PART V

Summary And Concluding Remarks
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CHAPTER XV

SUMMARY AND CONCLUDING REMARKS

1) Press has been established and recognised, conceded and accepted as an effective mass medium of expression. Importance of freedom of press is of immense vitality. Importance of freedom of the Press has been advocated and struggled by philosophers, sociologists, political thinkers, jurists, constitutionalists, judges and journalists for achieving variety of ends. In a democracy freedom of Press is regarded as extremely vital and crucial.

2) Along with increasing importance of freedom of Press the manner and frequency of the controversies recurring in the law relating to the media are increased. The sweep of mass media law is vast and its mandates are numerous.

3) What is meant by 'Freedom of Press' is, in general, freedom of newspapers to print and publish news and views without any Governmental interference. The role of the press in a developing and democratic society should neither be that of an adversary nor an ally of the Government. The free press should be a constructive critic.
4) Freedom does not mean license. Every liberty, if left uncontrolled, inherits tendency to become a license. Press is not free from blemish. It is for such reasons that number of great thinkers have emphasised the aspects of limitations on freedom of press.

5) Any modern State depends upon its press, and so, the freedom and quality of its press have become ensured indications of the freedom and quality of a State. The history of a newspaper is, almost by definition, the history of the country, in which it is published. The newspaper first flourished in areas where authority was weak or the rulers were more tolerant e.g. Germany.

6) England, which has eventually advanced beyond all other countries journalistically, has no special claim as home of modern Press. However, it is equally true that historically the origin of 'concept of freedom of press' is born in England. Famous Areopagitica of philospher and poet John Milton are the best known supporters of the great pleas for a free press. Famous political writer and thinker of England - Jhon Stuart Mill - has impressed upon the thinking of the world for his thoughts 'on liberty of press'.

7) United States is the first country in the world which guaranteed freedom of press unequivocally in its written constitution.
8) The concept of freedom of press developed in India as a part of and along with Nationalist Movement which aimed at the independence of India. Therefore, aim of Indian Press during pre-independence period was to oppose and criticise British Rulers. This continued till the nation was freed.

9) The concept of the Right, Liberty and Freedom has emerged as a sociopolitical value. The historical, philosophical and political evolution of the same has varied from age to age, place to place, time to time and with conditions of life in the respective period.

10) Liberty is a concept. It is pure. Being a concept, it is not changing or relative. Its forms may change. It cannot be given or guaranteed by some one or by any statute. But it exists. Freedom is an expression or form of extent of accepted liberty. Freedom can be provided, guaranteed, recognised, regulated, limited by statute or by some other means i.e., authority. Thus, so far as definition and meaning is concerned, there is no difference between the terms liberty and freedom. However, liberty is the conceptual, the substantive aspect of freedom. Therefore, liberty is wider in its connotation so as to include freedom in itself, viz., under Indian Constitution, Art.21 deals with conceptual aspect of freedom while Art.22 with regulated freedom.
11) The word 'right' in its ordinary sense means to make claim and to assert in making that claim that one is entitled and justified to do so. The Universal Declaration of Human Rights adopted and proclaimed by General Assembly of U.N.O. on 10th December, 1948, in its preamble recognises inalienable rights of all members of the family as foundation of freedom, justice and peace.

12) In India, there is no specific constitutional provision guaranteeing freedom of the press. Indian Constitution guarantees right to freedom of speech and expression under Art.19(1)(a). The Courts in India have spelt out freedom of press as a 'species of which freedom of speech and expression is a genus.' Thus freedom of press is a fundamental right included in right to freedom of speech and expression, subject to reasonable restrictions under Art.19(2).

13) Under Art.32 of the Indian Constitution, right to move the court has been guaranteed as a fundamental right. Thus fundamental rights are justiciable. Accordingly right and remedy go hand in hand. Therefore, enforcement of right to freedom of press is also guaranteed under Indian Constitution.

14) Unlike Indian Constitution, United States Constitution guarantees right to freedom of press expressly. Under United States Constitution no limitations
are put forth upon right to freedom as such. Thus constitutional guarantee is in absolute terms. However, limitations are evolved by judicial pronouncements. Under United States Constitution there is no express provision as to the power of judicial review. But it is there impliedly. Doctrine of judicial review has been evolved and now settled is founded on judicial decisions.

15) Provisions of fundamental rights under Part III of the Indian Constitution in general and guarantee of freedom of speech and expression in particular, is based on Bill of Rights under Amendment I of the United States Constitution. Theory of absolute rights is discarded under both Constitutions.

16) Under Indian Constitution no rights are reserved to the people. There is no provision such as Xth Amendment to United States Constitution which expressly reserves to the people powers not delegated under the Constitution or denied to the States. It, therefore, follows that under Indian Constitution, once the theory that the legislatures are the delegates of the people is given up, then the theory that in delegating certain powers to the legislatures, the people reserved fundamental rights to themselves lacks any foundation.

17) Drive for inclusion of Bill of Rights by way of Ist Amendment to U.S. Constitution and discussions
during the Constituent Assembly while making of India's Constitution indicate that fundamental right to freedom of press has been considered as a symbol of being the written constitutions progressive and liberal.

18) In India, Press as an institution, has no special right or privilege. Press stands on no higher footing than any citizen and cannot claim any privilege as distinct from that of a citizen. Any non-citizen cannot claim right to freedom of press.

19) Many newspapers are published by companies. A company is not entitled to the fundamental rights enumerated under Art.19 being a non-citizen. As such any company would not be entitled to claim freedom of press as a right. However, if a newspaper company is incorporated in India, its Indian shareholders, who are citizens of India, have a right to challenge invasion of freedom of press. Recommendation of the Second Press Commission in its report (1982) that all Indian Companies engaged in the business of communication and whose shareholders are citizens should be deemed to be 'citizens' for the purpose of the relevant clause of Art.19, is endorsed here.

20) Press as an industry is not immuned from ordinary or general laws which are applicable to other citizens and industries.
21) Freedom of press in its concept includes printing and publishing of the news, views, opinions and ideas. Such views and opinions may be of the editor, publisher, author or that of any other person. It includes to receive and propagate ideas and information of social and political or economic or furtherance of human thought or literature. It includes freedom to distribute and circulate ideas, volume of circulation, to choose class and number of readers. Newspapers have a right to determine size and fix price of their paper.

22) The concept of freedom of press in essence means freedom from precursorship or restraint prior to publication. Whole struggle for freedom of press is against the prior restraint in the form of licensing.

23) In view of the settled principles governing and protecting essential concept of freedom of press, issue of non-mentioning of 'freedom of press' specifically in the array of guaranteed fundamental rights under Art.19(1) becomes less important practically. Under the United States Constitution where freedom of press is guaranteed specifically, the thinking of scholars goes on the lines that freedom of the press as a right recognizably distinct from that of freedom of speech is an idea whose time is past due.

24) Under the present provisions of Indian Constitution and as per settled law on the point, freedom
is fully guaranteed to the press under the freedom of expression clause. No useful purpose will be served by inserting a separate provision in the Constitution on freedom of the press as that concept is already embodied in Art.19(1)(a).

25) Freedom of press is considered under Art.19(1)(a). It also falls for consideration under Art.19(1)(g), which has a commercial aspect. Under the garb of regulation of commerce, the substance of freedom of the press may be eroded by governmental attitudes without a frontal attack on freedom in theory. Indian Supreme Court has laid emphasis on the command of means as essential of freedom.

26) Economic and tax measures, legislation relating to social welfare and wages, factory laws, monopolistic practices in trade, etc. may have some effect upon freedom of the press when applied to persons or institutions engaged in various forms of communication. But where the burden placed on them is the same as that borne by others engaged in different forms of activity, it does not constitute abridgement of freedom of the press. The use of such measures, however, to control the 'content' of expression would be undesirable.

27) Freedom of press is a part of basic structure of Indian Constitution. Because if freedom of press is
totally deleted from the Constitution, it would amount to violation of basic structure of the Constitution. However, this clear position is required to come out from judicial pronouncement.

28) Freedom of press is a fundamental right which is to be weighed with the directive principles of State Policy in Part IV of the Indian Constitution.

29) There is no any proclamation of Emergency after 1975. Indian Press has witnessed Press Censorship during the period of that emergency. The power of censorship should be invoked only in case of extreme necessity in the national interest and only under such circumstances that situation cannot be saved without resort to this power.

30) Under Indian Constitution, a balance between two competing interests, i.e. freedom of press and social interest, is sought to be achieved by providing limitations on individual freedom amounting to constitutional exceptions in the form of reasonable restrictions under Art.19(2). Reasonableness of restrictions is to be examined by the courts. Further reasonableness of restriction in a particular statute is to be examined and not the reasonableness of that statute.

31) Art.19(2) as it stands today, is inserted by Constitution (1st Amendment) Act, 1951, with retrospective
effect. Art.19(2) was again amended in 1963 by which the grounds of 'sovereignty and integrity of India' were added.

32) United States Constitution does not provide expressly any limitations on individual rights. However, it does not mean that there are no limitations on individual rights and that they are absolute. The task of balancing individual rights and security of social interest has been done by the United States Supreme Court. While exercising judicial power at such situations, courts had to formulate and evolve some rules and tests with the help of constitutional doctrines such as 'police power' of the state and due process clause. On the basis of it the question whether the state has encroached upon the individual rights in an impermissible way has been decided. Thus, practically individual rights are not absolute as different tests for limitations are evolved by the United States Supreme Court viz., clear and present danger test.

33) The limitation Clauses under Art.19 i.e. Clauses (2) to (6), open the door to judicial review of legislation in India in the same manner as the doctrine of Police Power of the State and due process clause have done in United States. The clauses under Art.19 imported the doctrine of Police Power with the difference that while the 'grounds' of abridgement of the individual
rights were not enumerated in the Constitution of United States, under the Indian Constitution they have been specified.

34) The concept of 'reasonableness' seems to be the reflection of the "common right and reason" under English law. It is thus universal sense of fairness running through the judicial role by 'common right and reason' under English Law, by 'due process' clause in United States Constitution and by 'reasonableness of restriction' under the Indian Constitution.

35) Provisions in respect of exceptions in both the Constitutions may substantially be the same, but materially different. The scope for discretion and creative activity for the judge is very much the same under both the Constitutions yet Indian Constitution provides for more express statement of matters of exceptions which leads to rigidity while United States Constitution without specifying matters of exceptions leaves the American Judge in a sort of multidimensional control of the situation.

36) Apart from the reasonable restrictions that could be imposed upon freedom of press under Art.19(2), there could be interference by the State by other way, in the exercise of that freedom. Such an effort is forbidden by Art.13(2). What Art.13(2) does is that it forbids the
making of any law which has the effect of 'taking away' or 'abridging' any fundamental right. There can be no ambiguity or controversy when a right is completely taken away, the action would be clearly hit by Art.13(2). However, difficulty may arise while interpreting the term 'abridge' when a Law, Rule or Regulation is designed with an object other than abridgement of freedom of speech, but the impact of such Law, Rule or Regulation upon freedom of speech, is secondary, incidental or indirect. In such cases the cardinal principle is that there is no abridgement of the freedom unless the 'context' of speech or expression i.e. freedom of press itself is regulated.

37) Press is an industry and a profession as well. A newspaper is a public utility and the exercise of ownership rights has to be subject to some measure or restraint and regulation. However, public interest may be the only criteria which regulates this activity.

38) There cannot be an absolute right. One has the duty to allow other citizens to enjoy their rights. Enjoyment of individual right in a free and open society is qualified by social obligation. The press has a social responsibility and accountability to the public. The theory that the freedom of the press knows no restraints is not practicable. Because while exercising freedom of press it is required that the freedom of speech and
expression of readers is also to be protected. Therefore provisions for reasonable restraints in the public interest are desirable.

39) Legislative privileges may be justified for the reason of their necessity for a Legislative House to maintain its authority and smoothness in business. Privileges are also attached to the members of a House individually. The privileges of the Houses of Parliament and the State Legislatures are defined by Articles 105 and 194 of the Constitution respectively.

40) Breach of privileges and contempt of Legislature are offence under the special provisions of the Constitution. Legislature is the sole judge of such breach and contempt by the press. Courts have no jurisdiction to sit in appeal to review the decision of the Legislature. Higher Judiciary has limited power of review to see whether the legislature has acted within the ambit of privilege provisions or not and it is because of guarantee of fundamental rights under Part III of the Constitution.

41) Power of legislature in the matter of breach of privilege is very broad and undefined. Legislature may order punishments such as admonition, reprimand, imprisonment and exclusion. The procedure followed while dealing the matters does not provide for legal
representation. Privileges are not defined or categorised. So also there are no categories of privileges for which the potential punishments can be assessed. Speaker of the House who issues notice or warrant in the event of breach, is the judge to decide the punishment. This is again not in accordance with the principles of natural justice and fair trial. All this leads to uncertainty in the matters of privileges. All this leads to the criticism and comments of arbitrariness and waywardness of the Legislative House.

42) Press being a non-member of the House has to face diverse types of circumstances. Usually in many cases of alleged breach of privilege of a House by a newspaper an apology tendered by the editor, printer or publisher has sufficed the matter. However, uncertainty in the area of privileges and non-definition of categories of privileges hamper the activity of the press in a free and healthy atmosphere, which is not in conformity with the guarantee of freedom of speech and expression. Therefore, the matter requires urgent consideration.

43) It is, therefore, necessary from the point of view of freedom of press that the privileges of Parliament and State Legislatures should be codified as early as possible. For that purpose Draft Bill prepared by Karnataka Legislative Assembly on February 5, 1988 is
annexed recommended muttatis mutandis for adoption with suitable amendments as per requirements.

44) Contempt of court by press is a criminal wrong done against the judiciary or judicial system as a whole. It is punished under Section 12 of the Contempt of Courts Act, 1971 by imprisonment or fine or with both. Contempt of court is not an offence under any of the provisions of Indian Penal Code, 1860. Contempt needs mens rea or tendency of the matter published to interfere in the proper administration of justice. Contempt proceedings are summarily tried. Ordinarily, courts do not punish for contempt of court unless it is really a serious matter or causes substantial interference in the administration of justice. However, instances for conviction for contempt are also frequent.

45) Publication of comments on or criticism of public utterances of judges is not contempt because the judge sheds his mantle as a judge when he enters the public arena of debate.

46) In view of the mushroom growth of the newspapers and in view of the increasing tendency of reporting judicial proceedings, particularly prior to and during pendency of trial, it is always desirable to empower judiciary with contempt jurisdiction. The Press, however, must at all times act in a responsible manner.
The press should avoid use of immoderate language, to eschew the publicity of pending trials as sensationalising events with a view to increase circulation.

47) In India we have Westminster model of executive functioning in secrecy. But the need of the day is of an open Government accountable to the people. It cannot be disputed that in matters of security of the State, defence installations, secret pacts, if any, with other country, so also future economic plans, commercial intelligence, scientific inventions etc. need protection of secrecy. A balance is required to be maintained in between the democratic requirements of openness and continuing need to keep certain matters secret. At present secrecy is the rule and openness an exception. The need for balance demands that openness may be the rule and secrecy the exception.

48) The most likely use of access to the Government documents is by the press. Press acts as surrogate of the people in criticising the Governmental functioning and mannerism of working. The matter of official secrecy vitally affects the efficacy of the press in performing role as fourth wheel of running democracy.

49) In governing the matter of official secrecy at present there is Official Secrets Act, 1923. There is a need to amend the said Act on the same lines as the British Government is amending its Official Secrets Act,
1911. In the circumstances press would be the most important beneficiary of the liberalisation of present strict rules of secrecy.

50) Recommendation of the Second Press Commission that Sec.5 of the Official Secrets Act, 1923 may be repealed and substituted by other provisions suited to meet the paramount need of and other vital interest of the State as well as the right of the people to know the affairs of the State affecting them may be considered as early as possible.

51) In United Kingdom, Official Information Bill has been proposed. In United States there is Freedom of Information Act, 1974. In India right to Information may be guaranteed as a fundamental right.

52) Press may be afforded protection by suitable legislation in the matter of disclosure of source of information by the press.

53) There should be a separate central legislation granting specific right to information to the people which would serve for ensuring fearless functioning of the press and would protect the press in the matter of disclosure of sources of information by press. It is therefore necessary from the point of view of freedom of press that an enactment achieving above purposes may be passed at the earliest. For that purpose Draft Bill
prepared by Karnataka Legislative Assembly namely 'Freedom of Press Bill, 1988' is annexed and recommended here for adoption with suitable amendments as per requirements.

54) Immorality, immodesty or obscenity is a wrong against whole society. It is a wrong injuring morals of the society. Therefore, subjection of right to freedom of speech and expression to the reasonable restriction in the interest of public decency is imperative for the preservation of morality in the society.

55) Indian Courts while dealing with alleged obscene publication have fully secured freedom of press in the area of medical science, literary or artistic works etc., while dealing with literary works, great importance has been always attached to the author's objective of exposing certain evils in the society rather than the language used or manner in which the work is presented.

56) Indian Penal Code, 1860 incorporates offence affecting public decency and morals under sections 292 to 294. Bihar Press Bill, 1982 was a proposed amendment to Section 292 of Indian Penal Code in the form of Section 292-A. In the Bill there was an attempt to prohibit, print and publish grossly indecent or scurrilous matter or matters intended to blackmail under the guise
of being obscene or indecent. The Bill was prima face an attempt to clutch off the freedom of press. However, said attempt was futile because of the vigilance shown by the Indian press and pressure of masses at large. It is bounden duty of every advocate of freedom of press to see that elastic provisions such as Section 292 Indian Penal Code will not be used for curbing freedom of press and veins of national life will not be chocked.

57) Defamation is a permissible ground of putting restriction under Art.19(2) of Indian Constitution. Also for defamation by press there is civil remedy for damages as well as a forum for prosecution under Criminal Law i.e., Indian Penal Code is available. Both remedies can be availed simultaneously.

58) Civil law for damages for defamation is not codified and is mainly based on the Common Law. This brings lot of harassment of the press as liability for defamation is cast even in case of innocent distributors and printers. Further liability for multiple publication, different cause of action for each separate publication may cause suffocation to freedom of press by clutches of law. Therefore, civil law needs codification and there should be a Defamation Act on the lines of Defamation Act, 1952 of England.

59) A number of reforms have been suggested in this work under the caption 'A Reformative Perspective:
Suggestions and Recommendations' in Chapter XIII, which may be referred here. Along with all other suggestions a need for qualified privilege to press is stressed here so as to give breathing space in a healthy atmosphere to the press.

60) A number of reforms in the procedural aspect of criminal law have also been suggested here. With an added emphasis it may be said that a great hardship is caused to the authorities of the press i.e. publisher, printer, editor, correspondent, distributor etc. in attending criminal prosecutions at remote places. This is required to be remedied by suitable amendment in Cr.P.C. exempting personal attendance of the Press-man. Further, normally tendering of apology or explanation in suitable cases may be added as a stage in the proceedings before the magistrate. So also it may be provided by suitable amendment that all matters pertaining to defamation prosecutions may be tried by the Chief Judicial Magistrate at a District place within those jurisdiction the offence has been committed. Number of other reforms have also been suggested in the Chapter of Defamation under caption of recommendations and suggestions.

61) Defamation Bill, 1988 was another attempt to curb freedom of press. It was as an out-come of character assassination of high personnel in the country by the press. However, it could not be successful. Indian Press will have to be vigilant that such attempt will not be
62) Since Defamation Bill, 1988, there was much discussion about an alternate remedy in the form of right to reply. It was considered that whether right to reply can provide alternate and speedy mechanism to the civil remedy for damages or criminal prosecution. However right to reply, eventhough recognised, has got its own limitations and cannot be a full flage or sole remedy, but can be accepted to a limited extent.

63) As in proceedings of Hindu Marriage Petitions there is a stage of reconciliation, likewise in case of defamation matters a stage of reconciliation may be added and for that purpose matters may be referred to the Loknyayalaya of the concerned region.

64) Privacy is an emerging personal right. A State of one's aloneness excluding interference by others may be said to be privacy. Such a state of situation may be interfered by the press if because of publicity given by the press feelings of an individual are hurted.

65) Right to privacy is a child of Western Society. It is yet to be recognised by the Indian Society which still believes in a spirit in jointness rather than state of seculition. However, so far as individual liberty is concerned right to privacy may be recognised in principle.
66) There is no separate legislation concerning privacy. Law Commission of India has proposed some amendments in Indian Penal Code so as to protect privacy without interfering freedom of press. Second Press Commission has endorsed the same. It is submitted that the same may be adopted with an emphasis for early action.

67) Separate legislation on privacy does not seem to be within the realm of possibility that such a project would be executed in near future. Because there seem to be insuperable difficulties in making such a project viable and effective because acts of intrusion of privacy may not be bound precisely in an enactment. This may add to the disparities, confusion and conflicts in the realm of privacy. Moreover it may lead to harassment of the press affecting freedom of press. Therefore, instead of comprehensive legislation ground of invasion of privacy may be added as a permissible ground for reasonable restriction under Art.19(2).