CHAPTER I

NEWSPAPERS : HISTORY OF THEIR LAW.

The start of the first newspaper in this subcontinent which term would include in this work Bangladesh, India and Pakistan, is related to Mr. James Augustus Hicky. He identified himself as "the printer to the Honourable Company" meaning obviously the East India Company. He had hardly any refined taste and his paper, named Bengal Gazette or Calcutta General Advertiser, a two-sheet newspaper, contained only abuses and attacks on the servants of the Company. Even the Governor-General Warren Hastings and his wife were not spared. The result was what was anticipated. He was subjected to a number of action. The first was deprivation of the privilege of circulating his newspaper through the General Post Office. Secondly Mr. Hicky was interlocked with serious litigations, in a number of libel cases.

He was also subjected to oppression by the East India Company which left him in utter penury. During the next few years a few other papers came up evidently because all of them assured the Governor-General that they would abide by the regulations made by his Government. In Madras, the Madras Gazette was required to submit to censorship by the Military Secretary before its publication. When the newspaper protested against this precensorships the free postage facilities were withdrawn. However, by and large, the Bombay and Madras newspapers generally kept themselves on the right side of the Government, the rare recalcitrants being summarily dealt with on charges of gross libel of the Government. In Calcutta, one William Duane, Editor of the Bengal journal, was persecuted, his house broken into and searched and he was ultimately sent back to England without being given any compensation for the property left behind by him. In a dispatch to the Board of Directors, the Governor-General said that newspapers in Calcutta had assumed a

licentiousness too dangerous to be permitted in this country and that he, therefore, had to be deported to England. In general, papers were pulled up for various offences, the most important of which related to military subjects. Those editors who were found inconvenient were deported to England. The most significant aspect of this period was that there were no Press laws as such in this country during the latter part of the 18th century. Despite that, the pattern of Governmental action was to deport incorrigible editors, deny postal facilities to the unrepentant and to require those who persisted in causing displeasure to the Government to submit either a part or the whole newspaper for censorship.

Every newspaper today is required to carry in print the name of the printer, publisher and the editor and this requirement seems to have its origin in the early 19th century. The Marquess of Wellesley, who was engaged in a fight with Tipoo Sultan, could not brook any news being published about the European community in India and laid down rules for the conduct of the whole tribe of editors and threatened to deport the mischievous editors by force to Europe. Regulations were made in 1799 requiring the newspapers to print the names of the printer, publisher and the editor and to submit all material published in the paper for prior scrutiny by the Secretary to the Government. Any breach of the regulations was punishable with deportation from India. But, in fact, the newspapers did not submit to the requirement of precensorship with regularity. On the other hand, in spite of the rigid restrictions there was a spate of pamphlets, some of them emanating from the Missionaries of Serampore attacking Hindu and Muslim beliefs. In Madras, the regulations were more stringent, requiring the press to submit manuscripts for censorship before publication.

Precensorship came to an end under peculiar circumstances. When asked to exclude certain portions from his newspaper, Heatly, the editor of Morning Post, refused to comply claiming that no action could be taken against him as he was a native of India. Heatly was born of a European father and Indian mother and the Government having realised that it was powerless to take action against

one Indian by birth, Lord Hastings abolished censorship and placed the responsibility for excluding any matter likely to affect the authority of the Government or anything injurious to the public interest on the editor himself.

During this period, three men played an important part in establishing freedom of the press in this country. James Silk Buckingham was an indefatigable fighter for the freedom of the press and was on several occasions threatened to be deported but was saved by Lord Hastings, who adopted a benevolent attitude towards the press, because he realised that the most effective safeguard for the Government was permitting full freedom of discussion by the press as this would serve to strengthen the hands of the administration. Despite the strong opposition from his Council and censure from the Court of Directors, Lord Hastings relaxed some of the existing restrictions. Raja Ram Mohan Roy's three papers, which resolutely opposed Hindu social and religious beliefs, were considered as fraught with danger and likely to explode all over India like a spark thrown into a barrel of gunpowder. In official quarters, they were viewed with some apprehension. The newspapers, which favoured orthodox viewpoint however, did not attract the same measure of hostile attention. The tireless campaign by Buckingham and Ram Mohan Roy convinced many eminent minds both in this country and in England of the useful role a free press could play by its exposure of lapses in the administration and its criticism of the Government's policies.

After the departure of Lord Hastings, the new Governor-General John Adam recorded his objection "to the assumption by an editor of a newspaper of the privilege of sitting in judgment on the acts of Government and bringing public measures and the conduct of public men as well as the conduct of private individuals before the bar of what Mr. Buckingham and his associates miscall "public opinion". He, therefore, issued an ordinance requiring that all matters printed in a press or published thereafter, except matters of a commercial nature, should be printed under licence

from the Governor-General. The application for a licence should furnish the name or names of the printer and publisher or the proprietors, their places of residence, location of the press and the title of the newspaper, etc. Where there was a change in any of the particulars enumerated above, a fresh application for licence should be submitted. The Governor-General had the power to revoke the licence. Certain penalties were imposed in cases where the printing or publishing was done without the requisite licence. Regulations issued under this ordinance empowered magistates to attach and to dispose of both unlicensed printing presses and presses which continued to function after the notice of recall. The presses were also required to carry on the first and last pages the names of the printer, city or town or place of publication and also required that a copy of the paper should be forwarded to the local magistrate on payment. Penalties were imposed for non-compliance with these regulations. It was apparent that these regulations were aimed at the Indian language press of those days. These regulations may be said to be the forerunners of the Vernacular Press Act of 1878.

In the period that followed, both Lord Bentinck and Sir Charles Metcalf adopted a more liberal attitude towards the press in India. Metcalf advocated the liberty of the press believing that its benefits outweigh its mischiefs. The unsatisfactory nature of the Press Laws agitated the minds of Indians and Sir Charles Metcalf referred the matter to Lord Macaulay to draft a Press Act. Macaulay pointed out that the licensing regulations were indefensible and should be repealed. He expressed the view that licences to print ought not to be refused or withdrawn except under very peculiar circumstances. While agreeing with the views of Lord Macaulay, the Governor-Generat expressed the view that as the Press Laws differed in the different provinces, the enactment of general law for the whole of India was indispensable,. But there were others in the Governor-General's Council who emphasised the importance of the Government keeping a watchful eye particularly on the native press. However, the Council passed the new Act repealing the Bengal regulations of 1823 and Bombay Press Regulations of 1825 and 1827. The new Act

said Government into hatred or contempt, to excite disaffection or unlawful resistance to its orders or to weaken its lawful authority or the authority of its civil or military servants, or observations or statements having a tendency to create alarm or suspicion among the native population of any intended interference by the Government with their religious opinions and observances or having a tendency to weaken the friendship towards the British Government of Native Princes, chiefs.....or alliance with it."

The rapid growth of the local language press made the Government rather uneasy. The official opinion had hardened towards the language press and the diehards among them stressed the need for a more effective law than that which then existed (namely, Act XXV of 1857, s.124A of the Penal Code and so on). In the year 1877, the Press Association, headed by Surendranath Banerjee, waited on the then Viceroy and made a fervent appeal not to impose any stringent restrictions on the language press. The Viceroy in his reply made no reference to the subject. In the following year, the Vernacular Press Act was passed (Act IX of 1878). The salient provisions of this enactment were to place newspapers published in the languages of the subcontinent under "better control" and to furnish the Government with more effective means than the existing law provided for punishing and suppressing seditious writing. The Vernacular Press Act owed its origin to the pique of the then Lt. Governor of Bengal, Sir Ashley Eden. The incident leading to the passing of the Act, as described by Motilal Ghose, needs narration in full :

"Babu Shishir Kumar was at the time a poor man. His position in Calcutta Society was not high. The tempting offer came from the ruler of the province. Many other men in his circumstances would have succumbed to his temptation. But he was made of a different stuff. He resisted and did something more. He thanked His Honour for his generous offer, but also quietly remarked, your honour, there ought to be at least one honest journalist in the land. The expected result followed. Sir Ashley flew into an unconquerable rage. With scathing sarcasm, he told Babu Shishir Kumar that he

had forgotten to whom he was speaking, that as supreme authority in the province he could put him in jail any day he liked for seditious writing in his paper, and that he would drive him back to Jessore bag and baggage from where he came in six months. It was not a vain threat. The Vernacular Press Act owed its origin to this incident. It was to take his revenge on Babu Shishir Kumar that Sir Ashley Eden persuaded Lord Lytton to pass this monstrous measure at one sitting. The blow was aimed mainly at the Amrita Bazar Patrika which was then an Anglo-Vernacular paper and fell within the scope of the Act. But Babu Shishir Kumar and his brothers were too clever for Sir Ashley. Before the Act was put in force, they brought out their paper in wholly English garb and thus circumvented the Act and snapped their fingers at the Lt. Governor ; for, a journal conducted in the English language was beyond the jurisdiction of Lord Lytton's Vernacular Press Act."

The Vernacular Press Act, instead of cowing down the language press, produced exactly the opposite effect. The general tone of the newspapers was one of opposition to Government and Government measures. This hostile attitude continued till 1880 when Gladstone, who became the Prime Minister, had denounced the Act and gave instructions to repeal the Act.

Writing about the press in the 19th century India, Dr. Pattabhi Sitaramayya points out that "popular agitation gives birth to repression on the ground that, unless the people are thoroughly beaten, no concession should be made to popular demands. Lord Lytton's Press Act of 1878 which was, however, quickly withdrawn, was the real forerunner of this policy. The Arms Act was another reply to the growing self-consciousness of the nation and continued a festering sore."

In the latter part of the 19th century, the Government of the then India was haunted by the spectre of sedition. By a notification promulgated on 25th June, 1891, the Government restricted the rights of the free press even in Indian States. The Indian National Congress protested against it in 1891. The notification prohibited

the publication of a newspaper within the territory of a Native State without the permission of the Political Agent. If this was contravened, the Political Agent could, by order in writing, require the editor to leave such local area within seven days from the date of such order and prohibit him from re-entering such local area without the written permission of the Political Agent. Disobedience of such an order made one liable to forcible expulsion. Dr. Pattabhi Sitaramayya points out "Sections 124A and 153A were forged in the year 1897 and really created disaffection towards the Government. It is interesting to note that sections 108 and 144 were first applied to politicians even in the last century. Secret Press Committees were established in 1898 which evoked a vehement protest from Mr. W.A. Chambers at the 14th Congress.....Kelkar spoke against the hateful institution of the Press Committees which are only a thinly veiled press censorship and, as such, a distinct disgrace to British India." Even more startling was the statement, unearthed by Mr. R.N. Mudholkar in 1897 made by Sir James Fitz James Stephen which was in the following words : "Go to the English newspapers ; whatever they say, you may say ; that anybody should want to be more offensive than they, is inconceivable."

Mr. S. Natarajan describes the early part of the 20th century as an "amazingly hysterical period which the press in this subcontinent passed through." The Anglo-Indian Press was one with the Government in its policies and it went all out to belittle the extremist as well as the moderate schools. Naturally, therefore, the Government did not find any danger in the Anglo-Indian Press. Defiance of the Government and challenging its acts were explained away as "occasional lapses from good taste and right feeling." The Times of India, which was pulled up for flagrant contempt of court in the Tilak trial (1897) was let off with a warning. This form of extreme discrimination displayed by the British Government provoked a caustic comment from Gokhale who said : "The terms of race arrogance and contempt in which some to these newspapers constantly speak of Indians, and specially of educated Indians, cut into the mind more than the lash can cut into the flesh. Many

of my countrymen imagine that every Anglo-Indian pen that writes in the press is dipped in Government ink. It is an absurd idea, but it does great harm all the same." Speaking on another occasion, Gokhale went on to expose the system of confidential circulars "which seek to take away in the dark what has been promised again and again in the Acts of Parliament, the proclamations of Sovereigns and the responsible utterances of successive Viceroys" and said that the unlimited power that the Government possessed inclined it constantly to enact repressive legislation. Further, Gokhle's remark that nowhere was the press so weak in influence as it was in India was borne out by the fact that the Government promulgated an Ordinance and enacted laws to control public meetings (1907) followed by the Newspapers (Incitement to Offences) Act, 1908. By this Act, power was given to a magistrate to seize a printing press if he was convinced that a newspaper printed therein contained any incitement to murder or to an act of violence or to an offence under the Explosive Substances Act. Power was conferred on the magistrate to make the conditional order absolute either by an ex parte decision in an emergency or after hearing evidence from persons concerned against the order. Police sub-inspectors were to carry out the magistrate's order under warrant and right of appeal to the High Court lay within 15 days of the order being made absolute. Proceedings under the Act did not save any person from being prosecuted under any other law, and on the order being made absolute, the local Government could annul the declaration in respect of the newspaper or any newspaper which was in substance the same as the prohibited newspaper ; the effect of this draconian law was that several newspapers, which expressed sympathy with terrorist activities, ceased publication in 1908. All hopes that the hardships inflicted by the 1908 Act were temporary were shattered when the Indian Press Act was passed in 1910.

The most harsh provisions of the Press Act, 1910, were the requirement of security deposit by every person keeping a printing press and forfeiture of the deposit in all cases where the matter

go further and show that it is impossible for them to have that tendency either directly or indirectly, and whether by way of inference, suggestion, allusion, metaphor or implication. Nor is that all. The legislature has added the all-embracing phrase "or otherwise". Again, in the case of New India edited by Mrs. Besant, the Madras High Court remarked : "Section 3(1) imposes a serious disability on persons desiring to keep printing presses." A deputation of the Press Association headed by Mr. Horniman waited on Lord Chelmsford, the Viceroy, on 5th March, 1917, to impress upon him the harsh nature of the law and he rebuked the deputation in unmeasured terms. He said : "The function of a Judge is not to say what the law ought to be, but what it is. Executive action is and must always be based upon information, experience, considerations of policy which find no place in the courts of law. Sir Lawrence Jenkins was not entirely consistent with himself. And I cannot but think that if he had any knowledge of the statistics I have given you, he would have hesitated before describing the keeping of printing presses and the publication of newspapers as an extremely hazardous undertaking."

Lord Chelmsford used the Press Act with severity and too often. Mrs. Besant was prohibited from entering the Bombay Presidency by Lord Willingdon under the Defence of India Act. In Bengal, the number of young men interned ran up to nearly three thousand. The Congress urged the Government to repeal immediately the Defence of India Act, the Press Act, the Seditious Meetings Act, the Criminal Law Amendment Act and similar other repressive measures.

The Criminal Law Amendment Act, 1913, and the Defence of of India Regulations, which came into force at the outbreak of war in 1914, were used to stifle criticism and silence agitation. The amount collected by the Government by way of securities and forfeitures, most of them by executive orders, the number of presses closed and the publications proscribed under the Act would clearly show under what trying conditions the press functioned and to what extent it was crippled. The numerous protests proved to be of no avail. Immediately on the heels of these repressive measures came

the legislation based on the recommendations of the Rowlatt Committee. The agitation, which followed the passing of these laws, took the form of reading publicly, copying and distributing proscribed literature openly and courting punishment. Horniman was deported. Later, however, he was permitted to resume publication but under censorship with security deposit of a few thousands of rupees.

The position had become by then, intolerable. A Press Law Committee was appointed under the chairmanship of Sir Tej Bahadur Sapru in 1921. The journalists deposed before the committee that an Anglo-Indian editor in Madras was allowed to make the most violent attacks on Indians who advocated the reforms that are now law. But if an Indian paper replied to the attack, it found itself accused of exciting hatred. The Sapru Committee recommended the repeal of the 1908 and 1910 Acts, the amendment of the Registration of the Press and Books Act to empower seizure of seditious literature, to ensure the printing of the editor's name in every issue of a newspaper and to reduce the maximum penalty of imprisonment to six months. The committee said that the two Acts had done little to check the evils they were meant to restrain for the "more direct and violent forms of sedition are now disseminated more from the platform and through the agency of itinerant propagandists than by the press."

Next in importance is the Indian Press (Emergency Power) Act. 1931, which was described as an Act to provide against the publication of matter inciting to or encouraging murder or violence. The sweeping nature of s.4 of this Act may be noticed from the fact that it provided that whenever it appears to the Government that any printing press in respect of which any security had been ordered to be deposited under s.3 was used for the purpose of printing or publishing any newspaper, etc., containing any words, signs or visible representations which (i) incite to or encourage, or tend to incite to or to encourage, the commission of any offence of murder or any cognizable offence involving violence or (ii) directly or indirectly express approval or admiration or any such offence or

of any person, real or fictitious, who has committed or is alleged or represented to have committed any such offence, the Local Government may forfeit the security or, where no security has been deposited, declare the press to be forfeited. On the second occasion, the security to be deposited by the press could be upto ten thousand rupees. Power was also conferred on the Postal and Customs authorities to seize articles in course of transmission if they are suspected to contain matter of the nature described above.

Laws relating to press in Bangladesh as at present will be discussed in the following pages.

CHAPTER II

CONSTITUTIONAL PROVISIONS RELATING TO PRESS

Freedom of the Press is a fundamental right

Freedom of the Press is a fundamental right available to every citizen of Bangladesh. Now, what is a fundamental right ?

A legal right is an interest which is protected by law and is enforceable in the courts of law. While an ordinary legal right is protected and enforced by the ordinary law of the land, a fundamental right is one which is protected and guaranteed by the written Constitution of the state. These are called 'fundamental', because while ordinary rights may be changed by the parliament in its ordinary process of legislation, a fundamental right, being guaranteed by the Constitution, cannot be altered by any process shorter than that required for amending the Constitution itself. Nor can it be suspended or abridged except in the manner laid down in the Constitution itself.

On the other hand, the fundamental rights being guaranteed by the fundamental law of the land, no organ of the State, executive, legislative or judicial, can act in contravention of such rights, and any act which is repugnant to such rights must be void.

Once the Constitution is regarded as the supreme law of the land the powers of all the other organs of Government are considered as limited by its provisions ; it follows that not only the parliament but also executive and all administrative authorities are equally limited by its provisions, so that any executive or administrative authorities are equally limited by its provisions, so that any executive or administrative act which contravenes the provisions of the Constitution must, similarly, be void.

In fact, no right can be said to be fundamental if it can be overridden by the parliament and if there is no authority under the

Constitution to pronounce a law to be invalid where it contravenes or violates such right directly or indirectly.

The Enforcement of the Rights

The fundamental rights, guaranteed by Part III of the Constitution of Bangladesh, are not "natural" rights but such rights as will be enforceable by Courts ; they are a part of the positive law of the land. While the aim to govern and control the absolute power of the State in imposing restrictions of the freedom of the governed, they are for the most part qualified, not absolute rights, but how far the constitutional protection of such rights will constitute an effective shield against any future executive arbitrariness and legislative invasion is a major problem whose solution would depend as much on the exercise of judicial restraint as on the legislative wisdom of the elected representatives in Parliament. These rights are, no doubt, paramount to ordinary laws.

The insertion of these rights in the Constitution and the guarantee of their enforcement imply judicial review and control of the legislative and executive acts and organs of the State. In so far as there has been encroachment upon the rights not justified by the constitutional restrictions recognised by the Constitution, the Court will declare the order of statute as invalid, unenforceable and unconstitutional. Under Article 26 of the Constitution the Courts have been empowered to declare laws inconsistent with or made in derogation of the fundamental rights to be void. Any person or citizen who feels aggrieved as a result of an infringement of any fundamental rights may move the High Court Division of the Supreme Court under Article 102(1) of the Constitution. These Articles provide the means of enforcing the fundamental rights guaranteed by Part III, and have made the Judiciary the guardian of the citizens, liberty and privileges under the Constitution. The basic principle underlying a declaration of Fundamental Rights in a Constitution is that it must be capable of being enforced not only against the executive but also against the legislature by judicial process.

Even though freedom of the press was not specifically mentioned in Article 8 of the Constitution of Pakistan, 1956 it was considered to be included under the guarantee regarding the freedom of speech and expression. Muhammad Shafi J. in interpreting the scope of that Article, stressed the justification for the existence of an independent press in these words :

"The purpose of the Constitution is that there should be as few restrictions on the freedom of the press as in the light of the conditions prevailing in a country are absolutely essential. In fact, no restriction should be placed on the freedom of the press except in times of grave emergencies, such as war, civil commotion on a large scale, and even then only in respect of matters involving the security of the State."

Some statements made by Blackstone about the most important of the above-mentioned vehicles of expression, that is, the press, require consideration :

"The liberty of the press is indeed essential to the nature of a free state ; but this consists in laying no previous restrictions upon publications, and not in freedom from censure for criminal matter when published. Every free man has an undoubted right to lay what sentiments he pleaded before the public ; to forbid this is to destroy the freedom of the press ; but if he publishes what is improper, mischievous, and illegal, he must take the consequences of his own temerity....To publish (as the law does at present) any dangerous or offensive writings, which when published, shall on a fair and impartial trial be adjudged of a pernicious tendency, is necessary for the preservation of peace and good order, of government and religion, the only solid foundations of civil liberty."

These words are, no doubt, to be valued ; but the question remains still to be answered as to how the power of a licenser can be regulated by law if censorship must not be dispensed with for the sake of peace, order, good government and religion. For, censorship, though may be subjected to well-defined principles, would in the long run mean interference by a single person of the rights of other person to make manifest their own thoughts.

Pre-Censorship

An order under Section 7(1) of the Press (Emergency Powers) Act, 1931 calling upon the printer and publisher of a newspaper to deposit security was held unconstitutional since it aimed to restrain him from expressing himself freely before he actually expressed himself. In the words of Kayani C. J, "Whatever restraint is to be placed on him, will naturally relate to the manner of his expression. If he is required to fulfil a condition before actually expressing himself, the restraint will be of a preventive nature....."

In a case before the Madras High Court where Section 49-A of the Madras City Police Act, 1886, in regard to publication for sale of any book or pamphlet containing news or information of horse races empowered the executive authority under its rule-making power to permit such publication or to refuse it, the Court held that it amounted to a previous restraint on the exercise of the freedom of expression and was illegal.

"Pre-censorship of news by the executive authority is not consistent with the exercise of the fundamental right to freedom of speech and expression guaranteed by the Constitution."

The reasons for which pre-censorship should be condemned as unconstitutional were advanced by Chief Justice Hughes of the United States Supreme Court. Minnesota enacted a statute under which the owners and publishers could be enjoined from publishing any newspaper or magazine if it contained any "malicious, scandalous and defamatory matter." A paper called "The Saturday Press" was condemend under the statute. The Supreme Court set the injunction aside because the statute imposed a previous restraint on publication, a device resorted to in colonial days to suppress criticism and stiff opposition. Civil or criminal action may be taken if the publisher or press-keeper commits any crime or does any wrong, but a paper cannot be suppressed because it is irresponsible or reckless or impudent.

"While reckless assaults upon public men, and efforts to bring obloquy upon those who are endeavouring faithfully to discharge

official duties exert a baleful influence and deserve the severest condemnation in public opinion, it cannot be said that this abuse is greater, and it is believed to be less than that which characterized the period in which our institutions took shape. Meanwhile, the administration of government has become more complex, the opportunities for malfeasance and corruption have multiplied, crime has grown to most serious proportions, and the danger of its protection by unfaithful officials and of the impairment of the fundamental security of life and property by criminal alliances and official neglect, emphasizes the primary need of a vigilant and courageous press especially in great cities. The fact that the liberty of the press may be abused by miscreant purveyors of scandal does not make any the less necessary the immunity of the press from previous restraint in dealing with official misconduct. Subsequent punishment for such abuses as may exist is the appropriate remedy consistent with constitutional privilege."

In that they influence public opinion, motion pictures, radio and television can also claim the protection of Article 39. Where a New York statute gave a censor the right to prevent the exhibition of a motion picture on the ground that it was sacrilegious, it was held that the statute was unconstitutional ; thus bringing the motion pictures within the ambit of the constitutional guarantees of freedom of speech and of the press. Clark J. observed : "The censor is set adrift upon a boundless sea amid a myriad of conflicting currents of religious views, with no charts but those provided by the most vocal and powerful orthodoxies. New York cannot vest such unlimited restraining control over motion pictures in a censor."

Freedom of Circulation

Freedom of expression includes the freedom of publication as well as distribution. There can be no doubt that freedom of speech and expression includes freedom of propagation of ideas, and that freedom is secured by freedom of circulation. "Liberty of circulating is as essential to that freedom as liberty of publishing ; indeed without the circulation, the publication would be of little value."

If the taxes imposed on a publisher show an invidious incidence, they may be declared unconstitutional as having the effect of stifling circulation of books or papers disseminating knowledge. In 1712, the British Parliament imposed a tax on printed papers and pamphlets and required a stamp to be affixed on a newspaper. Such taxes were known as "taxes on knowledge". A tax of 2 percent was imposed on the gross receipts from advertisement in a newspaper having a circulation of 20,000 copies per week. In the opinion of the Supreme Court, the tax here involved is bad, not because it takes money from the pockets of the appellees :

"If that were, all a wholly different question would be presented. It is bad because, in the light of its history, and of its present setting, it is seen to be a deliberate and calculated device in the guise of a tax to limit the circulation of information to which the public is entitled in virtue of the Constitutional guarantees. A free press stands alone of the great interpreters between the government and the people. To allow it to be fettered is to fetter ourselves."

General observations regarding Constitutional Restrictions on the Freedom of Press

The Constitution does not indicate what restrictions are to be considered reasonable with regard to matters mentioned in Article 39 and, it is for the Courts to decide whether or not a restriction which is impugned is reasonable or not.

The test of reasonableness, wherever prescribed, should be applied to each individual Act impugned, and no abstract standard, or general pattern, of reasonableness can be laid down as applicable to all cases :

"The nature of the right alleged to have been infringed, the underlying purpose of the restriction imposed, the extent and urgency of the evil sought to be remedied thereby, the disproportion of the imposition, the prevailing conditions at the time should all enter into the judicial verdict. In evaluating such elusive factors and forming their own conception of what is reasonable, in all the circumstances of a given case, it is inevitable that the social philosophy and

the scale of values of the judges participating in the decision should play an important part, and the limit to their interference with legislative judgment in such cases can only be dictated by their sense of responsibility and self-restraint and the sobering reflection that the Constitution is meant not only for people of their way of thinking but for all, and that the majority of the elected representatives of the people have, in authorising the imposition of the restrictions, considered them to be reasonable.

"The right to determine the reasonableness of the restriction vests in the Court and it requires no mention that there can be no absolute test of reasonableness which would be applicable to all circumstances."

Where the extent of the restriction is left to the discretion of an executive authority, it amounts to negation of the right to freedom of speech and expression. Demanding security from a person who disseminates or attempts to disseminate or abets the dissemination of seditious matter is provided for under Section 108 of the Code of Criminal Procedure and this was held to be imposing reasonable restrictions in the interests of the security of the State.

The right to free speech and expression guaranteed to every citizen by Article 39 is, as already mentioned, not absolute. Restrictions that are supposed to be good for the community may be imposed to override the right of the individual. And such restrictions will not be considered to be unreasonable. Vague or uncertain restrictions are not reasonable, because the citizen does not know the scope of the restriction and the inevitable result is either to take away the right altogether or render it impossible of compliance. A restriction imposed on a guaranteed right cannot be reasonable if it is arbitrary, or in excess of what is required in the interest of the public and on this view, Section 144 of the Code of Criminal Procedure was held not to conflict with Article 19 (1) (a) of the Indian Constitution, corresponsding to Article 39 of the Bangladesh Constitution. Reasonableness is required not only in the substantive provisions of the impugned law, but also in the procedural provisions. Applying this test, although no objection could be

taken to the substantive provisions of the Dramatic Performances Act (XIX of 1876), its procedural part imposed unreasonable restrictions on the right of freedom of speech and expression as it denied the petitioner the right to be heard before final condemnation of the right to have the order reviewed by a higher tribunal.

In a case where the respondent made some remarks in a petition before a subordinate Judge about the conduct of a High Court Judge it was observed that the contention that no proceedings would be taken against the respondent because of Article 8, corresponding to Article 39 of the Constitution of Bangladesh, was based on a misreading of the Article, for it is mentioned in clear terms that it would not affect any law which placed reasonable restrictions on the liberty of speech and expression.

Content of the Constitutional Provision

Having discussed the nature of the constitutional provisions relating to press. I now pass on to its content.

The Constitution of the People's Republic of Bangladesh provides as follows :

Article 39. (1) Freedom of thought and conscience is guaranteed.

(2) Subject to any reasonable restrictions imposed by law in the interests of the security of the state, friendly relations with foreign states, public order, decency or morality, or in relation to contempt of court, defamation or incitement to an offence—

(a) the right of every citizen to freedom of speech and expression ; and

(b) freedom of the press, are guaranteed.

It is clear from the above, that freedom of thought and conscience is unlimited in Bangladesh. It suffers from no constraints. Freedom of speech, expression and the press is however not unlimited.

It is amazing that in no countries of the world does the principle of unlimited and absolute freedom of thought and conscience find place as in Bangladesh. Nowhere else has freedom of thought and

conscience been guaranteed in so many words. I quote a few Constitutions of the world on this subject.

(A) The First Amendment to the Constitution of the United states (1791) lays down—

The Congress shall make no laws abridging the freedom of speech or of the press.

(B) **England**—The right of freedom of discussion like all other individual rights, is in **England,** not based on any declaration embodied in a constitutional document, or in any particular rule of statute of common law, but is based on the ordinary rule of law that no man is to be punished except for a distinct breach of the law.

(C) Eire—Sec. 40(6)(1) of the Constitution of Eire says : The State guarantees liberty for the exercise of the following rights subject to public order and morality :—

(i) The right of the citizens to express freely their convictions and opinions.

The education of public opinion being, however, a matter of such grave import to the common good, the State shall endeavour to ensure that organs of public opinion, such as the radio' the press, the cinema, while preserving their rightful liberty of expression. including criticism of Government policy, shall not be used to undermine public order or morality or the authority of the State. The publication or utterance of blasphemous, seditious or indecent matter is an offence which shall be punishable in accordance with law.

(D) **France**—The preamble to the Constitution of the fourth French Republic (1946) declares—

The free communication of ideas and opinions is one of the most precious of the rights of man ; every citizen, then can freely speak, write and print, subject to responsibility for the abuse of this freedom in cases determined by law.

(E) **U. S. S. R.—Art. 125 of the Soviet Constitution says :**

Article 125—In conformity with the interests of the working people, and in order to strengthen the socialist system, the citizens of the U. S. S. R. are guaranteed by law.

(a) freedom of speech ;

(b) freedom of the press ;

(c) freedom of assembly, including the holding of mass meeting ;

(d) freedom of street processions and demonstrations.

These civil rights are ensured by placing at the disposal of the working people and their organistions printing presses. stocks of paper, public buildings, the streets, comminications-facilities and other material requisites for the exercise of these rights.

[It would be a mistake to suppose that there are no fundmental rights in the Soviet Constitution. The declarations in this behalf in the Constitutions of the U.S.S.R. and of the allied States are as good as in any other constitution, but for the fact that these rights are to be enjoyed for the benefit or in the interests of one class of people, namely, the working class.]

(F) **West Germany—Art. 5 of the West German Constitution (1948) says—**

1. Everyone shall have the right freely to express and to disseminate his opinion through speech, writing, and illustration and without hindrance to instruct himself from generally accessible sources. Freedom of the press and freedom of reporting by radio and motion pictures shall be guaranteed. There shall be no censorship.

2. These rights shall be limited by provisions of general laws, legal regulation for protection of juveniles, and by the right of personal honour.

3. Art and science research and teaching shall be free. Freedom shall not absolve from loyalty to the constitution.

(G) **Japan—Art. 21 says—**

Freedom of assembly, association, speech, and press and all other forms of expression are guaranteed. No censorship shall be maintained, nor shall the secrecy of any means of communication be violated.

(H) **The Constitution of India provides—**

(1) All citizens shall have the right—

(a) to freedom of speech and expression :

(2) Nothing in sub-clause (a) of clause (1) shall affect the operation of any existing law, or prevent the state from making any law, in so far as such law imposes reasonable restrictions on the exercise of the right conferred by the said sub-clause in the interests of the sovereignty and integrity of India, the security of the state, friendly relations with foreign state, public order, decency or morality or in relation to contempt of court, defamation or incitement to an offence.

(I) **Pakistan Constitution of 1956 provided—**

8. Every citizen shall have the right to freedom of speech and expression, subject to any reasonable restrictions imposed by law in the interest of the security of Pakistan, friendly relations with foreign states, public order, decency or morality, or in retation to contempt of court, defamation or incitement to an offence.

(J) The Constitution of the Islamic Republic of Pakistan, 1962 provided—

9. Freedom of speech.

Every citizen shall have the right to freedom ef speech and expression subject to any reasonable restrictions imposed by law in the interest of the security of Pakistan, friendly relatlons with foreign states, public order, decency or moratity, or in relation to contempt of court, defamation or incitement to an offence.

Now, the first point for consideration is,

What could be the meaning and interpretation of this principle enshrined in para 1 of Article 39 of our Constitution regarding absolute freedom of thought and conscience.

There are five accepted rules of interpretation :

1. The fundamental rule of interpretation of all enactments to which all other rules are subordinate is that they should be construed according to the intent of the Assembly which passed them.

For the purpose of interpretation, however, "intent" or intention does not mean what the Constituent Assembly meant to say, but what the meaning of the words employed is. In other words, we have to find out the expressed intention from the words of the Article itself.

2. If the words of the Article are themselves precise and unambiguous, no more is necessary than to expound those words in their natural and ordinary sense.

3. When the language is plain and admits of one meaning only, that meaning, and that meaning alone, must be given to it, however absurd, harsh, unjust, arbitrary or inconvenient the consequences may be. The reason is plain, viz, that in interpreting the Article we cannot assume the function of Assembly.

4. The Constitution must be read as a whole with a view to determining the intention of the Article.

5. The Article ought to be so interpreted that if it can be prevented, no para, sentence or word shall be superfluous, void or insignificant.

So effect must be given to every clause and word of the Article. It is improper to omit any word which has a reasonable and proper place in it or refrain from giving effect to its meaning.

What is thought ? It is an active process through which the objective universe is reflected in concepts, judgements and theories in human mind. Man is a thinking being, the ability to think being a special gift to homo sapiens. A man thinks and that is why he is a man.

What is conscience ? It is a moral sense, an ethical consciousness which differentiates good from bad, and right from wrong. It gives direction to man and purpose to his life.

Thought and conscience are by their very nature individualistic. Although it is the society which provides largest amount of materials

for their formation, yet it is curious phenomenon that men, in the same society, differ in their thoughts and consciences. The constitutional guarantee protects individualism and opposes regimentation in these two fields.

Keeping the above accepted rules of interpretation and the meaning of the twin concepts of thought and conscience in view, I have tried to ascertain the implication of para one of Article 39. I am not sure what really was the intention of the Constituent Assembly to frame this surprisingly unique principle, but after giving my utmost and anxious consideration on it, I have explored the following possible meanings :—

1. A citizen has such freedom of thought and conscience as is restricted by no limitations. In the field of expression either vocally or in black and white his freedom is limited, the boundary being the interest of the state etc. So his thought and conscience have the freedom of straying into and treading the area of what may presently be regarded as even subversion of state.

A citizen therefore may have subversive thought and conscience ; but as long as he is not the subject of their expression, he enjoys constitutional immunity. He may give an air of subversion or circumstances may clothe him with that character yet he will enjoy immunity by virtue of this guarantee.

2. A citizen has an unlimited freedom of thought and conscience, his restriction begins with expression. So if he writes down his thoughts or ideas born out of his conscience, he is not accountable for them to anybody unless and until his writings get expressed through any media, inclusive of printing or circulating.

Justice Munim, in his "Rights of the Citizen under the Constitution and Law" observes quoting Geoffrey Marshall (Constitutional Theory) that the freedom of thought and conscience must necessarily include the right to express opinions, for, nobody who has urged the necessity of the freedom of thought can have seriously meant anything by that phrase but the expression of free thought by some public manifestation.

With the view of Justice Munim, agreement is difficult.

With Dr. Kamal Hossain, who had significant contributions in the making of our Constitution, I had a short discussion. His interpretation is as follows :

Para 1 of Article 39 puts in human language the spirit of Quranic verse—'la ikraha fiddin' and 'lakum Dinukum olia din'. There may arise, even in these days of enlightened tolerance, situation like Christian inquisition against which this guarantee will operate. A man in power, with state authority at his back, might ask a citizen, "What is your view on Hanafi doctrine ?" The citizen may say in reply that he has the right to think anything about the doctrine and that the said right is fundamental under para 1 of Article 49, and that he is not bound to make about it any declaration.

This fundamental right has been subjected as yet to no judicial interpretation and therefore it is anybody's guess as to what it really means.

GENERAL DISCUSSION

Article 39 is a guarantee against state action

Article 39 guarantees among other rights the fundamental right of freedom of press subject to the power of the state to impose restrictions on the exercise of this right.

Available to citizens only

But it should be noted that Article 39 is confined to citizens of Bangladesh. The right conferred by this Article is not available to any person who is not a citizen of Bangladesh.

Thus a person whose citizenship has been terminated or who has no citizenship of Bangladesh cannot complain of any restriction against his freedom of expression through press. The citizenship itself is subject to some legislative restrictions.

Available to natural persons only

The right conferred by the Article is confined to natural persons who are citizens and that a corporation not being a citizen, cannot claim this right even though its share-holders are citizens.

Nature of this right

The concept of "natural right" in respect of freedom of press is not relevant in Bangladesh for ascertaining whether there is any inviolable right apart from that included in Article 39 of the Constitution. The concept "of natural right" may however be utilized for determining the ambit of this Fundamental Right itself.

Nature of Constitutional guarantee

There is a difference between what an Act commands and what a Constitution commands. When a right is created by an Act or Ordinance, it can be exercised only subject to the conditions imposed by it and it can be restricted in any manner or taken away by the legislature at any time. But when a right is fundamental under the Constitution, it cannot be taken away by the legislature. The fundamental right may be subjected to such restrictions as are provided by the Constitution itself and no more.

RESTRICTIONS

General

Absolute or unrestricted rights in respect of freedom of press do not and cannot exist in any modern state. In two very modern states of the world, one having no constitution and the other having one, the position is the same. In England, where there is no constitutional guarantee of fundamental rights and in the United States, where there exists constitutional guarantee of freedom of press, the freedom is not unlimited.

The American Supreme Court has observed :

"The liberty of the individual to do as he pleases even in innocent matters is not absolute. It must frequently yield to the common good.

"The reconciliation of the contest between power and liberty, between the claims of the plitical society on the one hand and the interests of the individual, on the other, is a perennial problem of political society, a problem of recurrent difficulty which curioulsy persists irrespective of any difference in the form of government. Since the disappearance of the Fetish of laissee fair and the emergence of the welfare state, it is generally acknowledged that the individual can have no absolute or unfettered right in any matter and that the welfare of the individual, as a member of a collective society, lies in a happy compromise between his rights as an individual and the interests of the society to which he belongs. There is no protection of the rights themselves unless there is a measure of control and regulation of the rights of each individual in the interests of all."

The Indian Supreme Court has observed :

"Putting restraint on the freedom of wrong-doing of one person is really securing the liberty of the intended victims. Therefore restraints of liberty should be judged not only subjectively as applied to a few individuals who come within their operations but also objectively as securing the liberty of a far greater number of individuals."

Police Power

In U.S.A., the doctrine of police power is a rule, under which the states are said to have the inherent power to impose such restrictions upon the fundamental rights as are necessary to protect the common good, public health, safety and morals.

In other words the police power is founded on the theory that "the whole is greater than the sum total of all the parts, and when the individual health, safety and welfare are sacrificed or neglected, the state shall suffer."

The police power is merely an authority to firmly and even with force establish principles of good conduct and neighbourliness calculated to prevent a conflict of rights and to insure to each the uninterrupted enjoyment of his own, so far as that is reasonable and consistent with a corresponding enjoyment by other.

On the other hand,

(i) The police power does not confer upon the state an unrestricted authority to accomplish whatever the public may presently desire. It is the governmental power of self protection and permits reasonable regulation of rights and property in particular essential to the preservation of the community from injury which of course, includes general welfare.

(ii) The regulations which are imposed in the exercise of the police power must have (a) a real and substantial relation to the desired ends, and (b) must not be arbitrary or oppressive in other words, the police power must be exercised subject to constitutional limitations, including "Due process".

The concept as envisased in our Constitution is that there cannot be any such thing as absolute or uncontrolled liberty, for that would lead to anarchy, and disorder. Liberty has to be limited in order to be effectively possessed. The question therefore arises in each case of adjusting the conflicting interests of individual and of the society.

There cannot be any such thing as absolute or uncontrolled liberty wholly freed from restraint, for that would lead to anarchy and disorder. The possession and enjoyment of all rights are subject to such reasonable conditions as may deemed to the governing authority of the country to be essential to the safety, health, peace, general order and morals of the community. Ordinarily every man has the liberty to order his life as he pleases, to say what he will, to go where he will, to follow any trade, occupation or calling at his pleasure and to do any other thing which he can lawfully do without let or hindrance by any other person ; on the other hand, for the very protection of these liberties the society must arm itself with certain powers. What the constitution therefore attempts to do in declaring the rights of the people is to strike a balance between individual liberty and social control. Art. 39 of the Constitution guarantees this individual liberty and prescribes various restraints that may be placed upon them by law so that they may not conflict

with public welfare or general morality. The peculiarity of this Article lies in the fact it contains two parts, one declaring the right itself and the other enumerating precisely the limitations which may be imposed by the state upon the exercise of this right.

Relationship of restrictions with Permissible ground must be proximate

Not only should the restriction, in order to be valid, relate to any of the grounds mentioned in the Article, but the relationship between the impugned legislation and any of the relevant specified ground must be rational or proximate. This also follows from the expression "in the interest of."

In an Indian case (A 56, S.C. 541) it was said that "Uttering abusive or defamatory slogans against a Minister cannot be penalised on the ground of public order unless there is clear evidence that the utterances would lead to a reasonable apprehension of breach of the peace."

In the interests of

It is now settled that though the words "in the interests of" imply that the restriction imposed under any of the limitation prescribed in Article 39 in order to be valid must be proximately related to a ground specified in the relevant limitation, that very expression enables the legislature to restrict the exercise of the fundamental right as soon as a threat of injury to the social interest protected by the relevant ground on a proximate tendency thereof is manifest, it is not bound to wait until the mischief has actually taken place.

In other words, once the connection between the restrictive legislation and the permissible ground is rational, the legislature has the discretion as to the expediency of the stage at which the restriction is to be applied, thus, it is not prevented from providing against threatened or apprehended injury as distinguished from an actual injury (A 1962 S.C. 955).

Adjustment of competing fundamental rights

The very existence of a legal right requires that the rights of all persons who possess such right should be equally maintained ;

it follows, therefore, that nobody can be allowed to so exercise his legal right as to prejudice the exercise of a similar right belonging to another individual. This inherent limitation of a legal right extends to fundamental rights as well.

U.N. Declaration

The framers of the Universal Declaration of Human Rights (1948) were, however, anxious to emphasise this self-evident limitation which is apt, to be forgotten in course of a zealous advocacy of individual rights. In Art. 19(2) of the Declaration, therefore, it is stated,

"In the exercise of his rights and freedoms everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society".

The Draft Covenant on civil and political rights prepared by the commission on Human Rights in 1952, amplified the above provision by engrafting it as a limitation clause upon the several individual rights specifically. Thus Art. 16 (3) of the Draft Covenant stipulates that the exercise of the freedom of expression provided in cl. (2) of the Article,

"Shall be subject to restrictions as are provided by law and are necessary for respect of the rights or reputation of others."

It is to be noted that the limitation provided for in the foregoing provisions is constituted not only by the same right, as that which is sought to be exercised by a person, but also the other rights and freedoms belonging to other persons.

Who may impose the restrictions

The state making any law. The restrictions referred to in Article 39 may be imposed by the legislative authority i.e. the parliament.

From the language of Article 39 it is clear that the restrictions referred to in this clause can be imposed only, by law, including of

course, valid subordinate legislation. But without legislative authority the executive cannot impose any restriction upon any of the fundamental rights guaranteed by Act 39.

The legislature however is not required to make a law solely for the purpose of imposing the restriction. A restriction may be imposed by a general law, if the other conditions are satisfied.

In order to justify a restriction the law which imposes the restriction must be otherwise valid. A restriction which is not authorised by a valid law cannot be saved. In the case of subordinate legislation the procedure required by the statute must be complete before it can be defended under the Article.

What constitutes a restriction

1. When a law is impugned as having imposed a restriction upon a fundamental right, what the court has to examine is the substance of the legislation, without being beguiled by the mere appearance of the legislation (A 1958 SC 578). The legislature cannot disobey the constitutional prohibitions by employing an indirect method. The legislative power being subject to the fundamental rights the legislature cannot indirectly take away or abridge the fundamental rights which it cannot do directly ; on the other hand, the effects of the legislation are relevant for this purpose only in so far as they are the direct and inevitable consequence or the effects which could be said to have been in the contemplation of the legislature. The possible or remote effect of a legislation upon any particular fundamental right cannot be said to constitute a restriction upon that right.

The restriction must have a rational relation to the object which the legislature seeks to achieve

The requirement of the rational relationship between the restriction and the ground of restriction (e.g. public orders) which is authorised by Act 39 follows not only from general principles but also from the specific words in these clauses namely, "in the interests of".

It has been held by the Supreme Court that this expression "in the interests of" postulates a proximity of relationship (A 1954 SC. 276).

Thus, a limitation imposed in the interests of public order to be a reasonable restriction, should be one which had a proximate connection or nexus with public order, but not one farfetched, hypothetical or problematical or too remote in the chain of its relation with the public order.

"In the interests of" does not however predicate that the legislature can impose the restriction only where the mischief has actually taken place or is sure to take place. It can also curb tendencies to cause the mischief aimed at. From this standpoint it has been held that the expression is wider than words like "for the maintenance of." "In the interests of" authorises the legislature to restrict an act or utterance which not only produces the mischief aimed at, e.g. breach of public order or security of the state, but also those which have a tendency to cause that effect but which may not actually lead to a breach of public order, thus the excitement of religous disaffection with a deliberate intent has a proximate tendency to cause public disorder.

The question of tendency has however, to be determined objectively with reference to the circumstances in which the michief sought to be suppressed is likely to take place and not in the abstract. Indian Supreme Court says in Romesh Thappar's (1950 SC R 594) case,

Where a law purports to authorise the imposition of restrictions on a fundamental right in language wide enough to cover restrictions both within and without the limits of constitutionally permissible legislative action affecting such right, it is not possible to uphold it even so far as it may be applied within the constitutional limits as it is not severable, so long as the possibility of its being applied to purposes not sanctioned by the constitution cannot be ruled out it must be held to be wholly unconstitutional and void.

The validity of a restrictive law depends upon its relationship to any of the grounds enumerated in Art. 39. Hence if the restriction is clothed in such wide language that it is possible to apply it for purposes not sanctioned by the Articles, the restriction must be struck down as wholly void.

The means by which a fundamental right may be restricted

Once the proximity of the relationship of the restriction with a constitutionally permissible object of restriction is established the court would not interfere with the means adopted by the legislature except where it is patently arbitrary. In this sphere, the court acts upon the principle of respect for the legislative determination and does not seek to inquire whether a better means (according to the court) to secure the same object could have been adopted by the legislature.

The restriction must not be excessive

As stated already it has been held that in order to be reasonable, a restriction must not be greater than the mischief to be prevented.

"Legislation which arbitrarily or excessively invades the right cannot be said to contain the quality of reasonableness."

In other words, even where the restriction imposed has a rational relation to the object which the legislature seeks to achieve, it will be unreasonable if it is unnecessarily harsh and overreaches the scope of the object to achieve which it was enacted A.I.R. 1959 SC. 300.

In determining the substantive reasonableness, the court has to take into consideration various factors such as the nature of the right alleged to have been infringed, the underlying purpose of the restrictions imposed, th extent and urgency of the evil sought to be remedied thereby, the disproportion of the imposition, the prevailing conditions at the time. The impugned law must not under the

guise of protecting public interests arbitrarily interfere with the exercise of a fundamental right.

Retroactivity and reasonableness

In Bangladesh there is no specific limitation against retrospective legislation save that contained in the case of criminal legislation. The question, however, becomes relevant in connection with the reasonableness of the restriction imposed by such legislation if a fundamental right is affected thereby, and Art. 39 comes into operation. Though the question has not yet been fully thrashed out, the Supreme Court of India has laid down the general proposition that the retrospectivity of a statute is an element which may properly be taken into consideration in determining the reasonableness of the restriction imposed by the statute, but the decision so far merely gives an indication as to the circumstances in which mere retroactivity will not be considered to be unreasonable but not much guide as to the circumstances in which it may be considered to be unreasonable (A.I.R. 1954 SC 92).

A restriction is not necessarily unreasonable merely because it creates a civil liability in respect of a transaction which has taken place before the date on which the Act was enacted.

How far it would be reasonable to make the exercise of a fundamental right dependent on the subjective satisfaction of the Executive :

In determining the reasonableness of the restriction imposed by a law, one of the tests which has been applied by Indian Courts is whether the restriction is to be imposed by the authority who is empowered by the legislature, subjectively or obectively. A subjective decision is the decision of the person who makes it, solely on his own satisfaction, and the reasonableness of that satisfaction cannot be tested by the court. An objective decision on the other hand, is one which is arrived at by the application of some external standard other than the personal satisfaction of the authority who

makes the decision and because it is made according to an objective standard, the reasonableness of the decision can be tested by the court, or the application of the same objective standard, for instance whether a particular conclusion follows from the evidence placed before the authority.

No absolute answer can, however, be given to the question whether a restriction would invariably be unreasonable if the authority is empowered to impose it on his subjective satisfaction.

The answer to this question depends on the nature of the right and the circumstances calling for the restriction.

Emergency as an exception

In all countries it is acknowledged that an administrative action is not liable to be challenged on the ground that it has affected a right without a notice or hearing where summary action is called for by the emergent nature of the situation. When a building under the roof of which is huddled a number of poor tenants is on the point of collapse, the administrative authority may pull it down without notice by the order. It would follow that a law which provides for such summary action in similar circumstances would not be liable to be impugned as being unreasonable within the meaning of Art. 39.

A law is not invalid merely because it empowers the Government or its delegate on its subjective satisfaction to prohibit, for a limited period, the publication in or importation into, a particular area, of matters prejudicial to the maintenance of peace and harmony affecting or likely to affect public order, because the mischief to be averted demands quick and effective decision.

Provision for appeal or revision as an element of reasonablenes

It has been accepted by some of the Superior Courts in this subcontinent that the provision for or the absence of a provision for appeal is an element to be taken into consideration in determining the procedural reasonableness of a statute by which discretionary power is vested in an administrative authority to impose restrictions upon the Expression.

Grounds of restriction

(These restrictions will be elaborately discussed in due course.)

I. Security of the state

However precious the freedom of expression may be in a democratic society the means can never override the end itself. The object of freedom of expression is to maintain the opportunity for free discussion, to the end that government may be responsive to the will of the people and that changes if desired may be obtained by peaceful means, that opportunity can hardly be maintained without the existence of an organised government having the power to ensure the exercise of that right and to prevent interferences with that right, which belongs to every citizen. No state can therefore tolerate utterances which threaten the overthrow of organized government by unlawful or unconstitutional means. The reason is that the security of the state or organized government is the very foundation of the freedom of press.

II. Friendly relations with foreign states

The interests of maintaining friendly relations with foreign states is not specified in any of the major Constitutions of the world as a valid ground for restricting the freedom of press.

The expression friendly relations with foreign states being very wide will include not only libel of foreign dignitaries, inducement of foreign enlistment but also propaganda in favour of rival claimants to authority in a foreign state after Bangladesh has already recognized a particular person or persons to be authority in that state, propaganda in favour of war with a state at peace with Bangladesh, and the like.

III. Public order

None of the freedoms guaranteed by a written constitution can flourish in a state of disorder. Order is an elemental need in any organised society, Hence, as Justice Holmes of the American Supreme Court observed :

"The most stringent protection of free speech would not protect a man falsely shouting fire in a theatre and causing panic.

The essential rights are subject to the elemental need for order without which the guarantee of civil rights would be a mockery.

Public order is an expression of wide connotation and signifies that state of tranquillity which prevails among the members of a political society as a result of the internal regulations enforced by the government which they have established."

Anything that disturbs public tranquillity disturbs public peace, the expression public tranquillity is not defined in the Penal Code, but from the offences included in chap. viii of that code, we may gather what is understood by this expression by the framers of the code, thus it includes an (1) unlawful assembly ; (2) rioting ; (3) promoting enmity between different classes ; (4) affray.

The preaching of communal hatred or feelings of enmity between different sections of the community can be punished (S. 153 A. P.C.) and reasonable preventive measures may also be taken for the maintenance of communal harmony. The test of the offence is whether the writing is likely to rouse communal passions and that is to be determined from the language used, and the atmosphere in which it is published. The truth or untruth of the statement is immaterial, and a sensational statement contained in the headlines, put forward at a time when the atmosphere was surcharged with communal bitterness could not but accentuate the feelings of enmity and hatred between the two communities.

The punishment of Expressions which deliberately insult or attempt to insult the religious beliefs of a class of citizens (S. 205 A. P.C) has also been upheld as valid, on the same ground.

Public order also includes public safety in its relation to the maintenance of public order, Public Safety, ordinarily means security of the public or their freedom from danger, external or internal. From the wider point of view Public Safety would also include the securing of public health, by prevention of adulteration of food-

stuffs, prevention of epedemics and the like. But from the point of view of public order, it would have a narrower meaning and offences against Public Safety would include creating internal disorder or rebellion, interference with the supply or distribution of essential commodites or services inducing members of the police to withhold their services inducing members of the police to withhold their services, or inducing public servants engaged in services essential to the life of the community to withhold their services.

Maintenance of public order would also include the prevention of a public nuisance, and would, therefore include the regulation of the use of loud speakers.

In its external aspect, Public Safety would mean protection of the country from foreign aggression.

It has already been stated that the expression "in the interests of" enables the lagislature to curb tendencies to create a breach of public order. But, at the same time, it has also been pointed out that this would not enable the legislature to provide for situations which have only a problematic relationship with public order, whether in a particular case an utterance would have a tendency to create a breach of public order is to be determined objectively from the circumstances in which the utterance is made, the nature of the audience and the like.

IV. Decency or morality

The word decency or morality is wide enough to cover so large an area that its frontiers are not easily discernible.

'Morality' is a far more vague word than indecency. The difficulty of determining what would offend against morality is enhanced by the fact that not only does the conception of immorality differ between man and man, but the collective notion of society also differs amazingly *in* different ages, thus it was not long ago that birth control *perse* was regarded as immoral. But since the Malthus Doctrine of population, birth control is regarded as a legitimate means of checking overpopulation. Annic Besant was convic-

ted for publishing literature advocating contraception. But in England or in this subcontinent the publication of such literature from a scientific or medical standpoint is no longer regarded as an offence ; the immorality of an act or representation, therefore, has to be judged by the standards of today. One thing is clear, however.

According to the existing notions, immorality, does not refer to acts the condemnation of which depends upon controversial doctrines but to acts which are regarded as acts of immorality by the consensus of general opinion.

It is to be noted that in ss. 292-4 of the Penal Codes the word obscene is used in the same sense of sexual immorality and the heading of the chapter is offences against morals. From this it has been held by the Superior Courts that the expression "interests of morality" is to be construed in the same sense.

V. Contempt of Court

Since the general principles of English common law are followed by our Courts in determining what constitutes contempt of court these principles may be analysed broadly.

In relation to the freedom of speech and expression there are three sorts of contempt of a court, (a) one kind of contempt is scandlising the Court itself ; (b) there may be likewise a contempt of the court in abusing parties who are concerned in causes in the court ; (c) there may also be a contempt in prejudging mankind against persons before the cause is broadly speaking. It consists of any conduct that tends to bring the administration of justice into disrespect or to obstruct or interfere with the due course of justice.

These three kinds of contempt are known as' 'criminal contempt'' as distinguished from" "contempt in procedure" or "civil contempt" consisting in disobedience to a Court's order or process involing a private injury.

(a) **Scandalising the court.**—Any act done or writing published calculated to bring a court or a judge of the court into contempt, or lower his authority is a contempt of court, e.g. imputing corrup-

tion, misconduct or incapacity in the discharge of his public duties. Hence any criticism which tends to bring into ridicule and contempt the administration of Justrice is contempt. Thus, it is a gross contempt to impute that judges of the highest court of justice acted on extraneous considerations in deciding a case.

The above rule is subject to important qualifications.

The object of the punishment *is* not the protection of the judge personally from imputations to which they may be exposed as individuals, but the protection of the public themselves from the mischief they will incur if the authority of the tribunal is impaired. Hence-

(i) The power to punish for scandalising the court is a weapon to be used sparingly and always with reference to the administration of Justice and not for vindicating personal insult to a judge, not affecting the administration of Justice.

No doubt it is galling for any Judicial personage to be criticised, publicly as having done something outside his judicial proceeding which was ill-advised or indiscreet. But if a judge is defamed in such a way as not to affect the administration of justice, he has the ordinary remedies for defamation if he should feel impelled to use them.

There are two primary considerations which should weigh with the Court in such cases, viz. (a) whether the reflection on the conduct or character of the judge is within the limits of fair and reasonable criticism, and (b) whether it is a mere libel or defamation of the judge or amounts to a contempt of the court.

Where the question arises whether a defamatory statement directed against a judge is calculated to undermine the confidence of the public in the competency or integrity of the judge or is likely to deflect the court itself from a strict and unhesitant performance of its duties, all the surrounding circumstances under which the statement was made and the degree of publicity that was given to it would be relevant circumstances. The question is not to be determined solely with reference to the language or contents of the statement made. Mere publication to a third party, which would be

sufficient to establish an ordinary libel may not be conclusive for establishing contempt. That would depend upon the nature and extent of the publication and whether or not it was likely to have an injurious effect on the minds of the public and thereby lead to an interference with the administration of Justice.

(ii) Fair and reasonable criticism of a judicial act in the interest of the public good does not amount to contempt.

Judges and Courts are alike open to criticism, and if reasonable argument or expostulation is offered against a judicial act as contrary to law or the public good, no court could or would treat that as contempt of court. The law ought not be astitute in such cases to criticise adversely what under such circumstances and with such an object is published. But it is to be remembered that in this matter the liberty of the Press is no greater than the liberty of every subject.

Whether the authority and position of an individual judge or the due administration of justice is concerned no wrong is committed by any member of the public who exercises the ordinary right of criticising in good faith in private or public the public act dome in the seat of Justice. The path of criticism is a public way. The wrong headed are permitted to err therein. Provided that members of the public abstain from imputing improper motives to those taking part in the administrasion of Justice and the genuinely exercising a right of criticism and not acting in malice or attempling to impair the administration of Justice, they are immune. Justice is not a cloistered virtue. She must be allowed to suffer the scrutiny and respectful even though outspoken comments of ordinary men.

But the limits of bona fide criticism are transgressed when improper motives are attributed to judges and this cannot be viewed with placid equanimity by a court in a proceeding for contempt. Imputations made against Judicial officers without reasonable care and caution cannot be said to be bona fide.

Thus, it is a gross contempt to impute that Judge of the highest Court of Justice acted on extraneous considerations in deciding a case.

(b) Obstruction *of or* interferenee with the due course of Justice— Any speech or conduct which tends to influence the result of a pending trial civil or criminal, or otherwise tends to interfere with the proper course of Justice amounts to contempt of court. Thus, (i) anything which prejudices the court against any party before the cause is heard, is contempt whether the court is actually influenced by the act or statement is not material. The gist of the offence is conduct calculated to produce, so to speak, an atmosphere of prejudice in the midst of which the proceeding must go on. Thus discussion in a newspaper of the merits of a pending case or of the evidence to be adduced at the trial, constitutes contempt. The reasonable tendency of the writing to prejudice the court constitutes the contempt. The intention of the writer is also immaterial. (ii) Similarly, it is contempt to prejudice a party to a pending proceeding.

The publications concerning parties to proceeding in relation to those proceeding may amount to contempt of court, because it may cause those parties to discontinue or to compromise, and because it may deter persons with good causes of action from coming to the court, and is thus likely to affect the course of Justice.

Thus, it is a contempt to publish in a newspaper a photograph of a person charged with an offence when a question of identity may arise at the trial. No editor has a right to assume the role of an investigator and to publish statements of facts, during the investigation of a crime, suggesting that the accused was guilty of the crime. The publication of the statement of a witness recorded under S. 164 of the tr. P.C. before the commencement of the trial is likely to create an impression that the accused was guilty and thus to prejudice him at the trial. Similar view has been taken regarding the publication of the charges made in a criminal complaint before the charges are judicially determined. A misrepresentation of the evidence in a pending case, even though unintentional constitutes contempt if it is likely to prejudice the minds of the public against the accusede before the case is finally heard.

It is contempt to prejudice a party to a pending Judicial proceed-

ing, e.g, by holding a parallel inquiry on a matter which is subjudice. provided the scope of the inquiry is the same.

(iii) Any threat to a party to a pending litigation which would force him to withdraw his action or to abandon it amounts to contempt. The threat may be offered by issuing a circular that disciplinary action would be taken against a Government servant if he seeks redress to a court of law in matters arising out of his employment without first exhausting the official channels of redress.

(iv) The uttering of words or an action in the face of the court or in the course of proceedings may be a contempt provided they interfere with the course of justice, e.g. persisting in a line of conduct or use of a language in spite of the ruling of the presiding judge, or threatening or attempting violence on the opponent or using language so outrageous and provocative as to be likely to lead to a brawl in court, But a mere insult to counsel or to the opposing litigant is very different from an insult to the court itself or to members of the jury. The power to punish for contempt should not be used to suppress merely offensive methods of advocacy, or mere discourteous conduct of a counsel. But an Advocate who signs an application or pleading containing matter scandalising the court which lends to prevent or delay the course of justice is himself guilty of contempt of court unless he reasonably satisfies himself about the *prima facie* existence of adequate grounds therefore.

The summary proceeding for contempt committed in the court constitutes an exception to the general principle of natural justice that no man ought be a judge in his cause, for, the same judge who has been subject to contempt may try and punish the contemner. But procedure has been upheld both in England and in this subcontinent on the ground of avoidance of delay and the necessity of upholding the prestige of the court in the interest of the administration of justice ; of course, a reasonable opportunity must, nevertheless, be given to the contemner to defend himself.

(v) It is contempt on the part of any party to a prohibitory order issued by the court to commit a breach of it after (a) service

of such order upon him, or (b) othersise acquiring definite knowledge that such an order had been made.

(vi) It is contempt on the part of a subordinate court to intentionally and wilfully disobey the order of a superior court. But there cannot be intentional disobedience unless the subordinate court had knowledge of the orders of the superior court. Though a telegram from the advocate before the superior court may not be sufficient for communicating a stay order issued by the superior court, an affidavit filed by the party cannot be overlooked by the subordinate court.

(vii) Any direction given by an administrative to a Magistrate to ignore the decision of a superior court constitutes flagrant interference with the administration of justice.

VI. Defamation

The expression 'in the interests of defamation' seems to be wide enough to cover 'blackmailing' which consists in a 'threat' to publish defamatory matter with the object of inducing the person so threatened, to deliver any property or valuable security or to do anything which he is not legally bound to do or to omit to do any act which he is legally entitled to do.

Existing Law : The criminal law relating to defamation is contained is Sec. 499 of the Penal Code. The civil law relating to defamation is still uncodified in Bangladesh and follows the English common law subject to slight differences under s. 3 (a) of the Dramatic Performances Act (XIX of 1876), a dramatic performance may be prohibited if it is of a defamatory nature.

VII. Incitement to an offence

In the absence of any definition of offence in the Constitution, the definition contained in s.3. (38) of the General Clauses Act shall apply :

"Offence shall mean any act or omission made punishable by any law for the time being in force.'

Hence, under the present exception, ouı Legislatures shall be competent to enact that incitement to commit any offence punishable under any law, general, special or local, shall be itself an offence. In short, the incitement of whatever is prohibited (*mala prohibita*) may be made an offence. Thus, the withholding of services by a Police officer being an offence under law inciting a Police officer to withhold his services would be punishable under the present ground.

The applicability of this ground is, however, governed by the following conditions-

Firstly, the impugned law imposing restriction upon advocacy or incitement must relate to a pre-existing offence ; in other words, the incitement, in order to be punishable, must be of an act which is, at the time of the offence, already an offence under any law for the time being in force. Hence, an incitement cannot be restricted under the present ground if the act or omission which is incited does not constitute an 'offence' non-payment of land revenue or other similar dues of the Govcrnment.

Secondly, in order to be saved by the present clause, the legislation must be levelled against a definite 'offence'. It would not be a valid restriction of the freedom if it is vague. Thus, in State of Bombay v. Balsara, the Supreme Court of India held that the prohibition of incitement or encouragement of any member of the public to commit any act 'which frustrates or defeats the provisions of this Act or any rule, regulation or order made thereunder' is too wide and vague, to be justified by Cl. (2) of Art. 19.

What constitutes 'incitement' will have to be determined by the court with reference to the facts and circumstances of each case. In the U.S.A., this also is determined by the 'clear and present danger' test. In Whitney v. California, Holmes. J. observed that there was a wide difference between 'advocacy' and 'incitement', and that advocacy falls short of incitement where there is no clear and present danger that the advocacy would be immediately acted upon. The same Judge held in another case that mere por-

trayal of existing evils cannot be construed as criminal incitement to disobey the existing law, however mistaken may be the assumptions of the writer or speaker, however unsound his reasoning or however intemperate his language.

In India, too, it has been held that mere approval or admiration of an act of murder or of violence, say, in a literary or historical work, shall not come within the scope of the present clause, unless such writing iteself has a present tendency to incite or encourage the commission of such offence. It cannot be held as a general proposition that in all cases of admiration or approval of an offence or offender there must be a tendency to encourage violent offences. The court has to look to the circumstances in each case in judging such a tendency viz., the purpose of the work, the time at which it was published, the class of the people who would read it, the effect it would produce on their minds, the context in which the objected words appear and the interval of time between the incidents narrated and the publication of the work. Thus, an article in a newspaper expressing approval or admiration of the conduct to certain women in defending themselves against the high-handedness of the police, in exercise of their right of private defence, was held not to constitute incitement of an offence.

The biography of a living person containing the narrative of a revolutionary movement which took place 35 years ago and which has now passed into history, does not come within the mischief of the present clause.

Existing Law

Chapter V of the Penal Code, 1860, provides for the punishment of 'abetment' of an offence and s. 107-8 lay down that a person abets the commission of an offence if he instigates any person to commit it.

S. 505 of the Code provides-

"Whoever makes, publishes or circulates any statement, rumour or report,--

(a) with intent to cause, or which is likely to cause, any officer, soldier, sailor or airman in the Army, Navy or Air Force of

Bangladesh to mutiny or otherwise disregard or fail in his duty as such ; or

(b) with intent to cause, or which is likely to cause, fear or alarm to the public or to any section of the public whereby any person may be induced to commit an offence against the state or against the public tranquillity ; or

(c) with intent to incite, or which is likely to incite, any class or community of persons to commit any offence against any other class or community, shall be punished with imprisonment which may extend to two years, or with fine, or with both.

Exception

It does not amount to an offence, within the meaning of this section, when the person making, publishing or circulating any such statemnt, rumour or report, has reasonable grounds for believing that such statement, rumour or report is true and makes, publishes or circulates it without any such intent as aforesaid."

The constitutional guarantee in respect of freedom of press and the reasonable limitation which law may impose on it have been discussed. In the chapters that follow, these matters will be discussed in greater details.

There could be situations in which the constitution empowers the president to suspend this freedom. This situation is, in constitutional language, known as emergency. Provisions relating to it in the constitution are available in Part IXA which runs as follows :

Part-IXA

EMERGENCY PROVISIONS

Proclamation of emergency.

141A. (1) If the President is satisfied that a grave emergency exists in which the security or economic life of Bangladesh, or any part thereof, is threatened by war or external aggression in internal disturbance, he may issue a Proclamation of Emergency :

(2) A Proclamation of Emergency—

(a) may be revoked by a subsequent Proclamation ;

(b) shall be laid before Parliament ;

(c) shall cease to operate at the expiration of one hundred and twenty days, unless before the expiration of that period it has been approved by a resolution of Parliament :

Provided that if any such Proclamation is issued at a time when Parliament stands dissolved or the dissolution of Parliament takes place during the period of one hundred and twenty days referred to in sub-clause (c) the Proclamation shall cease to operate at the expiration of thirty days from the date on which Parliament first meets after its re-constitution, unless before the expiration of the said period of thirty days a resolution approving the Proclamation has been passed by Parliament.

(3) A Proclamation of Emergency declaring that the security of Bangladesh, or any part thereof, is threatened by war or external aggression or by internal disturbance may be made before the actual occurrence or war or any such aggression or disturbance if the President is satisfied that there is imminent danger thereof.

Suspension of provisions of certain articles during emergencies.

141B. While a Proclamation of Emergency is in operation, nothing in articles 36, 37, 38, 39, 40 and 42 shall restrict the power of the state to make any law or to take any executive action which the State would, but for the provisions contained in Part III of this Constitution, be competent to make or to take, but any law so made

shall, to the extent of the incompetency, cease to have effect as soon as the Proclamation ceases to operate, except as respects things done or omitted to be done before the law so ceases to have effect.

Suspension of enforcement of fundamental right during emergencies.

141C. (1) While a Proclamation of Emergency is in operation, the President may, by order, declare that the right to move any court for the enforcement of such of the rights conferred by Part III of this Constitution as may be specified in the order, and all proceedings pending in any court for the enforcement of the right so specified, shall remain suspended for the period during which the Proclamation is in force or for such shorter period as may be specified in the order.

(2) An order made under this article may extend to the whole of Bangladesh or any part thereof.

(3) Every order made under this article shall, as soon as may be, be laid before Parliament.

Proclamation of Emergency

There could arise abnormal situations which would call for a departure from normal machinery of Government.

Part IXA of our constitution deals with these abnormal situations or emergencies.

A 'Proclamation of Emergency' may be made by the President at any time he is satisfied that the security or economic life of Bangladesh or any part thereof has been threatened by war, external aggression or internal disturbance (Art. 141A).

President's satisfaction

It is not necessary for the President to recite in the Proclamation the fact of his satisfaction about the emergency. Indian Supreme Court has already held that the question of existence of an emergency which is a pre-condition of the power to make a Proclamation under Art. 352 has been left to the subjective satisfaction of the Executive and that the courts are powerless to review that satisfaction. Though the court left open the question whether the court could interfere

with a Proclamation on the ground of *mala fides* for want of proper materials, it cannot be rasonably anticipated that the court would ever interfere on this ground, because as acknowledged in this case, the Executive is "obviously in the best position to judge the situation" and that the only safeguard against and abuse of his power was "public opinion".

Internal disturbance

It is to be noted that since the present part of the Constitution deals with extraordinary powers to deal with an 'emergency' the internal disturbance the existence of which would justify a Proclamation under Art. 141A does not mean ordinary breaches of the 'public order' but such a disorder as threatens the security of Bangladesh or any part thereof. It refers to a civil war or something of that nature. On the other hand, the internal disturbance which justifies a Proclamation may or may not be attended with violence. For example, it may be a general strike which 'disturbs' the normal life of the people as well as the internal security of the state, without involving an armed rebellion or the like.

Procedural limitation upon the President's power

Though the Constitution makes the president the sole judge of the question when he should make a Proclamation under this Article, there is one procedural limitation imposed by the Constitution, namely, that after it is made, the Proclamation must be laid before the Parliament.

The Constitution, however, does not prescribe any period within which the Proclamation must be laid before Prarliament, or any sanction if he fails to lay it within any period except that it "shall cease to operate at the expiration of 120 days" from the date of its issue by the President.

Duration of a proclamation under Art. 141A

Once a Proclamation has been approved by resolutions of the parliament, according to Art. 141A (2), the Proclamation will

continue indefinitely and will cease to operate only when the President revokes it by a subsequent Proclamation, being satisfied that it is no longer necessary. As in the matter of declaration, so in the matter of revocation, the President is made the sole authority.

Effects of a Proclamation of Emergency under Art. 141A

The effects of a Proclamation of Emergency may be discussed under four heads—(i) Executive ; (ii) Legislative ; (iii) Financial ; (iv) As to Fundamental Rights.

(i) **Executive** : When a Proclamation of Emergency has been made, the executive power of government shall, during the operation of the Proclamation, extend to taking any executive action regardless of fundamental rights.

(ii) **Legislative** : (a) As soon as a Proclamation of Emergency is made, the legislative competence shall be automatically widened and the limitation imposed by fundamental right, shall be removed.

(iii) **As regards Fundamental Rights** : Provision of Articles in Part III (Fundamental right) may be non-existent against the state during the operation of a Proclamation of Emergency. Further the right to move the courts for the enforcement of the fundamantal rights or any of them, may remain suspended, by Order of the President. The duration of the suspension may be made shorter by the Prsident's Order, so that it may not continue beyond the necessities of the case.

The further peculiarity of these emergency powers is that no distinction is herein made between times of war and times of peace, for a Proclamation of Emergency may be made even in cases of external aggression or internal disturbances and that not only when they have actually taken place but also when there is 'imminent danger' thereof, according to the President's satisfaction, which is final on the point.

In the U.S.A., it is open to the courts to determine whether Congress was justified in suspending the writ of habeas corpus.

In India, the propriety of the President's making an order under either Art. 352 or 359 is not justiciable and the suspension of the rights under Art. 19, under Art. 358, follows automatically upon the proclamation under Art. 352.

Suspension of right to move Court

I. Article 141C empowers the President to suspend the right to move the Courts for enforcement of any of the fundamental rights, included in Part III of the Constitution, as may be specified in Order of the President, during the operation of a Proclamation of Emergency.

II. The suspension shall be in force during the operation of a Proclamation of Emergency or such shorter period as may be specified in the Order of the President. But the President's Order shall not be final. It will be within the competence of Parliament to revoke or cancel the Order by legislation or to otherwise express its disapproval of the Order of the President. It will, however, be within the power of the President to make delay in giving Parliament the opportunity to take up the matter, for though the President's Order is to be laid before the Parliament, no definite time limit is fixed for that purpose.

It is also to be noted that the Article does not provide for a general suspension of the right to move the court for enforcement of all fundamental rights, or in respect of the whole of the country. Only such rights and such parts of the country will be affected as are mentioned in the President's Order. While it is competent for the President to make his order applicable to the whole of the country and to all citizens, there is nothing to preclude him from making a limited order.

CHAPTER—III

LAWS OF DEFAMATION RELATING OT PRESS

After having dealt with what the constitution has to say on the Press, I am passing on to the consideration of a matter which touches, legally speaking, the press most. Nearly all cases filed and persued by men and institutions against the newspaper, their editors and reporters in courts of this country relate to defamation. It is therefore, necessary for those connected with press to know in detail this branch of law.

Before proceeding to discuss the matter, I quote two portions, for their obvious relevance, from Shakespeare.

1. *Shakespeare, Othello : Act III, Scene* 3, 167 :

"Good name in man and woman, dear my lord,
Is the immediate jewel of their souls :
Who steals my purse, steals trash ; 'tis something, nothing ;
'Twas mine, 'tis his, and has been slave to thousands ;
But he that filches from me my good name ;
Robs me of that which not enriches him,
And makes me poor indeed."

2. *Shakespeare, Othetlo, Act H. Sc.* 3 :

"Reputation, reputation, reputation.
Oh I have lost my reputation !
I have lost the immortal part of myself
And what remains is bestial."

Defamation is both tort and offence

Defamation is a tort in the sense that a defamed person can sue the one who defames in a civil court for damages. It is also a criminal offence in the sense that a defamed person can initiate proceedings in a criminal court against the one who defames and the accudsed person is liable to punishment.

I shall first discuss defamation as an offence. Penal Code contains following provisions on defamation.

OF DEFAMATION

499. Whoever by words either spoken or intended to be read, or by signs or by visible representations, makes or publishes any imputation concerning any person intending to harm, or knowing or having reason to believe that such imputation will harm, the reputation of such person, is said, except in the cases hereinafter excepted, to defame that person.

Defamation.

Explanation 1.—It may amount to defamation to impute anything to a deceased person, if the imputation would harm the reputation of that person if living and is intended to be hurtful to the feelings of his family or other near relatives.

Explanation 2.—It may amount to defamation to make an imputation concerning a company or an association or collection of persons as such.

Explanation 3.—An imputation in the form of an alternative of expressed ironically, may amount to defamation.

Explanation 4.—No imputation is said to harm a person's reputation, unless that imputation directly or indirectly, in the estimation of theirs, lowers the moral or intellectual character of that person, or lowers the character of that person in respect of his caste or of his calling, or lowers the credit of that person, or causes it to be believed that the body of that person in a loathsome state, or in a state generally considered as disgraceful.

Illustrations

(a) A says—"Z is an honest man ; he never stole B's watch" ; intending to cause it to be believed that Z did steal B's watch. This is defamation, unless it falls within one of the exceptions.

(b) A is asked who stole B's watch. A points to Z, intending to cause it to be believed that Z stole B's watch. This is defamation unless it falls within one of the exceptions.

(c) A draws a picture of Z running away with B's watch, intending it to be believed that Z stole B's watch. This is defamation, unless it falls within one of the exceptions.

First Exeeption.—It is not defamation to impute anything which is true concerning any person, if it be for the public good that the imputation should be made or published. Whether or not it is for the public good is a question of fact.

Imputation of truth which public good requires to be made or published.

Second Exception.—It is not defamation to express in good faith any opinion whatever respecting the conduct of a public servant in the discharge of his public functions, or respecting his character, so far as his character appears in that conduct, and no further.

Public conduct of public servants.

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

Conduct of any person touching any public question.

Illustration

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

Fourth Exception—It is not defamation to publish a substantially true report of the proceedings of a Court of Justice, or of the result of any such proceedings.

Publication of reports of proceedings of Courts.

Exception.—A Justice of the peace of other officer holding an enquiry in open court preliminary to a trial in a court of Justice, is a court within the meaning of the above section.

Fifth Exception.—It is not defamation to express in good faith any opinion whatever respecting the merits of any case, civil or criminal, which has been decided by a Court of Justice, or respecting the conduct of any person as a party, witness or agent, in any such case or respecting the character of such person, as far as his character appears in that conduct, and no further.

Merits of case decided in court or conduct of witnesses and other concerued.

Illustrations

(a) A says—" I think Z's evidence on that trial is so contradictory that he must be stupid or dishonest." A is within this exception if he says this in good faith, inasmuch as the opinion which he expresses respects Z's character as it appears in Z's conduct as a witness, and no further.

(b) But if A says—"I do not believe what Z asserted at that trial because I know him to be a man without veracity." A is not within this exception, inasmuch as the opinion which he expresses of Z's character, is an opinion not founded on Z's conduct as witness.

Sixth Exception.—It is not defamation to express in good faith any opinion respecting the merits of any performance which its author has submitted to the judgment of the public, or respecting the character of the author so far as his character appears in such performance, and no further.

Merits of public performance.

Explanation.—A performance may be submitted to the judgment of the public expressly or by acts on the part of the author which imply such submission to the judgment of the public.

Illustrations

(a) A person who publishes a book, submits that book to the judgment of the public.

(b) A person who makes a speech in public, submits that speech to the judgment of the public.

(c) An actor or singer who appears on a public stage, submits his acting or singing to the judgment of the public.

(d) A says of a book published by Z—"Z's book is foolish ; Z must be a weak man ; Z's book is indecent : Z man of impure mind." A is within this exception, if he says this in good faith inasmuch as the opinion which he expresses of Z respects Z's character only so far as it appears in Z's book, and no further.

(e) But if A says—"I am not surprised that Z's book is foolish and indecent, for he is a weak man and a libertine". As not within this exception, inasmuch as the opinion which he expresses of Z's character is an opinion not founded on Z's book.

Seventh Exception.—It is not defamation in a person having over another any authority, either conferred by law or arising out of a lawful contract made with that other, to pass in good faith any censure on the conduct of the other in matters to which such lawful authority relates :

Censure passed in good faith by person having lawful authority over another.

Illustration

A Judge censuring in good faith the conduct of a witness, or of an officer of the court ; a head of a department censuring in good faith those who are under his order ; a parent censuring in good faith a child in the presence of other children ; a school master, whose authority is derived from a parent, censuring in good faith a pupil in the presence of other pupils ; a master censuring a servant in good faith for remissness in service ; a banker censuring in good faith the cashier of his bank for the conduct of such cashier as such cashier—are within this exception.

Eighth Exception.—It is not defamation to prefer in good faith an accusation against any person to any of those who have lawful authority over that person with respect to the subject matter of accusation.

Accusation preferred in good faith to authorized person

Illustration

If A in good faith accuses Z before a Magistrate : if A in good faith complains of the conduct of Z, a servant, to Z's master ; if A in good faith complains of the conduct of Z, a child, to Z's father -A is within this exception.

Ninth Exception.—It is not defamation to make an imputation on the character of another, provided that the imputation be made in good faith for the protection of the interest of the person making it, or of any other person, or for the public good.

Imputation made in good faith by person for protection of his or others interests.

Illustrations

(a) A, a shopkeeper, says to B, who manages his business—"Sell nothing to Z unless he pays you ready money, for I have no opinion of his honesty." A is within the exception, if he has made this imputation on Z in good faith for the protection of his own interests.

(b) A, a Magistrate, in making a report to his own superior officer, casts an imputation on the character of Z. Here, if the imputation is made in good faith, and for the public good, A is within the exception.

Tenth Exception.—It is not defamation to convey a caution, in good faith, to one person against another, Provided that such caution be intended for the good of the person to whom it is conveyed or of some person in whom that person is interested, or for the public good.

Caution intended for good of person to whom conveyed or public good.

500. Whoever defames another shall be punished with simple imprisonment for a term which may extend to two years, or with fine, or with both.

Punishment for defamation

501. Whoever prints or engraves any matter, knowing or having good reason to believe that such matter is defamatory or any person, shall be punished with simple iprisonment for a term which may extend to two years, or with fine, or with both.

Printing or engraving matter known to by defamatory.

Sale of printed or engraved substance containing defamatory matter

502. Whoever sells or offers for sale any printed or engraved substance containing defamatory matter, knowing that it contains such matter, shall be punished with simple imprisonment for a term which may extend to two years, or with fine, or with both.

I now pass on to elaborate discussion on the subject

Introduction

The right of a person during his lifetime to the unimpaired possession of his reputation and good name is recognised by law. Every one has an inherent right to have his reputation preserved inviolate. It is a jus in rem, a right absolute and good against all the world. A man's reputation is his property and possibly more valuable than any other form of property. It was not a mere poetic fancy that suggested that a good name was to be chosen in preference to riches. Indeed if one were to reflect on the degree of suffering caused by loss of character and compare it with that occasioned by loss of property it will be found that the former far outweighs the latter. Reputation depends on opinion, and opinion in the main is built on the communication of thought an information from one man to another. He, therefore, who directly communicates to the mind matter untrue and likely in the natural course of things substantially to disparage the reputation of a third person is, on the face of it, guilty of a legal wrong for which the remedy is an action for defamation,— a remedy, however, by no means commensurate with the damage that in every case may arise, but limited by many considerations of convenience and public policy.

Journalism and defamation

The fact that the accused is a journalist does not make any difference, for the simple reason that the press have no special privileges, and are in no better position than any other man. They have rather greater responsibility and should be more cautious in making scandalous imputations. In the case of publication of a defamatory matter actual source of information on which the person accused has acted and the justifiability of his so acting ought to be considered. If he has not taken proper care and acted on a gossip and the complai-

nant is thereby defamed he ought not to escape consequences on the ground that he has promptly contradicted the incorrect report. The culpability in such cases does not depend on the circumstances whether he has tried to undo the wrong which he has committed or not but upon the fact whether he has acted with care and caution or has done so rashly or negligently. Attempt to undo the mischief may exhibit want of malice or fear of the consequences. But even if it indicates absence of malice that is not enough to prove good faith as defined under the Penal Code. It is certainly not using due care and attention to publish defamatory statements about a person and also to publish his denial and let the public take their choice. Where the editor of a newspaper was absent from duty for bona fide purpose at the time of publication of defamatory matter and the work of editing was entrusted to a sub-editor, it was held that the presumptive liability of the editor was displaced and he could not be held guilty under Section 500. Where the declared printer of a newspaper leads absence in good faith, he should prove who was in fact the printer of the newspaper in his absence. The publication of notice in a newspaper conveying an imputation that the complainant is dishonest in the management of the affairs of a company and tries to conceal the dishonesty by methods that are themselves dishonest is defamation. To prove publication of a libel through newspaper it is sufficient to prove that the paper was delivered within the postal area over which the court had jurisdiction and it need not be proved that the article was read by some particular person. Newspaper is commodity meant for reading and it should be assumed that it was so read.

Malice

A newspaper publishing a report alleged to be defamatory cannot be brought within this section unless there is a proof of express malice. Where a newspaper in the usual course of reporting reported under a headline. "Alleged wagon-breaker shot dead" that one alleged to be a wagon breaker and wanted in connection with a number of police case was shot at by the police when he and his associates were alleged to have attacked the police with "daggers and swords" and had died.It was held that there was no defamation.

Imputation: An imputation ordinarily implies an accusation of something more than an expression of a suspicion. An expression of a suspicion may have the same effect on the mind of the person to whom the suspicion is communicated as an accusation whould have, so where a person makes a report to police that a theft was committed and that he supects a certain person which results in the search of that person's house, the person must be deemed to have made an imputation within the section. To give out that a woman had miscarriage without any knowledge whether she was married or not would amount to defamation. However reprehensible and morally unjustifiable the words complained of may be, they must, to be actionable, contain an imputation, concerning some particular person or persons whose identity can be established. An imputation against an association or collection of persons jointly may also amount to defamation within the meaning of Section 499 penal code, but at the same time it must be an imputation capable of being brought home to a particular individual or collection of individuals as such. A newspaper is not a person, and, therefore. it is, not a criminal offence to defame a newspaper. Defamation of a newspaper may in certain cases involve defamation of those responsible for its publication.

Defamation illustrated

An imputation of insolvency against a person in the way of this trade, calling a person discharged bankrupt and gambler convict in an affidavit, a statement in an objection to the nomination of the complainant that the complainant is a drunkard, use of word "blackmarketeer", use of the expression "topsy-turvy" in relation to complainant in a newspaper article, to say at a meeting that the complainant's wife had been married before to another person, calling a person a beast and pig in his conduct, imputing dacoit to a company by publishing open letter in a newspaper. publication of photograph with false caption, characterising any person as goonda, application that the complainant was a woman of loose character, description of person as illegitimate, imputation against

deceased person intended to be hurtful to feelings of his family, accused using defamatory words against Sarpanch in a meeting attended by a large number of persons, filing in court a plaint containing defamatory matter, allegations that woman has paramours wherever she goes, or expression of suspicion in F.I.R. are defamation depending on the circumstances of each individual case.

Information to police by the husband who was not on good terms with his wife that his wife had died due to abortion under suspicious circumstances possibly because the conception was illegitimate or imputation of habit of changing opinions to suit circumstances, or inviting a person to dinner and asking him to leave place when he attends without any imputation, or statement that the public servant worked for money for candidate at an election are defamamatory.

A person may be defamed by making scurrilous attacks upon the character of his wife, without alleging anything personally against him.

Imputation against the deceased

Under Explanation—1 the imputation must not only harm the reputation of the deceased person concerned, if living, but must also be intended to be hurtful to the feelings of the members of his family or other relatives.

Imputation against company etc.

Explanation 2 to Section 499, is intended to include a company or an association or collection of persons as such within the word 'person' as used in the definition, so that the latter should not be limited to individuals. The language of Explanation 2 is general and any collection of person would be covered by it. Of course, that collection of person must be identified in the sense that one could with certainty say that this group of particular people has been defamed as distinguished from the rest of the community. There must be some definite body of persons capable of being identified and the whole of whom it can be asserted that the defamatory matter applies. If a person complains that he has been defamed as a member of a class

he must satisfy the court that the imputation is against him personally and that he is the person aimed at. Where certain articles published in a paper contained scandalous accusations against the girl students of a college and implied that the girls were habitually guilty of misbehaviour described in the articles, the inevitable effect on reader must be to make him believe that it is habitual with the girls of that college to behave in this way. As by the article all the girls in the college collectively and each girl individually suffered in reputation, an action for defamation was held competent. Merely because a particular scene in a picture objected to by the complainant depicted some orthodox section of the Brahmin community uttering contemptuous words against bhangi community in general that would not amount to an act of defamation against the bhangi community much less against the complainant personally. The impugned scene in the film was general in nature. It was not directed against any individual or particular group of individuals who could be identified.

Having regard to the provisions of Section 499, read with Explanation 2 and the definition of the word "person" in Section 11, Penal Code, it cannot be said that a complainant for defamation is not maintainable at all by a corporation. But the scope of such a complaint by a corporation is not the same as that by individuals. A Municipal Board *per se* has hardly a reputation. If the management is good it will be said that the Board is being run efficiently. But if the management is bad there is bound to be accusation of inefficiency and nepotism etc. If a person makes any imputation so as to cause any special injury to the property of the Board then the Board can maintain a complaint under Section 500. But where the minority party in the Board attacks the majority party for inefficiency then such an attack does not amount to defamation. The words complained of must reflect on the management of its business and must injuriously affect the corporation, as distinct from the individual who composes it. The alleged libel must attack the corporation in its method of conducting its affairs, must accuse it of fraud or mismanagement, or must attack its financial position.

It cannot bring a prosecution for works which merely affect its honour or dignity. Moreover it cannot maintain a prosecution for words which reflect, not upon it as a body, but upon its members individually unless special damage has thereby been caused to it. It is doubtful if the police force at a particular place is such an association or collection of persons as is contemplated in Explanation 2. The libel need not name the class as such : it is sufficient if the words can only be interpreted in such a way as to reflect on all the members of that class. The imputation must be capable of being brought to a particular individual or collection of individuals as such. If a well-defined class is defamed, each and every member of that class can file a complaint. In other cases, the defamatory words must refer to some ascertained and ascertainable person and that person must be the complainant.

Intention to harm

Section 499 requires an *inter alia* intention on the part of the accused to harm the reputation of the complainant or the knowledge that the imputation made by him will harm such reputation. It is not necessary in order to establish an offence under Section 500 to prove that actual harm was caused. Proof that harm was intended to the complainant's reputation or that the accused knew or had reason to believe that harm will be caused by the imputation is sufficient. A person who published defamatory matter against another in a case not covered by any of the exceptions cannot escape punishment on the ground that the reputation of the person attacked was so good or that of the person attacking so bad, that serious injury to the reputation was not in fact caused. Intention to harm the reputation is not necessary but reasonable belief that the imputation would harm the reputation would suffice. The meaning which should be attributed to 'harm' is not the ordinary sense in which the word is used. By 'harm' is meant imputations on a man's character made and expressed to other, so as to lower him in their estimation, and that anything which lowers him merely in his own estimation, certainly does not constitute defamation.

Using obscene and insulting language in speaking of a respectable man after an altercation is over is calculated to lower the reputation of the man spoken of and amounts to defamation.

Explanation 4 to Section 499 would not apply when the words used and forming the subject-matter of the charge are *per se* defamatory. Where in reply to a book written by the complainant the accused wrote a book, matters dealt with being highly controversial religious matters, and in expressing his opinion the accused used very violent expressions but did not assail the personal character or the respectability of the complainant, it was held that there was no defamation. Where the accused referred to a person as Chamar as a result of his annoyance and out of spite and none of the priests attended the religious ceremony which had to be performed at the complainant's house, it was held that the accused was guilty of defamation. Imputation to a Hindu at the time of feast of brotherhood that he is an outcast is defamation. Publication of photograph with false caption depicting person therein as soldiers of "Goonda war" is *per se* defamatory. In the course of an election contest, the accused issued and published a poster against his rival candidate, a Barrister-at-law which contained the words : "The hollowness of Mr.....'s capacity as a Barrister has been exposed. "It was held that the imputation undoubtedly was calculated to lower, in the estimation of others, the intellectual qualities and the aptitude for his profession as a Barrister in him and was, therefore, defamatory. Accused stated in a petition to the forest authorities urging an enquiry into the conduct of a village Munsiff that the Village Munsiff was a very rich man, that he had gained over the Range Officer to his side and had been illicitly grazing goats in the reserve. It was held that the accused was guilty of the offence of defamation. The language employed by him was calculated to harm the Village Munsiff and lower the Range Officer in the estimation of his subordinates and the public.

Exception

A defematory statement does not fall within any of the Excep-

tions by reasons merely of the fact that it is punishable as an offence under Section 182 or any other section of the Code.

First Exception

Where the allegations contained in news items are factually incorrect, the accused can take no advantage of First Exception to Section 499. Mere creating doubt about truth or otherwise of statement is not enough to claim protection under Exception 1 and discharge the burden cast on accused under Section 105, Evidence Act. It is sufficient if the accused can show that the statements are substantially true in regard to the material portion of the allegation or insinuation. It is not sufficient that only a part of the libel is proved to be true. Public good is the good of the general public as contradistinguished from that of an individual. To come within the exception, the imputation should not only be proved to be true, but it must also be proved that it was for the public good that it was published. No amount of truth will justify a libel unless its publication was for the public good.

Where at a public action of Government forest produce, the officer made statement to the effect that the contractors who did not wish to bid should go away, and the accused said in the presence of witnesses that the complainant was turned out by the officers, it was held that the words used by the accused to the effect that the complainant was turned out, were defamatory, and justification could not be pleaded within the meaning of Exception 1 to Section 499. Denunciation of a Brahmin for providing liquor at a wedding reception to such of his guests as desire to partake of it is not for public good.

A court finding that an imputation is true and made for the public good may, on considering the manner of publication in the newspaper, hold that the particular publication is not for public good and is not covered by exception.

Second Exception

Every citizen has a right to comment on those acts of public men which concern him as a citizen of the country if he does not make his commentary a cloak for malice and slander. A

writer in a public paper has the same right as any other person and it is his privilege, if indeed it is not his duty, to comment on the acts of public men which concern not himself only but which concern the public, and the discussion of which is for the public good. And where a person makes the public conduct of a public man the subject of comment and it is for public good, he is not liable to an action if the comments are made honestly, and he honestly believes the facts to be as he states them, and there is no wilful misrepresentation of fact or any misstatement which he must have known to be a misstatement if he had exercised ordinary care. A newspaper article alleged that the head of a village was guilty of acts of oppression against the villagers in discharging his duties and especially in the procurement of grain. It also alleged that he received bribes. The writer of the article also wrote to the Collector of the district asking him to make enquiry into the allegations, and on enquiry the Collector found that the allegations were false. In a prosecution of the writer for defamation, it was held that the Collector came to the conclusion that the allegations had not been proved did not mean that the allegations were not made in good faith and it was for the Court to determine whether he acted with due care and attention in making the allegations in the article. The editor of a newspaper making certain allegations against the Jail Superintendent after hearing certain prisoners, but without giving the Jail Superintendent an opportunity to refute them, could not be said to have acted with due care and attention, therefore in good faith so as to bring himself within this and the ninth Exception. A member of the Board of Secondary Education was prescribed as 'dalal' of a publisher in an article in a newspaper. The only object of the editor was to draw the attention of the educationists, public and Government to the state of affair prevailing in the Board and he was not in any way actuated by malice. It was a reasonable inference warranted by the facts commented upon and as the facts from which the inference was drawn were correctly stated, he was entitled to the protection of the second exception.

Third Exception

Those who fill a public position must not be too thin-skinned in reference to comments made upon them. It would often happen that observations would be made upon public men which they know from the bottom of their hearts were undeserved and unjust : yet they must bear with them and submit to be misunderstood for a time. Where in a newspaper report the main assertion is true, mere exaggeration or departure from strict truth does not deprive the accused of the privilege given to him by Exception 3. Mere exaggeration or even gross exaggeration does not make the comment unfair especially where the matter is one of public interest, provided there is no misrepresentation or suppression of facts. The accused publishing a letter in a newspaper purporting to be a verbatim account what had transpired at a meeting of the Municipal Corporation and which was admittedly true in substance was protected under this Exception. To cover a case under Exception 3 it is sufficient to show that person concerned acted in good faith.

Fourth and fifth Exception

Publication of reports of proceedings of Court—Explanation 4 makes an imputation defamatory only if it lowers a person in the estimation of others. It implies a fall in reputation. It may be possible to make presumption of good behaviour in civil cases but in criminal cases the existence of good reputation and fall thereof must be factually proved on the plea of justification. It is not necessary to prove that the statement is literally true. It is sufficient if it is true in substance and if the essence of imputation is true. It is not required to be verbatim. A newspaper report of judicial proceeding need not be true absolutely word for word but taking the whole thing it must be a substantially true account. Good faith has not been made an ingredient in Exception 4. Where the accused while publishing news report did not travel beyond contents of complaints, he was entitled to claim privilege under fourth exception.

Sixth Exception

The object of this Exception is that the public should be aided

by comment in its judgment of the public performance submitted to its judgment. All kinds of performances in public may be truly criticised provided the comments are made in good faith and are fair. Liberty of criticism is allowed, otherwise we should have purity neither of taste nor of morals. Good faith under this Exception require not logical infallibility but due care and attention.

Seventh Exception

Censure by person in authority. A privilege does not justify publication in excess of the purpose or object which gives rise to it. A man may in good faith complain of the conduct of a servant to the master of the servant even though the complaint amounts to defamation, but he is not protected if he publishes it in a newspaper.

Eighth Exception

Statement to person in lawful authority. In order to establish a defence under the Exception the accused must prove that the person to whom the complaint was made had lawful authority over the person complained against, in respect of the subject-matters of accusation. The accused, a member of the Police Force, addressed an application to the District Panchayat Officer alleging that one lady, a neighbour of the accused, was a woman of lose character who was having illicit connection with goondas, her paramours coming to her frequently at nights and that her immoral activities reflected badly on the locality in which the acused lived. It was held that this Exception did not apply as the District Panchayat Officer or the Panchayat had no lawful authority over the person complained against, in respect of the subject-matter of the accusation.

Accusation before the public by publication in a newspaper is not the sort of lawful authority contemplated by the Exception. Where an accused felt some suspicion about a society from the audit report and thought that the publication was necessary in that case and had made some embellishments, additions etc. in the article probably to meet the taste of the public and to attract their pointep

attention to the main facts so as to make it an interesting readable matter, it was held that it was a case of excessive publication which would take the case out of the privilege conferred by Exception 8 to Section 499. The benefit of Exception 8 applies to a person charged with defamation under Section 500, where there is a *bona fide* complaint of a grievance and not a wanton accusation maliciously made with the object of injuring another person. Where a person without express malice makes a defamatory charge which he *bona fide* believes to be true, against one whose conduct has caused him unjury, to one whose duty it is to enquire and redress such injury, the occasion is privileged on the ground that the person making the charge has an interest in doing so and the person to whom the communication is made has a duty to hear it. A report made with the intention that a person named should be entered on the Surveillance Register is defamatory. Honesty of purpose is essential to protect communications made in fulfilment of a duty. The purport of such communications must also believed to be true. Good faith of the person making the accusation is an essential condition of exeption under 8th Exception. A complaint to police constable is not privileged. The defamatory statements made in answer to questions put by an investigating officer during investigation are privileged.

Ninth Exception :

The exceptions cover not only such allegation of facts as could be proved true but also expressions of opinions and personal inferences. There is no justification for reading the exception as meaning that if the person making the imputation believes in good faith that he has been acting for the protection of the interest of himself or any other person, he is not liable. Even if the defamatory imputations were found to be baseless and incrorrect and if they were made by the accused in good faith and for the public good, they were entitled to be protected under Exception 9. Where a lawyer's notice was charged with criminal breach of trust and theft of the properties of the deceased and he was threatened with civil and criminal proceedings and the accused sent in his reply through a

Vakil alleging that the widow was living an adulterous life and that she was discarded owing to her such conduct by her husband and that her daughter was not the daughter of her husband and that she had never lived with the deceased for about twenty-five years and the person to whom the communication is made has an interest in protecting the person making the accusation. In other words, besides the *bona fides* of the person making the imputation the person to whom the imputation is conveyed must have a common interest with the person making it which is served by the communication. This exception merely reproduces the principle laid down by Lord Cambell, C. J. The point of difference between Exceptions 8 and 9 is that whereas in the former the person to whom the complaint is made must have lawful authority to deal with the subject-matter of the complaint and to take proceedings against that person, there is no such requirement in Exception 9, where it is sufficient if a communication is made to a person for the protection of one's own interest in which the other also has an interest. Any one in the transaction of business with another has a right to use, *bona fide*, language which is relevant to that business and which a due regard to his own interest makes necessary even if it should directly or by its consequences be injurious or painful to another. But defamatory comments on the motives or conduct of the party with whom he is dealing do not fall within that rule. Exception relates to private communications made in good faith for the protection of one's interest and does not protect defamatory matter *perse* published in a newspaper. Where the accused made a statement in answer to a requisition by an investigating officer under Section 151, Criminal Procedure Code, 1898, and for the protection of his own interest, it was held that he was protected under this Exception.

Good faith in 9th Exception requires not logical infallibility but due care and attention. In deciding whether an accused person acted in good faith under the 9th Exception, it is not possible to lay down any rigid rule or test. It would be a question to be considered on the facts and circumstances of each case ; what is the

nature of the imputation made under ; what circumstances did it come to be made ; what is the status of the person who makes the imputation ; was there any malice in his mind when he made the said imputation ; did he make any enquiry before he made it ; are there reasons to accept his story that he acted with due care and attention and was satisfied that the imputation was true ? These and other considerations would be relevant in deciding the plea of good faith made by an accused person who claims the benefit of the 9th Exception. To establish good faith it has to be seen first, circumstances under which the report was written or words uttered ; secondly whether there was malice ; thirdly whether the accused made any enquiry before he made the allegation ; fourthly there are reaons to accept the version of probability that the accused acted in good faith. Where a comparative ignorant and timid man apprehending harassment by the complainant presented a petition to a Magistrate and he was prosecuted for allegations contained therein, it was held that the accused apparently acted more to protect himself than to injure other and that considering the circumstances under which he acted, the conviction under Section 500 was not sustainable. Mere good faith can be negatived on the ground of the recklessness indicative of want of due care and attention. Mere subjective belief without objective basis is not sufficient. The unnecessary aspersion is indicative of want of good faith. The care and attention required by law must have relation to the occasion and the circumstances. 'Due care and attention' imply genuine effort to reach truth and not ready acceptance of an ill-natured belief. Exception 4 describes quality of the imputation and not its effects. For the purpose of Exceptions to Section 499, definition of good faith as given in Section 53 of the code would prevail as against that given in the General Clauses Act. It would follow that an assertion P and N made before a Panchayat a statement that he had kept the complainent P for 10 for 11 years, in a case by P under Section 500, it was held that the statement of the accused before the Panchayat was made in good faith in order to explain his beating and

therefore, was covered by Exceptions 8 and 9. A statement that complainant was a rowdy and a lawbreaker made in good faith by rustic villagers for protecting the interest of the public and in order to object to the appointment of the complainant as the village Munsif is entitled to protection under this Exception.

Fair comments

In order that comment may be fair, the following conditions must be satisfied : (a) it must be based on facts truly stated ; (b) it must not contain imputations of corrupt or dishonourable motives on the person whose conduct or work is criticised, save in so far as such imputations are warranted by the facts ; (c) it must be honest expression of the writer's real opinion. The question which must be considered is this, would any fair man however prejudiced he may be, however exaggerated or obstinate his views, have said that which this criticism has said. In the matter of public interest, the Court must not weigh any comment on it, in a fine scale. Some allowance for intemperate language must be made if the writer keeps himself within the bounds of substantial truth and that he does not misrepresent or suppress any facts. There is a distinction between 'fair comments' based on wellknown or admitted facts and the assertion of unsubstantiated facts for comment. Where comment is made on allegations of fact which do not exist, the very foundation of the plea disappear. Every one has a perfect right to criticise a man's public conduct, to denounce its policy and even to denounce its folly or its absurdity or the mischievous consequences which will result from it. But a line must be drawn between hostile criticism on a man's public conduct and the motives by which that conduct may be supposed to be influenced. Allegations on the ground of fair comment cannot be justified the moment it is shown that the criticism is based upon a misstatement of facts.

Press

The freedom of journalists is an ordinary part of the freedom of the subject and to whatever length the subject in general may

go, so also may the journalists, but apart from statute and law, their privilege is no other and no higher. They have rather responsibilities and should be more cautious in making scandalous imputations. Where the accused a journalist in his article called the complainant "the most hated man of the locality" but could not produce any evidence either documentary or oral to show upon what material he had based the defamatory article, it was held that no public interest or public good could be served by calling the complainant, "the most hated man of the locality' and that the accused had acted in a reckless way without due care and attention.

Justification by truth

The word justification is used in connection with defamation in the technical sense of truth. It is not for the plaintiff to prove that the defamatory statement is false for the law presumes in his favour. It is for the defendant to establish the truth of a defamatory statement. Every defamatory allegation of fact, whether in the words themselves or in the innuendo, must be proved true. The truth of a defamatory matter is a complete defence to an action for damages though not to a prosecution for the crime of defamation. No action will lie for the publication of a defamatory statement if the defendant pleads and proves that it is true. Truth is an answer to the action, not because it negatives the charge of malice but because it shows that the plaintiff is not entitled to recover damages. For the law will not permit a man to recover damages in respect of an injury to a character which he either does not or ought not to possess. The reason for the defence of justification is not that the law has any special relish for the indiscriminate infliction of truth on other people, but because defamation is an injury to a man's reputation. At the same time justification is a dangerous plea if it is the only one which the defendant decides to adopt, for if he fails in it the judge is likely to regard his conduct as wanton and to return a verdict for heavier damages.

In order to substantiate the plea of justification it is not neces-

sary to prove literal truth of every fact which he has stated and it is enough to prove the substantial truth of every material fact. A statement is true in substance if the erroneous details in no way exaggerate the defamatory character of the statement or alter its nature.

Fair Comment : Introduction

A fair and *bona fide* comment on a matter of public interest is not a libel and it is a good defence to an action for damages that the statement in question is a fair comment on a matter of public interest. Honest criticism ought to be and is recognised in any civilised system of law as indispensable to the efficient working of any public institution or office, and as salutary for private persons who make themeselves or their work the object of public interest. 'Others abide our question, thou art free' may be true of Shakespeare in literature. In law it is not true of him or any body else. Fair comment is the name given to the right of every citizen to comment on matters of public interest. Again it may be remembered that a criticism being a literary work is in its own turn a fair object of criticism, as much so as the work which it criticises. The defence of fair comment is a part of the English law of tort for a pretty long time except in relation to criticism of Government officials and ministers which is a comparatively recent development. Literary criticism, on the other hand, was far more vitriolic in earlier times than in the modern era. The reason is that it was then felt that the proper method in dealing with the matter was not to resort to a court of justice but to meet it with something in print yet more stinging, just as men preferred the sword to litigation in order to vindicate an attack on their honour, so they were expected to retort to the pen with pen.

Distinction between fair comment, privilege and justification

Fair comment and criticism of matters of public importance are protected, even though involving attack on the character of individuals. There has been some difference of opinion as to whether the defence of fair comment is branch of the defence of privilege or an independent and a separate defence. The better view is it is an

independent defence. It is incorrect to say, as some writers do, that *bona fide* comment on matters of public interest come under qualified privilege. Defence of fair comment is distinguishable both from the justification and privilege. If the defendant pleads justification, he must prove that the imputation in the libel is substantially true, that is true not only in its allegations of fact, but also in any comments made therein. If he succeeds he makes out his defence and there is no need to inquire whether the comment was fair, it is sufficient that it was correct. If he fails he may, nevertheless, successfully contend that the statements are in the nature of comment on a matter of public interest. Again if the defence is privilege and privilege is established, the plaintiff must be nonsuited, however grossly untrue the libel might be, unless he has established that the defendant was actuated by the express malice in making the libel. Therefore with a view to negative the defence of privilege the plaintiff has to establish malice on the part of the defendant. But in case of fair comment the question that falls for decision is whether the comment is fair or does it exceed the bounds of fair criticism. But proof of malic may go to establish that the comment is not fair. Thus if a critic states in respect of a play that it is "dull, vulgar and degraded" and when sued for libel raises the plea of fair comment, he will succeed if this is an expression of honest opinion even though comment be not such as jury might think a just or reasonable criticism of the play. But the defence of fair comment will fail if the jury is of opinion that the libel was malicious or that it exceeded the bounds of fair comment. In other words, comment intrinsically unfair is not protected even though it is not inspired by malice.

Requisites of fair comment

There are four requisites of fair comment, namely, (1) the matter commented upon must be of public interest, (2) the comment must be an expression of opinion and not an assertion or a mere statement of fact, (3) the comment must be fair, and (4) the comment must not be tainted with malice.

Matter of public interest

Comment is of public interest. if it deals with the public life or work of any public man or institution or of any person who invites publicity. This includes many well recognised topics in particular, and in general anything which may fairly be said to invite comment or challenge public attention. In other words, there are two classes of cases in which free comment is permissible : (i) those in which the public interest arises out of the subject-matter itself, and (ii) those in which the complaining party itself has invited public attention. To the first category belong the affairs of the state, i.e. public acts of ministers and officers of the state. Everything which directly affects the welfare of a corporation or a state is clearly a matter of general public interest and there can be no dispute as to the right of discussion with regard to the policy of the Government, the administration of justice, the proceedings of the Legislature, the conduct of the executive in civil and military affairs, and generally the manner in which all those who may be called public servants discharge their duty. It includes the conduct of every public man and every public institution. "A clergyman with his flock, an admiral with his fleet, a general with his army, and a judge with his jury are all the subjects for public discussion because whoever fills a public position renders himself open to public discussion and if any part of his public acts is wrong, he must accept the attack as a necessary though unpleasant circumstances attaching to his position. Public institutions and local authorities also fall under the first category.

Books, works of arts, etc.

In the second category of matters of public interest fall those matters in which the complaining party has himself invited public attention. The true ground on which this kind of comment known generally as criticism seems to rest is that he who appeals to the public must be judged by the public. Under this category fall works of art, books, theatres, concerts and other public entertainments. Every man who publishes a book commits himself to the judgment

of the public and any one may comment on his performance. If the commentator does not step aside from the work or introduce fiction for the purpose of condemnation, he exercises a fair and legitimate right. Every species of literary production down to a tradesman has been dealt with on the same principles. Criticism of a literary work or a work of art cannot be allowed to be used as a mask for mere invectives or personal imputation not arising out of the subject-matter or based on facts. Statements of this kind cannot be treated as comments on a literary work and are libellous if they are defamatory and untrue. Again as already stated a criticism in itself being a literary work is itself a fair object of criticism.

Comment on a literary production need not be confined to criticism of it as literature. It can be criticised for its treatment of life and morals as freely as it can for bad writing, e.g., it can be criticised as having an immoral tendency. But an attack on the character of the author is not allowed ; it is not the man but his work that is subject to comment.

Civil Remedies

An aggrieved person has two remedies, (1) a suit for injunction restraining the publication of a defamatory statements, and (2) a suit for damages for injury to reputation occasioned by the publication of the defamatory matter.

Suit for injunction

The Court is competent to issue an injunction restraining the publication of a libel. But a court will refuse to exercise its discretion of issuing an injunction unless it is satisfied that statements in the document complained of are untrue, and that there is some likelihood of immediate and pressing injury to person or property, or trade, of the plaintiff.

In Bangladesh a court may restrain the publication of a libel by issue of an injunction under S. 54, Cl. (i) of the Specific Relief Act (1 of 1877). Even before the enactment of the Specific Relief Act, 1877, it had been held that the courts in India had such jurisdiction.

'Suit for damages ; Damages ; extent of

The usual remedy of a person defamed, however, is a suit for damages. In applying the general principles of the law of damages to actions of defamation, there are certain special considerations which require discussion. This is a kind of action in which (except in case of some kinds of slander, and that too under English law) no proof of actual damage is necessary. The plaintiff, therefore, need only lay before the Judge the words or writing of which he complains, and leave them to say what amount of compensation he is entitled to from the mere fact that the imputations have been made. The quantum of damage must necessarily depend upon the nature and character of the libel and the extent of its circulation, the position in life of the parties, and other circumstances attending the case. The extent of damage which defamation must cause must naturally depend to a great extent upon the publicity given to it. It is one thing for a man to be libelled in a private letter read by a single person, and quite another to be held up to the hatred, contempt or ridicule of the general public in a newspaper or placard. Therefore even though the defendant in his pleadings admits the publication, the plaintiff is nevertheless entitled to prove its manner and extent. If a libel has appeared in a newspaper, the plaintiff is not confined to the damage likely to have been caused by the publication of the particular copy which he gives in evidence, but may also invite the jury to consider the extent to which copies have been multiplied and circulated. "In order to show the extent of the mischief that may have been done to the plaintiff by a libel in a newspaper, you have a right to give evidence of any place where any copy of that libel has appeared for the purpose of showing the extent of the circulation." If the libel is a mere technical one and has not damaged the plaintiff's reputation, nominal damages and costs should ordinarily be awarded.

A plaintiff may recover damages because of the mere probability that injurious consequences will follow from the defamation. It is, however, open to him to strengthen his case by proving that such consequences have in fact followed. Thus a trader in respect of whom a widely circulated libel has been published may prove a genera

falling of his custom though he does not allege it in his pleadings. Similarly it has been held that a person who has been put up to ridicule in a newspaper may show that it has resulted in his being hated by particular persons. A shipowner who was defamed in a newspaper in respect of the seaworthiness and management of one of his vessels used for damages but did not claim any special damage in his pleading. It was held that he could adduce evidence regarding the amount to which the profits of the next voyage had fallen below the average. In such cases, however, the plaintiff gives the evidence in question merely for the purpose of emphasising the fact that has actually happened which the law would presume without proof. It is not the special damage, it is the general damage resulting from the kind of injury he has sustained. But where the only meaning reasonably attributable to a defamatory statement is a criticism of the goods or manufacture of a trader it cannot form the subject of an action without proof of special damage.

Essentials of defamation

There are in general three essentials of the tort of defamation, namely :—

1. There must be a defamatory statement.

2. The defamatory statement must be understood by right thinking or reasonable minded persons as referring to the plaintiff, or

3. There must be publication of the defamatory statement, that is to say it must be communicated to some person other than the plaintiff himself.