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A Judicial Doctrine of Postponement and the Demands of Open Justice

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The doctrine of "postponement" propounded by the Supreme Court with numerous safeguards against possible abuse is not quite immune to arbitrary interpretation. Indeed, it could well become an instrument in the hands of wealthy and influential litigants, to subvert the course of open justice.

Amid much scepticism, the Supreme Court in February took on the ambitious agenda of laying down norms for media reporting on matters under active judicial consideration. It heard a variety of opinions, including a serious suggestion from Additional Solicitor-General Indira Jaising, that all proceedings be televised to ensure that instances of misreporting would not go unnoticed. Others less indulgent towards the judiciary's ambitions, such as senior counsel Shanti Bhushan advised Chief Justice S.H. Kapadia, to simply dissolve the five-judge bench that had initiated the hearings since it was engaged in a futile pursuit. There were some who expressed partial endorsement, but aside from directly aggrieved parties, few who thought that the Supreme Court could arrive at a reasonable set of rules, consistent with the constitutional guarantees on free speech. It was not some deep sympathy for the media that determined this sense of scepticism, but a realisation that correcting one form of excess with another would be corrosive of basic democratic norms.

Undoubtedly chastened by these abundant expressions of doubt, the Supreme Court on September 11 arrived at a final determination that was modest in relation to its initial agenda. Far from a comprehensive set of guidelines on media reporting, the judgment authored by Chief Justice Kapadia chose to propound merely one solitary new principle: of a court-ordained "postponement" of reporting, when a credible case could be made that it would serve the cause of justice.

Postponement and Prior Restraint

"Postponement" is a word that does not have the same numbing impact as "prohibition". But despite the effort to soften the blow, a "postponement" of reporting seemed suspiciously to sound like a measure of "prior restraint" on the right to free speech. In free speech doctrine, "prior restraint" is held to be a vice with no redeeming quality. Individuals in a

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democracy are expected to have the awareness and sense of responsibility to determine what can be said and what not. Corrections could be applied *post facto* in any case where speech is held to be offensive or violative of another's rights. To make a law allowing prior restraint is to cast mature citizens in the role of infants and to appropriate to the government the power of guardianship.

Unsurprisingly, a large part of the Supreme Court judgment is taken up with a consideration of the numerous judicial precedents which have sanctioned the imposition of prior restraints on speech, in particular, narrowly defined cases. In defiance of ordinary understanding, it argues that prior restraint is permitted, though only in certain "exceptional" circumstances even under the absolutist doctrine of press freedom represented by the first amendment to the U.S. constitution. The authority cited here is the 1931 judgment of the U.S. Supreme Court in *Near versus Minnesota*, which is remembered in judicial history as a law which firmly rules out prior restraint except, hypothetically, in a limited number of contingencies where it may serve a broader public purpose: war, gross obscenity, the imminent threat of violence against innocent citizens, and a threat to the foundations of legitimate government. Curiously though, the Supreme Court while taking note of these purely incidental and inconsequential observations in a judicial ruling that argues the case against prior restraint, completely ignores the more authoritative ruling in the 1971 case of *New York Times versus the United States* which prepared the ground for the publication of the Pentagon papers and contributed to a rapid shift in the climate of public consent for the Viet Nam war. Several of the analogies and illustrations cited in the judgment, moreover, would seem more relevant to situations of trial by jury, rather than the "bench trial" system prevalent in India.

Despite finding what it deems to be sanctions in the law for this manner of action – which in less polite terms would be called censorship – the Supreme Court is anxious to establish that its propositions do not yet constitute prior restraint. Rather, they are a part of the necessary balance that has to be established between the various constitutional values, none of which is absolute. The right to free speech, though fundamental, cannot be granted the kind of wide amplitude that would pose a threat to other values. The Supreme Court provides a restatement of the current understanding on article 19 of the Constitution, reading the right to information -- which is not explicitly mentioned – into the intent of the text:

> Freedom of expression ... has a capacious content and is not restricted to expression of thoughts and ideas which are accepted and acceptable but also to those which offend or shock ... It also includes the right to receive information and ideas of all kinds from different sources. In essence, the freedom of expression embodies the right to know.

The value of this restatement is at once qualified by the remark that "free speech (would have), in appropriate cases, .. to correlate with fair trial. It also follows that in appropriate case(s) one right [say freedom of expression] may have to yield to the other right like right

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to a fair trial". *(All phrases within square brackets from the original.)* "Trial by newspaper" the court holds, falls within "the category of acts which interferes with the course of justice or due administration of justice". Articles 129 and 215 of the Constitution, which give the Supreme Court and all High Courts the status of "courts of record" and endow them with authority to punish for contempt, also confer the power to "prevent such acts which interfere, impede or pervert (the) administration of justice". The "presumption of innocence" is held to be a fundamental right. And if

> in a given case the appropriate Court finds infringement of such presumption by excessive prejudicial publicity by the newspapers, then under inherent powers, the Courts of Record *suo motu* or on being approached or on report being filed before it by subordinate court can under its inherent powers under Article 129 or Article 215 pass orders of postponement of publication for a limited period.

This order of postponement is not to be read as a censorship or as prior restraint. Rather, common law provides most courts with the authority to use contempt law to formulate various "neutralising" devices, "such as postponement of the trial, re-trials, change of venue and in appropriate cases even to grant acquittals in cases of excessive media prejudicial publicity". The power of postponement is to be read as precisely this manner of "a neutralising device", or "as a preventive measure to protect the press from getting prosecuted for contempt and also to prevent administration of justice from getting perverted or prejudiced."

Beyond the novelty of the doctrine of "postponement", this judgment adds little to the existing position in law, under which courts can order particular trial proceedings to be held in camera if necessary for ensuring fair procedure, or defer the publication of witness testimony when material harm could ensue to the individual concerned. This position was upheld by the Supreme Court as far back as 1966 in the case of *Naresh Shridhar Mirajkar versus State of Maharashtra*. The Mirajkar case was heard by a bench of nine judges, of whom eight concurred in three separate judgments that the temporary ban on the publishing of testimony of a witness summoned by a weekly magazine in a defamation case was not violative of article 19 of the Constitution. Only Justice M. HIdayatullah dissented, arguing that the imperatives of justice demanded an "open trial" and free and unfettered access to the media.

What the recent Supreme Court judgment does is to make the exception a general principle to which any litigant could seek recourse. The applicant who seeks an order of postponement would of course have to make a clear case that his interests would be prejudiced by unfettered media reporting and create sufficient grounds for "displacing" the "presumption of open justice". An order of postponement moreover, would not be given prior to the fact. Rather, the test would be "that the (actual and not planned) publication

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must create a real and substantial risk of prejudice to the proper administration of justice or to the fairness of trial". Shortly afterwards, the point is further underlined: "Such postponement orders operate on actual publication. Such orders direct postponement of the publication for a limited period".

Rulebook for the Media

The effort to write a rulebook for the media originated in February, when Chief Justice Kapadia was alerted to a news report that revealed an ostensibly privileged communication between two contesting parties. The issue involved an instrument floated by the real-estate and finance conglomerate. Sahara's counsel in a letter to the market regulator, the Securities and Exchange Board of India (SEBI), revealed "without prejudice" that it held assets in real estate and other sectors to secure all deposits mobilised under the instrument. Since the information was conveyed "without prejudice" to the ultimate outcome of the hearings, it could not be deemed to have compromised Sahara's case in any way. If anything, it was a source of reassurance for a few hundred thousand investors in the Sahara instrument, which was unlike anything seen in the Indian markets and did not have regulatory sanction.

For the Supreme Court to have picked this case as the ground for decreeing a wide-ranging set of guidelines for the media was curious. Even more breathtaking was its seeming determination to take on an expansive agenda, by sweeping up all proximate complaints received about media practice and assembling them into a common docket. In bringing back into focus matters -- of which some had been settled by apology, retraction and administrative correction by erring media organisations -- the Supreme Court seemed clearly to be signalling that *ex post* remedies are of little use when media freedom becomes a potential hazard to the administration of justice.

After all its labours though, the Supreme Court has emerged with another form of *ex post* remedy, though one the judiciary will retain the final authority to administer. This could well be a superfluous power, or one that could lend itself to considerable misuse. In restating the need for balancing the right to free speech with other constitutional values, the Supreme Court is clear, under article 141 of the Constitution, that it is laying down law for the entire country. This of course presumes a degree of coherence within the judicial system and consistency in the interpretation of the findings of the highest judicial bench.

Because the ruling of the Supreme Court coincided with a wave of public outrage over the arrest of a young cartoonist and anti-corruption campaigner on sedition charges, a readily available test case is available on the degree to which article 141 is honoured. The sedition clause – article 124A of the Indian Penal Code -- was held *ultra vires* of the fundamental rights in a 1958 ruling by the Allahabad High Court. Four years later, the Supreme Court reinstated it, ruling in the case of *Kedar Nath Singh versus State of Bihar* that it is not to be lightly used and would ordinarily be contrary to the fundamental rights, unless used to deal

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with an imminent threat of violence.

Despite this very clear decision, which should under Article 141 be applicable to the entire country, prosecution under the sedition clause has been multiplying and courts have been acting in ignorance or wilful disregard of the law. There is a dimension of coherence and consistency that has gone missing within the judicial apparatus. Viewed from this perspective, the doctrine of "postponement" propounded by the Supreme Court with numerous safeguards against possible abuse, is not quite immune to arbitrary interpretation. Indeed, it could well become an instrument in the hands of wealthy and influential litigants, to subvert the course of open justice.