

# Democracy and free Press

By Makhdoom Ali Khan

*Dawn  
9-9-94*

A FREE Press every politician adores — in times of trouble and then no more. Benazir Bhutto, during her first term in office, was an exception. She left the Press alone. No Press advice was issued, no censorship imposed, no journalist was threatened with prosecution, no paper was closed down. All this is quite normal in a democracy and is taken for granted. All this was very unusual for us and received much praise.

When she fell from power, in her darkest hour, the Press returned the compliment. When the power of the state was unleashed against her, the Press made sure that her voice was heard. Now the honeymoon seems over. From the petty viziers to the powerful President, as the gaze of the Press has made many of the powers that be uncomfortable, the second Benazir government appears to be having a change of heart.

The law ministry, its feathers unruffled, by damaging disclosures about even those of our rulers who claimed to be above suspicion, threatens to strike back in the only way it knows. A draft has been prepared, which, if approved by the cabinet and enacted into law, will amend the Pakistan Penal Code, 1860, and the Code of Criminal Procedure, 1898, to change the law and procedure relating to the offence of defamation.

Section 499 of the Penal Code defines the offence of defamation. The First and the Fourth Exceptions to this section respectively permit a person to defend himself by pleading that the statement was true or that it was based on a truthful report of judicial proceedings. Identical provisos are now to be inserted in these exceptions. These will cast a heavier burden of proving the truth on the accused.

The nature of imprisonment is also to be changed. The quantum of fine is to be enhanced from fifteen thousand to one million rupees. Some of the money, thus secured, is to be disbursed to the victim. Where asked for, the complainant is to be excused from personal appearance in courts. Some of this appears innocuous. That, however, is not the case.

The law even in its current state does not save a person who speaks the truth from prosecution. The complainant merely has to show that the statement complained of

move may mean two years of rigorous imprisonment and loss of whatever property he / she may have along with the savings of a lifetime. The same fate may result from a wholly truthful report or valid imputation which is otherwise difficult to substantiate for lack of access to official files and documents, particularly in the event of litigation.

We must not forget that the proposed law is likely to affect journalists more than anyone else. A profession which, given the hard working conditions and the poor wage structure, is comprised largely of people who do not have much in terms of worldly possessions. The draft law threatens to leave them with nothing at all. What they are robbed of will be used to make the rich richer.

The fearless journalist and the brave citizen may still discharge his duty. The majority would take a more pragmatic course. Free expression about the doings of public figures, already quite restricted, would be further chilled. Without free speech, democracy is stripped of all meaning.

Of course, the state has a duty to protect the reputation of individuals against wilful reviling and vilification. One does not, however, use a cannon to swat a fly. The common law which gives an individual the right to claim damages for defamation adequately protects that interest. There is hardly any justification for retaining defamation as an offence on the penal statute books. None can be offered for imposing more stringent penalties and changing the rules to make

---

The Prime Minister and her colleagues may not always be thrilled by what the Press writes about them. This, however, is a price which one pays for being in public life. For all its faults the Press provides an invaluable service. A free society is impossible without

The law even in its current state does not save a person who speaks the truth from prosecution. The complainant merely has to show that the statement complained of has hurt his reputation. Falsity is not an ingredient of the offence. Section 499 of the Penal Code requires that an accused who seeks the shelter of truth and claims the benefit of these Exceptions must demonstrate that the imputation is true or suffer conviction.

The provisos which the draft law seeks to insert, thus appear to do nothing more than restate the law. Anyone familiar with the law knows that this cannot be so. We all know that half of the time our legislators do not know what they are doing and for the rest of the time what they do makes not much sense. In law we must presume that all what they do has a meaning; not a word that they use is redundant and an amendment always makes a change in the existing law.

On these principles the provisos will have to be interpreted as making a change in the law. The law, at the moment, only requires the accused to establish prima facie or at the most on a balance of probabilities that the statement complained of as defamatory, is true. That done, the burden of proving otherwise is shifted on to the complainant. If the law is amended the burden on the accused will be heavier. He will be required to establish the truth of his assertions, beyond a reasonable doubt. Failure would result in conviction.

The consequences would be exactly the same where the accused claims the benefit of the Fourth Exception to Section 499 and states that he has published a substantially true report of the proceedings of a court of justice.

In our country where the citizen and the journalist alike have no access to official records and information, where an archaic and draconian Official Secrets Act still holds the field and all legally admissible evidence is in most cases in the control of the complainant, the placing of this heavier burden of proof on the accused can only have one meaning: In even the most blatant cases of misuse of public office and corruption in high places the Press would have to choose between keeping quiet or risking conviction.

The change in the nature of the imprisonment and the quantum of fine would mean that a person who makes a statement before securing the proof may suffer rigorous imprisonment of two years and fine of one million rupees. The fine would be recoverable as arrears of land revenue, that is by the sale of the property of the accused. It can then be awarded as compensation by the court to the complainant.

A journalist or a citizen who proceeds in the public interest to tell the truth would, under the proposed law, put at risk not only his liberty but also his property. A simple error, one wrong step, one false

invaluable service. A free society is impossible without a free Press.

conviction easier.

The only provision which appears to be a change for the better in the draft law is the one which authorises the court to dispense with the presence of the complainant. Its timing leaves much to be desired. It is no secret that President Farooq Leghari is upset over the disclosures about his real estate deals. The government has already announced the initiation of prosecution for defamation to please the President. The proposed law appears to be yet another step by the minions of the law ministry to assuage the President. While many of the substantive changes may offer him no joy as the Constitution prohibits retroactive application of penal laws, the procedural change can have retrospective application and may provide some comfort. What may be the right thing is being done for the wrong reason.

The only good news in all this is that the Prime Minister is reported to be not keen on the Bill. In a meeting with the representatives of the Press she has agreed to defer its enactment. This, however, is not enough. She must act quickly to kill it.

Hardly an important occasion goes by when the Prime Minister does not reiterate her commitment to democracy and draws attention to her democratic credentials. She frequently praises the human rights record of her government. All this would be given a lie if the proposed law is not nipped in the bud. A government which enacts a law that threatens to strip journalists of their liberty, subject them to hard labour and sequester their property for the offence of speaking freely and truthfully can be anything but democratic.

The Prime Minister and her colleagues may not always be thrilled by what the Press writes about them. This, however, is a price which one pays for being in public life. For all its faults the Press provides an invaluable service. A free society is impossible without a free Press. A democracy cannot function without it. Even the errors it makes, the limits it oversteps, the anguish it causes has to be borne with fortitude as an integral part of democracy.

So far as her more trigger-happy and over-sensitive colleagues are concerned, the Prime Minister can improve their knowledge, if not their level of tolerance, by quoting to them what President Kennedy had said at a news conference about the Press: "I am reading more and enjoying it less. I talk to myself about it and at times I talk back to it but I don't plan to issue any general indictment of the Press."