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# The Indian Civil Liberties Bulletin

[ A MONTHLY REVIEW ]

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## MEMORANDUM ON FREEDOM OF THE PRESS

SUBMITTED ON BEHALF OF THE ALL-INDIA CIVIL LIBERTIES COUNCIL  
TO THE PRESS COMMISSION

### Introductory

The All-India Civil Liberties Council at its meeting on 22nd December 1952 charged its Secretariat with the duty of preparing a Memorandum on Freedom of the Press in so far as governmental restrictions on the freedom were concerned and submit it to the Press Commission. Accordingly, the following Memorandum is being submitted. The Memorandum was not placed before the All-India Civil Liberties Council for approval in detail, but as it follows the lines of the resolutions passed by the All-India Civil Liberties Conference and the All-India Civil Liberties Council, which is its executive, it may be presumed that the views expressed in the Memorandum meet generally with the approbation of the Council. (Resolutions passed at the fourth session of the All-India Civil Liberties Council in 1952 are appended to the Memorandum and members of the Commission are requested to have a look at Resolution No. 2 on Amendment of Article 19 (2), No. 3 on the Press Act, No. 4 on the Press Commission and No. 6 on the draft Covenant on Human Rights.) The Memorandum does not purport to give answers to all the questions set forth in Section P of G. Q., nor do the answers given follow the order of the Questionnaire. But the various headings will show clearly to what questions in the Questionnaire the answers are directed.

### Spelling out Limitations on Fundamental Rights

The Indian Constitution, unlike most other Constitutions, enumerates certain Fundamental Rights and proceeds at once to specify the qualifications to which exercise of the rights is to be subject. This method was employed in order apparently to guard against the judiciary applying the provisions of the respective guarantees with absolute literalness, if the guarantees as embodied in the Constitution appeared to be without any qualification. But if this was the fear which prompted the Constituent Assembly, when it enunciated any fundamental right, to accompany it with specific qualifications, it must be stated that the fear was groundless. The experience of the United

States of America, which was the first country in the world to incorporate a Bill of Rights in the Constitution, teaches us that the courts may well be trusted to interpret these rights with necessary discretion although the Bill of Rights itself contains no qualifications. The Supreme Court in the United States has, in applying the rights, evolved a body of rules of interpretation which, while giving sufficient protection to the individual, leaves sufficient power of control to the Government to enable society to secure public safety and other social interests. In fact the nice balancing that is required between individual freedom and public security can best be done by the courts which can take into account the changing conditions of society and decide every case upon its own facts as they appear in the light of those conditions. If, however, the Constitution-makers are to foresee and lay down in precise terms any limitations on the rights, the temptation is apt to be great to couch the limitations in too broad terms, cutting down the scope of the rights unduly, as is seen in the discussions in the U. N. Human Rights-Commission. Recognising this fact, the Commonwealth Government of Australia, when it brought forward a Bill in 1944 with the object among others of providing constitutional guarantees for freedom of speech and freedom of religion, it followed the example of the U. S. A., expressing the rights in unqualified language. The article relating to the right of free speech and free press was not qualified by any proviso, specifying the circumstances in which it can be restricted. It was in this form :

Neither the Commonwealth nor a State may make any law for abridging the freedom of speech or of expression.

(Incidentally, it may be stated in answer to Question 1 in Section P that though freedom of the press is not separately mentioned in our Constitution from freedom of speech, that is surely included in the Charter. In the Australian Bill the same phraseology was adopted, and it was stated by the Attorney General, Dr. Evatt, that the guarantee would "apply to any form of oral or written expression.")

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Although it may be held that the departure that the Indian Constitution makes from the United States Constitution in spelling out the restrictions to which the right of free speech and press is subject was hardly a wise procedure, still it has come about that the restrictions on the right which are embodied in cl. 2 of Art. 19 (as it was framed by the Constituent Assembly) are on the whole unexceptionable. It is universally recognised that in the exercise of the right the Government which is in charge of the maintenance of the public peace is entitled to interpose its authority in order to preclude resort to physical force, to prevent the infringement of the identical rights of others, and to protect the personal honour of the individual against attack by his fellows. The restrictions which Art. 19 (2) embodies are broadly of this nature and no reasonable objection can be taken to any of them. The heads under which the permissible restrictions are grouped, viz., libel, slander, defamation, contempt of court, offences against decency or morality, and protection of the security of the State, are all such as will meet with universal approbation. The only flaw one can find in the Article is that it clothes with validity every law, whether now existing or to be adopted in future, which merely "relates" to libel, etc. It is surely possible to envisage a law concerning contempt of court, for instance, which goes beyond proper limits and unduly limits the right of free criticism. Such a law, it would appear from the wording used in the Article, to escape judicial review as to its constitutionality. Apart from this, however, Art. 19 (2) does not suffer from any defect.

### Art. 19 (2) before Amendment

The great merit of Art. 19 was that it distinguished clearly between "public order" in general and "security of the State," in protecting which the Government would be entitled to impose limitations on fundamental rights. The former being a concept of wider import, it would necessarily permit broader restrictions, and the latter being a concept of narrower import, it would permit restrictions within a very much narrower field. And, taking account of this fact, the Constituent Assembly, with commendable clarity, classified the fundamental rights to freedom enumerated in Art. 19 (1), allowing the Government to interfere with some of them in face of a danger of public disorder merely, but permitting interference with the right to free speech and free press only when the Government is faced with the task of having to deal with that aggravated form of public disorder which causes a threat to the public security. In doing so, it recognised the primacy of the right to freedom of expression and endowed it with a peculiar sacredness lacking in the case of other comparatively minor rights. A greater sanctity attaches to free expression because, as Justice Black said in *Associated*

*Press v. United States* (1945) 326 U. S. 1: "A free press is a condition of a free society," and among democratic rights to be protected from legislative infringement. freedom of the press naturally takes a higher rank and has to be safeguarded more jealously than other rights, though these are important in themselves.

The necessary distinction between what is required in the interest of "security of the State" and in the interest merely of "public order" was brought out by a full bench of the Supreme Court in *Romesh Thappar v. State of Madras* [A. I. R. 1950 S. C. 124]. The judgment was unanimous except for Fazl Ali J., who dissented. Patanjali Sastri J., delivering the Court's opinion, said:

The Constitution, in formulating the varying criteria for permissible legislation imposing restrictions on the fundamental rights enumerated in Art. 19(1) has placed in a distinct category those offences against public order which aim at undermining the security of the State or overthrowing it, and made their prevention the sole justification for legislative abridgment of freedom of speech and expression; that is to say, nothing less than endangering the foundations of the State or threatening its overthrow could justify curtailment of the rights to freedom of speech and expression, while the right of peaceable assembly [sub-cl. (b)] and the right of association [sub-cl. (c)] may be restricted under cls. (3) and (4) of Art. 19 in the interests of "public order" which in those clauses includes the security of the State. This differentiation is also noticeable in Entry No. 3 of List III (Concurrent List) of the Seventh Schedule, which refers to the "security of a State" and "maintenance of public order" as distinct subjects of legislation. The Constitution thus requires a line to be drawn in the field of public order or tranquillity, marking off, more or less roughly, the boundary between those serious and aggravated forms of public disorder which are calculated to endanger the security of the State and the relatively minor breaches of the peace of a purely local significance, treating for this purpose differences in degree as if they were differences in kind.

... Deletion of the word "sedition" from the draft Art. 13 (2) [which in the Constitution as finally adopted has become Art. 19(2)], therefore, shows that criticism of Government exciting disaffection or bad feelings towards it is not to be regarded as a justifying ground for restricting the freedom of expression and of the press, unless it is such as to undermine the security or tend to overthrow the State. It is also significant that the corresponding Irish formula of "undermining the public order or the authority of the State" [Art. 40(6) (i) of the Constitution of Eire, 1937] did not apparently find favour with the framers of the Indian Constitution. Thus, very narrow and stringent limits have been set to

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permissible legislative abridgment of the right of free speech and expression, and this was doubtless due to the realization that freedom of speech and of the press lay at the foundation of all democratic organizations, for without free political discussion no public education, so essential for the proper functioning of the processes of popular government, is possible. A freedom of such amplitude might involve risks of abuse. But the framers of the Constitution may well have reflected, with Madison who was "the leading spirit in the preparation of the First Amendment of the Federal Constitution," that "it is better to leave a few of its noxious branches to their luxuriant growth, than, by pruning them away, to injure the vigour of those yielding the proper fruits."

We are, therefore, of opinion that unless a law restricting freedom of speech and expression is directed solely against the undermining of the security of the State or the overthrow of it, such law cannot fall within the reservation under cl. (2) of Art. 19, although the restrictions which it seeks to impose may have been conceived generally in the interests of public order.

The distinction which the Constituent Assembly had made was, however, soon afterwards wiped out by the Government by getting the Provisional Parliament that then existed to enact the Constitution (First Amendment) Act, 1951, which subjected the right to freedom of expression to those looser restrictions to which some other rights were subject. The priority of the right of free speech and free press which the Constituent Assembly had recognised thus ceased, and this basic right was brought down to the level of other rights which are not, one might say, of equal importance. Under the amendment not only those utterances could be penalised which constituted a threat to the security of the State but also those which could be held to imperil public order. The preferred status which the Constituent Assembly had given to the right to freedom of expression thus came to an end.

#### How the Amendment Was Made

How this sweeping change in the constitutional law of the country was brought about, undoing the best part of the Constituent Assembly's work in this respect is worth recalling. In *re Bharati Press* [A. I. R. 1951 Patna 12] a special bench of the Patna High Court held by a majority that "if a person were to go on inciting to murder or other cognizable offences either through the press or by word of mouth, he would be free to do so with impunity" and that such utterances would not fall within the restrictions authorized by Art. 19(2). This decision was so alarming that Sarjoo Prasad J., who wrote the above opinion, himself added in his judgment: "I wish that my decision on the point (viz., the scope of cl. 2 of Art. 19) would sooner than ever come to be tested by the Supreme

Court itself and the position re-examined in the light of the anomalous situation pointed out above," which he said he could not contemplate with equanimity. The case was accordingly carried in appeal by the Bihar Government to the Supreme Court, but the Government of India, without waiting for an authoritative interpretation of Art. 19(2) by the highest judicial authority, proceeded to amend the Article as if the Patna High Court's ruling about which that High Court had itself shown such hesitancy was the last word on the subject. The amendment which the Government managed to put through permits the right of free expression to be curtailed not only in the interest of "the security of the State," but also in the interest of "public order." The reason given was the Patna High Court's decision in the above case. The Prime Minister said: "Even murder or like offences can be preached," according to this decision. "It is an extraordinary state of affairs if that can be done." The Home Minister said: "Attempts to incitement to murder and violence would be included in the protective clause of Art. 19." The Law Minister asked: "Is it a desirable state of affairs that (the right of free speech) should be so unlimited that any person should be free to preach murder or the commission of any cognizable offence?"

Everyone was agreed that if the Patna High Court's opinion regarding the scope of Art. 19 (2) was final, the Article must be suitably amended. The "Indian Civil Liberties Bulletin," voicing the view of the All-India Civil Liberties Council, wrote:

We are quite free to admit, as we have already said before, that Governments must be in a position to punish direct incitements to violence, and if our Constitution is found by the highest judicial authority to contain any lacuna in this respect, we have no doubt that it must be filled. But to make the right to freedom of speech and expression also subject to qualifications required for the maintenance of "public order," as are the rights to peaceable assembly and freedom of association, is to deprive freedom of speech or the press of a very valuable safeguard. When a threat to public order on account of words used rises to the magnitude of a threat to the security of the State, the words should certainly be liable to punishment. This criterion which the Constitution as it stands at present prescribes must be maintained; only the form in which it finds expression may be changed. But to go beyond this and deliberately to lower the standard of protection of this essential right is to take a reactionary step which would rob the right of a necessary part of its protection. If in India, as in the United States, were applied the "clear and present danger" rule, along with the "preferred status" rule, mentioned in a later article entitled

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"U. S. Constitutional Law on Freedom of Speech," there would be no possibility of a minor breach of the peace being allowed to interfere with freedom of speech and expression as the substitution of the words "public order" for "security of the State" would.

[At the time the above was written it was not known whether in the amended Art. 19 (2) "public order" was to be substituted for or added to "the security of the State" as a restriction on free speech.]

The third session of the All-India Civil Liberties Conference said in the course of a resolution on the subject:

The Government should have first caused an appeal to be made to the Supreme Court for an authoritative interpretation of Art. 19 (2), and if as a result of this the Supreme Court had upheld the interpretation of the High Courts [it had not decided the appeal by then] the Government might have limited the amendment of the Article to making it clear that incitement to violence did not fall within lawful speech.

But the Supreme Court on appeal reversed the Patna High Court in *State of Bihar v. Shailabala Devi* [A. I. R. 1952 S. C. 329], saying: "It is plain that speeches or expressions on the part of an individual which incite to or encourage the commission of violent crimes such as murder . . . come within the ambit of a law sanctioned by Art. 19 (2) of the Constitution," though the expressions in question in this case did not as a matter of fact partake of this character, which is another matter. This view of the Supreme Court was founded on Art. 19 (2) before it was drastically amended by the Constitution Amendment Act which further restricts freedom of speech and the press by enacting that even such expressions as tended to endanger "public order" or constituted "incitement to an offence" could be interfered with. From the indecent haste in amending the Constitution on the basis of a judicial decision which was appealed from and which eventually proved to be erroneous, it almost looks as if the Government of India was anxious to take advantage of a wrong decision and rush through the amendment, lest the Supreme Court should correct the decision and thus deprive it of even a colourable excuse for vastly enlarging the scope of restriction on freedom of expression, as the amendment does.

When the constitutional amendment was under debate, several members of Parliament pointed out how far-reaching the restrictions on free expression would be, rendering the right itself ineffective. For instance, Dr. Kunzru said:

If the amendments proposed are accepted then it is not merely that Art. 19 will be amended, but that, for all practical purposes, part (a) of cl. 1 of Art. 19 will be deleted. The provision relating to freedom of speech and expression will be reduced to the position that Fundamental Rights occupy in the continental

constitutions. In those constitutions Fundamental Rights are no more than pious wishes. At the best, they are indications of the policy of the authorities; nothing more than that. I, therefore, think that if Government really feel that the clause to which I have referred must be hedged round with such serious limitations as to make it valueless for all practical purposes, then they should courageously come forward and ask for the deletion of that clause.

Prime Minister Nehru in fact went very near saying that freedom of expression need not be guaranteed in the Constitution. He remarked:

I have never heard of anyone saying that in the United Kingdom there is no freedom of the press or freedom of anything because Parliament is all-powerful. It is only here that we seem not to rely on ourselves, have no faith in ourselves, in our Parliament or our Assemblies.

His point was that in India too everything might be left to the legislatures, thus virtually scrapping the whole of the Bill of Rights!

## Art. 19 (2) After Amendment

### 1.—"PUBLIC ORDER"

#### A Catch-All Reservation

The objection to introducing the phrase "public order" into Art. 19 (2) in addition to the phrase "security of the State" as justifying interference with the right of free speech and free press is that it broadens the qualifications to the right in such a manner as to sweep in a wide variety of conduct into the exceptions, from conduct resulting in a grave threat to the safety and security of the State to conduct resulting in a trifling danger of a breach of the peace, all lending equal justification to any interference with the right. The amendment of the Article to this effect has rendered the guarantee of free expression almost wholly nugatory.

The justice of this remark will become apparent from the strong criticisms levelled by progressive countries in the United Nations bodies at the Article (Art. 14) in the draft Covenant on Human Rights relating to freedom of information. This Article too includes "public order" as a basis for restricting the right in addition to "national security," giving power to the Governments to arrest the flow of information or opinion when danger of breach of public order is apprehended as much as when they are confronted with the much more serious danger of breach of public safety and security. The United Kingdom delegate pointed out that the introduction of the phrase "public order" into the Covenant with the object of justifying the limitation on the enjoyment of human rights "might well constitute a basis for far-reaching derogations from the rights granted."

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Specifically referring to Art. 14(3) as well as Arts. 13, 15 and 16, in which the term "public order" appears, Lord Macdonald, the representative of the United Kingdom, said in the Third Committee of the fifth session of the General Assembly (18th October, 1950):

The stipulated limitations were... so broad and vague that they could be construed as *permitting the imposition of almost any restriction on the rights* to which they referred and, in fact, *completely nullified* the effect of the Articles to which they applied. (Emphasis supplied.)

The representative of Lebanon had correctly stated at the fifth session of the Commission on Human Rights that no dictator would have the slightest compunction in acceding to a Covenant drafted in such terms, nor, when he had acceded, would he find that it in any way inhibited his repressive activities; he could invoke the exception in the interest of "public order," embodied in Arts. 13, 14, 15 and 16.

Innumerable atrocities had already been committed for the protection of the State against subversive activities under that pretext. The United Kingdom, representative in the Commission on Human Rights had consistently argued against the use of that phrase on such grounds.

Thus the United Kingdom is on record that it considers "that in view of the recorded expression of opinion by the (Human Rights) Commission as to the wide meaning to be given to the term 'public order' used in para. 3 of Art. 14, the Article, with the limitations allowed by para. 3, affords no guarantee of the freedoms which are its subject." (Emphasis supplied.) The delegation of Lebanon said in the Third Committee that in spite of some doubts it had accepted the "public order" reservation in the Declaration (of Human Rights which had no binding force), but it thought that the expression would be out of place in the Covenant (which was legally binding).

It may be noted that, in submitting India's comments on the draft Covenant on 21st February 1950, the Minister for External Affairs, who is no other than Mr. Nehru, stated that it was necessary to have the phrase "public order" in para. 3 of Art. 14. (This would seem to show that even before the Patna High Court had given a wrong decision in the Bharati Press case, which was later made the basis for amending the Constitution, he was bent upon making the amendment adding "public order" to "security of the State" as a restriction on free expression in India.) The United Kingdom on the other hand stated that it stood by the remarks of Lord Macdonald quoted above.

The same kind of criticism was made against the phrase "for the protection of public order" that occurred in the earlier draft of Art. 2 of the Convention on Freedom of Information, viz., that it would give too wide a discretion to Governments in suppressing freedom of expression.

The delegate of France said, for instance, that such general limitations as the interests of public order "were so broad as to enable Governments to use them as an excuse for all their policies and activities, however injurious to freedom of information."

That the draft Covenant on Human Rights still retains, like our Constitution, the qualification of "public order" in addition to that of "national security" should give no comfort to the citizens of India. It is inevitable that when a voluntary pact is to be arranged between nations of various grades of civilization, some of them zealous to maintain democratic rights but a large majority still not weaned from old-world habits of autocracy, the pace of the international community in the march towards progress would be determined by the pace of the slowest of them. Thus in many respects the Covenant is in a most unsatisfactory form. The Article relating to Freedom of Expression is one instance; that relating to Freedom of Person is another. Both are almost as bad as the corresponding Articles in the Indian Constitution. The really democratic countries do not care for them at all. Similarly, such countries have ceased to take any interest in the Convention on Freedom of Information and for the same reason.\* That in all these matters India is with the majority of the nations of the world only argues that it is as backward as most of them. It should have been India's endeavour to support progressive countries in these international deliberations. That on the contrary it has placed itself in opposition to them cannot be a source of pride to those who had cherished the fond hope that India should play a glorious part in the United Nations in preserving fundamental liberties for the human-kind.

## 2.—"FRIENDLY RELATIONS WITH FOREIGN STATES"

In so far as two of the additional restrictions which the amendment of Art. 19(2) permits the legislatures to impose on the right to freedom of expression were concerned, viz., restrictions (1) for the maintenance of "public order" and (2) for the prohibition of an "incitement to violence," the Government of India could at least take cover behind the Patna High Court's judgment in

\* Objecting in the Third Committee in the closing months of last year that the draft Convention on Freedom of Information contained very many far-reaching limitations, Sweden declared that "it might be better to have no convention at all than one which could be used as a pretext for even more far-reaching restrictions." The United States agreed with the Swedish position, saying that "it was better to have no convention at all than one that provided freedom from information, not freedom of information." Australia remarked that "the draft convention contained so many escape clauses as to invite Government censorship and restrictions which might render meaningless the freedom it was intended to promote." The United Kingdom "could not agree that any convention would be preferable to no convention at all; a badly drafted convention might be exploited by unscrupulous governments acting under the protection of the name of the United Nations."

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the Bharati case, though after the judgment was reversed by the Supreme Court, the ground was cut from under its feet. But in introducing the third head of additional restrictions, viz., "friendly relations with foreign States" no such excuse was available to the Government. The imposition of this restriction was denounced by the Opposition in Parliament as permitting adoption of legislation which might possibly suppress all criticism of Government's foreign policy. The restriction is so loosely worded as to justify such sweeping condemnation inasmuch as it is capable of being invoked to penalise advocacy of a foreign policy which may be even slightly unpalatable to the powers that be. Government disowned such an intention. The Law Minister explained that the object which Government had in view in adopting this particular constitutional amendment was to enable it to pass legislation which would protect the heads of foreign States from attacks of a personal nature. But if this was the limited objective of the amendment, there was no reason why the amendment should not have been proposed in that narrower form. If this had been done the opposition in Parliament and outside would have been very much less on this score. Government was invited by some members of Parliament to limit the scope of the amendment in this way so as to conform to the avowed intentions of the Government, but Government refused to do so.

It must be admitted that there are countries like Canada which penalise "libels on heads of foreign States," though such countries are not many. Canada's Criminal Code provides:

Every one who, without lawful justification, publishes a libel that tends to degrade, revile or expose to hatred and contempt in the estimation of the people of a foreign State any person who exercises sovereign authority over that State is guilty of an indictable offence and is liable to imprisonment for two years.

But it ought to be stated in this connection that in the general revision of the Criminal Code that is afoot in that country it is proposed to delete this section. Originally, the amendments proposed in the Code were for the most part of a reactionary character, increasing the Government's hold on the expression of opinion. Fortunately, many of these proposed restrictions were relaxed in the Senate in December 1952. And also some positive improvements were introduced, one of which is the elimination of the section concerning libel on heads of foreign States, and if Parliament endorses the elimination after it reconvenes on 12th January 1953, the Criminal Code of Canada will cease to have any limitation imposed on discussion of international relations, which is as it should be.

The real reason for introducing "friendly relations with foreign States" as a justification for limiting the

right to freedom of speech and the press appears to be that the Indian Government has thought it politic and expedient to make common cause with the Arab-Asian bloc of reactionary countries like Egypt and Saudi Arabia, which are keen on imposing this restriction on freedom of information and opinion. The draft Convention on Freedom of Information originally contained sub-paragraph (j) in Art. 2 which would have restricted the flow of information in so far as it concerned international relations. But, on account of the strong opposition offered by countries like the United Kingdom and the United States of America in the committee on the draft Convention in January and February 1951, the sub-paragraph was deleted. India was among the countries which favoured retention of the sub-paragraph, the Indian delegation expressing the view of the Arab-Asian countries that the provision was "vital to a 'good-neighbour policy' and the promotion of international understanding." After the defeat of this proposal, Saudi Arabia and Egypt put forward a proposal to the effect that the Governments should be free to impose a ban on information if its diffusion was considered by them to be "likely to undermine friendly relations between peoples and States." This proposal was also decisively defeated in the committee, India voting in its favour along with its sponsors. But the Arab-Asian group has not ceased its efforts to shape the Convention in a way which is thought most unsatisfactory by democratic countries. Every now and then it puts forward variants of the same reactionary proposal. Every time the proposal meets with the opposition of advanced nations and every time India ranges itself with the group of backward countries. The latest form which the proposal, now moved by Egypt, has taken is that the right to freedom of expression in the draft Covenant should be liable to be restricted "for the maintenance of peace and good relations between States." It will be seen that this proposed restriction is almost the same as that which has already been introduced in the Indian Constitution. Fortunately, the Egyptian amendment was defeated, which must have caused great chagrin to India. One wonders whether a necessary consequence of the much vaunted aloofness of India from the Anglo-American bloc in international relations is that it should so tie itself in with the Arab-Asian bloc as to feel constrained to give its indiscriminating support to every proposal, however reactionary, that the bloc may make itself responsible for. If this is so, all one can say is that India is reduced, in the field of civil rights, to giving up the company of progressive nations in favour of an alliance with a group of countries which have not yet been able to shake themselves free from their age-long anti-democratic traditions.

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RE-AMENDMENT OF AMENDED ART. 19(2)  
Essential Pre-Requisite of Freedom of the Press

In proposing insertion of the above-mentioned three additional restrictions in Art. 19(2), Government spokesmen frankly admitted that all the three restrictions were expressed in overbroad language, and that their governing scope would have to be reduced when adopting legislation for the purpose of giving effect to them. And the Prime Minister gave a kind of promise that, when occasion came to reduce them to legislative terms, their scope would be properly narrowed. But assuming that this hope is fully realized, what will it amount to? It will only mean that the legislatures will refrain, while the present Government is in power, from utilising to the maximum extent the new power of restricting free speech and free press which the amended Art. 19(2) confers on them. But there can surely be no guarantee that future Governments will similarly pass a self-denying ordinance on themselves. Nor will the right to freedom of expression remain really assured even while the present Government uses the power with restraint. For even during this period freedom of speech and the press will always be under a potential threat of being curtailed under provocation. The *raison d'être* of a constitutional guarantee of fundamental rights is that in no circumstances should the legislatures be in a position to invade these rights. It becomes a wholly topsy-turvy arrangement, first to give authority to the legislatures to exceed what are admitted to be proper limits, and then to make an endeavour to persuade them not to do so. That will defeat the very purpose of incorporating any right in the so-called Fundamental Rights. Such rights must receive constitutional protection; the Constitution itself must prevent all legislative interference with them. It is possible to envisage a state of affairs in which without any constitutional limitations on legislative power people are able to enjoy full individual liberty. The United Kingdom is a shining example of this. There Parliament is a sovereign body; it can pass and bring into effect any restrictive legislation it pleases. No constitutional limitations can be imposed on its power. And yet people in that country are in the enjoyment of as much individual freedom as that which people in other countries are enabled to enjoy because of their Bill of Rights. But in India we have chosen a different path. Recognizing that we lack the traditions of the United Kingdom, the Constituent Assembly came to the conclusion, very wisely, that in this country the legislatures could not always be trusted to guard fundamental liberties, and the Constituent Assembly therefore sought to guarantee these liberties in the Constitution. The meaning of it is that the Constitution itself establishes outer barriers within which any restrictions to be imposed by the legislatures must ever be confined. If the legislatures should be tempted to go beyond them, the Supreme Court is to pull them back by virtue of the constitutional limita-

tions. Art. 19(2) fixed these outer barriers for the right of free expression. What Government has done by persuading Parliament to amend this Article is to extend vastly the limits within which governments, by adopting necessary legislation, can exercise powers of restricting the right. When Government admit, as they have done, that the constitutional provisions by themselves are too wide but plead that governments will in actual practice keep well inside the limits set by the constitutional provisions, they in effect admit that the constitutional barriers are down, that the fundamental right to freedom of expression has been abolished, and that the people must be content to have only as much liberty of speech and liberty of the press as the legislatures will be pleased to allow. If the liberty that people enjoy, whether large or small, is to be on legislative sufferance, they are deprived of all liberty as a matter of right, and Freedom of Expression comes practically to be scored out from our charter of fundamental rights. A right which is protected only by statutory provisions but is left unprotected by constitutional limitations cannot properly be called a fundamental right. The free trade in ideas which the Constituent Assembly desired to establish in India by means of Art. 19 (1) (a) visually disappears when the legislative branch of the Government is given power to regulate the right of free speech and free press. The amended Art. 19 (2), which permits restrictions that it is desired the legislatures should *not* impose, "puts free speech under the legislative thumb," in the expressive phrase of Justice Douglas, making the legislative judgment supreme. When this happens, free speech in the constitutional sense disappears. For the essence of the guaranteed right of free expression is that the right should not be under legislative control, that it should not be left to the legislature to determine its meets and bounds.

The All-India Civil Liberties Council attaches far greater importance to amending Art. 19(2) than to repealing in toto or modifying in any particulars any of the laws which are restrictive of freedom of expression. If the outer barriers of that right are properly fixed in the Constitution, many of these laws will fall of themselves by reason of their being liable to be invalidated by the Supreme Court. If, however, the constitutional provisions remain unsatisfactory, as they have become after the passing of the Constitution Amendment Act, then there will remain the constant danger of the laws being again made repressive even if as a result of the Press Commission's recommendation they come to be excised of all their objectionable features. The blanketing effect of the restrictions which the amended Art. 19 (2) authorizes is destructive virtually of all freedom of expression. As long as this Article remains the constitutional law of India, the threat of restriction of this most basic of rights will hang over all speeches and publications, even if the statutes be good for the time being. For the mere existence of such

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a constitutional provision permitting restriction of the widest scope must necessarily result, in the words employed by Justice Murphy of the Supreme Court of the U. S. A. in a similar situation in *Thornhill v. Alabama* (1940) 310 U. S. 88, in "a continuous and pervasive restraint on all freedom of discussion that may reasonably be regarded as within its purview." The All-India Civil Liberties Council desires that the Commission should, above all, help in removing this restraint capable at any time of being brought into effect by means of bad legislation. What it insists upon is a permanent remedy against all repressive legislation, and such a remedy will not be available unless Art. 19 (2) is restored to the form which it had before the enactment of the Constitution Amendment Act, with the proviso that the restrictions to be imposed on the exercise of the right to freedom of expression should be required to be "reasonable," the reasonableness being justiciable in courts.

### Section 124-A, Penal Code

#### LAW OF SEDITION

In *Tara Singh v. Punjab*, decided on 28th November 1950 [A. I. R. 1951 Punj. 27], the Punjab High Court held that after the Constitution came into force sec. 124-A, Indian Penal Code, under which Master Tara Singh was being prosecuted for two allegedly seditious speeches, had become void as contravening the right to freedom of speech and expression guaranteed by Art. 19 (1), and that the section was not saved by Art. 19 (2) under which only those utterances could be penalised which undermine the security of the State or tend to overthrow the States [See the observations of the Supreme Court on this point *supra*, in Thappar's case decided earlier, i. e., on 26th May 1950.] After this decision the section should really go. But it still continues in effect because of the amendment of cl. 2 of Art. 19 by the Constitution (First Amendment) Act, 1951, which declares in sec. 3 that the clause so amended "shall be deemed always to have been enacted," thus validating a law which the judicial authorities pronounced to be invalid. It was the claim of the Government that the constitutional amendment they were undertaking was only an enabling measure and that no laws were being immediately enacted to give effect to it. This claim, it should be noted, is obviously belied by the fact that by the mere passing of the Constitution Amendment Act they were re-enacting the law of sedition which was universally condemned as exceedingly harsh and repressive and which, the Punjab High Court itself through Weston C. J. in this case declared, "has become inappropriate by the very nature of the change which has come about" in that India had become "a sovereign democratic State."

Weston C. J. ruled that the interference with freedom of speech and the press which sec. 124-A allows

is not covered by Art. 19 (2) because of the interpretation of the section which holds the field, viz., that the offence of sedition consists in exciting or attempting to excite certain bad feelings towards the Government, even if the attempt to excite such feelings be unsuccessful and even if the feelings that were excited did not issue or tend to issue in any sort of actual disturbance. It is obvious that under this interpretation, in some instances at least, the speeches or writings in question which form the offence "will not undermine or tend to overthrow the State," which is the only permissible limitation placed by Art. 19 (2) upon free speech and press. The interpretation of the words "bring into hatred or contempt, or excite disaffection towards the Government" to which Weston C. J. referred is that which was given by Strachey J. in *Queen Empress v. Bal Gangadhar Tilak*. In his summing up Strachey J., after expressing his agreement with the observation of Sir Comar Fetheram C. J. in *Queen Empress v. Jogendra Chander Ghosh* that "disaffection means a feeling contrary to affection," said:

You will observe that the amount or intensity of the disaffection is absolutely immaterial except perhaps in dealing with the question of punishment. If a man excites or attempts to excite feelings of disaffection, great or small, he is guilty under the section. The offence consists in exciting or attempting to excite in others certain bad feelings towards the Government. It is not exciting or attempting to excite mutiny or rebellion or any sort of actual disturbance, great or small. Whether any disturbance or outbreak was caused by these articles is absolutely immaterial. If the accused intended by the articles to excite rebellion or disturbance, his act would doubtless fall within sec. 124-A, and would probably fall within other sections of the Penal Code. But even if he neither excited nor intended to excite any rebellion or outbreak or forcible resistance to the authority of the Government, still if he tried to excite feelings of enmity to the Government that is sufficient to make him guilty under the section. I am aware that some distinguished persons have thought that there can be no offence against the section unless the accused either counsels or suggests rebellion or forcible resistance to the Government. In my opinion, that view is absolutely opposed to the express words of the section itself, which as plainly as possible makes the exciting or attempting to excite certain feelings, and not the inducing or attempting to induce to any course of action such as rebellion or forcible resistance, the test of guilt.

This interpretation of sec. 124-A was, as Weston C. J. points out, expressly approved by the Privy Council when refusing leave to appeal.

The law of sedition as enacted in sec. 124-A, Penal Code, was based on the English common law. But the



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chief difference between the two, which makes the Indian law extremely dangerous, lies in the fact, as stated by Das C. J. in *Pratap v. the Crown* [A. I. R. 1949 East Punjab 305], that the former lacks the "external standard," prescribed by English judges in interpreting the latter, "to measure the nature and quality of hatred, contempt or disaffection which would render a person liable to prosecution." The external standard laid down in English decisions requires "that in order to amount to sedition the words, etc., must generate hatred, contempt or disaffection of such intensity or depth as would be likely to result in violence or tumult or public disorder." "The result, therefore, is," said Das C. J., "that the English law of sedition permits the freest public discussion, comment, criticism and censure, either at meetings or in the press, in relation to all political or party questions, all public acts of the servants of the Crown, all acts of the Government, and all proceedings of courts of justice and does not put any narrow construction upon the expressions used in such discussions, etc., but only insists that the criticism and censure must be without malignity, must not impute corrupt or malicious motives and must not incite people to disobey lawful orders or promote violence, tumult or public disorder." The Indian law of sedition, however, severely restricts freedom of speech and freedom of the press.

Later, an endeavour was made by the Federal Court in *Niharendu Dutt v. Emperor* [A. I. R. 1943 F. C. 22] to restrict the scope of sec. 124-A by importing into it the external standard applied by English judges. Sir Maurice Gwyer C. J. said in this case:

Public disorder, or the reasonable anticipation or likelihood of public disorder, is thus the gist of the offence. The acts or words complained of must either incite to disorder or must be such as to satisfy reasonable men that that is their intention or tendency.

This interpretation, however, did not have sway for long. When in 1944 the Bombay High Court followed the decision of the Federal Court in *Imperator v. Sadashiv Narayan*, the Privy Council in *King-Emperor v. Sadashiv Narayan* [A. I. R. 1947 P. C. 82], which was an appeal from the decision of the Bombay High Court, expressly overruled the decision of the Federal Court, holding that the test laid down by the Federal Court could not be accepted, viz., that it was an essential ingredient of sedition within the meaning of sec. 124-A that the act complained of should be an act which is intended or likely to incite to public disorder. It said:

It is sufficient for Their Lordships to adopt the language of Strachey J. as exactly expressing their views in the present case.

Thus the law has been brought back to the position which it occupied before. It gives almost untrammelled power to the executive to curb freedom of speech and the press. And it is this law, declared invalid by the Punjab High

Court as contrary to the provisions of the republican Constitution, which the Government has revalidated by sec. 3 of the Constitution Amendment Act, which makes the amended Art. 19(2) retrospective in operation.

The Press Laws Enquiry Committee, 1948, has said in its report: "We understand that there is a proposal before Government for the amendment of sec. 124-A so as to bring it in line with the law of sedition in Great Britain," but while Government are quick in adopting repressive legislation like the new Press Act, it appears very tardy in amending a law which has long been recognised as a law of the utmost severity and which the Press Laws Enquiry Committee has described as "incompatible with a democratic form of government." The kind of amendment that is required in the law of sedition is that which has been suggested by the late Mr. Brelvi and Mr. K. Srinivasan as members of the Press Committee. They have expressed the view that, "as recommended by the Geneva Conference, only expressions which incite persons to alter by violence the form of government or which promote disorder should be regarded as seditious and the scope of the law of sedition should be strictly confined within the limit." This recommendation should immediately be carried into effect.

It must, however, be added that even after the law of sedition is put into proper shape, the danger will still remain until the amended Art. 19 (2) is re-amended that it may again be given an objectionable form by a future government, for there is infinite scope, in Art. 19 (2) as it stands at present, for a law which will in effect suppress all free expression. The only permanent remedy therefore lies in so re-amending the Constitution as to make any abridgment by the legislatures of the right to freedom of speech and freedom of the press impossible.

## Sec. 153-A, Penal Code

### GROUP LIBEL LEGISLATION -

The Punjab High Court in *Master Tara Singh's case*, referred to in the preceding section of this Memorandum, also invalidated sec. 153-A, Penal Code, and for the same reason as sec. 124-A, "as providing an unwarranted restriction on the freedom of speech and expression," and this section also has been revalidated by sec. 3 of the Constitution Amendment Act.

Weston C. J. had not to spend much time in showing why "sec. 153-A must follow sec. 124-A." The English law of seditious libel includes both these offences, for a seditious intention consists of an intention "to raise discontent or disaffection amongst His Majesty's subjects," and also "to promote feelings of ill-will and hostility between different classes of such subjects" (*Halsbury's Laws of England*). The law of seditious libel in both these forms "exists as an ultimate sanction," but for all practical purposes it has long become obsolete. As the

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English Committee on the Law of Defamation says in its report [Cmd. 7536]: "Prosecutions for seditious libel, save in the most flagrant cases, may easily present the appearance of political prosecutions which the English tradition tends to view with disfavour." Therefore, in the words of the Indian Press Laws Committee, "prosecutions (for both kinds of sedition) are now rare and convictions rarer still" in England. If the use of sec. 153-A, like that of sec. 124-A, is limited to punishing speeches or writings which, as recommended by the Press Laws Committee, are "intended to or are likely to lead to violence," no objection can well be taken to the retention of the section, provided the limitation of its scope is embodied in the section itself.

But there can be no conceivable justification for deleting the section for all other classes of the people and retaining it for "religious communities" alone, as two members of the Committee, the late Mr. Brelvi and Mr. K. Srinivasan, seem to have suggested. It may be that communal antipathy is an evil of large dimensions at the present moment, but the evil should be counteracted by a law of a general nature. Promotion of ill-will or hatred is to be condemned, wherever practised; it cannot be tolerated if the feelings of some classes of people are worked upon and penalised only if the feelings of some other class of people are inflamed. The law must be the same for all and must be enforced equally against all offenders who come within its clutches, without distinguishing between them. This word of caution appears to be necessary. The Government of the new State of India, particularly because the State has been formed after partition carried out on the lines of race and religion, have set their face against racial and religious differences. National unity is cherished as the highest ideal, and all activity supposed to be antagonistic to this ideal is relentlessly put down. The authors of this Memorandum accept this ideal without any mental reservation, but the use of compulsion in protecting the ideal is something they cannot approve of. Implicit devotion to the ideology of the Government should not be forced upon anyone and propaganda against that ideology, like propaganda against any other, should be permitted within reasonable limits. The limits should be set by law which should be made applicable to all propagandists, whether they are on what the Government consider to be the right side or wrong side. To single out in our legislation people who emphasize communal differences or to enforce a seemingly non-discriminatory law against them alone would be the height of intolerance wholly at variance with the basic principle of freedom of expression.

Because the whole law of seditious libel including that aspect which concerns promotion of ill-will between classes has become obsolete, proposals are sometimes made in England for enacting a law which would be available for normal use against people who indulge in

group defamation and which would permit actions for damages to be brought by members of the injured group. Group defamation is described as "false statements vilifying not identifiable individuals, but groups or classes of persons distinguishable by race, creed or vocation." Much evidence was laid before the Committee on the Law of Defamation in favour of strengthening the existing law, and a member of the Committee itself proposed an addition of the following clause to the Defamation (Amendment) Bill moved by a private member, Mr. Harold Lever, in Parliament:

Notwithstanding the provisions of sub-sec. (2) of sec. 15 of this Act it shall be an offence punishable by imprisonment for a period not exceeding two years for any person to utter or cause to be uttered, or print or publish or cause to be printed or published, or distribute or cause to be distributed, any statement or publication directed, or reasonably understood to be directed, against any body of persons within the United Kingdom, distinguishable as such by race, creed or colour, which is calculated to bring the same into hatred, ridicule, or contempt.

A private person or organization shall have the right to initiate proceedings hereunder, provided that the fiat of the Attorney General or the consent of the Director of Public Prosecutions be obtained.

The Committee rejected all such suggestions about providing against group libel on the ground that the effect of it would be unduly to curtail free expression. The conclusion of the Committee on this point was:

Much as we deplore all provocation to hatred or contempt for bodies or groups of persons with its attendant incitement to violence, we cannot fail to be impressed by the danger of curtailing free and frank—albeit, hot and hasty—political discussion and criticism. No suggestion has been made to us for altering the existing law which would avoid the prohibition of perfectly proper criticisms of particular groups or classes of persons. The law of seditious libel still exists as an ultimate sanction and we consider that the law as it stands affords as much protection as can safely be given. We do not, therefore, recommend any general change in the existing law to deal with group defamation.

In the U. S. A. some states have enacted laws penalising group vilification; some of these laws have already been declared unconstitutional by the courts, though some have been upheld as valid. The general nature of these laws will become apparent from the New Jersey statute, making guilty of a misdemeanour

any person who shall print, write . . . any book, speech, article, statement, circular or pamphlet which in any way, in any part thereof, incites, counsels, promotes or advocates hatred, abuse, violence or hostility against any group or groups of persons

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residing or being in this state, by reason of race, colour, religion, or manner of worship.

It is recognised that "the existing law is almost incapable of punishing or otherwise discouraging the individuals and organizations who are deliberately stirring up racial and religious hatreds." Nevertheless, enlightened opinion in the U. S. A. is definitely against adopting any legislation specially directed against the evils of group vilification, on the ground that the remedy proposed "will do much more harm than good." The unofficial Commission on the Freedom of the Press in that country was unanimously opposed to the enactment of group libel legislation, holding that methods to combat racial and religious and economic antagonisms must be sought outside the law. Professor Chafee has on behalf of the Commission set forth objections to such legislation, two of which are particularly worthy of note by us in India, viz., that group libel laws will discourage open discussion and that they will increase dissension between groups.

#### The Press Act, 1951

[At this point in the Memorandum is reproduced the resolution on the Press Act adopted by the All-India Civil Liberties Conference at its meeting on 21st October 1951, which, it will be remembered, asks for the total repeal of the Act (see pp. ii : 2 to 5 of the BULLETIN)].

#### SOME OTHER POINTS

1. It may be noted that Question 4 in Section P has been answered in para. 2 of the Resolution given above, the answer being that there should be no special Press law but that it should be left to the ordinary criminal law of the country to deal with press offences as in England. Since 1695 everyone is at liberty in that country to write and publish what he pleases subject to the ordinary law of the land. "The liberty of the Press," declared Lord Russell, Chief Justice, in *Rex v. Gray* (1900) 2 Q. B., "is no greater and no less than the liberty of every subject of the Queen," and Lord Kenyon, Chief Justice, declared in *Rex v. Reeves*, "The power of free discussion is the right of every subject of this country." Freedom of the Press is not something which concerns exclusively writers or publishers; it is above all freedom for the people. Justice Sutherland of the United States Supreme Court said in *Grosjean v. American Press Co.* (1936) 297 U. S. 233 :

A free press stands as one of the great interpreters between the government and the people. To allow it to be fettered is to fetter ourselves.

2. The answer to Question 14, Section P, is contained in para. 7 of the Resolution, the principle to follow in this respect being that which is laid down by the Belgian judiciary, the principle, viz., "of the successive and exclusive responsibility of the author, publisher, printer and distributor." It may be added that the French law defines the responsibility for press offences in the following order: 1. The author or director of the publication;

2. failing them, the publisher; 3. failing the publisher, the printer; and 4. failing the printer, the sales agents, distributors or bill-posters.

3. The answer to Question 5, Section P, is that legal sanctions should be enforced against all who abuse freedom of the press; it cannot be left to the profession to enforce the necessary sanctions. One reason for this is that the press should not be in the enjoyment of any special privileges, as it should not labour under any special disabilities. Another reason is that when a certain view becomes highly unpopular, the press in general is apt to be unduly harsh against such of the members of the profession as choose to espouse the unpopular view. It would be unjust to deprive a minority opinion of the protection of the law.

#### Permissible Restrictions

4. The answer to Question 3, Section P, may briefly be thus formulated. Freedom of speech and press is not an absolute right; it can be subjected to valid restrictions. It is well established that profane, grossly indecent, libelous and such-like utterances, inflicting immediate injury, must be punished. No constitutional issue is held to arise here. But a difficult constitutional problem arises where in political agitation any utterance menaces public security or public peace. In such cases also, in extreme situations restriction of free speech and press is justified. The philosophical basis for it is thus stated by Professor Chafee in "Free Speech in the United States":

The true boundary line of the First Amendment can be fixed only when Congress and the courts realize that the principles on which speech is classified as lawful or unlawful involves the balancing against each other of two very important social interests, in public safety and in the search for truth. Every reasonable attempt should be made to maintain both interests unimpaired, and the great interest in free speech should be sacrificed only when the interest in public safety is really imperilled, and not, as most men believe, when it is barely conceivable that it may be slightly affected.

"It is not easy," says Mr. Chafee, "to fix the precise point where restrictions on speech become permissible as a result of this balancing. The Supreme Court has, on the whole, fixed it by the 'clear and present danger test,' first enunciated by Mr. Justice Holmes and later developed by Mr. Justice Brandeis. These Justices conveyed the philosophy, as is said in *American Communications Association, C. I. O. v. Douds* (1950) 339 U. S. 382, "that under the First Amendment the public has a right to every man's views and every man has the right to speak them. Government may cut him off only when his views are no longer merely views but threaten, clearly and imminently, to ripen into conduct against which the public has a right to protect itself." That is to say, "only when force is very likely to follow an utterance before there is a chance for counter-argument to have effect may that utterance be punished or prevented," but when force does follow, it "may and must be met with force." The test of "clear and present danger" is particularly applicable where it is feared that speeches or publications are likely to create disorder. In *Dennis v. United States* (1951) 341 U. S. 494 Justice Jackson said:

The test applies and has meaning where a conviction is sought to be based on a speech or

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writing which does not directly or explicitly advocate a crime but to which such tendency is sought to be attributed by construction or implication from external circumstances. The formula in such cases favours freedoms that are vital to our society, and, even if sometimes applied too generously, the consequences cannot be grave.

The same Justice said in *Beauharnais v. Illinois* (1952) 343 U. S. 250 :

Punishment of printed words based on their tendency either to cause breach of the peace or injury to persons or groups, in my opinion, is justifiable only if the prosecution survives the "clear and present danger" test. It is the most just and workable standard yet evolved for determining criminality of words whose injurious or inciting tendencies are not demonstrated by the event but are ascribed to them on the basis of probabilities.

As Justice Douglas said in this case, "The peril of speech must be clear and present, leaving no room for argument, raising no doubts as to the necessity of curbing speech in order to prevent disaster." (Emphasis added.) These are the lines on which India should proceed to determine the minimal restrictions on exercise of the right to freedom of expression which must be allowed because this freedom itself, of supreme importance as it is,\* is "dependent upon the power of constitutional government to survive" (Douds case, *supra*).

5. The answer that may be given to Question 2 Section P, is as follows. While freedom of the press cannot be absolute in any country, the extent of permissible freedom should not depend upon the progress a country may have made towards democracy. It is sometimes argued in defending the Press Act that in India wider restrictions require to be imposed on the press than in countries with democratic traditions because the people here are still unused to those virtues of tolerance and self-restraint which come with the growth of a democratic spirit. Freedom of speech and press is a fundamental human right the extent of which must be the same everywhere. That is why there is at all an attempt to define this right in an International Covenant which is meant to be applicable in all countries though they are at different levels of civilization. Freedom of speech and press prescribes a code of conduct for the rulers, and it is the level of civilization which the rulers have attained that is in question here rather than the level of civilization of the ruled.

#### Contempt of Court

6. Question 13(a) refers to the law and practice in contempt of court cases. The answer to it is that the practice should be that which is followed in the U. S. A. In that country the "clear and present danger" test is applied in all cases affecting public peace and public safety, and though the test is not applicable in cases concerning libel, etc., it is held to be applicable in contempt of court cases. In *Bridges v. California* (1941) 314 U. S. 252 the Supreme

Court applied this test, saying: "History affords no support for the contention that certain criteria (e. g. the 'rule of reason' formulated in the "clear and present danger" test) applicable under the Constitution to other types of utterances are not applicable, in contempt proceedings, to out-of-court publications pertaining to a pending case." This broad principle was reiterated by the Court in a unanimous opinion in *Pennekamp v. Florida* (1946) 323 U. S. 331 :

*Bridges v. California* fixed reasonably well-marked limits around the power of the courts to punish newspapers and others for comments upon and criticism of pending litigation. The case placed orderly operation of courts as the primary and dominant requirement in the administration of justice. The essential right of the courts to be free of intimidation and coercion was held to be consonant with a recognition that freedom of the press must be allowed in the broadest scope compatible with the supremacy of order. A theoretical determinant of the limit of open discussion was adopted from experience with other adjustments of the conflict between freedom of expression and maintenance of order. This was the "clear and present danger" rule. The evil consequence of comment must be "extremely serious and the degree of imminence extremely high before utterances can be punished." . . . We conclude that the danger under this record to fair judicial administration has not the clearness and immediacy necessary to close the door of permissible public comment. When that door is closed, it closes all doors behind it.

In *Craig v. Harney* (1947) 331 U. S. 367 the Court said :

The fires which (the language) kindles must constitute an imminent, not merely a likely, threat to the administration of justice. The danger must not be remote or even probable; it must immediately imperil.

7. Question No. 6 in Section P concerning sec. 144 of the Criminal Procedure Code is answered in para. 9 of the All-India Civil Liberties Council's Resolution on the Press Act (quoted above). The answer is that the section should not be applied to the Press.

## Suspension of Freedom of the Press

### ART. 19 *vis-a-vis* EMERGENCY PROVISIONS

The Constitution of India provides in its Emergency Provisions for the suspension of the enforcement of Fundamental Rights during emergencies. When the President has proclaimed an emergency, he is given power by order to declare that the right to move any court for the enforcement of any of the Fundamental Rights mentioned in the order shall remain suspended for the period during which the proclamation of emergency is in force or for a shorter period ( Art. 359 ). While all other Fundamental Rights are thus only liable to be suspended in accordance with the will of the President, which means the will of the Ministry, the rights mentioned in Art. 19, including Freedom of the Press, are by virtue of Art. 358 automatically suspended, without the intervention of the President when a proclamation of emergency is issued and remain suspended for the whole period of the operation of the proclamation. The legislatures then become free to pass any laws and the executive

\* Justice Black in *Wieman v. Updegraff* decided on 15th December 1952 described the importance of free speech thus: "All speech criticizing Government rulers . . . may be dangerous to the status quo. With full knowledge of this danger the Framers rested our First Amendment on the promise that the slightest suppression of thought, speech, press, or assembly is still more dangerous." (Emphasis supplied.)

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becomes free to take any action in despite of the safeguards which Art. 19 provides. Art. 358 in effect says that when a crisis arises, freedom of speech and freedom of the press will cease to exist.

This is a sweeping restriction, the like of which was only to be found in Art. 48 of the German Republic which authorized the President to suspend Art. 118 relating to freedom of speech and of the press "if public safety and order in the German Reich is materially disturbed or endangered." Suspension of free speech and free press was not automatic in the German Republic, as is the case in India, and yet Germany's experience of the use of Art. 48 was most unhappy, being supposed to be one of the important causes that led to Hitler's dictatorship. In the United States, however, no fundamental right is capable of ever being suspended, except the single right to the writ of habeas corpus. The following observations of the Supreme Court in the Milligan case [ *ex parte Milligan* (1863) 4 Wall. 2 ], which arose during the Civil War are well-known :

The Constitution of the United States is a law for rulers and people, equally in war and in peace, and covers with the shield of its protection all classes of men, at all times and under all circumstances. No doctrine involving more pernicious consequences was ever invented by the wit of man than that any of its provisions can be suspended during any of the great emergencies of government.

Our fathers knew that . . . unlimited power, wherever lodged at such a time ( i. e., time of war ), was especially hazardous to free men. For this and other equally weighty reasons, they secured the inheritance they had fought to maintain by incorporating in a written Constitution the safeguards which time had proved were essential to its preservation. Not one of these safeguards can the President or Congress or the Judiciary disturb, except the one concerning the habeas corpus.

The illustrious men who framed that instrument (the Constitution) were guarding the foundations of civil liberty against the abuses of unlimited power. Knowing this, they limited the suspension (even in war) to one great right and left the rest to remain forever inviolable.

In no contingency can any other right like that of freedom of the press be suspended, and habeas corpus too can be suspended only "when in cases of rebellion or invasion the public safety may require it" ( U. S. Constitution, Art. 1, sec. 9, cl. 2 ). Nor is the opinion of the Congress which alone is authorized to suspend habeas corpus final as to whether a state of rebellion or invasion prevails and whether, in the event of such a condition, the public safety requires suspension. The opinion is subject to judicial review. W. W. Willoughby and Lindsay Rogers say in "The Problem of Government," p. 104, that, in case of suspension of habeas corpus, "actual and not simply constructive necessity by a declaration of the legislature is necessary ; and the courts will be the judge."

Thus, it will be seen that in the United States freedom of speech and freedom of the press are not liable to be suspended in any exigency whatever ; the normal constitutional safeguards of these rights remain effective at all times. This point was emphasized by Justice Jackson of the Supreme Court on 18th October 1951 at a dinner

given to fifteen German editors studying in the United States. He said to them :

Freedom of the press in the United States has a different legal basis than it has in Germany under the Weimar Republic, and different than it generally has had in Europe. The Weimar Constitution, of course, contained articles which protected press freedom along with other civil rights from official invasion, but with this fatal exception : all of these rights could be suspended by the government in an emergency.

Our Constitution makes no such provision for crisis suspensions of freedoms of speech or the press. . . . While our press and other freedoms are not perfectly secured, the Government has no ready weapon for their overthrow, such as the Weimar Constitution provided. Freedom of the press here is a legal right enforceable in court, and is not a mere privilege, possessed at the sufferance of the existing government. . . .

And he added that no provision is made in the U. S. Constitution for suspension of the right to free press in an emergency because emergency powers always "tend to invite emergencies."

What Mr. Jackson said unofficially on this occasion he had an opportunity of repeating in his judicial capacity in the recent steel seizure case [ *Youngstown Sheet & Tube Co. v. Sawyer* (1952) 343 U. S. 579 ], in which emergency powers of the President were invoked in order to maintain proper balance between liberty and authority. He showed how in Germany, after the first World War, individual rights were suspended on the plea of public safety and order by the use of Art. 48 of the Weimar Constitution. These rights, he said, were first suspended temporarily, on more than 250 occasions in thirty years, and, "finally, Hitler persuaded President von Hindenburg to suspend all such rights, and they were never restored." In contrast to this, he pointed out how in the United States the Founding Fathers refused to invest the President with undefined emergency powers. He said :

They knew what emergencies were, knew the pressures they engender for authoritative action, knew, too, how they offered a ready pretext for usurpation. We may also suspect that they suspected that emergency powers would tend to kindle emergencies. Aside from suspension of the privilege of the writ of habeas corpus in time of rebellion or invasion, when the public safety may require it, they made no express provision for exercise of extraordinary authority because of a crisis.

Justice Frankfurter expressed the same idea in *Dennis v. United States* (1951) 341 U. S. 494. Saying that the United States as a sovereign nation has all the powers necessary for maintaining its existence in face of the danger of foreign aggression and internal rebellion, he added :

But even the all-embracing power and duty of self-preservation is not absolute. Like the war power, which is indeed an aspect of the power of self-preservation, it is subject to applicable constitutional limitations. See *Hamilton v. Kentucky Distilleries Co.* (1919) 251 U. S. 146. Our Constitution has no provision lifting restrictions upon governmental authority during periods of emergency, although the scope of a restriction may depend on the circumstances in which it is invoked.

## FREEDOM OF THE PRESS: AICLC'S EVIDENCE BEFORE THE PRESS COMMISSION

The First Amendment is such a restriction. It exacts obedience even during periods of war, it is applicable when war clouds are not figments of the imagination no less than when they are. The First Amendment categorically demands that "Congress shall make no law . . . abridging the freedom of speech or of the press . . ." The right of a man to think what he pleases, to write what he thinks, and to have his thoughts made available for others to hear or read has an engaging ring of universality.

The United States has not come to grief because of lack of emergency powers in the Constitution. It passed through many grave crises and was able to overcome them all by adhering strictly to the normal constitutional structure.

It would be too much to call on the Press Commission to recommend that Government undertake a general revision of the Constitution with a view to deleting Emergency Provisions of Part XVIII from the Constitution. But perhaps it may not be too much to suggest to the Commission, if they agree with Justice Jackson's remark that "emergency powers tend to invite emergencies," that they recommend a slight change in this Part, viz., that Art. 358 be omitted altogether and the rights enumerated in Art. 19 be left to be dealt with under Art. 359 in emergencies. This would by no means be a radical change. All it would do is to place Freedom of the Press, for instance, on the same footing as other Fundamental Rights. This right would then cease to be more vulnerable than others, as it now is. It would not then be automatically suspended as soon as the President proclaims an emergency and would not remain suspended as long as the proclamation is in operation. Under the suggested change, if made, it would be open to the President to consider whether it is necessary to include this right in the order, which he is empowered to issue under Art. 359, suspending enforcement of fundamental rights. The right to freedom of the press would not thereby become inviolable in emergencies. It would still remain capable of being interfered with if the President as personifying the views of the Cabinet thought that such interference was necessary. It would not divest Government of any real power. On the contrary it would give them an opportunity of assessing the situation with a view to determining whether or not there exists an overriding necessity for suspending the right. Instead of suspension following the proclamation of emergency as a matter of course, it could be resorted to if the Government responsible for the maintenance of law and order judged that such resort was required by the circumstances of the situation. If after a proclamation of emergency suspension of free press does not automatically take place but it is left to Government to order suspension after doing a little bit of thinking for themselves, none will be the loser, not Government certainly who can bring about suspension if they are bent on it.

To spread the idea, as Art. 358 does, that freedom of the press must come to an end no sooner than a threat to the security of the country appears on the horizon is fatal to civil liberties. Such an idea does not prevail in any democratic country, and consequently there is no provision resembling that of Art. 358 in any constitution. In

countries which have democratic traditions freedom of the press is scrupulously preserved even in war time. No mention need be made of the United States which is a stranger to the whole idea of an emergency apparatus of government. But, even in a country like the United Kingdom which does not recognize any constitutional limitations on legislative power, no reputable statesman believes that freedom of the press is to be abolished on the outbreak of war. A competent observer has said of British civil liberty in the second World War :

One of the most impressive features of the British Government in the recent war was the scrupulous and consistent regard for the civil liberties of the people maintained throughout the conflict by the Government itself and the myriad of authorities carrying out its will. Although the freedom of the subject was placed squarely in the hands of the Government to respect or invade according to its own appraisal of the necessities of the moment, the encroachments upon this freedom were in fact trifling, even in the darkest days of the Nazi threat to the island.

This is the opinion expressed by Mr. Clinton L. Rossiter in "Constitutional Dictatorship" about the general state of civil liberties in England, and about freedom of expression, he says it "suffered little abridgment in wartime Britain." Of freedom of the press he says:

Although its military and diplomatic reporting was heavily censored, the press was free to attack the Government in the spirit of sincere, or for that matter carping, criticism. . . . Regulation 2D (allowing the Government even to suppress any publication engaged in the systematic printing of matter calculated to foment opposition to the prosecution of the war) was reluctantly approved by an aroused Parliament only after definite assurances had been made that it would be used in none but the gravest situations of national danger. It was under 2D that the Communist publications "The Week" and "The Daily Worker" were suppressed in the period before the Soviet Union went to war and converted it into one of the "holy" variety. The important fact is that it was authorized, and by an executive decree at that, even if it was used only twice. . . . The freedoms of speech and assembly underwent even less invasion, although they too were at the mercy of the Government.

It may be argued that in India too the unlimited power to curb the freedom of the press in emergencies that the Constitution gives will be little exercised, though the right will remain formally suspended. It may be so; that can only be a matter of speculation. But if Government will in actual practice abstain from interfering with the press without cause, it is all the greater reason why freedom of the press should not remain suspended in law. And since Government will obtain all the legal power that they may need if freedom of the press is governed by Art. 359 instead of by Art. 358, there can be no conceivable objection to the adoption of the change here suggested.