

## **AN INTERNATIONAL APPROACH TO JOURNALISTIC SOURCE PROTECTION AND A NEED FOR LEGAL RECOGNITION IN INDIA**

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### **Abstract:**

Freedom of speech and expression<sup>1</sup> is imperative for the journalism to function efficiently. The aspect of source protection privilege which is the right of the journalist to protect the source of information is one of the most essential aspects for a newsgatherer to perform and attain its objectives. Various other democratic nations in the world have recognized the importance of journalistic privilege and source confidentiality either in a statutory form or court rulings. Although India being the largest democracy and a mature nation the legal developments regarding source protection is meagre. Various scholars and jurists give their recommendations to make a statute on journalists' privilege citing the advancements in journalist laws in various other countries. There is no legislative provision to support or not even the supreme court addressed this issue even after two recommendations from law commissions. The researcher in this paper addresses the need for legal recognition for source protection privilege in India with a comparative approach towards various other democratic jurisdictions in the world.

Keywords: Source protection privilege, anonymity, freedom of speech

### **Introduction**

Freedom of speech and expression has been considered as a fundamental right which is essential for the healthy functioning of democracy. Journalism plays an important, essential role in a democratic nation. They tend to circulate the demand from the society and publishes information regarding the responsibility of public officers. Media acts as a bridge between people and the government and ensures the free flow of information between both sides. It's not always the media that bring news to the public, sometimes these journalists whether national or international media

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<sup>1</sup> Indian express v Union of India 1986 AIR 515

depend on the public for certain information. Some individuals come forward with news for the publicity of their names but some individuals (hereafter referred to as sources) convey the news to newsgatherers with the precondition of anonymity. The reason for the same is that the unintended consequences that might adversely affect the physical safety and security of the individual. The journalist ethics ensures the journalist to keep the source of information anonymous and that's the reason these journalists argue to protect the confidentiality of the sources. This confidentiality not only includes the source of information also the nature of information (published/unpublished documents, photographs, audio/video clips, etc.). The main problem addressed here is the legal and regulatory norms in the country which obstructs the etiquette of journalists by demanding the source of information. To protect the freedom of the press, the right of journalists to protect the source of information should be acknowledged with the freedom of speech and expression. Despite repeated requests and arguments put forth the source protection privilege for the journalists is neglected in India. So, this paper focusses on the need for legal recognition in India with a comparative approach towards the legislations in various other jurisdictions.

### **Is source protection prevalent in the United Kingdom?**

It is the basic doctrine of journalistic ethics to protect the identity of sources who supply the information in confidence. So, the need for anonymity becomes obvious for the journalist whereas in many circumstances he is compelled to disclose the source of information. In fact, common law did to give an absolute privilege of confidentiality but it did recognize in certain cases. The prominent statement made in the case of *Goodman v. the United Kingdom* acted as a principal in the future. The European Court of Human Rights stated that "protection of journalistic sources is one of the basic conditions for freedom without such protection, sources may be deterred from assisting the press in informing the public on matters of public interest. As a result, the vital public watchdog role of the press could be undermined and the ability of the press to provide accurate and reliable information could be adversely affected."<sup>2</sup> Also, it is to be noted that article 10 of the European convention on human rights(ECHR) deals with the right to freedom of expression and information.<sup>3</sup> The ruling in *Goodwin's* case prominently regulated that the right to protect the source of information is implied in article 10 itself because the fear of disclosure may obstruct the

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<sup>2</sup> *Goodwin v. United Kingdom*(1996) 22 E.H.R.R 123,para.39

<sup>3</sup> Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) (ECHR) art 10.

flow of information. Although the common law did not give an absolute right, it did recognize in a landmark judgment in the case *R v. Broadcasting complaints commission ex p. Granada TV* that the judge has discretion as to force the name of their sources even where their identity was relevant to an issue.<sup>4</sup> The common law approach towards the journalist protection of sources was surprisingly perceptible. To strengthen the argument section 10 of Contempt of court Act (1981) insists that the court cannot demand disclosure of the source of information contained in publication unless there are interests of justice or national security.<sup>5</sup> This stands as an armor for the journalist who wants to protect the source of information. Also, the police and criminal evidence Act (1984) acts as a legislative safeguard on source protection. Journalistic sources come under excluded material and such material can only be seized with a warrant under sec 9 of the Act. Also, the police must have reasonable grounds for believing that the required information is substantially essential.<sup>6</sup> These legislations and case laws made the courts in the UK to be hesitant in demanding for disclosure of confidential information. In some cases, government officials also recognized the importance of journalistic sources. In 2015, while drafting the serious crime bill<sup>7</sup>, Julian Huppert added a new clause that ensured the confidentiality of journalistic sources. Even though it was rejected the then minister Karen Bradley added a new government clause and explained his intention to include provisions protecting the public interest and confidentiality of journalistic sources.<sup>8</sup> So the nation considered the protection of journalistic information is necessary to ensure press freedom as it reflected in the laws and codes of conduct.

### **Source protection privilege-Australia**

Australia is a part of commonwealth nations and it ranks 26<sup>th</sup> position in world press freedom index 2020<sup>9</sup> ahead of countries like India, the US, and the UK. It considers freedom of the press as an integral part that helps in the functioning of the democratic society. It is the obligation of journalists to share the source of the information and the name of the publisher in the publication itself unless there is an exception where the journalist is in an agreement of confidentiality with

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<sup>4</sup> *R. v. Broadcasting Complaints Commission ex p. Granada TV*[1995] E.M.L.R. 16

<sup>5</sup> , s.10, Contempt of Court Act 1981

<sup>6</sup> s 8(1)(d), Police and Criminal Evidence Act 1984,

<sup>7</sup> Serious crimes act 2015, <https://services.parliament.uk/bills/2014-15/seriouscrime.html>

<sup>8</sup> Column 96, Karen Bradley, Hansard parliamentary debate, *House of Commons Hansard Debates for 23 Feb 2015 (pt 0003)* (2015), <https://publications.parliament.uk/pa/cm201415/cmhansrd/cm150223/debtext/150223-0003.htm>.

<sup>9</sup> Australia | RSF, (2019), <https://rsf.org/en/australia>, Subject: Press freedom index

the source of information. The Australian journalist code of ethics stated that the journalist should practice to keep the anonymity of sources, if the informants rely on it. But Australia has a bad history of treating journalists. There are multiple instances where journalists were forced to reveal the sources even though there is no public interest involved. The request for revealing sources requires proper reason and relevance. The landmark judgment in 2005 where Gerald McManus and Michael Harvey from Herald Sun were convicted and fined for not revealing their confidential source and they also face personal suffering.<sup>10</sup> This conviction became a huge explosion where the debate on freedom for journalism arose. Later on, in 2011 the Evidence Amendment (Journalists Privilege) Act<sup>11</sup> was enacted which gave certain protections to the journalists in the country. It allowed the court discretion to order a journalist not to answer any questions which might reveal the source of their information. Although there were several arguments that the act did not provide explicit protection for journalist and it relies on the discretion of the court, it is to be noted that the importance for media and journalism is being elevated and the federal courts in Australia started to interpret matters ensuring the protection of journalist and ordered for revealing of source of information only if the public interest outweighs the effect of disclosure.

### **Status in Austria**

Austria gives indestructible protection for the confidentiality of journalistic sources. The media act of 1981 deals with the regulation and procedural aspects of media and journalism in the country. Article 31 of the media act provides explicit protections for the confidentiality of sources for publishers, editors, journalists, and other employees of the media industry. They were given the right to refuse to answer certain questions if that refers to the sources.<sup>12</sup> This provision was considered as esteem in the country and authorities showed due reverence in protecting the confidentiality of the source of information.

### **Is anonymity a fundamental right? – Sweden**

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<sup>10</sup> R v McManus and Harvey [2007] VCC 619

<sup>11</sup> federal register of legislation Australia, *Evidence amendment (journalist privilege) act, 2011* (2011), <https://www.legislation.gov.au/Details/C2011A00021/Html/Text>.

<sup>12</sup> Austria | federal Act of 12 June 1981 on the Press and other journalistic media (Mediengesetz - MedienG) StF: BGBl. Nr. 314/1981

Sweden ranks 4<sup>th</sup> place<sup>13</sup> in the freedom of press index 2020. The media-friendly nation has always intended to protect the journalistic ideas. The concept of source protection augmented more than 120 years ago. The country stood distinguished in the European continent by showing the utmost approbation towards the ethics of journalism. Here, the journalist's privilege is a constitutional right. The freedom of press Act which is a part of the Swedish constitution entitles the right of anonymity.<sup>14</sup> Also, the researcher found interesting that the Swedish law allows to initiate a criminal proceeding against journalist if their confidential identity is revealed without authorization. The Swedish law also initiate actions against public authorities if they violate by making queries about journalistic sources. This guarantees the transparency of media functioning in the country.

### **Are there countries that provide absolute protection for journalists?**

Protection for journalistic sources vary from country to country. The relationship between journalism and democracy is the foremost and predominant in maintaining the conduct of administration in a country. Many countries provided press-shield laws to grant an absolute privilege for journalists towards the protection of their sources.

1. The jurisdiction of Pennsylvania provides an absolute protection privilege for the newsgatherers. The law in the country demands that there is no need to disclose the source of any information obtained in any legal proceeding or investigation.<sup>15</sup>
2. Indonesia grants the journalist the right to refuse. The press act of the nation permits the journalist to discard questions pertaining to reveal the divulging identities of sources.<sup>16</sup>
3. The law adopted by Mexico in 2006 furnish absolute protection for journalists to protect their source identity also imposes criminal penalties on authorities who violate the right.<sup>17</sup>
4. In turkey, the 2004 press law states that the owner of the periodical or editor cannot be forced to disclose the source of information also they cannot be legally testified on the issue of non-disclosure.<sup>18</sup>

Many other countries and jurisdictions also provided the right to hide the source of information to journalists. By granting the journalists an absolute privilege helps the journalist not only to

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<sup>13</sup> Sweden | RSF, (2019), <https://rsf.org/en/sweden>, Subject: Press freedom index

<sup>14</sup> The Fundamental Law on Freedom of Expression, SFS nr: 1991:1469

<sup>15</sup> CAL EVID CODE, Para. 1070(a) (West, 1995).

<sup>16</sup> Indonesia 1999 Law No 40 On Press, s. 1 (10)

<sup>17</sup> Código Penal Federal, 243 Bis inciso III

<sup>18</sup> Press Law, No: 5187, s.12, 9 June 2004

protect sources also to protect himself from various external dangers. In the last decade, countries with less protection for journalists face various hindrances such as life threats, physical abuses as well as emotional blackmails. The researcher feels that the shield laws enacted in the above-mentioned countries play a vital role in minimizing the number of violations against the media persons.

### **Aspect of source protection in India**

India is the largest democracy. It also has various historical aspects involved in the ambit of media laws. The history of media law in India dates back to 324-300 BC when the punishment for spreading rumors was written in arthashastra during the reign of Chandragupta Maurya. Also, the pre-typographic newspapers are found to be in later Mughal times. The actual functioning and role of the press started after 1870. Many laws were prevailing to regulate the performance of journalists in India. Various governments have enacted media-related laws during the post-independence era. The press in Indian society was gradually gaining prominence and attained an autonomous situation as it had the freedom to govern itself and take care of its affairs. The concept of source protection privilege is not properly addressed in any of the Indian laws. This legal ambiguity has led to various hindrances suffered by the journalists in the country. The freedom of speech and expression jurisprudence has a lot of ambiguity pertaining to this issue. The Indian courts were reluctant to address the principle of source protection even though it was approached several times. The main reason for the ambiguity is that the freedom of speech and expression jurisprudence did not elevate to protect the freedom of the press. The researcher hereafter will address briefly the constitutional and ethical aspects of journalistic source protection and also would emphasize why India should show attention in this regard.

The right to speech and expression guaranteed under the constitution of India prevails as a realm in various sectors. The right to free speech doesn't mean as it sounds. A literal interpretation of this aspect would end up in problems. There are various altercations and hindrances revolving around this mechanism. Article 19(1)(a)<sup>19</sup> of the constitution states that all citizens have the fundamental right to freedom of speech and expression. This fundamental right may be reasonably restricted by the grounds under Article 19(2)<sup>20</sup>, namely public order, nation's security, related to

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<sup>19</sup> Constitution of India ,Article 19(1)(a)

<sup>20</sup> Constitution of India ,Article 19(2)

friendly nations, morality, defamation, etc. Although freedom of the press is not explicitly mentioned in the Indian constitution it is implicit under freedom of speech doctrine. The court in the case of *Brij Bhushan & Another v. The State Of Delhi 1950*<sup>21</sup> recognized that freedom of the press was an essential part of the right to freedom of speech and expression. Although it was recognized press or journalism in India did not flourish much. there was no conventional protection as such to protect the rights of the journalists. For instance, the subject of source protection or journalist privilege did not get much attention even after many years. The only legislative provision which talks about this in section 15(2) of the press council of India Act. Section 15(2) of the press council act, 1978 states that Nothing in sub-section (1) shall be deemed to compel any newspaper, news agency, editor or journalist to disclose the source of any news or information published by that newspaper or received or reported by that news agency, editor or journalist.<sup>22</sup> The press council of in India, instead of acting as an aegis for journalists, it acted as a complaints handling body. Not only this authority was futile in nature the statutory provision of source protection privilege was incapable to attain its intention. According to the norms, the journalist cannot be compelled by the press council to disclose the source of information, but if the journalist discloses voluntarily, it would not be considered as a violation of journalist ethics if it is to repel charges against him. There is an ambiguity regarding the rule requiring a newspaper not to publish matters disclosed to it in confidence. Although it has some exceptions. The press council authority and the legislative norms are in fact doing disfavour and injustice to the journalist community. The main issue here is the ambiguity regarding the extent of source protection privilege. Journalist acts enigmatic when the conflict arises whether to respect the confidence of the source or to disclose the source to court when demanded. The journalist feels clueless to handle the judicial compulsion. Even though codes of conduct of various newspapers are very concerned about morality in source protection doctrine, there are very few institutions that allow their newsgatherers to maintain anonymity to the full extent. There is no specific statutory provision in India to protect the journalist from disclosure in courts. A journalist may be booked with charges of contempt and nondisclosure if he fails to divulge the source of information. The Indian evidence act remained silent regarding source protection while it talked about the communication between a lawyer and a client in sections 126 and 129.<sup>23</sup> The law commission of 2003 in its 185<sup>th</sup> report recommended to include source protection privilege for the journalists by the inclusion of section 132A in the India Evidence Act 1872. It states that “No Court shall require a person to

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<sup>21</sup> *Brij Bhushan & Another v. The state Of Delhi 1950 AIR 129*

<sup>22</sup> S.15(2) , Press Council India act 1978.

<sup>23</sup> S.126 &S.129 of Indian Evidence Act, 1872



disclose the source of information contained in a publication for which he is responsible, unless it is established to the satisfaction of the Court that such disclosure is necessary in the interests of the sovereignty and integrity of India, the security of the State, friendly relations with foreign States, public order, decency or morality or in relation to Contempt of Court or incitement to any offence.”<sup>24</sup> The commission also referred to the 93<sup>rd</sup> law commission report on disclosure of sources of information by mass media<sup>25</sup> and 132<sup>nd</sup> report on CrPC<sup>26</sup> that talked about the inclusion of a provision to protect the journalist from forced disclosure of the source of information in courts without a reasonable exception. It is always the public interest prevails over the source protection privilege. The framers of the reports made a comparative analysis with different countries and gave the recommendation. But the legislators ultimately failed to make provision. The courts in India always remain silent on this issue and refuse to make a decision in favour of journalists. The following case would support the researcher’s argument. In the case *Javed Akhtar v Lana Publishing Company* (1987)<sup>27</sup> a well-known scriptwriter asked for the disclosure of sources since defamatory comments were published about him in an article. The defendants compelled to apply ” newspaper rule” which is prevalent in the U.K so that they are not forced to disclose the source of information. But the court delivered judgment in favour of the plaintiff stating that there is no “newspaper rule” in the jurisdiction of India or there is no precedent applying the rule. In another case of *Jai Prakash Agarwal v Bishambar Dutt Sharma* (1986),<sup>28</sup> a contempt petition was filed against two reporters for a criticized publication of the judicial decision on an election petition. The issue here whether they should be asked to reveal the source of information. The Delhi high court in this case stated that there is no absolute privilege for the press to hide the source of information nor the journalist has immunity. The court may ask the journalist anytime to disclose the information when considered necessary. It has been many years and still, there are no decisions or legislation passed in favour of journalists to maintain the source confidentiality. But in 2011 whistleblowers act 2011<sup>29</sup> was enacted which considered the importance of source protection, but it mainly protected the interest of the complainant. This act was limited only to the government sector. Although it had its own flaws, journalists considered it to be an improvement to protect their interest but of course not to the complete extent.

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<sup>24</sup> P 421 law com report 185th

<sup>25</sup> Law Commission Report No. 93(1983) - Disclosure of Sources of Information by Mass Media

<sup>26</sup> Law Commission Report No. 132 (1989)- Need for Amendment of Chapter ix of CrPC

<sup>27</sup> *Javed Akhtar v. Lana Publishing Company*, AIR 1987 Bom 339

<sup>28</sup> *jai prakash agarwal vs bishambar dutt sharma*(1986), (Protection of Sources, 2012), <http://asu.thehoot.org/resources/press-laws-guide/protection-of-sources-6295>

<sup>29</sup> Whistle blowers act, 2011



**Conclusion:**

The researcher finds that there are many countries in the world with proper shield laws and absolute privilege to protect the journalistic source confidentially. From the outcome of the research, the research feels that despite many recommendations from the law commission and various other comparative studies the lawmakers failed to enact a particular law to protect the interests of the journalist. In many circumstances, the judiciary also ruled in favour of public interest over journalists. This unfavourable approach by the judiciary made the journalists in India feel unprotected and are unable to perform their objectives. In order to fulfil the duties of the democracy journalists have to rely on these anonymous sources and unless there is a strong legal guarantee on anonymity not many valuable information will come out. The outcome of the research clearly exhibits the need for India to make a law that keeps the balance of journalistic privilege and the exceptions. The judiciary should commiserate on journalists and strenuously protect the right of press on source confidentiality by eliminating the ambiguity in protecting the source confidentiality.

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