

**THE PRESS COUNCIL**  
**An Experiment in Guarding**  
**Free Speech**

**Thesis submitted to the Cochin University**  
**of Science and Technology**  
**for the award of the degree of**

**DOCTOR OF PHILOSOPHY**

**By**

**SEBASTIAN PAUL**

**under the supervision of**

**Prof V D Sebastian**

**School of Legal Studies**  
**Cochin University of Science and Technology**  
**Kochi 682 022**

**July 1996**

Prof V D SEBASTIAN  
37/2314-A Valiaveetil  
Palliparambu Road  
Kaloor  
KOCHI 682 017

CERTIFICATE OF THE RESEARCH GUIDE

CERTIFIED that to the best of my knowledge  
the thesis: The Press Council - An experiment  
in guarding free speech, submitted by  
Mr Sebastian Paul, is the record of bona fide  
research carried out by him in the School of  
Legal Studies, Cochin University of Science  
and Technology, under my supervision.



Kochi  
9.7.1996

V D Sebastian  
Research Guide

## CONTENTS

Preface	i
<b>Part One: History, Constitution and Procedure</b>	
1. Freedom from Prior Restraint	1
2. The Concept of a Regulatory Mechanism	24
3. Emergence and Revival of the Press Council	36
4. The Council in Action	49
5. For and Against Sanctions	64
6. Building up a Code of Conduct	81
<b>Part Two: Issues, Problems and Solutions</b>	
7. The Press and Parliament	90
8. Contempt of Court	108
9. Journalists' Sources	122
10. Law of Defamation	134
11. Protecting Privacy	154
12. Right to Know and Right to Reply	181
13. Obscenity, Harmful Publications	212
<b>Part Three: The Press Council Case-Book</b>	
14.1. Advertisers and Advertisements	229
14.2. The Press and the Police	245
14.3. Interference from Within	261
14.4. Accreditation and Freedom	276
14.5. Communal Writings	286
14.6. Right of Reply	298
14.7. Journalistic Impropriety	303
<b>Part Four: Guide, Adviser and Ally</b>	
15. Summing up Findings and Recommendations	315

## **Appendices**

- A. The Press Council Act, 1978, p. 342
- B. Principles for Code of Journalistic Ethics, p. 354
- C. Agra Declaration of Journalists, p. 356
- D. Recommendations of the Press Council on Parliamentary Privileges and Freedom of the Press, p. 358
- E. Recommendations of the Press Council for amending the Contempt of Courts Act, p. 361
- F. Recommendations for amending S. 5 of the Official Secrets Act, p. 363

**Table of Cases**

**Table of Complaints adjudicated  
by the Press Council**

**Bibliography**

## PREFACE

I started the final writing of this thesis, perhaps as a coincidence, on May 3, the day proclaimed by the UNESCO as World Press Freedom Day. The observance of the day was mostly confined to a concise announcement in an insignificant inside corner in some newspapers; others just ignored it. The theme, if not the day, however, deserves a more serious attention at a time when the country is more dissatisfied than ever with its own media.

The exercise brings to mind a 17th century English pamphleteer named John Twyn who published a defence of the revolution. Condemned for treason, he was hanged, cut down while still alive, emasculated, disemboweled, quartered and, presumably to make absolutely sure, beheaded. A great many people today feel that this is just about the treatment appropriate to their journalists. Elsewhere in the world, they are in fact treated almost that way. In 1995, according to the New York-based Committee to Protect Journalists, 51 reporters

and editors were killed in the line of duty. Although it was less than the previous year's 73, 1995, according to CPJ chairperson Kati Marton, marked a growth in the trend of journalists being deliberately targeted for assassination.

Many of the world's governments have enshrined press freedom in their constitutions but feel free to ignore it. The Universal Declaration of 1948 proclaims freedom of expression as an essential human right. But government resistance to it is tenacious. For the most part, the fight against press freedom comes down to politicians protecting themselves and the status quo. The media, they claim, exercise power without responsibility.

After the collapse of the Soviet Union, democracy seemed to be on the march everywhere, together with an independent press. For security and prosperity, the spread of democracy is essential. And democracy is impossible without a free press. Free and responsible, of course. But responsibility is not likely to be taught by

the Twyn treatment or lesser forms of repression.

1. Reasons for the choice of this theme

The Indian press, befitting to the glorious as well as suicidal fight put up by its originator, Augustus Hicky, against the repression of Warren Hastings, is still in the throes of a struggle to carve out a niche for itself in the lively political arena of the country. Threats galore and accusations of the press becoming irresponsible are not stray. Its culmination was the muzzling of the press during emergency. The danger perpetuated by smaller minions persists.

There is no doubt that the press should be responsible. At the same time any external regulation, be in the form of pre-censorship or otherwise, is anathema because of the importation of the Blackstonian concept of press freedom to our Constitution in the light of the U.S. Supreme Court decisions. It was in this context that the Press Council was established in 1968, on the

recommendation of the Press Commission, as a statutory body, to regulate the press from within and to safeguard its freedom. The chequered career of the Council, with a two-year interregnum during emergency, is a novel and unique experiment worth studying. Though the institution of the press council has now become a universal phenomenon, the Indian experience is receiving encomium from other Councils for its effective and trend-setting method of functioning as adjudicator, arbitrator and legislative consultee.

A significant factor which prompted me to choose this theme is the insignificant knowledge or familiarity evinced by the journalists themselves in the functioning of the Press Council as a friend, philosopher and guide of the press. The available literature on the subject is also scanty. Books on press laws are, no doubt, useful for lawyers to track down statutory provisions and judicial precedents; but not much useful to serious students of law and journalism exploring the core area of legal doctrine.



## 2. Previous studies on this topic

A useful study on the institution of Press Council first came from H Phillip Levy whose pioneering work THE PRESS COUNCIL: History, Procedure and Cases, with a preface by Lord Devlin, then Chairman of the British Press Council, was published in 1967. A review of the book was published by Geoffrey Robertson in 1983 under the title PEOPLE AGAINST THE PRESS: An Enquiry into the Press Council. The first Indian study on the subject was done by N K Trikha, a former member of the Press Council, in 1986, almost two decades after the coming into existence of the Council. Trikha's book THE PRESS COUNCIL: A self-regulatory mechanism for the press contains inside knowledge of the working of the Council with an informed critical analysis. Apart from this, the only available material is a series of monographs published by the Indian Law Institute in collaboration with the Press Council. They are Violation of Freedom of the Press (1986), Law of Defamation: Some Aspects (1986), Violation of Journalistic Ethics and Public Taste (1984),

Parliamentary Privileges and the Press (1984), Contempt of Court and the Press (1982) and Official Secrecy and the Press (1982). Rajeev Dhavan's ONLY THE GOOD NEWS (1987) and P. M. Bakshi's PRESS LAW (1986) are valuable additions to the meagre literature on the subject. The quarterly review and the annual report of the Press Council are an enriched source material for our study apart from the occasional newspaper articles and commentaries made by vigilant champions of the freedom of the press like Soli Sorabjee and A. G. Noorani. The umpteen number of decisions so masterfully rendered by our Supreme Court on the basis of the English and American decisions provide the bedrock to sustain the arguments which, I have to confess, tend to be partisan at times with a natural and pardonable tilt in favour of the press.

### 3. Outline, Method and Importance

This work is divided into five sections, with thematically developed chapters for each section. The

first section gives an insight into the process of developing the concept of press freedom and how it was incorporated into our legal philosophy and terminology with a particular meaning and content. The history of the Press Council as a self-regulatory mechanism is narrated in chapter 2. With a world overview, we are coming to the Indian Press Council, its origin, development and composition. The working of the Council is narrated in greater detail with an analysis of the issues like desirability of conferring penal powers on the Council and the desirability of framing a code of conduct for newspapers, news agencies and newsmen.

The second part is devoted to the opinion rendered by the Council in its advisory as well as adjudicatory jurisdiction. The areas of conflict bedevilling the press are identified in self-contained chapters. Those are again divided into categories like press and legislature, press and judiciary, press and executive, press and society, press and individual. Basic problems like right of reply, right to information, protection of the news

source, role of the editor and the threats and possibilities posed by the proposed entry of foreign newspapers are treated in great detail, marshalling out all available material within the pre-fixed parameters of this thesis.

The third part is a case-book. It is only a collection of sort with the intention of giving an insight into the way in which the Council is likely to approach the decision of cases on the subject. These representative cases have been culled out from the annual reports of the Council and have been stated briefly underlining the principles underlying the decisions and observations of the Council.

Part Four will be a critical evaluation of the functioning of the Council. We will examine the positive as well as negative aspects and try to make some practical suggestions for a true and effective functioning of the Council as a self-regulatory mechanism for the press.

Part Five contains recommendations of the Council on important laws affecting the press, its guidelines on various issues, code of conduct suggested by professional bodies and important statutory provisions.

As is clear from the division of the work and its contents, the method that is being followed is expository, analytical and historical. In brief, the whole study will be expository in nature, but being treated from a juridical point of view.

We intend to make the whole study on three working hypotheses: that freedom of the press is absolutely essential for the success of a democracy; that the press should be free and at the same time responsible; and that the only permissible method of controlling the press is the enforcement of self-control. We firmly believe that it is not just the proof of these working principles that is important, but that a conviction about their importance is significant for our freedom and democracy.

This study analyses the role of the Press Council as a champion and guard of free speech. It discusses the extent to which the Council succeeded in achieving its statutory objective of preserving the freedom of the press and maintaining and improving the standards of newspapers and news agencies. It also examines the inherent and in-built weaknesses of the Council and suggests ways and means for restructuring and enlarging its functions.

I wish to express my gratitude to Dr V D Sebastian for the invaluable advice he gave me throughout the preparation of this thesis apart from suggesting the subject itself. I am also greatly indebted to Professor K N Chandrasekharan Pillai, Dean of the Faculty and Head of the School of Legal Studies, Cochin University, for all the affectionate as well as authoritative persuasion which prompted me to complete this work at least at the end of the prescribed period.

S.F.

Part One

HISTORY, CONSTITUTION  
AND PROCEDURE

## CHAPTER 1

### FREEDOM FROM PRIOR RESTRAINT

If I had to choose between having a government without newspapers on the one hand and newspapers without a government on the other hand, I would have no hesitation in preferring the latter.

Thomas Jefferson

I would rather have a completely free press with all the dangers involved in the wrong use of that freedom than a suppressed or regulated press.

Jawaharlal Nehru

1.1 Newspapers of a sort have existed since the Chinese T'ang dynasty - about a 1,000 years ago. Handwritten sheets circulated information around the imperial court. Similarly in Europe, handwritten news sheets were the only means, apart from word of mouth, of passing on details of current events. The earliest known European news sheet is Norwegian, dated 1326.

1.2 When printing - developed in Germany about 1450 - was applied to news sheets, more could be circulated at a lower cost. One printed in Rome in 1493 described



Columbus's recent voyage to the New World. News sheets were printed only when there was a newsworthy event to be reported.

1.3 The first weekly paper was possibly *Aviso Relation Zeitung*, published in Wolfenbuttel, Germany, by Adolph von Sohne in Europe.<sup>1</sup>

1.4 In the 19th century, the political influence of newspapers earned British journalists the tag 'the fourth estate,' recognising the power they shared with the traditional three estates of the nation - church, nobility and common people.<sup>2</sup>

1.5 The first English newspaper was started in London in 1621 by Nathaniel Butter. His paper - which never had a fixed title - appeared more or less weekly. Even in that rudimentary stage, the press was not considered as a neutral vehicle for the balanced

---

<sup>1</sup>. The Inventions That Changed The World: The Reader's Digest Association Limited (London, 1982) at 187.

<sup>2</sup>. What Thomas Carlyle wrote about the British Government a century ago has a curiously contemporary ring:

Burke said there were Three Estates in parliament; but, in the Reporters' Gallery yonder, there sat a Fourth Estate more important far than they all. It is not a figure of speech or witty saying; it is a literal fact - very momentous to us in these times.

discussion of diverse ideas. Instead, the free press meant organised, expert scrutiny of government. The press was a conspiracy of the intellect, with the courage of numbers. This formidable check on official power was what the British Crown had feared: the press was licensed, censored and bedeviled by prosecutions for seditious libel.

### THE DANGER OF PRIOR RESTRAINT

1.6 The British had an effective licensing system beginning in 1530 under Henry VIII. It is in protest against such governmental interference that the concept of freedom of the (printing) press<sup>3</sup> developed in England. That campaign had its crowning glory when Milton wrote Areopagitica in 1644 as a protest addressed to the Long Parliament. It was a time when printing was seen by those at the head of Church and State in Europe as a potential threat to their authority. Many printers faced considerable risks. In the 16th century the Inquisition set itself up in Italy as a censor of books. In England though the notorious Star Chamber was abolished by the Long Parliament in 1641, the licensing system continued. Milton stirred the conscience of the society by exhorting

---

<sup>3</sup>. William Caxton, England's first printer, started work in Westminster in 1476.

that free men must have the 'liberty to know, to utter, and to argue freely according to conscience, above all liberties'.<sup>4</sup> However, the system remained in effect, one way or another, until 1695 when the licesing law expired, and the House of Commons refused to pass a new one. Though the reasons given were technical,<sup>5</sup> the system was killed for practical reasons. Both Torys and Whigs feared that the other party might use such a system to stifle the opposition press, a medium through which both parties at various times had gained considerable support. Hence, the reluctance of members of Parliament to support licensing. Since then there was no further attempt to introduce any previous restraint on the publication of printed matter and by 1784 it was acknowledged in the courts that-

The liberty of the press consists in printing without any previous license, subject to the consequences of law.<sup>6</sup>

---

<sup>4</sup>. J. Milton, Areopagitica, in J. Patrick, ed., The Prose of John Milton 327 (New York: New York University Press, 1968).

<sup>5</sup>. Vide Macaulay, History of England (1872), Vol IV, p. 78.

<sup>6</sup>. R. v. Dean of Asaph, (1784) 3 T.R. 428.

1.7 The reason why 'prior restraint' was obnoxious but not subsequent punishment, was explained by Blackstone thus:

Any form of prior restraint is a fetter on the free will of the people and an attempt to control the liberty of expression by administrative authorities. A subsequent punishment does not put any restraint on the freedom of thought or expression; it only takes account of the abuse of the freedom by punishing anybody who publishes anything which has been made illegal by the law, as injurious to the society. By punishing licentious, subsequent punishment, thus, maintains the liberty of the press.<sup>7</sup>

1.8 Freedom of the press in England is thus the freedom of the press from prior restraint or pre-censorship.

1.9 The struggle for freedom of the press had its greatest triumph when it came to be guaranteed by a written constitution, as a fundamental right. In 1776, the Virginia Bill of Rights asserted:

---

<sup>7</sup>. (1765) 4 Bl. 151 (152); See also Halsbury (4th Ed.) Vol. 18, para 1694.

Freedom of the press is one of the great bulwarks of liberty, and can never be restrained but by despotic governments.

1.10 This was followed by the federal Bill of Rights, incorporated into the U S Constitution by the First Amendment in 1791:

Congress shall make no law ... abridging the freedom ... of the press.

1.11 In setting up the three branches of the Federal Government, the Founders deliberately created an internally competitive system. As Justice Brandeis once wrote:<sup>9</sup>

The [Founders'] purpose was, not to avoid friction, but, by means of the inevitable friction incident to the distribution of the governmental powers among three departments, to save the people from autocracy.

1.12 The primary purpose of the constitutional guarantee of a free press was a similar one: to create a fourth institution outside the government as an additional check on the three official branches. Consider the opening words of the Free Press Clause of the Massachusetts Constitution, drafted by John Adams:

---

<sup>9</sup>. Patterson v. Colorado, (1906) 205 U.S. 454 (462).

The liberty of the press is essential to the security of the state.

1.13 From the Blackstonian concept of absence of previous restraint, imported along with the common law from England, the free press guarantee has acquired a larger and positive content which was summarised by Justice Black in these words:<sup>9</sup>

No purpose in ratifying the Bill of Rights was clearer than that of securing for the people of the United States much greater freedom of religion, expression ... than the people of Great Britain had ever enjoyed ... the only conclusion supported by history is that the unqualified prohibitions laid down by the framers were intended to give to liberty of the press, as to other liberties, the broadest scope that could be countenanced in an orderly society.

1.14 This broader aspect of the freedom of the press today has been formulated judicially<sup>10</sup> in these words:

... the guarantees of freedom of speech and press were not designed to prevent the censorship of the press merely, but any action of the government by means of which it might

---

<sup>9</sup>. *Bridges v. California*, (1941) 314 U.S. 252 (265).

<sup>10</sup>. *Bigelow v. Virginia*, (1975) 44 L.Ed. 2d 600; *Curtis Pub. Co. v. Butts*, (1967) 388 U.S. 130 (150).

prevent such free and general discussion of public matters as seems absolutely essential.

1.15 As Cooley pointed out, mere absence of previous restraints was not enough. Subsequent punishment might also be odious, unless it is subject to constitutional limitations.

... liberty of the press might be rendered a mockery and a delusion ... if, while every man was at liberty to publish what he pleased, the public authorities might nevertheless punish him for harmless publications.<sup>11</sup>

#### AMERICAN VIEW

1.16 Since the United States imported the common law from England, most historians and legal scholars agree that the fathers of the Bill of Rights understood the concept of freedom of the press in the Blackstonian sense of absence of prior restraint.<sup>12</sup> Some persons, such as Hugo Black and Zachariah Chafee, have argued that it precludes a good deal more.<sup>13</sup> Even revisionist historian

---

<sup>11</sup>. Cooley, *Constitutional Limitations*, II, xii, 883.

<sup>12</sup>. *Patterson v. Colorado* (1906) 205 U.S. 454 (462).

<sup>13</sup>. See Zachariah Chafee, Jr., *Free Speech in the United States* (Cambridge, Mass.: Harvard University Press, 1941). In a famous case in 1732, involving an attempt by a royal official in New York to silence criticism of him by a hostile editor, a plea was made that while in England, such criticism would, indeed, be

Leonard Levy agrees that the phrase freedom of the press in the First Amendment was "an assurance that the Congress was powerless to authorize restraints in advance of publication."<sup>14</sup>

1.17 The American courts had little opportunity to explore the problem of prior restraint as the 140 years since the Constitution were free from instances of direct pre-publication censorship. Then came Near v. Minnesota,<sup>15</sup> one of the most important cases of the century. In that case the Supreme Court struck down a Minnesota "gag law" which was used to enjoin H M Near from publishing the Saturday Press unless he could convince the state authorities that his paper would no longer be a "public nuisance". This dramatic example of prior restraint was condemned by Chief Justice Charles Evans Hughes who declared that the chief purpose of the liberty of the press was to prevent previous restraints upon publication.

---

punishable, "America must have her own laws". See, Paul L. Murphy, "Certain Unalienable Rights," Issues and Themes (1975).

<sup>14</sup>. See Leonard W. Levy, "Liberty and the First Amendment: 1790-1800" in Origins of American Political Thought 257 (John P. Roche, ed. 1967).

<sup>15</sup>. 283 U.S. 697 (1931).



1.18 The 1931 Near case, a great hallmark of press freedom, ruled the roost for the next 40 years till another celebrated case arose in 1971 now known as the *Pentagon Papers* case.<sup>16</sup> It was a case in which the U S Supreme Court refused to prohibit the *New York Times* and the *Washington Post* from publishing a series of articles based on classified Pentagon documents on U S involvement in Vietnam. The court held by majority that (1) any prior restraint on a newspaper bears a heavy presumption against it being unconstitutional; and (2) the government must meet a heavy burden of showing justification for such restraint. Later in *Tornillo*<sup>17</sup> it was fairly established that no governmental agency could dictate to a newspaper in advance what it could print and what it could not. Two years later in 1976 the court, after reviewing prior restraint cases (primarily *Near v. Minnesota* and *New York Times v. United States*), again stressed:

The thread running through all these cases is that prior restraints on speech and publication are the most serious and the least tolerable infringement on First Amendment rights.<sup>18</sup>

---

<sup>16</sup>. *New York Times v. U.S.*, 403 U.S. 713 (1971).

<sup>17</sup>. *Miami Herald v. Tornillo*, 418 U.S. 241 (1974).

<sup>18</sup>. *Nebraska Press Association v. Stuart*, 427 U.S. 539.

1.19 In its lead editorial on 1 July 1971, the day after the Supreme Court of the United States had "freed" the Pentagon Papers, the New York Times exulted:

The historic decision of the Supreme Court in the case of the United States Government v. The New York Times and the Washington Post is a ringing victory for freedom under law ... the nation's highest tribunal strongly reaffirmed the guarantee of the people's right to know, implicit in the First Amendment to the Constitution of the United States.

#### INDIA, PRIOR TO INDEPENDENCE

1.20 Since there were no fundamental rights in India prior to Independence, there was no guarantee of the freedom of expression or of the press. The footing of the press was explained by the Privy Council<sup>19</sup> to be the same as in England, namely, that of an ordinary citizen so that it had no privileges nor any special liabilities, apart from statute law.

1.21 However, the history of Indian journalism tells a different story.

---

<sup>19</sup>. Arnold v. Emp., A.I.R. 1914 F.C. 116.

1.22 The first-ever full-fledged newspaper to make an appearance in the country, the Bengal Gazette, also known as the Calcutta General Advertiser and Hicky's Gazette, was launched in Calcutta on 29 January 1780. Highlighting most of the time the vices of the Governor General, Mr Warren Hastings, and his consort, the Gazette, edited and published by the pioneer of journalism in India, Mr James Augustus Hickey, attracted the unbridled wrath of the East India Company and was forced to fold up in 1782 after 26 months of chequered publication.

1.23 The Licensing Act was dead in England in 1694 and by 1784 it was acknowledged in the courts that "the liberty of the press consists in printing without any previous licence, subject to the consequences of law".<sup>20</sup> However, it is a curious riddle that the East India Company, even after it was brought under the direct control of the British Parliament with the passing of the Regulating Act of 1773, was experimenting with the very same obnoxious methods to muzzle the toddling press in India. When Hicky's Gazette was folding up, the editor was in jail and the press was under seizure. Most of the

---

<sup>20</sup>. See the case cited supra note 4.

time Mr Hicky was editing the paper from jail: he was in jail for 16 months though the paper was in existence only for 26 months.

1.24 The first press law in India was the Regulations issued by the Governor General in 1799 which required the submission of all material for pre-censorship by the Secretary to the Government of India. Though pre-censorship was later abolished, an ordinance was promulgated in 1823 introducing 'licensing' of the press under which all matters printed in a press, except commercial matters, required a previous license from the Governor General. The licensing regulations, though replaced by Metcalf's Act in 1835, were reintroduced by Lord Canning's Act of 1857 and it was applied to all kinds of publication, including books and other printed papers in any language, European or Indian.

1.25 The year 1878 saw the passing of the Vernacular Press Act which was specifically directed against newspapers published in Indian languages, for punishing and suppressing seditious writings. It empowered the government, for the first time, to issue search warrants and to enter the premises of any press, even without

orders from any court. Fortunately, it was short-lived, being repealed in 1881.<sup>21</sup>

1.26 The Newspapers (Incitement to Offences) Act, passed in 1908, empowered a magistrate to seize a press on being satisfied that a newspaper printed therein contained incitement to murder or any other act of violence or an offence under the Explosive Substances Act. That Act was followed by a more comprehensive enactment, the Indian Press Act, 1910, directed against offences involving violence as well as sedition. It empowered the government to require deposit of security by the keeper of any press which contained matter inciting sedition, murder or any offence under the Explosive Substances Act, and also provided for forfeiture of such deposit in specified contingencies. The rigours of this Act were enhanced by the Criminal Law Amendment Act of 1913 and by the Defence of India Regulations which were promulgated on the outbreak of the First World War in 1914.

---

<sup>21</sup>. Sisir Kumar Ghosh, the diehard nationalist and founder of Amrita Bazar Patrika, turned his Bengali newspaper into an English daily overnight for evading this restrictive law. The 1878 Act is now best remembered in the annals of this tremendously influential newspaper conglomerate.

1.27 Both the Acts of 1908 and 1910 were repealed in 1922 in pursuance of the recommendations of a committee set up in 1921 to the effect that the contingency in view of which these Acts had been passed was over and that the purposes of these Acts would be served by the ordinary law.

1.28 This benevolence was ephemeral. Infuriated by the launching of the civil disobedience movement in 1931 for the attainment of swaraj, the Government promulgated an ordinance<sup>22</sup> to 'control the press' which was later embodied in the Press (Emergency) Power Act, 1931. Originally a temporary Act, it was made permanent in 1935.

1.29 The 1931 Act imposed on the press an obligation to furnish security at the call of the executive. The provincial governments were empowered to direct a printing press to deposit a security which was liable to be forfeited if the press published any matter by which any of the mischievous acts enumerated in section 4 of the Act were furthered, e.g., bringing the government into hatred or contempt or inciting disaffection towards the government; inciting feelings of hatred and enmity between different classes of subjects, including a public servant to resign or neglect his duty. This system of

executive control and punishment of the press was foreign to democratic England. As pointed out by Durga Das Basu,<sup>22</sup> it was an antiquated revival of the trial by Star Chamber of press offences and the licensing system which English democracy had fought and suppressed. The very preamble of the Act - "for the better control of the press" - was offensive.<sup>23</sup>

#### AFTER INDEPENDENCE

1.30 This in company with the Official Secrets Act and various provisions of the Indian Penal Code and the Criminal Procedure Code provided the queer scenario of press repression in India at the time of Independence which prompted our Constitution-makers to depart from the British pattern and draw inspiration from the 160 years of American experience in the development of press freedom. It is only in consonance with this that from the very beginning, the Indian Supreme Court came to be influenced by American decisions in interpreting Article

---

<sup>22</sup>. Basu, Law of the Press (Prentice-Hall of India Private Limited, New Delhi, 1986), p. 257.

<sup>23</sup>. Some of the clauses of the Act were declared to be repugnant to the provisions of Art 19(2) of the Constitution, as it then stood. Cf. Amarnath v. State, A.I.R. 1951 Punj. 18; Srinivasa v. State of Madras, A.I.R. 1951 Mad. 70; Rama Shankar v. State, (1954) Cr L.J. 1212. The Press Laws Enquiry Committee also recommended repeal of the Act.

19(1)(a) even though while interpreting other provisions of the Constitution, the court expressed reluctance in importing American case-law.<sup>24</sup> The Supreme Court, in the very first case<sup>25</sup> that came up for consideration under Article 19 (1)(a), acknowledged the influence of the U S First Amendment in the incorporation of the right to freedom of speech and expression in our Constitution:

Thus, very narrow and stringent limits have been set to permissible legislative abridgement of the right of free speech and expression and this was doubtless due to the realisation that freedom of speech and of the press lay at the foundation of all democratic organisations, for without free political discussion no public education, so essential for the proper functioning of the process of popular government, is possible. A freedom of such amplitude might involve risks of abuse. But the framers of the Constitution may well have reflected, with James Madison, who was the leading spirit in the preparation of the First Amendment of the Federal U.S.

---

<sup>24</sup>. See K K Venugopal, "Guarding Free Speech, Precedents and Procedures," Span (May 1987), p. 11.

<sup>25</sup>. Romesh Thappar v. State of Madras, A.I.R. 1950 S.C. 124.



Constitution,' that 'it is better to leave a few of its noxious branches to their luxuriant growth, than, by pruning them away, to injure the vigour of those yielding the proper fruits'. - Quoted in *Near v. Minnesota* (283 U.S. 607).

1.31 In the result, the positive trend of American decisions has been followed by our Supreme Court without any inconsistency. The court not only accepted freedom of the press as an integral part of the freedom of speech but gave it the status of a basic pillar of the democratic structure on which the Constitution was built. In Brij Bhushan v. State of Delhi,<sup>26</sup> the court held that the freedom of the press was one of the most valuable rights guaranteed to a citizen by the Constitution. In culmination of this trend, Bennett Coleman & Co. v. Union of India<sup>27</sup> referred to the freedom of the press as "the Ark of the Covenant of the Constitution". Again in Maneka Gandhi v. Union of India,<sup>28</sup> Justice P N Bhagwati set out the basis for giving this right the "preferred position" which the U S Supreme Court had conferred on the freedom of speech and press:

---

<sup>26</sup>. A.I.R. 1950 S.C. 106.

<sup>27</sup>. A.I.R. 1973 S.C.106.

<sup>28</sup>. A.I.R. 1978 S.C. 597.

Democracy is based essentially on free debate and open discussion, for that is the only corrective of governmental action in a democratic set-up. If democracy means government of the people, by the people, it is obvious that every citizen must be entitled to participate in the democratic process and in order to enable him to intelligently exercise his right to making a choice, free and general discussion of public matters is absolutely essential. Manifestly, free debate and open discussion, in the most comprehensive sense, is not possible unless there is a free and independent press. Indeed the true measure of the health and vigour of a democracy is always to be found in its press. Look at its newspapers - do they contain expression of dissent and criticism against governmental policies and actions, or do they obsequiously sing the praises of the government or lionize or deify the ruler? The newspapers are an index of the true character of the government, whether it is democratic or authoritarian. It was Mr Justice Potter Stewart [of the U S Supreme Court] who said: "Without an informed and free press, there cannot be an enlightened people". Thus freedom of the press constitutes one of the pillars of democracy...

1.32 In the Nakkheeran case<sup>29</sup>, while upholding the right of the magazine to publish the autobiography of a condemned prisoner, the Supreme Court categorically proclaimed that any attempt on the part of the State or its officials to prevent the publication of a matter in a newspaper would amount to prior restraint which is a constitutional anathema. At the same time the court felt that the principles emerging from the English and American decisions need some modifications in their application to our legal system because the sweep of the First Amendment to the U.S. Constitution and the freedom of speech and expression under our Constitution is not identical though similar in their major premises.

1.33 There has been similar thinking throughout the democratic world. The Universal Declaration of Human Rights, proclaimed by the United Nations in 1948, has enshrined in Article 19 the right to a free press. It reads:

Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive, and impart information and ideas through any media and regardless of frontiers.

---

<sup>29</sup>. R Rajagopal v. State of T.N., A.I.R. 1995 S.C. 264.

## THE PROBLEM OF ACCOUNTABILITY

1.34 When the freedom of the press is considered, a question arises: Whose freedom is it? According to the Statement of Principles adopted by the American Society of Newspaper Editors,

Freedom of the press belongs to the people. It must be defended against encroachment or assault from any quarter, public or private.<sup>30</sup>

1.35 The Code of Ethics, adopted by the U S Society of Professional Journalists, says:

Freedom of the press is to be guarded as an inalienable right of people in a free society.<sup>31</sup>

1.36 Thus it can be seen that the press is performing an important public function. At the same time the press is not a public institution. As pointed out by Rajeev Dhavan, its ownership pattern, methods of public accountability, channels of promoting equal access to all the members of the public, and working pathology are such

---

<sup>30</sup>. Article II of the Statement of Principles, adopted by the ASNE board of directors, 23 October 1975: this code supplants the 1922 code of ethics ("Canons of Journalism").

<sup>31</sup>. The Code of Ethics adopted by the 1973 annual convention of Sigma Delta Chi.

that it must be treated as a private enterprise. It only performs certain functions which are important to the public. Whereas there is public interest in maintaining certain institutions like judiciary, there is also a public interest in maintaining the freedom of expression of individuals and ensuring that these individuals - whether in the form of the press or otherwise - should be allowed to perform certain functions which are in the public interest.<sup>32</sup> An attempt has been made to try and balance various aspects of the public interest and it is in this context that the problem of accountability assumes importance.

1.37 Increasingly, readers are being given the opportunity to talk back to newspapers, in "op-ed" pages, expanded letters-to-the-editor sections or before the press councils. The Sigma Delta Chi code of ethics supports the philosophy behind these relatively recent developments:

Journalists recognize their responsibility for offering informed analysis, comment, and editorial opinion on public events and issues. They accept the obligation to present such

---

<sup>32</sup>. Dhavan, Contempt of Court and the Press (1982), p.174.

material by individuals whose competence, experience, and judgment qualify them for it.

Journalists should be accountable to the public for their reports and the public should be encouraged to voice its grievances against the media. Open dialogue with our readers, viewers, and listeners should be fostered.<sup>33</sup>

1.38 External regulation especially government action being an unbearable anathema, the golden mean is self-regulation by the profession itself. The first British Royal Commission on the Press had also felt that the means of maintaining proper relationship between the press and the society lay not in government action but in the press itself. It is out of this concern that the concept of a Press Council or a Court of Honour had evolved.

---

<sup>33</sup>. Swain, Reporters' Ethics (1978), pp. 106-07.

## CHAPTER 2

### THE CONCEPT OF A REGULATORY MECHANISM

The sole aim of journalism should be service. The newspaper press is a great power, but just as unchained torrent of water submerges the whole countryside and devastates crops, even so an uncontrolled pen serves but to destroy. If the control is from without, it proves more poisonous than want of control. It can be profitable only when exercised from within.

Mahatma Gandhi

2.1 The concept of a regulatory mechanism for the press had originated in Sweden, the country which contributed the ingenious idea of setting up an Ombudsman with authority to inquire into and pronounce upon grievances of citizens against the executive branch of government. The Swedish Press Council, called the Court of Honour, was set up in 1916, and it is a voluntary body composed of representatives of the press. There is also an Ombudsman of the press who is generally a professional judge. All complaints against the press are first screened by the Ombudsman, and if found worth inquiry, are forwarded to the Press Council for consideration.

2.2 Today there are more than four dozen press and media

councils in various countries. A few of them, including those in India, Italy, the Netherlands and Turkey, have been set up under the statutes. The composition and complexion of the councils differ: the Italian and Dutch Press Councils have nothing to do with publishers and confine their activities to the maintenance of professional standards of journalists. The Netherlands Council consists of two journalists, two non-journalists and a jurist as Chairman. Norway's Press Council also has lay members whereas the Austrian and Burmese Press Councils have no lay members. In Denmark and Germany, the Councils address themselves only to publishers. The Australian Press Council strives to promote the people's right to be well served by a "free, courageous but self-restrained press". In Canada the Press Council "helps to foster a sense of professionalism" as also to set standards and encourage journalists to discuss their problems on an organised basis.

2.3 Free enterprise, as pointed out by H Phillip Levy, is a prerequisite to a free press, and free enterprise in the case of newspapers would generally mean commercially profitable enterprise.<sup>1</sup> However, the claims of society and the claims of commerce have to be

---

<sup>1</sup>. H Phillip Levy, The Press Council: History, Procedure and Cases (New York: Macmillan, 1967), p.8.



reconciled without any government interference. The best way is self-regulation by the profession itself. The means of maintaining the proper relationship between the press and society, as observed by the First Royal Commission in England, lay not in government action but in the press itself.

2.4 The concept of a press council as a self-regulatory mechanism, free from interference and influence of government, has been described as a mechanism for media responsiveness to the public.<sup>2</sup> The MacBride Commission, set up by the UNESCO, has said:

We are convinced that the widespread establishment of such bodies would foster the gradual elimination of news distortion and would encourage democratic participation, both essential ways to future communication.<sup>3</sup>

2.5 However, there is another philosophical view, expounded by John C Merrill of Columbia University and others, that the press councils amount to interference in the freedom of the press. Merrill says:

... the individual journalist should resist any effort to take the decision-making out of the hands of individual medium and invest it in some outside authority. Such outside authorities would include any branches of government, advertisers or pressure groups, including press councils, the professional

---

<sup>2</sup>. Sandman, Rubin and Sachman, Media, p.8.

<sup>3</sup>. Many Voices, One World, p. 248.

organisations or societies of any kind.<sup>4</sup>

2.6 This radical libertarian view is not shared by many. Describing the Press Council as a buffer between the press and the public, Justice Mudholkar, first Chairman of the Press Council of India, says:

It is the Press Council that the journalist, the proprietor, the government and ordinary newspaper reader can look up to for safeguarding the freedom of the press. It is the Council and the Council alone that can be the guardian of the press in this country. If at any time the Council chooses to remain dormant one would say that the freedom of the press is in danger.<sup>5</sup>

Another Chairman of the Council, Justice A N Grover, considers the role of the Press Council as "essentially to be of an impartial arbitrator on issues affecting flow of information in general and the press freedom in particular".<sup>6</sup>

### GENESIS IN BRITAIN

2.7 It was the British Press Council, established in 1953, which served as a model and provided an impetus for the setting up of such councils in many countries in the sixties.<sup>7</sup> The idea of establishing such a council can be traced to the Report of the Royal Commission on the

---

<sup>4</sup>. Merril, The Imperatives of Freedom: A Philosophy of Journalistic Autonomy, p.12.

<sup>5</sup>. Mudholkar, Press law, Tagore Law Lectures, p. 127.

<sup>6</sup>. The Press Council of India Review, April 1980.

<sup>7</sup>. The British Press Council was abolished and the Press Complaints Commission came into being on 1 January 1991. The main difference between the Press Council and the Press Complaints Commission is that while the Press Council was also responsible for the preservation of the freedom of the press, the Press Complaints Commission has only to ensure a decent standard of conduct by British newspapers. Besides, the Commission, while dealing with complaints against the press, is to be guided by a code of conduct.

Press, presented to the British Parliament in 1949. The Commission was appointed in 1947 with Sir David Ross of Oxford University as its Chairman to inquire into the finance, control, management and ownership of the press with the object of "furthering the free expression of opinion through the press and the greatest practical accuracy in the presentation of the news". Though it was generally agreed that the British Press was inferior to none in the world, the Commission found much to criticise. Pointing out the fact that a newspaper is produced by a profession grafted on to a highly competitive industry, the Council found that the ideals of the profession could only be realised within the conditions set by the industry. Caught betwixt the delicate and difficult problem of reconciling the claims of society and the claims of commerce, the Commission recommended that the press itself should create a central organisation which should be called the General Council of the Press.

2.8 The envisaged objects of the General Council were to safeguard the freedom of the press; to encourage the growth of the sense of public responsibility and public service amongst all engaged in the profession of journalism - that is, in the editorial production of newspapers; and to further the efficiency of the profession and the well-being of those who practise it.

Being a voluntary body to be set up by the press, the Council would depend for its effectiveness on its moral authority rather than on any statutory sanctions.

2.9 The Report of the Royal Commission was debated by the House of Commons on 28 July 1949. Following the debate, the Newspaper Proprietors' Association and the Newspaper Society met to consider how the Press Council envisaged by the Royal Commission was to be established. However, the endeavour was lackadaisical as the press was in no hurry to forge fetters for itself. Two years elapsed before the proprietors were able to produce a draft constitution and another two years passed in debating such questions as what the function of the Press Council was to be, what representation on the Council was to be accorded to the various constituent bodies and whether representatives of the public should be admitted to membership. Perturbed by the unconscionable delay, Mr C J Simmons introduced a private member's bill to establish a Press Council by legislation. Though the Bill made no further progress after the second reading, the steps taken to set up a statutory body seem to have had the desired effect of expediting the work of the joint committee. Finally, the press, more under duress than of its own free will, set up a Press Council of its own making. Had it delayed doing so much longer it was

virtually certain that Parliament would have imposed one by legislation. The press might be divided in its views on a number of matters but was quite united in its opposition and resistance to statutory control, the very negation of freedom of the press. A free press required freedom to govern itself. The creation of the Press Council gave it the opportunity to do so.<sup>8</sup>

2.10 The British Press Council came formally into existence on 1 July 1953.

#### The Constitution of the Council

2.11 In the beginning the British Press Council was a professional body consisting entirely of representatives of the newspaper industry and having as its chairman a member of the press. This departure from the recommendation of the Royal Commission was corrected on the recommendation of the Second Royal Commission (under the chairmanship of Lord Shawcross) when a new constitution was adopted on 1 July 1963. The former title 'The General Council of the Press' was revoked, and the new title 'The Press Council' was substituted. The objects, recommended by the First Royal Commission and set out in the 1953 constitution, were re-adopted with

---

<sup>8</sup>. Supra note 6, p.10.

slight amendments. As they stand today the objects are:<sup>9</sup>

(i) To preserve the established freedom of the British Press.

(ii) To maintain the character of the British Press in accordance with the highest professional and commercial standards.

(iii) To consider complaints about the conduct of the press or the conduct of persons and organisations towards the press; to deal with these complaints in whatever manner might seem practical and appropriate and record resultant action.

(iv) To keep under review developments likely to restrict the supply of information of public interest and importance.

(v) To report publicly on developments that may tend towards greater concentration or monopoly in the press (including changes in ownership, control and growth of press undertakings) and to publish statistical information relating to them.

(vi) To make representations on appropriate occasions to the government, organs of the United Nations and to press organisations abroad.

---

<sup>9</sup>. Art 2 of the Articles of Constitution of the Press Council approved by the Newspaper Proprietors Association Ltd., The Newspaper Society, The Scottish Daily Newspaper Society, Scottish Newspaper Proprietors' Association, The Institute of Journalists, The National Union of Journalists and The Guild of British Newspaper Editors.

(vii) To publish periodical reports recording the Council's work and to review from time to time developments in the press and the factors affecting them.

2.12 Under the 1953 constitution the Council contained no representatives of the public, but consisted of 20 members, all representatives of, and appointed by, the constituent organisations on an agreed allocation. When the Council was reconstituted in 1963, the professional representatives were reduced by five, and five lay members were appointed in their place. In this way the first Royal Commission's recommendation that the Council should consist of 25 members, representing proprietors, newspaper and other journalists, and lay members amounting to 20 per cent including the chairman, was met. The first independent chairman chosen was Lord Devlin, a judge whose exceptional legal talents had taken him to the House of Lords, and who had the further advantage of great experience of public service in other fields. The third Royal Commission suggested in 1977 parity between lay and journalist members in the matter of rights and privileges for the purpose of instilling greater public confidence regarding the impartiality and efficiency of the Council. Since 1977, the stature of the Council has undoubtedly grown year by year, as indeed has the amount of work with which it deals.

## IN THE U.S. AND ELSEWHERE

2.13 In the United States, where any restraint on the press is constitutionally abhorrent, the proposal for the establishment of a press council made by the Hutchins Commission on Freedom of the Press in 1947 was rejected by most news organisations. It was only in 1973 that a National News Council, on the lines suggested by the Hutchins Commission, was created "to serve the public interest in preserving freedom of information and advancing accurate and fair reporting of news". Its members and advisers, numbering 20 in 1975, included five lawyers (two former State Judges), one member of Congress, ten media representatives, one businessman, two civil rights leaders (one from the clergy), and one educator.

2.14 When the Second International Conference on Press Councils and similar bodies was held in Kuala Lumpur in 1989, in compliance with the mandate of the first such conference held in 1985 (also at Kuala Lumpur), 109 delegates participated.<sup>10</sup> This as well as

---

<sup>10</sup>. The representatives included those from Australia, Canada, Czechoslovakia, Denmark, India, Indonesia, Korea, New Zealand, Nepal, Norway, the Philippines, Sweden, Sri Lanka, Thailand, Turkey, Vietnam, the United Kingdom, the United States of America and the Union of Soviet Socialist Republics.



the Third International Conference held in New Delhi in 1992 affirmed the Kuala Lumpur declaration of 1985 and reaffirmed their adherence to the concept of a free and responsible press as enunciated in it. According to that declaration:

1. The right of free speech is a fundamental and inviolable human right. Freedom of the press is an essential corollary of that right. That freedom is neither a proprietary right of publishers nor a privilege of journalists; it is the right of the people to be informed.
  
2. Freedom of the press involves the corresponding duty of responsibility upon the press, involving the acceptance of and compliance with high ethical standards by editors and journalists.
  
3. The institution of press councils and similar bodies is a desirable method whereby the freedom of the press and the corresponding duty of responsibility may be developed and enhanced.
  
4. The method whereby a press council or

similar body is constituted is a matter for each country or region, and will necessarily reflect such factors as its legal traditions, constitution, socio-economic development, culture and civilisation. However constituted, a press council or similar body must be autonomous and independent of government or any other outside interference.

2.15 The Australian Press Council has suggested the constitution of a World Association of Press Councils. Though the Press Council of India does not think it advisable to have such a formal association, because of its financial implications, it feels that informal arrangements like holding periodical international conferences of press councils and other press regulatory bodies would be preferable.<sup>11</sup>

---

<sup>11</sup>. Press Council of India, (1991-92) Ann. Rep. 27.

## CHAPTER 3

### EMERGENCE AND REVIVAL OF THE PRESS COUNCIL

*^Quis custodiet ipsos custodes?* (Who will guard the guards themselves?)  
- a rhetorical query by second century Roman satirist Decimus Junius Juvenalis.

3.1 The first Press Commission of India expressed mixed feelings about the "standards and performance" of the press.<sup>1</sup> It observed that despite shortcomings such as yellow journalism, sensationalism, malicious attacks on public men, indecency and vulgarity, the country possesses a number of newspapers of which any country may be proud of. Many journalists who appeared before the commission assured it that "if the responsibility of regulating the profession is left to the journalists themselves, they would enhance the prestige of the profession and ensure that Indian journalism progresses along healthy lines".<sup>2</sup>

---

<sup>1</sup>. Report of the First Press Commission (1952-54), Chapter XIX, pp 339-56.

<sup>2</sup>. Ibid, p. 352.

3.2 The Commission concluded that the best way of maintaining professional standards in journalism would be "to bring into existence a body of people principally connected with the industry whose responsibility it would be to arbitrate on doubtful points and to censure anyone guilty of infraction of the code." The body recommended by the Commission was a statutory all-India Press Council.<sup>3</sup> Maintaining editorial independence, objectivity of news presentation, fairness of comment, fostering the development of the press, protecting it from external pressures and regulation of the conduct of the press in the matter of such objectionable writing as was not legally punishable were also suggested as the objects and functions of the proposed Council.

3.3 The Press Council of India was first established in 1966 under the Press Council Act, 1965 with the object of "preserving the freedom of the press and of maintaining and improving the standards of newspapers in India".<sup>4</sup> Though the first Press Commission had recommended the setting up of such a statutory and autonomous body as early as in 1954, it came into existence only at the end of a duodecennial exercise of chequered legislation. The Bill introduced in 1956 for

---

<sup>3</sup>. Ibid, pr. 947, p. 352.

<sup>4</sup>. Preamble of the Act.

the constitution of a press council lapsed with the dissolution of the Lok Sabha in 1957 and nothing was done hereafter, despite the continuing demand from various journalist organisations, till 1962 when the National Integration Council called for the immediate establishment of a press council. A fresh Bill was introduced in the Rajya Sabha in July 1963 and, for lack of priority in the government list of parliamentary business, it took two full years for it to become an Act<sup>5</sup> on 12 November 1965. Even then it took another eight months for the actual establishment of the Council on 4 July 1966 with Justice J R Mudholkar, a sitting judge of the Supreme Court, as chairman.

3.4 The very concept of the Press Council emphasises the fact that it is a representative body of the press as a whole; yet it was bogged down in the quagmire of competing sectional claims over its composition. The pulls and counter pulls became so intense as to take the issue of composition to the court. However, the Delhi High Court dismissed the writ petition, rejecting the contention that the Council was not constituted in accordance with statutory provisions. Irked by the controversy, Justice Mudholkar resigned and Justice N Rajagopala Ayyangar, a retired judge of the Supreme

---

<sup>5</sup>. The Press Council Act (34 of) 1965.

Court, took over as Chairman in May 1968.

3.5 The Statement of Objects and Reasons of the Press Council Act, 1965 stated the broad expectations from the Council which was to be "an autonomous body ... and was to regulate its own procedure". It was "to safeguard the liberty of the press, evolve and maintain standards of journalistic ethics, keep under review developments tending towards monopoly and concentration of control and promote research and provide common services for the press". It was to consist of "people principally connected with the press ... as well as a few members ... representing the interests of education, literature, law and culture ... and also public opinion through three members drawn from Parliament. The procedure laid down by Section 4 of the Act for the selection of the Chairman was that he would be nominated by the Chief Justice of India. According to the same Section, 22 other members were to be selected by a three-member selection committee comprising the Chief justice of India, the Chairman of the Press Council and a nominee of the President of India. Of the 22, thirteen were to be from among the working journalists, including not less than six editors who did not own or carry on the business of management of newspapers. Of the editors not less than three were to be of newspapers published in Indian

languages. Six members were to be nominated from amongst persons who owned or carried on the business of management of newspapers. The rest of the three members were to be from among the nominees of the University Grants Commission, Bar council of India and the Sahitya Academy. Three members of Parliament - two from the Lok Sabha - were to be nominated by the presiding officers of the two Houses. The Chairman and members were to hold office for three years. The tasks of the Council were widely enumerated to include helping newspapers to maintain their standards, build a code of conduct, maintain high standards and "foster a due sense of both the rights and responsibilities of citizenship," to encourage a "sense of responsibility and public service among all those engaged in the profession of journalism," to review the concentration of power amongst newspapers and any other factors which may hinder the dissemination of news in the public interest and finally to promote technical research.<sup>6</sup> However, the powers given to the Council were not so extensive. Apart from the power to censure, it had no power except the power to summon and enforce the attendance of witnesses, to require the discovery and production of documents, to receive evidence on affidavits, to issue commission for the examination of witnesses and documents and to require the publisher of

---

<sup>6</sup>. Ibid, s.12.

any newspaper to furnish information on such points as the Council deems necessary.<sup>7</sup>

3.6 A 20-member Advisory Committee with the Minister of Information and Broadcasting as chairman was constituted in 1968 to "study the existing Act under which the Press Council of India has been set up and to suggest such amendments as may be considered necessary to enlist for the Council full and effective cooperation from all sections of the press and the public and to enable it to play its due role in preserving the freedom of the press and improving the standards of journalism in the country which are in conformity with the basic objectives of the Council". Based on the report of the Committee, submitted on 31 October 1968, the Press Council Act was amended in 1970. One of the principal changes was to include news agencies within the scope of the authority of the Press Council.<sup>8</sup> News agencies were also given membership on the Council. The Council was given the responsibility to undertake studies of publications of foreign embassies in India and investigate the extent to which newspapers got subsidies from foreign governments. Endowed with the dual duty of

---

<sup>7</sup>. Id., s.14.

<sup>8</sup>. The Press Council Act, 1970. Ss 9 & 10. (amending Ss 12 and 13 of the Press Council Act, 1965).



defending the press and of improving professional standards, the Council was now required to "promote a better functional relationship among all classes of persons engaged in the production or publication of newspapers or in news agencies". To its power of censure was added the power to "warn and admonish" journalists and editors. Power was given to require the concerned newspaper to publish the results of the Council's inquiry. The Council could requisition public records from offices and courts. But it was made clear that a newspaper editor or journalist could not be compelled to disclose the source of his information. Though the status of the Council was enhanced to that of a chief negotiator in all disputes relating to the press, those disputes between the proprietors and journalists to which the Industrial Disputes Act, 1947 apply were excluded from its purview.

3.7 In this study we are not very much concerned about the 1965 Act, including its amended version of 1970, except to note that the paramount function assigned to the Council was "to help newspapers and news agencies maintain their independence" and "to build up a code of conduct for newspapers and news agencies and journalists in accordance with high professional standards". Enmeshed in factional controversies, the Council could only

proceed very slowly in the initial stages. As soon as it acquired momentum, its career was wound up as part of the legislation against the press during the emergency,<sup>9</sup> on the specious plea that "it was not able to carry on its functions effectively to achieve the objects for which the Council was established". This charge did not hold water because in its decade-long existence, the Council had considered nearly 1,000 complaints - mostly either against or by the State Governments - and an awareness was created in the public mind about the role and functions of the Council. Though the Council did not formally evolve a code of conduct, those adjudications, besides redressing the grievances, helped to build up a good case law serving as a code of conduct. Reserving a detailed post-mortem to subsequent chapters, it would be suffice to point out here that the Second Press Commission had declared that it had done useful work and recommended not only its continuance but a larger ambit of its powers and functions. The abolition of the Council was only a corollary to the official attempt to extinguish the flame of freedom during the black days of 1975-77. And viewed in that context, the Repeal Act of 1976 was nothing but an encomium, albeit incognito, to the commendable performance of the Council. And it is pertinent to repeat the words of the first chairman of

---

<sup>9</sup>. The Press Council Repeal Act, 1976.

the Council:

If at any time the Council chooses to remain dormant one would say that the freedom of the press is in danger.<sup>10</sup>

#### REVIVAL AFTER EMERGENCY

3.8 With the restoration of press freedom after the emergency, the Press Council was resuscitated with the enactment of the Press Council Act, 1978. Though basically a copy of the earlier legislation, the new Act made certain significant changes in respect of the powers of the Council. It was given explicit power to make observations on the conduct of any authority, including the government.<sup>11</sup> As a safeguard against frivolous complaints, the Council was given power to reject a complaint in limine if in the opinion of the Chairman there is no sufficient ground for holding an inquiry.<sup>12</sup> In order to make the Council viable, self-dependent and autonomous, it was given power to levy fees from newspapers and news agencies besides receiving grants

---

<sup>10</sup>. Madholkar, J., Press Law (Tagore Law Lectures, 1975), p. 127.

<sup>11</sup>. The Press Council Act, 1978. Section 15(4).

<sup>12</sup>. Ibid, S. 14. During the three-year term of the fourth Press Council (1988-91), a total of 496 cases were adjudicated while 1,195 were dismissed at the preliminary stage.

from the government.

3.9 The British Press Council, when first formed in 1953, consisted of 20 members, all representing the profession. It continued as an exclusive professional body consisting entirely of representatives of the newspaper industry and having as chairman a member of the press till 1963 when it was restructured to include five lay members in accordance with the recommendation of the Royal Commission. The size of the Council was kept the same and Lord Devlin, an illustrious judge, was chosen (by the press itself) as its first independent chairman.

3.10 The 1965 version of the Indian Press Council consisted of a chairman, nominated by the Chief Justice of India, and 25 other members of whom three were from among persons having special knowledge or experience in the field of education, science, literature, law or culture; and three from among the members of Parliament. In the 1978 Act, the number was raised to 28 besides the chairman. The chairman, instead of being solely nominated by the Chief Justice, has to be nominated by a three-member committee consisting of the Chairman of the Council of States (Rajya Sabha), the Speaker of the House of the People (Lok Sabha) and a person elected by the members of the Council. Of the other 28 members, 13 shall

be nominated from among the working journalists, six shall be from among persons who own or carry on the business of management of newspapers; one from among persons who manage news agencies; three shall be persons having special knowledge or practical experience in respect of education and science, law and literature and culture, nominated respectively by the University Grants Commission, the Bar Council of India and the Sahitya Academy; and the remaining five shall be members of Parliament.

3.11 Though the Indian Press Council closely resembles the British Press Council in many respects, no uniform pattern can be drawn from a comparative study of different press councils functioning in the world. The constitution of the New Zealand Press Council is on the British pattern. The Swedish Court of Honour, the progenitor of modern press councils, has normally a former judge of the Supreme Court as its president; but in Ontario, a former university president is the chairman of the Press Council. Both in the Austrian and Burmese Press Councils, there are no lay members. In Indonesia all the members are chosen by the government for the exclusive purpose of advising the government on press matters. Though the size of the press is as miniscule as its territory, Israel has the largest press council with

a membership of 80. Though no qualification is prescribed for a person to be appointed as chairman of the Press Council in India, taking into account the quasijudicial nature of the duties and responsibilities entrusted to the Council, a retired judge of the Supreme Court has so far always been appointed as chairman.<sup>13</sup>

3.12 The most important function of the Press Council is to adjudicate complaints; the gradual and steady increase in the number of complaints is an indication of the fact that the performance of the Council is being appreciated and recognised by the people who have great faith and confidence in the functioning of the Council. In its first full annual report (1967), the Council described the importance of this function thus:

The Press Council is intended not only to protect the freedom of the press but also the rights of citizens ensuring that they are served by a healthy, non-scurrilous, public-spirited and independent press. Adjudication of complaints against the behaviour of the press and also behaviour of others towards the press thus constitutes the most important function a press council is required to perform.

---

<sup>13</sup>. Mr Justice P B Sawant, a former judge of the Supreme Court, succeeded Mr Justice R S Sarkaria as Chairman of the Press Council of India following the expiry of the second three-year term of the latter on 23 July 1995.

3.13 A study of the Annual Reports would reveal a progressive increase in the institution of complaints and their disposal by the Council in recent years with consequent acceleration of the process of building up a code of conduct for newspapers and newsmen. Norms of ethics have now been extended to new areas. Privacy is a typical example of such extension.

## CHAPTER 4

### THE COUNCIL IN ACTION

4.1 The Press Council with its wide range of responsibilities works through standing committees, the most important of which is the Inquiry Committee. There are six committees: Inquiry Committee (I & II), Selection Committee, Finance Committee, Library Committee and All Purposes Committee.<sup>1</sup> In the matter of functioning through committees, the Press Council of India follows the British Press Council which works through two standing committees: the General Purposes Committee and the Complaints Committee. The General Purposes Committee deals with what has been described as the positive side of the Council's work; this includes keeping under review the law on such matters as censorship, contempt of court and libel, press monopoly and prepare statistical information on these developments. It also handles complaints about the conduct of other people against the press while the Complaints Committee handles the negative

---

<sup>1</sup>. Section 8(1) of the Press Council Act 1978 empowers the Council to constitute from amongst its members any committee for performing its functions.



side of the Council's work, complaints about the conduct of the press.

#### WHO MAY MAKE A COMPLAINT?

4.2 Dispensing with the rigidity of locus standi, any member of the public is entitled to lodge a complaint<sup>2</sup> against a newspaper, news agency, editor, or other working journalist, alleging a breach of the recognised ethical canons of journalistic propriety and taste in the publication or non-publication of a matter.<sup>3</sup> Cases can also be initiated by any member of the public against a professional misconduct of journalists whether they be on the staff of a newspaper or engaged in freelance work. On the contrary, the British Press Council deals with complaints against newspapers, not against individual journalists; the

---

<sup>2</sup>. The Press Council Act, 1978. S 14(1). However, as held by the Council in Dr Satyanarayanan Dave v. Indian Express, (1989-90) Ann. Rep. 111, when the impugned criticism is against any individual, right to reply is restricted to the affected person and no third person has locus standi. The rule of locus standi ensures that the process of the Council shall not normally be invoked at the instance of a person who has no special stake or interest in the matter. See Lalit Mohan Gautam v. Indian Express, (1990-91) Ann. Rep. 122.

<sup>3</sup>. "Matter" means an article, news item, news report, or any other matter which is published by a newspaper or transmitted by a news agency by any means whatsoever and includes a cartoon, picture, photograph, strip or advertisement. Vide Regulation 2(a) of the Press Council (Procedure for Inquiry) Regulations, 1979.

editor accepts responsibility not only for what appears in his newspaper, but also for the behaviour of his staff.

4.3 Limitation of time is provided under regulation 3(1)(f) for filing complaints: within two months in the case of a complaint relating to the publication or non-publication of any matter in respect of dailies, weeklies and news agencies; and within four months in all other cases. In the case of a complaint against an editor or a working journalist, alleging any professional misconduct other than by way of publication or non-publication of any matter, the same shall be lodged within four months of the misconduct complained of. The Council in its discretion may condone the delay. The complaints can be against the press as well as by the press. A newspaper, a journalist or any institution or individual can complain against the Central or a State Government or any organisation or person for interference with the free functioning of the press or encroachment on the freedom of the press.

4.4 Reminiscent of the statutory requirement of issuing notice to the opposite party prior to the launching of the litigation under many enactments, it is a firm rule of the Press Council that before it will

accept a complaint the aggrieved person must seek redress from the editor of the newspaper drawing his attention to what the complainant considers to be a breach of journalistic ethics or an offence against public taste. Such prior reference to the editor affords him an opportunity either to take remedial action or to clarify the position, sometimes to the satisfaction of the prospective complainant.

4.5 Should an aggrieved person fail to obtain satisfaction from the editor, he can then make his complaint to the Press Council.<sup>4</sup> He should enclose with his complaint copies of correspondence with the editor; if no reply has been received from the editor, the fact should be mentioned in the complaint.

4.6 The complainant has, in his complaint, to give the name and address of the newspaper, editor or journalist against whom the complaint is directed. A clipping of the matter or news item complained of, in original, should accompany the complaint. The complainant has to state in what manner the passage or news item or the material complained of is objectionable. He should also supply other relevant particulars, if any.

---

<sup>4</sup>. The complaint may be sent to: The Secretary, Press Council of India, Faridkot House (Ground Floor), Copernicus Marg, New Delhi 110 001.

4.7 In the case of a complaint against non-publication of material, the complainant will, of course, say how that constitutes a breach of journalistic ethics.

4.8 In order to nip vexatious or frivolous complaints in the bud itself, the Council is given the power not to take cognizance of a complaint if in the opinion of the chairman there is no sufficient ground for holding an inquiry.<sup>5</sup>

4.9 The Press Council will not deal with any matter which is sub judice<sup>6</sup>. The complainant has to declare that "to the best of his knowledge and belief he has placed all the relevant facts before the Council and that no proceedings are pending in any court of law in respect

---

<sup>5</sup>. The European Court of Human Rights in Strasbourg is also following a similar practice. Every petition or complaint will be considered first by the European Commission for Human Rights, the investigative arm of the Court. In order to prevent governments having to deal with a vast number of vexatious or unfounded petitions, the Commission has a sub-committee to weed out such cases and to conduct preliminary inquiries. When cases are accepted as bona fide they are first referred to governments, and efforts are made to settle them by friendly negotiations. If these fail, the Commission has the ultimate remedy of referring the case to the Court. See Paul Martin, "Europe's Court of Last Resort," Reader's Digest (Bombay: July 1986), pp. 66-70.

<sup>6</sup>. Dr S. V. Charupure v. Middy, (1989-90) Ann. Rep. 181. Proceedings against the newspaper were dropped by the Council when it was brought to its attention that a suit relating to the impugned report was pending in Bombay High Court. See sec 4(3) of the Act.

of any matter alleged in the complaint". A declaration that "he shall notify the Council forthwith if during the pendency of the inquiry before the Council any matter alleged in the complaint becomes the subject matter of any proceedings in a court of law" is also necessary.

4.10 In Britain, if legal proceedings in respect of the subject matter of a complaint have been instituted or are threatened, the Press Council will defer the complaint until after the proceedings have been concluded or abandoned. If such proceedings are threatened, or if the Council considers they are likely, it will require the complainant either to abandon the proceedings or to wait until they have been disposed of by the court. Where the complainant decides to abandon legal proceedings and proceed with his complaint before the Council, the newspaper is protected from subsequent legal action. The press councils are at best quasi judicial bodies and their proceedings must give way to court proceedings.

4.11 Clement Jones, a former British editor and a member of the British Press Council for eight years, says:

There is also an obligation on the part of the Press Councils not to usurp the courts of law and they should refuse to deal with cases where there is an obvious and serious remedy at law,

unless the complainant gives a clear undertaking not to go to law subsequently, using the Council's adjudication to buttress his legal action.<sup>7</sup>

#### HOW A COMPLAINT IS DEALT WITH

4.12 On taking cognizance of a complaint, the editor or journalist concerned is asked to show cause why action should not be taken against him. After receiving the written statement and other relevant materials from the opposite party, the secretariat of the Council prepares a dossier and places it before the Inquiry Committee. The Committee screens and examines the complaint in necessary details and, if need be, calls for further particulars or documents. The persons concerned are given opportunity to give oral evidence by appearing before the Committee personally or through their authorised representatives. The British Press Council has so far refused to permit legal representation to prevent its proceedings becoming too formal and legalistic. There the proceedings are informal. However, legal practitioners can also be authorised to appear before the Committee and the Council in India.

---

<sup>7</sup>. Trikha, The Press Council: A self-regulatory mechanism for the press (Bombay: Somaiya, 1986), p.41.

4.13 After the Inquiry Committee reaches its decision, the findings and recommendations will be forwarded to the Council, which may or may not accept them. The Committee gives reasons for arriving at the conclusions and submits the entire record of the case to the Council. The Council passes orders giving its decisions on every finding contained in the Committee's report or remits the case to it for further inquiry. Many recommended adjudications are accepted by the Council in view of the fact that the Committee before making any recommendation hardly leaves any room for doubt.

4.14 After a decision in Council is reached a summary of the facts and of the recommendation is released for publication. If the Council thinks it necessary or expedient in public interest so to do it can direct any newspaper to publish in the manner the Council deems fit any particulars relating to an inquiry.

#### Powers of Civil Court

4.15 For the purposes of performing the functions of the Council or holding any inquiry under the Act, it has been provided in Section 15(1) that the Council has the same power throughout India as are vested in a civil

court while trying a suit under the Code of Civil Procedure in respect of:

- (a) summoning and enforcing the attendance of persons and examining them on oath;
- (b) requiring the discovery and inspection of documents;
- (c) receiving evidence on affidavits;
- (d) requisitioning any public record or copies thereof from any court or office;
- (e) issuing commissions for the examination of witnesses or documents; and
- (f) any other matter which may be prescribed.

Section 15(3) further provides that "every inquiry held by the Council shall be deemed to be a judicial proceeding within the meaning of Ss 193 and 228 of the Indian Penal Code". Section 193 deals with fabrication of any evidence in the course of judicial proceedings and section 228 deals with intentional insult or interruption to public servant sitting in judicial proceedings. The legislative intent that the functioning of the Council dealing with any complaint is to be in the nature of a judicial function is made manifestly clear by the various provisions in the Act. However, the lawyers are often told that the Council is not a court of law and the procedure adopted by it is less rigid than the one followed in the courts.

4.16 In a Chandigarh case as well as in the Verghese case, the Council had to threaten the exercise of judicial power to tame recalcitrant respondents. In the case of the Chandigarh journalists, the Government of



Haryana, which had earlier refused to recognise the authority of the Council in the Tribune case, sent its Director of Public Relations to answer the inquiry only upon the threat to use the power to issue summons. In the Verghese case, the Council succeeded to compel the management to produce the complete correspondence exchanged between Mr B G Verghese and Mr K K Birla.

#### PROCEEDINGS ARE OPEN

4.17 Justice should not only be done but should manifestly and undoubtedly be seen to be done. The proper administration of law in accordance with the rules of natural justice requires that proceedings before a judicial or quasi-judicial body should be held openly and in public. Although the principle may not be universally observed, it is undoubtedly recognised throughout the world as being a basic standard by which the quality of legal systems may be judged.<sup>e</sup>

4.18 In Britain the adjudication of complaints is held in private. According to the procedure adopted in 1954, the Press Council would not sit in public or permit reporters to attend its meeting. Commenting on this, the

---

<sup>e</sup>. See J G Starke, "Current Topics: The Right of Freedom of Public Access to Court Proceedings," 63 A.L.J. 155 (1989).

Observer in a leading article of 28 March 1954 said: "Newspapers which claim the right of free reporting in the public interest should be ready to apply the same principle to their own affairs". However, the procedure was not changed when the Council was reconstituted in 1963.

4.19 In India, though every inquiry held by the Press Council shall be deemed to be a judicial proceeding, its proceedings were held *in camera* (till the open court rule was accepted in 1986) and requisite information was released after the matter stood adjudicated. Needless to say this was a negation of the fundamental freedom of information; and the Council itself received a poser on this when S Sahay, editor of the Statesman, requested admittance to the meeting of the Inquiry Committee hearing the complaint of Mr Balram Jhakar, then Speaker of the Lok Sabha, against the Illustrated Weekly of India.<sup>9</sup> Sahay claimed that the public had a right to know not only the final conclusions of the Council but also the submissions of the parties so

---

<sup>9</sup>. 1986 Ann. Rep. 106. The complaint was filed by the Secretary to the Speaker against the Illustrated Weekly of India for publishing a photograph showing Rama Swarup, an alleged spy against whom action under the Official Secrets Act and the Foreign Exchange Regulation Act was taken, with Mr Balram Jhakar. Revising the view taken by the Inquiry Committee, the Council unanimously held that there was nothing wrong in publishing the photograph as it was genuine and newsworthy.

as to be able to judge the soundness or otherwise of the Council's decision since it was on the basis of this case-law that a code of conduct was being built up. According to him:

The Council is entrusted with the task of building up a code of conduct, presumably on a case-law basis. And case-laws can carry conviction only if people are aware of the material and arguments that have shaped the Council's decision. Hence the Council, in my view, owes it to the people and the profession that its proceedings, right from the inquiry stage, are made available to the people through the press.

4.20 In his detailed note, the Chairman, Justice A N Sen, recommended to the Council that it may not, for any valid reason, refuse to permit the press to attend and watch the proceedings before the Inquiry Committee or the Council. The Press Council which has been established for the purpose of preserving the freedom of the press may not itself be considered guilty of denial of legitimate freedom to the press, he said.

4.21 Accepting the recommendations of the Chairman, the Council at its meeting in August 1986 decided as follows:

- i. Members of the public, including the press, should be allowed to attend and watch the

proceedings before the Inquiry Committee and also before the Council;

- ii. In an appropriate case, the members of the Inquiry Committee may decide to exclude all outsiders, including the members of the press, at the hearing of a particular complaint. The decision of the Inquiry Committee should be either unanimous or by consensus failing which the decision by a majority of the members present at the Inquiry Committee meeting should prevail.<sup>10</sup>
- iii. After the hearing of a complaint has been concluded before the Inquiry Committee and when members choose to deliberate amongst themselves about the decision to be recommended to the Council, no outsider, including any member of the press, and even the parties to the proceedings will be permitted to remain present.
- iv. At the time of consideration of the recommendations of the Inquiry Committee by the Council, the Council may also exclude the members of the public, including the press, at the time of mutual discussion and deliberation, if the Council considers it to be fit and proper. Any such decision by the Council, if not unanimous or by consensus, must be by a majority of the members present at the meeting.<sup>11</sup>

4.22 There was no difficulty for the Council to make its proceedings open because neither the Act nor the Regulations states anywhere that the proceedings will be held in private. The fact that the Indian Press Council,

---

<sup>10</sup>. In the constitution of the Alberta Press Council there is a provision in Art 4(c) which reads - "Meetings of the Council shall be open to the public unless a majority of the members present agree otherwise".

<sup>11</sup>. For details of the observations and deliberation of the Council, see 1986 Ann. Rep. 219- 227.

unlike its British counterpart which is an exclusive professional organisation of the journalists, is statutory in nature was also overlooked when earlier Justice N Rajagopala Ayyangar, in his capacity as Chairman of the Council, refused to oblige to a strong plea for permitting the press to report the proceedings in the Verghese case. In 1984, the then Chairman, Justice A N Grover, took strong exception to the publication of proceedings before the Inquiry Committee when the case had not yet been disposed of.

#### DECISIONS BY CONSENSUS

4.23 The decision of the Press Council is taken by majority of votes of members present and voting in any meeting. In the event of the votes being equal, the Chairman shall have a casting vote and shall exercise it. However, the Council generally takes decisions by consensus. Moral authority and universal acceptability being the main sanction of the Press Council, it is advisable that it should always strive to reach decisions by consensus. Recourse to voting will ultimately lead to external lobbying and internal grouping which will greatly diminish the stature and prestige of a very important body. Public trust is important because its decisions are final. They cannot be questioned in a court

of law except by invoking the writ jurisdiction of the High Courts or the Supreme Court.

4.24 The opinion expressed by the Council subserves two useful purposes: (1) That any abuse of press freedom does not pass without anybody noticing it or raising a finger of protest, and (2) that the press should not, in its own interest, indulge in scurrilous or other objectionable writings - writings such as have been considered below the level of recognised standards of journalistic ethics by a fair-minded jury like the Council constituted mainly of the press itself. That much restraint is necessary to preserve a much prized freedom.

## Chapter 5

### FOR AND AGAINST SANCTIONS

5.1 The protracted debate on the desirability of conferring penal powers on the Press Council still lingers without any chance of arriving at a consensus. In the absence of punitive powers, the Council is often denigrated as a toothless tiger; but the detractors fail to understand that this self-regulatory mechanism is rested exclusively on moral authority and public esteem. Apart from stray instances of imposing fine, expelling members or withholding press passes, press councils all over the world are satisfied with the sanction of a public condemnation.

5.2 The British Press Council's main sanction was the obligatory publication of the adjudication in full, though there was no requirement to allocate it any particular position or prominence.<sup>1</sup> This is the case

---

<sup>1</sup>. Lord McGregor of Durriss, Chairman of the Press Complaints Commission (the present version of the British Press Council), was quoted by The Times (London) in September 1991 as saying that no newspaper had yet repeated a violation of the industry's code of conduct. If there was evidence of systematic flouting of the

with most press councils; but in Belgium the Council of Discipline and Arbitration of the General Association of the Belgian Press (a press council of sorts) can expel members or suspend a journalist's press pass. The progenitor of press councils, the Swedish Court of Honour, can impose an administrative fine of skr 1,000 to 3,000 on delinquent newspapers besides requiring them to publish the censure. Except the solitary example of Sri Lanka where the Press Council is functioning as a district court with penal sanctions for its contempt, in almost all other countries where there are press councils the sanction is what might be called self-condemnation by compelling the concerned newspaper to publish the adjudication which has gone against it.<sup>2</sup>

5.3 After examining the issue of penal powers, the First Press Commission of India recommended that the Press Council should have the authority to censure objectionable types of journalistic conduct. Accordingly statutory power was given to the Council to censure any newspaper, editor or journalist<sup>3</sup> if it was proved that the concerned newspaper had offended against the

---

Commission's ruling, he said, the next government could introduce statutory regulation.

<sup>2</sup>. Trikha, *The Press Council: A self-regulatory mechanism for the press* (Bombay: Somaiya, 1986), p 51.

<sup>3</sup>. Sec 13 of the Press Council Act, 1965.



standards of journalistic ethics or public taste or the editor or the working journalist had committed any professional misconduct or a breach of the code of journalistic ethics. This power of the Council was made final and it was made clear in the Act that the decisions rendered by the Council should not be questioned in a court of law, subject to the condition that the Council would not hold an inquiry into a matter which was sub judice. By the Amendment Act of 1970, the Council was given further power to warn or admonish the offender as also to disapprove the conduct of the editor or a journalist. Section 13 of the Act was amended to give the Council an express authority to require any newspaper to publish in such manner as the Council thinks fit any particular relating to any inquiry against a newspaper or news agency, an editor or a working journalist including the respective names. Thus the Press Council of India had the power to warn, admonish, censure or to express disapproval and to require a newspaper to publish its adjudication and those powers remained in tact till the Council was abolished in 1976.

5.4 Under the de novo Act of 1978 an express provision was made enabling the Council to make observations on the conduct of any authority, including

government.<sup>4</sup> But even prior to the incorporation of this provision, it was held in a Bihar case<sup>5</sup> that it should be the duty of the Press Council to inquire into complaints against the government in order to maintain the independence of a newspaper. The court rightly held in that case that the independence of a newspaper would be jeopardised where the government throws out an allurements of serving on governmental bodies of high rank and status to editors who have been freely criticising the policies and acts of the government.<sup>6</sup>

5.5 The Press Council itself felt that it required some minimum powers to enforce its decisions in order to meet a situation arising out of the defiance of the Council's directions by recalcitrant newspapers. At its meeting held in Shimla in 1980 the Council decided to approach the Government to insert an express provision in the 1978 Act empowering the Council to recommend to the authorities concerned denial of certain facilities and

---

<sup>4</sup>. Sec 15(4) of the Press Council Act, 1978.

<sup>5</sup>. State of Bihar v. Press Council of India, A.I.R. 1975 Pat 79.

<sup>6</sup>. The problem still persists compelling the Press Council to set up a committee to make a thorough inquiry about journalists who have availed of personal benefits during the last 10 years. "The Council can publish names of such journalists and even has a right to issue summons against them," the chairman, Justice P B Sawant, told newsmen at Shirdi. Hindustan Times, New Delhi, 29 December 1995.

concessions in the form of accreditation, advertisements, allocation of newsprint or concessional rates of postage for a certain period in cases of newspapers which were censured thrice by the Council. Acceptance of the Council's recommendations was sought to be made obligatory. Justice A N Grover, the then Chairman of the Council, in his evidence before the Second Press Commission in 1981 reiterated the need for conferring penal powers on the Council.

5.6 The Council has undergone three phases of thinking on the subject. Under the chairmanship of Justice Grover penal powers were considered desirable and necessary; under Justice A N Sen's tenure as Chairman, the question had been considered in depth and then buried as any such powers, if given, could be misused by the government; and under Justice Sarkaria's chairmanship the old question of "teeth" for the Council was again resurrected. As such it is worthwhile to examine this question in detail.

5.7 In our constitutional context where a balance is sought to be achieved between competing social interests, any restriction on the freedom of the press shall pass the test of reasonableness envisaged in Art 19(2). The State is empowered to impose by law restrictions on the

freedom of the press; the judiciary is empowered to determine whether in a given case such restriction is reasonable.<sup>7</sup> It is not necessary for the purpose of this study to go into this question in detail. It is sufficient to mention just a few relevant norms derived by courts from Art 19(1)(a) pertaining to freedom of the press. Thus, imposition of pre-censorship on a newspaper,<sup>8</sup> or prohibiting a newspaper from publishing its own views, or those of its correspondents, on a burning topic of the day,<sup>9</sup> or imposing a ban upon entry and circulation of a journal within a state<sup>10</sup> - all such restrictions are regarded as infringement of Art 19(1)(a). To crown it all, the Supreme Court has ruled in the 1994 Nakkeeran<sup>11</sup> case that the government has no

---

<sup>7</sup>. Indian Express Newspapers v. Union of India, (1985) 1 S.C.C. 641. (Paragraphs 82, 91-93).

<sup>8</sup>. Brij Bhushan v. State of Delhi, A.I.R. 1950 S.C. 129.

<sup>9</sup>. Virendra v. State of Punjab, A.I.R. 1957 S.C. 896.

<sup>10</sup>. Romesh Thappar v. State of Madras, A.I.R. 1960 S.C. 124.

<sup>11</sup>. R Rajaopal v. State of T N, A.I.R. 1995 S.C. 264. The facts show that the prison authorities attempted to prevent Nakkeeran, a Tamil weekly, from publishing the autobiography of Auto Shankar, who had been sentenced to death. The announcement that the weekly was about to publish the autobiography alarmed several officials and politicians who feared that their nexus with criminals would be exposed. The Supreme Court held that the government had no authority to impose prior restraint on the press to prevent publication of the alleged matter irrespective of the fact that it is defamatory or not.

legal authority to impose any prior restraint on a newspaper, preventing it from publishing materials defamatory of government officials. Attempts to regulate the commercial aspects of the newspaper were also scoffed at by the Supreme Court as contrary to the constitutional mandate.<sup>12</sup> The courts will thus abhor denial of advertisements and withdrawal of postal concessions as unconstitutional.

5.8 In view of this constitutional protection, the Press Council had to clarify that the proposed punitive restrictions were to be moulded and given effect to within the permissible limits of Art 19(2). It was also decided that the penal powers of the Council would be exercised against newspapers and journalists only if they err three times within a period of three years. The Press Commission (1982) endorsed this suggestion with an enlargement that a newspaper would invite sanction if it attracts adverse notice of the Council thrice, whether by way of disapproval, warning, admonition or censure and not only by censure as suggested by the Council. However, the Council was modest enough to reiterate its earlier stand while commenting on the recommendation of the Commission. Caught between the conflicting views on the

---

<sup>12</sup>. Supra note 5; Sakal Papers v. Union of India, A.I.R. 1962 S.C. 305; Bennett Coleman & Co. v. Union of India, A.I.R. 1973 S.C. 106.

issue, one totally opposed to any punitive power for the Council and the other favouring some teeth for its effectiveness, perhaps it might be as a sort of compromise that the Council had proposed this limitation. Even this limited claim, however, was opposed by sections of the press, particularly the Editors' Guild of India. An apprehension, albeit reasonable, was made that the government might take advantage of these powers to make the Council an instrument to punish inconvenient newspapers and newsmen. As a result of all these criticisms, Justice Grover, while addressing a seminar organised by the Haryana Union of Journalists at Faridabad on 20 August 1983, said the Press Council was a friend of the press and if the press did not want it to have these powers, it would not press for them. Recalling those developments, the Council said in its 1987 Annual Report:<sup>13</sup>

The all purpose committee of the Council was authorised to reconsider the matter. After detailed debates, the Council was of the opinion that, in the prevalent conditions, these powers could tend to be misused by the authorities to curb the freedom of the press. It, therefore, withdrew its demands for extension of penal powers to the Council.

---

<sup>13</sup>. at p. 7.

5.9 The question whether the Council should be clothed with penal power still remains unanswered. Though the history of freedom of the press in England is a triumph of the people against the power of the licenser,<sup>14</sup> a member in the House of Commons, Mr John Gorst, participating in the debate on the setting up of the Third Royal Commission on the Press, went to the extreme extent of wondering "whether the Government will, in the end, have to consider whether there should be a licence to print the newspapers - a licence to print which a press council with a real teeth should have the legitimate opportunity, as a last ditch sanction, to withdraw if a newspaper continually flouted the accepted practices of the day." Fortunately this disillusionment with the powers and functioning of the Press Council was not shared by many; Mr Alex Lyon, another member, said: "The only sanction against him (the editor of a newspaper) is the sanction of exposure to condemnation by the Press Council which condemns in such an inoffensive manner". Drawing an important distinction between the profession of journalism and other professions like law, medicine or accounting, Mr Lyon, a barrister, further said: "It (the Council) has no power to penalise or to restrict the continuation in the profession of a

---

<sup>14</sup>. Vide Macaulay, History of England (1872), Vol IV, p 78; Cf. Lovell v. Griffin, (1938) 303 U.S. 444 (451).

journalist because journalism is not a closed profession in the same way as the legal profession or accountancy with a ruling body which can expel if there is a breach of the code of ethics".<sup>15</sup>

5.10 Contrary to the stand taken by some chairmen of the Indian Press Council, the power of public condemnation has been commended by the lay chairmen of the British Press Council. Lord Devlin said in 1969 that "the theoretical defect that the Press Council was without teeth was cured by the uncoordinated decisions of editors to publish adjudications against their newspapers". According to Lord Pearce "to be compelled to print in your own newspaper your own condemnation is a serious matter".<sup>16</sup>

5.11 The First Royal Commission had occasion to examine the suggestion of setting up a Registration Council, analogous with similar arrangements in the Bar Council and the Medical Council, with powers to keep register of qualified journalists and to check all members for professional misconduct or in the alternative to create a single professional association comprising

---

<sup>15</sup>. Trikha, *The Press Council: A self-regulatory mechanism for the press*, Somaiya Publications, Bombay, 1986, p. 57.

<sup>16</sup>. *Ibid*, pp 57-58.



all staff journalists and vested with power to expel erring members. The suggestion was rejected on the ground that such arrangements would result in the conversion of the profession of journalism into a closed profession. Since journalism is and ought to be an open profession, such closed shop practices are anathema in the context of freedom of expression. Reiterating the faith in the efficacy of the non-punitive nature of the Council's powers, the Third Royal Commission on the Press in 1977 proposed wide ranging powers for the Council including the authority to investigate records of publication or a particular journalist to be able to censure newspapers for publishing contentious opinions based on inaccurate information. For the offending journalist it suggested that the Council should ensure that his humiliation is more obvious. It also suggested that the Council should be given power to take up investigation suo moto into the conduct of a newspaper without waiting for a formal complaint.<sup>17</sup>

5.12 Coming to India, a committee consisting of eminent journalists and jurists which was set up by a seminar held in New Delhi in 1977 under the auspices of the Institute of Constitutional and Parliamentary Studies disfavoured the idea of giving more teeth to the Press

---

<sup>17</sup>. Id, p. 58.

Council than its power to summon individuals and documents. However, a former Chairman of the Press Council, Justice Rajagopala Ayyangar, said from his experience that sanctions like reduction in advertisement quota had become necessary to deal with recalcitrant newspapers which did not care even repeated censure. As for the sanctions against erring State or public authorities, he felt that a strong verdict against them had a telling effect.<sup>18</sup>

5.13 Justice Ayyangar's position, however, was not shared by many. His successor in office, Justice A N Sen, was against arming the Council with "more powers" as the existing provisions were "sufficient" to pull up an erring newspaper. Addressing a news conference at the end of a six-day Council sitting in Calcutta, he said, "I have been all through against further power for the Council".<sup>19</sup>

5.14 Apart from the reasons mentioned in the 1987 Annual Report, Justice Sen had yet another reason for not wanting penal powers. He felt that conferment of powers like imposition of fine or jail or damages would have the effect of usurping the power of the courts and would

---

<sup>18</sup>. Id., p. 59.

<sup>19</sup>. The Hindu, 9 January 1989.

involve the Council in undesirable litigation. If the Council was authorised to impose any punishment which the courts were entitled to award, there would be not only a parallel jurisdiction but all decisions and orders passed by the Council may become the subject-matter of appeal. Notwithstanding the powers conferred on the Council, the right of an individual to approach the ordinary courts will remain in tact. In short, the status of the Council would get compromised which will not be desirable for a body which is meant to foster self-regulation for the press.

5.15 S Sahay, an eminent editor, gives yet another reason why penal powers the Press Commission had in mind are to be viewed with suspicion. He says:

As stated earlier, the penalties suggested were withdrawal of accreditation, denial of advertisements and postal facilities. All these lie, basically, within the province of the government. Any move that would appear to bring the Press Council nearer to the government can only be detrimental to the freedom of the press.

Imagine an obliging press council under a pliant chairman anticipating the whims of the government of the day and merrily punishing

"offending" newspapers and journalists.<sup>20</sup>

5.16 Prem Bhatia, another eminent editor and former member of the Press Council, raises some pertinent questions in this regard.<sup>21</sup> One of these is that resort to moral authority is based on the assumption of a sensitive response by the party against whom such authority is applied. Should newspapers found lacking in propriety refuse repeatedly to let their readers know that their conduct has been found to be faulty, what does one do? In all fairness, unfavourable as well as favourable verdicts should be published as an ethical duty by those concerned. Such action would be a test of the editor's professional conscience. But what if the conscience is put to sleep?

5.17 After analysing the pros and cons of this issue, Dr N K Trikha, a senior journalist and former member of the Press Council, says:

Considering the question in all these aspects one would be inclined to agree with the view that for a press council sanctions should be of a moral nature. At the same time a very strong opinion should be built up in the profession

---

<sup>20</sup>. S Sahay, More Teeth for the Press Council, Newstime, Hyderabad, 21 February 1989.

<sup>21</sup>. Prem Bhatia, Inside the Press Council, Current, Bombay, 15 October 1988.

and amongst the public at large against such newspapers and journalists who violate the code of ethics with impunity, and against governments and other authorities who seek to curb the press and limit its freedom.<sup>22</sup>

5.18 Emphasising the strength and effectiveness of the British Press Council's censure, H Phillip Levy rightly observes:

The obligation and moral duty of a newspaper to publish an adjudication of the Council against itself had the effect of reinforcing the Council's condemnation with the condemnation of the public which the publicity ensured. Nothing can be more disparaging and unwelcome to a newspaper which values its good name than to be obliged to publish to its readers a judgment of the Press Council that it has infringed journalistic standards.

The answer, therefore, to the question whether sanctions are necessary, is that they are not, and the Press Council has proved it. Sanctions of a punitive nature would be as repugnant to the Council as they appeared to the Royal Commission. The role of the Press Council is that of an educator; its method is persuasion not force; its weapon is publicity not punishment; its appeal is to conscience and fair play. In a free press sanctions would be an incongruity.<sup>23</sup>

---

<sup>22</sup>. Supra note 15, p.61.

<sup>23</sup>. See Levy, The Press Council: History, Procedure and Cases, (London: Macmillan, 1967), p. 466.

5.19 The Third International Conference on Press Councils and Similar Bodies, held in New Delhi in October 1992, considered the proposal that press councils be endowed with sanctions and powers in addition to the moral sanctions that they enjoy now. Observing that such a move would militate against the basic premise that the press councils provide a democratic, efficient and inexpensive facility for the hearing of complaints, the conference resolved that the press councils should not seek nor be granted the power to impose additional sanctions.<sup>24</sup>

5.20 It is not easy to conclude whether sanctions are necessary for the Press Council to protect innocent victims from the recalcitrance of newspapers and journalists. Though the arguments arranged in the foregoing paragraphs against the conferment of any such power on the Press Council are valid and acceptable, an impartial observation of the current Indian newspaper scenario will justify the recent assertion made by Justice P B Sawant, the present Chairman, that the Council would assume power to recommend payment of cost and compensation at the time of deciding a case<sup>25</sup>. This will definitely have a salutary effect in toning up the

---

<sup>24</sup>. The Press Council of India Review, 1/1993, pp 187-189.

<sup>25</sup>. Times of India, Bombay, 24 January 1996.

quality of the adjudicatory jurisdiction of the Council, especially in matters relating to defamation. Otherwise it will be poor consolation for a victim to hear a statement of censure from the Council after a long time without any compensation for the damage. In an era where victimology is gaining ground, this is an aspect which the Council cannot overlook. The compensation so ordered can easily be realised by asking the government to insist on the production of a "no dues certificate" from the Council before paying the advertisement bills. The Council, in order to overcome the scorn that it is a mere paper tiger with rubber teeth, should acquire some power beyond the present power of censure. A recommendation made by the Council last year to the Cabinet Secretary (in case of the Central Government) and the Chief Secretary (in case of the State Governments) to cancel advertisements or other privileges if a newspaper was found guilty twice within a span of two years is worthy of consideration and acceptance. That much power is needed for the Council and that much fear is needed to be instilled in newspapermen.

## CHAPTER 6

### BUILDING UP A CODE OF CONDUCT

6.1 Under Section 13(2)(b) of the Press Council Act, 1978, the Press Council is authorised to build up a code of conduct for newspapers, news agencies and journalists in accordance with high professional standards. This mandate was there in the 1965 Act also; though no such code appears yet to have been formulated either by the present Council or by the one which was abolished in 1976. At least to this extent Mrs Indira Gandhi's Government was justified when it repealed the Press Council Act in 1976 on the plea that "it (the Council) was not able to carry on its functions effectively to achieve the objects for which it was established".

6.2 Sweden has a code of ethics and Japan has evolved "the canons of journalism"<sup>1</sup>. The First Press Commission in India was of the view that formulation of a code of journalistic ethics was one of the prime duties and responsibilities of the Press Council. It also

---

<sup>1</sup>. Trikha, The Press Council: A self-regulatory mechanism for the press, (Bombay: Somaiya, 1986), p. 94.



enumerated the principles which it wanted to find place in the code<sup>2</sup>. Though the recommendation of the Press Commission was to the effect that the proposed Press Council should 'formulate' a code of conduct, the Press Council Act of 1965 made a departure from it and instead laid down that the Council should 'build up' a code<sup>3</sup>.

6.3 The first Press Council examined the question of framing a code but on consideration of similar attempts in other countries to frame an exhaustive code noted that such attempts either proved futile or resulted in the mere enumeration of some basic principles in general terms. Although it has stopped short of laying down the comprehensive code of conduct, it has issued guidelines or declarations of principle on various issues which define the limits of acceptable behaviour in these important areas. These along with the principles evolved in the course of adjudication will compensate the lack of a rigid and comprehensive code of journalistic ethics. The Council appears to be satisfied with this performance

---

<sup>2</sup>. Report of the First Press Commission (1954), p. 514.

<sup>3</sup>. Sec 12(2) of the Press Council Act 1965 reads: The Council may, in furtherance of its object, perform the following functions, namely:

(a) x x x

(b) to build up a code of conduct for newspapers and journalists in accordance with high professional standards.

when in its eighth Annual Report (1973) it noted that "in the course of eight years of its functioning, the Council has already built up a fairly sizeable case law to serve as codes in the areas dealt with in the course of its adjudications"<sup>4</sup>.

6.4 In this exercise, the Indian Press Council was emulating the British Press Council which was in favour of evolving a code rather than write it down rigidly. Britain does not have a written constitution; nor do they have a written common law. A declaration on the principles of the Press Council of Britain recognised the advantage of an unwritten code because, just like an unwritten constitution, a flexible code could be easily adapted to the changing circumstances.

6.5 Although the British Press Council always resisted the idea of a comprehensive code of conduct for journalists, it targeted certain specific areas of journalistic activity for the issuance of Declarations of Principle. These take the form of 'mini-codes,' lists of dos and don'ts relating to defined subjects. At present there are three such subjects: privacy, payments (i.e. chequebook journalism) and financial journalism. These Declarations are among the few written guidelines on

---

<sup>4</sup>. Supra, n. 1, p. 95.

ethical standards in journalism, and contravening them might lead to a condemnation from the Council.<sup>5</sup> As pointed out by Lord Devlin, it has, whether it realised it or not, adopted the methods of generations of judges who produced the common law of England. They let it grow out of the decisions they gave.<sup>6</sup>

6.6 Apart from the framing of the 1968 guidelines for avoidance of objectionable communal writing<sup>7</sup> and the formulation of a code of conduct for the duration of the national emergency declared in the wake of the Indo-Pak war of 1971, the Indian Press Council has repeatedly decided against straightaway putting down a general code of conduct for the press. Conforming to this stand, Justice A N Sen, a former Chairman of the Council, says:

A question had often been raised as to whether the Council should lay down a code of conduct for the journalists. The consistent view of the Council has been that it will not be proper to lay down any code of conduct. I am in entire agreement with this view. I feel that defining a code of conduct in clear terms may be

---

<sup>5</sup>. Tom G Crone, Law and the Media, (Oxford: Heinemann Professional Publishing, 1989), pp 177-78.

<sup>6</sup>. H Phillip Levy, The Press Council: History, Procedure and Cases, (London: Macmillan, 1967), p. xi.

<sup>7</sup>. See 1969 Ann. Rep. 99 for Guidelines on Communal Writings issued by the Press Council in November 1968. More details in infra ch. 14.5, p. 286.

impracticable and in my view seeking to lay down the code of conduct which must necessarily be in broad and general terms may have the effect of interference with the freedom of the press. The Council, however, through its various decisions has been laying down the norms of journalistic ethics and propriety.<sup>2</sup>

6.7 Though both the 1965 and 1978 Acts establishing the Press Council spoke of 'building up' a code, the Government always wanted that it should be 'framed'. The non-framing of the code was a convenient alibi for abolishing the Council during the internal emergency. The Information and Broadcasting Ministry's annual report for 1975-76 stated:

The Press Council during the nine years of its existence had failed to curb the tendentious, provocative and unrestrained writings in the press. It was unable to frame a code of conduct for editors and complaints of minor character mostly engaged its attention. Accordingly the Press Council of India was abolished with effect from 1st January 1976.

6.8 During the interregnum, a futile attempt was made by the Government to prepare a code with the connivance of a section of editors. A code drafted by a committee of such editors was presented in the Rajya

---

<sup>2</sup>. Chairman's Foreword, 1986 Annual Report 2.

Sabha on 8 January 1976. Those henchmen, however, made a sudden volte-face after the emergency; some of them opposing even the building up of a code by the Press Council.

6.9 The new Council set up under the 1978 Act considered the question afresh in 1980. A discussion was set in motion on the usefulness of building up, in the course of time, a body of case law based on adjudications and also on the proposal to frame principles with regard to the protection of the right of privacy of the citizen, communal and casteist writings, right to reply and right to correction. The overwhelming opinion was against the formulation of any such principles by the Council and the proposal was shelved.

6.10 The Government was not prepared to leave the matter as such. On 24 August 1982, the Ministry of Information and Broadcasting wrote to the Council asking it to prepare a code of conduct in terms of Sec 13(2)(b) of the Act so that it will be possible to establish an offence against the standards of journalistic ethics, professional conduct or public taste. In view of the limited leeway provided by the statute and taking into account the recommendation of the Second Press

Commission,<sup>9</sup> the Council was of the opinion that while such a code could never be exhaustive it would be more appropriate to build up an acceptable code gradually on the basis of the principles of case law gathered from the adjudications rendered by it from time to time. For this purpose, the Council decided to prepare and publish a compendium on the case-law built up by it so far on the basis of its adjudications.<sup>10</sup> It is gratifying to note that the Third International Conference on Press Councils and Similar Bodies held in New Delhi in October 1992 recommended to other press councils to emulate the Indian pattern.

6.11 Though a written code has the advantage of serving as a ready guide for the journalists as well as

---

<sup>9</sup>. Report of the Second Press Commission (1982), Vol. 1, paras 27, 32.

<sup>10</sup>. Accordingly, a compendium entitled Violation of Journalistic Ethics and Public Taste was brought out by the Council in 1984 in collaboration with the Indian Law Institute based on the decisions rendered under section 14 of the Act. A similar digest prepared on the basis of adjudications falling under section 13 was brought out in 1986 under the title Violation of Freedom of the Press. Law of Defamation: Some Aspects is an excellent monograph published in 1986. Another document A Guide to Journalistic Ethics was also brought out by the Council, containing guidelines sorted out from its adjudications, in an effort to build up a code of conduct. Apart from this, the Council is bringing out an Annual Report and Quarterly Review. An annual index of adjudications and the principles enunciated therein is also published. The annual reports of the British Press Council are entitled The Press and the People.

the authorities, its disadvantages far outweigh the advantages. It can conveniently be used as a tool to coerce the journalists and they can easily be hauled up citing a violation. Journalism is not a closed profession and the imposition of a code of conduct on the analogy of other professional bodies will hamper the cherished freedom of expression. As the Editors' Guild of India pointed out "responsible people cannot be governed by formal codes". The National Union of Journalists (India) adopted the Agra Declaration in 1981 which is described as the credo of journalists.<sup>11</sup> The All-India newspaper Editors' Conference adopted a code of ethics for editors in the early fifties and revised it in 1983.<sup>12</sup> It is needless to say that a voluntary code of conduct is most desirable. As advised by Justice Sen, an editor may conveniently set down certain norms and standards to be followed by his newspaper:

It may be the duty of the editor to lay down such norms as functioning within the norms is expected to be smooth and not to result in any kind of misuse of the freedom of the press.<sup>13</sup>

---

<sup>11</sup>. See Appendix

<sup>12</sup>. See Appendix

<sup>13</sup>. Speech delivered by Justice A N Sen, the then Chairman of the PCI, on 25 October 1986 at the Editors' Conference organised by the Haryana unit of the All-India Small and Medium Newspapers' Federation. For full text, see 1987(2) PCI Review 1.

6.12 But times are changing and the need for a code of ethics is increasingly felt at least in certain areas of journalism. Participating in a seminar on the role of the media in investor protection, Mr Justice P B Sawant, chairman of the Press Council, stated that the Council was contemplating formulation of a code of ethics for financial journalists as it found the existing code inadequate to cover several aspects of business journalism.<sup>14</sup> A committee appointed by the Securities and Exchange Board of India (SEBI) under the chairmanship of Mr Y H Malegam to suggest disclosure norms for offer documents in capital issues had also recommended a code of conduct for financial journalists. As the press is in a position to control the economy and manipulate the market, a code of conduct is absolutely necessary to safeguard the interests of the growing lower middle class investors.

---

<sup>14</sup>. The Times of India, Bombay, 4 December 1995.



Part Two

ISSUES, PROBLEMS  
AND SOLUTIONS

## Chapter 7

### THE PRESS AND PARLIAMENT

All are involved in a Parliament.

John Selden<sup>1</sup>

7.1 The dichotomy between legislative privileges and freedom of the press presents an interesting panorama of paranoiac confrontations and unresolved conflicts. If freedom of the press is the ark of the covenant of democracy,<sup>2</sup> the essence of parliamentary democracy is a free, frank and fearless discussion in parliament. The rule of freedom of speech and debate in Parliament became established in England in the 17th century in the famous case of Sir John Eliot, followed by a declaration in the Bill of Rights in 1688 that the freedom of speech and debate on proceedings in Parliament ought not to be impeached or questioned in any court or place outside Parliament. In India, this freedom is expressly safeguarded by Cls (1) and (2) of Art 105 (in the case

---

<sup>1</sup>. Tabletalk, 1689, 'Parliament'.

<sup>2</sup>. Bennett Coleman & Co v. Union of India, A.I.R. 1973 S.C. 106.

of the State legislature, by Art 194) of the Constitution. It is this freedom which is in direct conflict with a newspaper's right to publish and inform the public.

7.2 When the Constitution of independent India was adopted in 1950, it was provided that so long as Parliament did not enact any law of its own, its privileges would be the same as those of the British House of Commons, including the inherent power to punish for contempt or breach of its privileges. Apart from a cosmetic change for the purpose of a sentimental omission of the reference to the "House of Commons of the United Kingdom," the 42nd as well as the 44th Constitution amendments did not effect any departure from the position prevailing on 26 January 1950. Therefore, whenever a question arose as to whether any privilege of a legislative house had been infringed by a newspaper, invariably it becomes necessary to make a reference either to the bewildering mass of English precedents or to May's Parliamentary Practice to understand the position, practice and precedent obtaining in the House of Commons. The privileges exist to enable members to carry out their work and the object is to safeguard the dignity of each House, allowing members to perform their

duties without fear or favour.<sup>2</sup> In the United Kingdom, a review of this branch of the law was undertaken by the Select Committee of the House of Commons in 1966-67.

7.3 A journalist may encounter the law of Parliament in various ways:

(i) By violating any of the privileges of Parliament, e.g. - relating to publication of its proceedings.

(ii) By violating any of the Rules of Procedure made by a House of the Legislature, in exercise of the power conferred by Arts 118 and 208 of the Constitution, e.g. - relating to admission and withdrawal of strangers.

(iii) By publishing comments or any other statement which undermines the dignity of the House or the confidence of the public in the legislature, and are, accordingly, punishable by Parliament as 'contempt of parliament', which is analogous to the power of a court of record to punish for 'contempt of court'.

7.4 However, like judges, members of parliament are nowadays more resilient and accustomed to strident criticism than they used to be. It is highly unlikely that robust but honest attacks in the media on parliament

---

<sup>2</sup>. Robin Callender Smith, Press Law (1978), pp 259-60.

or its members would lead to findings of contempt - although action might easily be taken over reports which seem to be malicious.

7.5 Two instances can be cited to illuminate this point: When Arun Shourie, executive editor, wrote an article in Indian Express on 4 September 1981 under the title "Pretty Little Lies in Parliament," commenting on the Finance Minister's statement in both houses of Parliament on the issue of association of the Prime Minister, Mrs Indira Gandhi, with a trust floated by A R Antulay, the then Chief Minister of Maharashtra, permission to move a motion of breach of privilege was refused on the ground that "it is not consistent with the dignity of the house to take notice of every case which may technically appear to constitute a breach of privilege".<sup>4</sup> The Chairman of the Rajya Sabha observed on this aspect of the matter:

As regards Shri Arun Shourie, I do not think this is a proper case for action. Newspapers always look into things closely and critically. They must, however, ascertain the facts better. Although the item is phrased in language which is not high-toned or polite, I am going to ignore it. Arun Shourie was doing a journalistic duty according to his lights.

---

<sup>4</sup>. Lok Sabha Proceedings, XXVI Priv. Digest, No. 2, p.8 (1981).

I have said before that the newspapers are the eyes and ears of the public and if every citizen has a right to criticise the actions of others, so also the newspapers whose profession is to turn the light of publicity on the irregularities of public actions.<sup>5</sup>

7.6 Earlier in 1967, S Mulgaokar, editor-in-chief of the Hindustan Times, was held guilty of a breach of privilege and contempt of the house for using the term 'Star Chamber' with reference to Parliament. Mulgaokar did not express regrets; but the committee of privileges took a liberal view. It took note of the disclaimer on the part of the editor that he had any intention to bring the institution of parliament into disrepute and contempt. While the committee felt that he should have unhesitatingly and gracefully expressed an unconditional and unqualified regret, nevertheless, in the totality of the circumstances, it felt it better to ignore the matter "as that would add to the dignity of the house". It was further observed:

The Committee feel that the penal powers of the House for breach of privilege or contempt of the House should be exercised only in extreme cases where a deliberate attempt is made to bring the institution of Parliament into disrespect and undermine public confidence in

---

<sup>5</sup>. Rajya Sabha Proceedings, XXVI Priv. Digest, No. 2, pp 18, 21 (1981).

and support of Parliament.<sup>6</sup>

7.7 These two instances clearly reflect the mature wisdom of a Parliament which on an earlier occasion had condemned R. K. Karanjia, editor of Blitz, for publishing adverse and derogatory comments on J. B. Kripalani for his speech in the Lok Sabha during the defence debate. When the editor was called to the bar of the House and reprimanded, it was the first such instance in the history of our Parliament.

7.8 The penal power of Parliament hanging like a Democles' sword in the slender thread of discretion is not conducive to a free press. As regards the plea of justification put up by Karanjia that the comments in question amounted to fair comment, the Committee of Privileges said:

Nobody would deny the press, or as a matter of fact any citizen, the right of fair comment. But if the comments contain personal attacks on individual members of parliament on account of their conduct in parliament or if the language of the comments is vulgar or abusive, they cannot be deemed to come within the bounds of fair comment or justifiable criticism.<sup>7</sup>

7.9 Despite the grace and indulgence shown by Parliament in the case of Arun Shourie, the Andhra

---

<sup>6</sup>. XIII Priv. Digest, No.1, pp 3-6 (1968).

<sup>7</sup>. V Priv. Dig., No.2, pp 28-36 (1961).

Pradesh Legislative Council preferred to remain adamant in getting Ramoji Rao, Chief Editor of Eenadu, before the bar of the House for admonishing him on the charge that he had committed a breach of privilege and contempt of the House by commenting in the daily on 9 March 1983 on the proceedings of the Council under the headline 'Peddalu Golaba' (elders' commotion). The intervention of the Supreme Court further infuriated the Council and the rapid developments were reminiscent of the conflict of the legislature and the judiciary in the Keshav Singh case.<sup>8</sup> Though at one point of time it appeared that it would lead to a major constitutional crisis, it was avoided by the tactful handling of the situation by the Chief Minister, N T Rama Rao, who advised the Governor to prorogue the Council on 30 March 1984.<sup>9</sup> Again it was 'privilege' which served as the atrocious cover for the Tamil Nadu Legislative Assembly sending to jail, in April 1987, the editor of Ananda Vikatan for daring to publish a cartoon which did not even name specific legislators or insinuate identities.

7.10 The experience of the exercise of legislative privileges by the legislatures in India until now will

---

<sup>8</sup>. In re Under Article 143 of the Constitution of India, A.I.R. 1965 S.C. 745.

<sup>9</sup>. See, M P Jain, Parliamentary Privileges and the Press (Bombay: N M Tripathi, 1984), pp 113-114.



show that it is neither expedient nor advisable to confer such absolute powers on them. After a review of the privilege cases handled by the various legislatures, the First Press Commission reported in 1954 that some of the cases disclose "over-sensitiveness on the part of the legislatures to even honest criticism". The Commission went on to observe:

The press, as a whole, is anxious to maintain and enhance the dignity and prestige of our courts and legislatures and recognises that within the precincts of the Assembly hall the presiding officer's ruling is supreme and the freedom of the members absolute. It is, therefore, all the more necessary that the legislatures should respect the freedom of expression where it is exercised by the press within the limits permitted by law, without imposing additional restrictions in the form of breach of privileges unless such restrictions are absolutely necessary to enable them to perform their undoubtedly responsible duties. No one disputes that parliament and state legislatures must have certain privileges and the means of safeguarding them so that they may discharge their functions properly but like all prerogatives the privilege requires to be most jealously guarded and very cautiously exercised. Indiscriminate use is likely to defeat its own purpose. The fact that there is no legal remedy against at least some of the punishments imposed by the legislature should make them all the more careful in exercising their powers, privileges

and immunities.<sup>10</sup>

7.11 Though 1954 was too early an year to make a comprehensive assessment and objective evaluation, it is pertinent to note an important suggestion made by the Press Commission:

It would therefore be desirable that both Parliament and state legislatures should define by legislation the precise powers, privileges and immunities which they possess in regard to contempt and the procedure for enforcing them ... Articles 105 and 194 do contemplate enactment of such a legislation and it is only during the intervening period that Parliament and state legislatures have been endowed with the powers, privileges and immunities of the House of Commons.<sup>11</sup>

7.12 Reiterating this suggestion, the Second Press Commission said:

We think that from the point of view of freedom of the press it is essential that the privileges of parliament and state legislatures should be codified as early as possible.<sup>12</sup>

7.13 The intention of the framers of the Constitution was that sooner than later the legislatures should frame their own

---

<sup>10</sup>. Report of the First Press Commission (1954), p. 430.

<sup>11</sup>. Ibid, p. 421.

<sup>12</sup>. Report of the Second Press Commission, Vol 1, p. 53 (1982).

laws and it was only as an interim measure that they were given the privileges of the House of Commons.<sup>13</sup> When Article 105(3) came up for consideration before the Constituent Assembly on 19 May 1949, there was strong criticism against the reference to the privileges of the House of Commons and on behalf of the Drafting Committee, Sir Alladi Krishnaswamy Ayyar said: "If you have the time and if you have the leisure to formulate all the privileges in a compendious form, it will be well and good". He assured the House that "only as a temporary measure, the privileges of the House of Commons are made applicable to this House". This assurance was reiterated by the President of the Constituent Assembly, Dr Rajendra Prasad, when he said on 16 October 1949:

The Parliament will define the powers and privileges, but until the Parliament has undertaken the legislation and passes it the privileges and powers of the House of Commons will apply. So, it is only a temporary affair. Of course the Parliament may never legislate on that point and it is therefore for the members to be vigilant.<sup>14</sup>

7.14 That apprehension became prophetic because

---

<sup>13</sup>. Subba Rao, J., in Searchlight I, A.I.R. 1959 S.C. 395 at 417, expressly characterised the second part of Art 194(3) as "a transitory measure".

<sup>14</sup>. As quoted by Ramakrishna Hegde in his introduction to The Karnataka Bills, published by the Government of Karnataka, 1988.

Parliament never legislated and what was intended to be "a temporary affair" has lasted for more than four decades, the only exception being the futile attempt of Ramakrishna Hegde to codify the privileges, define the offences and prescribe the punishment by introducing the Karnataka Legislature (Powers, Privileges and Immunities) Bill in 1988 during his tenure as Chief Minister of Karnataka.<sup>15</sup>

7.15 It is significant that the Press Council, distressed by this nebulous state of affairs, took up "a study of the question of parliamentary privileges vis-a-vis the press" as soon as it came into being in 1966. In chapter 2 of the second Annual Report (1967), the Council published the results of the study and strongly recommended codification. It said:

The Press Council is convinced that the present undefined state of the law of privileges has placed the press in an unenviable position in the matter of comments on the proceedings of Parliament.

7.16 The undefined boundary of parliamentary privileges which Justice Subba Rao described as 'nebulous'<sup>16</sup> has been a cause of chronic uneasiness for the press. In the absence of a

---

<sup>15</sup>. For full text of the bill, see The Karnataka Bills, published by the Government of Karnataka, 1988.

<sup>16</sup>. Supra n. 13 at p. 419.

precise and unambiguous code, parliamentary correspondents and commentators are scared of treading, albeit unwillingly, on what is often described as 'privileged comms'. In order to get insulated from this latent danger, they may try to tone down their comments which is detriment to the genuine interests of both the press and the legislature.

7.17 It is this danger which prompted the Press Council to repeat in 1982 what it said 15 years ago:

The Council reiterates its view that the privileges of Parliament and State legislatures should be codified in the interest of the freedom of the press.<sup>17</sup>

7.18 This aspect was highlighted by Justice A N Sen, Chairman of the Press Council, at Ahmedabad on 20 January 1987 when he said:

The major constraint on the freedom of the press, as I see it, is the lack of proper and necessary recognition of the right to information by the press ...I am also of the opinion that the privileges of the legislature should be codified to throw sufficient light on what may be considered to be

---

<sup>17</sup>. Recommendations of the Press Council, finalised at its meeting of 28 December 1982. For full text of the recommendations, see supra n. 9 pp 121-23.

acts of contempt and the area of contempt should be clearly demarcated and identified.

7.19 The Supreme Court in M S M Sharma v. S K Sinha<sup>18</sup> observed that if Parliament or a State legislature enacted a law under Articles 105(3) or 194(3) of the Constitution, defining its privileges, that law would be subject to Article 19(1)(a) and could be struck down if it violated or abridged any of the fundamental rights, unless that law could be validly saved under clause (2) of Article 19. As pointed out by Justice A N Grover, a former Chairman of the Press Council, the houses of Parliament or the State legislatures would be most reluctant to codify legislative privileges in view of this constitutional position.<sup>19</sup>

7.20 When a spate of rulings in the Tamil Nadu Assembly came down heavily on the print medium and the editor of the Illustrated Weekly of India was summoned on 20 April 1992 to be reprimanded for an article carried by the weekly sometime in 1991, the Press Council issued a press release on 2 May 1992 reminding all concerned the important recommendations made by it on parliamentary

---

<sup>18</sup>. A.I.R. 1959 S.C. 395.

<sup>19</sup>. Supra note 9, Foreword.

privileges and freedom of the press in the study conducted in collaboration with the Indian Law Institute way back in 1982.<sup>20</sup> Describing the conflict as one between a House and a citizen, the Council reiterated its demand for the preparation of an informal code of privileges by a body appointed by the Parliament and the State legislatures.<sup>21</sup>

7.21 The Committee of Privileges of the Lok Sabha which examined the issue in the light of the developments in Tamil Nadu has since summarily rejected the demand for codification of privileges.<sup>22</sup> Allaying apprehensions that the

---

<sup>20</sup>. While approaching the Press Council, the editor, Anil Dharkar, stressed on two points: (a) he was not the editor of the publication at the relevant time; (2) he was not and never has been the publisher of the magazine as stated by the Speaker. The Council was unable to help him as he had also moved the Supreme Court in the matter and the Council is debarred from taking up any matter which may be sub judice. However, the explanation provided by him was accepted by the Tamil Nadu Assembly and privilege motion against him was dropped. Consequently the Supreme Court dismissed the petition. For recommendations of the Council, see supra n. 17.

<sup>21</sup>. The PCI Review, 3/1992, pp 1-3.

<sup>22</sup>. The fourth report of the Committee of Privileges received approval of the Speaker on 5 August 1994 and was tabled in the Lok Sabha on 19 December 1994. Following the conference of presiding officers in New Delhi in September 1992, the Lok Sabha Secretariat, however, issued a document which is a compilation of rulings, House committee reports, established parliamentary practices, rules of conduct and conventions of Lok Sabha. The document will help the journalists as well as the

unfettered power to punish posed a threat to freedom, the Committee pointed out on the basis of a detailed study of privilege cases that have arisen in the Lok Sabha since 1952 that the House has used the power "extremely rarely". Barring cases of contempt of the House where visitors created disturbances by shouting slogans or throwing leaflets from the visitors gallery, there has only been one instance in the Lok Sabha since 1952 when a person was sent to jail for having committed breach of privilege and contempt of the House. The contemner was Smt Indira Gandhi, former Prime Minister. She was expelled from the post-emergency Parliament and was sentenced to imprisonment which ended with the prorogation of the House a week later.

7.22 A study of the pattern of disposal of privilege notices since 1980 revealed that out of the hundreds of notices received each year only a tiny fraction reached the Committee stage with the

---

public and the harassed officials to know what are not privileges. For instance, misbehaviour of a member is not a privilege. Though this exclusionary list lacks statutory force, yet it is expected to have a persuasive effect on the legislators as well as reporters to self-regulate their conduct along the path of professional rectitude. As pointed out in the 14th Annual Report (1992-93) of the Press Council, it is a step in the right direction.



majority being disallowed either at the threshold or through a ruling by the Speaker in the House. In 1981, out of 246 notices of question of privilege received in the Lok Sabha secretariat, 226 were disallowed at the threshold, 17 were disallowed by the Speaker through a ruling given in the House and only two were referred to the Committee of Privileges. In 1991, out of 100 notices received 99 were disallowed at the threshold and only one notice was referred to the Committee of Privileges. In 1992, however, all the 122 notices received were disallowed at the threshold.<sup>23</sup>

7.23 These figures will justify the assertion of the Committee that the misuse and abuse of privileges is only a myth. However, the Committee does not cite any study relating to the abuse of privileges in different legislatures. For instance, while it approvingly quotes the restraint shown by the Lok Sabha, the Committee has nothing to say about the actions of the legislature in Tamil Nadu from where the issue arose in the first place. The panel noted that absence of codification was not responsible for confrontation between the legislature and the judiciary. But what is the difficulty in codifying the privileges? The answer in the words of the Committee is: "If codified, parliamentary privileges will become subject to fundamental rights enshrined in the

---

<sup>23</sup>. Report of the Lok Sabha's Committee of Privileges tabled in the Lok Sabha on 19 December 1994. (as reported in The Hindu on 30 December 1994.)

Constitution and they will come within the ambit of judicial scrutiny and determination." There lies the crux of the matter.

7.24 Apart from the vexed question of codification, it is time to deliberate on whether a legislative house should enjoy privileges and wield penal powers for the conduct of its business and maintenance of its authority. It will be expedient if legislative privileges were confined for the purpose of dealing with encroachers, detractors and obstructors. The entire idea of a person committing a breach of privilege by making a comment or writing a report in a newspaper should be discarded as obnoxious. The American process of government, based on free and uninhibited discussion, is a shining example worthy of examination in this context. The power of the U.S. Congress to punish for contempt is subject to judicial review; but it does not in any way belittle the authority of the House or hamper its functioning. The scope of legislative privileges in the United States is extremely limited and scope of judicial review much broader than in the United Kingdom.<sup>24</sup> If a press commentator, in the legitimate exercise of his right to freedom of speech, abuses or defames a legislature or a

---

<sup>24</sup>. See Kilbourn v. Thompson, 103 U.S. 168 (1881) and Marshall v. Gordon, 243 U.S. 521 (1916).

legislator, the remedy ought to be sought in a court of law. Such a contraction in the area of legislative privileges in favour of freedom of speech will definitely enhance the prestige and dignity of the legislature. The preamble to the paramount parchment of the people (our Constitution) fulfils itself, as pointed out by Justice V R Krishna Iyer and Dr Vinod Sethi, in such an atmosphere of light, thought and speech.<sup>25</sup>

---

<sup>25</sup>. V R Krishna Iyer and Vinod Sethi, "Parliamentary Privileges: An Indian Odyssey," (New Delhi: Capital Foundation Society, 1995), p. 147.

## CHAPTER 8

### CONTEMPT OF COURT

8.1 Of all the risks a journalist faces in the day-to-day presentation of news and views the one about which he or she is likely to exercise most care is contempt of court. The punishment for publishing a contempt can be swift and severe; grave contempts can result in imprisonment of the editor or journalist; and there are numerous examples of the courts imposing fines for lesser contempts.

8.2 There was no codified law of contempt till the Contempt of Courts Act was passed in 1926. It was replaced by the Contempt of Courts Act 1952. After a few years' working of the 1952 Act, it became obvious that the law relating to contempt was unsatisfactory and needed changes in view of the pronouncements of the Supreme Court. One departmental<sup>1</sup> and one parliamentary committee<sup>2</sup> examined the matter at length. On the basis

---

<sup>1</sup>. The Sanyal Committee Report, 1963.

<sup>2</sup>. The Bhargava Committee Report, 1968.

of these reports, the Contempt of Courts Bill, 1968 was presented in Parliament, harmonising as far as possible the interests of the individual in the freedom of expression and the interests of the administration of justice within the framework of the Constitution. The Bill was eventually passed as the Contempt of Courts Act, 1971, "to define and limit the powers of certain courts in punishing contempts of courts and to regulate their procedure".

8.3 The Press Council of India undertook an exhaustive examination of the law relating to contempt of courts on the basis of the 1968 Bill and observed thus:<sup>2</sup>

One might be forgiven for the feeling that the law in this (press vis-a-vis judiciary) respect has not been quite fair to the need of the freedom which the Press must enjoy, due in great part to unnecessary oversensitiveness on the part of the courts and the judges as regards their dignity. Besides, it is acknowledged on all hands that the Press is greatly handicapped by the contours of the law in this regard being vague and undefined such that it leads to timorousness on its part when dealing with the conduct of judges or their decisions, or commenting on matters of public interest, which is far from healthy.

---

<sup>2</sup>. 1969 Ann. Rep. 107-108.

The Press Council is greatly concerned at this state of the law and earnestly desires that this condition of uncertainty in the law should be ended by properly framed legislation which would, at the same time, safeguard the freedom of the Press and the prestige and dignity of the judiciary, while ensuring the orderly progress of the judicial process of the adjudication of cases.

8.4 Articles 129 and 215 of the Constitution make the Supreme Court and the High Courts respectively 'Courts of Record' with power to punish for contempt. Apart from this, the Constitution permits reasonable restrictions on the guaranteed right of freedom of speech and expression in the interests of, inter alia, contempt of court.

8.5 Neither the Act of 1926 nor of 1952 provided any definition of 'contempt of court,' and it was held that the legislature considered it unnecessary to define it as the term had already gained a definite meaning ascribed to it by judicial pronouncements of English and Indian courts.<sup>4</sup> The Act of 1971, for the first time, gave a complete definition of the expression, by codifying the results of judicial decisions, in cls (a) to (c) of section 2. Accordingly, "contempt of court" consists of two categories: civil and criminal. Civil contempt is

---

<sup>4</sup>. L.R. v. Das Gupta, A.I.R. 1954 Pat. 204.

defined in cl (b); briefly speaking, it may be said to be 'contempt in procedure,' committed by disobeying judicial decrees, orders and the like. Criminal contempt is defined in cl (c). It means the publication of any matter or the doing of any other act which

- (i) scandalises or tends to scandalise, or lowers or tends to lower the authority of any court; or
- (ii) prejudices, or interferes or tends to interfere with, the due course of any judicial proceeding; or
- (iii) interferes or tends to interfere with, or obstructs or tends to obstruct, the administration of justice in any other manner.

8.6 The Press Council was not happy with this definition. It declared that "the Bill did not deal with the important and vital question of what constitutes the contempt of by what is termed "scandalising the court," but leaves it subject to the same undefined rules dependent on the uncertainty consequent on the predilection of individual judges and courts as at present. This is not satisfactory and the Council would urge the enactment of legislation which would balance the functioning of a free Press with the maintenance of

public confidence in the independence, impartiality and integrity of the judiciary."<sup>5</sup> The Council considered that innocent writings without intent to interfere with the course of proceedings in a court should not attract the penal consequences. The Council rejected the orthodox view found in the Bill that since it was difficult to prove intention, the mischief done, whether intended or not, deserved to be punished. It then offered suggestions for improvement in various clauses of the Bill. One suggestion was that as in the case of criminal contempt committed in the face of a judge, in cases of contempt arising out of attacks on the impartiality or integrity of a judge also, the proceedings should be heard by other judges of the court. In cases where the attack was on the entire body of judges of a High Court, the case should be directed to be heard by the Supreme Court.<sup>6</sup>

8.7 Newspapers are often charged with the criminal contempt of scandalising the courts. Apart from highlighting any basic problem in relation to the press and the law of contempt, most of the scandalising cases either involve disgruntled litigants attacking the judges or the newspapers publishing unverified market place gossips about judges. The language used in many of these

---

<sup>5</sup>. Supra note 3. p.108.

<sup>6</sup>. Ibid, p. 123



newspaper stories often expressed the frustrations of the authors. Justice Masodkar recounted this in a case when he accepted the apology of one such writer and remarked that the latter's

[E]xpressions, ... merely indicate coloured flare of language and which may have origin in an injured state of mind and as such unhealthy expression of personal sense of frustration though tantamount to contempt, would not by itself be the ground to take any serious view of the matter. [He] ... has submitted unqualified apologies and we have nothing to doubt his bona fides. Looking to the background of his case and his personal frustration as a writer, he has overstepped in expression. Matters of expression are personal in nature. Much depends on the training and culture of the maker. What may appear to a sophisticated mind as harsh, rough, rude and uncouth may not be so to unsophisticated and even to angry, irritated and brooding. There is nothing before us to hold that the opponent was actuated by desire to disrupt nor we are sure about his ability to express what he feels just or unjust ...<sup>7</sup>

8.8 This indulgence, congruent with the spirit of the Constitution, is very near to the American approach where in a similar situation the judges will ask the

---

<sup>7</sup>. B G Ghate v. P S Raohute, (1977) Cr L J 1490, p. 1491.

question: is there a clear and present danger that the administration of justice will be affected?<sup>e</sup> Since a 'clear and present danger' cannot really be shown in a large number of cases, the law of contempt does not really act as a check on comments made by the press. The American courts do not depend on contempt of court to ensure a fair trial of issues. The American procedure allows other methods and techniques in order to secure a fair trial; and American judges are not unduly perturbed by adverse newspaper comments.

8.9 Even in England the rigid doctrinaire approach is slowly fading away with the passing of the Contempt of Court Act 1981. Section 2(2) of the Act states that the strict liability rule will only apply to those publications which create a substantial risk of serious prejudice to the course of justice in the relevant proceedings. The relevant test for contempt is: Is there a substantial risk of serious prejudice? The courts have made it clear that it is a double test - the risk must be substantial and the likely prejudice has to be serious. In the words of Lord Chief Justice Lane:

A slight or trivial risk of serious prejudice

---

<sup>e</sup>. Bridges v. California and Time-Mirror Co. v. California, (1940) 314 U.S. 252; Fennekamp v. Florida, (1945) 328 U.S. 331.

was not enough nor was a substantial risk of slight prejudice.<sup>9</sup>

B.10 Indian courts, true to the old English approach, display a tendency to frown upon any kind of comment on a matter which is pending before a court or where it is imminent that a cause or matter may come before the courts. Besides, the courts frequently punish people who say or do things which, in the opinion of the judges, lower the dignity of the court. The line between comment which scandalises the judges and comment which is legitimate criticism is not always easy to draw. No clear statement on the limits of permissible discussion emerged even though the Delhi High Court judgments in the Congress Party (1971) and Supersession of Judges (1974) cases insisted on the right of the public to discuss matters of public importance even if such matters were pending determination before the courts.<sup>10</sup> Apart from the Avadh Bar case,<sup>11</sup> the Supreme Court did not get an opportunity to deal with any case under the 1971 Act till 1978. In the wake of the great controversy surrounding the appointment of the Chief Justice of India, the Times of India carried a news item in which a group of Bombay

---

<sup>9</sup>. Attorney General v. Times Newspapers (1983)

<sup>10</sup>. Dioviyaya Narain Singh v. A. K. Sen, (1971) 1 Delhi 14 (Congress Party case); Anil Kumar Gupta v. K. Subba Rao, (1974) Delhi 1 (Supersession case).

<sup>11</sup>. B. N. Verma v. Harrobind Dayal, A.I.R. 1975 All. 52.

lawyers accused the judges who had decided the Habeas Corpus case during the emergency of behaving in a cowardly manner. Chief Justice Beg explained and defended the judgment in that case and took the view that the newspaper should be held guilty of contempt.<sup>12</sup> Unfortunately, the majority did not deal with the case and simply disposed of the matter on the basis "that it is not a fit case where a formal proceeding should be drawn up". In the companion Indian Express case<sup>13</sup>, though Justice Krishna Iyer had written a long inconclusive essay laying down certain guidelines in such cases, which was self-confessedly obiter dicta, it is not clear as to whether he prefers the test as to whether there should be a clear and present danger or whether one should look at the motive of the contemner or the overall social effect or all of these things. Though in the Supersession case, the Delhi High Court insisted on the right of the public to discuss matters of public importance, there is no complete discussion on how this right is recognised by the law of contempt of court.

8.11 It was in this context that the Press Council, in association with the Indian Law Institute, undertook a comprehensive study and made important recommendations

---

<sup>12</sup>. In re Sham Lal, A.I.R. 1978 S.C. 489.

<sup>13</sup>. In re Mulgaokar, A.I.R. 1978 S.C. 727.

for amending various sections of the 1971 Act in 1982. With a firm view that truth or bona fide belief that the subject matter of the publication is true should constitute a defence, the Council recommended the following as a new provision in section 5:

Publication of any statement which is true or which the maker in good faith believes to be true shall not constitute criminal contempt provided the making of the statement is not accompanied by publicity which is excessive in the circumstances of the case.

At the same time a proper safeguard is necessary and with this in mind, the Council further suggested that the following may be added as a proviso to section 12:

Provided that if the contemnor pleads truth or bona fide belief in truth as a defence and the court finds that the defence is false the contemner shall be punished with rigorous imprisonment for a period of six months and fine or both.

This is meant as a deterrent to those who may be tempted to falsely or maliciously make allegations which may ultimately be found to be concocted and baseless. It was with this view that the Council further suggested the addition of the following as a definition clause under section 2(cc):

Nothing is done in good faith unless it is done with due care and caution.

8.12 Dr Rajeev Dhavan, while preparing the investigative study on contempt of court,<sup>14</sup> suggested that the punishment for scandalising the courts should be abolished. However, in his Foreword to the study, Justice A N Grover, the then Chairman of the Press Council, cautioned that the conditions obtaining in our country must not be overlooked. He said:

Once the door is laid open to level all kinds of allegations which may even be prompted by disgruntled litigants to malign the judges, there will be serious danger not only of blackmail but also of irresponsible character assassination which will bring the judiciary and the judicial system into contempt and ridicule. It is not expedient to draw inspiration from the position in the United States of America or even in the United Kingdom for the simple reason that the law of torts is very highly developed in those countries and is frequently resorted to. Moreover the damages which are awarded in case of defamation are so heavy that people are mortally afraid of making false allegations. It is not so in our country. The tortuous course which a suit for defamation generally follows and the years that it is likely to take before it is finally decided by the highest court are well known with the result that everyone is greatly

---

<sup>14</sup>. Rajeev Dhavan, Contempt of Court and the Press (1982).

discouraged from launching such proceedings.<sup>15</sup>

8.13 Though the Press Council is in agreement with the demand of journalists and lawyers that the plea of justification should be allowed to be pleaded in contempt cases, it is to be noted that the Phillimore Committee in England was not prepared to accept that 'truth' should by itself be made a defence where a judge is scandalised.<sup>16</sup> However, the working paper of the Canadian Law Commission took the view that 'truth' could be pleaded in a contempt trial that took place in the normal course and not as a result of a summary procedure.<sup>17</sup>

8.14 The law of contempt, intended to insulate the judiciary from insult, requires a drastic overhaul in the interests of freedom of speech and expression. The press, wary of the danger, may leave the courts untouched. Though fair and reasonable criticism of a judicial act in the interest of the public good does not amount to

---

<sup>15</sup>. Ibid, p. vi.

<sup>16</sup>. Phillimore Committee Report on Contempt of Courts (1974) Cmnd. 5794, paras. 165-66, pp. 70-71.

<sup>17</sup>. Law reform Commission, Criminal Law: Contempt of Court: Offences against the Administration of Justice (1977) Working Paper No. 20, p. 61.

contempt,<sup>18</sup> many a newspaper will not dare to venture into that dangerous arena. While s. 4 of the Act protects fair and accurate reporting of judicial proceedings, s. 5 protects fair criticism of a judicial decision because the public has an interest in the proper administration of justice. This provision is an exception to the class of contempt by 'scandalisation' of a court as mentioned in s. 2(c)(i), and is founded on the principle stated in Gray's case as follows:

Judges and court are alike open to criticism, and if reasonable argument or expostulation is offered against any judicial act as contrary to law or public good, no court could or would treat that as contempt of court.<sup>19</sup>

In short, the immunity on the ground of 'fair comment' is an adjustment between the public interest in freedom of expression and the public interest in the free flow of justice. The principle behind this exception to liability for contempt of court and its ambit was expressed by Lord Atkin as:

... no more than the liberty of any member of the public to criticise temperately and fairly but freely any episode in the administration

---

<sup>18</sup>. R v. Gray, (1900) 2 Q.B. 36.

<sup>19</sup>. ibid.



of justice.<sup>20</sup>

8.15 In the context of the foregoing analysis, it will be worthwhile to recall the view taken by the Press Commission of India in 1954:

The Indian press as a whole has been anxious to uphold the dignity of courts and the offences committed more out of ignorance of law relating to contempt than to any deliberate intention of obstructing justice or giving affront to the dignity of courts. [I]nstances where it could be suggested that the jurisdiction has been arbitrarily or capriciously exercised are extremely rare and we do not think that any change is called for either in the procedure or in the practice of the contempt of court jurisdiction exercised by the High Courts.<sup>21</sup>

8.16 Times have changed; and along with it the views on the subject. "Justice," as observed by Lord Atkin, "is not a cloistered virtue; she must be allowed to suffer the scrutiny and respectful even though outspoken comments of ordinary men."<sup>22</sup>

---

<sup>20</sup>. Ambard v. A.G. of Trinidad, A.I.R. 1936 P.C. 141.

<sup>21</sup>. Report of the Press Commission of India (1954).

<sup>22</sup>. *Supra* note 20.

CHAPTER 9  
JOURNALISTS' SOURCES

9.1 Of all the valuable commodities cherished and jealously guarded by journalists, a long contact list of reliable sources is the foremost. Every reporter has his own contact list which has usually been in existence, growing year by year, since its owner had his or her first job as a trainee.

9.2 The system by which contacts and sources of information are built up rests essentially on mutual trust and cooperation. On the one hand the journalist relies on being given accurate information upon which to base his or her story and on the other the source relies, where necessary, on not being identified or otherwise compromised. In such circumstances it is a cardinal rule of journalism that the identity of the source remains confidential.

9.3 Given the fact that people who speak to

reporters on this basis are frequently breaking some duty of confidence they themselves owe to a third party, e.g., an employer, it is not surprising that the journalistic principle of protecting sources clashes from time to time with the rather different priorities of tribunals and courts of law.

9.4 The outcome of such clashes has varied according to the circumstances of each case, but courts have been known to take a hard line. In the early sixties, three journalists in England were ordered by the Tribunal of Inquiry looking into the case of Vassal the admiral spy, to reveal the sources for stories they had written at a very early stage in the scandal which accurately identified the traitor. All three refused and two of them went to prison for contempt; the third reporter escaped such drastic punishment only because his source came forward voluntarily.<sup>1</sup>

9.5 In the case against Mullholland, Lord Denning identified the interests of justice as being the primary consideration in deciding whether to order disclosure:

---

<sup>1</sup>. Attorney General v. Clough, (1963) 2 W.L.R. 343; Attorney General v. Mullholland and Foster, (1963) 2 W.L.R. 658 (C.A.).

The judge ... will not direct him to answer unless it is not only relevant but also a proper and indeed necessary question in the course of justice to be put and answered.

In Clough's case Lord Parker cited 'the interests of the state' as being the dominant consideration.

9.6 Whether or not a court or tribunal orders a journalist to reveal the identity of his or her source is, of course, always a matter of discretion for the judge. It is clear from the old cases that, although journalists do not have the absolute privilege against disclosure which cloaks the lawyer/client relationship, the courts were reluctant to force them to betray their sources unless the interests of justice or of the state demanded it. Indeed after the Mullholland case the Attorney General told the House of Commons, somewhat defensively, that in the previous eighty years there had only been about six instances where such disclosure had been required.

9.7 In India both Mr Vir Sanghvi, editor of Sunday newsmagazine, and Mr Govindan Kutty, author of Seshan: An Intimate Story, appeared before the Jain Commission, probing the conspiratorial aspects of the Rajiv Gandhi assassination. Making a dramatic disclosure about the

reference to an unnamed aide of the then Prime Minister, Mr Chandra Shekhar, in his article,<sup>2</sup> Mr Sanghvi told the Commission that the aide in question was Rajmangal Pandey who has since died. The write-up had referred to the aide as having told Mr Sanghvi after the assassination in May 1991 that a high government official had met the Prime Minister and alleged that one of the members of the Government was involved in it. Mr Sanghvi was acting in accordance with law because the Indian Evidence Act 1872 does not recognise any privilege for journalists to keep their source a secret.

9.8 In England, protection in this regard has now been given by statute. Both the principle itself and the considerations which may override it are set out in statutory form by Section 10 of the Contempt Act 1981.

No court may require a person to disclose, nor is any person guilty of contempt of court for refusing to disclose the source of information contained in a publication for which he is responsible, unless it is established to the satisfaction of the court that it is necessary in the interests of justice or

---

<sup>2</sup>. Vir Sanghvi: "Who Killed Rajiv Gandhi?" Sunday, Oct 30-Nov 5, 1994.

national security, or for the prevention of disorder or crime.

19.9 The strength of the protection afforded by Section 10 was tested in Secretary of State for Defence v. Guardian Newspapers Ltd. On 31 October 1983, under the headline 'Heseltine's Briefings to Thatcher on Cruise', The Guardian published a confidential memorandum prepared by the Secretary of State for Defence on the question of Cruise missiles and their arrival in Britain. The Government demanded the return of its document and the newspaper, realising that the marks on their copy of the memorandum would identify their source, cited Section 10 of the Contempt Act and refused. The conflict was between protection of a journalistic source and national security. In each of the courts, right up to the House of Lords, national interest prevailed. According to the Master of the Rolls, Lord John Donaldson, there was hardly a contest:

The maintenance of national security requires that trustworthy servants in a position to mishandle highly classified documents passing from the Secretary of State for Defence to other Ministers shall be identified at the earliest possible moment and removed from their positions. This is blindingly obvious. Whether or not the Editor acted in the

public interest in publishing the document was not the issue. The Secretary of State's concern was quite different. It was that a servant of the Crown who handled classified documents had decided for himself whether classified information should be disseminated to the public. If he could do it on one occasion he might do it on others, when the safety of the state would be truly imperilled.<sup>3</sup>

9.10 The duty of a witness duly summoned to give evidence in a court is generally regulated by the Indian Evidence Act 1872. It is the scheme of the Act that in a court, a witness is compellable to answer all questions relevant to the facts in issue, except where a specific provision of the law excuses him from disclosing particular information, or prohibits him from so doing. Such a privilege is recognised for certain situations, but a journalist is not one of the persons exempted from the general duty of disclosure in a court. There is no reported High Court decision on the subject. However, Mr P.M. Bakshi<sup>4</sup> is narrating two incidents. In the first

---

<sup>3</sup>. Secretary of State for Defence v. Guardian Newspapers Ltd (1984) 10 Current Law Notes of Latest Cases 394 (H.L.). In fact the Master of the Rolls made one mistake. The source, as it turned out when the newspaper handed back the document, was not a 'he' but a 'she'. Sarah Tisdall, a junior civil servant in the Foreign Office, was sentenced to six months imprisonment.

<sup>4</sup>. P. M. Bakshi, Press Law: An Introduction (TRF Institute for Social Sciences Research and Education, New Delhi, 1986), pp 98-99.

case, Kaliprasanna Kavyabisharad, editor of HITABADI, declined to say who was the writer of a poem published in his paper for which he had been charged with libel. The manuscript was produced in court, but with the portion in which the name of the writer appeared torn off. Kaliprasanna preferred to go to jail rather than disclose the name of the contributor. He was sent to jail for nine months. In the second case, Bipin Chandra Pal refused to depose in court who was the author of an article for which Aurobindo Ghose was being tried for sedition. Aurobindo Ghose was subsequently acquitted, but Pal was sent to jail for six months for refusal to depose as to the above fact. In Debi Prashad Sharma v. E.,<sup>5</sup> the Chief Justice had requested that the journalist reveal his source of information. The Privy Council, however, did not go into this aspect of the matter.

9.11 In the Branzburg case<sup>6</sup>, the American Supreme Court refused to accept the plea that the journalists' right to refuse to disclose the source of information flows from the constitutional guarantee of the freedom of the press. However, recognising the privilege, Mr Justice

---

<sup>5</sup>. A.I.R. 1943 P.C. 202. See further C. Sarkar (ed.), The Press and the Law (1968), pp 39-48 (essay by C.P.Gupta): 52-54 (essay by Y. Kumar).

<sup>6</sup>. Branzburg v. Hayes, (1972) 408 U.S. 663.



Douglas, in his dissenting judgment, observed:

The function of the press is to explore and investigate events, inform the people what is going on, and to expose the harmful as well as the good influences at work.

9.12 It was in reliance on this dissenting judgment that Mr Floyd Abrams, counsel to New York Times<sup>7</sup>, had written in an article (after referring to the function of the press to explore, inform and expose) as under:

It is the ability of the press to fulfil that function which, I believe, is and ought to be at the heart of the question as to whether, and to what extent, journalists should be exempt from the obligation of any other people to testify as to any such matters.

9.13 Though there is no federal legislation on the subject, State legislation in the United States presents a variety. Protection of the identity of a newsman's informant from disclosure in judicial proceedings and proceedings before legislative committees has been considered in many States as necessary to maintain a flow of information to the public. It is taken for granted that such protection will not unduly hamper the judicial

---

<sup>7</sup>. Floyd Abrams, "Protection for confidential news sources is essential for good journalism," Centre Magazine, 35-38.

and legislative process. These statutes generally protect the confidential sources of persons connected with, engaged in or employed by specified news media. Some of the States extend the privilege not only to newspapers, but also to other periodicals and press associations and in certain cases to radio and television also.

9.14 In some States, the privilege is absolute. This means that at no time and under no circumstances can the journalist be compelled to reveal his source of information. Some of the Circuit Courts (Courts of Appeal) have shown a readiness to recognise a limited protection for journalists' sources.<sup>a</sup>

9.15 Professionally, the American Newspaper Guild has adopted a code of ethics which in canon 5 states as under:

That newspapermen shall refuse to reveal confidences or disclose sources of confidential information in court or before judicial or investigating bodies...

9.16 It seems there are serious conflicts of values which society has to consider. On the one hand, there is

---

<sup>a</sup>. See the Caldwell case: Vincent Blasi, "Privilege in a time of subpoenas," (21 Dec 1970) Nation, p. 653.

the consideration that for centuries,<sup>9</sup> the law has acted on the postulate that it is entitled to every man's evidence, and has not recognised the principle that every confidential communication which it is necessary to make in order to carry on the ordinary business of life is protected.<sup>10</sup> As pointed out by Bakshi, it is as agonising for a judge to have relevant evidence withheld from him, as it is for the reporter to find facts, painfully elicited by him on a promise of secrecy, ruthlessly laid bare in a court.

9.17 The Law Commission of India has recommended that while an absolute privilege need not be given to reporters in respect of sources of information obtained by them in confidence, the court should (by amending the Indian Evidence Act) be vested with the discretion not to compel a reporter to make such disclosure in the circumstances of the case. In exercising the discretion, the court will obviously be expected to weigh the demands of discovery of truth against the demands of professional ethics by which a journalist is bound.<sup>11</sup>

---

<sup>9</sup>. For history, see Blair v. U.S., (1919) 250 U.S. 273.

<sup>10</sup>. Wheeler v. Le Merchant (1881) 17 Ch.D. 675.

<sup>11</sup>. Law Commission of India, 93rd Report, Protection of mass media in respect of confidential information.

9.18 Power to summon and enforce the attendance of persons and examining them on oath as also to require the discovery and to inspect documents gives the Press Council of India a great advantage which is not available to a voluntary body. Section 16 of the Press Council of India Act, 1978 gives the Council power to receive evidence on affidavit, to requisition any public record or copies thereof from any court or office and to issue commissions for the examination of witnesses or documents. But, at the same time, another wholesome provision has been made in the next section namely, newspapers, news agencies, editors or journalists shall not be compelled to disclose the source of any news or information whether published or not. This express provision does not exist in other countries.<sup>12</sup>

---

<sup>12</sup>. In an attempt to empower the press, Mr Ramakrishna Hegde had incorporated a provision in his aborted Karnataka Freedom of Press Bill 1988 which reads thus:

2. Immunity of a journalist or a worker in the press from disclosure of source of information.-Notwithstanding anything contained in any other law for the time being in force, no court shall compel a person to disclose the source of any news or information nor declare a person to be guilty of contempt of court for refusing to disclose the source of any news or information in whatever manner obtained in respect of a publication for which he is responsible unless it is established to the satisfaction of the court that such disclosure is indispensable in the interest of justice or national security or for the prevention of disorder or crime.

9.19 While asserting its right to hold on to its own confidential sources, what the press is actually demanding is a right to break confidences. What it wants to publish is confidential information. At present, the law relating to confidentiality has been given a sufficient amount of importance preventing a private individual from publishing such information except in extreme circumstances.<sup>13</sup> This is a salutary rule because while it is in the public interest that the truth must be told, it is also in the public interest that individuals in a society feel that their confidences will be protected. It is in the public interest that in a society people should maintain other's confidences. The circumstances when the courts or the government or commissions of inquiry can force these confidences broken have been narrowly defined. The press has yet to make out a general case for the extension of these exceptions to cover its work. The press will have to show that the public interest in its work is more important than the public interest in maintaining confidences.

---

<sup>13</sup>. On breach of confidence see, Frazer v. Evans, (1965)1 All. E.R. 8; Margaret, Duchess of Argyll (Feme Sole) v. Duke of Argyll, (1965)1 All. E.R. 611 where the previous case law is discussed. This line of case law virtually begins with Prince Albert v. Strange, (1849) 64 E.R. 293, a case decided by the old High Court of Chancery which prompted Warren and Brandeis to submit that an embryonic right to privacy did exist at common law; see also Follard v. Photographic Co., (1888) 40 Ch.D. 345 (also implied breach of contract); Lord Ashburton v. Pope, (1913) 2 Ch. 469.

CHAPTER 10  
THE LAW OF DEFAMATION

Free speech does not mean free speech:  
it means speech hedged in by all the laws  
against defamation, blasphemy, sedition  
and so forth; it means freedom governed  
by law.

Lord Wright M.R.<sup>1</sup>

10.1 The origins of the laws relating to defamation date back as far as King Alfred the Great who, in the ninth century, decreed that slanderers should have their tongues cut out.<sup>2</sup> Although over the years the penalties imposed upon those who transgress this branch of the civil law have become financial rather than physical, the principles have remained virtually unchanged. The legal rationale was expressed with great clarity by Justice Potter Stewart of the American Supreme Court in 1966:<sup>3</sup>

The right of a man to the protection of his own reputation from unjustified invasion and

---

<sup>1</sup>. James v. Commonwealth of Australia, [1936] A.C. 578.

<sup>2</sup>. Tom G. Crane, Law and the Media, (Oxford: Heinemann Professional Publishing, 1989), p. 1.

<sup>3</sup>. Ibid., p. 1.

wrongful hurt reflects no more than our basic concept of the essential dignity and worth of every human being - a concept at the root of any decent system of liberty.

10.2 Like many areas of law, defamation is a marriage of conflicting rights and interests. On the one hand is the principle which wholly underlies this particular course of action i.e., that a man's reputation should be protected from wrongful injury. On the other hand there are certain prevailing social interests which the law decrees that protection of reputation will take second place. Freedom of expression is the most significant of these dominant interests and a free press is, of course, a fundamental part of that right.

10.3 When the Rajiv Gandhi Government was forced to withdraw the ill-conceived and now infamous Defamation Bill in 1988 under pressure of a nationwide demand, it was a triumph for the Press Council because its intervention in the public debate on the Bill and its attempt to establish itself as a primary consultee on legislation concerning the press gave the Council an image apart from an adjudicator of complaints. The bane of the 1988 Bill was that it was clearly aimed at the

muzzling of criticism of the government and prevention of investigative journalism, especially where governmental corruption is concerned.

10.4 In the context of the free speech guarantee it is only fit and proper for us to import some of the principles recognised and adopted in US defamation law. Basically wherever there is a public interest component no action for defamation will lie in the United States unless the defamed person can show that the defamatory statement or allegation in question was made with actual malice. Thus in New York Times v. Sullivan<sup>4</sup> a paid advertisement sponsored by the Committee to Defend Martin Luther King and the Struggle for Freedom in the South accused the law enforcement officials in Montgomery, Alabama, of being racist, following the comments of a police official. The elected police commissioner of Montgomery brought an action for libel against the *Times* and several of the individual signatories to the advertisement. The court dismissed it in the following terms:

Debates on public issues should be uninhibited, robust and wide open - and may include sharp, unpleasant attacks on the government. The

---

4. (1964) 376 U.S. 255 at 270.



constitutional protection does not turn upon the "truth, popularity or social utility of the ideas and beliefs which are offered". Some degree of abuse is inseparable from the proper use of everything... Injury to official reputation affords no more warrant for repressing speech that does factual error... The constitutional guarantee requires a federal rule that prohibits a public officer from recovering damages for a defamatory falsehood relating to his official conduct, unless he proves that the statement was made with actual malice... The Constitution affords to the press an absolute and unconditional privilege to criticize official conduct, despite the harm which may follow from excesses and abuse...

10.5 Thus a US public official is in effect debarred, in the absence of actual malice, from bringing defamation suits with regard to his official reputation. This principle was later extended by the Supreme Court in Rosenblum v. Metromedia Line<sup>5</sup> to even cover defamation of a private person if the statement concerns a matter of public importance. This decision is a clear acknowledgement of the role of the press in informing the public of certain issues in so far as it concentrates not upon the public/private character of the person defamed, but on the subject matter discussed. Where the public interest component is not present, the individual's right to privacy will prevail.

10.6 The principle of Sullivan was carried forward

---

<sup>5</sup>. (1971) 403 U.S. 29.

by the House of Lords in Derbyshire County Council v. Times Newspapers Ltd<sup>6</sup>. The plaintiff, a local authority, brought an action for damages for libel against the defendants in respect of two articles published in Sunday Times questioning the propriety of investments made for its superannuation fund. Delivering the judgment, Lord Keith recalled that in the Spycatcher case<sup>7</sup>, the House of Lords had opined that "there are rights available to private citizens which institutions of ... government are not in a position to exercise unless they can show that it is in the public interest to do so". It was also held therein that not only was there no public interest in allowing governmental institutions to sue for libel, it was "contrary to the public interest because to admit such actions would place an undesirable fetter on freedom of speech" and further that action for defamation or threat of such action "inevitably have an inhibiting effect on freedom of speech".

10.7 Reference in this connection may also be made to the decision of the Judicial Committee of the Privy Council in Leonard Hector v. Attorney General of Antigua

---

<sup>6</sup>. 1993(2) WLR 449

<sup>7</sup>. Attorney General v. Guardian Newspapers Ltd. 1990(1) AC 109.

and Barbuda<sup>8</sup> which arose under S. 33(B) of the Public Order Act 1972 (Antigua and Barbuda). It provided that any person who printed or distributed any false statement which was "likely to cause fear or alarm in or to the public or to disturb the public peace or to undermine public confidence in the conduct of public affairs" shall be guilty of an offence. Quashing the criminal proceedings launched against a newspaper editor under the said provision, Lord Bridge of Harwich observed:

In a free democratic society it is almost too obvious to need stating that those who hold office in government and who are responsible for public administration must always be open to criticism. Any attempt to stifle or fetter such criticism amounts to political censorship of the most invidious and objectionable kind.

10.8 This private/public distinction is not altogether strange to the Indian criminal defamation law as is evident from the second and third exceptions in section 499 of the Indian Penal Code.<sup>9</sup> However, it is

---

<sup>8</sup>. 1990(2) AC 312.

<sup>9</sup>. Second Exception.—It is not defamation to express in good faith any opinion whatever respecting the conduct of a public servant in the discharge of his public functions, or respecting his character, so far as his

negligence which is the standard for liability in such cases, and not actual malice, as with the US law, and the exceptions to section 499 have not proved as useful or protective to Indian journalists as have the US precedents to the American press. More importantly, these public/private distinctions are confined to the criminal law of defamation. The civil law recognises no such distinctions, and public officials or private individuals who have been defamed where a matter of public interest is concerned have as much standing and enjoy exactly the same rights in civil defamation law as do private individuals who have been defamed where there is no public interest component.

#### 10.9 Recapitulating these well-known Anglo-American

---

character appears in that conduct, and no further.

Third Exception.-It is not defamation to express in good faith any opinion whatever respecting the conduct of any person touching any public question, and respecting his character, so far as his character appears in that conduct, and no further.

#### Illustration

It is not defamation in A to express in good faith any opinion whatever respecting Z's conduct in petitioning Government on a public question, in signing a requisition for a meeting on a public question, in presiding or attending at such meeting, in forming or joining any society which invites the public support, in voting or canvassing for a particular candidate for any situation in the efficient discharge of the duties of which the public is interested.

legal principles, our Supreme Court in a seminal judgment rendered in the Nakkheeran case<sup>10</sup> held that the Government, local authority and other organs and institutions exercising governmental power could not maintain a suit for damages for defamation. Leaving open the issue of the right of the officials to prosecute a publication under sections 499 and 500 of the Penal Code, the court categorically asserted that neither the government nor the officials who apprehend that they may be defamed have the right to impose a prior restraint upon the publication.

10.10 It is submitted that the criminal law of defamation be altogether abolished, which is the situation in the United States, while the civil law should be reformed, incorporating these public/private distinctions. In England also criminal prosecutions for libel are on the decline; and in 1975 the Faulkes Committee on Defamation actually considered its abolition. It was concluded, however, that the offence should be preserved - particularly as a worthwhile sanction against those instances where the libellous matter may be gross and persistent and the conduct of the

---

<sup>10</sup>. B Rajagopal v. State of T.N., AIR 1995 SC 264.

defendant very bad indeed'.<sup>11</sup> The Royal Commission on the Press, known as the McGregor Commission, however, recommended that all prosecutions for criminal libel should be conducted by the Director of Public Prosecutions, and private prosecutions for libel should no longer be permitted.<sup>12</sup>

10.11 The above submission is particularly relevant because a journalist in the present circumstances could face two separate proceedings for the same article and although civil and criminal proceedings for defamation are entirely separate and independent, with different requirements and components, the remedies are cumulative, not alternative.<sup>13</sup>

10.12 While adjudicating on a complaint<sup>14</sup> filed by the Government of Tamil Nadu against the Illustrated Weekly of India alleging that an article written by Cho Ramaswamy, making various allegations of corruption

---

<sup>11</sup>. Faulks Committee, Report on the Law of Defamation, Cmd 5909, (March 1975).

<sup>12</sup>. Report of the Royal Commission on the Press, Cmd 6810, pp 191-193, paras 19.35 to 19.36 (July 1977)

<sup>13</sup>. Ashok Kumar v. Radha Kanto, A.I.R. 1967 Cal. 178.

<sup>14</sup>. The Illustrated Weekly of India/Government of Tamil Nadu, 1984 Ann. Rep. 96.

against Chief Minister M G Ramachandran and his Government was defamatory, the Press Council made the following observations on the general pleas often taken in defence of the impugned publications.

Good faith or honest belief

10.13 It seems to have been assumed at some places that good faith in itself is a defence to liability that might arise otherwise for a statement which is found to be untrue and defamatory or whose truth cannot be established. This, however, is not law. Good faith may be an essential ingredient of some of the defences, but it is not in itself a defence. Honest belief in the truth of an allegation also does not suffice in law to confer immunity from liability for defamation. The defendant in a proceeding for libel must prove objectively that the allegation made was in fact true. If an allegation turns out to be untrue, then even a guarded statement expressing doubt about some aspect of the character of the complainant is punishable. Nor does the fact that the person defamed is a 'public figure' make a different rule applicable.

### Public interest

10.14 Fair comment on a matter of public interest is, no doubt, a well-recognised defence, but that defence is confined to comments. It does not protect untrue statements of facts, even if the matter is regarded as one of public interest. The fact must be established as true. If that is done, then the expression of honest opinion is protected where the matter is of public interest. But, the facts must be proved to be true.

### Reliance on newspaper reports

10.15 If a statement is made on the basis of newspaper reports, it is no defence in itself. If the statement turns out to be untrue, it may be defamatory.

### Repetition of libel

10.16 It is not a defence that an impugned statement merely repeats something published elsewhere and the use of the words such as 'alleged', 'learnt from reliable sources' and 'reported' does not, therefore, improve matters. In other words, the law does not permit an argument (i) that the maker of an impugned statement has not himself made the allegation of misconduct



independently, and (ii) that all that he says is that a person has reported to have committed certain misconduct. Publication of rumour that a person has been guilty of misconduct is as libellous as the direct charge.

#### Parliamentary proceedings

10.17 It was suggested in the course of arguments that the allegations were based on matters discussed in the State Legislature and were protected on that score. This argument, however, cannot be substantiated on the facts of this case. The article in issue does not purport to be a report of an Assembly proceedings held contemporaneously or otherwise. It does not purport even to be a summary of the Assembly debates. It is intended to be an independent contribution and is expected to be so regarded by the prospective readers. It cannot, therefore, claim any protection that may be available under the Constitution or the law in regard to reports of proceedings of the legislatures.

10.18 The following principles evolved as a result of the deliberations of the Council in its adjudication on complaints relating to defamation and scurrilous writings:

1. As regards the journalistic propriety of the publication of a libel on a public servant or a public figure, two factors are relevant:

(a) The analogy of exception 2 to section 499 IPC is applicable under which matter published in good faith pertaining to the conduct of a public servant in discharging his public functions or as regards his character does not constitute libel.<sup>15</sup>

(b) Before going into the question of good faith, the allegation must be found to be untrue. It is presumed that a person has a good character unless proved to the contrary, i.e., no presumption exists as to libellous statements being true. But it is equally true that the respondent cannot be censured unless the publication of an untrue statement is proved against him. No action may be taken against the editor unless the complainant leads evidence to support the complaint.<sup>16</sup>

---

<sup>15</sup>. Government of Goa/Blade, 1969 Ann. Rep. 12

<sup>16</sup>. Ibid.

2. Comments on the public conduct of a political leader and on the views held by him are not improper. However, the same cannot be said to a reference made to his private life. The editor would not be guilty of journalistic impropriety when the facts do not clearly forbid certain inferences which the editor has drawn.<sup>17</sup>
  
3. For publication of false news items without verification in order to defame the complainant, the editor is open to censure. An apology from him is not acceptable where he starts a newspaper clearly with the object of blackmailing local officials or public men, but failing in that objective, decides to close it down.<sup>18</sup>
  
4. Constant publication of certain indecent, obnoxious or defamatory writings with the object of extracting money by blackmail by the editor will entail the penalty of

---

<sup>17</sup>. Kapur Singh/Quami Ekta, 1973 Ann. Rep. 34.

<sup>18</sup>. R M Sharma/Daman Virodh, 1972 Ann. Rep. 138.

censure.<sup>19</sup>

5. An article carrying deliberate allegations by an editor, which are not true and proved to be incorrect, is in the nature of a blackmail intended to threaten the complainant into submission to his dictates. As such, it may be described as "the worst type of journalistic impropriety and misconduct".<sup>20</sup>

6. An editor may read "between the lines" and bestow political colour to events which may be correct. However, he may not publish what is characterised in the paper itself as a rumour, with apparently no evidence in support. Indulgence in this type of character assassination shows irresponsibility on his part.<sup>21</sup>

7. Compromise effected between the parties

---

<sup>19</sup>. Case of Bharti Leader, Jan. 1983 P.C.I. Rev. 55; case of Yug Mandal, 1973 Ann. Rep. 84.

<sup>20</sup>. Case of Campus Reporter, 1972 Ann. Rep. 125.

<sup>21</sup>. Case of Sigappa Nada, 1973 Ann. Rep. 85.

indulging in "libellous personal attacks without any regard to journalistic ethics or propriety" will not render a complaint liable to rejection. Mudslinging in the newspaper and the defence of the editor that it was done in retaliation of similar conduct by the complainant leaves both parties open to censure.<sup>22</sup>

10.19 The case of Indian Express<sup>23</sup> is an illustrative one in understanding the position of the Press Council vis-a-vis cases of defamation. The complaint was filed by Mr Harkishan Singh Surjeet, member of the CPI(M) Politbureau, alleging that the article written by editor Arun Shourie and published on the front page of the Indian Express dated 1.6.1990 under the caption SHEKHAR, LIMAYE ENTICE CPI(M) TO BREAK GOVERNMENT: OPEN WAR was defamatory. It was alleged in the story that Mr Chandra Shekhar and Mr Madhu Limaye had met the complainant and conveyed a plan to bring down the National Front government of Mr V P Singh at the Centre and replace it by a government comprising of Janata Dal and Congress-I headed by Mr Jyoti Basu. When

---

<sup>22</sup>. Case of Kewal Satya, 1973 Ann. Rep. 78.

<sup>23</sup>. 1991-92 Ann. Rep. 125.

controverted, the newspaper took up the position that it was standing by the story.

10.20 It has been held by the Press Council in a series of adjudications that the fundamental principles (shorn of their technicalities) underlying the Exceptions (particularly Exceptions 1 and 2) to Section 499 of the Indian Penal Code are applicable by way of analogy as part of the journalistic ethics.<sup>24</sup> 'Good faith' is the keystone of the arch of the principle of journalistic ethics evolved by the Press Council on the analogy of Exceptions 1 and 2 to S. 499 IPC. For the purpose of giving protection of this principle (against a charge of publishing a baseless, defamatory story), nothing may be published without due care, circumspection and enquiry.

10.21 As observed by the Press Council in Vasanth Sathe/The Independent,<sup>25</sup> the extent, nature and mode of the enquiry is largely a question of fact depending on the circumstances of each case. Nevertheless, one broad norm of practice which, normally, in cases of this kind

---

<sup>24</sup>. For precedents, see case of Blaze, supra note 6; Case of Surya India, 1990 Ann. Rep. 61; Case of Organiser, 1990 Ann. Rep. 72; and case of The Independent, 1991-92 Ann. Rep. 58.

<sup>25</sup>. Ibid.

will help is that whenever a newspaper receives a report containing allegations which are likely to lower the esteem or harm the reputation of any public figure or person, the editor should, before publishing it, verify its truth from the person concerned to elicit his version or reaction and publish that also along with the report/article. If the person concerned refuses to give his counter version, a footnote to that effect should be published. If the editor's mind is left rocking in doubt with regard to the veracity of any part of the report/article, he should omit from publishing it.

10.22 In regard to the appending of the post-script "I.E. stands by its report" to the rejoinders/denials of the complainant, the Council felt that it was not justified. In the companion complaint filed by Mr Limaye,<sup>24</sup> the Council expressed displeasure at the sensational caption given to the story. This caption casts its shadow on the entire impugned story, giving the impression that what was Mr Shourie's own comment or speculation has been passed on as a factual comment. This style of presentation is repugnant to the norm of journalistic ethics which cautions journalists not to mix

---

<sup>24</sup>. 1991-92 Ann. Rep. 139.

up their own comments and conjectures with facts.

10.23 A marked increase is evident in the institution of defamation cases against the press by public men - politicians in particular. A 15-year-old case, instituted by Mr Jagmohan, former Lt Governor of Delhi, against Indian Express for a report holding him responsible for the notorious Turkman Gate demolitions during emergency, was concluded in 1992 in the court of the Metropolitan Magistrate, Delhi, with the conviction of the then editor, Mr S Mulgaokar, and reporter, Mr Javed Laiq. The judgment gave rise to varied responses on the issue of delay in the trial of the case and also on whether an editor could be held personally responsible for all that appeared in the paper. Another distressing trend discernible from the Annual Reports of the Press Council is the increasing incidence of complaints being upheld against the press by the Council on the ground of defamation. In 1992-93 the Council upheld 63 complaints while rejecting only 13 in the category of defamation. It may be noted that the total number of complaints upheld against the press during the period was 81.

10.24 The present study does not purport to be a full examination of all aspects of the law of defamation



because the focus is on the aspects of special interest to the media. Although libel actions in India are not in terms of statistics as numerous as in the United States or in the United Kingdom, the number of matters brought before the Press Council is fairly large as indicated in the preceding paragraph. The recommendations of the Council,<sup>27</sup> particularly those relating to innocent dissemination of news, unintentional defamation, partial justification, fair comment, reports of certain proceedings to which qualified privilege attaches etc., deserve serious consideration by the Government while enacting a suitable legislation in line with the [English] Defamation Act. Such a legislation to replace the present uncodified position on the subject is highly necessary for removing a number of anomalies and liberalising the law keeping in view the constitutional rights regarding freedom of speech and expression and the reasonable restrictions that can be placed on it.

---

<sup>27</sup>. For details of the recommendations, see, F M Bakshi, Law of Defamation: Some Aspects, (N M Tripathi, Bombay, 1986), pp 127-137.

## Chapter 11

### PROTECTING PRIVACY

11.1 Protection of privacy is a relatively recent concern of law. The concept of privacy can safely be studied in conjunction with the law of defamation though, theoretically, the scope of each is different and the values which each seeks to protect are also different. Protection against defamation and protection against breach of privacy really cover two distinct areas of a person's life. The law of defamation protects the reputation of an individual; the law of privacy protects his feelings: the former is external while the latter is internal though the same statement can simultaneously injure both.

11.2 Privacy is a multi-faceted concept

compendiously described as the right "to be let alone".<sup>1</sup> Except in the case of celebrities and criminals - they either waive or forfeit this right - privacy is an issue in everyone's life. Distinct from isolation or loneliness, it is a conscious or unconscious attempt to free oneself from the interference or influence of other people, of society or the establishment at large.<sup>2</sup>

11.3 Privacy is a topic having several aspects, not all of which have a direct bearing on speech and expression. However, it is interesting to note that the concept, sprouting from the seminal contribution of the famous jurisprudential collaborators, Samuel Warren and Louis Brandeis,<sup>3</sup> was the result of their irritation at a Boston newspaper which published gossip of Warren's social activities. Yet, strangely enough, this is the one kind of invasion of privacy to which courts have

---

<sup>1</sup>. To use the famous expression first coined by the American scholar, Thomas Cooley, who is regarded as the father of the term "privacy". The phrase used in Cooley on Torts (1888) was quoted by Warren and Brandeis in their article. See infra n. 3.

<sup>2</sup>. See Hall, E.T., The Silent Language (London: Doubleday, 1959).

<sup>3</sup>. Warren and Brandeis, The Right to Privacy, 4 Harv. L.R. 193 (1890).

shown the most tolerance. The basic concepts of the libertarian press, the self-righting process, and the American constitutional guarantee of freedom of the press are influenced by the idea that the truth should be told because the people have a right to know it.

11.4 How have American courts attempted to resolve the conflict between privacy and freedom of speech? This is a conflict which assumes particular importance in the United States because of the First Amendment to the Constitution where we find a firm prohibition upon any law which abridges the freedom of speech or of the press. It has exerted a considerable influence not only upon the development of the American law of privacy but also upon the law of defamation.

11.5 In this particular sphere, American courts have acted upon two broad criteria:

- (a) Freedom of the press extends to matters of public interest, and the Constitution would not, therefore, permit the raising of any objection based on a claim to privacy. Such a claim conflicts with a freedom guaranteed by the Constitution.<sup>4</sup>

---

<sup>4</sup>. Time v. Hill, (1967) 385 U.S. 374.

(b) The above freedom does not extend to matters of private interest and if the ordinary principles of law recognise an action for breach of privacy, such recognition would not conflict with any constitutional freedom.<sup>5</sup>

11.6 This conflict can be illustrated by reference to some of the leading American cases. First, the case, Elmhurst v. Pearson,<sup>6</sup> which exemplifies the comparatively wide area in which free comment is permitted upon matters of public concern. The plaintiff had been one of the accused in a notorious sedition trial. During the course of the trial he had obtained work as a waiter in a hotel. A radio broadcaster commented upon this fact during a broadcast. His identity revealed, the plaintiff had lost his job. However, his action failed for reasons explained by the Court of Appeals for the District of Columbia. In the words of the court, "it is well settled in the jurisdictions which entertain (actions for invasion of privacy) that one who becomes an actor in an occurrence of public or general interest must pay the price of

---

<sup>5</sup>. Cox Broadcasting Corpn v. Cohn, (1975) 420 U.S. 469.

<sup>6</sup>. 153F.(2d) 467 (1946). U.S. Court of Appeals, Dist of Columbia.

publicity through news reports concerning his private life, unless these reports are defamatory".

11.7 Also in Sidis v. F.R. Publishing Corpn,<sup>7</sup> a former child prodigy, once in the public eye but living for over twenty years in obscurity, was held to be an unprotected subject for a magazine piece about his subsequent eccentric life. A privilege is enjoyed for news or matters of general interest, which the court found to be present here; and obscure doings may be as interesting as prominent ones.

11.8 On the other hand a Californian court came to a different conclusion in Melvin v. Reid.<sup>8</sup> A reformed prostitute, accused and acquitted in a sensational and widely publicised murder trial seven years before, had since married and lived a life of respectable obscurity. A motion picture account of the crime used her real unmarried name in portraying her earlier life. Violation of privacy was found by the court, indicating that lost privacy, like lost virtue, can be recovered and can again become the subject of protection. The film was nothing more than a commercial venture, and so

---

<sup>7</sup>. 113F. (2d) 806 (1940).

<sup>8</sup>. 112 Cal. App. 285 (1931).

without privilege for the harm it caused.<sup>9</sup>

11.9 Finally we turn to what is probably the most famous of American cases on privacy, Time Inc v. Hill,<sup>10</sup> a decision of the United States Supreme Court in 1967, which involved a straight confrontation between the individual's desire to be let alone and the freedom of speech provisions of the First Amendment. James Hill alleged that an article in Life magazine falsely portrayed an experience suffered by himself and his family when they had been held hostage in their own house for 19 hours by three escaped convicts. The article complained of was one describing a play, The Desperate Hours, which was a fictionalised account of a family being held captive by three escaping convicts. However, Life had, under the headline "True Crime Inspires Tense Play," portrayed it as a re-enactment of the Hills' experience, an experience which had been much in the news three years earlier. At that time Hill had made it quite clear that the family was scared but

---

<sup>9</sup>. Phoolan Devi's objection to Shekhar Kapur's Bandit Queen assumes relevance in this context. The film, acclaimed as a landmark in Indian cinema, was permitted to be screened only after effecting a few modifications to assuage the former dacoit who felt that it was the true story of her life.

<sup>10</sup>. Supra note 4.

was not mistreated during the ordeal. In the play the fictional family suffered violence at the hands of the criminals. Also ever since their true life experience the Hills attempted to avoid publicity as much as possible. The family desired nothing more than to be able to live in peace and to forget the entire episode. Now their three-year-old ordeal had been sensationally revived in an exaggerated manner.

11.10 Hill brought suit in New York for invasion of privacy. Time Incorporated, Life's publisher, was held liable. It was upheld on appeal. The appellate division ruling stood in stark contrast to the long tradition of rulings in New York which supported the concept of an unfettered press. The publisher sought a hearing by the United States Supreme Court, claiming that its constitutional guarantee of freedom of speech and of the press had been denied by the findings of the New York courts. The appeal was allowed by a majority of the court which said the subject matter of the article, the opening of a new play linked to an actual incident, was a matter of legitimate public interest. As such it was protected by the First Amendment. That protection would be lost only if a false story was published with knowledge of its falsity or in reckless



disregard of its truth. Justice Brennan, who wrote the opinion for the court, said the New York jury had not been properly instructed and called for a new trial to measure the actions of Life's editors under the standard of knowing falsity or reckless disregard.

11.11 In the opinion of the majority of the court, the defendants had displayed recklessness in publishing the article by failing to make a reasonable investigation of the facts of the story. Justice Fortas was distressed by the majority's lack of support of the right of privacy. Important as the rights guaranteed by the First Amendment were, there were also, in the words of Justice Fortas, other "great and important values in our society ... which are also fundamental and entitled to this court's careful respect and protection".

11.12 This division of opinion does demonstrate the difficulty faced by courts in drawing a line between privacy and freedom of speech. It is a conflict between two fundamental human rights, each of which is contained in the European Convention for the Protection of Human Rights and Fundamental Freedoms.<sup>11</sup>

---

<sup>11</sup>. Articles 8 and 10.





























































































































































































































































































































































































































































































