PROFESSIONAL SECRECY AND OTHER RIGHTS

C. P. GUPTA

Professional Secrecy and the Law: The press in almost all the free countries of the world has of late demanded a legal recognition of its right to professional secrecy as an essential aspect of the freedom of press.

The reasons for and against such extension have been succinctly summarised in the excellent study by the International Press Institute "Professional Secrecy and the Journalist" published from Zurich in 1962.

The reasons for in part include:

(1) That the journalist has a moral and ethical duty to protect the anonymity of an individual who gives him information with the understanding that it is to be regarded as confidential as to source.

(2) That the journalist must protect his sources as a practical assurance that he will continue to receive information in confidence, if need be, and make it possible for the newspaper to publish information that should be made known to the public.

(3) That the press contributed to the public welfare and performs an essential public service in presenting information that should be made known to the public.

(4) That the journalist serving the public welfare, is as much entitled to special privilege under the law as is the doctor or clergyman or lawyer.

(5) That, if a journalist can obtain information, the public agencies—including the police and the courts—should be able to obtain the same information without putting pressure upon the individual journalist to do their work for them and, in the process, betray a trust.

Arguments against include these points:

(a) That the function of the courts in the preservation of law and order must take precedence over any claim of privilege by the journalist.

(b) That the journalist receives information with the specific understanding that it is to be made known, whereas the doctor, lawyer, clergyman receive it with the express understanding that it is not to be made known.

(c) That a journalist, given a legal right to withhold source, could publish any sort of assertion or charge actually made up by the journalist to serve some purpose contrary to the public interest, or be used for that purpose.

(d) That there is no evidence to show that the press performs any better or any worse, whether or not it operates under law granting protection.

In spite of the demand for legal protection to professional secrecy, few countries have provided it, and in varying measure.

"Journalists in Austria enjoy the almost complete legal right to protect confidences. That right is virtually complete, also under the law in effect in the Philippines. Journalists in the United States are protected... by laws in 12 States, while judicial rulings in two other States provide an effective protection. Circumstances in Sweden, in Norway, in the German Federal Republic, and in Switzerland are almost as favourable under existing laws. This, however, represents the total protection under the law accorded to journalists in the world today in the area of professional secrecy".[1]

There is no unanimity among the journalists about the scope of the protection sought and they are not agreed whether it should be absolute or qualified.[2]

In India there is no legal protection given to professional secrecy of the press. Statutory protection has been to communications passing between the lawyer and his clients, between the husband and wife, between the officials of the State, and to communications received from others by Magistrates, police and revenue officers, about the commission of certain offences.[3]

1. *Professional Secrecy and the Journalist*, p. 233.
2. *Ibid.* 235. Mr. Y. Kumar in his paper has taken almost the same view.
3. The Indian Evidence Act, 1872, ss. 122 to 129 and 132.

Although the press in India has not enjoyed any legal protection to professional secrecy the cases in which the journalists have been compelled by the courts to disclose the sources of their information, or where the journalists have been penalised for non-disclosure, are very few indeed, if any at all.

In the absence of any cases or field study, it is difficult to say whether the few cases should be ascribed to the self-restraint by the journalists or to the indulgence of the courts towards them. Nor can it be said with any certainty as to how far the responsible journalist has been hampered in the discharge of his functions by the absence of statutory or legal protection to professional secrecy.

That the rules of professional ethics prevent the journalist from disclosing his sources is widely recognised. The demand is for legal protection on the parallel of protection to other professions.

The reason for treating communications between husband and wife as privileged, is, because it is considered "necessary to preserve the peace of the families", and there is a natural repugnance to compelling a wife or husband to be the means of other's condemnation.

On grounds of public policy public officials are not compelled to disclose communications made to them in official confidence and when they consider that public interests would suffer by such disclosure. The question whether the disclosure is in public interest or not has been left to the discretion of the executive officers and the courts will not enquire into it.

Similar reasons operate between the magistrates and police officers But the protection given to communications between the lawyer and his client is for somewhat different reasons. The idea of protection is to encourage the client to consult the professional experts unhampered by any fears about the disclosure of his communications.

It may be pointed out here that whereas in the case of other professional communications privilege enjoyed, by and large, is to keep confidential the contents, in the case of the press the demand is for the privilege to keep confidential the source of the published communications.

In the absence of any cases of hardship, not only the social necessity has to be demonstrated but its urgency has to be proved

to secure a priority in the programme of the over-busy legislatures.

Several speakers have said that in the matter of professional secrecy they were thinking of protection against the officials who often compelled the journalist to disclose the sources of his reports, and in the event of his refusal to do so, subjected him to various pressures and extra legal sanctions, such as, refusal of entry to offices. It would hardly serve any purpose to issue a general fiat in a statute, that no officer will ask a journalist about the sources of his published reports, for, if an official was displeased with the publication of a report, he could always withdraw from the journalist the concessions made to him without asking him to disclose the sources of his reports.

The real problem was of legal protection against the legal compellability of disclosing the sources of published information in a court of law, and it is this problem which was studied by the International Press Institute.

The right of the press to publish whatever it likes is, in a way, hampered by the law of defamation. The right to freedom of speech and expression, of which the freedom of press is a part, has been specifically subjected under our Constitution, to the law of defamation.

The civil law of defamation may be a greater and more effective check on the freedom of press than even the law of criminal libel. Heavy damages in a few cases may even force a newspaper to close down.[4]

The law of defamation in this country is based on the principles of the English common law.

Until recently, the freedom of the press in England came in for much trouble at the hands of the common law of defamation. If a paper published a photograph of X & Y, with the caption, even at the suggestion of X, that their engagement has been announced, it was made to pay damages to the plaintiff, who, unknown to the defendant, was the wife of X, not divorced, but living separately.[5]

Again, the papers were made to pay damages even for state-

4. In the recent case of Thackersay *v.* R.K. Karanjia, editor of *Blitz*, the Bombay High Court has granted a sum of rupees three lakhs as damages to the plaintiff. It is not proposed to deal with the case in any detail as an appeal from the judgment is pending before the Supreme Court.

5. *Cf.* Cassidy v. *Daily Mirror*, (1929) 2 K.B. 331.

ments in their humorous columns, if some person, unknown to the writer, could prove that the description given of the supposed fictitious figure tallied with his own and that the statements made in the column were defamatory of him.[6]

And that was not all. Damages were to be paid even for publishing a factual news item, such as, A.B. convicted of bigamy and sentenced to imprisonment, if there happened to be two A. Bs. in the town answering the same description, the statement being true with regard to one but not the plaintiff.[7]

It was only the Defamation Act of 1952, which helped in reconciling the conflicting claims of an individual to his reputation and that of the press to its freedom, by providing that in case of unintentional publication of defamatory statements a proper offer of amends, which, besides apology, includes an offer to join in publishing a correction, could be treated by the courts as a defence to an action of defamation.

The Defamation Act of 1952, obviously, does not apply to India and theoretically the law here is what it was at common law. Our courts have repeatedly stated that in the matter of making defamatory statements the press enjoys no privilege and is exactly in the same position as any other person. Some of them have gone to the extent of saying that not only a journalist "is not specially privileged as to what he must say. But on the other hand he has a greater responsibility to guard against untruths, for the simple reason that his utterances have a far larger publication than have the utterances of the individual and they are more likely to be believed by the ignorant by reason of their appearing in print."[8] Whenever libellous statements have been published in the press deliberately the courts have taken a serious view and granted damages for the defamatory statements. For example, in *The Englishman Ltd.* v. *Lajpat Rai*,[9] when the defendant, appellant newspaper, published the defamatory statement about the plaintiff, L. Lajpat Rai, that "he has been guilty of tampering with the loyalty of sepoys", Harrington, J., of the Calcutta High Court, held that the statement, deliberately published, in the context did amount to "an imputation that he (the plaintiff) has been guilty of offences under sections 124A and 131 of the Indian Penal Code" and was defamatory. The Court rejected the plea of privilege advanced by the defendants on the basis that similar statements about the plaintiff had been

6. *Cf.* Hulton v. Jones, (1910) A.C. 20
7. *Newstead* v. *London Express*, (1940) 1 K.B. 377.
8. Khair-ud-Din v. Tara Singh, AIR 1927 Lah. 20.
9. I.L.R. XXXVII Cal. 760.

made in Parliament, because the publication in question was not a fair and accurate report of parliamentary proceedings contemporaneously published but a republication by the paper as a statement of its own.

But apart from deliberately made defamatory statements, the position of defamatory statements made in the press inadvertantly, is different. In this regard, our law is not likely to develop on the lines English common law did. The courts seem to be on the guard. For example, in *Nagantha* v. *Subramania*,[10] the *Madras Standard* had published a letter from the defendant in which the writer had cast reflections on the conduct of a case by the plaintiff as a lawyer. Dismissing the appeal of the plaintiff against the reduction of damages by the Subordinate Judge's court below, Sadasiva Aiyar, J., speaking for the High Court, observed: "The appellant's lawyer referred to the House of Lords' cases in *Hulton & Co.* v. *Jones*, to support his position that whether the plaintiff was intended or not intended to be attacked, the defendant would be liable if an ordinary reader would reasonably come to that conclusion. Supposing that the English Law as developed by the English precedents is to that effect, I do not see why the Indian law should follow suit unless the doctrine is in consonance with justice, equity and good conscience. I am strongly of opinion that the dissenting opinion of L. Fletcher Moultan, J., on the question (an opinion which was expressed in the same case when it was before the Court of Appeal) [*See Jones* v. *Hulton & Co.* (1909) 2 K.B.444] is much more in consonance with justice and equity than the law as now settled in England on this point".

It may be argued, as it has been, that because of the requirement of expeditious publication the press people have to work under a great strain and that they do not have the time and leisure to verify the accuracy of every statement that goes to the press for publication. But it has to be remembered that the public interest in free and expeditious flow of news and views has to be balanced with the public interest in an individual's reputation. It will be tilting the balance too much on one side if the individual is to have no remedy for the gravest harm done to his reputation and interests by the published defamatory statements in the press. The English Defamation Act of 1952, protects the publication only of unintentional statements in the press. With regard to such defamatory statements in the press, the trend of the judges in this country, as disclosed by the very few cases that have come before them, is to grant no damages at all or only nominal ones.

10. AIR 1918 Mad. 700.

In the absence of any hard cases, such as the ones at English common law, to which reference has been made above, there does not appear to be any particular need here of an Act such as the Defamation Act of 1952, in England. There is hardly any reason to doubt the capacity of our judges to provide justice in the particular facts of the cases and their knack to develop the law on progressive lines. From the legislatures' point of view, it is also a question of priorities. The over-busy legislatures find it hard to cope with the more pressing social demands. For example, it took the Parliament about a decade to try to implement the recommendations of the Law Commission in the first of its reports in 1956, about the governmental liability for the torts of its employees, a matter, undoubtedly of much greater practical and social importance.

Right to Comment : To the press it is not only the right to gather and publish news but the right to express its views and to comment on matters of public interest, is an equally dear and important right. At common law an individual has the right to express a fair opinion, whether true or false, on a matter of public importance. Following the opinions of English judges our courts have expressed the view in a number of cases that the press has no special privilege to comment on matters. In spite of these general observances, the courts have been quite indulgent towards the press in upholding the defence of fair comment. Of course, the courts have intervened to grant damages for libel where defamatory statements were made in the name of comments. For example, in Subhas Chandra *v.* Knight & Sons[11] where the *Statesman*, purporting to comment on the speech of Lord Lytton, the Governor General, dealing with the arrest of certain persons under the Regulations of 1898, wrote in its leading article to the effect that Subhas Chandra Bose was not arrested because he was a Swarajist but because he was a terrorist, the Court granted damages to the plaintiff holding that it was not a mere comment but a statement of fact and that a libellous statement of fact was not a comment. In the course of his judgment, Rankin, C.J. observed, "In such a matter a journalist who does not exercise a reasonable degree of care and skill to make plain the limits of his intention may quickly drift into a repetition of the accusation into a suggestion that it must be true into an opinion to that effect. If he has done so and if the fair meaning to the ordinary reader, as put by a jury upon his words, is to present the reader with or commend to him a conclusion that the plaintiff has been guilty of a crime, it is in my opinion erroneous to say that he is merely commenting upon the statement of another".

11. AIR 1929 Cal. 69

Likewise, in Tushar Kanti Ghosh *v.* Bina Bhowmick,[12] where, in certain statements published in the *Amrita Bazar Patrika*, in the course of a dispute between the paper and some of its workers, allegations were made against the plaintiff that she as leader of her union, "has employed hirelings or has been concerned in the commission of daylight robberies or that she got her union affiliated to the B.P.N.T.U.C. as a subterfuge", the Court refused to treat them as mere comment and held them to be defamatory statements of fact. But in M.T.P. Publishing Co. *v.* Rodgers,[13] where the *Madras Times*, while commenting on the conduct of the plaintiff, had called him a "born agitator", and who, in the opinion of the paper, in misleading the workers to strike was serving his own interests rather than of the workers, the Madras High Court while accepting the appeal of the respondents observed: "The language, no doubt, is strong, but if the writer believed that Mr. Rodger's activities were mischievous, he was entitled to express himself forcibly with a view to dissuading the men from following him and so averting a strike". In fact, hardly have the courts ever held a comment in the press unfair because of the strong language used. The courts have gone to the extent of saying : "While a journalist is bound to comment on public questions with care, reason, and judgment he is not necessarily deprived of his privilege merely because there are slight unimportant deviations from absolute accuracy of statement, where those deviations do not affect the general fairness of the comment."[14] In Rama Krishna Pillai *v.* Karunachari Menon,[15] the defendant, editor of the *Indian Patriot* had written in his paper a number of articles justifying the action taken by the Maharaja of Travancore against the plaintiff's tri-weekly, the *Swadeshabhimani*, banning it in public interest. Dealing with defence of fair comment, the court observed that "there can be no doubt that fair comments upon any matter of public interest in which are included the publications in a newspaper are protected publications in the absence of malice". The court further observed that "No suit for defamation will lie against a person for comments made in a newspaper upon matters of public interest unless he has exceeded the bounds of fair comment or has been actuated by malice". In coming to the conclusion whether a comment is unfair or not, the courts do not apply their subjective standards of fairness but judge it from the broad angle of the critics and would hold the comment unfair only if it would be so regarded by the critics in their particular area. The cases do not point to any particular

12. 57 C.W.N. 378.
13. AIR 1917 Madras 854.
14. Suraj Mal *v.* Horniman, AIR 1917 Bom. 62.
15. (1913) 25 M.L.T. 476.

hardship suffered by the press in its freedom to comment and there does not appear to be any need for any statutory modification of the law in this regard.

Right of access to court proceedings and to publish the same : As in the matter of publishing defamatory statements so in the case of access to court proceedings, the press here does not enjoy any special privilege. The journalist has the same right to attend the proceedings of a court of law as any other member of the public. Based on the English common law tradition, justice is administered in the open courts. But as, at common law, the judges have the inherent jurisdiction to try some exceptional cases in camera, keeping out the press, as any member of the public. In other cases they may admit the press to the proceedings but may prohibit the publication of the whole or a part of it if in their opinion it was in the interests of justice to make such an order.

Recently, in the so-called Tarkunde's case, i.e. Naresh Sridhar Mirajkar *v.* The State of Maharashtra & another,[16] was witnessed a debate in the Supreme Court on the side issue whether the categories of in-camera proceedings were predetermined by law and closed or was it open to the judges, in their inherent jurisdiction, to prohibit the publication of proceedings if in their opinion it would not be in the interests of justice. Of course, from the lawyers' point of view, the main and important issue involved in that case was whether any errors of judgment on the part of judiciary while exercising their judicial functions in making orders even on matters, in a sense collateral to the dispute in hand, but which the judge considered necessary to do full justice in the case, could be said to involve the infringement of fundamental rights of a citizen calling for an interference by the Supreme Court under article 32 of the Constitution by the procedure of the writs. The court, with one dissenting voice, has answered the question in the negative. On the side issue of prohibiting the publication of court proceedings by the judges, an issue which was not relevant for the decision of the case, the Chief Justice speaking for the majority, while emphasizing the great role of trials held subject to public gaze, acting as a "check against the judicial caprice or vagaries" and serving as a "powerful instrument of creating confidence of the public in the fairness, objectivity and impartiality of the administration of justice" had "no hesitation in holding that the High Court has inherent jurisdiction to hold trials in camera if the ends of justice clearly and necessarily require the adoption of such a course."

Because of a certain statement of the witness, Mr. Goda,

16. Not yet reported.

in the original suit of Mr. Krishanraj M.D. Thakersay, where the plaintiff had claimed Rs. 3 lakhs as damages for publishing malicious libel, requesting the court to prohibit the publication of his statement in the court as the publication of an earlier statement in the court had caused him considerable loss in his business, a misleading impression is likely to be caused in some circles that the order of Mr. Justice Tarkunde prohibiting the publication of the statement sacrificed the public interest in knowing the truth about a matter to the narrow, selfish business interests of an individual. In fact this is not so. The Supreme Court has treated the order of Mr. Justice Tarkunde as one made in the larger interests of justice and not merely to protect the individual's interests, and that only is the correct legal view of the matter and will be so treated by the courts.

The question may now be considered whether the experience of the press in the matter of access to judicial proceedings and their publication, points to the need for a specific statutory guarantee to the press in order to enable it to discharge its functions properly in the welfare state. The reported cases do not point to any capricious exercise of the inherent jurisdiction of the courts to hear cases in camera. The powers have been exercised by the courts cautiously. They have not been eager to add to the categories of cases to be held in camera, and have not added any.

Conclusion : The general conclusion of this paper is that in the areas of professional secrecy, publication of information and expression of comment, access to judicial proceedings and the publication of the same, the present law of the land does not hinder the press in the discharge of its obligations to a free and democratic society. If statutory protections are desired in these areas, not only the need has to be demonstrated by citing clear cases of hindrances in the discharge of its functions by the press, but the journalists have also to prove the social urgency of the matter in order to deserve a high priority in the overcrowded legislative programme.