THE ROLE OF THE MEDIA IS OF PARAMOUNT IMPORTANCE TO UPHOLD THE RULE OF LAW

A. Introduction

The rule of law is an underlying principle of the Constitution of Mauritius, one of its fundamental tenets.[1] The rule of law has even been described as the citadel, which guards the people against despotism, which guards Government against anarchy.[2] It rests on two fundamental pillars. First it is the submission of all to the law. **..."Be you never so high, the law is above you"**. You will be prosecuted if you steal my watch and it will not matter if you are the Commissioner of Police. There must be equality before the law. The second characteristic of the Rule of Law is the maintenance of an independent judiciary. It lies at the core of the doctrine of separation of powers. The separation of powers in its modern form was articulated by Montesquieu but we owe it also to the English jurist Blackstone who explained the importance of the separation of powers when he wrote in 1765:

> "***Nothing is more to be avoided in a free constitution than uniting the provinces of a Judge and a minister of*** *state".*

The media invariably plays an important role to uphold the rule of law. In our system of government, the executive can exercise an immense amount of power which if left unchecked may be used in an abusive manner. A free and independent media can expose abuses on the part of authorities wherever and whenever it occurs and hold the

[1] Vide *Mahboob v. Government of Mauritius* (1982) MR 135; *Noordally v Attorney-General & ors* (1986) MR 204.
[2] *Mahboob v. Government of Mauritius* (1982) MR 135.

public and private sectors accountable. Eventually it will be for our institutions especially our courts of law to determine the illegality of such abuses and provide for remedial action. This explains why the framers of our constitution had guaranteed as fundamental rights an independent judiciary and the right to free expression in the context of a democracy based on the rule of law.

Constitutional provisions

Section 3 of the Constitution provides that no person will be discriminated in his enjoyment of his right to freedom of expression and reads as follows:

> "*It is hereby recognised and declared that in Mauritius there have existed and shall continue to exist without discrimination by reason of race, place of origin, political opinions, colour, creed or sex, but subject to respect for the rights and freedoms of others and for the public interest, each and all of the following human rights and fundamental freedoms -*
>
> *(a) the protection of the law;*
> *(b) freedom of conscience, of expression…"*

Section 12 is the substantive provision which deals with freedom of expression and reads:

> *"(1) Except with his own consent, no person shall be hindered in the enjoyment of his freedom of expression, that is to say, freedom to hold opinions and to receive and impart ideas and*

information without interference, and freedom from interference with his correspondence.

(2) Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of this section to the extent that the law in question makes provision–

In the interests of defence and... public [order]

For the purpose of protecting the … private lives of persons concerned in legal proceedings, [and].... maintaining the authority and independence of the courts…;

(c) …except so far as that provision or, as the case may be, the thing done under its authority is shown not to be reasonably justifiable in a democratic society."

Neither of these provisions (ss 3 and 12 of the Constitution) provides as extensive protection as the First and Fourteenth amendments of the US Constitution. The protection they provide to the media however is more than sufficient to enable it to play a critical role in a free and democratic society. The right to freedom of expression is the right to hold opinions and to receive and impart ideas and information without interference. It is the right of every citizen of Mauritius. It is not absolute and is subject to a number of qualifications that are reasonably necessary in a democracy. This is not unique to Mauritius.

Whilst freedom of expression was seen to be the "lifeblood of democracy", the Privy Council noted that all rights under Chapter II of our Constitution are subject to the qualifications of:

(a) maintaining the authority and independence of the courts; and

(b) having to be reasonably justifiable in a democratic society.

Over and above those two qualifications, the courts in assessing whether there has been a breach of the freedom of expression will have to consider other factors such: whether such qualification being prescribed by law follows any legitimate aim and whether the interference with the right is proportionate to legitimate aim pursued.

Most international human rights instruments (ICCPR, ECHR) have similar provisions qualifying the right to freedom of expression. Media independence does not, after all, mean the freedom to say what you want about anybody regardless of truth or intent. The media must be conscious that the right to freedom of expression also carries duties and responsibilities of equal importance. Journalists must act responsibly and ascertain the accuracy of their facts before emitting opinions or making adverse comments. If the free and independent media wants to act as a vital public watchdog it must ensure that its information is accurate, reliable and its comments are fair and in the public interests. It is our duty as a society to see to it that the ability of the media to obtain accurate and reliable information is not undermined by unnecessary rules of opacity or secrecy. We must uphold the right of the media to protect its confidential sources. It is one of the most fundamental tenets of press freedom.

Our courts have been loathed to interfere with the right to free expression and in deserving cases made it plain that the threshold of interference is exceptionally high. In the case of **Francois v Le Mauricien Ltd & Ors 2005 SCJ 94**, the Learned Judge found that the author has been fulfilling his constitutional role expected of a free press in a liberal democracy, fulfilling "*its duty … to impart in a manner consistent with its obligations and responsibilities- information and ideas on all matters of public interest*". The same fate was reserved to the plaintiff in the case of **Coindreau L. v Lazer A and Others 2004 SCJ 166** when it held that the respondents' right to freedom of expression and the right of the public to information were relevant considerations. The Judge concluded that the very nature of the press articles is such that they relate to matters which are of public interest and importance and on matters which the public at large has a right to be informed irrespective of whether the person who is aimed in these articles is identifiable or not.

An effective enjoyment of the right to the freedom of expression by the media would involve "responsible journalism." In the case of **Ohsan-Belllepeau & Anor v La Sentinelle Ltd**, the learned judges quoted with approval the observations made by LORD Nicholls in **Bonnick v Morris[2003] 1 AC 300, 309** :

> *"…Responsible journalism is the point at which a fair balance is held between freedom of expression on matters of public concern and the reputations of individuals. Maintenance of this standard is in the public interest and in the interests of those whose reputations are involved. It can be regarded as the price journalists pay in return for the privilege."*

Lord Hobhouse in that same case observed that "*no public interest is served by publishing or communicating misinformation.*"

In addition, if the publisher shows that he has taken necessary steps as a responsible journalist to try and ensure that what is published is accurate and fit for publication, he will be protected. As further pointed out in **Jameel v Wall Street Journal Europe [2006 3 WLR 642]**, "*weight should ordinarily be given to the professional judgment of an editor or journalist in the absence of some indication that it was made in a casual, cavalier, slipshod or careless manner*". Where the complaint relates to one particular ingredient of a composite story, it is stated in Jameel that:

> *"Consideration should be given to the thrust of the article which the publisher has published. If the thrust of the article is true, and the public interest condition is satisfied, the inclusion of an inaccurate fact may not have the same appearance of irresponsibility as it might if the whole thrust of the article is untrue".*

The rule of law depends on a free and independent media and a free and independent judiciary. In a sense, the judiciary depends on a free media to shield itself from any attempt to undermine its authority and independence, including any attempt from the media. The media in turn can count on an independent judiciary to defend its freedom, as long as it acts responsibly.

Our framers of the Constitution were alive to this symbiotic relationship and had provided necessary safeguards to protect the independence of the judiciary to further the rule of law.

Section 12 of the Constitution, expressly provides that the freedom of expression is subject to 'maintaining the authority and independence of the court '. This latter provision constitutes an important safeguard for maintaining public confidence in our courts. It is at the core of a society based on the rule of law.

In a small jurisdiction like ours, our administration of justice can be unnecessarily exposed to abuses with a consequence that the public confidence in our judiciary may be undermined. We have had many examples of such abuses in the past.

In the case of **AG v Times Newspaper Ltd 1974 AC 273** Lord Diplock explained the rationale for protecting the integrity and credibility of our courts in the following passage:

> *" .. in any civilised society it is a function of government to maintain courts of law to which its citizens can have access for the impartial decision of disputes as to their legal rights and obligations towards one another individually and towards the state as representing society as a whole. The provision of such a system for the administration of justice by courts of law and the maintenance of public confidence in it, are essential if citizens are to live together in peaceful association with one another."*

In a landmark case on contempt, **Ahnee v DPP, Privy Council Appeal No. 28 of 1998**, the Privy Council explains why in its opinion there was a need for the offence of scandalising the court in Mauritius:

"...it is permissible to take into account that in a country such as Mauritius, the administration of justice is more vulnerable than in the United Kingdom. The need for the offence of scandalising the court on a small island is greater."

Contempt of court is a generic term descriptive of conduct in relation to particular proceedings in a court of law which tends to undermine that system or to inhibit citizens from availing themselves of it for the settlement of their disputes. Contempt of court may thus take many forms.

We recall that in **Ahnee v DPP**, the then Chief Justice was engaged in an action for defamation against a politician. In an article published in Le Mauricien, it was wrongly alleged that the CJ had improperly fixed the date of the hearing of his own case and had chosen the Judges who were both potential witnesses in the trial of the case.

It is a well established principle that publications that are considered to be scurrilously abusive of a Judge amount to contempt by scandalising the court. The rules of contempt do not exist to protect a judge personally but operate to protect the public interest in the administration of justice.

In the case of **R v Fowler** (Tasmanian Court), the court held that:

"... they have nothing to do with the personal feelings of the Judge and no judge would allow his feelings to have any part in the matter, the power is exercised for the good of the people".

In **Badry v DPP,** it was held that comments upon a judge in his capacity as commissioner on a Commission of Inquiry also fell outside the scope of the offence. The leading case on scurrilous abuse of a judge is the case of **R v Gray (1900) 2 QB 36** where an article in the Birmingham newspaper described the judge as an "*a microcosm of conceit and empty headedness*" adding: "*Mr Justice Darling would do well to master the duties of his own profession before undertaking the regulation of another*".

It is apparent that the offence of scandalising the court represents a significant restriction on free speech and expression. However, the courts were quick to remind us that the path of justice is not immune from criticism and the "*wrong headed are permitted to err therein*" to the extent that the criticism is made in good faith and fair based on reliable and accurate facts.

As Lord Atkin declared in his memorable speech in **Ambard v A-G of Trinidad and Tobago [1936] 1 AC 322 at 335** ("Ambard"):

> *"But whether the authority and position of an individual judge, or the due administration of justice, is concerned, no wrong is committed by any member of the public who exercises the ordinary right of criticising, in good faith, in private or public, the public act done in the seat of justice. The path of criticism is a public way: the wrong headed are permitted to err therein: provided that members of the public abstain from imputing improper motives to those taking part in the administration of justice, and are genuinely exercising a right of criticism, and not acting in malice or attempting to impair the administration of justice, they are immune. Justice is not a*

cloistered virtue: she must be allowed to suffer the scrutiny and respectful, even though outspoken, comments of ordinary men".

Where then do we draw the line between abuse and fair criticism? In **Ahnee v DPP**, the Privy Council recognised that the offence of contempt of court by scandalising the court does not always sit comfortably with the right to freedom of expression under section 12 of the Mauritian Constitution. Despite the above, the necessity for such an offence in a country like ours was felt as follows as quoted in **Ahnee v DPP**:

"*Although there was a tension between freedom of expression and the offence of scandalising the court, the guarantee of freedom of expression in s 12 of the Constitution was subject to qualification in respect of provision under any law 'for the purpose of ... maintaining the authority and independence of the courts' and which was shown to be 'reasonably justifiable in a democratic society'. Given that the offence was narrowly defined and existed solely to protect the administration of justice rather than the feelings of judges and that it was in the public interest and therefore a good defence for judicial misconduct to be subject to exposure and criticism, the offence of scandalising the court was necessary in a democratic society*."

For example, in **Director of Public Prosecutions v Jean France Blais** in 2002, the DPP moved the Court to commit one Blais for contempt for scandalising the Court in a letter addressed to the Attorney General and copied to the Master and Registrar and various Counsel alleging a conspiracy by a Judge and requesting that the latter choose to sell dumplings ("boulettes") instead of sitting at the Supreme Court.

To give an idea of the kind of baseless attack some people choose to bring on judges, I quote from one of Mr Blais' letters:

> "*Je me demande comment vous pouvez juger des gens en Cour Supreme car vous même vous violez la loi, vous donnez des faveurs à des gens qui ne meritent pas et en retour je crois que vous recevez une commission avec eux, alors ça veut dire que vous êtes corrompu .... Imaginez-vous si tous les juges et magistrats sont corrompus comme vous, notre institution de justice sera pire qu'un bordel.*"

A system of justice will struggle to survive if such attacks are tolerated or allowed to go unpunished. And it is precisely to protect the integrity of judicial systems that the law of contempt and the offence of scandalising the Court exist, and are still applied today.

Conclusion

In this short paper, I have argued that the rule of law depends on two fundamental pillars, amongst others, one being an independent judiciary and a free media. This symbiotic relationship between the judiciary and the media remains in my view a paradox. The rule of law depends on a free and independent media and a free and independent judiciary. The judiciary depends on its independence to be able to carry out its functions with impartiality. It can count on the support of a free and independent media to defend itself against an onslaught on its independence from any quarters including the media. The media in turn can rely on an independent judiciary to defend its freedom as long as it acts responsibly.

It is our responsibility as a society to uphold a free and independent media to ensure that it can carry out its work in a responsible manner and to be able to protect its sources of information without which it will not be able to effectively carry out its role as a public watchdog. The media for its part has to assume its duties and responsibilities towards its readers by maintaining standards of impartiality and independence.

Where do draw the line however? Would it be in the public interest to publish the sordid sexual activities of an important public figure or should we protect the individual from such publication on the grounds that such publication would invade his right to privacy.

Satyajit Boolell, SC
Director of Public Prosecutions

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