principles on the Independence of the judiciary*, UNITED NATIONS HUMAN RIGHTS (Apr. 21, 2018, 1:39A.M.), <http://www.ohchr.org/EN/ProfessionalInterest/Pages/IndependenceJudiciary.aspx>