LAW COMMISSION OF INDIA

NINETY-THIRD REPORT

ON

DISCLOSURE OF SOURCES OF INFORMATION

BY MASS MEDIA

September, 1983

LAW COMMISSION OF INDIA

JUSTICE K. K. MATHEW

D.O. NO. F. 2(2)/83-L.C.
SHASTRI BHAVAN
NEW DELHI
SEPTEMBER, 9, 1983.

My dear Minister,

I am forwarding herewith the Ninety-Third Report of the Law Commission on "Disclosure of Sources of Information by Mass Media".

2. The subject was taken up by the Law Commission on its own. The need for taking up the subject is explained in Chapter I of the Report.

3. The Commission is indebted to Shri P. M. Bakshi, Part-time Member and Shri A. K. Srinivasamurthy, Member-Secretary, for their valuable assistance in the preparation of the Report.

With regards.

Yours sincerely,
Sd/-
(K. K. Mathew)

Shri Jagannath Kaushal,
Minister of Law, Justice & Co. Affairs,
New Delhi.

Encl. 93rd Report.

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CHAPTER 1

INTRODUCTORY

Scope and genesis.

1.1. This Report deals with the question whether a journalist or other person responsible for a publication by way of mass media should be compelled to disclose, in a court of law, the sources of information acquired by him in confidence for the purpose of his profession. This, of course, is a broad formulation of the question that is proposed to be dealt with in this Report. There are several subordinate issues that are also proposed to be considered in this context. The question pertains to the law of evidence, but obviously a consideration thereof necessitates an examination of many other fields of law. The question has been taken up by the Law Commission of India, *suo motu,* having regard to its importance and relevance to current thinking.

Position in law.

1.2. For a long time, there has been going on a debate whether journalists[1] should be given a right to refuse to disclose in court the source of their information. According to the present position on the subject, (as will be evident from the ensuing discussion),[2] no such privilege available to journalists is recognised in Indian law.

In most countries, the Code of professional ethics expects that journalists shall not disclose what is obtained by them in confidence. But this rule of professional conduct has not so far received recognition in law courts or in statutory provisions in India.

Journealistic practice.

1.3. The justification for considering reform of the law on the subject is mainly sought to be derived from the circumstances in which, and the conditions on which, information is obtained by the journalist. As a rule, when a journalist wishes to use information obtained professionally by him, he normally credits the source by name, with such further identification as may be necessary to establish the validity of the speaker's knowledge. However, to this general position, there are certain exceptions. In a study undertaken by the International Press Institute, the position was stated as under, a few years ago :[3]

> "Very few reports appear in print without some specific attribution to source. This is regarded as essential if the reader is to be able to form a proper judgment of the weight to be given to a particular statement. But there are exceptions. They are infrequent, but may be important. There are times and circumstances..... when an informant may not wish to be identified, as the source of a statement. To the journalist who has established himself as a reliable reporter, accurate and responsible in his approach to his task, the 'source' may nevertheless be willing to provide certain information with the understanding that it will not be attributed to him."

The informant (as was explained in the above study) may have good reason for wishing to remain anonymous. It may be a personal reason, but perfectly understandable and legitimate. There may even be a reason bearing some direct relation to the public welfare. If the source really

1. The expression "journalist" is used for the sake of brevity. Other persons responsible for any publication may also stand on the same footing.
2. Paragraphs 2.3 and 3.2, *infra.*
3. International Press Institute, Survey No. 6, Professional Secrecy and the Journalist (Arno Press), (1972).

wished to remain anonymous and if the journalist considered the information worthy of use, he would use it without directly attributing the information to a particular source.

The question that arises for consideration is whether the law should recognise the practice followed by journalists and incorporate it as a privilege that could be claimed if the journalist is called upon in a court of law (or other authority having legal power to compel a witness to testify).

The move for reform.

1.4. The present position in this regard, as already stated,[1] is that there is no such privilege except in countries where it is conferred specifically by statute. The position has been modified in certain countries, though not in India. However, even in countries where such a reform has been mooted, legislation in this direction has been rather slow. Thus, in a case that arose before the English court of Appeal,[2] Lord Justice Scarman (as he then was), speaking in the context of an application for the production under summons of an unpublished television film, observed that "while the law offered the press and the broadcasting authorities some protection against oppressive application it was arguable that more protection was needed." He expressed the view that this was a problem for law reform. However, no such reform was, until very recently, effected in England.[3] In fact, it may be mentioned that a journalist in England who refused to reveal his sources of information when ordered to do so by a judge was proceeded against for contempt of court. Fortunately, it was found in this case that the answer to the question was not relevant and necessary to the issue before the Court. The journalist was, therefore, held to be not guilty.[4]

Report on the Evidence Act.

1.5. Incidentally, it may be mentioned here that the Indian Evidence Act, 1872, which codified the law of evidence in India, has been reviewed[5] by the Law Commission in a comprehensive Report. But the particular question now under consideration had not presented itself before the Commission at that time.

Scheme of discussion.

1.6. In the present Report, it is proposed to deal first with the existing law in India or the subject, and next with the position in a few selected countries. The issues that require consideration will then be formulated, followed by our concrete recommendations for amendment of the law.

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1. Paragraph 1.2, *supra*.
2. *Souier* v. *Haldguarh*, (1975) 2 All E.R. 1009, 1022.
3. For the present English law, see Chapter 4, *infra*.
4. *A.G.* v. *Indian*. The Times, Pub. 20, 1982.
5. Law Commission of India, 69th Report (Indian Evidence Act, 1872).

CHAPTER 2

THE LEGAL OBLIGATION TO GIVE EVIDENCE

The general position.

2.1. It is well settled that there is a general legal obligation upon all persons to give evidence in court concerning relevant facts. This obligation has been regarded as essential to the administration of justice.[1] Coupled with this obligation is the obligation to answer all questions relating to relevant facts ; without such an obligation, the judicial enquiry, it is postulated, could not be completed successfully.

The exceptions.

2.2. A few exceptions to this general obligation (that is to say, the obligation to give evidence and to answer all relevant questions), have been created in most common law countries, based on considerations of public policy. However, it may be stated that the exceptions have been narrowly framed and the common law has been rather rigid in creating new exceptions.

Indian law.

2.3. In common with most common law countries, the Indian legal system also postulates that every person is bound to answer all questions held to be relevant by the court, unless there be applicable a specific legal provision conferring immunity on the ground of public policy.

The privileges in law.

2.4. It is not necessary for the present purpose to enumerate all these exceptions, or to catalogue the recognised evidentiary privileges. The question immediately for consideration is whether, to the list of such privileges, disclosure of the source of information obtained by a **journalist** *in confidence should be added.* In this context, it should also be pointed out at the outset, that while the breach of confidence in business and personal relationships may often be actionable (or, in some cases, even criminally punishable), the protection of confidence in itself as a basis for creating an exemption from the obligation to give evidence of the matters concerned has not so far been the approach adopted in most common law countries. Whenever, in the sphere of the law of evidence, a privilege has been recognised in respect of a confidential information, the law has generally insisted upon the presence of some other elements that would justify the recognition of an evidenciary privilege.[2]

Right of Public to every man's evidence.

2.5. Traditionally, it has been the position of the law[3] that the public has a right to every man's evidence. Obviously, a contrary rule would render orderly legal procedure both frustrating and futile. The interest of society favours the procuring from each person of relevant facts, in order to resolve the issue being litigated or investigated. This principle is perhaps implicitly assumed to be a postulate of fair trial.

As the Supreme Court of the United States has observed,[4] there is a long standing principle that the Grand Jury has a right to every man's evidence, "except that evidence which is protected by a constitution, a common law or statutory privilege." In England, as early as 1612, Lord Bacon declared[5] that "all subjects, without distinction of degrees, owe to the King tribute and service, not only of their deed and hand, but of their knowledge and discovery." Therefore, each citizen owed the King unfailing

1. See further, paragraph 2.5, *infra.*
2. See, further, Chapter 3, *infra*....
3. Law Commission of India, 69th Report (Indian Evidence Act, 1872), page 627
4. *Braamgburg* v. *Haves,* (1972) 33 L. Ed 626.
5. *Countess of Shrewsbury's* case, (1613) 12 Coke 94; 2 How. St. Tr. 769, 773.

duty to reveal all his knowledge, including its sources. To this general principle, the law creates an exception in the public interest, whenever it grants a privilege in the realm of evidence.

History of the law in England.

2.6. Historically, the legal obligation to give evidence is fairly old. In England, by Act of 5 Eliz, Chap. 9, S. 12, provision was made for the service of process out of any court of record, requiring the person served to testify concerning any cause or matter pending in the court, under a penalty of £ 10 besides damages to be recovered by the party aggrieved.[1] When it was that grand juries first resorted to compulsory process for witnesses, is not clear.[2] But, by 1612, the obligation to give evidence had come to be recognised. And, by the Act 7 and 8 Wm. III, Chapter 3, section 7 (1695), parties indicated for treason or misprison of treason were given the like process to compel their witness to appear as was usually granted to compel witnesses to appear against them; clearly evincing that process for Crown witnesses was already in use.[3]

Thus, the general obligation to give evidence is well recognised in Common law systems.

Position in India— general obligation.

2.7. Speaking broadly, this is the position in India also. Under the Indian Evidence Act, there is a general obligation on all persons to give evidence in Court, and to answer all questions held to be relevant by the court, except in special cases in which the law confers protection.

Considerations of public policy as creating privilege

2.8. No doubt, considerations of public policy have led to the emergence of certain privileges, available in certain special situation.[4] In law, a privilege is an immunity or exemption conferred by special grant to a certain class or individual in derogation of a common right.[5] Usually, a privilege or disability is created by law on the ground of some consideration of public policy. The law excludes, or dispenses with, some kinds of evidence on grounds of public policy, because it is thought that greater mischiefs would probably result from requiring or permitting the admission of such evidence than from granting a privilege or creating a disability in respect thereof. Where privilege is granted, it is based upon a recognition that in appropriate circumstances the public benefits more from protecting the particular relationship, than it is injured by the impediments which such privileges may cause to the administration of justice.

Wigmore's statement of the rationale.

2.9. The situations in which a privilege should be recognised has been the subject of much learned discussion. Four conditions must, according to Wigmore, be fulfilled before a privilege against disclosure should be enacted in the law of evidence. His statement of the position has almost become a classic. The conditions are: [6]

(1) The communication must originate in a confidence that the facts communicated will not be disclosed.

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1. See *Havithbury* v. *Harvey*, Cro. Eliz. pt. 1. p. 131, 78 Eng. Rep. 1141 *Growin* v. *West*, Cro. Car. 522, 540, 70 Eng. Rep. 1032-1066 (March 18, 1640).
2. *Blair* v. *U.S.* (1918) 63 L. Ed. 979, 982.
3. *Blair* v. *U.S.* (1918) 63 L. Ed. 979, 982.
4. Chapter 3, *infra*.
5. Wabster's New World Dictionary (1955), page 1160.
6. 8 Wigmore Evidence (McNaughten Ed. 1961), paragraph 2235.

(2) This element of confidentiality must be essential to the full and satisfactory maintenance of the relationship between parties.

(3) The relation must be one which, in the opinion of the community, ought to be sedulously fostered.

(4) The injury that would injure to the relation by disclosure of the communications must be greater than the benefit gained by the disclosure for the correct disposal of the litigation.

CHAPTER 3

EVIDENTIARY PRIVILEGES IN INDIA, AND THEIR RATIONALE

The exceptions to the general rule.

3.1. To the general rule that every person of sound mind is compellable to answer before a Court all questions held by the court to be relevant to matters under inquiry, a few exceptions are provided by law. There is, in the first place, a constitutional privilege against self-incrimination,[1] no person accused of an offence shall be compelled to be a witness against himself.

Secondly, under the Evidence Act,[2] certain matters are privileged from disclosure in a court of law. The provisions on the subject are somewhat elaborate. It would be convenient to quote from the Report of the Law Commission on the Evidence Act[3], where the matters so privileged were summarised as under :—

"(1) matters relating to conduct of judges or coming to the knowledge of judges, etc. in their judicial capacity (section 121) ;

(2) communications which are made to a spouse during marriage (section 122) ;

(3) State secrets (sections 123-124) ;

(4) communications between a legal adviser and a client (sections 126 and 129) ;

(5) certain title deeds (sections 129, 131) ; and

(6) certain incriminating matters (section 132)."

Journalistic privilege is not recognised in Indian Law. Although there do not appear to be any reported Indian decisions on the subject, this is a fairly well established position, and is borne out by at least two incidents that took place in India in the past, where journalists preferred to court punishment rather than disclose their correspondents or contributors.[4] In one case, Kaliprasanna Kavyabisharad, editor of the 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 appeared torn off. He was sent to jail for nine months.[5]

In the other case, Bepin Chandra Pall was sentenced to six months' imprisonment, because he refused to depose who was the author of an article for which Aurobindo Ghose was being tried for sedition. Aurobindo Ghose was subsequently acquitted. Pall was sent to jail for six months[5] for refusal to depose as to the above fact.

The binding thread.

3.2. In the Report[6] of the Law Commission on the Evidence Act, the rationale underlying the various evidentiary privileges was thus stated :—

"The privileges recognised by the law of evidence differ in their content, but a certain binding thread seems to connect them. To the explanation

1. Article 20(3), Constitution of India.
2. Sections 121-132, Indian Evidence Act, 1872.
3. Law Commission of India, 69th Report (Indian Evidence Act), page 630, para 62.13.
4. Note, "Journalistic privilege" (1963) Vol. 1, No. 9, Supreme Court Appeals.
5. Editorial, "Journalists and their sources" (31st March, 1980) Vol. 84, C.W.N. 85-87.
6. Law Commission of India, 69th Report (Indian Evidence Act, 1872), page 628, para 62.5.

given above-public welfare--may be added another element, namely, that most, if not all, of the privileges recognised by the law are needed for the proper functioning of the particular relationship. This relationship may be of various types. It may be domestic—as of husband and wife or professional—attorney and client—or may be wider—e.g. the Government's retention of certain information, or it may consist in a particular character occupied by the person concerned, e.g. the judge privileged under section 121. The law assumes that the proper performance of the function in question, or the proper maintenance of the relationship in question, justifies the grant of an evidentiary privilege in respect of certain matters which are considered essential for that function or relationship. It is on this assumption that the privileges are founded."

The rationale as dealt with in the California Evidence Code.

3.3. In order to indicate more clearly the common thread underlying the various privileges, reference was made in the above-mentioned Report[1] of the Law Commission to the California Evidence Code, section 910 of which makes the privileges applicable to "all proceedings".[2] That section of the California Evidence Act has the following Explanatory note which may be helpful for understanding the rationale of evidentiary privileges. The note was mainly intended to justify the broad application of the privileges (i.e. their application to administrative tribunals also), but the observations are of interest for our purposes also, and may be quoted from the above Report :—

"Most rules of evidence are designed for use in courts. Generally their purpose is to keep unreliable or pre-judicial evidence from being presented to the trier of fact. Privileges are granted, however, for reasons of policy unrelated to the reliability of the information involved. A privilege is granted because it is considered more important to keep certain information confidential than it is to require disclosure of all the information relevant to the issue in a pending proceeding."

"Thus, for example, to protect the attorney-client relationship, it is necessary to prevent disclosure of confidential communications made in the course of that relationship. If confidentiality is to be protected effectively by a privilege, the privilege must be recognised in proceedings other than judicial proceedings. The protection afforded by a privilege would be insufficient if a court were the only place where the privilege could be invoked."[3]

Core of the privilage of journalists.

3.4. The above material has been quoted from the Report of the Law Commission on the Evidence Act as it touches the heart of the matter under consideration and addresses itself directly to the core of the rationale of evidentiary privilege. In this sense, it is not only very relevant to the specific question to be considered now, but may even be described as almost invoked."[3]

No privilege in India for journalists.

3.5. As would have been evident from the position as to privilege under the Indian Law stated above,[4] the Indian Evidence Act does not recognise any privilege on the part of a journalist to refuse to disclose the source of information obtained by him in confidence.

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1. Law Commission of India, 69th Report (Indian Evidence Act), page 628, para 62.6.
2. Section 910, California Evidence Code.
3. Section 910, California Evidence Code, Explanatory notes, quoted in Law Commission of India, 69th Report (Indian Evidence Act, 1872), page 628, para 62.1.
4. Paragraph 3.1, *supra*.

Provision in the Press Council Act, 1978.

3.6. However, mention must be made of the provision made by the Press Council Act in relation to inquiries held by the Press Council under that Act. While section 15(1) of that Act, in line with the general approach of the law, imposes a legal obligation to give evidence before the Press Council, sub-section (2) of that section gives a protection to journalists, in these terms.[1]

Section 15(2) of the Press Council Act.

"15(2) Nothing in sub-section (1) shall be deemed to compel any newspaper, news agency, editor or journalist to disclose the source of any news or information published by that newspaper or received or reported by that news agency, editor or journalist."

We shall now refer briefly to the position elsewhere on the point at issue.

1. Section 15(2), Press Council Act, 1978, (37 of 1978).

CHAPTER 4

ENGLISH LAW

I. The Common Law Rule

Journalistic ethics and legal position.

4.1. English academic and professional literature keeps ethics and law distinct. A cardinal rule of journalistic ethics in England is that a journalist does not divulge the sources of his information. Many informants, it is stated, would "dry up" if they are not confident that their identity would be kept secret.[1]

The common law rule.

4.2. But the common law rules of evidence did not give journalists a privilege (i.e. a right to refuse to answer certain questions in evidence). As Lord Denning observed, the professional rule cannot be elevated into a legal rule.[2] This was clearly laid down in one of the English cases decided in 1963. It was held that there was no such privilege. In that case, two journalists were imprisoned for refusing to identify their sources before the tribunal inquiring into the Vassall Spy Affair.[3] In another case of the same year, a third journalist was sentenced for similarly refusing to disclose the source, but escaped his sentence when the source that had supplied information to him, came forward.[4]

In 1975, Gordon Airs of the *Daily Record* was fined 500 pounds for refusing to identify a source when called as a witness in a "Tartan Army" trial.[5]

Power to demand disclosure of sources.

4.3. A journalist may be required to identify his sources before courts, tribunals of inquiry or a Committee of either House of Parliament. In the Allighan Affair, the *Evening News* Editor was held to be in contempt for refusing to tell the Committee of Privileges which M.P. had been writing a political column in his newspaper.[6] No action, however, was taken against him, nor against Mr. Gordon Greig of the *Daily Mail* when he withheld a source from the Committee.

Judicial attitudes.

4.4. Some Courts in England used to adopt an authoritarian approach on the subject. For example, Lord Emsile said in the case relating to Gordon Airs (Daily Telegraph) :

> "Any witness, including any journalist witness, who declines to answer any competent and relevant question in court, must realise that he will be in contempt and liable to incur severe punishment."[7]

In one of the English cases decided in 1963,[8] Lord Parker told the journalist : "There must be emergencies in the interests of the State where private interests, professional interests and all interests must be subordinated. Your informant himself is under a duty to come forward and assist the

1. Anthony Richards, Law for Journalists (1977), page 82,
2. *Attorney General* v. *Mulholland & Foster,* (1963), 1 All E.R. 767.
3. Attorney General v. Mulholland & Foster, (1963) 1 All. E. R. 767.
4. *Attorney General* v. *Clough,* (1963) 1 All E.R. 420.
5. Anthony Richards Law for Journalists (1977), page 82. See also paragraph 4.4. *infra. infra.*
6. Anthony Richards, Law for Journalists (1977), page 82.
7. Anthony Richards, Law for Journalists (1977), page 82. See also Robin Calendar Smith Press Law (1978), page 127.
8. Attorney General v. Clough 9 (1963) 1, All E.R. 420.

interests of the State. How can you say that there is any dishonour on you if you do what is your duty as a citizen to put the interests of the State above everything ?".

Official Secrets Act, 1920.

4.5. There are also in force, in England, statutory provisions specifically requiring the disclosure of certain information. One of them is the Official Secrets Act, 1920, which provides as under :—[1]

> "It shall be the duty of every person to give on demand to a Chief officer of police or to a superintendent or other officer of police not below the rank of Inspector appointed by a Chief officer for the purpose..... any information in his power relating to an offence or a suspected offence under the [Official Secrets Act, 1911]..... and if any person fails to give such information..... he shall be guilty of an offence."

In 1938, Ernest Lewis, a journalist in the *Daily Despatch,* wrote a story about a wanted man. The information for this could have come only from a police officer, whose identity the police wished to know. Lewis refused to disclose the identity. The Magistrate convicted him under the Official Secrets Act. Rejecting his appeal, the Lord Chief Justice observed that the case was "too plain for argument."[2]

II. The Judicial attitude

Professional relationships and its protection.

4.6. Occasionally, in England, Judicial concern for the protection of certain confidential professional relationships did find expression. Although there was no legal privilege against disclosure by journalists, one does come across English judicial dicta laying stress on the need to balance the public interest in the disclosure of truth, and the public interest in the maintenance of professional confidence.

Dicta in cases decided in 1963— The element of discretion.

4.7. Two English cases of 1963 may again be referred to in this context. In *Att. Gen.* v. *Clough*[3] after the judge of first instance had denied the existence of any legal privilege to a newspaper reporter in respect of the source of his information, the judge added that "it still..... would remain open to this court to say in the special circumstances of any particular case that public policy did demand that the journalist should be immune.....". Again, in *Att. Gen.* v. *Mulholland*,[4] in the Court of Appeal, Lord Denning, M.R. speaking of clergymen, journalists, bankers and doctors, commented as under :—

> "The judge will respect the confidence which each member of these honourable professions receives in the course of it, and will not direct him to answer unless not only it is relevant, but also it is a proper and, indeed, necessary question in the course of justice to be put and answered."

Lord Justice Donovan, in the same case,[5] added that, on the facts of a particular situation, a trial judge should exercise a discretion not to compel a journalist or a doctor to reveal information "received under the seal of confidence", where the judge concludes "that more harm than good would result from compelling a disclosure or punishing a refusal to answer."

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1. Section 6, Official Secrets Act, 1920 (Eng.).
2. *Lewis* v. *Castle*, (1938), 2 K.B. 454.
3. *Att. Gen.* v. *Clough*, (1963) 1 All ER. 420, 428.
4. *Att. Gen.* v. *Mulholland* (1963) 1 All E.R. 767, 771, 773; (1963) 2 Q.B. 477, 489, 492.
5. *A.G.* v. *Mulholland* (1963) 1 All ER. 767, (1962) 2 Q.B. 477.

Ruling by Mr. Justice James.

4.8. Mr. Justice James, when Chairman of the Tribunal investigating the collapse of the Vehicle and General Insurance Co., declined to press a *Sunday Times* journalist to reveal how the journalist knew that a Department of Trade Inspector had been pressing for two years before the collapse of company. The judge said, "We do not think this is a case where the witness should be asked or pressed to go contrary to his belief as a member of his profession."[1]

House of Lords Case of 1977.

4.9. However, it should be noted that in a case decided[2] in 1977, the House of Lords was divided on the question whether, absent a recognised Ground of privilege, judges have the authority asserted in the dicta quoted[3] above from cases of 1963.

Shawcross's view.

4.10. The position was aptly put by Lord Shawcross, who later became Chairman of the Press Council, in his evidence before the Salmon Committee :[4]

> "My experience is that a journalist is very rarely asked to disclose a source unless it is absolutely necessary. If that is the view of the judge, or of an inquiry tribunal, I think the source ought to be disclosed, and that the public interest in knowing the source must prevail:"

Attorney General's statement.

4.11. In the Parliamentary furore which followed the *Mulholland* and *Foster cases,*[5] the Attorney General said:

> "The occasions when a journalist can be required to disclose the identity of this informant are extremely rare, and do not, in practice, arise in the ordinary courts. They occur only when it becomes important for a tribunal or a committee of either House of Parliament to inquire into the truth of an allegation made by a journalist."

He said that the number of times of journalist had been required to divulge his source in the preceding eighty years was "about six".

Disclosure of reporter's name.

4.12. The discussion so far deals mainly with disclosure of the name of the *informant.* However, less indulgence is likely to be shown where an editor declines to name the reporter who wrote a story (as distinct from *disclosing the reporter's source*).[6]

Alan Hitchins, editor of the South London, when called as a witness at the Old Bailey in 1956, was asked to identify the reporter who wrote a story. He refused "in view of newspaper practice". Judge Mande replied : "Of giving away your informants : I know that. Isn't this rather different ?"

Ultimately, Mr. Hitchins named the reporter.[7]

Granada Case-Discovery—Confidential Information.

4.13 In this context, mention must be made of the *Granada* case, which illustrates several facets of the position. Granada Television, (in a television interview), published confidential and secret material which dealt, *inter alia,* with relations between the Management of the British

1. Anthony Richard, Law for the Journalists (1977), pages 82-83.
2. *D.* v. *N.S.P. S.C.* (1977) 2 W.L.R. 201 : (1977) 1 All E.R. 587.
3. Paragraph 4.7, *supra.*
4. Lord Shawcross, Evidence before the Salmon Committee; Anthony Richards, Law for Journalists (1972), pages 80-83.
5. Para. 4.2, *supra.*
6. Anthony Richards, Law for Journalists (1977), page 83.
7. Manchester Guardian, 22nd September, 1956.

Steel Corporation and the Government. The information and documents emanated from a very highly placed source within the British Steel management. British Steel issued a writ claiming an injunction and seeking delivery of the documents ; in due course, the documents were delivered, but someone had tampered with the documents to ensure that the identity of the source remained protected. The Vice Chancellor ordered Granada Television to serve, on the British Steel Corporation, an affidavit setting out the name of the person responsible for supplying the information. Granada Television appealed. It was held that there was clear authority that the Court should balance the private right to confidentiality against the public good of press investigation of possible wrong-doing. In a proper case, the court would protect the press from any compulsion to name a source, but such immunity depended upon the publisher acting with a due sense of responsibility. In the present case, Granada Television had not acted with such responsibility and had abused their power. They had behaved so badly as to forefeit their right to immunity.[1]

Summary of the position as to journalists in England (Common law).

4.14. By way of a broad summary of the position in England at common law,[2] it may be stated that while a journalist does not possess a legal right, as such, to refuse to disclose his source of information, this does not mean that the English courts are entirely unsympathetic to a request by a journalist for being permitted not to disclose the source. In the first place, in an action for libel, at the pre-trial stage, disclosure of the source is not generally ordered in proceedings for discovery.[3] In the second place, in regard to the summoning of a journalist to give oral evidence and compelling him to answer questions that would involve the disclosure of his source of information, English judges usually do not insist on compelling him to do so, unless they regard the answer to the particular question as material. Thirdly, during recent times, judicial suggestions for reform of the law has also started pouring in, one example being the suggestion made by Lord Justice Soarman (as he then was) in a case reported in 1975.[4]

III. English statutory provision of 1981

English Act of 1981.

4.15. The position at common law has been summarised above. It should now be mentioned that in England, by a statutory provision enacted in 1981, sources of information contained in publications are protected to a limited extent. Section 10 of the Contempt of Courts Act, 1981,[5] reads as under :—

> "10. 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 be established to the satisfaction of the court that disclosure is necessary in the interests of justice or national security or for the prevention of disorder or crime."

Section 2(1) of the same Act defines the expression "publication", as under :—

> "2(1)..... "publication" includes any speech, writing, broadcast or other communication in whatever form, which is addressed to the public at large or any section of the public."

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1. *British Steel Corp.* v. *Granada Television* (1980), 3 W.L.R. 774 (HL)
2. For statutory modification of the Common Law rule, see paragraph 4.15, *infra.*
3. O. 82, R. 6, R.S.C. (Eng.).
4. *Senior* v. *Holdsworth,* (1975), 2 All E.R. 1009.
5. Section 10, read with section 2(1), Contempt of Court Act, 1981 (C. 49).

By section 19 of the same Act, "court" is defined as including any person or body exercising the judicial power of the State.

It may be of interest to note that in the Contempt of Courts Bill, section 10 (quoted above) was not contained in the original Bill. Nor had any such provision been recommended by the Phillimore Committee which had reported (1974) on the law of Contempt of Court. The section came into the Bill at the Commons Committee stage.[1]

IV. Obligation of disclosure—extent of

No general duty in England.

4.16. The above discussion shows that there is, in England now a limited legal obligation to disclose the source, if the competent authority considers such disclosure necessary. This limited obligation is governed by section 10 of the Contempt of Courts Act, 1981. At the same time, it should be remembered that there is no general duty of disclosure on all occasions. Except when required by a competent authority, a journalist cannot be required to disclose the source[2] of his information. Thus, in 1963, the Finance Committee of the Brierely Hill Urban District Committee demanded to know the names of a newspaper's reporter and his informant responsible for a story which gave advance information about a proposed increase in the local rate. The editor of the paper said that he had "not the slightest intention" of disclosing them.[2]

In 1938, the dominant Labour group on the Glassgow Corporation were minded to take some action (unspecified) against a city journalist, who had published details contained in a confidential document about proposed increase in council house rents. The group also desired to take action against his informant. They were, however, powerless to do anything about the former, and unable to ascertain the latter.[2]

V. Disclosure in Libel Actions

Libel actions.

4.17. Even before the passing of the Contempt of Courts Act, 1981,[3] it was settled that, in England, in interlocutory proceedings (i.e. proceedings preparatory to the hearing of a civil action), an interrogatory could not generally be served requiring a newspaper, when sued for libel, to reveal the source of information. Thus, it has been held[4] that in an action for libel, a newspaper could not be required to reveal its source where fair comment was pleaded as a defence. Again, the Court of Appeal would not allow a sports writer to be required to reveal his source, where "justification" was pleaded in an action for damage for libel.[5-6]

Supreme Court rule as to discovery in libel actions.

4.18. These judicial decisions on interrogatories in libel actions are now embodied in the Rules of the Supreme Court, the revelant rule reading as under[7] :

"In an action for libel or slander where the defendant pleads that the words or matters complained of are fair comment on a matter

1. Standing Committee A-7 sittings commencing 21 April 1981: Vol. 6, (Sec. Annotation in Current Statutes).
2. Anthony Richards, Law for Journalists (1977), page 83.
3. Paragraph 4.13, *supra*.
4. *Lyon* v. *Daily Telegraph*, (1943) 1 K.B. 476 ; (1943) 2 All E.R. 316 (C.A.).
5. *Lowson* v. *Oihama Press Ltd.*, (1949) 1 K.B. 129 ; (1943) 2 All E.R. 316, 717 (C.A.).
6. For extensive references, see Catley, Libel and Slander (1981), para. 1216.
7. S. 82 R. 6, R.S.C. (Eng.).

of public interest or were published on a privileged occasion, no interrogatories as to the defendant's sources of information or grounds of belief shall be allowed."

Infringement of copy right.

4.19. It may also be mentioned that in 1976, a judge refused to order a newspaper to reveal its source of information to a former Government Minister. The Minister was suing the newspaper publishers for alleged infringement of copyright and misuse of confidential information.[1]

VI. The Press Council of U.K.—Comments on disclosure of sources

The Press Council (U.K.).

4.20. Occasionally, the Press Council of U.K. has had to make comments relating to the disclosure of sources by journalists. In 1959, the Nottingham Branch of the National Union of Journalists complained to the Press Council about visits to the Nottingham Evening Post by C.I.D. officers who demanded to know the identities of the writers of certain *nom de pluse* letters to the editor. The Press Council adjudicated as under :—

> "The police must be at liberty to make inquiries in newspapers offices as elsewhere, but it was improper for a request to be made to a journalist to become a source of supply for information, on security matters "

VII. Medical records

Physician and patient

4.21. It would be of interest to refer to some cases concerning medical records which have been decided in England. In general[2], the common law does not recognise any privilege of non-disclosure in regard to information imparted by a patient to his physician in confidence. Although suggestions for reform of the law on the subject have occasionally been made, no[3] such legislation has so far been passed in England. Some commonwealth jurisdictions are, however, understood to have enacted laws on the subject[4].

4.22. The common law approach is represented by the dictum of Jessel M. R., who pointed out that protection (in the law of evidence) is confined to communications which a man must necessarily make in order to obtain legal advice, when needed for the protection of his life fortune. There are, he observed, many communications which, though absolutely necessary because, without them, the ordinary business of life cannot be carried on, still are not privileged. [5]"The protection is of very limited character and in this country is restricted to the obtaining of the assistance of lawyers as regards the conduct of the litigation or the right to property".

VIII. Contemptuous matter

Protection against disclosure.

4.23. There is one matter in which judicial practice in England disallows disclosure. Where a contemptuous article has been published, the court will not compel the editor to disclose the source or to name the author.[6]

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1. Anthony Richards, Law for Journalists (1977), page 83.
2. *Hunter* v *Mann*, 2 All E.R. 414. 2, Cross Evidence (1979), pages 296-297.
3. *D* v *N.S. P.C.C.* (1978) A.C. 171, 245 ; (1976) 2 All E.R. 993 (Lord Edmunds Davies).
4. Para 5.4, *infra*.
5. Wheeler v. La Merchant, (1881) 17 Ch. D 675 (Jessel M.R.).
6. *Re Bahama Islands Reference*, (1893) A.C. 138-140 (P.C.).

IX. Theft of documents

English cases of theft of documents.

4.24. There is an interesting case of "theft" of document by a journalist in England. David May, a journalist, obtained photographs of a Spanish banker after the banker's kidnap in Paris in 1974. The photographs, to prove their authenticity were accompanied by the banker's Paris residence permit. May refused to tell the police the sourse of the photographs and the permit. He was charged with handling "stolen property" (the permit), but was acquitted. The prosecution admitted that May[1] would not have been charged if he had disclosed his source. They maintained that the journalists' code of conduct was overridden, because the banker's life was at stake. The judge said that the journalists' code of silence was "not inflexible", and "there may be circumstances in which ..... it is more honourable to preserve life than a confidence."

In 1973, the *Sunday Times* and the *Railway Gazette* published stories about projected cuts in rail services, based on a confidential document which (the officials alleged) had been "removed" from Ministry offices. Police raided the offices of the Railway Gazette, saying that they were investigating an alleged theft of the documents. However, they failed to find the source through which it had been leaked. The Attorney-General later felt that there was "insufficient information" on which to charge any one with "stealing" a photocopy of the document.[2]

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1. *R. V. May*, (1975) as summarised by Anthony Richards. Law for Journalists (1977), pages 84-85.
2. Anthony Richards, Law for Journalists (1977), page 85.

CHAPTER 5
COMMONWEALTH COUNTRIES

Australia.

5.1. The position in a few Commonwealth countries on the subject under consideration may now be mentioned in brief. Australia follows the general rule of the common law that, in the absence of a statutory provision, journalists have no right to refuse to disclose, in proceedings before the Court, the source of their information.[1] The following observations of Starke J.,[2] made in regard to proceedings before a Royal Commission of Inquiry that had been set up to determine the truth of allegations made publicly by the journalist himself, are applicable to proceedings before courts also :—

> "Next it was submitted that the source of the appellant's information upon which the newspaper articles were based was privileged and that he could not be compelled to disclose it. *No such privilege exists according to law.* Apart from statutory provisions, the Press, in courts of law, has no greater and no less privilege than every subject of the king."

In the above case, the articles published by the editor had alleged that certain members of the Victorian Parliament (not named) had accepted bribes in connection with two Bills introduced into Parliament. The Royal Commission put him a qeustion as to the source of his information, which he declined to answer. He was convicted of an offence under the Evidence Act 1928 and fined £ 15. He appealed to the High Court of Australia, which held that he had been rightfully convicted.

Ruling in New South Wales.

5.2. The view taken by the High Court of Australia in the above case has been followed in a Full Court ruling in New South Wales.[3] The Full Court held that a discretion to decline to order that a journalist should answer a question as to his source existed only to the extent that the question was irrelevant or improper.[4]

Ruling in New South Wales and Australian Capital Territory.

5.3. In a later case decided in 1976, the Supreme Court of the Australian Capital Territory took the same view.[5] This was an action for defamation alleged to have been committed by the defendant corporation in publishing an article in its newspaper. The jurnalist who wrote the articles was asked during cross examination the names of the informants who had supplied the information alleged to be defamatory. The journalist refused to answer the question, saying that he was bound by his honour not to do so. The judge held that the journalist enjoyed no relevant privilege, following the decision of the N.S.W. Full Court which we have mentioned earlier.[6]

Position in Australia as to clergyman and physician.

5.4. The above is the position in Australia as to journalists in the absence of a statutory modification. Two Australian States (Victoria and Tasmania) have thought fit to enact legislation creating two additional

1. Mr. Justice David Hunt, "Why No First Amendment ? The Role of the Press in relation to Justice" (1980) 54 A.L.J. 456-462.
2. *McGuinnes* v. *Attorney General of Victoria,* (1946) 63 C.L.R. 73, 91 (High Court of Australia).
3. *Pt. Buchang,* (1964-1965) N.S.W.R. 1379, 1381.
4. Facts taken from Law Reform Committee of West Australia, Working Paper (Privilege for Journalists), pages 3—5, para 2.4 to 2.9 (10 June, 1977).
5. *Hewitt* v. *West Australian Newspaper Ltd.* (17 Nov. 1976) (Supreme Court of A.C.T.). Facts taken from Law Reform Committee of West Australia Working Paper, Privilege for Journalists, pages 5-6, para 2.10 (10 June, 1977).
6. *Re. Duchman,* (1964-65) N.S.W.R. 1379 (See para 5.2, *supra*).

privileges, besides those generally recognised in common law jurisdictions. In these states, a clergyman cannot divulge, without the consent of the patient, the contents of any confession made to him in his professional capacity.[1] Also, a physician or surgeon cannot, in these States, divulge in civil proceedings (unless the sanity or testamentary capacity of the patient is in dispute), any information which he acquired in attending the patient and which was necessary to enable him to prescribe or act for him.[2-3]

Position in Canada.

5.5. A discussion of the Canadian law on the subject may start by stating the general rule prevailing in Commonwealth jurisdictions[4] to the effect that the protection given by law for confidential communications is of a very limited character and is restricted to the obtaining of the assistance of lawyers as regards the conduct of litigation or the rights to property. On this basis, it can be stated that journalists in Canada have no privilege against the disclosure of information imparted to them in confidence during the exercise of their profession. There is one ruling of the British Columbia Court of Appeal to the same effect, regarding journalists.[5]

Obiter dicta in Supreme Court case (Canada).

5.6 However, it should, at the same time, be mentioned that in one case (not relating to journalists) decided by the Supreme Court of Canada, there are *obiter dicta* which suggest that even outside the relationship of lawyer and client, the doctrine of privilege to protect confidential relationship may receive some encouragement from the judiciary. In that case, a University Professor in Alberta claimed privilege for certain assertions about a college, these were assertions which he had set out in a confidential document sent to the Department Chairman as a part of the proceedings of the university for the consideration of tenure. After quoting the well-known "four fundamental conditions" given by Wigmore for the recognition of evidentiary privilege, the Supreme Court of Canada held that assuming the applicability of evidentiary privilege in the litigation, "the confidential document should have been ruled inadmissible ..... under the doctrine of privilege as so able considered in Wigmore ....." However, the court held that the particular facts at bar did not invoke the law of evidence.[6]

Ontario view.

5.7. It should be mentioned that the Court of Appeal for Ontario has concluded "that there is no recognised discretion to exclude relevant end admissible evidence based on confidentiality alone."[7]

Actions for defamation in Canada.

5.8. It is proper to mention, however, that in the narrow context of pre-trial discovery proceedings, where the action is for defamation against newspaper proprietors or reporters and arises from published articles, the question may arise how far the English practice,[8] of refusing to compel defendants in such cases to disclose the names of informants in response to the demand of the plaintiff, is to be followed in Canada. Opinion in this

1. Evidence Act, 1958, section 28(1) (Vict.); Evidence Act, 1910, section 96(1) (Tas.). The Tasmanian provision does not apply to a communication made for a criminal purpose.
2. Evidence Act, 1958, section 28(2) and (3) (Vic.); Evidence Act, 1910, section 96(2) and (3) (Tas.). The Tasmanian provision does not apply to a communication made for a criminal purpose.
3. For the English practice, see paragraph 4.20, *supra*.
4. *Wheeler* v. *Merchant*, (1881) 17 Ch.D. 675, 681, 682 (CA.).
5. *McConephy* v. *Times Publishers Ltd.* (1964) 49 D.L.R. (Second) 249 (British Columbia Court of Appeal), cited by Stanley Schiff, Evidence in the Litigation Process (1973), Vol. 2, page 1011.
6. *Slavuiych* v. *Boker*, (1976) 1 S.C.R. 254, 260, 261 (Supreme Court of Canada).
7. *Reference to Legislative Privilege*, (1978) 19 Ontario reports (2nd) 529, 541, 39 Canadian Criminal Cases (2nd) 226, 228, cited by Stanley Schiff, Evidence in the Litigation Process (1978), Vol. 2, page 1011.
8. For the English practice, see Order 82, Rule 6, R.S.C. (Eng.) and Chapter 4, *supra*.

respect seems to be differing in Canada. Ontario judges have consistently followed the English practice since the turn of this century.[1] However, the Court of Appeal for British Columbia has emphatically refused to follow the English practice.[2-3] It would therefore appear that the position in this regard in Canada should be considered as fluid.[4]

Proposed Evidence Code (Canada).

5.9. Finally, it may be added that the proposed Evidence Code for Canada would make drastic changes in the existing doctrine. Section 41 of that Code reads as under[5] :—

> "41. A person who has consulted a person exercising a profession for the purpose of obtaining professional services, or who has been rendered such services by a professional person, has a privilege against disclosure of any confidential communication reasonably made in the course of the relationship if, in the circumstances, the public interest in the privacy of the relationship outweighs the public interest in the administration of justice."

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1. *Reid* v. *Telegram Publishing Co.*, (1961) Ontario Reports 418 (Ontario High Court of Justice), referred to by Stanley Schiff, Evidence in the Litigation Process (1978), Vol. 2, page 1012.
2. *McConephy* v. *Times Publishers Ltd.* (1964) 49 D.L.R. (2nd) 349 (British Columbia).
3. McLauchlin, "Confidential Communication and the Law of Privilege" (1977) 11 Univ. of British Columbia Law Rev. 266.
4. Stanley Schiff, Evidence in the Litigation Process (1978), Vol. 3 pages 1011-1012.
5. Section 41, Evidence Code for Canada (proposed), quoted by Stanley Schiff, Evidence in the Litigation Process (1978), Vol. 2, page 1011-1012.

CHAPTER 6

POSITION IN THE UNITED STATES

I. First Amendment

Introductory

6.1. Developments in the U.S.A. with reference to journalistic privilege have been very extensive. The subject even assumed constitutional importance in 1972.[1] In this Chapter, only a few salient aspects of these developments will be touched.

The First Amendment and the judgment in Branzpur

6.2. Although it was generally agreed that the common law afforded no privilege to journalists, the question arose whether the Constitution of the United States did so. The First Amendment provides that "Congress shall make no law..... a bridging the freedom ..... of the press".

In 1972, the United States Supreme Court reviewed three cases in which grand juries, investigating the activities and ideas of certain political and social groups, had attempted to compel journalists to disclose confidential information and the identities of their informants. The cases, which were heard together, were (i) *Branzburg* v. *Haves,* (ii) In *Re Pappas* and (iii) *U.S.* v. *Caldwell* (the cases being collectively known as *the Branzburg* case).[2] The Supreme Court held, by a majority, that the First Amendment afforded no protection to journalists in these circumstances.[3,4]

II. State Laws (Shield laws in U.S.A.)

Position under State Laws in U.S.A.

6.3. However, the fact that the First Amendment does not confer an immunity, as such, on journalists from the disclosure of the source of a confidential information does not conclude the matter since, by legislation a number of States in the U.S.A., have provided that confidential relationships between a journalist and his source should be protected. This has been achieved by the passage of "shield laws". These laws provide the newsman with immunity from forced disclosure of the identity of his source. Details of the legislation vary from jurisdiction to jurisdiction.[5] The first State in the U.S.A. to enact such a law was Maryland (1896), followed by New Jersey (1938), Alabama and California (1935)[6] and other States. In 1970, such a law was passed by New York[7], while Pennsylvania had already enacted it in 1937.[8] The most well-known is the provision in California, first enacted in 1935 and appearing as section 1070 of the California Evidence Code.[9]

As of 1980, 26 States in U.S.A. had shield laws, the latest to pass such a law being Tennesse (1973).[10]

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1. Paragraph 6.2, *infra.*
2. *Branzburg* v. *Haves,* 33 L. Ed. 2d. 628.
3. Generally, see Alfred Hill, "Testimonial Privilege and Fair Trial" (Oct. 1980) 80 Col. L. Rev. 1170-1176.
4. As to libel actions, see para 6.13, *infra.*
5. Para 6.4, *infra.*
6. Section 1970, California Evidence Code.
7. Section 79-h. New York Civil Rights Law.
8. Pennsylvania Statutes, Title 28, Section 330.
9. Section 1070, California Evidence Code.
10. Sobel, Media Controversies (Facts on File 1981) pages 153-173; O'Brien, Public's Right to know (1980) App. C, pages 183-185 (State Shield Laws).

The subject has been dealt with at length in two studies.[1,2]

State Laws in U.S.A.

6.4. The statutes passed by the State legislatures in the U.S.A. vary in their content from State to State. These variations are regarding (a) the classes of publications covered by the statutes, (b) the classes of persons on whom the privilege is conferred by the statutes, (c) the matter protected by the statutes, (d) the presence or absence of the requirement of confidentiality in the statutes and (e) the quality or status of the privilege accorded by the statutes.

Classes of publications protected in U.S.A.

6.5. First, as regard the classes of publications covered by the "Shield laws" in force in various States in the U.S.A. there are three broad categories :—

(i) Statutes conferring the protection on newspapers and radio and television stations (for example, Alabama) ;

(ii) Statutes which cover also magazines, news agencies, press associations and wire services (for example, New York) ;

(iii) Statutes which cover any "medium of communication to the public" (for example, Oregon and New Mexico).

Classes of persons protected in U.S.A.

6.6. Secondly, as regards the classes of persons protected, there are three broad categories in the U.S.A. under the State "shield laws" :

(i) Statutes covering only professional reporters and news-casters (e.g. New York) ;

(ii) Statutes extending the privilege to editors/writers and publishers also (for example, Arkansas) ; and

(iii) Statutes granting the privilege to anyone connected with the relevant medium in a capacity involving the gathering of or processing of informations (e.g. Minnesota and Nebraska).

Matter protected in U.S.A.

6.7. Thirdly, the matter protected by such Shield Laws may be—

(i) only the sources of information obtained by a journalist professionally (e.g. Ohio and Kentucky) ; or

(ii) all unpublished information (e.g. Nebraska and Oregon).

Requirement of confidentiality in U.S.A.

6.8. Fourthly, as regards the requirement of confidentiality, under the general pattern or the Shield laws in U.S.A., there is no express requirement that the source should have given the information on the understanding that his identity would remain secret (for example, the statutes of Alabama, Minnesota and New York).

Quality or status of the privilege in U.S.A.

6.9. Finally, as to the quality or status of the privileges : some statutes in U.S.A. provide an absolute privilege, e.g., those of Alabama and New York. Others provide only a qualified privilege. An example of this latter category is that of Minnesota, whose statute provides that the privilege does not apply "in any defamation action where the person seeking disclosure can demonstrate that the identity of the source will lead to relevant evidence on the issue of actual malice",[3] or when the information is relevant to a serious offence and "there is a compelling and overriding interest requiring the disclosure of the information where the disclosure is necessary to prevent injustice," provided that the information cannot be obtained by other means. The statute of New Mexico requires disclosure when "it is essential to prevent injustice".

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1. Mauries Van Gerpen, Privileged Communications and the Press (1979), (Westport) Connecticut Green Wood Press.
2. Vincent Blasi, "The Newsmen's Privilege. An Emperical Study" (1971) Mich. Law Rev. 229.
3. See further, para 6.13, *infra* (libel actions).

6.10. It would be of interest to ascertain whether the absence or presence of protection has affected the flow of news. It appears that there is no substantial difference as to the flow of news in these States which have 'shield' laws and those which do not.[1] This may be because a number of these laws give only a qualified privilege.[2] Effect on flow of news.

III. Some decided cases in U.S.A.

6.11. Mention may be usefully made of a few cases decided in the United States on the question of newsmen's privilege. Judge Irving Kufman, writing for a unanimous three-judge panel of the Second Circuit, held in an anti-blockbusting suit that a writer for the Saturday Evening Post did not have to reveal his source, even though that source had direct knowledge of facts central to the issues of the anti-blockbusting suit before the court.[3] Neither the writer nor the publication was a party to the litigation.[4] Case law in U.S.A.

The Ninth Circuit has held that two staff members of a Black Panther party newspaper did not have to disclose the identities of persons associated with the publication to a federal grand-jury which was investigating threats of presidential assassination and other possible criminal conduct by members of the Black Panther Party.[5]

6.12. In another case,[6] decided on First Amendment grounds, sub-poenas directed to members of the press, including Washington Post reporter Bob Woodward and Carl Bernatein, were quashed. The Court concluded that the plaintiff had not made the requisite "positive showing of the materiality of the documents and other materials sought by the sub-poenas". Similarly, in yet another case,[7] the court refused to order a medical newsletter to disclose its confidential sources, even though those sources possessed information relevant to the plaintiff's allegations of adverse drug effects. The court reasoned that "the information sought here is relevant, but not essential to the resolution of the judicial controversy." Want of materiality (First Amendment) applied.

6.13. It appears that on October 31, 1977, the Supreme Court of United States declined to review a decision pronounced by the Supreme Court of Idaho that a reporter, when called as a witness in a civil suit, could not withhold the identity of a confidental source.[8] Case of 1977.

6.14. On the question whether there was a constitutional link between the right to publish news and the right to gather news, there was a comprehensive discussion in an issue of the Bulletin of the American Society.[9] The issue reports a unanimous verdict that "while our right to publish stands secure, our right to gather does not". Discussion in Bulletin of American Society.

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1. Note "Reporter's Privilege—Guardian of the People's Right to Know" (1976) 11 New England Law Review 405.
2. Para 6, 9, *supra.*
3. *Rakor* v. *F. & F. Investment*, 170 F. 2d 778 (2d Cir. 1972) Cert. denied. (1973) 411 U.S. 996.
4. Howard Simons and Joseph A. California Jr. Ed, The Media and the Law (1976), pages 15-16.
5. *Bursay* v. *U. B.* cited by Howard Simins and Joseph A. California, Jr. (Ed.), The Media and Law (1976), pages 15-16.
6. *Democratic National Committee* v. *Mc. Cord*, 356, F. Supp. 1394, 1398 (D.D.C. 1973) cited by Howard Simons and Joseph A. California, Jr. (Ed), The Media and the Law (1976), pages 15-16.
7. See Howard Simons and Joseph A Falifani, Jt. (Ed.). The Media and the Law (1976), pages 15-16.
8. *Tribune Publishing Co.* v. *Calderok*, (31 October, 1977) cited by Sobel (ed.), Media Controversy (Facts on File, 1931), page 10.
9. See December-January, 1978 issue of the Bulletin of the American Society, Gist of the discussions summarised in Sobel (Ed.), Media Controversy (Facts on File, 1981), page 12.

IV. Libel Actions

Libel actions (First Amendment applied.)

6.15. In libel suits, courts in U.S.A. have also refused (on First Amendment grounds) to order the disclosure of a defendant's confidential news sources, except in the unusual circumstances in which (a) the plaintiff has demonstrated a substantial likelihood that disclosure will lead to persuasive evidences on the issue of liability, and (b) alternative sources have been exhausted.[1]

The Eighth Circuit,[2] for example, has held that a Life Magazine reporter did not have to reveal the confidential source of allegedly libellous statements about the organized crime connections of a Mayor. In the above case, the Mayor was suing Life Magazine for libel. The Supreme Court declined to review this case and the decision of the Eighth Circuit was allowed to stand.[3,4]

6.16. Only one federal appellate court in U.S.A. has ordered a libel defendant to disclose the identity of a confidential news source. That case arose out of a Jack Anderson column reporting on the United Mine Workers and its general counsel, Edward Carey.[5] The court emphasized that it was not establishing a general rule applicable to all libel defendants, but rather was limiting its decision to order disclosure to the extraordinary circumstances before it. The court ordered disclosure because the statement alleged to be libellous was based entirely on confidential sources and the plaintiff had no way of proving either falsity or recklessness without a knowledge of the identity of those sources. The court stressed its agreement with the rule applied by the Eighth Circuit in the Cervantes case,[6] that a libel defendant may not be constitutionally required to disclose the identity of confidential news sources, except when the information obtained from the sources is the sole basis for the allegedly libellous statements. The Supreme Court never had to consider this case, because the source released Anderson side Brit Hume from his pledge of confidentiality.

V. Recent Developments in U.S.A.

Recent developments—California.

6.17. There have been some noteworthy recent developments in the United States relevant to the topic under consideration. A law permitting reporters to withhold their sources, adopted by California voters in 1930, was declared unconstitutional (January 18, 1932) by a Superior Court Judge, on the ground that it created an unsupportable conflict with the constitutional right to a fair trial. The issue concerned "out takes", or unused films, from an interview conducted for the CBS News Program "60 Minutes" by Mike Wallace. The subject of the interview was Barry Braeseke, now 25 years old, who had been convicted of first-degree murder. Judge Stanley Colde held that the "Shield Law" was a First Amendment privilege that must give way to the Sixth Amendment guarantee of fair trial for the accused."[7,8]

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1. See also para 6.9, *supra*.
2. *Corvantes* v. *Time*, Inc. 464 F. 2nd 986 (8th Circuit) 1972 cert. denied, (1973), 409, U.S. 1125.
3. Howard Simons and Joseph A. Califani, Jr. (Ed.). The Media and the Law (1976), page 16.
4. For other developments: see, "Source Protection in Libel Suits" after *Herbert* v. *Lando*. (March, 1981), 81 Colombia Law Rev., pages 338-365.
5. *Carey* v. *Hume*, 492 F. 2nd 631 (D.C. Cir. 1974), cert. Dismissed, 417 U.S. 938 (1974).
6. *Cervantes* v. *Time*, Inc. 464 F. ed. 956 (8th Cir. 1972). Cert. denied. (1973) 409 U.S. 1125 (para 615, *supra*).
7. Report, "California's Closure Law upheld Shield Law over-ruled" (23 January 1982) Editor and Publisher, page 16.
8. Information as to later developments by way of appeal was not available.

Farbar Case—Recent Development (New Jersey)

6.18. Another recent development worth noting relates to the well known Farber case, which arose in New Jersey in 1978. The case related to the murder trial of "Dr. X". In the trial, a surgeon had been accused of murdering five hospital patients by injecting them with curare. A journalist M.A. Farber had to undergo criminal penalties after the newspaper New York Times and its reporter refused to turn over the reporter's notes during the trial. Farber had to spend 40 days in jail and the New York Times paid a total of 2,85,000 dollars in fines for defying a court order that Farber should provide the defence with all his notes for his story and reveal his confidential sources.

Pardon by the governor.

6.19. On 19th January, 1982, the Governor of New Jersey Brendan Byrne, on his last day in office, returned the criminal penalties and issued pardon. The Governor noted the changes made in 1980 in the Shield Law of New Jersey, which required a hearing before the reporter is compelled to reveal his sources. "Farber and the New York Times were attempting to uphold a principle they believed in. They should not be burdened by a record of criminal contempt any longer". This is what Governor Byrne stated.[1]

VI. Model Contract in U.S.A.

Model contract, in U.S.A.

6.20. It is of interest to note one peculiar feature regarding the United States. It appears that the model contract evolved by the Newspaper Guild[1] in U.S.A. contains a clause relating to "privilege against disclosure and authentication". This privilege seems to have been introduced in 1970, and represents a definite policy as to the protection by the employer of reporters and their sources from source disclosure. It appears that the primary object of this clause is to give the employee full financial and legal support from the employer. The provisions of the model contract clause have been analysed as comprising the following propositions.[2] :—

P-1. An employee may refuse, without penalty or prejudice, to give up custody of or disclose any knowledge, information, notes, records, documents, films, photographs, or tapes or the source thereof, which relates to news commentary, advertising, or the establishment and maintenance of his sources in connection with his employment.

P-2. An employee may also refuse, without penalty or prejudice, to authenticate any material.

P-3. The employer shall not give up custody of or disclose any of the above without consent of the employee.

P-4. The employer shall notify the employee concerned, and the Guild, of any demand on the employer for such surrender or disclosure or authentication.

P-5. If the employee is proceeded against under law on account of his refusal to surrender or disclose or authenticate, the employed shall move to join as a party to such proceedings ;

P-6. (the Employer) shall meet all expenses incurred by the employee, including fees and expenses of legal counsel retained by the employee ;

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1. (23 January, 1982), Editor & Publisher, page 6.
2. The Newspaper Guild, "U.S. Model Contract" December 1, 1975, quoted in Gail L. Barwis, "Can Privilege be Bargained?" (Summer 1980), Journalism Quarterly 205, 206, 207.

P-7. and (the Employer) shall indemnify such employee against any monetary loss, including but not limited to fines, damages or loss of pay.

P-8. In no case shall an employee suffer loss of wages, employee status or benefits under this contract as a result of his refusal to surrender or disclose or authenticate.

VII. Directive of Justice Department

Directive by Justice Department.

6.21. It should also be mentioned that in 1971 the Justice Department,[1] under Attorney General John Mitchell, issued guidelines which, it followed, sharply restrict the power of U.S. attorneys to subpoena reporters, whether or not confidential sources are involved. Under these guidelines, no U.S. attorney may subpoena a reporter unless he has exhausted all other possible sources of the testimony he seeks. Even in such circumstances, the U.S. attorney must first obtain the explicit permission of the Attorney General before he subpoenas the reporter. Experience with these guidelines has been mixed. It is stated that as recently as late 1974, some government attorneys were not even aware of the guidelines. Nevertheless, these guidelines do stand as a formal Justice Department statement of principle and policy.[2]

VIII. Opinion Survey

Opinion poll of 1979.

6.22. In 1979, a survey was conducted amongst a national cross-section of 12,000 adults in the United States, who were interviewed by telephone from April 6, to April 9 that year under the ABC News-Harris Survey.[3] The majority of the respondents considered it more important to protect the privacy of a reporter's unpublished notes and sources, rather than to allow the courts to force disclosure of such information if it is felt necessary to ensure a fair trial. Two cases, substantially based on reported decisions, were put to the respondents. It will be of interest to quote the first case that was put before the respondents : "A newspaper reporter who is testifying at a trial refuses to name a person who gave him information. The reporter says he promised that person (that) he would never reveal his name, and if he broke that promise, other sources might not give important information to other reporters in the future, and then the American people would be cheated of their right to know that information. In addition, the reporter says, his constitutional right to freedom of the press is being violated. The attorney who asked for the name says the trial will not be fair without the testimony of the man who gave information to the reporter, because his story (is) important and no one else has all the information the reporter's source has. Now you are the judge. Would you order the reporter to name his source or not ?"

By a decisive 70-21%, most Americans would not order the reporter to name his source. That was the opinion as ascertained by the survey mentioned above.

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1. 28 C.F.R. 50.10 (1974).
2. Howard and Joseph A. Califani, Jr. (Ed.). The Media and the Law (1976) page 1.17.
3. See summary of the survey of opinion in (21st April, 1979) Editor & Reporter, page 13.

CHAPTER 7

THE ISSUES FOR CONSIDERATION

Matters of detail requiring consideration—classes of persons to be protected.

7.1. Assuming that the law on the subject under consideration is to be changed by suitable legislation, there arise for examination a number of questions of detail and difficulty. These questions concern the quality and range of the protection to be conferred, as regards (a) the classes of persons to be protected, under the head of journalistic privilege, (b) the classes of publications to be so protected, (c) the classes of matter to which the protection should extend, (d) the types of proceedings to be covered by the proposed protection, and (e) whether the protection should be in the shape of a privilege of a class of persons, or whether it should leave some discretion to the Court. The issues for consideration were set out in the Working Paper that had been circulated by the Commission on the subject.[1]

The first question that arises is as regards the classes of persons to be entitled to the proposed protection. Should the proposed protection cover only professional journalists, or should it also extend to part-time contributors and other persons connected with the publication, when acting in the process of gathering or processing of information ? There are, thus, two alternatives. The first alternative would be the narrower of the two. The narrower course, which would confine the protection to the professional journalist, has, no doubt, this argument in its favour, that the professional body of the journalists and the Press Council could help enforce the requisite standards. However, the framing of the protection in such narrow terms would have the effect of precluding persons who engage themselves in journalism occasionally and not as a matter of their regular vocation. As was observed by the Supreme Court of the United States, "the lonely pamphleteer who uses carbon paper or a mimeograph may as much have a right to protecion as a larger metropolitan publishers".[2] Further, it can be argued that if the protection is to be effective, it might have to cover the editor and other senior management personnel to whom the information is conveyed, and should also cover persons who accompany the newsmen, such as the cameraman.

Classes of publications to be considered for protection.

7.2. Secondly, regarding the classes of publications that should be entitled to the proposed protection, the question that arises is whether the protection should :—

(i) cover only newspapers, or

(ii) cover newspapers as well as periodicals,

(iii) also cover radio and television stations, or

(iv) be framed in the broadest terms, so as to cover any medium of communication to the public.

Of the four alternatives put forth above, the first alternative is the narrowest one, while the last alternative is the widest one.

Classes of matter to be protected.

7.3. Thirdly, regarding the matter to be protected, the question that arises is whether the protection :—

(i) should be limited to the source of information obtained by the journalist ; or

1. Working Paper dated 19, February, 1983.

2. *Brenzburg* v. *Hayes*, (1972) 408 U.S. 665; S.Ct. 2646; 33 Law Ed. 2 d 625.

(ii) should cover all information obtained by the journalist in confidence ?

As regards the first alternative, it can be argued in support thereof that aim of any protection is to increase the flow of information. Any proposed legislation need not concern itself with unpublished information. But an extended protection, as per the second alternative, may be sought to be justified on the ground that there is need to obtain background information which, though not intended itself for publication, is necessary for verifying the accuracy of the information to be published.

Types of proceedings to be covered.

7.4. Fourthly, the types of proceedings in regard to which the privilege under discussion should be allowed, the question is—Should the proposed privilege—

(i) be confined to civil proceedings, or

(ii) extend to all proceedings in the course of which evidence is, or may be, legally taken on oath ; or

(iii) be excluded in regard to certain special types of proceedings, such as defamation actions against the publishers, criminal proceedings or proceedings before Commissions of Inquiry.

Privilege or discretion.

7.5. As regards the status of the privilege (if any) to be conferred, a number of alternatives fall to be considered—

(i) Should the privilege (if allowed) be absolute, or

(ii) Should the Court (or other body) before which privilege is claimed have a discretion to uphold or reject the request ?

(iii) If such a discretion were to be given, what criteria should guide its exercise ?

Alternative (i) would be simple, but may lack in elasticity. In regard to alternative (ii) it can be stated that where a discretion is given to allow or disallow the privilege on a case by case basis, the court can balance the need to protect the confidentiality of the source against the interests of justice and the effective achievement of the object of inquiry.

Waiver of the privilege.

7.6. Finally, the question arises whether the privilege should be allowed to be waived. In detail, the queries that may arise in this regard are as follows :—

(a) Should the privilege be capable of being waived ?

(b) If so, who should be competent to waive it—

(i) the journalist, or

(ii) the employer of the journalist, or

(iii) the informant ?

Opinions invited.

7.7. The important issues relevant to the subject of this privilege were set out in the Working Paper which, after stating the alternatives, wound up the discussion as under :—

"The broad question is—in what circumstances, if any, should journalists be given the right to refuse to disclose in court and other

judicial proceedings the source of their information ? As elaborated above, so many points of detail arise out of this question. Briefly, these are as under:—

1. Who should be included in the term "journalist" for the purpose of privilege?

2. What media should come within the scope of the privilege ?[2]

3. (a) In order that the source be privileged, should the information be published, or should it be privileged even if the matter was never printed, broadcast or telecast ?

   (b) Should the privilege relate only to the identity of the person who supplied the information, or should it extend to the information upon which published matter is based ?[3]

4. Should the privilege apply to all court proceedings, civil or criminal, and if not, to which proceedings should it be confined ?[4]

5. Should the privilege, if allowed, be absolute or should the courts (or other appropriate bodies) have a discretion to uphold or reject claims of privilege ?[5]

6. If a privilege were to be enacted, who should be competent to waive it :[6]

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1. See paragraph 7.1, *supra* for the detailed queries on this point.
2. For detailed queries, see para 7.2, *supra.*
3. For detailed queries, see para 7.3, *supra.*
4. For detailed queries, see para 7.4, *supra.*
5. For detailed queries, see para 7.5, *supra.*
6. For detailed queries, see para 7.6, *supra.*

CHAPTER 8

COMMENTS RECEIVED ON THE WORKING PAPER

Comments on the Working Paper :

General description and views on first questi. n.

8.1. The Working Paper prepared on the subject under consideration was circulated by the Commission in February, 1983 to interested persons and bodies, including the Ministry of Information and Broadcasting, several organisations connected with the Press : The Press Council of India and its members, State Governments, High Courts and Bar Associations. A request was made to forward comments by the 15th April, 1983. All comments received upto 4th September, 1983 have been taken into account before finalising the Commission's views.

It may also be mentioned that very valuable views dealing with almost each question raised in the Working Paper have been expressed in an article by Shri S. Sahai of the Statesman who, incidentally, has also given in the article a gist of the important queries contained in the Working Paper. The Commission would like to express its appreciation of the interest shown by Shri Sahai in the matter[1] and also its gratitude to those who have sent comments on the Working Paper.

As regards the comments as such that have been received on the Working Paper, replies have been received from :

(a) Six High Courts[2]

(b) Registrar of one High Court who has, it appears communicated his personal views.[3]

(c) One Member of Parliament[4] and

(d) One Bar Association.[5]

However, with reference to the replies received from High Courts (six in all) mentioned above, it should be made clear that only one High Court has expressed its views.[6]

Three High Courts have sent negative replies, namely, that the High have no views to offer[7] or that the Judges of the High Court have no desire to offer views.[8]

Again, in two other High Courts, only six Judges of each High Court have given their reaction and the reaction is that those six judges have "no remark to offer"[9] or that they have no views to offer[10] (the rest of the Judges of these two High Courts have not expressed views or their reaction).

1. Shri Sahai's article in the Statesman dated 7th April, 1983.
2. Law Commission File No. F. 2(2)/83 L.C. S. No. 11, 13, 14, 18 and 20.
3. Law Commission File No. F. 2(2)/83 L.C. S. No. 18.
4. Law Commission File No. 2(2)/83-L.C. & S. No. 10. (Mr. Eduardo Faleiro 4624 M.P. Goa).
5. Bar Association, Manipur, Imphal. Law Commission F. No. 2(2)/83 LO S. No. 17.
6. Law Commission File No. 2(2)/83-LC S. No. 14.
7. Law Commission File No. 2(2)/83-LC S. No. 11 and 20.
8. Law Commission File No. 2(2)/83-LC S. No. 18 and 20.
9. Law Commission File No. F. 2(2)/83 LC S. No. 13.
10. Law Commission File No. F. 2(2)/83-LC S. No. 16.

Coming to the views expressed questionwise, the first question raised in the Working Paper was whether the proposed privilege in respect of disclosure by journalists should be confined to professional journalists only or whether it should cover others as well. In putting the query in this form, the Commission did not have in mind the categories of distinction between "working" and "non-working" journalists as such, or any demarcation between editorial and non-editorial staff. The Commission wished to elicit views as to whether there was need to keep distinct a person who has taken up journalism as a profession and, (on the other hand), the "lonely pamphleteer" who uses the carbon paper or a mimeograph.

According to the views expressed by Shri Sahai of the Statesman on this question,[1] "the short answer is that since the privilege is claimed on the ground of serving the public interest the people's right to know-it cannot be confined to journalists alone ; but must extend to others as well".

The reply of one Registrar of a High Court (personal view), is that the protection should be given not only to the professional journalists, but also to the part-time contributor and others connected with the publication when acting in the process of gathering or processing of information.[2] He would include, within the scope of the protection, the editor and other senior management personnel to whom the information is conveyed and the persons who accompany the newsman, such as the cameramen.

Comments received on the second question.

8.2. The second question put forth in the Working Paper concerns the categories of media to be covered. Should the proposed protection be confined to daily newspapers, or should it be broad enough to cover periodicals or should it be still broader so as to include the media as a whole ?

According to the view expressed by Shri Sahai in his article, "once again, the provision must be couched in the broadcast possible terms, bringing in its sweep any medium of communication—newspapers, periodicals and the electronic media, although the last being State-owned is hardly likely to publish anything embarrassing to anybody"[3]

According to the view expressed by one Registrar of a High Court (personal view), the protection should be framed in the broadest terms, so as to cover any medium of communication to the public namely, newspapers, periodicals, Radio and Television stations etc.[4]

Comments received on the third question.

8.3. The third question put forth in the Working Paper concerns the matter to be protected. Should the protection be limited to what has actually been published, or sould it extend to all information, published or unpublished ?

A High Court has expressed the view that a journalist should not be asked to disclose the sources of his information.[5]

The view of one Registrar of a High Court (personal view), is that the protection should cover all information (not only the source of information) obtained by the Journalist in confidence.[6]

1. Shri Sahai's article in the Statesman (7th April, 1983.).
2. Law Commission File No. F. 2(2)/83-LC, S. No. 12.
3. Shri Sahai, the Statesman (7th April, 1983).
4. Law Commission File No. F. 2(2)/83-LC, S. No. 12.
5. Law Commission File No. F. 2(2)/83-LC, S. No. 14.
6. Law Commission File No. F. 2(2)/83-LC, S. No. 12.

The Manipur Bar Association has expressed the view that a qualified privilege should be granted to Journalists who should not be required to disclose the source identity (of informant) or other confidential communications unless disclosure is necessary in the interest of "justice and public good".[1]

Comments received on the fourth question.

8.4. The fourth question put forth in the Working Paper elicited views as to whether the proposed protection should apply to all court proceedings (civil and criminal), and if not, to what proceedings it should be confined. Shri Sahai's article makes certain points after mentioning the "Fourth Question", but the points made really pertain to the fifth question and will be dealt with thereunder.

In the view of one Registrar of a High Court (personal view), the privilege "should be extended to proceedings in course of which evidence is or may be legally taken on oath except defamation actions against the publishers and proceedings before Commissions of Inquiry.[2]

Comments received on the fifth question.

8.5. The fifth Question in the Working Paper solicited views on the very important issue whether there should be a privilege as such which would be absolute, or whether the judge should have a discretion in the matter. In his article in the Statesman, Shri Sahai (in the opening portion of his general observations), has stated as under :—

> "It may straight-away be conceded that no right is, or can be absolute and that between two conflicting rights, society must decide which one must prevail, unless the two can be harmonized."[3]

Somewhat towards the end of the article, when dealing with the specific question whether the privilege should be absolute or whether the Judge should have a discretion, Shri Sahai has expressed the following further views :—

> "The point has already been made that no right is absolute and the journalists' right to confidentiality need not be absolute either. In such cases in which the interests of society overwhelm the rights of journalists, a court may compel disclosure. However, this must be done *in camera* and only the High Courts and the Supreme Court should have the right to compel disclosure. Some journalists still may want to withhold information, but if their conviction be so strong they must be prepared to take the consequences.[3]

Mr. Eduardo Faleiro, M.P., Goa does not favour absolute immunity. "Whilst the principle of confidentiality of sources of information may be recognised there must be an exception to this principle involving the considerations of public interest and promotion and advancement of justice."[4]

It is the view of one Registrar of a High Court (personal view) that the court should have the discretion to allow or reject the request.

"No Court may require a journalist to disclose the source of information contained in the publication unless it is established to the satisfaction of the Court that disclosure is necessary in the interest of justice or national security or for the prevention of disorder or crime."[5]

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1. Law Commission File No. F. 2(2)/83-LC, S. No. 17.
2. Law Commission File No. F. 2(2)/83-LC, S. No. 12.
3. Shri Sahai, The Statesman (7th April, 1983).
4. Law Commission File No. F. 2(2)/83-LC, S. No. 10.
5. Law Commission File No. F. 2(2)/83-LC, S. No. 12.

The views of the Manipur Bar Association, District and Sessions Court Compound, Imphal have been thus communicated[1] :—

"Just as the legal professionals are given the statutory privilege of not disclosing what their clients have entrusted with them confidentially, the Journalists as a professional class should be given some qualified privilege by suitable enactment. The Journalists should not be compelled to disclose the source of his information or the identity of their conformant as well as confidential communication, unless the disclosure is necessary in the interests of justice and public good."

Comments received on the sixth question.

8.6. The Sixth and the last question put forth in the Working Paper was, whether the privilege should be allowed to be waived, and if so, by whom the journalist, the employer or the informant ? The view expressed by Shri Sahai in his article is that "without the informant's consent, no body should have the right (to waive). If he (the informant) has waived his right, the editor or publisher may use his discretion."[2]

In the reply of one Registrar of a High Court (personal view) it is stated that the privilege should be capable of being waived by the journalist.[3]

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1. Law Commission File No. F. 2(2)/83-LC, S. No. 17.
2. Shri Sahai's Article in the Statesman (7th April, 1983).
3. Law Commission File No. F. 2(2)/83-LC, S. No. 12.

CHAPTER 9

RECOMMENDATIONS

Persons to be covered.

9.1. On the basis of the materials contained in the preceding chapters, we now proceed to make our own recommendations on the subject under consideration. At the outset, we would state that in our view, information obtained on an understanding that the source will not be revealed, deserves to be treated on a special footing so to justify special provisions conferring appropriate protection. The lines on which the statutory amendments should run will be presently indicated in greater detail, with reference to the various issues that have been considered by us.[1]

First, as regards the persons to be covered by the proposed amendment, we are inclined to include, within its scope, not merely the "professional journalist", but also the occasional or casual journalist, even "the lonely pamphleteer" of whom the Supreme Court of the United States was speaking.[2] It is also not our intention to exclude, from the protection, editors and other senior management personnel to whom the information is conveyed in professional confidence, or the technical personnel who accompany the newsman, such as the cameraman, who may be involved in the gathering of information imparted expressly or impliedly in confidence. In fact, as will be seen from the next paragraph (where we deal with the publications that should be entitled to the benefit of the proposed reform of the law), we are going to frame it in fairly wide terms so as to cover all mass media.

Publications to be covered.

9.2. Secondly, regarding the publications that should be entitled to the proposed protection, the question to be considered is whether the protection should—

(i) cover only newspapers, or

(ii) cover newspapers as well as periodicals, or

(iii) also cover radio and television stations, or

(iv) be framed in the widest terms, so as to cover any medium of communication to the public.

After giving considerable thought to the matter, we have come to the conclusion that every medium of communication to the public needs to be covered. We note that section 15(2) of the Press Council Act concentrates on "newspaper, news agency, editor or journalist", but presumably that was because that Act was concerned primarily with the press. On principle, we see no reason for treating other media on a separate footing. How this object of framing the reform in the widest terms so as to cover all media can be achieved is a matter of drafting, to which we shall address ourselves when coming to the precise recommendations to be made for statutory amendment.[3]

Matter to be protected.

9.3. The third question relates to the matter to be protected. We have found this to be a difficult issue. We note that section 15(2) of the Press Council Act[4] confers protection only against disclosure of "the source

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1. Chapter 7, *supra.*
2. *Pratsburg* v. *Hayes,* (1972) 408 U.S. 605, 92 S.G. 3616; 32 Law Ed. 2d 626.
3. Para 9.7, *infra.*
4. Para 3.6, *supra.*

of any news or information" published by a newspaper or received or reported by a news agency, editor or journalist. This would not cover unpublished information, other than the source.

In England, section 10 of the Contempt of Courts Act, 1931, gives immunity to a person "for refusing to disclose the source of information contained in publication for which he is responsible, unless it be established to the satisfaction of the court that disclosure is necessary in the interest of justice or national security or for the prevention of disroder or crime". This is also somewhat narrowly drawn. We appreciate that in principle, there is something to be said for conferring protection on such unpublished information. The journalist, for example, may consider it necessary to obtain background information which (though not itself intended for publication) may be required for verifying the accuracy of the information that is proposed to be published. Nevertheless, one cannot overlook the consideration that a protection for such unpublished information may occasionally create unforseen anomalies. We would, therefore, prefer to confine the protection to the source only.

Types of proceedings.

9.4. The fourth issue to be considered concerns the types of proceedings to be covered by the proposed protection. In our opinion, all proceedings in the course of which evidence is, or may be, legally taken on oath should be covered. Whether any exception should be made requiring disclosure in defamation actions is a matter of some difficulty. We would not, however, like to make any special provision on the subject to govern all defamation actions. The court, when dealing with the matter, will be expected to bear in mind the consideration of justice—an aspect which is dealt with in the next paragraph, where we discuss the status of the protection to be conferred.

Status of the protection.

9.5. This brings us to the most important question concerned with the status of the proposed protection. A number of alternatives fall to be considered in this respect, namely :—

(i) an absolute privilege against disclosure may be conferred ; or

(ii) the court (or other body adjudicating the controversy) before which protection is claimed may be given a discretion to uphold or reject the request for protection (the decision to be arrived at in each individual case) ;

(iii) while giving such a discretion, as is mentioned in (ii) above, some criteria may be laid down to guide the exercise of the discretion.

After devoting some thought to the matter, we have come to the conclusion that the matter should be left elastic, by vesting in the court a discretion in the matter, but without going to the length of conferring a privilege as such on any particular class of persons for any class of publications. With a discretion so to be vested in the court, the court can, in each case, balance the need to protect confidentiality of the source of the information (or the information itself, if so decided) against :—

(i) the interest of justice—a general consideration ; and

(ii) the demands of national security, prevention of disorder and crime,—considerations which may be relevant in special situations.

To confer an absolute privilege would be a very simple solution, but having regard to the variety of considerations involved and the complexity of the subject matter, we do not think that a reform of the law on the issue under consideration should be shaped as a "privilege". The disadvantage of conferring an absolute privilege is that it introduces an element of rigidity into the law, which might occasionally cause very serious anomalies. On the other hand, a discretion given to the court on the lines indicated above will leave the matter elastic.

Waiver irrelevant.

9.6. Since we are not recommending the conferment of a *privilege* as such,[1] the question whether the privilege should be allowed to be waived, and if so, by whom, becomes academic, and we need not therefore pause to discuss it.

Recommendation for amending the Evidence Act.

9.7. In the result, our recommendation is to insert a provision in the Indian Evidence Act, 1872 at the appropriate place (say, as section 132A), somewhat on the following lines :

> "132A. No court shall require a person to disclose the source of information contained in a publication for which he is responsible, where such information has been obtained by him on the express agreement or implied understanding that the source will be kept confidential".
>
> **Explanation.**—In this section—
>
> (a) 'publication' means any speech, writing, broadcast or other communication in whatever form, which is addressed to the public at large or any section of the public.
>
> (b) "source" means the person from whom, or the means through which, the information was obtained".

Recommendation to amend the two codes of procedure to provide for appeal against order under proposed section 132A, Evidence Act.

9.8. Having regard to the importance of a court order on the subject, we recommend that a provision for appeal against an order directing or refusing to direct disclosure under proposed section 132A, Evidence Act,[2] should be inserted in the Code of Civil Procedure, 1908, and in the Code of Criminal Procedure, 1978 at the appropriate place.

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1. Paragraph 9.5, *supra*.
2. Paragraph 9.7, *supra*.

(K. K. MATHEW)
CHAIRMAN

(NASIRULLAH BEG)
MEMBER

(J. P. CHATURVEDI)
MEMBER

(P. M. BAKSHI)
PART-TIME MEMBER

(VEPA P. SARATHI)
PART-TIME MEMBER

(A. K. SRINIVASAMURTHY)
MEMBER-SECRETARY

Dated : September 9, 1983.

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