Part One

HISTORY, CONSTITUTION
AND PROCEDURE
CHAPTER 1

FREEDOM FROM PRIOR RESTRAINT

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

Thomas Jefferson

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

Jawaharlal Nehru

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

1.2 When printing - developed in Germany about 1450 - was applied to news sheets, more could be circulated at a lower cost. One printed in Rome in 1493 described
Columbus's recent voyage to the New World. News sheets were printed only when there was a newsworthy event to be reported.

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

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

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


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

Burke said there were Three Estates in parliament; but, in the Reporters' Gallery yonder, there sat a Fourth Estate more important far than they all. It is not a figure of speech or witty saying; it is a literal fact - very momentous to us in these times.
discussion of diverse ideas. Instead, the free press meant organised, expert scrutiny of government. The press was a conspiracy of the intellect, with the courage of numbers. This formidable check on official power was what the British Crown had feared: the press was licensed, censored and bedeviled by prosecutions for seditious libel.

THE DANGER OF PRIOR RESTRAINT

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

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

The liberty of the press consists in printing without any previous license, subject to the consequences of law. 

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

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

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

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

\(^\text{7}\) (1765) 4 Bl. 151 (152); See also Halsbury (4th Ed.) Vol. 18, para 1694.
Freedom of the press is one of the great bulwarks of liberty, and can never be restrained but by despotic governments.

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

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

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

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

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

\[\text{\footnotesize\cite{Patterson v. Colorado, (1906) 205 U.S. 454 (462)}.}\]
The liberty of the press is essential to the security of the state.

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

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

1.14 This broader aspect of the freedom of the press today has been formulated judicially in these words:

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

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

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

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

\textbf{AMERICAN VIEW}

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

\textsuperscript{11}. Cooley, Constitutional Limitations, II, xii, 883.

\textsuperscript{12}. Patterson v. Colorado (1906) 205 U.S. 454 (462).

\textsuperscript{13}. See Zachariah Chafee, Jr., Free Speech in the United States (Cambridge, Mass.: Harvard University Press, 1941). In a famous case in 1732, involving an attempt by a royal official in New York to silence criticism of him by a hostile editor, a plea was made that while in England, such criticism would, indeed, be
Leonard Levy agrees that the phrase "freedom of the press" in the First Amendment was "an assurance that the Congress was powerless to authorise restraints in advance of publication."

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

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


15. 283 U.S. 697 (1931).
1.18 The 1931 *Near* case, a great hallmark of press freedom, ruled the roost for the next 40 years till another celebrated case arose in 1971 now known as the *Pentagon Papers* case.\(^{16}\) It was a case in which the U.S. Supreme Court refused to prohibit the *New York Times* and the *Washington Post* from publishing a series of articles based on classified Pentagon documents on U.S. involvement in Vietnam. The court held by majority that (1) any prior restraint on a newspaper bears a heavy presumption against it being unconstitutional; and (2) the government must meet a heavy burden of showing justification for such restraint. Later in *Tornillo*\(^{17}\) it was fairly established that no governmental agency could dictate to a newspaper in advance what it could print and what it could not. Two years later in 1976 the court, after reviewing prior restraint cases (primarily *Near* v. Minnesota and *New York Times* v. United States), again stressed:

> The thread running through all these cases is that prior restraints on speech and publication are the most serious and the least tolerable infringement on First Amendment rights.\(^{18}\)

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\(^{18}\) Nebraska Press Association v. Stuart, 427 U.S. 539.
1.19 In its lead editorial on 1 July 1971, the day after the Supreme Court of the United States had "freed" the Pentagon Papers, the New York Times exulted:

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

INDIA, PRIOR TO INDEPENDENCE

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

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

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

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

\textsuperscript{20}. See the case cited supra note 4.
time Mr Hicky was editing the paper from jail: he was in jail for 16 months though the paper was in existence only for 26 months.

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

1.25 The year 1878 saw the passing of the Vernacular Press Act which was specifically directed against newspapers published in Indian languages, for punishing and suppressing seditious writings. It empowered the government, for the first time, to issue search warrants and to enter the premises of any press, even without
orders from any court. Fortunately, it was short-lived, being repealed in 1881.\footnote{Sisir Kumar Ghosh, the diehard nationalist and founder of Amrita Bazar Patrika, turned his Bengali newspaper into an English daily overnight for evading this restrictive law. The 1878 Act is now best remembered in the annals of this tremendously influential newspaper conglomerate.}

1.26 The Newspapers (Incitement to Offences) Act, passed in 1908, empowered a magistrate to seize a press on being satisfied that a newspaper printed therein contained incitement to murder or any other act of violence or an offence under the Explosive Substances Act. That Act was followed by a more comprehensive enactment, the Indian Press Act, 1910, directed against offences involving violence as well as sedition. It empowered the government to require deposit of security by the keeper of any press which contained matter inciting sedition, murder or any offence under the Explosive Substances Act, and also provided for forfeiture of such deposit in specified contingencies. The rigours of this Act were enhanced by the Criminal Law Amendment Act of 1913 and by the Defence of India Regulations which were promulgated on the outbreak of the First World War in 1914.
1.27 Both the Acts of 1908 and 1910 were repealed in 1922 in pursuance of the recommendations of a committee set up in 1921 to the effect that the contingency in view of which these Acts had been passed was over and that the purposes of these Acts would be served by the ordinary law.

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

1.29 The 1931 Act imposed on the press an obligation to furnish security at the call of the executive. The provincial governments were empowered to direct a printing press to deposit a security which was liable to be forfeited if the press published any matter by which any of the mischievous acts enumerated in section 4 of the Act were furthered, e.g., bringing the government into hatred or contempt or inciting disaffection towards the government; inciting feelings of hatred and enmity between different classes of subjects, including a public servant to resign or neglect his duty. This system of
executive control and punishment of the press was foreign to democratic England. As pointed out by Durga Das Basu, it was an antiquated revival of the trial by Star Chamber of press offences and the licensing system which English democracy had fought and suppressed. The very preamble of the Act - "for the better control of the press" - was offensive.

AFTER INDEPENDENCE

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

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

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

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

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

Democracy is based essentially on free debate and open discussion, for that is the only corrective of governmental action in a democratic set-up. If democracy means government of the people, by the people, it is obvious that every citizen must be entitled to participate in the democratic process and in order to enable him to intelligently exercise his right to making a choice, free and general discussion of public matters is absolutely essential. Manifestly, free debate and open discussion, in the most comprehensive sense, is not possible unless there is a free and independent press. Indeed the true measure of the health and vigour of a democracy is always to be found in its press. Look at its newspapers — do they contain expression of dissent and criticism against governmental policies and actions, or do they obsequiously sing the praises of the government or lionize or deify the ruler? The newspapers are an index of the true character of the government, whether it is democratic or authoritarian. It was Mr Justice Potter Stewart [of the U S Supreme Court] who said: "Without an informed and free press, there cannot be an enlightened people". Thus freedom of the press constitutes one of the pillars of democracy...
1.32 In the Nakkheeran case\textsuperscript{29}, while upholding the right of the magazine to publish the autobiography of a condemned prisoner, the Supreme Court categorically proclaimed that any attempt on the part of the State or its officials to prevent the publication of a matter in a newspaper would amount to prior restraint which is a constitutional anathema. At the same time the court felt that the principles emerging from the English and American decisions need some modifications in their application to our legal system because the sweep of the First Amendment to the U.S. Constitution and the freedom of speech and expression under our Constitution is not identical though similar in their major premises.

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

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

THE PROBLEM OF ACCOUNTABILITY

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

Freedom of the press belongs to the people. It must be defended against encroachment or assault from any quarter, public or private.\textsuperscript{30}

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

Freedom of the press is to be guarded as an inalienable right of people in a free society.\textsuperscript{31}

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

\textsuperscript{30}. Article II of the Statement of Principles, adopted by the ASNE board of directors, 23 October 1975; this code supplants the 1922 code of ethics ("Canons of Journalism").

\textsuperscript{31}. The Code of Ethics adopted by the 1973 annual convention of Sigma Delta Chi.
that it must be treated as a private enterprise. It only performs certain functions which are important to the public. Whereas there is public interest in maintaining certain institutions like judiciary, there is also a public interest in maintaining the freedom of expression of individuals and ensuring that these individuals — whether in the form of the press or otherwise — should be allowed to perform certain functions which are in the public interest. An attempt has been made to try and balance various aspects of the public interest and it is in this context that the problem of accountability assumes importance.

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

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

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

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

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