RIGHT TO PRIVACY WITH SPECIAL REFERENCE TO DIGNITY OF WOMEN

A THESIS

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CERTIFICATE FROM THE SUPERVISOR

It is certified that the

(i) Thesis **"Right to Privacy with Special Reference to Dignity of Women**" Submitted by **Rajani Prabha Gupta**, is an original copy of research work carried out by the candidate under my supervision.

(ii) Her literary presentation is satisfactory and the thesis is in a form suitable for publication.

(iii) Work evinces the capacity of the candidate for critical examination and independent judgment. The thesis incorporates new facts and a fresh approach towards their interpretation and systematic presentation.

(iv) Rajani Prabha Gupta has put in at least 200 days of attendance every year.

Date: 16.08.2016 **Dr. K.C. Sharma**

Place : Kota **Supervisor**

PREFACE

In this study the researcher has examined in detail the "**Right to Privacy with Special Reference to Dignity of Women.**" It is intended that such a study will help determine the parameters which any legislation for society must include.

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Dated : 16.08.2016 ***(Rajani Prabha Gupta)***

Right to Privacy with Special Reference to Dignity of Women

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211. Sube Singh v. State of Haryana and Others, 2006 AIR SCW 779.
212. Sunil Batra v. Delhi Administration, (1978) 4 SCC 494.
213. Surup Singh Hrya Naik v. State of Maharashtra, AIR 2007 Bom 121.
214. Swatanter Kumar v. The Indian Express Limited and Others, CS(OS) 102/2014 passed on 16.01.2014.
215. Sweatt v. Painter, 339 U.S. 629 (1950).
216. T. Sareetha v. Venkata Subbaiah, AIR 1983 AP 356.
217. The Civil Rights Cases, 109 U.S. 3 (1883).
218. The Dartmouth College Case, (18 19) 4 Wh 518.
219. Time v. Hill, 385 U.S. 374 (1967).
220. U.S. Verma, Principal, Delhi Public School v. National Commission for Women and others, WP (C) No.1730/2001.
221. Union of India v. Prafulla Kumar Samal & Another (1979) 3 SCC 4.
222. United States v. Harris, 106 U.S. 629 (1883).
223. United States v. Morrison, 529 U.S. 598 (2000).

224. United States v. Virginia, 518 U.S. 515 (1996).
225. Uttarakhand Mahila Kalyan Parishad v. State of Uttar Pradesh, AIR 1992 SC 1695.
226. Vincent Panikurlangara v. Union of India, AIR 1987 SC 990.
227. Vipulsinh Ramjubha Jadeja v. State of Gujarat and Others, R/CR.RA/683/2015; Judgement on 8 July, 2016.
228. Virender v. State of National Capital Territory of Delhi, Criminal Appeal No. 121 of 2009 Judgment of the Delhi High Court dated September 29, 2009.
229. Vishakha v. State of Rajasthan, AIR 1997 SC 301.
230. Von Hannover v. Germany No. 1, (2004) (Application no. 59320/00).
231. Wainwright v. Home Office, (2003) UKHL 53, (2004) 2 AC 406.
232. Wheaton v. Peters, 33 U.S. 591, 634 (1834).
233. Wheeler v. Green, (1946) 1 All ER 63 (66) (CA).
234. Wolf v. Colorado, (1948) 338 US 25.
235. Woolmington v. Director of Public Prosecutions, (1935) AC 462.
236. X v. Iceland, 5 Eur. Commín H.R. 86.87(1976).
237. Y. v. Slovenia, ECHR, Application no. 41107/10, Judgement on 28.05.2015.
238. Z v. FINLAND, ECHR 25 Feb 1997.
239. Zahira Habibullah Sheikh (5) v. State of Gujarat, AIR 2006 SC 1367.

INTRODUCTION

"The fight is not for woman's status but for human worth. The claim is not to end inequality of women but to restore universal justice. The bid is not for loaves and fishes for the forsaken gender but for cosmic harmony which never comes till woman comes."

Justice Krishna Iyer, [1]

(Supreme Court of India).

(I) Rational of the Research

Privacy is a fundamental human right. It underpins human dignity and other values such as freedom of association and freedom of speech. It has become one of the most important human rights of the modem age.[2] Privacy is recognized around the world in diverse regions and cultures. It is protected in the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, and in many other international and regional human rights treaties. Nearly every country in the world includes a right of privacy in its constitution. At a minimum, these provisions include rights of inviolability of the home and secrecy of communications. Most recently written constitutions include specific rights to access and control one's personal information. In many of the countries where privacy is not explicitly recognized in the constitution, the courts have found that right in other provisions. In many countries, international agreements that recognize privacy rights such as the International Covenant on Civil and Political Rights or the European Convention on Human Rights have been adopted into law.

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1 V.R.Krishna Iyer, Law and Life, Vikas Publishing House, New Delhi, 1979, p. 31.

2 Marc Rotenberg, Protecting Human Dignity in the Digital Age (UNESCO 2000).

Among all the human rights in the international catalogue, privacy is perhaps the most difficult to define.[3] Definitions of privacy vary widely according to context and environment. In many countries, the concept has been fused with data protection, which interprets privacy in terms of management of personal information. Outside this rather strict context, privacy protection is frequently seen as a way of drawing the line at how far society can intrude into a person's affairs.[4] The lack of a single definition should not imply that the issue lacks importance. As Fernando Volio, observed, "In one sense, all human rights are aspects of the right to privacy."[5]

In the 1890s, future United States Supreme Court Justice Louis Brandeis articulated a concept of privacy that urged that it was the individual's "right to be left alone." Brandeis argued that privacy was the most cherished of freedoms in a democracy, and he was concerned that it should be reflected in the Constitution.[6]

Robert Ellis Smith, editor of the Privacy Journal, defined privacy as "the desire by each of us for physical space where we can be free of interruption, intrusion, embarrassment, or accountability and the attempt to control the time and manner of disclosures of personal information about ourselves."[7]

According to Edward Bloustein, privacy is an interest of the human personality. It protects the inviolate personality, the individual's

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3 James Michael, Privacy and Human Rights 1 (UNESCO 1994).

4 Simon Davies, Big Brother: Britain's Web of Surveillance and the New Technological Order 23 (Pan 1996).

5 Volio, Fernando, "Legal personality, privacy and the family" in Henkin (ed), The International Bill of Rights (Columbia University Press I 981).

6 Samuel Warren and Louis Brandeis, The Right to Privacy, 4 Harvard Law Review 193-220 (1890).

7 Robert Ellis Smith, Ben Franklin's Web Site 6 (Sheridan Books 2000).

independence, dignity and integrity.[8] As Ruth Gavison observed, there are three elements in privacy: secrecy, anonymity and solitude. It is a state which can be lost, whether through the choice of the person in that state or through the action of another person.[9]

The Calcutt Committee in the United Kingdom said that, "nowhere have we found a wholly satisfactory statutory definition of privacy." But the committee was satisfied that it would be possible to define it legally and adopted this definition in its first report on privacy that the the right of the individual to be protected against intrusion into his personal life or affairs, or those of his family, by direct physical means or by publication of information.[10]

The Preamble to the Australian Privacy Charter provides that, "A free and democratic society requires respect for the autonomy of individuals, and limits on the power of both state and private organizations to intrude on that autonomy. Privacy is a key value which underpins human dignity and other key values such as freedom of association and freedom of speech. Privacy is a basic human right and the reasonable expectation of every person."[11]

Aspects of Privacy: Privacy can be divided into the following separate but related concepts:

- Information privacy, which involves the establishment of rules governing the collection and handling of personal data such as

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8 Privacy as an Aspect ofHuman Dignity, 39 New York University Law Review 971 (1964).

9 Privacy and the Limits of Law, 89 Yale Law Journal 421, 428 (1980).

10 Report of the Committee on Privacy and Related Matters, Chairman David Calcutt QC, 1990, Cmnd. 1102, London: HMSO, at 7.

11 "The Australian Privacy Charter," published by the Australian Privacy Charter Group, Law School, University of New South Wales, Sydney (1994).

credit information, and medical and government records. It is also known as "data protection";

- Bodily privacy, which concerns the protection of people's physical selves against invasive procedures such as genetic tests, drug testing and cavity searches;
- Privacy of communications, which covers the security and privacy of mail, telephones, e-mail and other forms of communication; and
- Territorial privacy, which concerns the setting of limits on intrusion into the domestic and other environments such as the workplace or public space. This includes searches, video surveillance and Identification checks.

Models of Privacy Protection: There are four major models for privacy protection. Depending on their application, these models can be complementary or contradictory. In most countries reviewed in the survey, several are used simultaneously. In the countries that protect privacy most effectively, all of the models are used together to ensure privacy protection.

(i) Comprehensive laws: In many countries around the world, there is a general law that governs the collection, use and dissemination of personal information by both the public and private sectors. An oversight body then ensures compliance. This is the preferred model for most countries adopting data protection laws and was adopted by the European Union to ensure compliance with its data protection regime. A variation of these laws, which is described as a "co-regulatory model," was adopted in Canada and Australia. Under this approach, industry develops rules for the protection of privacy that are enforced by the industry and overseen by the privacy agency.

(ii) Sectoral Laws: Some countries, such as the United States, have avoided enacting general data protection rules in favor of specific sectoral laws governing, for example, video rental records and financial privacy. In such cases, enforcement is achieved through a range of mechanisms. A major drawback with this approach is that it requires that new legislation be introduced with each new technology so protections frequently lag behind. The lack of legal protections for individual's privacy on the Internet in the United States is a striking example of its limitations. There is also the problem of a lack of an oversight agency. In many countries, sectoral laws are used to complement comprehensive legislation by providing more detailed protections for certain categories of information, such as telecommunications, police files or consumer credit records.

(iii) Self-Regulation: Data protection can also be achieved, at least in theory, through various forms of self- regulation, in which companies and industry bodies establish codes of practice and engage in self-policing. However, in many countries, especially the United States, these efforts have been disappointing, with little evidence that the aims of the codes are regularly fulfilled. Adequacy and enforcement are the major problem with these approaches. Industry codes in many countries have tended to provide only weak protections and lack enforcement.

(iv) Technologies of Privacy: With the recent development of commercially available technology-based systems, privacy protection has also moved into the hands of individual users. Users of the Internet and of some physical applications can employ a range of programs and systems that provide varying degrees of privacy and security of communications. These include encryption, anonymous remailers, proxy servers and digital cash.[12] Users should be aware that not all tools effectively protect privacy.

[12] EPIC maintains a list of privacy tools at http://www.epic.org/privacy/tools.html.

Some are poorly designed while others may be designed to facilitate law enforcement access.

(II) Historical Development of the Right to Privacy:

The recognition of privacy is deeply rooted in history. There is recognition of privacy in the Quran[13] and in the sayings of Mohammed.[14] The Bible has numerous references to privacy.[15] Jewish law has long recognized the concept of being free from being watched.[16] There were also protections in classical Greece and ancient China.[17]

Legal protections have existed in Western countries for hundreds of years. In 1361, the Justices of the Peace Act in England provided for the arrest of peeping toms and eavesdroppers.[18] In 1765, British Lord Camden, striking down a warrant to enter a house and seize papers wrote, "We can safely say there is no law in this country to justify the defendants in what they have done; if there was, it would destroy all the comforts of society, for papers are often the dearest property any man can have.[19] Parliamentarian William Pitt wrote, "The poorest man may in his cottage bid defiance to all the force of the Crown. It may be frail; its roof may shake, the wind may blow through it, the storms may enter; the rain may enter but the King of England cannot enter, all his forces dare not cross the threshold of the ruined tenement."[20]

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13 An-Noor 24:27-28 (Yusufali); al-Hujraat 49:1 1-12 (Yusufali).

14 Volume 1 , Book 10, p. 509 (Sahih Bukhari); Book 020, p. 4727 (Sahih Muslim); Book 31, p. 4003 (Sunan Abu Dawuci).

15 Richard Hixson, Privacy in a Public Society: Human Rights in Conflict 3 (1987). See also, Barrington Moore, Privacy: Studies in Social and Cultural History (1984).

16 Jeffrey Rosen, The Unwanted Gaze (Random House 2000).

17 Jeffrey Rosen, The Unwanted Gaze (Random House 2000).at 5.

18 James Michael, supra, at. 15. Justices of the Peace Act, 1361 (Eng.), 34 Edw. 3, c. 1.

19 Entick v. Carrington, 1558-1774 All ER. Rep. 45.

20 Speech on the Excise Bill, 1763.

Various countries developed specific protection for privacy in the centuries that followed. In 1776, the Swedish Parliament enacted the Access to Public Records Act that required that all government-held information be used for legitimate purposes. France prohibited the publication of private facts and set stiff fines for violators in 1858.[21] The Norwegian Criminal Code prohibited the publication of information relating to "personal or domestic affairs" in 1889.[22] In 1 890, American lawyers Samuel Warren and Louis Brandeis wrote a seminal piece on the right to privacy as a tort action, describing privacy as "the right to be left alone." Following the publication, this concept of the privacy tort was gradually picked up across the United States as part of the common law.

The modem privacy benchmark at an international level can be found in the 1948 Universal Declaration of Human Rights, which specifically protects territorial and communications privacy.[23] Article 12 states: No one should be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks on his honour or reputation. Everyone has the right to the protection of the law against such interferences or attacks.

Numerous international human rights treaties specifically recognize privacy as a right.[24] The International Covenant on Civil and Political Rights, Article 17,[25] the United Nations Convention on Migrant Workers,

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21 The Rachel affaire. Judgment of June 1 6, 1 858, Trib. pr. inst. de la Seine, 1858 D.P. III 62. See Jeanne M. Hauch, Protecting Private Facts in France: The Warren & Brandeis Tort is Alive and Well and Flourishing in Paris, 68 Tulane Law Review 1219 (May 1994).

22 Prof. Dr. Juris Jon Bing, Data Protection in Norway, 1996.

23 Universal Declaration of Human Rights, adopted and proclaimed by General Assembly resolution 217A (III) of December 10, 1948.

24 Marc Rotenberg, ed., The Privacy Law Sourcebook: United States Law, International Law and Recent Developments (EPIC 2003).

25 International Covenant on Civil and Political Rights, adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of December 16, 1966, entry into force March 23, 1976.

Article 14,[26] and the United Nations Convention on Protection of the Child, Article 16[27] adopt the same language.[28]

On the regional level, various treaties make these rights legally enforceable. Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950[29] states:

(1) Everyone has the right to respect for his private and family life, his home and his correspondence.

(2) There shall be no interference by a public authority with the exercise of this right except as in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health of morals, or for the protection of the rights and freedoms of others.

The Convention created the European Commission of Human Rights and the European Court of Human Rights to oversee enforcement. Both have been active in the enforcement of privacy rights and have consistently viewed protections of Article 8 expansively and interpreted the restrictions narrowly.[30]

For numerous Anglo-Saxon and French authors, the right to respect "private life" is the right to privacy, the right to live, as far as one wish,

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[26] International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, adopted by General Assembly resolution 45/158 of December 18, 1990

[27] Convention on the Rights of the Child, adopted and opened for signature, ratification and accession by General Assembly resolution 44/25 of November 20, 1989, entry into force September 2, 1990

[28] Lee Bygrave, "Data Protection Pursuant to the Right of Privacy in Human Rights Treaties," 6 International Journal of Law and Information Technology 247-284 (1998).

[29] Council of Europe, Convention for the Protection of Human Rights and Fundamental Freedoms, (ETS No: 005) open for signature November 4, 1950, entry into force September 3, 1950.

[30] Nadine Strossen, Recent United States and International Judicial Protection of Individual Rights: A comparative Legal Process Analysis and Proposed Synthesis, 41 Hastings Law Journal 805 (1990).

protected from publicity. In the opinion of the Commission, however, the right to respect for private life does not end there. It comprises also, to a certain degree, the right to establish and develop relationships with other human beings, especially in the emotional field for the development and fulfillment of one's own personality.[31]

The Court has reviewed member states' laws and imposed sanctions on numerous countries for failing to regulate wiretapping by governments and private individuals.[32] It has also reviewed cases of individuals' access to their personal information in government files to ensure that adequate procedures exist.[33] It has expanded the protections of Article 8 beyond government actions to those of private persons where it appears that the government should have prohibited those actions. Other regional treaties are also beginning to be used to protect privacy. Article 11 of the American Convention on Human Rights sets out the right to privacy in terms similar to the Universal Declaration.[34] In 1965, the Organization of American States proclaimed the American Declaration of the Rights and Duties of Man, which called for the protection of numerous human rights, including privacy.[35] The Inter-American Court of Human Rights has begun to address privacy issues in its cases.

In India, the Constitution of 1 950 does not expressly recognize the right to privacy.[36] However, the Supreme Court first recognized in 1 964 that there is a right of privacy implicit in the Constitution under Article

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31 X v. Iceland, 5 Eur. Comm'n H.R. 86.87 (1976).

32 European Court of Human Rights, Case of Kiass and Others: Judgement of 6 September 1978, Series A No. 28 (1979). Malone v. Commissioner of Police, 2 All E.R. 620 (1979). See Note, Secret Surveillance and the European Convention on Human Rights, 33 Stanford Law Review 1113, 1122 (1981).

33 Leander v. Sweden, Application no. 9248/81, ECHR Judgement of 26 March 1987 (Leander Case).

34 Signed November 22, 1969, entered into force July 18, 1978, O.A.S. Treaty Series No. 36, at 1, O.A.S. Off. Rec. OEA/Ser. L/V/II.23 dec rev. 2.

35 O.A.S. Res XXX, adopted by the Ninth Conference of American States, 1948 OEA/Ser/. L.IV/1.4 Rev (1965).

36 Constitution of India, 1950.

21 of the Constitution, which states, "No person shall be deprived of his life or personal liberty except according to procedure established by law."[37]

(III) Legislative Initiatives towards Protection of Dignity and Privacy of Woman:

India there are numerous laws aimed at empowerment of women in the areas of personal, labour, service and criminal and social economic matters. The Fundamental Law of the land namely Constitution of India guarantees equality for women. It would be proper to refer some of the most important legislations pertaining to empowerment of women.

1. Constitution of India, 1950:

The Constitution of India not only guarantees equality to women but also empowers the State to adopt measures to positive discrimination in favour of women. The principle of gender equality is enshrined in the Indian Constitution in its Preamble, Fundamental Rights, Fundamental Duties and Directive Principles. Article 14 of the Constitution of India guarantees equality before law. Article 15 prohibits discrimination on the grounds of sex. Article 16 states about equality of opportunity for all citizens in matters relating to employment. Article 39(a) requires the State to direct its policy towards securing for its citizens, men and women equally, the right to an adequate means of livelihood. Article 39(d) requires the State to secure equal pay for equal work for men and women. Article 39(e) directs the State not to abuse the health and strength of workers, men and women. Article 42 directs the State to make provisions for securing just and humane conditions of work and for maternity relief. The constitution imposes a fundamental duty on every citizen through

[37] Kharak Singh v. State of UP, I SCR 332 (1964)

Article 51 A(e) to renounce the practices derogatory to the dignity of women.

The 73rd and 74th amendments to the Constitution of India provided for reservation of seats (at least 1/3) in the local bodies of Panchayats and Municipalities for women. Under Clause (3) of Article 243-D, not less than one-third of the total number of seats to be filled by direct election in every Panchayat shall be reserved for women. Similar reservation in Municipalities is prescribed by Clause (3) of Article 243-T of the Constitution.

Competence of Central and State legislatures to enact legislations is derived from the Indian Constitution. The Seventh Schedule of the Constitution of India has three Lists, which contain various entries, which can be subject matters of legislation.

List I : Union List

List II : State List

List III : Concurrent List

The power to enact legislations on various subject matters listed therein comes from the following Articles of the Constitution of India:

Article 246 (1) of the Constitution of India gives the Parliament the exclusive power to make laws with respect to any of the matters enumerated in List I in the Seventh Schedule (Union List). This power of Parliament is unfettered by Article 246(2) and (3). Article 246 (2) of the Constitution of India gives the Parliament and the State Legislature the power to make laws with respect to any of the matters enumerated in List III in the Seventh Schedule (Concurrent List). The power of the State

Legislature is subject to Article 246(1) while the power of Parliament is unfettered by Article 246(3). Article 246 (3) of the Constitution of India gives the State Legislature the exclusive power to make laws with respect to any of the matters enumerated in List II in the Seventh Schedule (State List). This power of the State Legislature is subject to Article 246(1) and (2).

"Privacy" is not a subject in any of the three lists in Schedule VII of the Constitution of India. But Entry 97 of List I states: "any other matter not enumerated in List II and List III." Thus only the Indian Parliament is competent to legislate on privacy since it can be interpreted as any other matter not enumerated in List II and List III.

Till date there is no specific enactment on Privacy. But the Constitution of India has embodied many Rights in Part III, which are called Fundamental Rights. These are enumerated in Article 14-30 of the Constitution.

2. Indian Penal Code, 1860:

Sections 292, 293 and 294 provide for punishment in sale and exhibit of obscene books objections and for obscene act in public place. Section 304B deals about murder of women in connection with demand of dowry. Sections 312 to 318 deal about punishment for causing miscarriage. Section 354 provides punishment for outraging the modesty of any women, Section 366 deals about kidnapping for marriage against her will. Section 366-A deals about prostration of minor girls for sexual purpose. Section 376 deals about punishment for rape. Section 494 protects women from bigamy. Section 497 deals about protection of married women from adultery. Section 498-A of Indian Penal Code deals about subjecting women to cruelty by her husband or relatives and her

husband and Section 509 provides punishment for uttering words and gesture or act intended to insult the modesty of a woman.

3. Code of Criminal Procedure, 1973:

- Section 98. Power to compel restoration of abducted females.
- Section 100(3) Where any person in or about such place is reasonably suspected of concealing about his person any article for which search should be made, such person may be searched and if such person is a woman, the search shall be made by another woman with strict regard to decency.
- Section 125, Code of Criminal Procedure, a woman has got right to maintenance.
- Section 160, Police Officer's power to require attendance of witnesses Provided that no male person under the age of fifteen years or woman shall be required to attend at any place other than the place in which such male person or woman resides.
- Section 198 Prosecution for offences against marriage and aggrieved party is a woman who, according to the local customs and manners, ought not to be compelled to appear in public, some other person may, with the leave of the Court, make a complaint on his or her behalf;
- Section 416 postponement of capital sentence on pregnant Woman. etc.

4. Indian Evidence Act, 1872:

Sections 113(a), 113(b) and 114(c) provide for presumptions as to abetment of suicide by a married woman within 7 years of marriage, as

dowry death of a woman and as to absence of consent of woman for sexual intercourse.

5. Hindu Adoption Maintenance Act, 1956:

Section 18-A provides for obligations of husband to maintain his wife. Section 18(2) provides right of wife to live separately and Section 19 provides for maintenance of widow by her father-in-law.

6. Hindu Succession Act, 1956:

Section 14 of the Act provides for property of female Hindu to be her absolute property. Section 23 provides right of female legal heirs in the dwelling house.

7. The Hindu Minority and Guardianship Act, 1956:

Section 6 of the Act provides for mother as a natural guardian for minors below 5 years.

8. The Hindu Marriage Act, 1955 :

Section 13(2) of the Act provides for wife to present a petition for divorce. Section 13(b) provides equal right for wife for getting divorce by mutual consent. Section 24 of the Act provides for relief for interim maintenance and expenses. Section 25 of the Act provides for right to a wife to seek permanent alimony and maintenance and Section 26 of the Act provides right to claim custody of children.

9. The Dowry Prohibition Act, 1961

Under the provisions of this Act demand of dowry either before marriage, during marriage and or after the marriage is an offence.

10. The Muslim Women (Protection of Right on Divorce) Act, 1986:

Under the provisions of the Act provides for maintenance of women by the relatives after the iddat period.

11. The Factories Act, 1948:

The provisions of this Act provides for health, safety, welfare, and working hours for women labourer working in factories.

12. The Equal Remuneration Act, 1976:

It provides for payment of equal wages to both men and women workers for the same work or work of similar nature. It also prohibits discrimination against women in the matter of recruitment.

13. The Employees State Insurance Act, 1948:

The Act provides for insurance pension and maternity benefits to women workers.

14. The Maternity Benefit Act, 1961:

It provides for maternity benefit with full wages for women workers.

15. The Medical Termination of Pregnancy Act, 1971:

The Act safeguards women from unnecessary and compulsory abortions.

16. The Child Marriage Restraint Act, 1976:

The Act provides safeguards for girls from child marriage.

17. The Immoral Trafficking (Prevention) Act, 1986:

The Act safeguards women from prostitution.

18. The Pre-Natal Diagnostic Technique (Regulation and Prevention of Measure) Act, 1994:

This Act prohibits diagnosing of pregnant women and also identification of child in the womb whether it is male or female.

19. The Indecent Representation of Women (Prohibition) Act, 1986:

The Act safeguards women from indecent representation.

20. The Commission of Sati (Prevention) Act, 1992:

It safeguards women from Sati.

21. The National Commission for Women Act, 1992:

The Act provides for a setting up a statutory body namely the National Commission for Women to take up remedial measures, and facilitate redressal of grievances and advise the Government on all policy matters relating to women.

22. The Family Courts Act, 1984 :

The Act provides for setting up a Family Court for in-camera proceedings for women.

23. The Tamil Nadu Prohibition of Eve-teasing Act, 1988:

The Act provides punishment for eve-teasing.

24. The Protection of Women from Domestic Violence Act, 2005:

The Act provides for punishment for domestic violence committed by husband and his relatives and also provides legal assistance for women suffering from domestic violence. It also provides interim maintenance to women and also for compensation and damages.

25. Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013

- The Act defines sexual harassment at the work place and creates a mechanism for redressal of complaints. It also provides safeguards against false or malicious charges.
- The Act also covers concepts of *'quid pro quo harassment'* and *'hostile work environment'* as forms of sexual harassment if it occurs in connection with an act or behaviour of sexual harassment.
- The definition of *"aggrieved woman"*, who will get protection under the Act is extremely wide to cover all women, irrespective of her age or employment status, whether in the organised or unorganised sectors, public or private and covers clients, customers and domestic workers as well.
- While the "workplace" in the Vishaka Guidelines is confined to the traditional office set-up where there is a clear employer-employee relationship, the Act goes much further to include organisations, department, office, branch unit etc. in the public and private sector, organized and unorganized, hospitals, nursing homes, educational institutions, sports institutes, stadiums, sports complex and any place visited by the employee during the course of employment

including the transportation. Even non-traditional workplaces which involve tale-commuting will get covered under this law.

- The Committee is required to complete the inquiry within a time period of 90 days. On completion of the inquiry, the report will be sent to the employer or the District Officer, as the case may be, they are mandated to take action on the report within 60 days.
- Every employer is required to constitute an Internal Complaints Committee at each office or branch with 10 or more employees. The District Officer is required to constitute a Local Complaints Committee at each district, and if required at the block level.
- The Complaints Committees have the powers of civil courts for gathering evidence.
- The Complaints Committees are required to provide for conciliation before initiating an inquiry, if requested by the complainant.
- The inquiry process under the Act should be confidential and the Act lays down a penalty of Rs 5000 on the person who has breached confidentiality.
- The Act requires employers to conduct education and sensitisation programmes and develop policies against sexual harassment, among other obligations.
- Penalties have been prescribed for employers. Non-compliance with the provisions of the Act shall be punishable with a fine of up to Rs. 50,000. Repeated violations may lead to higher penalties and cancellation of licence or registration to conduct business.
- Government can order an officer to inspect workplace and records related to sexual harassment in any organisation.

(IV) Judicial Initiative towards Right to Privacy and Dignity of Women:

Though plethora of legislations exists, due to ineffective enforcement, women are exploited by the male dominated society. Male dominated society has found ways to circumvent the provisions of the Act and act as a blockade against women empowerment. Due to the failure of the legislations to protect women, judiciary has come forward to protect women. In protecting the women, the Indian Judiciary has removed all the procedural shackles and has completely revolutionized constitutional litigations. The judiciary has encouraged widest possible coverage of the legislations by liberal interpreting the terms. The judiciary has shifted from doctrine approach to the pragmatic approach, which was conducive to all interests in the society. The Courts have shown greater enthusiasm in granting the constitutional provisions for all women. The judiciary by its landmark judgments had filled up the gap created by the Legislative machinery. The judiciary had extended helping hands to women, when the legislature had denied it. The higher judiciary has shown concern for women's right in recent times; it also had been greatly influenced by the international declaration and covenants on women's rights.

The vibrant judiciary has recently exalted the dignity of women by its golden judgments. In **Municipal Corporation of Delhi v. Female Workers,**[38] the Supreme Court extended the benefits of the Maternity Benefit Act, 1961 to the Muster Roll (Daily Wagers) female employees of Delhi Municipal Corporation. In this case, the Court directly incorporated the provisions of Article 11 of the Convention on the

[38] AIR 2000 SC 1274.

Elimination of all Forms of Discrimination against Women, 1979[39] into the Indian Law.

In **Chairman, Railway Board v. Chandrima Doss**,[40] the Supreme Court awarded compensation of 10 lakhs to an alien woman under Article 21 of Constitution, who has been a victim of rape.

In **Githa Hariharan v. Reserve Bank of India**,[41] the Supreme Court interpreted Section 6(a) of Hindu Minority and Guardianship Act, I 956 and Section 19(b) of the Guardians and Wards Act, 1 890 in such a way that father and mother get equal status as guardians of a minor.

In **Mohammed Ahmed Khan v. Shah Bano**,[42] the Supreme Court granted equal right of maintenance under Section 125 of the Criminal Procedure Code, 1973 to a divorced married woman notwithstanding the personal law. The Supreme Court also held that "large segments of society which have been traditionally subjected to unjust treatment, women are one such segment."

In **Charansingh v. Union of India,**[43] the Delhi High Court expressed that women are a backward class as compared to men.

In **Government of Andhra Pradesh v. P. B. Vijay Kumar**,[44] the Supreme Court has held that the issue of reservation for women in State services was upheld under Article 15(3) of the Indian Constitution.

In **Municipal Corporation of Delhi v. Female Workers**,[45] the Supreme Court held that a just social order could be achieved only when

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39 Convention on all forms of Discrimination Against Women, 1979
40 AIR 2000 SC 988
41 AIR 1999 SC 1149
42 AIR 1985 SC 945
43 1979 Lab IC 633
44 AIR 1995 SC 1648
45 AIR 2000 SC 1274, 1281

inequalities are obliterated and women, which constitute almost half of the segment of our society, are honoured and treated with dignity.

In **Uttarakhand Mahila Kalyan Parishad v. State of Uttar Pradesh**,[46] the Supreme Court struck down the discriminatory rules of Education Department of Government of Uttar Pradesh. In **Air India v. Nargis Mirza**,[47] the Supreme Court struck down the discriminatory Rules of Indian Airlines.

In **Bodhisattwa v. Ms. Subhra Chakraborty**,[48] the Supreme Court held that rape is a crime against basic human rights.

In **Vishakha v. State of Rajasthan**,[49] the Supreme Court took a serious note of the increasing menace of sexual harassment at workplace and elsewhere. Considering the inadequacy of legislation on the point, the Court even assumed the role of legislature and defined sexual harassment and laid down instruction for the employers.

In **Apparel Export Promotion Council v. A. K Chopra,**[50] the Supreme Court found all facets of gender equality including prevention of sexual harassment in the fundamental rights granted by the Constitution.

In **C. B. Muthamma v. Union of India,**[51] a service rule whereby marriage was a disability for appointment to foreign service was declared unconstitutional by the Supreme Court.

In **Shobha Rani v. Madhukar,**[52] the Supreme Court held that dowry demand was held enough to amount to cruelty.

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46 AIR 1992 SC 1695
47 AIR 1981 SC 1829
48 AIR 1996 SC 922
49 AIR 1997 SC 301
50 AIR 1999 SC 625
51 AIR 1979 SC 1868
52 AIR 1988 SC 121

In **Prathibha Rani v. Suraj Kumar,**[53] the Supreme Court upheld women's right to the Stridhana.

In **State of Punjab v. Gurmit Singh,**[54] the Supreme Court held that rape was held to be violative of the right of privacy.

In **Bodhisathwa Gowtham v. Subhra Chakaraborty,** [55] the Supreme Court observed that rape was not only an offence under the criminal law, but it was a violation of the fundamental right to life and liberty guaranteed by Article 21 of Indian Constitution.

In **Ms. Savita Samvedi and Another v. Union of India and Others,**[56] the Supreme Court held that a married daughter was allowed accommodation in parental house.

In **Delhi Domestic Working Women's Forum v. Union of India,**[57] the Supreme Court suggested the formulation of a segment for awarding compensation to rape victims at the time of convicting the person found guilty of rape. The Court suggested that the Criminal Injuries Compensation Board or the Court should award compensation to the victims by taking into account, the pain, suffering and shock as well as loss of earnings due to pregnancy and the expenses of child birth if this occurs as a result of rape.

In **Gourav Jain v. Union of India,**[58] the Supreme Court laid down guidelines including the necessity of counselling, cajoling, and coercing the women to retrieve from prostitution and rehabilitate them.

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53 AIR 1985 SC 628
54 AIR 1996 SC 1393
55 AIR 1996 SC 622
56 (1996) 1 SCR 1046
57 (1995) 1 SCC 14
58 AIR 1997 SC 3012

In **Kharak Singh v. State of Uttar Pradesh,**[59] In this case the appellant was being harassed by police under Regulation 236(b) of Uttar Pradesh Police Regulation, which permits domiciliary visits at night. The Supreme Court held that the Regulation 236 is unconstitutional and violative of Article 21. It concluded that the Article 21 of the Constitution includes "right to privacy" as a part of the right to "protection of life and personal liberty". The Court equated 'personal liberty' with 'privacy', and observed, that "the concept of liberty in Article 21 was comprehensive enough to include privacy and that a person's house, where he lives with his family is his 'castle' and that nothing is more deleterious to a man's physical happiness and health than a calculated interference with his privacy".

Gobind v. State of Madhya Pradesh, [60] is another case on domiciliary visits. The Supreme Court laid down that "privacy-dignity claims deserve to be examined with care and to be denied only when an important countervailing interest is shown to be superior. If the Court does find that a claimed right is entitled to protection as a fundamental privacy right, a law infringing it must satisfy the compelling State interest test.

In **State v. Charulata Joshi,**[61] the Supreme Court held that "the constitutional right to freedom of speech and expression conferred by Article 19(l)(a) of the Constitution which includes the freedom of the press is not an absolute right. The press must first obtain the willingness of the person sought to be interviewed and no court can pass any order if the person to be interviewed expresses his unwillingness".

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59 AIR 1963 SC 1295
60 (1975)2 SCC 148.
61 (1999) 4 SCC 65.

In **R. Rajagopal v. State of Tamil Nadu,**[62] The Supreme Court held that the petitioners have a right to publish what they allege to be the life-story/autobiography of Auto Shankar insofar as it appears from the public records, even without his consent or authorization. But if they go beyond that and publish his life story, they may be invading his right to privacy, then they will be liable for the consequences in accordance with law. Similarly, the State or its officials cannot prevent or restraint the said publication. It stated that "A citizen has a right to safeguard the privacy of his own, his family, marriage, procreation, motherhood, child bearing and education among other matters. None can publish anything concerning the above matters without his consent- whether truthful or otherwise and whether laudatory or critical. If he does so, he would be violating the right to privacy of the person concerned and would be liable in an action for damages

In **People's Union for Civil Liberties v. Union of India,**[63] the Supreme Court held that the telephone tapping by Government under Section 5(2) of Telegraph Act, 1885 amounts infraction of Article 21 of the Constitution of India. Right to privacy is a part of the right to "life" and "personal liberty" enshrined under Article 21 of the Constitution. The said right cannot be curtailed "except according to procedure established by law".

In **Mr. 'X' v. Hospital 'Z',**[64] for the first time the Supreme Court articulated on sensitive data related to health. In this case, the appellant's blood test was conducted at the respondent's hospital and he was found to be Human Immunodeficiency Virus that is positive. His marriage, which was already settled, was called off after this revelation. Several persons

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62 AIR 1995 SC 264.
63 (1997) 1 SCC 301
64 (1998) 8 SCC 296.

including the members of his family and those belonging to their community came to know of his Human Immunodeficiency Virus that is positive status and was ostracized by the community. He approached the National Commission against the respondent hospital claiming damages from them for disclosing information about his health, which, by norms of ethics, according to him, ought to have been kept confidential. The National Commission summarily dismissed his complaint. Consequently he moved the Supreme Court by way of an appeal.

In Appeal court observed as regards the argument of the appellant that his right to privacy had been infringed by the respondents by disclosing that he was Human Immunodeficiency Virus that is positive and, therefore, they were liable in damages, the Supreme Court observed that as one of the basic human rights, the right of privacy was not treated as absolute and was 'subject to such action as may be lawfully taken for the prevention of crime or disorder or protection of health or morals or protection of rights and freedom of others."

In **District Registrar and Collector v. Canara Bank,**[65] it was held, that "exclusion of illegitimate intrusions into privacy depends on the nature of the right being asserted and the way in which it is brought into play; it is at this point that the context becomes crucial, to inform substantive judgment. If these factors are relevant for defining the right to privacy, they are quite relevant whenever there is invasion of that right by way of searches and seizures at the instance of the State."

A woman's right to privacy is inviolable. Unauthorized intrusion therein, is not only deplorable but is an insult both to Womanhood which we claim to respect and to the civilized society which we claim to belong

[65] (2005) 1 SCC 496: AIR 2005 SC 186.

to. Challenge to the validity of Section 9 of the Hindu Marriages Act, which provides for restitution of conjugal rights in **T. Sareetha v. Venkata Subbaiah**.[66] was upheld by the Andhra Pradesh High Court on the ground that the remedy was barbarous, savage and violated the right of privacy and human dignity guaranteed by Article 21 of the Constitution.

The High Court observed that a decree for restitution of conjugal rights constitutes the grossest form of violation of an individual's right to privacy. It denies the woman her free choice, whether, when and how her body is to become the vehicle for procreating of another human being. The woman loses her control over her most intimate decisions and the legal right to privacy guaranteed by Article 21 is flagrantly violated by a decree of restitution of conjugal rights.

This far reaching Judgment was however frowned upon by the Delhi High Court in **Harinder Kaur v. Harinder Singh,**[67] wherein it was observed that .Constitutional law in the home is most inappropriate. It is like introducing a bull in a China Shop. It will prove to be a ruthless destroyer of the marriage institution and all that it stands for. In the privacy of the home and married life, neither Article 21 nor Article 14 should have any place.

The right to privacy for women was recognized by the Supreme Court and in the case of **State of Mahrashtra v. Madhukar Narayan Mardikar,**[68] it was held that even a woman of easy virtue is entitled to privacy and no one can invade her privacy as and when one like. So also it is not open to any and every person to violate her person as and when

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66 AIR 1983 AP 356.
67 AIR 1984 Delhi 66.
68 AIR 1991 SC 207.

he wishes. She is entitled to protect her person if there is an attempt to violate it against her wish. She is equally entitled to the protection of law.

(V) Nature of Study

Every one seeks minimum of privacy however laws in many ways limit privacy; an example of this would he law concerning taxation. which normally require the sharing of information about personal income or earnings. in some countries individual privacy may conflict with freedom of speech laws and Some laws may require public disclosure of information which would he considered private in other countries and cultures. Privacy may he voluntarily sacrificed. Normally in exchange for perceived benefits and very often with specific dangers and losses. although this is a very strategic view of human relationships. Women a half the population of world securing their dignity desire privacy for them. This study defiantly seeks to find out the privacy available to women, which would defiantly help legal scientists and luminaries and students and even to lay man to understand the problems and advance remedies to a women.

(VI) Objectives of Study

Privacy is a basic human right. It underpins human dignity and other values such as freedom of association and freedom of speech. It has become one of the most important human rights of the modern age. Privacy is recognized around the world in diverse regions and cultures. A woman's right to privacy is inviolable. Unauthorized intrusion therein, is not only deplorable but is an insult both to Womanhood which we claim to respect and to the civilized society. Without Decency and proper dignity a women status in society is no more than a chattel.

The legal framework and the laws enacted by parliament are plenty for the protection of dignity of women. But when the time comes for the application of laws, then political pressures cannot let the judiciary he independent. Today the woman is stuck within the paradox of cultural ethos modernity' and hollow protection of privacy and dignity. The woman is the subject of feminist politics in India. The category of 'woman' as the subject of feminist politics in India reflects a failure of constitutionalism. Crimes against women are rampant. They are on the increase. Although our constitution imposes a fundamental duty on every citizen through Article 51 A (e) to renounce the practices derogatory to the dignity of women. But most of legacy information systems are unaware of this fundamental Right.

As it is noticed that all the older social evils such as Child marriage, restrictions on education and infanticide still persists. Therefore the present researcher while observing the complexity and the significance of the topic as mentioned above, chosen it for further studies. Study shall contain all the efforts and endeavor made to mark out the area containing the roots of the problems and suggest shall he advanced where necessary.

(VII) Review of Literature

There is a lot of literature available on right to life with dignity and privacy. This would assist in tracing out the depth of the problem arising in enforcement of development of feminine jurisprudence. The researcher has make study on the topic of origin and development of right to life. The researcher has reviewed the books of eminent author related to the topic. In addition to this researcher has also reviewed the various case-Laws, various judicial decision of Courts.

- **P.S. Narayana** in his book "*Public Interest Litigation*", 4th edition, 2005, Asia law house - Hyderabad observed that public interest litigation is necessary for social justice. This book public interest litigation already had undergone three editions within a short span of time. The subject public interest litigation. Indubitably is a subject of utmost public paramount. In the recent times the Apex court expressed displeasure over the nature of public interest litigations which are being filed afore the Constitutional courts.
- **Asim Pandya** – "*Writs and other Constitutional Remedies*", Lexix Nexix-1st Edition 2009, deals with constitutional remedies for protection of citizens rights. A great deal of mystification subsists in judicial pronouncements due to the very wide interpretation given to Article 14of the Constitution. As a result thereof the entire canon of the principles of administrative law has become a component of Article 14. in an obliteration of the dividing line between the case where Article 14 in its true sense and spirit is infringed and other cases where an action is challenged on the ground of non-compliance of the fundamental principles of administrative law.
- **H.R. Khanna** in his book "*Making of India's Constitution*" - Eastern Book Company, 2015, describes the logic of fundamental rights embodied in Indian constitution. The subject of the Indian Constitution is of great interest to the people of India. khanna has traced out the sundry changes made in the draft of the Constitution of India during its passage through the constituent assembly and the final shape given to the Constitution. He is integrated his own comments on sundry aspects of the Constitution.
- **Dr. Subhash Kashyap**, in "*The framing of India's Constitution*" universal law publication, 2006, described the work of the

constituent Assembly and the drawing up of India's Constitution occupies a pre-eminent place in the recent history of India. A comprehensive and an objective study have been composed of this subject in all its facets. This volume is an affluent store-house of source material for the study of Indian Constitution. Our Constitution has adopted adult suffrage.

- **Dr. Madubhushi Sridhar** in "*The Law of Expression an Analytical Commentary on Law for Media*", 1st edition 2007, Delhi Law House, analyzed about the Regime of India has promulgated on 1st February 2007, to enable Prasar Bharati to apportion the broadcast signal of International cricket matches involving India. The Cumulation Cabinet promulgated an ordinance that makes it obligatory for the rights holders of sporting events to apportion advertisements tree live broadcast signals with all Prasar Bharti platforms on a revenue sharing substratum.
- **Prof. Ranbir Singh** and **Prof. A Lakshminath** – "*Fiscal Federalism Constitutional Conspectus*" 1st edition, 2005 Wadhwa Nagpur, have been indicted in the backdrop of the law and economics forms of kineticism that is steadily gaining momentum across the world. This concept emerging gradually but surely from being something of mere academic paramountcy, to one that has very practical authentic life application. This book undertakes a detail review of the Constitutional provisions and the cognate judicial interpretation, which has been both exalted and condemned in equal quantities.
- **Dr. K. C. Joshi** in his book "*The Constitution Law of India"* Cental Law Publication, 2013, has observed that in Constitutional Jurisprudence, Right to life and personal liberty is the most valuable among Fundamental Rights; Denuded of this there cannot

be a full fledged human personality at all. In this sense it looks that the shortest Article 21 has contravened the most sizably voluminous liberation. As pointed by the Supreme Court in Unnikrishanan v. State of Andhra Pradesh has been ever expending in to its sweep rights such as the right to go abroad right to privacy right to medical assistance etc. Containment and right against custodial violence have expanded the connotation of Personal liberty and its paramountcy.

- **Shailaja Chandar**, in his book "*V.R. Krishna Iyyer on Fundamental Rights and Directive Principals*", Deep and Deep Publications, 1998, observed that Indian Constitution has been particularly shaped and reshaped through the judicial process. It is not doubt true that the apex court has played paramount role in era of Constitutional jurisprudence. In the field of Constitutional law, Fundamental Rights and directive principles occupy subgenre's position. It explicated the relationship between the Fundamental Rights and directive principles.
- **B. P. Dwivedi** in "T*he Transmuting Dimension of Personal Liberty in India*", D.C.Wadhwa and Company, Nagpur, 1998 observed that Liberty is a dynamic concept. Each word of Article 21 has been subject to close judicial scrutiny. The Indian judiciary has shown soft corner in administration of malefactor equity and equity to the poor and down trodden courts have shown great dynamism in the fields of right to bail, licit avail, expeditious tribulation and human conditions in prisons and homes for the custody of women and children, and the capital penalization.
- **Kanhaiyalal Sharma** in "*Re-constitution of the Constitution of India*" 2002, Deep and Deep Publishers Delhi, analyzed the prisoners of Constitution of Bharat National Commission to review

the working of the Constitution (NCRWC) exordium and summarily of recommend actions gives very limpidly legislature can not be competent to make a malefactor law retrospective so as to provide that a person may be convicted.

- **Dr. Durga Das Basu** in "*Prelude to Constitution for India*", 2007 Universal Law Publication, Observed that a law is verbalized to be prospective, when it affects acts done or omission made after the law comes in to effect. The majority of laws are prospective in their operation but sometimes the legislative may give retrospective effect in law, that is to verbally express to bring within the operation of the law not only future acts and omissions but withal acts or omission committed even prior to the enactment of the law in question.
- **Prof. Kailash Rai** - "*The Constitutional Law of India*", Central Law Publications 2015. In this book historical background of the Indian Constitution very pellucidly. Nature and kinds of the Constitution are prescribed. The doctrine of legitimates. Exception has now occupied a consequential place in the public law. This doctrine has been discussed under chapter II of the book.
- **N.K. Acharya** in "*The Constitution of India*", 2007, Asia Law House, analyzed that Constitution of India has 22 components and it contains 395 Articles. In the course of time 21 Articles omitting those reiterated and incipient Article numbering 75 have been integrated. The integrated Article is given a suffix of alphabets. Hence the number given in decisions by the Supreme Court have opened up deep issues and revived remotely ideological concerns over the designation and content of this oldest of inedited Constitutions, Conclusively, but by no denotes unimportantly theoretical discussion and depth.

- **Prof. Narendar Kumar** – "*Constitutional Law of India*" has describe that Constitution being a living document its provisions have to be construed, having regard to march time, the development of law the transmuting convivial, economic, political values of the society and its people.
- **M.P. Jain** – "*Indian Constitution Law*" observed that in many areas, Constitutional law has been substantially transformed from other edition of this book. Since 1978 there have been many paramount Constitutional cases and development which have been integrated in this book. All the incipient development has been taken in this book.
- **Letch Garlicki** in "*Constitutional Value and the Strasbourg Court*" gone through the regional protection of human rights in Europe. Each national Constitutional proclaims a set of values that determine the designation of its provisions. While these are no clear cut values Principles and norms all Constitutions contain some very general nations that may accommodate as a substructure in the process of Constitutional interpretation.
- **Mahesh Arora** in "*Right to life - personal liberty and right against arbitrary detention*" April 15, 2014…… analyzed that the right to life in our Constitution constitute the most fundamental right rudimental. Amendment 44 in 1978 and 21 (right to life) (right sentence for the crime in cognation) fundamental rights under Article 20 at the time of the crisis can be taken away.
- **Neepa Jain** in "*Article 21 of Constitution of India and right to Livelihood*" that a human being, man's only complete the desiderata of animals is not known, as in any organized society, the right to stay. He himself had assured each facility to develop and inhibit his Magnifier, which is exempt from the ban, whereas it is

only safe. All human rights are designed to achieve this object. Right implicatively pabulum, decent environment, inculcation, shelter, medical care and authority to ensure that in any civilized society insinuates. Article as employed by the word 'life'

- **K. Venkata Subba Rao** in "*Constitutional Development in India: Contribution of Equity*" Deep and deep publications, 1992, analyzed that A.k. Gopalan amendment american andhra andhra pradesh appeal application article ascendancy rearward classes bihar bombay chief equity citizens clause emolument conferred constituent assembly Constitution of India Constitutional law decision delhi dissenting opinion doctrine of prospective executive exercise expression federal liberation fundamental rights gajendragadkar golaknath regime gujarat held valid .
- **J. Pandey** and **R. K. Dubey** in "*Civil Liberty under Indian Constitution*" 1995 observed that the cases referred to above have been discussed at the opportune places in the book. In the cull of the cases the author has exercised his full desertion. The issue on which the law is not well settled, the conflicting views have been verbalized and explicated and an endeavor has been made to derive confusion as to the present position of the law.
- **Vishoo Bhagwan**, 7th revised edition 1999, observed that No advocate in India can be successful in profession without having in depth study of the Constitution of India. Constitution of India is the fundamental law of the land. In India constitution of India, the fundamental law is not made, but it has been evolved.
- **D. N. Gautam** in "*Fifty Years of Indian Constitution*" 2001 deals with many facets of the working of the Indian Constitution during its first half century, with analysis of some of the fundamental quandaries that have afflicted our civil society.

- **Sukhbir Bhatnagar** in "*Constitutional Law and the Governance*" 2008 that Article 21 has both negative and affirmative contents. Positive rights, thus been held to be well conferred under article 21. Bulwark of article 21 is well elongated to under tribulations, prisoners and even to the convicts.
- **Rajeev Bhargava** in "*Politics and Ethics of the Indian Constitution*" 2013 Observed that Under the Supreme Court's fundamental rights and individual freedom in the office on that accentuate it has been pointed out that a large consequentiality and Copy Ness and managing and leading nationality, convivial and be the goal of economic equality can not be achieved.
- **Fali S. Nariman** observed in "*The State of the Nation in the Context of Indian's Constitution*" 2013 that a division of the High Court in this book to noise pollution free environment to live in right ensured by Article 21 of the Constitution which has been considered as one, which has been brought to our notice.
- **N. M. Ghatate** in "*Emergency Constitution and Democracy: An Indian Experience*", 2011 Observed that the procedure established by law for any person, except with his life and personal freedom can be lost. He is a citizen of the state in the life of every human being is bound to forefend and freedom.
- **P. P. Rao** in "Reclaiming the Vision - Challenges of Indian Constitutional Law and Governance" 2013 held that After the meeting in Karachi in 1931, many of the provisions of the directive fundamental right and principles.46,the Indian National Congress, including sundry parts of the Constitution, in the replica, civil rights and economic bulwark also adopted a resolution committing the land reforms, efforts to provide security gregarious putting

Terminus and implementation of the goals expressed in the words of liberation.

- **P. L. Mehta** and **N. Verma** in "*Human Rights under the Indian Constitution, the Philosophy and Judicial Gerrymandering*", 1999 observed that No person except according to procedure established by law deprived of his life or personal liberty that will be life.
- **Dr. S. S. Dhaktode** in "*Human Right and Indian Constitution*" 2013 observed that take into consideration issues prevalent in the trial court the constitutionality of the statute of prevalent cases of postulation, and the history of the times can be considered as subsisting at the time of the law to pursue and concern that the facts of each state in order to postulate.
- **Samaraditya pal** in "*India's Constitution, Inceptions and Evolution*", 2014 observed that each incident of sexual harassment at the work place, Gender and life and the right to freedom ensured by the Constitution of India as a result of the violation of the fundamental right to the fundamental rights of the two most valuable is the gainsaying.
- **Mamta Rao**, in "*Constitutional Law*" 2015 Eastern Book Company observed the composition of the Indian Constitution to describe Constitution and moves on with a detailed discussion on the nature of government, bureaucracy, the party system, and members of civil society. Add text to issue a joint womb, along with a wide topic and provides a potential.
- **Dr. A. K. Tripathi** in "*Indian Constitution*" 2008 has gone through the importance of Constitutional amendments, directive principles, centre-state relations, judiciary, civil services, blackward classes etc. The stress has been given on the parliamentary and administrative procedure to ease the students of

political science in different spheres. The issues have been described in brief and impressive manner for the students.

- **Dr. G. P. Tripathi** in "*Constitutional Law : New Challenges*", 2009, Central law publication deals with Indian constitution, parliament, central executive in-depth, the Supreme Court, the United States and the Union Territory, the state legislature, executive, municipality, federal system, legislative, financial, administrative relationships, political and civil rights, fundamental rights, the principles of state policy of freedom and security of direct basic duty.
- **Kalpana Rajaram** in "*Constitution of India and Indian polity*", 2010 observed about the Constitution of India, its development and working, and analyses the political system in India. Very subsidiary for those seeking a concise erudition of the subject. The basic concept New line the verbalised above explanation for such trained new line interpretation judicial revolution, along with righteous, the concept of the right to life and personal liberty development, denotement, width and depth with reference to an incipient should be considered, so that makes it necessary.
- **P.M. Bakshi** in "*The Constitution of India*" 2015 universal law publication deals with an analytical commentary on the Indian Constitution with exhaustive case law references and digest. State government and parliament of India and governance and the constitution of the United States each and all local or other ascendant entry is included within the Being a pocket-sized book containing the text of the Indian Constitution, incorporating amendments.
- **Keshav Dayal** in "*Makers of Indian Constitution, Framing of the Indian Constitution and Biographies of the Constitution Makers*"

2014 observed the role played by the prominent bellwethers including lawyers has become paramount and is essential for the comprehensive study of the present day Constitution.

(VIII) Methodology of the Research Work

First of all we will review all the available literature in form of books, journals report on subject of the constitutional provision to role of judiciary which are as following: -

1. Studying all available text books.
2. Journals. report
3. Report of United Nation Organization
4. Report of National Commission on Human Right
5. Judicial Dicta
6. Conducting empirical surveys through questionnaire interviews.
7. Obtaining the views of Scholars.
8. Internet
9. National and International Seminars held in the area.

(IX) Hypothesis

In India, the constitution does not expressly recognize the Right to privacy. The concept of privacy as a fundamental right thirst evolved in 1964 in the case of Kharak Singh. The Supreme Court for the first time recognized that there is a right of privacy implicit in the Indian Constitution under Article 21. The Court held that the right to Privacy is an integral part of the right to life but with out any clear cut laws, it still remains in the grey area.

1. A broad and holistic approach is needed to ease the right to privacy must be recognized as a fundamental Right.
2. State being a welfare state should immediately formulate scheme and policies as government has framed right to information so there is needed to find how much we can avoid Right to Privacy.
3. The right to life include the right include the right to privacy.
4. The supreme court of India has examined the scope of Article 21 in different occasions ascertain the constraints within which the assurance of personal liberty is available to the people of India.
5. Personal freedom of expression has get its full meaning in Maneka Gandhi case.
6. Natural justice is a pervasive doctrine integral to process full equitable play in Indian jurisprudence for dignity of women.
7. Supreme Court in felicitous cases awarded emolument in case of contravention of Article 21 for development of feminine jurisprudence.

(X) Plan of the Study

The researcher has divided the entire study in following chapters:-

Chapter-1 Constitutional Provisional vis-a-vis Dignity of Woman in India. In this chapter researcher will study about the constitutional provisions vis-à-vis dignity of woman in India.

Chapter-2 International Prospective with Special Provisions of Human Rights Declarations. In the second chapter researcher attempts to examine the present relevance of the present law.

Chapter-3 Comparative Study of United States of America, United Kingdom and India. In this chapter the scholar will analyses

comparative study with United States of America, United Kingdom and social legal system of various countries.

Chapter-4 Various Dimensions of Right to Privacy. In this chapter researcher will analyses Right to privacy and election law, Right to privacy and right to information, Right to privacy and medical law with special reference to dignity of women.

Chapter-5 The Role of Media in Sting Operation of Right to Privacy. In this chapter the researcher will discuss about the question of right to privacy with special reference to dignity of women relating to the present time regarding the subject under the research.

Chapter-6 The Dignity of a Woman : Procedural Law and Judicial Pronouncements. In this chapter researcher will analyses various dimensions of law and decisions given by Supreme Court and various High Courts of various countries

Chapter-7 Conclusion and Suggestions. The last chapter of this research task will be the conclusion and suggestions drawn on the basis of study under taken.

CHAPTER 1

CONSTITUTIONAL PROVISIONAL VIS-A-VIS DIGNITY OF WOMAN IN INDIA

The Indian Judiciary wedded with the establishment of rule of law. The country where the rule of law is established, citizen of that country wants to enjoy some basic rights and freedom. The rights and freedom cannot enjoy without the establishment of Rule of law. People want to enjoy their life without any fear, any burden and any restriction. In this regard Article 21 of Indian Constitution has a wide area for the right of the person. Article 21 of the Constitution says that "No person shall be deprived of his life or personal liberty except according to procedure established by law."

The analysis of Article 21 of the Constitution reveals the following characteristics namely

(i) Life;
(ii) Personal liberty;
(iii) Deprived; or
(iv) Procedure established by law.

These phrases have been interpreted by the Indian judiciary from time to time. The judicial interpretation of these phrases may be divided into three eras that is Gopalan, Menka Gandhi and Post Menka Gandhi. The era of Gopalan is the initial starting age on the matter.

(I) Development of Personal Liberty :

(A) ERA of Gopalan Case :

According to Article 21 "No person shall be deprived of his life or personal liberty except according to procedure established by law."

There were three main questions before the judiciary to determine in **Gopalan Case**[1]:

1. What is the mean of the word 'Law' in Article 21? It deals with the enacted law or it means the principles of natural justice also.
2. The reasonableness of the Law of preventive detention ought to be judged under Article 19?
3. Does the maxim 'procedure established by law' introduce the American concept of procedural due process in India?

But the Supreme Court of India determine that the word law means only state made statue law. The Court rejected the plea that by the term 'law' in Article 21 meant not only the state made law but jus natural or the principles of natural justice.

But in **Kharak Singh's case**[2], it was held that 'personal liberty' was not only limited to bodily restraint or confinement to prisons only, it was used as a compendious term including within itself all the varieties of rights which go to make up the personal liberty of a man. In **R.C. Kooper v. Union of India,**[3] the 11 judges bench of Supreme Court including Justice Shah, Justice Sikri, Justice Shelet and Justice Hegde observed that any law that deprives the life and personal liberty must be just and fair.

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1 A.K. Gopalan v. State of Madras, AIR 1950 SC 27.
2 Kharak Singh v. State of Uttar Pradesh, AIR 1963 SC 1295.
3 AIR 1970 SC 564.

(B) Era of Menka Gandhi Case : New Dimension For Personal Liberty:

Justice P.N. Bhagwati observed in **Menka Gandhi**[4] case that "The expression 'personal liberty' in Article 21 is of widest amplitude and it covers a variety of rights which go to constitute the personal liberty of man and some of them have raised to the status of distinct fundamental rights and given additional protection under Article 19."

Before the decision of Menka Gandhi[5] article 21 guaranteed the right to life and personal liberty to citizens only against the action of the executive and not from legislative action. But after the decision of Menka Gandhi article 21 also protect the right of life and personal liberty from the legislative action.

The Court observed in **Francis Coralie v. Union Territory of India,**[6] that the right to live is not restricted to mere animal existence. It means something more than just physical survival. The right to 'live' is not confined to the protection of any faculty or limb through which life is enjoyed or the soul communicates with the outside world but it also includes "the right to live with human dignity", and all that goes along with it, namely, the bare necessities of life such as, adequate nutrition, clothing and shelter and facilities for reading, writing and expression ourselves in diverse forms, freely moving about and missing and commingling with fellow human beings.

In **Satwant Singh v. Assistant Passport Officer,** [7] Justice Bachawat and Justice Hiddayatullah observed that the right to travel

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4 Menka Gandhi v. Union of India, AIR 1978 SC 597.
5 Menka Gandhi v. Union of India, AIR 1978 SC 597.
6 AIR 1981 SC 576.
7 AIR 1967 SC 1836

abroad was held to be an aspect of 'personal liberty' of an individual and, therefore, no person can be deprived of his right to travel except according to the procedure established by law. Since a passport is essential for the enjoyment of the right denial of a passport amounts to deprivation of personal liberty. Hence, a passport for travel cannot be denied except according to procedure established by law.

(C) Post Menka Gandhi Era:

After Menka Gandhi era, the judiciary interpreted Article 21 in various forms for the protection of life of a common man. In **A.K. Bindal v. Union of India,**[8] it was held that no person should be deprived of his life and personal liberty except according to the procedure established by law. In **Lata Singh v. State of Uttar Pradesh,**[9] Justice Katju observed that right to merry is a absolute right under Article 21 of the Constitution.

Thus the Article 21 has a large range to protect the right of the people. In the above case it has been said that article 21 requires these condition of his of law to deprive a person of his life and person liberty:-

(i) There must be a law.
(ii) It must lay down a just and reasonable procedure.
(iii) The executive must follow this procedure while depriving a person of his life and personal liberty.

The article 21 is also applicable on the non-citizens. The Supreme Court has said that "even those who come to India as tourists also have the right to live, so long as they are here, with human dignity, just as the state is under an obligation to protect the life of every citizen in this

[8] (2003) 5 SCC 163
[9] AIR 2006 SC 2522

country. So also the state is under an obligation to protect the life of the persons who are not citizens."[10]

Thus with the above brief preview of Article 21 it is clear that it has a multidimensional interpretation. Any arbitrary, whimsical and fanciful act of the part of any state depriving the life or personal liberty would be against article 21 of the Indian Constitution.

(II) Dimensions of Right to Privacy:

'Privacy' is very much desired by all citizens, who consider it as the most valuable component of one's liberty. With the growth and development of one's activities in the society, it has assumed a proportionately increased significance. Changes in the political order and exigencies of life also enhanced the same. No one, thus likes any interference in his ways of living and enjoyment of personal freedom. An injury to one's privacy and private rights is therefore regarded as the worst invasion of the fundamental freedom conferred under Article 21 of the Constitution.

(A) Police Surveillance:

In **Prem Chand v. Union of India**,[11] the Supreme Court posed 'two problems of disturbing import' viz., "who will police the police? Is freedom of movement unreasonably fettered if policemen are given power of externment for public peace?" One 'Mr. Prem Chand Paniwala who spiraled up into a prosperous dealer in Delhi from humble beginnings of aerated water-vendor', questioned the notice of externment issued by the Deputy Commissioner of Police. The facts of the case show

[10] Chairman Railway Board v. Chandrima Das, AIR 2000 SC 988.
[11] AIR 1981 SC 613

that he became a stock-witness for the police as otherwise his trade would not be permitted to be carried on by the police. In the words of the Court, it was condemned, that [12] "We were flabbergasted at this bizarre confession but to lend credence to his assertion counsel produced a few hundred summonses where the petitioner was cited as a witness. Was he not omnipresent how could he testify in so many cases save by a versatile genius for loyal unveracity? For sure, the consternation of the community at this flood of perjury will shake its faith in the veracity of police investigation and the validity of the judicial verdict. We have no doubt that the petitioner, who was given particulars of a large number of cases where he had been cited as witness, is speaking the truth even assuming the 3,000 cases may be an exaggeration. In justice, Justices and Justicing and likewise in the police and policing, the peril to the judicial process is best left to imagination if professional perjurers like the self-confessed Paniwala are kept captive by the Police to be pressed into service for proving 'cases'. Courts, trusting the police may act on apparently veracious testimony and sentence people into prison. The community, satisfied with such convictions, may well believe that all is well with law and order. We condemn, in the strongest terms, the systematic pollution of the judicial process and the consequent threat to human rights of innocent persons. We hope that the higher authorities in the Department who, apparently, are not aware of the nefarious goings-on at the lesser levels will immediately take measures to stamp out this unscrupulous menace". [13]

This observation made by the court was aimed at a condemnation of the heinous police-practice to lead false evidence by coercing persons placed in helpless situations; and it was also intended to warn against its

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[12] Prem Chand's case AIR 1981 SC 613 at page 615

[13] Prem Chand 's case: (supra) AIR I 981 SC 61 3 at page 616.

unholy and disastrous consequence of polluting the very judicial system of crime-adjudication.

Referring to the Delhi Police Act, 1978, it was also added that "The provisions of the statute ostensibly have a benign purpose and in the context of escalation of crimes, may be restrictions which, in normal times might appear unreasonable, may have to be clamped down on individuals. We are conscious of the difficulties of detection and proof and the strain on the police in tracking down criminals. But fundamental rights are fundamental and personal liberty cannot be put at the mercy of the police. Therefore, Sections 47 and 50 have to be read strictly. Any police apprehension is not enough. Some ground or other is not adequate. There must be a clear and present danger based upon credible material which makes the movements and acts of the person in question alarming or dangerous or fraught with violence. Likewise, there must be sufficient reason to believe that the person proceeded against is so desperate and dangerous that his mere presence in Delhi or any part thereof is hazardous to the community and its safety".

The Court made it clear that it was emphasizing on the need of the State to issue clear orders to the police department 'to free the processes of investigation and prosecution from the contamination of concoction through the expediency of stockpiling of stock-witnesses'. 'Among the list of wanted persons must be not only the poor suspects but the dubious rich'.

In this case the State conceded not to take action against the petitioner, any further. Mr. Paniwala's case is the best illustration of abuse of police powers. While safeguarding the constitutional freedom, the Apex Court has emphasized on the need to guard against two

dangerous trends: (i) The callousness with which the police resort to dubious methods of proof of a prosecution-charge. (ii) The duty of the criminal courts not to succumb to the evidence led by prosecution in a mechanical manner procuring the services of stock-witnesses who may lie in the matter, either because of their own oblique objects or on account of the compulsions dawned on them by the police.

(B) Domiciliary Visits of Harassment:

In **Kharak Singh v. State of Uttar Pradesh,**[14] the constitutional validity of Chapter-XX of the Utter Pradesh Police Regulations and the powers conferred upon the police officials there under was questioned, contending that they violate the citizens' fundamental rights under Arts. 19(l)(d) and 21 of the Constitution. Regarding secret picketing of the houses of suspects, it was held that secrecy from the suspect, has as its purpose the ascertainment of the identity of the persons who visit the house of the suspect, so that the police might have a record of the nature of the activities - of the suspect; and that this cannot in any material or palpable form affect the right on the part of the suspect to 'move freely' nor can it deprive, him of his 'personal liberty'. Regarding the contention that if the suspect comes to know that his house is being subjected to picketing, that might affect his inclination to move about or that in any event it would prejudice his 'personal liberty', it was said that in dealing with a fundamental right such as the right to free movement or personal liberty, that only can constitute an infringement which is both direct as well as tangible and it could not be that under these freedoms the constitution- makers intended to protect or protected more personal sensitiveness. It was contended further that such picketing might have a tendency to prevent friends of the suspect from going to his house and

[14] AIR 1963 SC 1295

would thus interfere with his right 'to form associations' guaranteed by Article 19(l)(c). Rejecting it, it was observed that is not necessary to examine closely and determine finally the precise scope of the 'freedom of association' and particularly whether it would be attracted to a case of the type now under discussion, since the expression 'picketing' is used in clause (a) of this Regulation not in the sense of offering resistance to the visitor, physical or otherwise or even dissuading him, from entering the house of the suspect but merely of watching and keeping a record of the visitors.

As regards 'Domiciliary visits at night', the court held that it is clear that having regard to the plain meaning of the words 'domiciliary visits', the police authorities are authorized to enter the premises of the suspect, knock at the door and have it opened and search it for the purpose of ascertaining his presence in the house. Nextly, the meaning of the expression 'personal liberty' was examined by the court, which explained it thus[15]: "It is true that in Article 21 as contrasted with the 4th and 14th Amendments in the United States, the word 'liberty' is qualified by the word 'personal' and therefore its content is narrower. But the qualifying adjective has been employed in order to avoid overlapping between those elements or incidents of 'liberty' guaranteed by Article 21 and particularly in the context of the difference between the permissible restraints or restrictions which might be imposed by sub clauses 2 to 6 of the Article on the several species of liberty dealt with in the several clauses of Article 19 (1)".

It was laid down in this 'case that any common law remedy in the event of violation of the fundamental right is no bar to the relief, and the Supreme Court can straight away grant it under Article 32 of the

[15] Kharak Singh v. State of Uttar Pradesh, AIR 1963 SC 1295 (at page 1301)

Constitution. Next the Court observed as follows regarding the connotation of the expression 'personal liberty': "We shall now proceed with the examination of the width, scope and content of the expression 'personal liberty' in Article 21. Having regard to the terms of Article 19(1)(d), we must take it that that expression is used as not to include the right to move about or rather of locomotion. The right to move about being excluded, its narrowest interpretation would be that it comprehends nothing more than freedom from physical restraint or freedom from confinement within the bounds of a prison; in other words, freedom from arrest and detention, from false imprisonment or wrongful confinement. We feel unable to hold that the term was intended to bear only this narrow interpretation but on the other hand consider that 'personal liberty' is used in the Article as a compendious term to include within itself all the varieties of rights which go to make up the 'personal liberties' of man other than those dealt with in the several clauses of Article 19(1). It was observed by the court that it might not be inappropriate to refer here to the words of the preamble to the Constitution that it is designed to 'assure the dignity of the individual' and therefore of those cherished human values as the means of ensuring his full development and evolution. Such vital words as 'personal liberty' have to be construed in a reasonable manner and to be attributed that sense which would promote and achieve those objectives. Hence clause (b) of Regulation 236 was held to be plainly violative of Article 21 and as there is no 'law' on which the same could be justified it must be struck down as unconstitutional.

As regards the right of privacy, the Court observe[16] : "As already pointed out, the right of privacy is not a guaranteed right under our

[16] Ibid at page. 1303

Constitution and therefore the attempt to ascertain the movements of an individual which is merely a manner in which privacy is invaded is not an infringement of a fundamental right guaranteed by Part III".

Regulation 236 (b) authorizing domiciliary visits was struck down as unconstitutional. While agreeing with the majority view Mr. Justice Subbarao and Mr. Justice Shah declared the entire Regulation 236 as unconstitutional, observing as follows[17]: "No doubt the expression 'personal liberty' is a comprehensive one and the right to move freely is an attribute of personal liberty. It is said that the freedom to move freely is carved out of personal liberty and, therefore, the expression 'personal liberty' in Article 21 excludes that attribute. In our view, this is not a correct approach. Both are independent fundamental rights, though there is overlapping. There is no question of one being carved out of another. The fundamental right of life and personal liberty had many attributes and some of them are found in Article 19. If a person's fundamental right under Article 21 is infringed the State can rely upon a law to sustain the action; but that cannot be a complete answer unless the said law satisfies the test laid down in Article 19 (2) so far as the attributes covered by Article 19 (1) are concerned. In other words, the State must satisfy that both the fundamental rights are not infringed by showing that there is a law and that it does amount to a reasonable restriction within the meaning of Article 19(2) of the Constitution. But in this case no such defence is available, as admittedly there is no such law. So, the petitioner can legitimately plead that his fundamental rights both under Article 19 (l) (d) and Article 21 are infringed by the State".

The learned judges further added as follows holding that right of privacy is a part of the fundamental right under Article 21 : "The

[17] Ibid at page. 1305

scientific methods used to condition a man's mind are in a real sense physical restraints, for they engender physical fear channeling one's actions through anticipated and expected grooves. So also creation of conditions which necessarily engender inhibitions and fear complexes can be described as physical restraints. Further, the right to personal liberty takes in not only a right to be free from restrictions placed on his movements, but also free from encroachments on his private life. It is true our Constitution does not expressly declare a right to privacy as a fundamental right, but the said right is an essential ingredient of personal liberty".

The two learned judges defined the right of personal liberty in Article 21 as a right of an individual to be free from restrictions or encroachments on his person, whether those restrictions or encroachments are directly imposed or indirectly brought about by calculated measures. The separate and concurring judgment of Mr. Justice K Subba Rao and Mr. Justice Shah noted above has taken a more welcome and correct view of the issue as to the scope of the expression 'personal liberty' in Article 21.

Merely because two distinct Articles [18] have some common ingredients or overlapping aspects it cannot be said that they are mutually exclusive in that respect and to that extent. Any impugned executive act infringing one's liberty has to satisfy the fulfilment of the two constitutionally guaranteed freedoms. The seven freedoms in Article19 are only in recognition of the basic freedom conferred under Article 21.

[18] Articles 19 and 21, the Constitution of India, 1950.

In **Govind v. State of Madhya Pradesh,** [19] the petitioner challenged the validity of Regulations 855 and 856 of Madhya Pradesh Police Regulations made under Section 46(2)(c) of the Police Act, 1861 . He complained of certain false cases against him and the facts were as follows: The petitioner's grievance was that the police were making domiciliary visits both day and night, at frequent intervals, that they were secretly picketing his house and the approaches to his house, that his movements were being watched by the patel of the village and that when the police came to the village for any purpose, he was called and harassed with the result that his reputation had sunk low in the estimation of his neighbours. Whenever he left the village for another place he had to report to, the chowkidar of the village or to the police station about his departie and that he had to give further information about his destination and the period within which he would return. The petitioner contended that those actions of the police were violative of the fundamental right guaranteed to him under Articles 19(1)(c) and 21 of the Constitution. He prayed for a declaration that Regulations 855 and 856 are void as contravening his fundamental rights under the above articles.

It was observed by the Court that the provision in Regulation 856 for domiciliary visits and other actions by the police is intended to prevent the commission of offences. The object of domiciliary visits is to see that the person subjected to surveillance is in his residence only and has not gone out of it for commission of any offence. The Regulations 855 and 856 have the force of law.[20] It was held thus:

(i) The right to privacy in any event will necessarily have to go through a process of case-by-case development. Even assuming that the right to personal liberty, the right to move freely

[19] AIR 1975 SC 1378
[20] Govind v. State of Madhya Pradesh, AIR 1975 SC 1378

throughout the territory of India and the freedom of speech create an independent right of privacy, as an emanation from them which one can characterize as a fundamental right, the right is not absolute.

(ii) Drastic inroads directly into the privacy and indirectly into the fundamental rights, of a citizen will be made if Regulations 855 and 856 were to be read widely. To interpret the rule in harmony with the Constitution is therefore necessary and canalization of the powers vested in the police by the two Regulations earlier read becomes necessary, if they are to be saved at all.

(iii) The relevant Articles of the Constitution adverted to earlier, behave the court, to narrow down the scope for play of the two Regulations. If any action were taken beyond the boundaries so set, the citizen will be entitled to attack such action as unconstitutional and void.

The Court has proceeded to further observe that it cannot be said surveillance by domiciliary visits would always be unreasonable restriction upon the right of privacy. It was held that the procedure under the Regulations is reasonable having regard to the provisions of Regulations 853(c) and 857.

It was also observed in this case that assuming that Article 19(5) does not apply in terms, as the right to privacy of movement cannot be absolute, a law imposing reasonable restriction upon it for compelling interest of State must be upheld as valid. While declaring that surveillance does not tantamount to an unreasonable restriction on the right of privacy, the court has pointed out the following three limitations on the manner of exercise of this function:

(i) 'Surveillance' can be made in respect of such persons who are intent upon committing crimes which have the effect of endangering public peace or security in the society.

(ii) Before embarking upon such surveillance, there must be in existence enough and reasonable material, indicating an intention to commit such crimes.

(iii) 'Surveillance" cannot be resorted to, as a matter of course, and as a measure of harassment.

(C) Prevention of Crime is Object of Surveillance :

In **Malak Singh v. State of Punjab**,[21] certain useful observations of caution are made by the court, saying that prevention of crime is one of the prime purposes of the Constitution of a police force and Section 23 of the Police Act prescribes it as the duty of police officer 'to collect and communicate intelligence affecting the public peace, to prevent the commission of offences and public nuisances'. "Organized crime cannot be successfully fought without close watch of suspects. But, surveillance may be intrusive and it may so seriously encroach on the privacy of a citizen as to infringe his fundamental right to personal liberty guaranteed by Article 21 of the Constitution and the freedom of movement guaranteed by Article 19(l)(d). That cannot be permitted". Article 8 of the European Convention of Human Rights on the right to respect for a person's private and family life was quoted with approval thus:

(i) Everyone's right to respect for his private and family life, his home and his correspondence shall be recognized.

(ii) There shall be no interference by a public authority with the exercise of this right, except such as is in accordance with law

[21] AIR 1981 SC 760

and is necessary in a democratic society in the interests of national security, public safety, for the prevention of disorder and crime or for the protection of health or morals".

This observation of the court contains an implicit warning to the Executive that surveillance shall not be a pretext for illegal interference with anyone's freedom. Its aim has to be maintenance of law and order in the society, which in turn needs prevention of crime. Pertaining to the question of maintenance of surveillance registers and the right of police to do so, the following *obitor dicta* are very valuable[22]:

(i) "As we said discreet surveillance of suspects, habitual and potential offenders, may be necessary and so the maintenance of history sheet and surveillance register may be necessary too, for the purpose of prevention of crime. History sheets and surveillance registers have to be and are confidential documents, neither the person whose name is entered in the register nor any other member of the public can have access to the surveillance register. The nature and character or the function involved in the making of an entry in the surveillance register is so utterly administrative and non-judicial that it is difficult to conceive of the application of the rule of *Audi Alteram Partem*. Such enquiry as may be made has necessarily to be confidential and it appears to us to necessarily exclude the application of that principle".

(ii) "But all this does not mean that the police have a licence to enter the names of whoever they like in the surveillance register; nor can the surveillance be such as to squeeze the fundamental freedoms guaranteed to all citizens or to obstruct the free

[22] Malak Singh's case: AIR 1981 SC 760: (at page 763)

exercise and enjoyment of those freedoms; nor can the surveillance so intrude as to offend the dignity of the individual".

In my opinion it can be observed that:

(i) The object of surveillance is maintenance of law and order in the society, while preventing the crime.
(ii) The nature of making entries in a surveillance register is non-judicial and has to be necessarily confidential.
(iii) Surveillance cannot be for extraneous considerations, unconnected with its objects.
(iv) Excessive surveillance resulting in interference with citizen's freedoms enables the court to intervene and enforce the constitutional protection.

(D) Veracity of Testimony :

In **State of Maharashtra v. Madhuker Narayana Mardikar**,[23] it has been declared that everyone is entitled to protect his or her right to privacy and cautions that a court should not disregard the value of the evidence of a person merely because that such a person's character is not satisfactory in some respects:

"The High Court observes that since Banubi is an unchaste woman, it would be extremely unsafe to allow the fortune and career of a Government Official to be put in jeopardy upon the uncorroborated version of such a woman who makes no secret of her illicit intimacy with another person. She was honest enough to admit the dark side of her life. Even a woman of easy virtue is entitled to privacy and no one can invade

[23] AIR 1991 SC 207

her privacy as and when he likes. So also it is not open to any and every person to violate her person as and when he wishes. She is entitled to protect her person if there is an attempt to violate it against her wish. She is equally entitled to the protection of law. Therefore, merely because she is a woman of easy virtue, her evidence cannot be thrown overboard. At the most the officer called upon to evaluate her evidence would be required to administer caution unto himself before accepting her evidence. But in the present case we find that her evidence is not only corroborated in material particulars by the evidence of her husband but also by the evidence of Police Sub-Inspectors Ghosalkar and other members of the Police party who had accompanied him on receipt of a phone call from the respondent. As pointed out earlier Banubi who was herself living in a glass house, considering her antecedents, could never have behaved in the manner she is alleged to have behaved if the respondent had merely raided her house and drawn up a nil panchanama. In that case she would not have approached the District Superintendent of police at the earliest opportunity and would not have lodged a complaint of misbehaviour against the respondent".

(E) Eavesdropping :

Telephone tapping was an infringement of the right under Article 21. The petitioner questioned acts of tapping of telephones of politicians on the part of Governmental agencies, in **People's Union for Civil Liberties v. Union of India**.[24] It was held thus on the scope of right to privacy:

"The right to privacy has not been identified under the Constitution. As a concept it may be too broad and moralistic to define it judicially.

[24] AIR 1997 SC 568

Whether right to privacy can be claimed or has been infringed in a given case would depend on the facts of the said case. But the right to hold a telephone conversation in the privacy of one's home or office without interference can certainly be claimed as 'right to privacy'. Conversations on the telephone are often of an intimate and confidential character. Telephone conversation is a part of modem man's life. It is considered so important that more and more people are carrying mobile telephone instruments in their pockets. Telephone conversation is an important facet of a man's private life. Right to privacy would certainly include telephone-conversation in the privacy of one's home or office. Telephone tapping would, thus, infract Article 21 of the Constitution of India unless it is permitted under the procedure established by law".[25]

Referring to the Right to freedom of speech and expression as guaranteed under Article 19(1)(a) of the Constitution, it was held that when a person is talking over telephone, he is exercising his right to freedom of speech and expression. Telephone-tapping, when it comes within the grounds of restrictions under Article 19(2) would infract Article 19(1)(a) of the Constitution. The court has pointed out that India is a signatory to the International Covenant on Civil and Political Rights, 1966, of which Article 17 of the said Covenant reads: (1) "No one shall be subject to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to lawful attacks on his honour and reputation. (2) Every one has the right to the protection of the law against such interference or attacks".

When the interception is permissible has been pointed out by the Court, examining the provisions of Section 5(2) of the Telegraph Act,

[25] Ibid. at page 574

1885 thus[26]: "Section 5 of the Act permits the interception of messages in accordance with the provisions of the said Section 'Occurrence of any public emergency' or 'In the interest of public safety' are the sine qua non for the application of the provisions of Section 5(2) of the Act. Unless a public emergency has occurred or the interest of public safety demands, the authorities have no jurisdiction to exercise the powers under the said section. Public emergency would mean the prevailing of a sudden condition or state of affairs affecting the people at large calling for immediate action. The expression 'public safety' means the state or condition of freedom from danger or risk for the people at large. When either of these two conditions are not in existence, the Central Government or a State Government or the authorized officer cannot resort to telephone tapping even though there is satisfaction that it is necessary or expedient so to do in the interests of sovereignty and integrity of India etc., In other words, even if the Central Government is satisfied that it is necessary or expedient so to do in the interest of the sovereignty and integrity of India etc."

While concluding the judgment, the court issued the following directives which are aimed at the prevention of any arbitrary exercise of the executive power in the matter and with a view to protect the right to privacy.

(i) An order for telephone-tapping in terms of Section 5(2) of the Act shall not be issued except by the Home Secretary, Government of India (Central Government) and Home Secretaries of the State Governments. In an urgent case the power may be delegated to an officer of the Home Department of the Government of India and the State Government not

[26] Ibid at pages 574, 575, 576

below the rank of Joint Secretary. Copy of the Order shall be sent to the Review Committee concerned within one week of the passing of the order.

(ii) The Order for tapping shall require the person to whom it is addressed to intercept in the course of their transmission by means of a public telecommunication system, such communications as are described in the order. The order may also require him to disclose the intercepted material to such person and in such manner as are described in the order.

(iii) The matters to be taken into account in considering whether an order is necessary under Section 5(2) of the Act shall include whether the information which is considered necessary to acquire could reasonably be acquired by other means.

(iv) The interception required under Section 5(2) of the Act shall be the interception of such communications as are sent to or from one or more addresses, specified in the order, being an address or addresses likely to be used for the transmission of communications to or from, from one particular person specified or described in the order or one particular set of premises specified or described in the order.

(v) The order under Section 5(2) of the Act shall cease to have effect at the end of the period of two months from the date of issue, if not renewed. The authority may, renew the order if it considers that it is necessary to continue it. The total period shall not exceed six months.

(vi) The authority which issued the order shall maintain the following records:

(a) the intercepted communications.

(b) the extent to which the material is disclosed.

(c) the number of persons and their identity to whom any of the material is disclosed.

(d) the extent to which the material is copied, and

(e) the number of copies made of any other material.

(vii) The use of the intercepted material shall be limited to the minimum that is necessary in terms of Section 5(2) of the Act.

(viii) Each copy made of any of the intercepted material shall be destroyed when its retention is no longer necessary in terms of Section 5(2) of the Act.

(ix) There shall be a Review Committee consisting of Cabinet Secretary, the law Secretary and the Secretary, Telecommunications at the level of the Central Government. The Review Committee at the State level shall consist of Chief Secretary, Law Secretary and another member, other than the Home Secretary, appointed by the State Government to decide on the compliance with the aforesaid requirements, etc.[27]

Since 'public emergency' and 'public safety' are not such 'frequently occurring considerations' as other 'routine administrative causes', it is made necessary that the competent authority empowered to intercept telephonic conversation shall reach a subjective satisfaction while deciding on the exercise of statutory power. Even then when a particular information concerning a person can be acquired by other means, it is not legal or proper for him to resort to the extraordinary step of 'interception'. This is a valuable safeguard against any arbitrary decision of the Executive Authority as in a given case the aggrieved person might successfully demonstrate to the court that the nature of the

[27] Ibid. at pages 578 and 579.

information required by such 'Authority' was such that it could be had otherwise and therefore his fundamental right was infringed unjustifiably.

(F) Privacy and Morality:

In **Sharda v. Dharmpal,**[28] it was pointed out that the right to privacy in terms of Article 21 is not an absolute right and in case of conflict between the fundamental rights of two parties, that right which advances public morality would prevail. It was so decided while answering the question whether a party to a divorce proceeding can be compelled to undergo medical examination, as the wife's mental condition was in issue. However it was observed that though the Court has the power to direct a party to submit for such medical test, it has to satisfy itself that there is a strong and prima facie case for granting such direction.

(G) Residuary Liberties and Right of Franchise:

In **Raghunath Pandey v. The State of Bihar,**[29] under the provisions of Bihar Municipal Corporations Act, 1978 a new municipal Corporation was constituted, dissolving an existing Municipality and certain Gram Panchayats. Section 2 of the Act was attacked as violative of Article 21 of the Constitution, contending that it affected citizens' right of franchise etc. Rejecting the same, it was observed thus: "The other ground of attack is that even the people of the suburban areas have a civic right to be governed by a unit of self-government of their choice and their right of franchise is their civic right. I do not understand how a citizen can have his own choice of the form of government. I have already discussed the impact of directive principles under Articles 40 and 48 of

[28] AIR 2003 SC 3450: (2003) 4 SCC 493.
[29] AIR 1982 Patna 1 (DB).

the Constitution in this case. A Gram panchayat cannot say that it will always remain a gram panchayat or it has a right to refuse any better form of self government. This is a matter to be decided by legislature and so long the law laid down by the legislature is within the framework of the Constitution it cannot be assailed. The right of franchise of anybody is not being taken away".

(H) Medical Care:

In **Mrs. Shanta v. State of Andhra Pradesh,**[30] the petitioner complained of serious injury in her abdomen due to the negligence of doctors who performed caesarean operation for delivery. She pleaded medical negligence in not properly cleaning her abdomen of all portions, objects and bodies including the cotton that is mop removed later from her stomach. While upholding her claim it was observed as follows with regard to the valuable right under Article 21:

"Hypocrites must not have thought and many, who believe that a physician or a surgeon is a healer and a life giver, would never have thought that the oath, which he performed would be only a ritual, would use more for professing and less in practice. Directives in Part IV of the Constitution included in the list of principles of policy to be followed by the State in Article 39 therein, include that the health and strength of workers, men and women, and the tender age of children are not abused and that citizens are not forced by economic necessity unsuited to their age of strength and in Article 47 therein provide that the state shall regard the raising of the level of nutrition and the standard of living of its people and the improvement of public health as among its primary duties. The cherished right of life as in Article 21 of the Constitution of India extends

[30] AIR 1998 AP 51.

to receiving proper and complete medical attention from medial practitioner, whether working in a Government Hospital or a private practitioner. It was believed and there appears to be some still believing that a man of medicines is a missionary and so he takes the oath of service to the suffering human beings, in return receiving subsistence and satisfaction.

The Preamble and Article 38 of the Constitution of India envision, in the words of the Supreme Court, in **Consumer Education & Research Centre v. Union of India**,[31] 'as its arch to ensure life to be meaningful and livable with human dignity'. The right to health is an integral facet of meaningful right to life to have not only a meaningful existence but also robust health and vigour without which life is a misery. Any one thus who has the opportunity to tinker in any capacity with another, has a duty to ensure that his or her interference with the life of another has done no injury or harm which would affect the life of that person either diminish it or injure it in any manner. A doctor thus to whom a patient is brought for treatment gets full control upon the life of the patient and when he or she treats the patient, his or her command upon the patient is all pervasive".[32]

While awarding compensation to the petitioner for the wrong done to her, it was further observed thus: "The Government of the State has taken the responsibility of providing the best medical treatment and agreed to meet all expenses for the treatment as well as other attendant expenses. She has been thus taken by the State Government in its charge for providing to her all necessary medical care, which care the

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31 AIR 1995 SC 922

32 Mrs. Shanta's Case AIR 1998 AP 51 at p. 57.

Government has agreed to provide to her until she is completely cured and until her complete recuperation".

A sum of three lakhs rupees was awarded as a compensation in the case with a direction to deposit it for 5 years, paying interest and then pay it to the victim. It was also held that the petitioner shall be free to take action in tort for the damages under the private law against all the concerned persons etc.[33]

(I) Right to call for 'Bundh':

In **Bharat Kumar K. Palicha v. State of Kerala**,[34] the relief sought is a declaration that calling for and the holding of 'bundh' is unconstitutional and illegal, being violative of Articles 19 and 21 of the Constitution. Whenever there is a call for 'bundh' there is a forced closure of all public and private establishments, schools and all public activity comes to a standstill. Even public and private transport systems would not be allowed to operate. At the very outset of the judgment in the case, the Kerala High Court has taken note of the fact that the citizen's recourse to Article 226 is in the context of a failure on the part of the State Movement to save the citizens from the adverse effects of 'bundh'. The following are the salient aspects of the decision in the case:

(i) The State has a duty to ensure that citizen rights and freedoms are not trampled upon by political or violent minority organization.

(ii) 'Bundh' deprives a citizen from enjoyment of his fundamental right and freedoms.

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33 Ibid at p. 60.

34 AIR 1997 Ker. 291 (FB).

(iii) No political party or organization has any right to paralyse the industry and commerce in the State or prevent the citizens from exercising their fundamental rights.

(iv) Political parties and organisations which call for a 'bundh' are liable to compensate the Government, the public and the private citizens for the loss suffered by them on account of such 'bundh'.

Justice Balasubramanyan, observed in the judgment as follows: "According to the petitioners calling for a bundh entails exhortation to violence and physically restraining others who are citizens of the country and hence it is an illegal activity and cannot be supported as a fundamental right of freedom of speech and expression or of assembling peaceably and without arms, protected by Article 19(l)(a) and (b) of the Constitution. The petitioners further complain that by the calling of the bundh and the holding of it, citizens are prevented from attending to their avocations and the traders are prevented from keeping open their shops or from carrying on their business activities It is also contended that the workers are prevented from attending to work in the factories and other manufacturing establishments leading to loss in production leading to national loss. It is also contended that with a view to purvey terror, the organizers of the 'bundh' also indulge in wanton acts of vandalism like destruction of Government property and transport vehicles and even private cars and two wheelers. The illegal acts cannot be recognized as part of the right of any person protected by Article 19(1) of the Constitution. It is also contended that the right of the political parties, if any, to hold demonstration or to show protest, cannot extend to preventing the citizens of the country from exercising their fundamental rights of attending to their business, their studies and their avocations and in such a context, the calling for and the holding of 'bundhs' ought to be

declared illegal. It is complained that neither the State nor the police force takes steps to prevent violence and to prevent coercion so that whenever a bundh is called, a citizen, out of fear for his life and his property, is forced to remain indoors. No person has a right to prevent a citizen from going to the hospital or from seeking medical aid and no person or organization has a right to prevent the doctors from attending to their duties by attending on their patients and those who come to them for emergency treatment. The right to go to the railway station, the aerodrome and to the bus terminal could not be prevented in the guise of a protest at the instance of some of the political organisations and when such prevention is achieved by threat, sometimes naked and visible and sometimes by psychological means and by the stalking menace, the same has to be prevented".

After explaining the meaning of the Hindi word 'bundh' as 'closed' or 'blocked' the consequences of 'Bundh' are explained by the court thus: "Ifthe intention is to prevent the milk supply, prevent the distribution of newspapers, prevent people going to the hospitals for treatment, prevent the people from travelling and to generally prevent them from attending to their work either in service of the State or in their own interest, that obviously means that it amounts to a negation of the rights of the citizens to enjoy their natural rights, their fundamental freedoms and the exercise of their fundamental rights".

It was remarked by the Court that it cannot take an 'Ostrich' like policy as to these ill-effects of 'Bundh' and then proceeded to observe as follows:

(i) "Even if there is no express or implied threat of physical violence to those who are not in sympathy with the bundh, there is clearly a menacing psychological fear instilled into the citizen

by a call for a bundh which precludes him from enjoying his fundamental freedom or exercising his fundamental rights".

(ii) "We are inclined to the view that the call for a bundh implies a threat to the citizen that any failure on his part to honour the call, would result in either injury to person or injury to property and involves preventing a citizen by instilling into him the psychological fear that if he defies the call for the bundh, he will be dealt with by those who are allegedly supporters of the bundh. Faced with a complaint of a similar nature against what has come to be known as 'gherao', a special Bench of the Calcutta High Court in **Jay Engineering Works v. State**,[35] considered what was really implied by the expression 'gherao' and came to the conclusion that the object was to compel those who control industry to submit to the demands of the workers without recourse to the machinery provided for by law and in wanton disregard of it and in short, to achieve their object not by peaceful means but by violence and that such a 'gherao' involves the commission of an offence".

(iii) It is true that theoretically it is for the State to control any possible violence or to ensure that a bundh is not accompanied by violence. But in our present set up the reluctance and sometimes the political subservience of the law-enforcing agencies and the absence of political will exhibited by those in power at the relevant time, has really led to a situation where there is no effective attempt made by the law- enforcing agencies either to prevent violence or to ensure that those citizens who do not want to participate in the bundh are given

[35] AIR 1968 Cal 407.

the opportunity to exercise their right to work, their right to trade or their right to study".

It was held by the Court that no political party or organization can claim that it is entitled to paralyse the industry and commerce in the entire State or Nation. They cannot prevent the citizens not in sympathy with their view point, from exercising their fundamental rights or from performing their duties for their own benefit or for the benefit of the State or the Nation.

Then the Court concluded as follows regarding the contention that no relief can be granted against the political parties in the proceedings under Article 226 of the Constitution: "We are inclined to the view that the political parties and the organizations which call for such bundhs and enforce them are really liable to compensate the Government, the public and the private citizen for the loss suffered by them for such destruction. The State cannot shirk its responsibility of taking steps to recoup and of recouping the loss from the sponsors and organisers of such bundhs. We think, that these aspects justify our intervention under Article 226 of the Constitution".

In **Communist Party of India (Marxist) v. Bharat Kumar and Others**,[36] the above noted decision of the Kerala High Court was confirmed by the Supreme Court on Appeal, observing as follows: "On a perusal of the impugned judgment of the High Court,[37] referring to which learned counsel for the appellant pointed out certain portions, particularly in paras 13 and 18 including the operative part in support of their submissions, we find that the judgment does not call for any interference.

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[36] (1998) 1 SCC 201

[37] Bharat Kumar K. Palicha vs. State of Kerala, AIR 1997 Ker. 291 (FB): (1997) 2 K LJ 287 (FB).

We are satisfied that the distinction drawn by the High Court between a 'Bandh' and a call for general strike or 'Hartal' is well made out with reference to the effect of a 'Bandh' on the fundamental rights of other citizens. There cannot be any doubt that the fundamental rights of the people as a whole cannot be subservient to the claim of fundamental right of an individual or only a section of the people. It is on the basis of this distinction that the High Court has rightly concluded that there cannot be any right to call or enforce a 'Bandh' which interferes with the exercise of the fundamental freedoms of other citizens, in addition to causing national loss in many ways. We may also add that the reasoning given by the High Court, particularly those in paragraphs 12, 13 and 17 for the ultimate conclusion and directions in paragraph 18, is correct with which we are in agreement. We may also observe that the High Court has drawn a very appropriate distinction between a 'Bandh' on the one hand and call for general strike or 'Hartal' on the other. We are in agreement with the view taken by the High Court".

(J) Beauty Contest and Right to Privacy:

The question whether a beauty contest offends Article 21 was considered in **Chandra Rajakumari v. Commissioner of Police, Hyderabad**,[38] and it was held as follows: "The beauty contest in any form in its true sense of the term can be neither obscene nor prohibited under any law as long as it is intended for the welfare of women in all respects and it is intended only as a form of art and entertainment and in a way a sport to select the winners on comparative merit, hut if it indecently represents any woman by depicting in any manner the figure of a woman, form, body or any part thereof in such a way so as to have the effect of being indecent, or derogatory to or denigrating women or is

[38] AIR 1998 AP 302.

likely to deprave, corrupt or injure the public morality or morals within the meaning of Section 2(c) of the Indecent Representation of Women (Prohibition) Act, 1986 it is totally 3rohibited by virtue of Section 3 and 4 of the said Act and also punishable under Sections 6 and 7 of the Act both in regard to the offenders and also the abettors who may directly or indirectly encourage, participate or aid in the holding of such contests. It offends Article 14, 21 and 51-A of the Constitution of India and the International covenants accepted by the United Nations Organisation in addition to violation of human rights as is understood both under the Constitution and any law relating to protection of human rights and punishable as per law in such cases. It also amounts to public immorality and repugnant to public opinion offending the dignity of woman and womanhood as a whole and depraves the woman society in particular so as to exploit either for commercialization or for lust".

(K) Statement Made to Doctors and Privacy:

In **District Registrar and Collector, Hyderabad and another v. Canara Bank and others**,[39] the Supreme Court had occasion to consider the extent of the right to privacy of a person in relation to the question of freedom from unreasonable search and seizure. In this context, Lahoti, Chief Justice, in the judgment of the Bench observed as that "Though the United States Constitution contains a specific provision in the Fourth Amendment against 'unreasonable search and seizure', it does not contain any express provision protecting the 'right to privacy'. However, the United States Supreme Court has culled out the 'right of privacy' from other rights guaranteed in the United States Constitution. In India, our Constitution does not contain a specific provision either as to 'privacy' or even as to 'unreasonable' search and seizure, but the right to privacy has,

[39] 2005 (1) SCC 496.

as we shall presently show, been spelt out by our Supreme Court in the provisions of Article 19(1)(a) dealing with freedom of speech and expression, Article 19(1)(d) dealing with right to freedom of movement and from Article 21 which deals with right to life and liberty." "Intrusion into privacy may be given by (1) legislative provisions, (2) administrative/executive orders, and (3) judicial orders. The legislative intrusions must be tested on the touchstone of reasonableness as guaranteed by the Constitution and for that purpose the court can go into the proportionality of the intrusion vis-a-vis the purpose sought to be achieved. So far as administrative or executive action is concerned, it has again to be reasonable having regard to the facts and circumstances of the case. As to judicial warrants, the court must have sufficient reason to believe that the search or seizure is warranted and it must keep in mind the extent of search or seizure necessary or the protection of the particular State interest. In addition, as stated earlier, common law recognised rare exceptions such as where warrantless searches could be conducted but these must be in good faith, intended to preserve evidence or intended to prevent sudden danger to person or property."

The court has traced the development in India referring to the case of **MP. Sharma v. Satish Chandra**,[40] **Kharak Singh v. State of Utter Pradesh,**[41] **Govind v. State of Madhya Pradesh,**[42] **R. Rajagopal v. State of Tamil Nadu,**[43] **People's Union for Civil Liberties v. Union of India,**[44] **'X' v. Hospital 'Z',**[45] **People's Union for Civil Liberties v. Union of India**,[46] and **Sharda v. Dharmpal**.[47]

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40 1954 SCR 1077: 1954 Cri.LJ 865.
41 (1964) 1 SCR 332.
42 (1975) 2 SCC 148
43 (1994) 6 SCC 632.
44 (1997) 1 SCC 301.
45 (2003) 4 SCC 399.
46 (2003) 4 SCC 399.
47 (2003) 4 SCC 493.

The Court was considering in this case the validity of Section 73 of the Stamp Act as amended by the Andhra Pradesh Act, 17 of 1986. The said amendment permitted the inspection of documents in the private custody and also enables the concerned Authority to make search and seizure of the same. It was held that the section violated the right to privacy, inasmuch as there are no safeguards in respect of the interests of the persons in custody while making such a search and seizure, provided in the amended section. It was also pointed out that there are no sufficient guidelines indicated in the Act as to who can be authorised to inspect etc. and as to when there is a necessity for the search etc. This question has arisen in the contest of search and seizure of documents in the custody of Banks for the purpose of impounding them. In this context the Court has observed: "It cannot be denied that there is an element of confidentiality between a Bank and its customers in relation to the latter's banking transactions."

(L) Police Atrocities:

R. Rajagopal alias R.R. Gopal and another v. State of Tamil Nadu and others,[48] is an interesting case relating to the right of privacy, where the question was with regard to the publication of the autobiography of a condemned prisoner.

The facts of the case are thus stated in the judgment of the Supreme Court: "This petition raises a question concerning the freedom of press vis-a-vis the right to privacy of the citizens of this country. It also raises the question as to the parameters of the right of the press to criticize and comment on the acts and conduct of public officials. A Tamil weekly magazine 'Nakkheeran', published from Madras, sought issuance of an

[48] 1994 AIR SCW 4420: AIR 1995 SC 264.

appropriate writ under Article 32 of the Constitution, restraining the respondents, viz. the State of Tamil Nadu and others from taking any action as contemplated in their communication dated June 15, 1994 and further restraining them from interfering with the publication of the autobiography of the condemned prisoner, Auto Shankar, in their magazine. Shankar alias Gouri Shankar alias Auto Shankar was charged and tried for as many as six murders and was convicted and sentenced to death by the learned Sessions Judge, Chenglepat which was confirmed by the Madras High Court. His appeal to the Supreme Court was dismissed. Auto shankar wrote his autobiography while confined in Chenglepat sub jail. The autobiography was handed over to his wife, for being delivered to his advocate, Sri. Chandra Sekharan. The prisoner requested his advocate to ensure that his autobiography is published in the petitioners' magazine, 'Nakkheeran'. 'The autobiography sets out the close nexus between the prisoner and several Indian Administrative Service, Indian Police Service and other officers, some of whom were indeed his partners in several crimes'. Before commencing the serial publication of the autobiography in their magazine, the petitioners announced that very soon the magazine would be coming out with this sensational life history of Auto Shankar. This announcement sent shock waves among several police and prison officials. They forced the said prisoner, by applying third degree methods, to write letters addressed to the Inspector General of Prisons and the State Government requesting that his life story should not be published in the magazine. Ultimately, the Inspector General of Prisons wrote the impugned letter to the first petitioner. It states that the petitioners' assertion that Auto Shankar had written his autobiography while confined in jail in the year 1991 is false etc., The prisoner has himself denied the writing of any such book. The letter concludes, 'from the above facts, it is clearly established that the serial in your magazine

under the caption 'Shadowed Truth' or 'Auto Shankar's dying Declaration' is not really written by Gauri shankar but it is written by someone else in his name'. Legal action was threatened to be taken against the publishers in case of publication of such autobiography".

On the facts it was contended by the petitioners that the contents of the impugned letter are untrue, the argument of jeopardy to prisoners' interest is a hollow one; the petitioners have a right to publish the said book in their magazine as desired by the prisoner himself.

The petitioners asserted that the freedom of press guaranteed by Article (19)(1)(a) entitles them to publish the said autobiography. It was also contented that the condemned prisoner has also the undoubted right to have his life story published and that he cannot be prevented from doing so. The case of the police was that the allegation that a number of Indian Administrative Service, Indian Police Service and other officers patronized the condemned prisoner in his nefarious activities is baseless. They also denied that they subjected the said prisoner to third degree methods to pressurise him into writing letters denying the authorization to the petitioners to publish his life story etc.,

The Court framed the following questions:

(1) Whether a citizen of this country can prevent another person from writing his life story or biography? Does such unauthorized writing infringe the citizen's right to privacy? Whether the freedom of press guaranteed by Article 19(1)(a) entitles the press to publish such unauthorized account of a citizen's life and activities and if so to what extent and in what circumstances ?What are the remedies

open to a citizen of this country in case of infringement of his right to privacy and further in case such writing amounts to defamation?

2. (a) Whether the government can maintain an action for its defamation?

(b) Whether the government has any legal authority to impose prior restraint on the press to prevent publication of material defamatory of its officials? and

(c) Whether the public officials, who apprehend that they or their colleagues may be defamed, can impose a prior restraint upon the press to prevent such publication?

(3) Whether the prison officials can prevent the publication of the life-story of a prisoner on the ground that the prisoner being incarcerated and thus not being in a position to adopt legal remedies to protect his rights, they are entitled to act on his behalf?

These questions were answered by the Court thus: "Question nos. 1 and 2;

(1) The right to privacy as an independent and distinctive concept originated in the field of Tort Law, under which a new cause of action for damages resulting from unlawful invasion of privacy was recognized. This right has two aspects which are but two faces of the same coin: (i) the general law of privacy which affords a tort action for damages resulting from an unlawful invasion of privacy and (ii) the constitutional recognition given to the right to privacy which protects personal privacy against unlawful governmental invasion. The first aspect of this right must be said to have been

violated, where, for example, a person's name or licence is used, without his consent, for advertising or non advertising purposes or for that matter, his life story is written; whether laudatory or otherwise and published without his consent. In recent times, however, this right has acquired a constitutional status. Right to privacy is not enumerated as a fundamental right in our Constitution but has been inferred from Article 21. The first decision of this court dealing with this aspect is **Kharak Singh v. State of Uttar Pradesh**.[49] A more elaborate appraisal of this right took place in a later decision in **Govind v. State of Madhya Pradesh,**[50] wherein Justice Mathew, speaking for himself, Justice Krishna Iyer and Justice Goswami, traced the origins of this right and also pointed out how the said right has been dealt with by the United States Supreme Court in two of its well-known decisions in Griswold vs. Connecticut[51]".

(2) "There are two possible theories for protecting privacy of home. The first is that activities in the home harm others only to the extent that they cause offence resulting from the mere thought that individuals might be engaging in such activities and that such 'harm is not constitutionally protectable by the State. The second is that individuals need a place of sanctuary where they can be free from societal control. The importance of such a sanctuary is that individuals can drop the mask, desist for a while from projecting on the world the image they want to be accepted as themselves, an

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49 AIR 1963 SC 1295
50 AIR 1975 SC 1378
51 (1965) 381 US 479; 14 L Ed 2d 510 and Roe v. Wade (1973) 410 US 113

image that may reflect the values of their peers rather than the realities of their natures".[52]

"The right to privacy in any event will necessarily have to go through a process of case-by-case development. Therefore, even assuming that the right to personal liberty, the right to move freely throughout the territory of India and the freedom of speech create an independent right of privacy as an emanation from them which one can characterize as a fundamental right, we do not think that the right is absolute".

(3) "The question is how far the principles emerging from the United States and English decisions are relevant under our constitutional system. So far as the freedom of press is concerned, it flows from the freedom of speech and expression guaranteed by Article 19(1)(a). But the said right is subject to reasonable restrictions placed thereon by an existing law or a law made after the commencement of the Constitution in the interests of or in relation to the several matters set out therein. Decency and defamation are two of the grounds mentioned in clause (2). Law of Torts providing for damages for invasion of the right to privacy and defamation and Sections 499 and 500, Indian Penal Code, 1860 are the existing laws saved under clause (2). But what is called for today is a proper balancing of the freedom of press and said laws consistent with the democratic way of life ordained by the Constitution. Over the last few decades, press and electronic media have emerged as major factors in our nation's life. They are still expanding and in the process becoming more inquisitive."

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[52] 26 Stanford Law Rev 1161.

(4) "As observed in **New York Times v. United States**,[53] popularly known as the pentagon papers case, 'any system of prior restraints of that is freedom of expression comes to this Court bearing a heavy presumption against its constitutional validity' and that in such a case, the Government 'carries a heavy burden of showing justification for the imposition of such a restraint'. We must accordingly hold that no such prior restraint or prohibition of publication can be imposed by the respondents upon the proposed publication of the alleged autobiography of 'Auto Shankar' by the petitioners. This cannot be done either by the State or by its officials. In other words, neither the Government nor the officials who apprehend that they may be defamed, have the right to impose a prior restraint upon the publication of the alleged autobiography of Auto Shankar".

The Court summarized the principles thus:

(1) The right to privacy is implicit in the right to life and liberty guaranteed to the citizens of this country by Article 21. It is a right to be let alone. A citizen has a right to safeguard the privacy of his own, his family, marriage, procreation, motherhood, child bearing and education among other matters. None can publish anything concerning the above matters without his consent, whether truthful or otherwise and whether laudatory or critical. If he does so he would be violating the right to privacy of the person concerned and would be liable in an action for damages. Position may, however, be different, if a person voluntarily thrusts himself into controversy or voluntarily invites or raises a controversy.

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[53] (1971) 403 US 713.

(2) The rule aforesaid is subject to the exception, that any publication concerning the aforesaid aspects becomes unobjectionable if such publication is based upon public records including Court records. This is for the reason that once a matter becomes a matter of public record, the right to privacy no longer subsists and it becomes a legitimate subject for comment by press and media among others. We are, however, of the opinion that in the interests of decency {Article 19(2)} an exception must be carved out to this rule, viz., a female who is the victim of a sexual assault, kidnap, abduction or a like offence should not further be subjected to the indignity of her name and the incident being published in press media.

(3) There is yet another exception to the Rule in (1) above. Indeed, this is not an exception but an independent rule. In the case of public officials, it is obvious, right to privacy, or for that matter, the remedy of action for damages is simply not available with respect to their acts and conduct relevant to the discharge of their official duties. This is so even where the publication is based upon facts and statements which are not true, unless the official establishes that the publication was made by the defendant with reckless disregard for truth. In such a case, it would be enough for the defendant to prove that he acted after a reasonable verification of the facts; it is not necessary for him to prove that what he has written is true. of course, where the publication is proved to be false and actuated by malice or personal animosity, the defendant would have no defence and would be liable for damages. It is equally obvious that in matters not relevant to the discharge of his duties, the public official enjoys the same protection as any other citizen as explained in (1) and (2) above. It needs no reiteration that

judiciary, which is protected by the power to punish for contempt of Court and the Parliament and Legislatures protected as their privileges are by Articles 105 and 104 respectively of the Constitution of India, represent exceptions to this rule.

(4) So far as the Government, local authority and other organs and institutions exercising Governmental power are concerned, they cannot maintain a suit for damages for defaming them.

(5) Rules 3 and 4 do not, however, mean that Official Secrets Act, 1923, or any similar enactment or provision having the force of law does not bind the press or media.

(6) There is no law empowering the State or its officials to prohibit, or to impose a prior restraint upon the press/media.

It was held that the petitioners have a right to publish, what they allege to be the life story/autobiography of Auto Shakar in so far as it appears from the public records, even without his consent or authorisation. But if they go beyond that and publish his life-story, they may be invading his right to privacy and will be liable for the consequences in accordance with law. Similarly, the State or its officials cannot prevent or restrain the said publication.[54]

(M) Detention in Civil Prison for Revenue Recovery:

In **J.V. Krishnaiah v. Sub-Collector**,[55] the detention in civil prison for recovery of dues under the Madras Revenue Recovery Act, was questioned as violative of Articles 19, 21 and 22 of the Constitution of India. It was held as follows:

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[54] 1994 AIR SCW 4420 (p. 4437).
[55] AIR 1968 A.P. 83 (FB).

'In so far as the contention based on Articles 19(l)(d), 21 and 22 of the Constitution is concerned, it is convenient to deal with them first. In view of the proclamation of emergency issued by the President under Article 352, Article 19 is suspended by virtue of Article 358. Articles 21 and 22 are not attracted where the personal liberty of a citizen is affected by his being detained or kept in custody in accordance with the procedure established by law. Where a person is arrested and kept in detention under any law, whether of parliament or of a state under which the safeguards envisaged in Article 22 are provided for, the arrest and detention cannot be said to be an infringement of the fundamental rights guaranteed under the aforesaid two Articles. It has been held that the arrest of a person for recovery of amounts under Sections 48 and 49 of the Madras Revenue Recovery Act does not violate Articles 21 and 22.[56] Clauses (1) and (2) of Article 22 have been construed to apply to arrests made without warrant of a court and to persons who have been taken into custody on the allegation or accusation of actual or suspected or apprehended commission by that person of any offence of a criminal or a quasi- criminal nature or some act prejudicial to the public interests.

(N) Validity of Section 9, Hindu Marriage Act, 1955:

In **Smt. Harvinder Kaur v. Harmander Singh Choudhry**,[57] Section 9 of the Hindu Marriage Act, 1955 founding the matrimonial relief of restitution of conjugal rights is held to be not violative of Articles 14 and 21 of the Constitution, observing as below and laying down that in domestic affairs, like matrimonial life and its privacy, there is no question of importing the application of fundamental rights like Article 21 etc., It was held as follows:

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[56] Collector of Malabar v. E Ebrahim, AIR 1957 SC 688 and Purushottam v. B. M Desai, AIR 1956 SC 20

[57] AIR 1984 Delhi 66.

(i) "One general observation must be made, introduction of constitutional law in the home is most inappropriate. It is like introducing a bull in a Chinese Shop. It will prove to be a ruthless destroyer of the marriage institution and all that it stands for. In the privacy of the home and the married life neither Article 21 nor Article 14 have any place.

In a sensitive sphere which is at once most intimate and delicate the introduction of the cold principles of Constitutional law will have the effect of weakening the marriage bond. That the restitution remedy was abolished in England in 1970 by Section 20 of the Matrimonial proceedings and Properties Act, 1970 on the recommendation of the Law commission headed by Justice scarmann is no ground to hold that it is unconstitutional in the Indian set-up".

(ii) "This illustrates that the house of everyone is to him his castle and fortress. The spouses can claim a kind of sacred protection behind the door of the family home which generally speaking, the civil authority may not penetrate. The introduction of Constitutional Law into the ordinary domestic relationship of husband and wife will strike at the very root of that relationship and will be a fruitful source of dissension and quarrelling. It will open the door to unlimited litigation in a relationship which should be obviously as far as possible protected from possibilities of that kind. The 'domestic community' does not rest on contracts sealed with seals and sealing wax, nor on Constitutional law. It rests on that kind of moral cement which unites and produces 'two- in-one ship".

It was held that Section 9 is constitutional and the restitution decree amounts to a preparation for divorce if the parties do not come together.

(O) Freedom of Speech:

In **J. Yogendra Nath Handa v. State**,[58] when the Rajasthan State Legislative Assembly met for its Budget Session some members opposed the Governor's address saying that instead of issuing certain ordinances, the necessary Bills ought to have been introduced in the Assembly. The action of the Governor in ordering removal of those members was questioned before the State High Court. They contended that it amounted to violation of their freedom of speech and liberty etc. According to them, it was only the speaker of the House that could initiate any disciplinary action and not the Governor.

Shri Ramanand Aggarwal, Member of the House had limited his prayer in the Writ Petition to (i) quashing the order of the Governor dated 26the February, 1966 expelling the petitioner from the House; and (ii) issuing an order or direction restraining the Marshall and the Government of Rajasthan from enforcing the order of the governor punishing the members of the House. He claimed that he had a fundamental right of free speech under Articles 19 and 194(1) of the Constitution of which he could not have been deprived under orders of the Governor. It was also urged that the fundamental right of the petitioner under Article 21 of the Constitution was also invaded by the Governor. It was held as follows:

"The petitioners have relied on Article 19 of the Constitution of India, but we think that apart from the suspension of this Article during the period of emergency consequent to the proclamation of the President

[58] AIR 1967 Rajasthan 123.

under Article 358 of the Constitution of India, it does not come into picture so far as the present case is concerned. The fundamental rights under Part III of the Constitution of India including the right of freedom of speech and expression under Article 19 or that of protection of life and personal liberty under Article 21 thereof, are guaranteed for all citizens of this country and should not be confused with the constitutional rights under Article 194(1) including the special right of freedom of speech in the House which is available only to the members of the legislature over and above the fundamental rights. The real grievance of the petitioners in these cases is about the alleged infringement of their constitutional rights or privilege under Article 194(1), but the proper forum to raise questions relating to them is the House. The argument about invasion of fundamental rights under Articles 19 and 21 has been raised in vain, because there is no allegation that any member's personal liberty or his right of freedom of speech was violated the moment he was brought outside the precincts of the House and left as a free ordinary citizen as distinguished from the member of the Legislative Assembly. Freedom of speech available under Article 194 is subject to the provisions of the Constitution and to the rules and standing orders regulating the procedure of the legislature."[59]

(P) Legislative Privileges:

The facts pertaining to the case reported under the head as 'Under Article 143 of the Constitution of India: In a matter[60] it has been held that the Speaker of the Legislative Assembly of Uttar Pradesh State administered a reprimand to one Mr. Keshav Singh for alleged contempt of the House and also for allegedly committing a breach of the privilege

[59] Per D.S. Dave, C.J: AIR I 967 Rajasthan I 23: (at page 125).
[60] AIR 1965 SC 745.

of a member of the House. The subject-matter of the two accusations is a pamphlet printed and published by Mr. Keshav Singh. In pursuance of the decision of the House, the speaker directed that Mr. Keshav Singh be committed to prison for the said person's writing a disrespectful letter to the speaker etc. and issued a warrant and Mr. Keshav Singh was detained in Jail. The said action was questioned by Mr. Keshav Singh by way of a writ petition before the Allahabad High Court. The High Court granted bail and directed release, pending the case before it. Thereupon the legislative Assembly considered the judicial act of the High Court judges concerned and Advocate who appeared for Mr. Keshav Singh as amounting to contempt of the House and directed that all of them should be brought before it. The judges and the Advocate moved the High Court by separate petitions questioning the directions of the legislature. The President of India moved the Supreme Court, under Article 143(1) of the Constitution for its opinion on the issues arising in the context. A full bench of the High Court restrained the speaker from acting further in the matter and stayed the proceedings issued by the House. On these facts, the Supreme Court delivered its opinion, making the following observations and leaving the adjudication of the main controversy before the High Court to be decided by itself as it is competent to do so.

Chief Justice Gajendragadkar Observed in the Court's judgment as follows: "Having examined the relevant decisions bearing on the point, it would, we think, not be inaccurate to observe that the right claimed by the House of Commons not to have its general warrants examined in Habeas Corpus proceedings has been based more on the consideration that the House of commons is in the position of a superior court of record and has the right like other superior courts of record to issue a general warrant for commitment of persons found guilty of contempt. Like the

general warrant issued by superior courts of record in respect of such contempt, the general warrant issued by the House of Commons in similar situations should be similarly treated. It is on that ground that the general warrants issued by the House of Commons were treated beyond the scrutiny of the courts in Habeas Corpus proceedings. In this connection, we ought to add that even while recognizing the validity of such general warrants, Judges have frequently observed that if they were satisfied upon the return that such general warrants were issued for frivolous or extravagant reasons, it would be open to them to examine their validity".

"There is no doubt that the House has the power to punish for contempt committed outside its chamber, and from that point of view it may claim one of the rights possessed by a Court of Record. A Court of Record, according to Jewitt's Dictionary of English Law, is a court whereof the acts and judicial proceedings are enrolled for a perpetual memory and testimony, and which has power to fine and imprison for contempt of its authority. The House, and indeed all the legislative Assemblies in India, never discharged any judicial functions and their historical and constitutional background does not support the claim that they can be regarded as Courts of Record in any sense. 'If that be so, the very basis on which the English courts agreed to treat a general warrant issued by the House of Commons on the footing that it was a warrant issued by a superior Court of Record, is absent in the present case, and so, it would be unreasonable to contend that the relevant power to claim a conclusive character for the general warrant which the House of Commons, by agreement is deemed to possess, is vested in the House. On this view of the matter, the claim made by the House must be rejected".

Next, the court considered the question of House's privilege visa-vis Article 21. It was observed that if a citizen moves the Supreme Court and complains that his fundamental right under Article21 had been contravened, it would plainly be the duty of the Court to examine the merits of the said contention, and that inevitably raises the question as to whether the personal liberty of the citizen has been taken away according to the procedure established by law. It was held that the impact of the fundamental constitutional right conferred on Indian citizens by Article 32 on the construction of the latter part of Article 194(3) is decisively against the view that a power or privilege can be claimed by the House, though it may be inconsistent with Article 21. The rules made by the House for regulating its procedure and the conduct of its business would be subject to the provisions of the Constitution under Article 208(1). Referring to Section 30 of the Advocates Act, 1961, which confers on Advocates a right to practise in all courts, tribunals or persons legally authorized to take evidence etc. and Section 14 of the Bar Councils Act which recongises a similar right, it was remarked that if a citizen has the right to move the High Court or the Supreme Court against the invasion of fundamental rights of the citizen, then the advocates' statutory right to assist citizens in such a task would step in and that process would remain uncontrolled by Article 194(3). This was described by the Court as one integrated scheme for enforcing the fundamental rights of citizens, while sustaining the rule of law. It was then concluded that the particular right which the House claims in the case to be an integral part of its power or privilege is inconsistent with the material provisions of the Constitution and cannot be deemed to have been included under the latter part of Article 194(3). Regarding the claim of the House that its general warrants must be held to be conclusive and cannot be deemed to be the subject-matter of the latter part of Article 194(3), it was observed that it is

somewhat doubtful whether the power to issue a general unspeaking warrant is consistent with Section 554(2)(b) and Section 555 of the Code of Criminal Procedure.

(Q) Religious Freedom and Children's Custody:

The freedom to practise religion, conferred under Article 25 of the Constitution does not include any liberty to subject children to any dangerous conditions, such as, ill-health or 'any risk to 'life'. The jurisdiction of courts to issue 'Habeas Corpus' for safeguarding the interests of children is based on their inherent jurisdiction.

In **Marggarate Maria Pulparampil Nee Feldman v. Dr. Chacko Pulparampil,**[61] the contention was that due to various reasons, the High Court should not and even cannot exercise jurisdiction to grant custody of the children to the mother even if it be found that such a course would be in the best interests of the infants. The jurisdiction that is exercised when the court decides on the question of custody of infants brought before the Court in Habeas Corpus proceedings is an inherent jurisdiction as distinct from a statutory jurisdiction conferred by any particular special statute. It was pointed out by the court that none of the provisions contained in the enactments, the Guardians and Wards Act, 1890, and the Travancore Christian Guardianship Act, stand in the way of exercising parens patriae jurisdiction arising in a case of this nature.

The father's right to the custody of his children is explained thus, after referring to the case of **Sara Dorine Ramanathan v. Swamynathan Ramanathan**: [62] "Regarding Article 25 of the Constitution of India, it was emphasized that all persons have the right in

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61 AIR 1970 Kerala 1 (FB).
62 (1961) 39 Mys.LJ 189.

India freely to profess, practise, and propagate religion and that this fundamental right guaranteed by the Constitution when taken along with the rights of a father who is the natural and legal guardian of his child to bind up the child in his own faith and according to his own views, and impart to the child such training and education that he considers best for the Child, would be a complete answer to the claim or any other person for the custody of the child".

It was held that there is nothing in Article 25 of the Constitution of India that abridges or abrogates the High Court's jurisdiction as parens patriae. It was observed that neither Article 19(1)(e) nor Article 21 compels a citizen of this country to reside and settle only within the territory of India and he is at perfect liberty to travel abroad and reside in any foreign country without prejudice to his right to return to this country at any time he chooses. 'In the case of a minor child it will ordinarily be left to the parent to decide where the minor child should reside whether inside the territory of India or outside it. But circumstances can arise when this decision for the minor will have to be taken not by the parent but by Court'.

(R) 'Reservation' and Liberty:

In **P. Sagar v. State of Andhra Pradesh,**[63] certain Rules for selection for admission to Medical Colleges in the Andhra and Telangana regions of the Andhra Pradesh State, providing reservation for backward classes, were questioned as ultra vires and violative of Articles. 15(4), 19 and 21 of the Constitution. The court made reference to the American Law on the subject also while dealing with the contention that Articles 21 and 19 are infringed in making reservations for the Backward Classes, in

[63] AIR 1968 A.P. 165: (DB).

spite of the exception in Articles 15(4) or 29 (2), as each one of the fundamental rights conferred by Part III of the Constitution must be given effect to. It was observed that it is not always appropriate to draw on American cases interpreting the American Constitution while interpreting the provisions of the Indian Constitution. The Indian Constitution had to provide for the needs peculiar to the country. It was observed thus: "When, therefore, under Article 15(1), the State was inhibited from discriminating against any citizen on grounds only of religion, race, caste, sex, place of birth or any of them, or under Article 29(2) from denying to any citizen admission into any educational institution maintained by the State of receiving aid out of State funds on grounds only of religion, race, caste, language or any of them, it was positively permitted to make special provisions notwithstanding anything contained in those Articles for the advancement of any specially and educationally backward classes of citizens or for the scheduled castes and the Scheduled Tribes. These provisions having been made in respect of educational institutions, makers will again provide for these when guaranteeing life or personal liberty of any person under Article 21, much less to take away by this guarantee what was positively permitted under Article 15(4)".

It was concluded holding that there is no justification to interpret the words 'personal liberty' in Article 21 in the same manner as the American Supreme Court has done in considering the word 'Liberty' in the V Amendment. Article 21 was held to be not negativing the exception in Article 15(4).

(S) Detention in Civil Prison:

Whether detention in civil prison when sanctioned by law infringes right to personal liberty is a question sometimes raised. In **Jolly George**

Varghese v. The Bank of Cochin,[64] the constitutional validity of Section 51, Code of Civil Procedure, 1908 has been examined in detail, with reference to Article11 of the Declaration of Human rights. The court considered the legality of detention in civil prison, for non-payment of a decree-debt. It was held as follows:

"Right at the beginning, we may take up the bearing of Article 11 on the law that is to be applied by an Indian Court when there is a specific provision in the Civil Procedure Code, authorizing detention for non-payment of a decree debt. The covenant bans imprisonment merely for not discharging a decree debt. Unless there be some other vice or mens rea apart from failure to foot the decree, international law frowns on holding the debtor's person in civil prison, as hostage by the Court. India is now a signatory to this covenant and Article 51(c) of the Constitution obligates the State to 'foster respect for international law and treaty obligations in the dealings of organized peoples with one another'. Even so, until the municipal law is changed to accommodate the Covenant what binds the court is the former, not the latter, A.H. Robertson in 'Human Rights in National and International Law' rightly points out that international conventional law must go through the process of transformation into the municipal law before the international treaty can become an internal law".

In this context, the court pointed out that Article 11, grants immunity from imprisonment to indigent but honest judgment-debtors, and that the march of civilization has been a story of progressive subordination of property rights to personal freedom. Next the court examined if there is any conflict between Section 51, Code of Civil Procedure, 1908 and Article 11 of the International Covenants. It

64 AIR 1980 SC 470.

explained that the said Article only interdicts imprisonment if that is sought solely on the ground of inability to fulfill the debtor's obligation. But Section 51 also declares that if the debtor has no means to pay he cannot be arrested and detained. Section 51 does not violate the mandate of Article 11. When the debtor has no more any means and if he has money on which there are other pressing claims also it is violative of the spirit of Article 11 to arrest and confine him in jail so as to coerce him into payment.

The judgment dealt with the effect of international law and the enforceability of such law at the instance of individuals within the state, and it was observed: "The remedy for breaches of International Law in general is not to be found in the law courts of the State because International Law per se or proprio-vigore has not the force or authority of civil law, till under its inspirational impact actual legislation is undertaken".

It was then remarked that the English Courts lean in favour of the liberty of the citizen, especially of his person and they interpret strictly the statutes which purport to diminish such liberty. In such situations, the Courts presume that Parliament does not intend to restrict private rights in the absence of clear words to the contrary.

The impact of Article 21 on Section 51, Code of Civil Procedure, 1908 was enunciated as follows: "Equally meaningful is the import of Article 21 of the Constitution in the context of imprisonment for non-payment of debts. The high value of human dignity and the worth of the human person enshrined in Article 21, read with Articles 14 and 19, obligate the State not to incarcerate except under law which is fair, just

and reasonable in its procedural essence. **Maneka Gandhi's case**[65] as developed further in **Sunil Batra v. Delhi Administration**,[66] **Sita Ram v. State of Uttar Pradesh**[67] and **Sunil Batra v. Delhi Administration**,[68] lays down the proposition. It is too obvious to need elaboration that to cast a person in prison because of his poverty and consequent inability to meet his contractual liability is appalling".

It was held that to order arrest the simple default to discharge is not enough and there must be some element of bad faith beyond mere indifference to pay, or, alternatively, current means to pay the decree or a substantial part of it.

On the question of legality of detention in Civil Prison for recovery of dues under Order 21 Rule 11 A, civil procedure code, it was held as follows in **M/s. Maruti Ltd (in Liqn), Chandigarh v. M/s. Pan India Plastic Privet Limited, New Delhi**:[69] "When the Courts are required to deprive a person of his personal liberty while ordering his detention in prison, such like provisions are to be strictly complied with before such orders are passed. Order 21 Rule, 11-A of the civil procedure code as reproduced above is a provision in the statute which affects the personal liberty of a citizen. If such an application is filed it has to accompany an affidavit stating the grounds on which arrest is applied for. Simply on doing so, the order of arrest is not required to be passed. As provided under Section 51 of the Code of Civil Procedure, 1908 in the case of a decree for the payment of money, execution of detention in prison is not to be ordered unless the judgment-debtor is afforded an opportunity of showing cause why he should not be committed to prison and the Court is

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65 (1978)1 SCC 248
66 (1978) 4 SCC 494
67 (1979) 2 SCR 1085
68 W.P. No. 1009 of 1979, Dt. 20-12-1979 (SC)
69 AIR 1993 Punjab and Haryana 215.

required to record reason in writing for its satisfaction of the grounds mentioned therein. On failure to establish one of such grounds on which reliance is placed, order detaining the judgment-debtor in prison cannot be passed".

In **K. Karunakar Shetty v. Syndicate Bank, Manipal,**[70] the contention was that the petitioner had no means to pay the decretal amount owed to his creditor and therefore the decree cannot be executed by his arrest and detention in civil prison. The Karnataka High Court held as follows:

"Unfortunately the executing court has not applied its mind to the law declared by the Supreme Court in regard to Sections 51 and 58 of the Code of Civil Procedure, 1908 read with Order 21, Rule 38. He has independently gone into the provisions contained in the Civil Procedure Code without examining what the Supreme Court and what the High Courts have said in regard to the said decision rendered by the Supreme Court. He has gone to the extent of holding that the burden of proof is on the judgment-debtor to demonstrate that he has no means and not on decree-holder. On the other hand, in **Jolly George Varghese v. Bank of Cochin,**[71] the Supreme Court has clearly laid down that as long as there is no dishonesty and malafides on the part of the judgment-debtor to discharge his obligation, committing him to civil prison would amount to violation of Article 11 of the International Covenant on Civil and Political rights and Article 21 of the Constitution of India. Therefore, it is the decree-holder who has to demonstrate that the judgment-debtor has wilfully with the malafide intention, to deprive the benefit of the decree refused to pay the decretal amount inspite of having sufficient means to

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70 AIR 1990 Karnakata 1.
71 AIR 1980 SC 470

pay. The decree holder has not discharged that obligation by any cogent evidence. Then the impugned order is clearly in contravention of the ruling of the Supreme Court".

On the facts of the case, the proper method of an institution-creditor to secure the interest is pointed out thus: "In this court, learned counsel for the decree-holder has fairly submitted that the judgment-debtor is not without means inasmuch as he has a share in the joint family property. If there is a decree against the coparcener or a sharer, there is a mode of execution available to the Bank. The Bank should pursue that mode to secure the individual interest in the immovable property attached and sold. Sending the judgment debtor to prison for a period of three months, less or more, is not a way of realizing the decretal amount. Bank's business is to collect the moneys due to it and ensure repayment of loan or decretal amount and not prosecute a proceeding which will deprive a person's liberty. The Bank is a statutory body and should act with great responsibility in realising its amounts. Sending to prison is not a fair means of realizing the loan advanced".

The impugned order was set aside with liberty to the decree holder in the same execution proceedings to take out appropriate proceedings to realize its amounts. This case places the burden on the decree holder to establish malafides on the part of his judgment debtor who neglects to pay the debt. When there are sufficient means possessed by the judgment-debtor an institution creditor, like the Bank, as for instance, has to resort to the ordinary modes of execution.

In **Dodla Narayana v. Velti Reddemma,** [72] the question for consideration was whether in a decree for execution of a prohibitory

[72] AIR 1990 AP 147.

injunction, the judgment-debtor can be detained in a civil prison for more than three months. Order 21 Rules 32 of the Code of Civil Procedure, 1908 is as follows:

"Decree for specific performance for restitution of conjugal rights, or for an injunction: Where the party against whom a decree for the specific performance of a contract, or for restitution of conjugal rights, or for an injunction, has been passed, has had an opportunity of obeying the decree and has wilfully failed to obey it, the decree may be enforced in the case of a decree for restitution of conjugal rights by the attachment of his property or, in the case of a decree for the specific performance of a contract, or for an injunction by his detention in the civil prison, or by the attachment of his property, or by both"

Section 51 of the Code of Civil Procedure provides for arrest and detention in prison for the period prescribed under Section 58 that is three months. Order 39 Rule 2 A, says: "Consequence of dis-obedience or breach of injunction: In the case of disobedience of any injunction granted or other order made under Rule 1 or Rule 2 or breach of any of the terms on which the injunction was granted or the order made, the Court granting the injunction or making the order, or any Court to which the suit or proceedings are transferred, may order the property of the person guilty of such disobedience or breach to be attached, and may also order such person to be detained in the civil prison for a term not exceeding three months, unless in the mean time the Court directs his release'.

Adverting to the above provision, it was held thus: "Here, again, the word used is 'decree' and clause (2) prohibits the arrest of judgment-debtor for more than one time. Even if the first order was for a period less

than the maximum prescribed, the judgment-debtor cannot be arrested for a second time. This is also in indication to show that liberty of a person cannot be interfered with in execution of civil decrees more than once. The arrest is not the only method by which the decree can be enforced; there are other modes like attachment of properties etc. Article 21 of the Constitution suggests the question whether it is a fair procedure to deprive a person of his personal liberty for not obeying a decree for which other modes of execution are also provided. Section 58 must be construed in a reasonable and fair manner, having regard to the object and reason. On a combined reading of Sections 51 and 58, we are of the view that in execution of a decree, bar, prohibitory injunction under order 21 Rule 32, the judgment-debtor cannot be detained in a civil prison for more than three months, and more than one time".[73]

(T) Depreciation of Unwarranted Enquiry:

In **Secretary, Minor Irrigation and Rural Engineering Services, Uttar Pradesh v. Sahngoo Ram Arya,**[74] it was held that "It is seen from the above decision of this Court that the right to life under Article 21 includes the right of a person to live without being hounded by the Police or the Central Bureau of Investigation to find out whether he has committed any offence or is living as a law-abiding citizen.[75] Therefore, it is clear that a decision to direct an inquiry by the Central Bureau of Investigation against a person can only be done if the High Court after considering the material on record comes to a conclusion that such material does disclose a prima facie case calling for an investigation by the Central Bureau of Investigation or any other similar agency, and the same cannot be done as a matter of routine or merely because a party

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73 Dodla Narayana's case: AIR 1990 AP 147: (at page 151).
74 AIR 2002 SC 2225.
75 A Regd. Society v. Union of India, AIR 1999 SC 2979

makes some such allegations. In the instant case, we see that the High Court without coming to a definite conclusion that there is a prima facie case established to direct an inquiry has proceeded on the basis of fs' and ' and thought it appropriate that the inquiry should be made by the Central Bureau of Investigation. With respect, we think that this is not what is required by the law as laid down by this Court in the case of Common Cause."

After laying down the principle, the Court found on the facts of the case that the High Court has failed to express even a prima facie opinion in respect of the relevant allegations against the concerned person, and therefore remitted the case to it for considering the entire pleadings of the parties and decide whether the material on record is sufficient to direct Central Bureau of Investigation's enquiry.

(U) Duty of Disclosure:

People's Union for Civil Liberties v. Union of India,[76] is a case under the Prevention of Terrorism Act, 2002, where it was held that any person can be compelled to furnish the information about terrorist acts and in that context, the Supreme Court made the following observations:

(1) "Section 39 of the Code of Criminal Procedure, 1973 casts a duty upon every person to furnish information regarding offences. Criminal justice system cannot function without the co-operation of people. Rather it is the duty of everybody to assist the State in detection of the crime and bringing criminal to justice. Withholding such information cannot be traced to right to privacy,

[76] AIR 2004 SC 456.

which itself is not an absolute right.[77] Right to privacy is subservient to that of security of State".

(2) "It is settled position of law that a journalist or lawyer does not have a sacrosanct right to withhold information regarding crime under the guise of professional ethics. A lawyer cannot claim a right over professional communication beyond what is permitted under section 126 of the Evidence Act, 1872. There is also no law that permits a newspaper or journalist to withhold relevant information from Courts though they have been given such power by virtue of Section 15(2) of the Press Council Act, 1978 as against Press Council".

[77] Sharda v. Dharmpal, 2003 (4) SCC 493

CHAPTER-2

INTERNATIONAL PROSPECTIVE WITH SPECIAL PROVISIONS OF HUMAN RIGHTS DECLARATIONS

(I) Universal Declaration of Human Rights :

The Universal Declaration of Human Rights emerged in 1948 as a reaction to the atrocities and oppression caused by the Second World War. It was for the first time that the rights and Freedoms of individuals were detailed and there was international instrument for protection of individual. It state that :

"Whereas recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world,

Whereas disregard and contempt for human rights have resulted in barbarous acts which have outraged the conscience of mankind, and the advent of a world in which human beings shall enjoy freedom of speech and belief and freedom from fear and want has been proclaimed as the highest aspiration of the common people,

Whereas it is essential, if man is not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression, that human rights should be protected by the rule of law,

Whereas it is essential to promote the development of friendly relations between nations,

Whereas the peoples of the United Nations have in the Charter reaffirmed their faith in fundamental human rights, in the dignity and worth of the human person and in the equal rights of men and women and have determined to promote social progress and better standards of life in larger freedom,

Whereas Member States have pledged themselves to achieve, in co-operation with the United Nations, the promotion of universal respect for and observance of human rights and fundamental freedoms,

Whereas a common understanding of these rights and freedoms is of the greatest importance for the full realization of this pledge, now, therefore the General Assembly proclaims this Universal Declaration of Human Rights as a common standard of achievement for all peoples and all nations, to the end that every individual and every organ of society, keeping this Declaration constantly in mind, shall strive by teaching and education to promote respect for these rights and freedoms and by progressive measures, national and international, to secure their universal and effective recognition and observance, both among the peoples of Member States themselves and among the peoples of territories under their jurisdiction."[1]

Thus it acknowledge the "inherent dignity and of the equal or inalienable rights of all members of the human family as the foundation of freedom, justice and peace in the world". Its Preamble acknowledges the importance of a human rights legal framework to maintain international peace and security, stating that recognition of the inherent

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[1] Preamble of The Universal Declaration of Human Rights.

dignity and equal and inalienable rights of all individuals is the foundation of freedom, justice and peace in the world. The Universal Declaration of Human Rights emphasized that 'a common understanding of these rights and freedoms is of the greatest importance for the full realization of rights contained therein'. The Universal Declaration of Human Rights contains rights that were culturally and politically acceptable to most countries across the world, thereby imparting a universal character to the Declaration. The Indian Constitution in fact, exemplifies the 'common understanding' of basic human rights as it incorporates the principles outlined in the Universal Declaration of Human Rights in the form of Fundamental Rights and Directive Principles of State Policy.

In the chairmanship of Eleanor Roosevelt for the first time in history, the international community embraced document considered to have universal value like as "a common standard of achievement for all peoples and all nations".

Violation of Human Rights was considered as a source of international conflict and protection of human rights was regarded as necessary for international peace. This conviction was reflected in the proclamation[2] issued by president Franklin D. Roosevett on January 6, 1941 which came to be known as '*Four Freedoms*'. These are as follows :

- Freedom of speech
- Freedom of Religion
- Freedom from want
- freedom from fear

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[2] Document of American foreign Relations. Vol. III. P. 26

After the World War II, the victorious powers (popularly referred to as Allied powers, namely, the United States, United Kingdom, China, France, and former Union of Soviet Socialist Republics) have taken the initiative to end the wars in future and to settle any disputes by peaceful means. This concept resulted in number of conferences, wherein the future nations and peoples of the world could have their confidence and live with utmost liberty and dignity. Accordingly, they decided to establish an organisation, which could provide the required legal regulation of the states on the basis of their participation. The name 'United Nations' was suggested for the future organisation, by the Former United States President Franklin D Roosevelt, in 1942. According to him, United Nations represents a symbol of unity of Independent Nations and their people who united to achieve peace forever and to give away the concept of war. This concept of Roosevelt received widespread recognition by other major countries. Accordingly, they established the United Nations in 1945.

Various movements which started from centuries back for the recognition of the rights of men and women, received widespread recognition especially, in the western world. However, the independent recognition by states in their constitutions had not given the much required acknowledgement in the international arena. After the Second World War, the member states, while discussing on the establishment of United Nations seriously though that in order to have similar rights of man across the world. Accordingly, after long deliberations, the words "human rights" took birth in international law with the adoption of the Charter of the United Nations on October 24, 1945 at San Francisco.

The idea of human rights predates the United Nations but it achieved a formal and universal recognition only after setting up of this

body. The main objective of United Nations is “to save succeeding generations from the scourge of war” and “to reaffirm faith in fundamental human rights”. Article 1 of the Charter states that one of the aims of the United Nations is to achieve international cooperation in "promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language or religion". Even before India had attained independence, it signed the Charter on October 30, 1945 and that shows its commitment to the cause of human rights.

The articles of the Charter have the force of positive international law as a Charter is a treaty and therefore a legally binding document. All United Nations Member States must fulfill in good faith, the obligations to observe, promote and respect human rights and to cooperate with United Nations and other nations to attain this aim.

After the establishment of the United Nations, in order to discharge its commitment for the promotion of Human rights it has established a small committee of nine members on February 15, 1946 to take steps for the preparation of an International Bill of Human Rights.

In April 1946, Mrs. Roosevelt was appointed as its chairperson. Immediately, after the constitution, the committee had its preliminary meeting and suggested for the increase of the members, which was increased to eighteen. The representatives of the following countries were appointed. They were Australia, Belgium, Byelorussia of Soviet Socialist Republic, Chile, China, Egypt, France, India, Iran, Lebanon, Panama, Philippines, United Kingdom, United States, Union of Soviet Socialist Republics, Uruguay, and Yugoslavia. On June 21, 1946, the Economic

and Social Council framed the terms of reference on which the committee needed to work for the drafting of the Universal Declaration.

After the terms of reference to prepare a universal text for the promotion and protection of human rights, the committee later converted into the Commission on Human Rights, which functioned till 2006. This was later converted into a permanent inter governmental body known as Human Rights Council, in 2006 by the General Assembly. At present, the strength of the council is 47 states.

The Commission on Human Rights after deliberations appointed, Mr. John Peters Humaphrey of Canada as the drafting committee chairman. John Humphrey prepared the first draft of the universal text. After that Mr. Rene Cassin, a French Professor of Law and Judge prepared the final version of the Universal Declaration of Human Rights with 30 Articles on the model of the Napoleon code. In 1968, he received the Nobel Peace Prize for drafting the Universal Declaration of Human Rights.

After the final version of the Draft, the General Assembly had finally adopted the Universal Declaration of Human Rights on December 10, 1948 in Paris. Since then December 10 is celebrated as Human Rights day to mark the Universal Declaration and the Fundamental Freedoms of human beings, which were recognized universally without any discrimination as to race, regional, sex, language and culture.

The Universal Declaration covers the range of human rights in 30 clear and concise articles. The first two articles lay the universal foundation of human rights: human beings are equal because of their shared essence of human dignity; human rights are universal, not because

of any State or international organization, but because they belong to all of humanity.The first cluster of Articles, 3 to 21, sets forth civil and political rights ‘to which everyone is entitled. The right to life, liberty and personal security, recognized in Article 3, sets the base for all following political rights and civil liberties, including freedom from slavery, torture and arbitrary arrest, as well as the rights to a fair trial, free speech and free movement and privacy. The second cluster of Articles, 22 to 27, sets forth the economic, social and cultural rights to which all human beings are entitled. The cornerstone of these rights is Article 22, acknowledging that, as a member of society, everyone has the right to social security and is therefore entitled to the realization of the economic, social and cultural rights “indispensable” for his or her dignity and free and full personal development. Five articles elaborate the rights necessary for the enjoyment of the fundamental right to social security, including economic rights related to work, fair remuneration and leisure, social rights concerning an adequate standard of living for health, well-being and education, and the right to participate in the cultural life of the community.

The third and final cluster of Articles, 28 to 30, provides a larger protective framework in which all human rights are to be universally enjoyed. Article 28 recognizes the right to a social and international order that enables the realization of human rights and fundamental freedoms. Article 29 acknowledges that, along with rights, human beings also have obligations to the community which also enable them to develop their individual potential freely and fully. Article 30, finally, protects the interpretation of the articles of the Declaration from any outside interference contrary to the purposes and principles of the United Nations. It explicitly states that no State, group or person can claim, on

the basis of the Declaration, to have the right to engage in any activity or to perform any act aimed at the destruction of any of the rights and freedoms set forth in the Universal Declaration.

All human beings are born equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood.[3] Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.[4] Everyone has the right to life, liberty and security of person.[5] Slavery is black spot on human right protection, so it is banned. No one shall be held in slavery or servitude; slavery and the slave trade shall be prohibited in all their forms.[6] No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.[7]

Right to equality is a basic human right. Right to equality is also included. All are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination.[8] No one shall be subjected to arbitrary arrest, detention or exile. [9] Everyone is entitled for fair hearing. [10] Everyone has a right to be presumed innocent in criminal matter until prove don guilty beyond doubt. [11]

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3 Article 1, Universal Declaration of Human Rights
4 Article 2, Universal Declaration of Human Rights.
5 Article 3, Universal Declaration of Human Rights.
6 Article 4, Universal Declaration of Human Rights.
7 Article 5, Universal Declaration of Human Rights.
8 Article 7, Universal Declaration of Human Rights.
9 Article 9, Universal Declaration of Human Rights.
10 Article 10, Universal Declaration of Human Rights.
11 Article 11, Universal Declaration of Human Rights.

Right to privacy is also included which is basic human rights. It is recognized that no one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, or to attacks upon his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks. [12]

Everyone has the right to freedom of movement and residence within the borders of each State and out of state.[13] Right to asylum is also recognized. [14] Everyone has the right to a nationality and vice-versa right to change his nationality. [15] Everyone has the right to marry and to found a family. [16] No one shall be arbitrarily deprived of his property. In this everyone has the right to own property alone as well as in association with others. [17]

Religious freedom is a cornerstone of human rights. Everyone has the right to freedom of thought, conscience and religion or belief either alone or in community.[18] Freedom of peaceful assembly and association is also included.[19] Right to democracy is also recognized. Everyone has the right to take part in the government of his country, directly or through freely chosen representatives. The will of the people shall be the basis of the authority of government; this will/shall be expressed in periodic and genuine elections which shall be by universal and equal suffrage and shall be held by secret vote or by equivalent free voting procedures. [20]

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12 Article 12, Universal Declaration of Human Rights.
13 Article 13, Universal Declaration of Human Rights.
14 Article 14, Universal Declaration of Human Rights.
15 Article 15, Universal Declaration of Human Rights.
16 Article 16, Universal Declaration of Human Rights.
17 Article 17, Universal Declaration of Human Rights.
18 Article 18, Universal Declaration of Human Rights.
19 Article 20, Universal Declaration of Human Rights.
20 Article 21, Universal Declaration of Human Rights.

Everyone has the right to work, to free choice of employment, right to equal pay for equal work, just and favourable remuneration, right to form and to join trade unions for the protection of his interests. [21] Everyone has the right to rest and leisure is also included. [22]Standard of living adequate for the health, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control is also recognized.[23]

Everyone has the right to education in which education shall be free, at least in the elementary and fundamental stages. Elementary education shall be compulsory. Parents have a prior right to choose the kind of education that shall be given to their children.[24] Everyone has the right freely to participate and enjoy in the cultural life of the community.[25] A duty has been imposed on everyone to the community in which alone the free and full development of his personality is possible. Everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others.[26]

(II) Worldwide Influence of the Universal Declaration of Human Rights and the International Bill of Rights:

From 1948, when the universal declaration of human rights was adopted and proclaimed, until 1976, when the international covenant on

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[21] Article 23, Universal Declaration of Human Rights.
[22] Article 24, Universal Declaration of Human Rights.
[23] Article 25, Universal Declaration of Human Rights.
[24] Article 26, Universal Declaration of Human Rights.
[25] Article 27, Universal Declaration of Human Rights.
[26] Article 29, Universal Declaration of Human Rights.

civil and political rights and the International Covenant on Economic, Social and Cultural Rights, entered into force the universal declaration stood alone as the international standard of achievement for all peoples and all nations. Today the universal declarations, along with the covenants make up the international bill of rights.

Nearly all international human rights instruments adopted by the United Nations bodies since 1948 elaborate principles set out in the universal declaration of human rights. The International Covenant on Economic, Social and Cultural Rights states in it's preamble.

> *"In accordance with the universal declaration of human rights, the ideal of free human beings enjoying freedom from fear and want can only be achieved if conditions are created whereby everyone may enjoy his or her economic, social and cultural rights, as well as his or her civil and political rights."*

The coming into force of the covenants, by which state parties accepted legal as well as the moral obligation to promote and protect human rights and fundamental freedoms, has not diminished the widespread influence of the universal declaration.

The universal declaration has established many of the principles for a number of important international conventions and treaties-the 1984 convention against torture and other cruel, inhuman or degrading treatment or punishment; the declaration on the elimination of all forms of intolerance and of discrimination based on religion or belief, proclaimed by the general assembly in 1981, clearly defines the nature and scope of the principles of non-discrimination and equality before the law and the right to freedom of thought, conscience, religion and belief contained in the universal declaration and the international convenants.

The universal declaration has informed the constitutions of nation states and it's principles have been included or adopted by the council of Europe, the organization of African unity, and the American convention on human rights, at Costa Rica, in 1969. Judges of the international court of justice have invoked principles contained in the international bill of human rights as a basis for their decisions.

In 1968, at the international conference on human rights in teheran, the universal declaration was once again declared "a common understanding of the peoples of the world concerning the inalienable and inviolable rights of all members of the human family and constitutes an obligation for the members of the international community".

> *"The universal declaration has come to be regarded as an historic document articulating a common definition of human dignity and values. The declaration is a yardstick by which to measure the degree of respect for, and compliance with, international human rights standards everywhere on earth".*

At the 1993 world conference on human rights in Vienna, over 150 countries once again re-affirmed their commitment to the universal declaration of human rights expressed in the Vienna declaration and program of action.

(III) International Covenants on Civil and Political Rights, 1966 :

Preamble of the International Covenants on Civil and Political Rights :

The States parties to the present Covenant, Considering that, in accordance with the principles proclaimed in the Charter of the United Nations, recognition of the inherent dignity and of the equal and

inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world, Recognizing that these rights derive from the inherent dignity of the human person, Recognizing that, in accordance with the Universal Declaration of Human Rights, the ideal of free human beings enjoying civil and political freedom and freedom from fear and want can only be achieved if conditions are created whereby everyone may enjoy his civil and political rights, as well as his economic, social and cultural rights, Considering the obligation of States under the Charter of the United Nations to promote universal respect for, and observance of, human rights and freedoms, Realizing that the individual, having duties to other individuals and to the community to which he belongs, is under a responsibility to strive for the promotion and observance of the rights recognized in the present Covenant,

The Covenant follows the structure of the Universal Declaration of Human Rights and International Covenant on Economic, Social and Cultural Rights, with fifty-three articles, divided into six parts.

Part I recognizes the right of all peoples to self-determination, including the right to "freely determine their political status", pursue their economic, social and cultural goals, and manage and dispose of their own resources. It recognises a negative right of a people not to be deprived of its means of subsistence, and imposes an obligation on those parties still responsible for non-self governing and trust territories (colonies) to encourage and respect their self-determination.[27]

Part II obliges parties to legislate where necessary to give effect to the rights recognised in the Covenant, and to provide an effective legal remedy for any violation of those rights. It also requires the rights be

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[27] Article 1 International covenants on civil and political Rights.

recognised "without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status,"[28] and to ensure that they are enjoyed equally by women.[29] The rights can only be limited "in time of public emergency which threatens the life of the nation," and even then no derogation is permitted from the rights to life, freedom from torture and slavery, the freedom from retrospective law, the right to personhood, and freedom of thought, conscience and religion.[30]

Part III lists the rights themselves. These include rights to physical integrity, in the form of the right to life and freedom from torture and slavery,[31] liberty and security of the person, in the form of freedom from arbitrary arrest and detention and the right to habeas corpus;[32] procedural fairness in law, in the form of rights to due process, a fair and impartial trial, the presumption of innocence, and recognition as a person before the law;[33] individual liberty, in the form of the freedoms of movement, thought, conscience and religion, speech, association and assembly, family rights, the right to a nationality, and the right to privacy;[34] prohibition of any propaganda for war as well as any advocacy of national or religious hatred that constitutes incitement to discrimination, hostility or violence by law;[35] political participation, including the right to the right to vote;[36] Non-discrimination, minority rights and equality

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28 Article 2 International covenants on civil and political Rights.
29 Article 3 International covenants on civil and political Rights.
30 Article 4 International covenants on civil and political Rights.
31 Articles 6, 7, and 8 International covenants on civil and political Rights.
32 Articles 9 to 11 International covenants on civil and political Rights.
33 Articles 14, 15, and 16 International covenants on civil and political Rights.
34 Articles 12, 13, 17 to 24 International covenants on civil and political Rights.
35 Article 20 International covenants on civil and political Rights.
36 Article 25 International covenants on civil and political Rights .

before the law.[37] Many of these rights include specific actions which must be undertaken to realise them.

Part IV governs the establishment and operation of the Human Rights Committee and the reporting and monitoring of the Covenant.[38] It also allows parties to recognise the competence of the Committee to resolve disputes between parties on the implementation of the Covenant.[39]

Part V clarifies that the Covenant shall not be interpreted as interfering with the operation of the United Nations or "the inherent right of all peoples to enjoy and utilize fully and freely their natural wealth and resources".[40]

Part VI governs ratification, entry into force, and amendment of the Covenant.[41]

(IV) Optional Protocol to International Covenants on Civil and Political Rights :

(A) First Optional Protocol :

The First Optional Protocol to the International Covenants on Civil and Political Rights was adopted by General Assembly on 16th December, 1966 and it entry into force, 23rd March, 1976. Thus, individuals who claim that their rights and freedoms have been violated, may call the State in question to account for its actions, provided it is a party of the optional Protocol to the International Covenants on Civil and Political Rights.

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37 Articles 26 and 27 International covenants on civil and political Rights.
38 Articles 28 to 45 International covenants on civil and political Rights.
39 Articles 41 and 42 International covenants on civil and political Rights
40 Articles 46, 47 International covenants on civil and political Rights
41 Articles 48 to 53 International covenants on civil and political Rights

Key Provisions of the First Optional Protocol to the International Covenants on Civil and Political Rights :

- Establishes an individual complaints mechanism for the International Covenants on Civil and Political Rights;
- Parties agree to recognize the competence of the United Nations Human Rights Committee to consider complaints from individuals or groups who claim their rights under the International Covenants on Civil and Political Rights have been violated.

(B) Second Optional Protocol :

The purpose of the Second optional Protocol is revealed by its full title, "aiming at the abolition of the death penalty". It was adopted by the General Assembly by its resolution 44/128 of 15 December 1989. The Preamble to the Second Optional Protocol reinforces the view that abolition of the death penalty is a desirable and progressive human rights measure that enhances human dignity and enjoyment of the right to life.

The International Covenants on Civil and Political Rights commits its members to the abolition of the death penalty within their borders, though Article 2.1 allows parties to make a reservation allowing execution for grave crimes in times of war.

(V) International Covenant on Economic, Social and Cultural Rights:

The Covenant follows the structure of the Universal Declaration of Human Rights and the International Covenants on Civil and Political Rights, with a preamble and thirty-one articles, divided into five parts.

Preamble :

The States Parties to the present Covenant, Considering that, in accordance with the principles proclaimed in the Charter of the United Nations, recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world,

Recognizing that these rights derive from the inherent dignity of the human person,

Recognizing that, in accordance with the Universal Declaration of Human Rights, the ideal of free human beings enjoying freedom from fear and want can only be achieved if conditions are created whereby everyone may enjoy his economic, social and cultural rights, as well as his civil and political rights,

Considering the obligation of States under the Charter of the United Nations to promote universal respect for, and observance of, human rights and freedoms,

Realizing that the individual, having duties to other individuals and to the community to which he belongs, is under a responsibility to strive for the promotion and observance of the rights recognized in the present Covenant, Agree upon the following.

Part I recognises the right of all peoples to self-determination, including the right to "freely determine their political status", pursue their economic, social and cultural goals, and manage and dispose of their own resources. It recognises a negative right of a people not to be deprived of its means of subsistence, and imposes an obligation on those parties still

responsible for non-self governing and trust territories (colonies) to encourage and respect their self-determination.[42]

Part II establishes the principle of "progressive realisation". It also requires the rights be recognised "without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status".[43] The rights can only be limited by law, in a manner compatible with the nature of the rights, and only for the purpose of "promoting the general welfare in a democratic society".[44]

Part III lists the rights themselves. These include rights to work, under "just and favourable conditions",[45] with the right to form and join trade unions;[46] social security, including social insurance[47]; family life, including paid parental leave and the protection of children[48]; an adequate standard of living, including adequate food, clothing and housing, and the "continuous improvement of living conditions"[49]; Health, specifically "the highest attainable standard of physical and mental health"[50]; education, including free universal primary education, generally available secondary education and equally accessible higher education. This should be directed to "the full development of the human personality and the sense of its dignity",[51] and enable all persons to participate effectively in

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42 Article 1 International Covenant on Economic, Social and Cultural Rights.
43 Article 2, International Covenant on Economic, Social and Cultural Rights.
44 Article 4, International Covenant on Economic, Social and Cultural Rights.
45 Article 7, International Covenant on Economic, Social and Cultural Rights.
46 Articles 6, 7, and 8 International Covenant on Economic, Social and Cultural Rights.
47 Article 9 International Covenant on Economic, Social and Cultural Rights.
48 Article 10 International Covenant on Economic, Social and Cultural Rights.
49 Article 11 International Covenant on Economic, Social and Cultural Rights.
50 Article 12 International Covenant on Economic, Social and Cultural Rights.
51 Article 13 International Covenant on Economic, Social and Cultural Rights.

society[52]; participation in cultural life[53]. Many of these rights include specific actions which must be undertaken to realise them.

Part IV governs reporting and monitoring of the Covenant and the steps taken by the parties to implement it. It also allows the monitoring body the Committee on Economic, Social and Cultural Rights to make general recommendations to the United Nations General Assembly on appropriate measures to realise the rights.[54]

Part V governs ratification, entry into force, and amendment of the Covenant.[55]

(VI) Right to Privacy in International Law:

Privacy is a fundamental human right recognized in the United Nations Declaration of Human Rights, the International Covenant on Civil and Political Rights and in many other international and regional treaties. Privacy underpins human dignity and other key values such as freedom of association and freedom of speech. It has become one of the most important human rights issues of the modern age. The publication of this report reflects the growing importance, diversity and complexity of this fundamental right.

Nearly every country in the world recognizes a right of privacy explicitly in their Constitution. At a minimum, these provisions include rights of inviolability of the home and secrecy of communications. Most recently-written Constitutions such as South Africa's and Hungary's include specific rights to access and control one's personal information.

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52 Articles 14 International Covenant on Economic, Social and Cultural Rights.
53 Article 15 International Covenant on Economic, Social and Cultural Rights.
54 Article 21 International Covenant on Economic, Social and Cultural Rights.
55 Articles 26 to 31 International Covenant on Economic, Social and Cultural Rights.

In many of the countries where privacy is not explicitly recognized in the Constitution, such as the United States, Ireland and India, the courts have found that right in other provisions. In many countries, international agreements that recognize privacy rights such as the International Covenant on Civil and Political Rights or the European Convention on Human Rights have been adopted into law.

In the early 1970s, countries began adopting broad laws intended to protect individual privacy. Throughout the world, there is a general movement towards the adoption of comprehensive privacy laws that set a framework for protection. Most of these laws are based on the models introduced by the Organization for Economic Cooperation and Development and the Council of Europe.

In 1995, conscious both of the shortcomings of law, and the many differences in the level of protection in each of its States, the European Union passed a Europe-wide directive which will provide citizens with a wider range of protections over abuses of their data. The directive on the "Protection of Individuals with regard to the processing of personal data and on the free movement of such data" sets a benchmark for national law. Each European Union State must pass complementary legislation by October 1998.

The Directive also imposes an obligation on member States to ensure that the personal information relating to European citizens is covered by law when it is exported to and processed in, countries outside Europe. This requirement has resulted in growing pressure outside Europe for the passage of privacy laws. More than forty countries now have data protection or information privacy laws. More are in the process of being enacted.

Reasons for Adopting Comprehensive Laws :

There are three major reasons for the movement towards comprehensive privacy and data protection laws. Many countries are adopting these laws for one or more reasons.

- **To remedy past injustices:** Many countries, especially in Central Europe, South America and South Africa, are adopting laws to remedy privacy violations that occurred under previous authoritarian regimes.
- **To promote electronic commerce:** Many countries, especially in Asia, but also Canada, have developed or are currently developing laws in an effort to promote electronic commerce. These countries recognize consumers are uneasy with their personal information being sent worldwide. Privacy laws are being introduced as part of a package of laws intended to facilitate electronic commerce by setting up uniform rules.
- **To ensure laws are consistent with Pan-European laws:** Most countries in Central and Eastern Europe are adopting new laws based on the Council of Europe Convention and the European Union Data Protection Directive. Many of these countries hope to join the European Union in the near future. Countries in other regions, such as Canada, are adopting new laws to ensure that trade will not be affected by the requirements of the European Union Directive.

Of all the human rights in the international catalogue, privacy is perhaps the most difficult to define and circumscribe.[56] Privacy has roots

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[56] James Michael, Privacy and Human Rights, UNESCO 1994 p.1.

deep in history. The Bible has numerous references to privacy.[57] There was also substantive protection of privacy in early Hebrew culture, Classical Greece and ancient China. These protections mostly focused on the right to solitude. Definitions of privacy vary widely according to context and environment. In many countries, the concept has been fused with Data Protection, which interprets privacy in terms of management of personal information. Outside this rather strict context, privacy protection is frequently seen as a way of drawing the line at how far society can intrude into a person's affairs.[58] It can be divided into the following facets:

- **Information Privacy**, which involves the establishment of rules governing the collection and handling of personal data such as credit information and medical records;
- **Bodily privacy**, which concerns the protection of people's physical selves against invasive procedures such as drug testing and cavity searches;
- **Privacy of communications,** which covers the security and privacy of mail, telephones, email and other forms of communication; and
- **Territorial privacy**, which concerns the setting of limits on intrusion into the domestic and other environments such as the workplace or public space.

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57 Richard Hixson, Privacy in a Public Society: Human Rights in Conflict 3 (1987). See Barrington Moore, Privacy: Studies in Social and Cultural History (1984).

58 Simon Davies "Big Brother : Britain's web of surveillance and the new technological order", Pan, London, 1996 p. 23

The lack of a single definition should not imply that the issue lacks importance. As one writer observed, "in one sense, all human rights are aspects of the right to privacy."[59]

The Right to Privacy:

Privacy can be defined as a fundamental (though not an absolute) human right. The law of privacy can be traced as far back as 1361, when the Justices of the Peace Act in England provided for the arrest of peeping toms and eavesdroppers.[60] In 1765, British Lord Camden, striking down a warrant to enter a house and seize papers wrote, "We can safely say there is no law in this country to justify the defendants in what they have done; if there was, it would destroy all the comforts of society, for papers are often the dearest property any man can have."[61] Parliamentarian William Pitt wrote, "The poorest man may in his cottage bid defiance to all the force of the Crown. It may be frail; its roof may shake; the wind may blow though it; the storms may enter; the rain may enter but the King of England cannot enter; all his forces dare not cross the threshold of the ruined tenement."

Various countries developed specific protections for privacy in the centuries that followed. In 1776, the Swedish Parliament enacted the "Access to Public Records Act" which required that all government-held information be used for legitimate purposes. In 1792, the Declaration of the Rights of Man and the Citizen declared that private property is inviolable and sacred. France prohibited the publication of private facts

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59 Volio, Fernando. "Legal personality, privacy and the family" in Henkin (ed) The International Bill of Rights, New York : Columbia University Press, 1981.

60 James Michael, p.15.

61 Entick v. Carrington, 1558-1774 All E.R. Rep. 45.

and set stiff fines in 1858.[62] In 1890, American lawyers Samuel Warren and Louis Brandeis wrote a seminal piece on the right to privacy as a tort action describing privacy as "the right to be left alone."[63]

The modern privacy benchmark at an international level can be found in the 1948 Universal Declaration of Human Rights, which specifically protected territorial and communications privacy. Article 12 states:

No-one should be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks on his honour or reputation. Everyone has the right to the protection of the law against such interferences or attacks.[64]

Numerous international human rights covenants give specific reference to privacy as a right. The International Covenant on Civil and Political Rights, the United Nations Convention on Migrant Workers and the United Nations Convention on Protection of the Child adopt the same language.[65]

On the regional level, these rights are becoming enforceable. The 1950 Convention for the Protection of Human Rights and Fundamental Freedoms,[66] states:

(1) Everyone has the right to respect for his private and family life, his home and his correspondence.

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62 The Rachel affaire. Judgment of June 16, 1858, Trib. pr. inst. de la Seine, 1858 D.P. III 62. See Jeanne M. Hauch, Protecting Private Facts in France: The Warren & Brandeis Tort is Alive and Well and Flourishing in Paris, 68 Tul. L. Rev. 1219 (May 1994).

63 Warren and Brandeis, *The Right to Privacy*, 4 Harvard L.R. 193 (1890).

64 Universal Declaration of Human Rights.

65 International Covenant on Civil and Political Rights.

66 Article 8, .Convention for the Protection of Human Rights and Fundamental Freedoms Rome, 4.XI.1950.

(2) There shall be no interference by a public authority with the exercise of this right except as in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health of morals, or for the protection of the rights and freedoms of others.

The Convention created the European Commission of Human Rights and the European Court of Human Rights to oversee enforcement. Both have been particularly active in the enforcement of privacy rights and have consistently viewed Article's protections expansively and the restrictions narrowly.[67] The Commission found in its first decision on privacy:

For numerous Anglo-Saxon and French authors, the right to respect "private life" is the right to privacy, the right to live, as far as one wishes, protected from publicity. In the opinion of the Commission, however, the right to respect for private life does not end there. It comprises also, to a certain degree, the right to establish and develop relationships with other human beings, especially in the emotional field for the development and fulfillment of one is own personality.[68]

The Court has reviewed member statesi laws and imposed sanctions on several countries for failing to regulate wiretapping by governments and private individuals.[69] It has also reviewed cases of individuals access to their personal information in government files to ensure that adequate procedures were implemented. It has expanded the

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67 Nadine Strossen, Recent US and Intl. Judicial Protection of Indvidual Rights: A comparative Legal Process Analysis and Proposed Synthesis, 41 Hastings L.J. 805 (1990).

68 X v. Iceland, 5 Eur. Commín H.R. 86.87(1976).

69 Malone v. Commissioner of Police, 2 All E.R. 620 (1979).

protections of Article 8 beyond government actions to those of private persons where it appears that the government should have prohibited those actions.[70] Presumably, under these combined analyses, the court could order the imposition of data protection laws if data was improperly processed to the detriment of the data subject.[71]

Article 11 of the American Convention on Human Rights sets out the right to privacy in terms similar to the Universal Declaration.[72] In 1965, the Organization for American States proclaimed the American Declaration of the Rights and Duties of Man, which called for the protection of numerous human rights including privacy.[73] The Inter-American Court of Human Rights has also begun to addresses privacy issues in its cases.

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70 Judgement of 26 March 1987.

71 Rolv Ryssdal, Data Protection and the European Convention on Human Rights in Council of Europe Data protection, human rights and democratic values, XIII Conference of the Data Commissioners 2-4 October 1991 41-43. (1992).

72 Signed Nov. 22, 1969, entered into force July 18, 1978, O.A.S. Treaty Series No. 36, at 1, O.A.S. Off. Rec. OEA/Ser. L/V/II.23 dec rev. 2.

73 O.A.S. Res XXX, adopted by the Ninth Conference of American States, 1948 OEA/Ser/. L./V/I.4 Rev (1965).

CHAPTER 3

COMPARATIVE STUDY OF UNITED STATES OF AMERICA, UNITED KINGDOM AND INDIA

Right to privacy is basic human rights. In Indian Constitution Right to Privacy is embodied in Right to life, Rule of Law which includes Natural Justice. For analyzing the right to Privacy it is important go through the right to life and personal liberty with due process of law.

(I) England :

In the Magna Carta, it was demanded that: *"Ne Corpus liberi hominis capiatur nec imprisonetur nec dissaisetur nec utlagetur nec exuletur nec aliquot modo destruator nec vex eat vel mittat super eum vi nisi per judicium parium suorum vel per legem terre"* which means, "No free man shall be taken, or imprisoned or disseised or outlawed or banished or any ways destroyed, nor will the King pass upon him or commit him to prison, unless by the judgment of his peers or the law of the land". In the Petition of Grievances, 1610, it was stated that *"Among many other points of happiness and freedom which your Majesty's subjects have enjoyed under your royal progenitors, there is none which they have accounted more dear and precious than this, to be guided and governed by the certain rule of law, and not by any arbitrary form of government. Out of this root hath grown the in dubitable right of the people of this kingdom, not to be made subject to any punishment, other than such as are ordained by the common laws of this land, or the statutes made by their common consent in Parliament."*

This demand was reiterated in the Petition of Rights, 1628, and since then the servance of this principle has established what is known as the Rule of Law in England. The phrase 'due process of law' was first used in a statute of the 14th century and the framers of the American Constitution appear to have borrowed the phrase from there. But under the English Constitution, the expression 'law of the land' has a different meaning than the 'due process of law' of the American Constitution. In England, 'law' means the law as declared by Parliament. It does not mean any fundamental law limiting the powers of Parliament itself. The 'law of the land' in the above Charters thus simply means the absence of any arbitrary power by the Executive and that no man can be punished except after being tried for a definite offence, that is, for violation of a 'law' and in the ordinary legal manner.[1] As explained by the Privy Council in **Eshugbayi v. Government of Nigeria**[2]:

"In accordance with British jurisprudence no member of the Executive can interfere with the liberty or property of a British subject except on the condition that he can support the legality of his action before a court of justice. And it is the tradition of British justice that judges should not shrink from deciding such issues in the face of the Executive."

Under the English 'Rule of Law', the Executive has no privileges other than what the law for the time being concedes and it has to defend its action before the ordinary courts and that only by the authority of law. Thus, when a statute does not authorise the arrest of a person without warrant, it cannot be justified on the ground that it was 'convenient' to

1 Dicey, Law of the Constitution (1959 Edn., pp. 202-03).
2 AIR 1931 PC 238.

the Police or any other executive authority.[3] But as against the legislative competence of Parliament, there is no limit under the English constitutional system. Thus, *"The concessions of Magna Carta were wrung from the King as guarantees against the oppressions and usurpations of his prerogative. It did not enter into the minds of the barons to provide security against their own body or in favour of the commons by limiting the power of Parliament the omnipotence of Parliament was absolute, even against common right and reason."*[4]

It can be observed that the subject is entitled to have the law impartially administered; but he has no right that the law shall not be changed to his detriment. In other words, he has no 'absolute' rights which are guaranteed against an Act of Parliament. This is a consequence of the general principle that Parliament is sovereign.[5] As May observed:

"The Constitution has assigned no limits to the authority of Parliament over all matters and persons within its jurisdiction. A law may be unjust and contrary to the principles of sound government. But Parliament is not controlled in its discretion and when it errors, its errors can be corrected by if."[6]

So, Leslie Stephen went so far as to say that *"If a legislature decided that all blue-eyed babies should be murdered, the preservation of all blue-eyed babies would be illegal."* Thus in England, it is not open to a Court to invalidate a law on the ground that it seeks to deprive a person of his life or liberty contrary to Court' s notions of justice of 'due process.' For the most authoritative pronouncement on this question in

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3 Christie v. Leachinsk', (1947) 1 All ER 567 (576).
4 Hurtado v. California, (1884) 110 US 576.
5 Stephen's Commentaries,Vol. I., pp. 115, 545.
6 May, Parliamentary Practice, 16th Edn., p. 28.

recent years, we must refer to Lord Wright's observation in **Liversidge v. Anderson**[7]:

"All the Courts to-day and not least this House, are as jealous as they have ever been in upholding the liberty of the subject. But that liberty is a liberty confined and con- trolled by law, whether common law or statute."

As to how personal freedom is maintained in England as against the Executive, the words of the Magna Carta are clear enough, viz., that no man can be deprived of his personal freedom save 'by the law of the land'. Though there is no constitutional guarantee safeguarding the freedom, it is safeguarded by the ordinary law itself, which means the common law, as it stands modified or supplemented by the common law itself. Thus, most of the safeguards which are included in the American guarantee of 'due process', as will appear from the pages hereafter, are ensured in England by common law. But if the Legislature alters or modifies these common law principles, as it has, in many respects, the individual cannot challenge the constitutionality of such legislation before a court of law. These broad common law safeguards of personal liberty in England may now be noticed. If anybody's personal freedom is interfered with without lawful justification, he can-

(a) regain his freedom through the ordinary Courts, by means of the writ of 'habeas corpus';
(b) sue the person (whether a public official or not) who has arrested to detain him unlawfully, for damages for false imprisonment'0 or

[7] Liversidge v. Anderson, (1942) AC 206 (260).

prosecute him criminally for assault. To such an action brought by a citizen, 'act of State' is no defence.[8]

Taking of life, again, is a criminal offence, even when committed by a a public official, save when it is committed-

(i) in execution of the lawful sentence of a competent court;
(ii) in defence of person or property; or
(iii) in course of the advancement of public justice or the preservation of public order.[9]

The courts can, however, interfere only on the ground of absence, excess or abuse of authority, but cannot revise decisions lawfully taken by the Executive, on the ground that the Judges are of a different opinion. Of course, in order to make an executive action lawful, it must be in conformity not only with the substantial provisions but also with the procedural requirements laid down by the law. Again, when the executive action is something more than an administrative action and simulates a judicial decision, the courts impose another common law requirement, namely, that the decision must be arrived at in compliance with the principles of natural justice.[10]

Again, though a law cannot be invalidated in England on the ground that it violates 'due process', the concept of 'fairness' involved. in 'due process' is applied by the courts in interpreting the law itself, so that an individual may escape from executive encroachment upon his liberty or property even though the executive action may be apparently supported by a law. Thus, as will appear shortly,-

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8 Cf. Dastagir v. State of Madras, AIR 1960 SC 756 (761) : (1960) 3 SCR 1 16, where this position was assumed.
9 Smith and Hogan, Criminal Law, (1969), pp. 229 et seq.
10 Vol. 1, Art. 14, p. 1307

(a) In construing statues depriving a person of his liberty or property, the courts habitually lean in favour of the individual and would not support the executive action unless the terms of the statute authorising the action are clear and explicit.[11]

(b) No person can be punished for an alleged crime unless the terms of the statute which creates the offence are reasonably certain.[12]

(c) The court leans strongly against an interpretation of a statute which deprives the subject of rights of property without compensation[13] and such intention is not imputed to the Legislature unless the intention is expressed in unequivocal terms.[14] The presumption is, of course, weakened, in times of national emergency.[15]

(d) At a criminal trial, the accused is entitled to a presumption of innocence, and the prosecution is bound to prove all the ingredients of the charge beyond reasonable doubt;[16] subject, of course, to statutory exceptions, relating to special cases.[17]

From this principle it has been deduced that even when the accused confesses his guilt, he cannot be convicted on such confession, so long as the prosecution does not show that it was not obtained from him under any threat or promise.[18] Even apart from this, in criminal cases, the Judge has discretion to exclude evidence which, though legally relevant, would "operate unfairly against the defendant".[19] In general, natural justice has been identified with 'fairness' and 'fair hearing'. Hence, the doctrine that where a statute is silent, 'the justice of the common law' will supply the

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11 London and North Eastern Railway v. Berriman, (1946) 1 All ER 268 (HL).
12 Elderton v. Totalisator Co., (1945) 2 All ER 624 (CA).
13 Wheeler v. Green, (1946) 1 All ER 63 (66) (CA).
14 Central Control Board v. Cannon Brewery, (1919) AC 744 (752).
15 Edgington v. Swindon, Borrough Council, (1938) 4 All ER 57.
16 Woolmington v. Director of Public Prosecutions, (1935) AC 462.
17 Cf. Gatland v. Police Commr., (1968) 2 All ER 100; R. v. Podola, (1959) 3 All ER 418; R. v. Dunbar, (1957) 2 All ER 737.
18 Director of Public Prosecutions v. Ping Lin, (1975) 3 All ER 175 (HL); Ibrahim v. R., (1914) AC 599 (606) (PC).
19 Callis v. Gunn, (1963) 3 All ER 677 (680).

omission of the Legislature, by reading into the statute a requirement of giving the party an opportunity to be heard,[20] has come to mean, further that such opportunity shall be a 'fair' opportunity[21] and that a statutory tribunal[22] or other authority[23] has a duty to act 'fairly' and must listen fairly to both sides,[24] and arrive at a decision by a process[25] that was fair to the parties.

Right to Privacy in England :

'The right to privacy is illusory. Humans do not need a right to privacy to flourish and society is better off without conferring legal protection to privacy'. Privacy is interpreted differently in many different countries. In western countries, particularly the United Kingdom and the United States of America it is seen as protection against the invasion of one's privacy by the government, companies and other individuals. Some countries have incorporated these rights into their privacy laws and constitutions. Many countries have laws which limit privacy such as in the case of taxation law, which requires individuals to share their personal information regarding earnings and income with government. In some countries freedom of speech may be in conflict with individual privacy laws and in particular where some laws require public disclosure of matters which other countries and cultures consider to be private.

"The evolution of a right to privacy parallels the development of the humanist tradition. A right of privacy is predicated on the belief that each human being has intrinsic value, that is, is valuable in and of him or

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20 Cooper v. Wandsworth Board, (1863) 143 ER 414 (420).
21 Board of Education v. Rice, (1911) AC 179 (182) (HL).
22 R. v. Gaming Bd., (1970) 2 QB 417 (429) (CA).
23 Re Pergamon Press, (197 1) Ch 388 (399) (CA).
24 R. v. Deputy Commissioner, (1965) 1 QB 456 (488) (CA).
25 Council of Civil Service Unions v Minister for the Civil Service, (1985) AC 394 (402) (HL).

herself. Respect for this belief becomes the fundamental source of all human rights."

Privacy is an inherent human right, and is required for maintaining the human condition with respect and dignity. Article 12 of the Universal Declaration of Human Rights states that "No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks."

The privacy of individuals may be termed as the right to determine how information concerning the individual is communicated to others and how that information is controlled.

Further, privacy has been determined to be the right to be left alone; freedom from interruption, intrusion, embarrassment or accountability; control of the disclosure of personal information; protection of the individual's independence, dignity and integrity; secrecy, anonymity and solitude; the right to protection from intrusion into your personal life. The right to privacy involves rules governing the collection and handling of personal data (such as credit information and medical records), the protection of physical autonomy (including the right to control personal matters), the right to limit access to oneself (for example, controlling communication and intrusion into domestic and work space) and the right to control one's identity. Privacy conflicts with: freedom of speech; national security; police powers of surveillance; personal morality; freedom of information and electronic commerce.

Legal Position:

There is no right to privacy in United Kingdom law even after the Human Rights Act 1998, and Parliament has shown a lack of enthusiasm

for creating such a right. However, the judiciary has developed the doctrine of breach of confidence in a way that provides a limited right to privacy, particularly since the Human Rights Act 1998. Although Article 8 of the European Convention on Human Rights creates a right to respect for private life, this is not a right to privacy. Also Article 8 must be balanced with Article 10 which guarantees freedom of expression, which is significant when the press is alleged to have breached an individual's right to privacy.

In **Malone v. Metropolitan Police Commissioner (No. 2)**[26] the United Kingdom courts held that telephone tapping by the police could not be unlawful in the United Kingdom as there was no right to privacy at common law that could be breached. This contrasts with the United States of America where the right to privacy is a protected right. If there is no right to privacy in the law, how can privacy be protected in the United Kingdom? There are two ways: Firstly, the right to confidence and secondly, through Article 8 of the European Convention on Human Rights.

Those who allege invasion of privacy generally rely on an action in ‘breach of the right to confidence'. The common law right to confidence is a recognised right. The essence of the right to confidence may be summarised as misuse of private information. The courts in the United Kingdom have established, in many decisions, that publishing or obtaining information or unauthorised photographs amounts to a breach of confidence in situations where it is considered that a ‘duty of confidence' exists. The duty of confidence is considered to exist when a person possesses information that someone in their position should know would reasonably be regarded as confidential. It is a breach of confidence

[26] [1979] 2 All ER 620

if the information is detrimental to the owner or the subject of such information and used without the consent of the owner. A person can be subject to a duty of confidence by a written or oral contract or agreement or depending upon the nature of the relationship between the owner of the information and the person in whom he or she confides.

The law of breach of confidence is a flexible doctrine which can be used to protect private information in many situations. Lawyers must not disclose to third parties information given to them by their clients; doctors must preserve the confidence of their patients as must priests. In a case in **Stephens v. Avery**,[27] the court recognised that a duty of confidence could arise in relation to the details of a sexual relationship between two women. Also the law of 'breach of confidence' has been used extensively to protect trade secrets and commercially sensitive information. Employees owe a duty of confidence to their employers, either under the terms of a written contract or by an implied term of loyalty and fidelity.

The case of **Prince Albert v. Strange,**[28] provides a good illustration of how the right to confidence protects privacy. The defendant who was a publisher was in possession of copies of private etchings of the Royal Family at home. The publisher had attained them from an employee of a printer to whom Prince Albert had entrusted the plates. While the right to privacy was not explicitly recognised at the time, it was argued on behalf of Queen Victoria and Prince Albert that they had a right to keep private, art works that they had commissioned, for their personal enjoyment. Ruling in favour of Queen Victoria and Prince Albert, the court held that "every man has a right to keep his own

[27] [1988] 2 WLR 1280
[28] (1849) 2 De G & Sm 293

sentiments, if he pleases. He has certainly a right to judge whether he will make them public or commit them only to the sight of his friends."

The court further held that the publication of these etchings invaded the Royal Family's right to privacy, in the sense of a right to control one's possessions and enjoy them.

Privacy and the Human Rights Act, 1998 :

The Human Rights Act 1998 incorporated the European Convention on Human Rights into United Kingdom law. Article 8(1) of the Convention provides that "everyone has the right to respect for his private and family life, his home and his correspondence." That right is, however, subject to some qualifications. Article 8(2) of the Convention provides that there shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, or for the protection of the rights and freedoms of others.

So the Act and the Convention confer a right of "respect for" private life, and provide a number of reasons why a public authority would be justified in interfering with that right. Some have argued that this is tantamount to a "right to privacy" but the courts – in England, at least – have rejected that notion.

In the case of **Wainwright v. Home Office**[29], the House of Lords held that there is no cause of action under English law for "invasion of privacy." In addition, the court said that Article 8 of the Convention does

[29] [2003] UKHL 53, [2004] 2 AC 406

not create any such cause of action. It said that in interpreting the Convention in cases involving privacy, the concern of the European Court of Justice has simply been whether the law in the United Kingdom provides an adequate remedy in circumstances where there has been an invasion of privacy in breach of Article 8(1) that is not justified under Article 8(2).

Thus in the Wainwright case, the House of Lords reasoned that although there have been cases where the European Court has found that the law in the United Kingdom did not provide a claimant with an adequate remedy for an unjustified breach of Article 8(1) of the Convention, that does not mean that a new, general cause of action for invasion of privacy is required in order to provide such a remedy. Although the Wainwright case made it clear that there is no cause of action for invasion of privacy, many legal commentators have observed that the influence of Article 8 of the Convention has caused the courts in the United Kingdom to broaden the scope of the cause of action for breach of confidence. In its broader form – now referred to as "misuse of private information" – this cause of action might be said to be coming close to conferring a right to privacy.

Traditionally, to bring a claim for breach of confidence**,** the claimant had to establish that there was a confidential relationship between the claimant and the defendant. The logic to that is easy to follow: A gives B certain information in confidence. B spills the beans and A suffers damages as a result. A sues B for damages on grounds of breach of confidence.

By contrast, to bring a claim for misuse of confidential information**,** the claimant need only establish that he had a reasonable

expectation of privacy in relation to the information in question. The relationship with the defendant is not particularly relevant. For instance, when John Terry applied for an injunction to restrain the publication of certain details about his romantic life, the "defending" parties were "persons unknown" who might publish certain information.

Although, in **John Terry's case**,[30] the judge did not prohibit publication, he said that if he had determined that there was a real risk that intrusive details about Mr Terry's relationship would be published, he would have ordered that publication be prohibited. That would have been on the grounds that publication would be a misuse of confidential information in which Mr Terry had a reasonable expectation of privacy. The fact that there was no confidential relationship with the prospective publishers did not matter.

So it may be that the development of the cause of action for misuse of confidential information is beginning to resemble some kind of right to privacy. The John Terry case illustrates, however, that in enforcing such a right, the courts must balance it against the rights of others such as the right of the newspaper publishers to freedom of expression.

(II) United States of America:

The Fifth Amendment to the Constitution of United States of America (1791) declares that *"No person shall be deprived of his life, liberty or property, without due process of law."*[31]

The Fourteenth Amendment imposes similar limitation on the State authorities. These two provisions are conveniently referred to as the 'due

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30 R v John Terry, Westminster Magistrates' Court, U.K., 13 July 2012

31 The 'due process' clause was adopted in s. 1(a) of the Canadian Bill of Rights Act, 1960. In the Canada Act, 1982, this expression has been substituted by 'the principles of fundamental justice' [s. 7].

process clauses'. Under the above clauses the American Judiciary claims to declare a law as bad, if it is not in accord with 'due process', even though the legislation may be within the competence of the Legislature concerned. Due process is conveniently understood means procedural regularity and fairness.[32]

While in England, all that Parliament enacts is 'law of the land', a legislative enactment, in the United States of America , is not 'law' unless it is in conformity with 'due process'. This was explained in the early case of **Murray's Lessee**:[33]

> *"That the warrant now in question is legal process, is not denied. It was issued in conformity with an act of Congress. But is it 'due process of law? It is manifest that it was not left to the legislative power to enact any process which might be devised. The article is a restraint on the legislative as on the executive and judicial powers of the government and cannot be so construed as to leave Congress free to make any process 'due process of law' by its mere will."*

Since the guarantee applies also against the Judiciary, it follows that any judicial proceeding which forfeits the life or liberty of a person, however guilty he may be, without complying with the procedural requirements of due process, must be held to be invalid.[34]

Curiously, though the very expression 'due process of law' was borrowed from an English statute in evolving this concept of due processes. The fathers of the American Constitution went ahead of the

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32 Constitutional Interpretation by Craig R. Ducat, 8th Edn. 2002, p. 475.
33 Murray's Lessee v. Hoboken Land & Improvement Company, (1856) 18 How 272.
34 Brock v. N. Carolina, (1951) 344 US 424 (427).

English doctrine of Rule of Law. In **Chambers v. Florida**,[35] Justice Black explained the difference in attitude as follows:

> *"A liberty loving people won the principle that criminal punishments could not be inflicted save for that which proper legislative action had already by 'the law of the land' forbidden when done. But even more was needed from the popular hatred and abhorrence of illegal confinement, torture and extortion of confessions of violations of the 'law of the land' evolved the fundamental idea that no man's life, liberty or property be forfeited as criminal punishment for violation of that law until there had been a charge fairly made and fairly tried. Thus, as assurance against ancient evils, our country, in order to preserve "the blessings of liberty," wrote into its basic law the requirement, among others, that the forfeiture of the lives, liberties or property of people accused of crime can only follow if procedural safeguards of due process have been obeyed."*[36]

Historically speaking, the procedural meaning was the original meaning attributed to the Clause. As will be just seen, it was interpreted as meaning the process of law which hears before it condemns".[37] Any law which sought to deprive a person of his liberty or property without such hearing was condemned by the Supreme Court as unconstitutional and invalid, notwithstanding the competence of the Legislature to enact it. Thus, originally concerned with securing procedural safeguards to a person accused of crime, the Supreme Court soon came to apply the Clause to question the substantive reasonableness of social and economic legislation from the standpoint of individual liberty, inspired by the

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35 Chambers v. Florida, (1940) 309 US 227; Rochin v. California, (1952) 342 US 165.
36 Chambers v. Florida, (1940) 309 US 227; Rochin v. California, (1952) 342 US 165.
37 Hagar v. Reclamation District, (1884) 111 US 701.

doctrine of laissez faire.[38] Though the substantive attitude has also been extended to nullify criminal laws, in the realm of personal safety and liberty, it is the procedural aspect which has played a more important part. We should, therefore, deal with the two aspects separately.

Procedural due process means that in dealing with individuals, the Government must proceed with 'settled usages and modes of procedure', e.g., that there should be no conviction without a hearing.

Due process focuses on the means by which government deprives people of things, whether life, liberty or property, and calls to mind assurances that policy will be implemented in ways that are not irregular, arbitrary or unreasonable. When governmental action that imposes some deprivation or limits an individuals' right of action, is at issue, interpreters of the clause who focus on this variety of due process essentially ask whether the affected person received all the process that was due. This way of putting the question accurately suggests that procedural due process deals in degree of protection.[39] Due process unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances. Due process is flexible and calls for such procedural protection as the particular situation demands.[40]

In **Hovey v. Elliot**,[41] the Supreme Court approved of Daniel Webster' s argument in the **Dartmouth case**,[42] the 'due process'—"is the process of law which hears before it condemns, which proceeds upon enquiry, and renders judgment only after trial. Its meaning is that every. citizen shall hold his life, liberty and property and immunities under the

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38 Chicago R.R. Company v. Minnesota, (1890) 134 US 418.
39 Constitutional Interpretation by Craig R. Ducat, 8th Edn. 2002, p. 475.
40 Mathews v. Elridge, (1976) 424 US 3 19.
41 Hovey v. Elliot, (1897) 167 US 409.
42 The Dartmouth College Case, (18 19) 4 Wh 518.

protection of the general rules which govern society." In a later case,[43] the Court said:

> *"By due process of law is meant one which, following the forms of law, is appropriate to the case and just to the Parties to be affected. It must be pursued in the ordinary modes prescribed by law, it must be adapted to the end to be attained, whenever it is necessary for the protection of the parties it must give them an opportunity to be heard respecting the justness for the judgment sought. The clause, therefore, means that there can be no proceeding against life, liberty or property which may result in deprivation of either, without the observance of those general rules established in our system of jurisprudence for the security of private rights."*

The court further observed that some form of hearing is required before an individual is finally deprived of a property interest. The right to be heard before being condemned to suffer grievous loss of any levied, even though it may not any stigma and hardships of a criminal conviction is a principle basic to our society.[44] In the concurring judgment by Justice Frank Furker, it was observed that the fundamental requirement of "due process is the opportunity to be heard" of a meaningful time and in a meaningful manner.

Procedural Due Process involves two central issues- (1) what constitutes a life, liberty or property interest that cannot be taken away be government without "due process of law"; and (2) once due process is

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43 Hagar v. Reclamation District, (1884) 111 US 701.
44 Joint Anti-fascist Commr. v. McGrath, (1951) 341 US 123.

required, what sort of notice and opportunity to be heard "constitution due process"?

The focus of procedural due process is to identify substantive rights-life, liberty or property- to assess whether the governments procedures for taking them away, are constitutionally adequate.[45] The learned author has further stated that "a court necessarily must first decide whether the status in question is life, liberty or property, right to which due process attaches. If so, then the court must decide whether pre-deprivation procedures are sufficient to constitute due process.

Although due process generally requires prior notice and opportunity to be heard "before" deprivation of life, liberty or property, some times due process is satisfied by post-deprivation hearing or other remedy. When government deprive persons of property to prevent immediate public harm and provide adequate post-deprivation remedies, a pre-deprivation hearing is not necessarily required.[46] In cases where it was virtually impossible to provide pre-deprivation hearing, post-decisional hearing is sufficient.[47]

A law which provide for registration and prior disclosure of whereabouts of certain category of convicts was held valid and no prior hearing is required, since the registration and prior disclosure is consequence of conviction. It was held that criminal trial which ended in conviction affords, ample due process protection.[48]

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45 Massey on American Constitutional Law, 2nd Edn. 2005, p. 432.

46 North American Cold Storage Co. v. Chicago, (1908) 211 US 306; Mackey v. Montrym, (1979) 443 US 1 ; Ingraham v. Wright, (1977) 430 US 651.

47 Parrott v. Taylor, (1981) 451 US 527; Hudson v. Palmer, (1984) 468 US 517.

48 Connectieat Department of Public Safety v. Doe, (2003) 538 US 1.

The Privacy Laws of the United States :

The privacy laws of the United States deal with several different legal concepts. One is the invasion of privacy, a tort based in common law allowing an aggrieved party to bring a lawsuit against an individual who unlawfully intrudes into his or her private affairs, discloses his or her private information, publicizes him or her in a false light, or appropriates his or her name for personal gain.[49] Public figures have less privacy, and this is an evolving area of law as it relates to the media.

The essence of the law derives from a right to privacy, defined broadly as "the right to be let alone." It usually excludes personal matters or activities which may reasonably be of public interest, like those of celebrities or participants in newsworthy events. Invasion of the right to privacy can be the basis for a lawsuit for damages against the person or entity violating the right. These include the Fourth Amendment right to be free of unwarranted search or seizure, the First Amendment right to free assembly, and the Fourteenth Amendment due process right, recognized by the Supreme Court as protecting a general right to privacy within family, marriage, motherhood, procreation, and child rearing. [50]

The early years in the development of privacy rights began with English common law which protected "only the physical interference of life and property". Its development of tort remedies is "one of the most significant chapters in the history of privacy law".[51] Those rights expanded to include a "recognition of man's spiritual nature, of his feelings and his intellect." Eventually, the scope of those rights broadened even further to include a basic "right to be let alone," and the former

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49 "Invasion of Privacy Law & Legal Definition", US Legal. Retrieved October 17, 2013.

50 "Right to Privacy Law & Legal Definition", US Legal. Retrieved 17 October 2013.

51 Solove, Daniel J., Marc Rotenberg, and Paul M. Schwartz (2006), Privacy, Information, and Technology, Aspen Publishers, pp. 9–11, ISBN 0-7355-6245-8.

definition of "property" would then comprise "every form of possession – intangible, as well as tangible." By the late 19th century, interest in privacy grew as a result of the growth of print media, especially newspapers.

Between 1850 and 1890, United States newspaper circulation grew by 1,000 percent from 100 papers with 800,000 readers to 900 papers with more than 8 million readers. In addition, newspaper journalism became more sensationalistic, and was termed yellow journalism. The growth of industrialism led to rapid advances in technology, including the handheld camera, as opposed to earlier studio cameras, which were much heavier and larger. In 1884, Eastman Kodak company introduced their Kodak Brownie, and it became a mass market camera by 1901, cheap enough for the general public. This allowed people and journalists to take candid snapshots in public places for the first time.

Samuel D. Warren and Louis D. Brandeis, young partners in a new law firm, feared that this new small camera technology would be used by the "sensationalistic press." Seeing this becoming a likely challenge to individual privacy rights, they wrote the "pathbreaking" Harvard Law Review article in 1890, "The Right to Privacy".[52] According to legal scholar Roscoe Pound, the article did "nothing less than add a chapter to our law",[53] and in 1966 legal textbook author, Harry Kalven, hailed it as the "most influential law review article of all". As recently as 2001, in the Supreme Court case of **Kyllo v. United States**,[54] the article was cited by a majority of justices, both those concurring and those dissenting.

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52 Samuel Warren and Louis D. Brandeis (1890), "The Right To Privacy", Harvard Law Review (Vol. 4, No. 193). Retrieved 17 October 2013.

53 Mason, Alpheus Thomas (1946), Brandeis: A Free Man's Life, Viking Press, p. 70.

54 533 U.S. 27 (2001).

Warren and Brandeis write that privacy rights should protect both businesses and private individuals. They describe rights in trade secrets and unpublished literary materials, regardless whether those rights are invaded intentionally or unintentionally, and without regard to any value they may have. For private individuals, they try to define how to protect "thoughts, sentiments, and emotions, expressed through the medium of writing or of the arts". They describe such things as personal diaries and letters needing protection, and how that should be done: "Thus, the courts, in searching for some principle upon which the publication of private letters could be enjoined, naturally came upon the ideas of a breach of confidence, and of an implied contract". They also define this as a breach of trust, where a person has trusted that another will not publish their personal writings, photographs, or artwork, without their permission, including any "facts relating to his private life, which he has seen fit to keep private". And recognizing that technological advances will become more relevant, they write:

"Now that modern devices afford abundant opportunities for the perpetration of such wrongs without any participation by the injured party, the protection granted by the law must be placed upon a broader foundation". Public disclosure of private facts arises where one person reveals information which is not of public concern, and the release of which would offend a reasonable person. [55] "Unlike libel or slander, truth is not a defense for invasion of privacy." Disclosure of private facts includes publishing or widespread dissemination of little-known, private facts that are non-newsworthy, not part of public records, public proceedings, not of public interest, and would be offensive to a reasonable person if made public.

[55] Joey Senat (2000), "4 Common Law Privacy Torts" (archive.org, 2013).

History of Privacy Law :

Legal concepts like ownership of real property and contracts originated many hundreds of years ago and are now well established in law. In contrast, the right of privacy has only recently received legal recognition and is still an evolving area of law. It is generally agreed that the first publication advocating privacy was the article by Warren and Brandeis.[56] However, the codification of principles of privacy law waited until Prosser, *Privacy*[57], which Prosser subsequently entered into the Second Restatement of Torts at §§ 652A-652I (1977).

Early invasions of privacy could be treated as trespass, assault, or eavesdropping. Part of the reason for the delay in recognizing privacy as a fundamental right is that most modern invasions of privacy involve new technology. Before the invention of such technology, one could be reasonably certain that conversations in private could not be heard by other people. Before the invention of computer databases, one might invade a few persons' privacy by collecting personal information from interviews and commercial transactions, but the labor-intensive process of gathering such information made it impossible to harm large numbers of victims. Further, storing such information on paper in file cabinets made it difficult to *use* the information to harm victims, simply because of the disorganized collection of information.

The famous phrase, the right "to be let alone" has a long history. As far back as 1834, the United States Supreme Court mentioned that a "defendant asks nothing — wants nothing, but to be let alone until it can be shown that he has violated the rights of another."[58] The phrase, "the

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[56] *The Right to Privacy*, 4 Harvard L.R. 193 (1890).
[57] 48 Cal.L.Rev. 383 (1960).
[58] *Wheaton v. Peters*, 33 U.S. 591, 634 (1834)

right to be let alone", also appears in a law textbook,[59] as corresponding to the duty "not to inflict an injury", for example, by battery. This argument was expanded by Warren and Brandeis in their famous law review article. Brandeis used the phrase "the right to be let alone" in his famous dissent in **Olmstead v. United States**,[60] the first wiretapping case heard by the United States Supreme Court. The "right to be let alone" is the most terse definition of the right to privacy, although, through numerous United States Supreme Court decisions cited later in this article, this phrase has come to be associated with preventing invasions of the private sphere by the government.

Constitutional basis for right to privacy :

The United States Constitution contains no express right to privacy. The Bill of Rights, however, reflects the concern of James Madison and other framers for protecting specific aspects of privacy, such as the privacy of beliefs,[61] privacy of the home against demands that it be used to house soldiers,[62] privacy of the person and possessions as against unreasonable searches,[63] and the 5th Amendment's privilege against self-incrimination, which provides protection for the privacy of personal information. In addition, the Ninth Amendment states that the "enumeration of certain rights" in the Bill of Rights "shall not be construed to deny or disparage other rights retained by the people." The meaning of the Ninth Amendment is elusive, but some persons have interpreted the Ninth Amendment as justification for broadly reading the Bill of Rights to protect privacy in ways not specifically provided in the first eight amendments.

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59 T.M. Cooley, *A Treatise on the Law of Torts* 29 (2d ed. 1888)
60 277 U.S. 438, 478 (1928).
61 1st Amendment
62 3rd Amendment
63 4th Amendment

The question of whether the Constitution protects privacy in ways not expressly provided in the Bill of Rights is controversial. Many originalists, including most famously Judge Robert Bork in his ill-fated Supreme Court confirmation hearings, have argued that no such general right of privacy exists. The Supreme Court, however, beginning as early as 1923 and continuing through its recent decisions, has broadly read the "liberty" guarantee of the Fourteenth Amendment to guarantee a fairly broad right of privacy that has come to encompass decisions about child rearing, procreation, marriage, and termination of medical treatment. Polls show most Americans support this broader reading of the Constitution.

The Supreme Court, in two decisions in the 1920s, read the Fourteenth Amendment's liberty clause to prohibit states from interfering with the private decisions of educators and parents to shape the education of children. In **Meyer v. Nebraska,**[64] the Supreme Court struck down a state law that prohibited the teaching of German and other foreign languages to children until the ninth grade. The state argued that foreign languages could lead to inculcating in students "ideas and sentiments foreign to the best interests of this country." The Court, however, in a 7 to 2 decision written by Justice McReynolds concluded that the state failed to show a compelling need to infringe upon the rights of parents and teachers to decide what course of education is best for young students. Justice McReynolds wrote:

> *"While this court has not attempted to define with exactness the liberty thus guaranteed, the term has received much consideration and some of the included things have been definitely stated. Without doubt, it denotes not merely freedom from bodily restraint*

[64] 262 U.S. 390 (1923)

but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men."

Two years late, in **Pierce v. Society of Sisters**,[65] the Court applied the principles of Meyer to strike down an Oregon law that compelled all children to attend public schools, a law that would have effectively closed all parochial schools in the state.

The privacy doctrine of the 1920s gained renewed life in the Warren Court of the 1960s when, in **Griswold v. Connecticut,**[66] the Court struck down a state law prohibiting the possession, sale, and distribution of contraceptives to married couples. Different justifications were offered for the conclusion, ranging from Court's opinion by Justice Douglas that saw the "penumbras" and "emanations" of various Bill of Rights guarantees as creating "a zone of privacy," to Justice Goldberg's partial reliance on the Ninth Amendment's reference to "other rights retained by the people," to Justice Harlan's decision arguing that the Fourteenth Amendment's liberty clause forbade the state from engaging in conduct that was inconsistent with a government based "on the concept of ordered liberty."

In 1969, the Court unanimously concluded that the right of privacy protected an individual's right to possess and view pornography might be the basis for a criminal prosecution against its manufacturer or distributor

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[65] 268 U.S. 510 (1925)
[66] 381 U.S. 479 (1965)

in his own home. Drawing support for the Court's decision from both the First and Fourth Amendments, Justice Marshall wrote in **Stanley v. Georgia**[67]:

> *"Whatever may be the justifications for other statutes regulating obscenity, we do not think they reach into the privacy of one's own home. If the First Amendment means anything, it means that a State has no business telling a man, sitting alone in his own house, what books he may read or what films he may watch. Our whole constitutional heritage rebels at the thought of giving government the power to control men's minds."*

The Burger Court extended the right of privacy to include a woman's right to have an abortion in **Roe v. Wade**[68], but thereafter resisted several invitations to expand the right. **Kelley v. Johnson,**[69] in which the Court upheld a grooming regulation for police officers, illustrates the trend toward limiting the scope of the "zone of privacy." Some state courts, however, were not so reluctant about pushing the zone of privacy to new frontiers. The Alaska Supreme Court went as far in the direction of protecting privacy rights as any state. In **Ravin v. State,**[70] drawing on cases such as Stanley and Griswold but also basing its decision on the more generous protection of the Alaska Constitution's privacy protections, the Alaska Supreme Court found constitutional protection for the right of a citizen to possess and use small quantities of marijuana in his own home.

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67 394 U.S. 557 (1969)
68 410 U.S. 113 (1973)
69 425 U.S. 238 (1976)
70 537 P.2d 494 (Alaska 1975)

The Supreme Court said in case of **Moore v. East Cleveland,**[71] that "the Constitution protects the sanctity of the family precisely because the institution of the family is deeply rooted in the Nation's history and tradition." Moore found privacy protection for an extended family's choice of living arrangements, striking down a housing ordinance that prohibited a grandmother from living together with her two grandsons. Writing for the Court, Justice Powell said, "The choice of relatives in this degree of kinship to live together may not lightly be denied by the state."

In more recent decades, the Court recognized in **Cruzan v. Missouri Department of Health,**[72] that individuals have a liberty interest that includes the right to make decisions to terminate life-prolonging medical treatments. In **Lawrence v. Texas**,[73] the Supreme Court, overruling an earlier decision, found that Texas violated the liberty clause of two gay men when it enforced against them a state law prohibiting homosexual sodomy. Writing for the Court in Lawrence, Justice Kennedy reaffirmed in broad terms the Constitution's protection for privacy:

> *"These matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment. At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life....The petitioners are entitled to respect for their private lives. The State cannot demean their existence or control their destiny by making their private sexual conduct a crime. Their right to liberty under the Due Process Clause gives them the full right to engage in their conduct without intervention*

[71] 431 U.S. 494 (1977)
[72] 497 U.S. 261 (1990)
[73] 539 U.S. 558 (2003)

of the government. It is a promise of the Constitution that there is a realm of personal liberty which the government may not enter."

One question that the Court has wrestled with through its privacy decisions is how strong of an interest states must demonstrate to overcome claims by individuals that they have invaded a protected liberty interest. Earlier decisions such as Griswold and Roe suggested that states must show a compelling interest and narrowly tailored means when they have burdened fundamental privacy rights, but later cases such as Cruzan and Lawrence have suggested the burden on states is not so high.

The future of privacy protection remains an open question. Justices Scalia and Thomas, for example, are not inclined to protect privacy beyond those cases raising claims based on specific Bill of Rights guarantees. The public, however, wants a Constitution that fills privacy gaps and prevents an overreaching Congress from telling the American people who they must marry, how many children they can have, or when they must go to bed. The best bet is that the Court will continue to recognize protection for a general right of privacy.

Federal State Constitution :

Although the word "privacy" is actually never used in the text of the United States Constitution, [74] there are Constitutional limits to the government's intrusion into individuals' right to privacy. This is true even when pursuing a public purpose such as exercising police powers or passing legislation. The Constitution, however, only protects against state actors. Invasions of privacy by individuals can only be remedied under previous court decisions.

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[74] "Charters of Freedom – The Declaration of Independence, The Constitution, The Bill of Rights". National Archives. Retrieved October 17, 2013.

The Fourth Amendment to the Constitution of the United States ensures that "the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized".

The First Amendment protects the right to free assembly, broadening privacy rights. The Ninth Amendment declares that the fact that a right is not explicitly mentioned in the Constitution does not mean that the government can infringe on that right. The Supreme Court recognized the Fourteenth Amendment as providing a substantive due process right to privacy. This was first recognized by several Supreme Court Justices in **Griswold v. Connecticut**,[75] decision protecting a married couple's rights to contraception. It was recognized again in 1973 **Roe v. Wade**,[76] which invoked the right to privacy to protect a woman's right to an abortion, and in the 2003 with **Lawrence v. Texas**,[77] which invoked the right to privacy regarding the sexual practices of same-sex couples.

California :

Article 1, §1 of the California Constitution articulates privacy as an inalienable right. California Security Breach Information Act No. 1386 expands on privacy law and guarantees that if a company exposes a Californian's sensitive information this exposure must be reported to the citizen. This law has inspired many states to come up with similar measures. [78] California's "Shine the Light" law, operative on January 1,

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75 381 U.S. 479 (1965)
76 410 U.S. 113 (1973)
77 539 U.S. 558 (2003)
78 "US State Privacy Laws". Protegrity. N.p., 2008. Web. October 25, 2010. Archived November 13, 2010, at the Wayback Machine.

2005, outlines specific rules regarding how and when a business must disclose use of a customer's personal information and imposes civil damages for violation of the law. California's Reader Privacy Act was passed into law in 2011. [79] The law prohibits a commercial provider of a book service, as defined, from disclosing, or being compelled to disclose, any personal information relating to a user of the book service, subject to certain exceptions. The bill would require a provider to disclose personal information of a user only if a court order has been issued, as specified, and certain other conditions have been satisfied. The bill would impose civil penalties on a provider of a book service for knowingly disclosing a user's personal information to a government entity in violation of these provisions. This law is applicable to electronic books in addition to print books. [80]

Florida:

Article I, §23 of the Florida Constitution states that "Every natural person has the right to be let alone and free from governmental intrusion into the person's private life except as otherwise provided herein. This section shall not be construed to limit the public's right of access to public records and meetings as provided by law." [81]

Montana:

Article 2, §10 of the Montana Constitution states that "The right of individual privacy is essential to the well-being of a free society and shall not be infringed without the showing of a compelling state interest". [82]

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79 Cal. Civil Code § 6267

80 "SB 602: Reader Privacy Act", Legislative Counsel's Digest, Legislative Counsel, State of California, February 17, 2011. Retrieved October 17, 2013.

81 Article I: Declaration of Rights, Section 23: Right of privacy". Constitution of Florida. Florida Legislature. November 5, 1968. Retrieved November 10, 2013.

82 Article II: Declaration of Rights, Section 10: Right of privacy". Constitution of Montana. Montana Legislative Services. March 22, 1972. Retrieved October 17, 2013.

Washington:

Law enforcement are required to obtain a warrant before using International mobile subscriber identity catcher technology.[83] Private individual's text messages are protected from warrantless searches.[84]

(III) Ireland :

Article 40(4) of the Constitution of 1937 says that "No citizen shall be deprived of his personal liberty save in accordance with law."

'Save in accordance with law' has been interpreted to mean 'in accordance with the law as it exists at the time when the Article is sought to be invoked'.[85] The view of Duffy, J.,[86] that 'law' in the above Article, meant law which was consistent with the constitutional guarantees and not any law enacted by the Legislature, was not supported by the Supreme Court, on a reference by the President. In the result, this provision is no safeguard against the Legislature itself.

Fundamental Rights under the Irish Constitution :

The Constitution recognises and declares that people living in Ireland have certain fundamental personal rights. These rights are natural human rights and are confirmed and protected by the Constitution.

Not every fundamental right that you possess is set out in the Constitution; you have many personal rights that are not specifically stated in the Constitution. These rights may be derived or implied from the Constitution. For example, the Constitution does not specifically state

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83 Farivar, Cyrus. "Cops must now get a warrant to use stingrays in Washington state". arstechnica.com. arstechnica.com. Retrieved 31 May 2015.

84 Sara Jean, Green. "State high court upholds privacy rights on text messages, tosses out 2 drug convictions". seattletimes.com. seattletimes.com. Retrieved 31 May 2015.

85 In re Art. 26, (1940) IR 470.

86 State v. Lennon (Burke's case), (1940) IR 136.

a right to privacy but the courts recognise that the personal rights in the constitution imply the right to privacy.

Fundamental rights are not absolute, they can be limited or restricted by the Oireachtas on the grounds, for example, of the common good or public order.

Every constitutional right has the same status and value. If there is a conflict between the constitutional rights of individuals, the courts will look at all the circumstances and weigh all of the factors to decide which constitutional right is more important in that particular case.

Right to life:

The Constitution specifically recognises and protects your right to life. Your right to life also means the right to have nature take its course and to die a natural death. That does not mean that you have the right to have your life terminated or death accelerated. Your right to die is simply the right to die a natural death and not to be kept alive by artificial means. The right to life of the unborn was inserted into the Constitution by a constitutional amendment in 1983. The equal right to life of the mother is also protected. In 1992, two amendments were added to the Constitution; the right of the mother to travel to another state and freedom of information in relation to services available in another state.

Personal liberty :

The Constitution guarantees that you have a right to liberty and freedom, except in accordance with the law. This means that, in general, you are entitled to your own personal freedom but legislation may provide for your arrest and detention in certain circumstances. The State

may only breach your right to personal liberty in circumstances that come within a law that provides for your arrest and/or detention.

If you believe that you are being detained or held unlawfully, you may make an application to the High Court. If the person or institution detaining you cannot justify the detention or prove that it is lawful, the High Court may order that you be released. This is called a *Habeas Corpus* order.

Religious liberty :

Your are free to practise your religion and your freedom of conscience. The State guarantees not to endow or favour any religion and not to discriminate on the grounds of religion.

State aid for schools cannot discriminate between schools of different religious denominations. Every child has the right to attend a denominational school receiving State funding without having to participate in religious instruction in the school. Your right to religious liberty may be limited to protect public order and morality.

The Right to Privacy:

The Constitution does not specifically state a right to privacy but the courts recognise that the personal rights in the Constitution imply the right to privacy. For example, your private written communications and telephone conversations cannot be deliberately, consciously and unjustifiably interfered with. However, your right to privacy may be limited or restricted by legislation in the interests of the common good, public order and morality. Privacy is a fundamental human right, enshrined in numerous international human rights instruments. It is

central to the protection of human dignity and forms the basis of any democratic society. It also supports and reinforces other rights, such as freedom of expression, information and association. Activities that restrict the right to privacy, such as surveillance, can only be justified when they are prescribed by law, necessary to achieve a legitimate aim, and proportionate to the aim pursued.

As innovations in information technology have enabled previously unimagined forms of collecting, storing and sharing personal data, the right to privacy has evolved to encapsulate State obligations related to the protection of personal data. A number of international instruments enshrine data protection principles, and many domestic legislatures have incorporated such principles into national law.

Ireland is a signatory to the Universal Declaration of Human Rights and has ratified the International Covenant on Civil and Political Rights. Article 17 of the International Covenant on Civil and Political Rights, which reinforces Article 12 of the Universal Declaration of Human Rights, provides that "no one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation". The Human Rights Committee has noted that states parties to the International Covenant on Civil and Political Rights have a positive obligation to "adopt legislative and other measures to give effect to the prohibition against such interferences and attacks as well as to the protection of the right to privacy."

Ireland is a party to the European Convention on Human Rights, which, as has already been noted, has been incorporated into domestic law. In matters within the scope of European Law, Ireland is bound by

the Charter of Fundamental Rights of the European Union, Articles 7 and 8 of which relate to the right to privacy and the protection of personal data respectively.

The European Convention on Human Rights has been brought into force in Ireland with the adoption of the European Convention on Human Rights Act 2003. That Act gives effect to Article 8 of the European Convention on Human Rights which provides:

> *"1. Everyone has the right to respect for his private and family life, his home and his correspondence.*
>
> *2. There shall be no interference by a public authority with the exercise of this right except such as it is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic wellbeing of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."*

Reviewing the law to ensure it is updated is always a worthwhile exercise. But are Ireland's privacy laws in need of reform? This is the position of Alan Shatter, the Irish Minister of Justice, who has indicated that his Government will act because "It is clear that some sections of the print media are either unable or unwilling in their reportage to distinguish between "prurient interest" and "the public interest". The position in Ireland is not dissimilar to that in the United Kingdom, but the common law world has struggled with the concept of a right to privacy generally. The United States has recognised it. Australia has expressly denied the right and the United Kingdom and Canada have not conclusively determined the position, although there is increasing acceptance in

England of the right given its incorporation through the European Convention of Human Rights.

What Ireland does have, over and above the British position is a constitutional right, and the Irish position at common law (really in equity and tort) is also reasonably developed. However, a fundamental principle yet to be established by the Irish courts is whether the obligation to keep something confidential extends to those who surreptitiously acquire information by surveillance techniques that are phone tapping and photos/videos. This is a crucial question left largely unanswered. It applies in the Kate Middleton case to the Irish Daily Star, and threatened actual publications elsewhere.

The Irish Courts have the benefit of having a somewhat established constitutional right, and so the law has developed in this area. It is somewhat established, because it is not clearly set out, that the Constitution provides a conceptual and intellectual backdrop for developing a jurisprudence in relation to privacy that the English courts cannot directly avail themselves of. Interstitial lawmaking has given rise to a right of privacy in relation to marital privacy and in relation to telephone communications, but in short, the right has not been properly articulated. This may therefore be the right time to flesh out the actual nature of the right. This does not mean that such a right need be a creature of statute, but it is hard to see how judges will want to take steps here by themselves. Creative lawmaking has generated useful decisions in the past, but the interplay between freedom of expression and the sanctity of a private world free from press intrusion is a cornerstone debate in our society at large. Answering this is possibly best determined by the body politic rather than the judges.

Irish Courts have accepted what we may call the Garbo principle that there is the right to be left alone. The trouble is they may need help in defining the boundaries of that right. The Irish courts have noted the decision in **Von Hannover v. Germany No. 1,**[87] where a complex interplay between the public status of an individual, the potential for a campaign of harassment, the contribution of the publication to a debate of current interest in contemporary society, and the potential mere entertainment value would be relevant factors in reaching a decision. Further, the Irish Courts will be reluctant to allow a right of privacy to subsist where public figures court publicity in relation to the matters they subsequently seek to protect.

In **Kate Middleton's case**[88] it is difficult to see how the primary act by Closer was not an invasion of privacy under current privacy law, and arguably a breach of confidentiality, and it is probably not a stretch of judicial imagination to arrive at a situation where this instance would be an invasion of an Irish constitutional right or the human right set out in Article 8 of the European Convention as analysed by the German Courts and the European Court of Human Rights. In the United Kingdom the press are very sensitive to issues of intrusion with regard to members of the British Royal Family, not least in the aftermath of the phone hacking scandal, and so reluctance to publish in that country has more to do with political and economic fallout than it does to a stronger and more well established right of privacy than in Ireland. Ireland if anything is a possibly safer harbour legally for those wishing to assert their rights of freedom generally. However, as we have seen in France, one can have strong privacy laws, but without teeth, there will always be those who will be prepared to break the law for a wider commercial gain.

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87 [2004] (Application no. 59320/00)

88 ECHR, Application No. 48009/09, Judgement on 10.05.2011.

One thing is for sure there will be more of this, and the current ambiguities around a right to privacy in Ireland will be examined either judicially or through the legislature in the near future.

(IV) West Germany :

Article 2(2) of the West German Constitution (1948) declares that "*Everyone shall have the right to life and physical inviolability. The freedom of the individual shall be inviolable, These rights may be interfered with only on the basis of the legal order.*"

Though the freedom of life and liberty guaranteed by the above Article may be restricted, such restriction will be valid only if it is in conformity with the 'legal order'. Being a basic right, the freedom guaranteed by Article 2(2) is binding on the legislative, administrative and judicial organs of the State.[89] This gives the individual the right to challenge the validity of a law or an executive act violating the freedom of the person by a constitutional complaint to the Federal Constitutional Court, under Article 93. Procedural guarantee is given by Articles 103(1) and 104. Article 104(1)-(2) provides:

"(1) The freedom of the individual may be restricted only on the basis of a formal law and only with due regard to the forms prescribed therein....

(2) Only the Judge shall decide on the admissibility and continued deprivation of liberty."

These provisions correspond to Article 21 of Indian Constitution and the court is empowered to set a man to liberty if it appears that he has been imprisoned without the authority of a formal law or in contravention

[89] Article 1(3) of the West German Constitution.

of the procedure prescribed therein. Article 103(1) goes beyond Article 12 of Indian Constitution by ensuring 'due process' in a judicial hearing:

"Everyone brought before a Court shall have a claim to proper legal hearing".

Under Article 104, a person whose liberty is infringed is entitled to be brought before a court and in the court he is entitled to a 'fair hearing'. If, therefore, the trial does not conform to the standard of a fair hearing, the aggrieved individual can have the judgment annulled on that ground by a constitutional complaint to the Federal Constitutional Court.

Privacy Law in Germany:

Privacy law is taken very seriously in Germany, much more so than in the United Kingdom. It is one of the strictest countries regarding privacy in the world. This is very noticeable in terms of the contrast in media coverage between the United Kingdom and Germany, however it also applies to the internet. German privacy laws and more notably their enforcement have actually put restrictions on areas of the internet and it's use. This has caused websites and social media such as Google and Facebook numerous problems, as the freedoms of the internet come into conflict with the growing interference with the private lives of individuals.

In 2010 Google maps was forced to blur out images at street level, after complaints by residents whose houses were shown. People were given the opportunity to opt out of Street View in order to comply with German privacy standards. 3% of Germans actually did this and these buildings were blurred out, making Street View look rather comical. In some cases single housing blocks were blurred out among a whole row of

buildings on well known city streets, while in the countryside many large houses were blurred out obscuring the entire street. Google has since stopped updating Google Street View in Germany. Ironically the blurred out images have attracted attention all around the world, which is probably not exactly what the owners of those houses wanted.

In 2014, the Independent Centre for Privacy Protection in Schleswig-Holstein that is a state on the Northern tip of Germany, made it illegal for organisations based in the state to have Facebook fan pages and to use the 'Like' application. The Independent Centre for Privacy Protection website states that by using the application, traffic and content data are transferred to the United States where feedback is sent to the website owner regarding the web page usage. Therefore, according to the Independent Centre for Privacy Protection, when you visit Facebook or use one of its plug-ins you can expect to be tracked by the company for two years. Last summer, privacy officials in Hamburg also claimed Facebook could be fined for keeping biometric data stored via the facial recognition system hosted on its site.

Germany has a rather diligent application of the European Directive on Privacy while the United Kingdom's application is rather loose to say the least. However privacy laws have been in place since the 1970s and the right to privacy has been an important issue in German society for a long time. The history of Germany has a large part to play in this. Under the Nazi regime and in the German Democratic Republic people were constantly under surveillance and faced persecution. These regimes used methods that severely infringed people's privacy and made a negative and terrifying impact on their personal lives. Many Germans feel that privacy laws are very important and that these should be regularly updated and adapted to be in tune with modern technology and

society. Maybe we could learn from the German approach to privacy in relation to the view that the law should be an ever evolving organism, which a perception long is held by the legal system in England and Wales.

Challenges to privacy infringements by Germany may not be such a bad thing for internet users across the globe, as it brings to light potentially dodgy privacy violations by new applications, terms and conditions or privacy policies by new media and social networking sites. The issue of privacy will only become a wider issue as our personal lives are ever more present and visible online and while companies seek to use personal information on the internet as a resource for selling their products and conducting research. While the United Kingdom may still be more pragmatic and loose in its implementation of privacy laws, it will most likely become more stringent as individuals grow increasingly concerned with their right to privacy and their exposure over the internet.

(V) Canada:

Section 1(1) of the Canadian Bill of Rights Act, 1960, adopted the 'Due Process' Clause from the American Constitution. But the difference in the Canadian set-up was due to the fact that this Act was not a constitutional instrument to impose a direct limitation on the Legislature but only a statute for interpretation of Canadian statutes, which, again, could be excluded from the purview of the Act of 1960, in particular cases, by an express declaration made by the Canadian Parliament itself that is Section 2. The result was obvious:

The Canadian Supreme Court held[90] that that the Canadian Court would not import 'substantive reasonableness' into Section 1(a), because

[90] Curr v. R., (1972) SCR 889.

of the unsalutary experience of substantive due process in the United States of America; and that as to 'procedural reasonableness', Section 1(a) of the Bill of Rights Act only referred to 'the legal processes recognized by Parliament and the Courts in Canada'. The result was that in Canada, the 'due process clause' lost its utility as an instrument of judicial review of legislation and it came to mean practically the same thing as whatever the Legislature prescribes, much the same as 'procedure established by law' in Article 21 of the Constitution of India, as interpreted of the **Gopalan case**.[91] The foregoing shortcomings of the Bill of Rights Act, 1960 have been removed in 1982.

In 1982, Canada adopted the Canadian Charter of Rights and Freedoms, and incorporated it as Part I of the Canada Act, 1982,[92] which was a Constitution Act enacted by the British Parliament, by way of amending the British North America Act, 1867.

After some controversy, in 1984, the Canadian Supreme Court has established judicial review founded on the Charter,[93] on the ground that it is a constitutional document as distinguished from an ordinary statute, and that by reason of Section 52(1) of the Canada Act, 1982, any law inconsistent with the Charter would be void, unless saved by Section 1 which permits of reasonable limits.[94] Decisions under the Bill of Rights, 1960, therefore, are no binding authority for interpretation of the Charter.[95]

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91 Gopalan v. State of Madras, (1950) SCR 88 : AIR 1950 SC 27.

92 3 SCW 98 ff

93 Law Society v. Skapinker, (1984) 9 -DLR (4th) 161 (167ff.) (SC); AG. Que v. Quebec School Boards, (1984) 10 DLR (4th) 321 (324-25) (SC); Hunter v. Southam, (1984) 11 DLR (4th) 641 (643, 660) SC; R. v. Big M., (1985) 18 DLR (4th) 321 (359) (SC); R. v. Oakes, 26 DLR (4th) 200 (216) (SC); Morgantaler v. R., (1990) LRC (Const.) 242 (336) (SC).

94 AG. Que v. Quebec School Bds., (1984) 10 DLR (4th) 321 (324-25) (SC); Hunter v. Southam, (1984) 1 1 DLR (4th) 641 (643, 660) (SC).

95 R. v. Big M., (1985) 18 DLR (4th) 321 (359) (SC); R. v. Oakes, 26 DLR (4th) 200 (216) (SC); Morgantaler v. R., (1990) LRC (Const.) 242 (336) (SC).

The Charter of Rights and Freedoms has been interpreted to include a right of privacy (in the prohibition against unreasonable search and seizure), and there are several laws in Canada that discuss the notion of privacy among them the federal Privacy Act and Personal Information Protection and Electronic Documents Act, and Ontario's Freedom of Information and Protection of Privacy Act, these laws have normally served to protect private citizens from intrusions into their private lives by government or by big business. The Ontario ruling effectively creates a new tort a new wrong, with specific definitions and limitations attached to allow an individual to sue another person directly for violating his or her personal information.

Assuming this new tort is not struck down, what it means is that if something like Britain's cell phone-hacking scandal were to take place in Canada, there would now be a direct recourse for someone whose privacy was invaded to sue the reporter or media boss who made away with this personal information. The twist here, however, is that in order to keep frivolous suits to a minimum, the Ontario court is setting out very low damages, which may not act as much of a deterrent.

In **Jones v. Tsige**,[96] the defendant and plaintiff were colleagues at a major Toronto bank. The defendant, Winnie Tsige, had started dating the ex-husband of the plaintiff, Sandra Jones, and subsequently fell into some dispute over money with him. As part of that lovers' quarrel, Tsige accessed Jones's personal bank account records approximately 174 times over a four-year period to see whether she was receiving child-support payments from her ex-husband. Though why this was important to her remains a bit of a mystery.

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[96] 2012 ONCA 32 – CanLII.

When she became suspicious, Jones told the bank and Tsige confessed to her superiors what she had done and appears to have been truly upset by her own conduct. The bank suspended her for a week without pay, and denied her a bonus for the year. Although the bank seemed to be dealing with the problem, neither of the remedies it provided served to compensate Jones for the invasion of her privacy, so she sued and was asking for $90,000 in damages.

Faced with this situation, the court had to ask itself two questions: First, was someone even allowed to sue another person for an invasion of privacy under the laws of Ontario; and second, if a suit could be brought, how much money should be awarded for that intrusion?

In writing the unanimous decision, Justice Robert Sharpe noted that this first question has been bandied about in the courts for the last 120 years without a clear answer. He also pointed out that existing laws would do nothing to compensate the wronged party in a case he thought cried out for a remedy. At least five Canadian provinces as well as many American states allow individuals to sue other people for an invasion of their privacy. But none of those jurisdictions define exactly what an "invasion of privacy" is, which is what the Ontario court set out to do.

After an exhaustive look at the state of the law in Canada, Australia, New Zealand, the United Kingdom and the United States, Sharpe and his colleagues settled on the following rule: "One who intentionally intrudes, physically or otherwise, upon the seclusion of another or his private affairs or concerns, is subject to liability to the other for invasion of privacy, if the invasion would be highly offensive to a reasonable person." In other words, if you start snooping though my stuff,

either in person or through some electronic means, I might be able to sue you. I say "might," as the last part of the definition is very important.

The Ontario court wanted to make sure that judges would not be flooded with claims from people who might be overly sensitive about their personal space. So, to clarify the situation, the court said that only intrusions into things like one's financial or health records, sexual practices and orientation, employment, diary or private correspondence would qualify as "highly offensive" for the purpose of the test.

It also made it clear, without going into great detail, that there would be other times where the invasion of a person's privacy would not result in a successful claim. So what does all this mean for you when your neighbour starts rooting through your recycling how much money can you recover in damages?

That is where Judge Sharpe threw a bit of a wet cloth on any great expectations. In her case, Jones was suing for $90,000, but the Appeal Court reasoned that damages for invasion of privacy should rarely be higher than $20,000, and even then only in the most serious of circumstances. In the end, Jones was awarded only $10,000. Her lawyer, Christopher Du Vernet, told CBC News Channel that he is happy the courts have recognized that people should be able to sue for breaches of privacy, but he expressed his disappointment at the cap on damages. He believes that some people or organizations will see a $10,000 damage award as merely "chump change," well worth the cost to get hold of some juicy information on, say, a business rival or a celebrity or political opponent, which might have much more value in the long run. Both the parties in this case will have until mid-March to decide whether they want to try to appeal the decision to the Supreme Court of Canada.

(VI) Bangladesh :

Art. 32 of the Constitution of Bangladesh, 1972,[97] says that *"No person shall be deprived of life or personal liberty save in accordance with law."* This provision is similar to other constitution provision of life and liberty. Consequently, unless controlled by some other provision, it should be interpreted as in India.

The Constitution of the People's Republic of Bangladesh provides a group of provisions, under part III, which contain the fundamental rights. Unfortunately, the right to privacy is not specifically mentioned in any of those provisions. Does it mean the constitution does not regard the right to privacy so fundamental? Article 42 of Constitution of People's Republic of Bangladesh discusses about the right to property. Article 42(1) says that "Subject to any restrictions imposed by law, every citizen shall have the right to acquire, hold, transfer or otherwise dispose of property, and no property shall be compulsorily acquired, nationalized or requisitioned save by authority of law." This article also mentioned right to privacy indirectly. In **Chen Yue Kiew (F) v. Angkasamas Sdn Bhd**,[98] Court found that a land owner is entitled to an exclusive use of his land and the air space above the land. The court would not hesitate to grant a perpetual injunction against anyone trespassing into the land of another or into the air space above it. Similarly, in the United Kingdom, the court in **Baron Bernstein of Leigh v. Skyviews and General Limited**,[99] faced with the problem of balancing the right of an owner to enjoy the use of his land against the rights of the general public. In this case the plaintiffs land was flown over and an aerial photograph of his house taken without his knowledge and consent. The plaintiff sued the defendant for

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97 3 SCW 385.
98 [2003] 4 MLJ 365.
99 [1978] QB 479.

trespassing and invasion of privacy. The court held that a landowner's rights in the air space above his property are not extended to an unlimited height. The court also held that the act of taking a photograph from the air space above the ordinary use and enjoyment is not unlawful. However, Griffiths J attributed the act as 'monstrous invasion privacy.' In **Chong Chieng Jen v. Mohd Irwan Hafiz Bin Md Radzi and another,**[100] Court gives a judicial note and approval on the right to privacy and the right to property as the very basic rights of a man. The concurrent mention of right to privacy and the right to property side by side arguably indicates the strong relationship of the two as enshrined in the article 13(1) of the Federal Constitution of Malaysia. Article 13 of Federal Constitution of Malaysia discusses about right to property.

Article 43 of the Bangladesh Constitution also guarantees the privacy of home and correspondence and in communications.[101] Article 43 say "Every citizen shall have the right, subject to any reasonable restrictions imposed by law in the interests of the security of the State, public order, public morality or public health-(a)to be secured in his home against entry, search and seizure; and (b) to the privacy of his correspondence and other means of communication." In the case of **Bangladesh v. H.M. Ershad,**[102] it was held that neither police officer, nor any other public functionary can enter into the house of any citizen and conduct any search or seize anything unless he is duly authorized under any law. If the restriction imposed has no nexus with the specified matters or is in excess of the requirement for which it is imposed, or if the object can be achieved by any less rigorous means, or if the law does not provide a way of checking arbitrary or illegal exercise of the power of

[100] [2009]8 MLJ 364.
[101] Islam, M. (2002), Constitutional Law of Bangladesh, Bangladesh: Mullick Brothers, p. 276- 277.
[102] Bangladesh v. H. M Ershad, 52 DLR (AD) 162.

search and seizure, it will be found invalid. Moreover, in 2011, a women went to beauty parlour and found a hidden close-circuit television cameras. A write petition has been filed by the Bangladesh Human Rights Foundation. In this case, The High Court ordered the government to take out all close-circuit television cameras from beauty parlours.[103]

[103] News editor. (2011), Persona CCTV Probe Time Extended, *bdnews24.com*, 10 October.

CHAPTER 4

VARIOUS DIMENSIONS OF RIGHT TO PRIVACY

In this chapter the researcher wants to analyze the concept of right to privacy in relation to right to information conflicts, election matter and medical matters.

(I) Right to Privacy and the Election:

The secret ballot is a voting method in which a voter's choices in an election or a referendum are anonymous, forestalling attempts to influence the voter by intimidation and potential vote buying. The system is one means of achieving the goal of political privacy.

Secret ballots are used for many different voting systems. The most basic form may be blank pieces of paper, upon which each voter writes only his or her choice. Without revealing the votes to anyone, the voter would fold the ballot paper and place it into a sealed box, which is emptied later for counting. An aspect of secret voting is the provision of a voting booth to enable the voter to write on the ballot paper without others being able to see what is being written. Today, one of the most common forms of the secret ballot involves printed ballot papers with the name of the candidates or questions and respective checkboxes. Provisions are made at the polling place for the voters to record their preferences in secret. The ballots are designed to eliminate bias and to prevent anyone from linking voter to ballot. A problem of privacy arises with moves to improve efficiency of voting by the introduction of postal

voting and electronic voting. Some countries permit proxy voting, which some argue is inconsistent with voting privacy.

(II) History of Election Various Countries:

In ancient Greece, secret ballots were used in several situations, like ostracism, and also to remain hidden from people seeking favours. In ancient Rome, the laws regulating elections were collectively known as Tabellariae Leges, the first of which was introduced in 139 before Christ. Today the practice of casting secret ballots is so commonplace that most voters would not consider that any other method might be used. Other methods which had been used and which are still used in some places and contexts include "oral votes", public display of votes and roll calls. Other public voting methods include raising a hand to indicate a vote, or the use of coloured marbles or cards to indicate a voting choice.

(A) France :

Article 31 of the Constitution of the Year III states that "All elections are to be held by secret ballot". The same goes with the constitution of 1848: voters could hand-write the name of their preferred candidate on their ballot at home or receive one in a distribution in the street. The ballot is folded in order to prevent other people from reading its content. Louis-Napoleon Bonaparte attempted to abolish the secret ballot for the 1851 plebiscite with an electoral decree requesting electors to write down "yes" or "no" under the eyes of everyone. But he faced a strong opposition and finally changed his mind, allowing secret ballot to take place. The voting booth was permanently adopted only in 1913.

(B) United Kingdom :

Before the secret ballot was introduced, voter intimidation was commonplace. The demand for a secret ballot was one of the six points of Chartism. The British parliament of the time refused to even consider the Chartist demands but it is notable that Lord Macaulay, in his speech of 1842, while rejecting Chartism's six points as a whole, admitted that the secret ballot was one of the two points he could support. The London School Board election of 1870 was the first large-scale election by secret ballot in Britain.

The secret ballot was eventually extended generally in the Ballot Act 1872, substantially reducing the cost of campaigning, and was first used on 15 August 1872 to re-elect Hugh Childers as Member of Parliament for Pontefract in a ministerial by-election following his appointment as Chancellor of the Duchy of Lancaster. The original ballot box, sealed in wax with a liquorice stamp, is held at Pontefract museum. The use of numbered ballots makes it possible, given access to the relevant documents, to identify who has voted for whom.

(C) Australia and New Zealand :

Chartist ideas influenced the miners of Eureka Stockade in 1854 in Victoria where they adopted all of Chartism's six points including the secret ballot.

Secret balloting appears to have been first implemented in Tasmania on 7 February 1856. Until the original Tasmanian Electoral Act 1856 was 're-discovered' recently, credit for the first implementation of the secret ballot often went to Victoria and South Australia. Victoria enacted legislation for secret ballots on 19 March 1856, and South

Australian Electoral Commissioner William Boothby generally gets credit for creating the system finally enacted into law in South Australia on 2 April of that same year a fortnight later. The other Australian colonies followed: New South Wales 1858, Queensland 1859, and Western Australia 1877. New Zealand implemented secret voting in 1870. State electoral laws, including the secret ballot, applied for the first election of the Australian Parliament in 1901, and the system has continued to be a feature of federal elections and referenda.

(D) United States

New York polling place circa 1900, showing voting booths on the left. In the United States the practice became known as the "Australian ballot", defined as having four parts:

- an official ballot being printed at public expense,
- on which the names of the nominated candidates of all parties and all proposals appear,
- being distributed only at the polling place and
- being marked in secret.

In the United States, most states had moved to secret ballots soon after the presidential election of 1884. Kentucky was the last state to do so in 1891, when it quit using an oral ballot. But seven states did not have government-printed ballots until the 20th century; South Carolina created them in 1950 and Georgia in 1922.

The first city to start using the Australian ballot in the United States was Louisville, Kentucky, and the first state to adopt the Australian ballot was Massachusetts. For this reason it is also known as the "Massachusetts ballot". In the United States, voting by secret ballot was

universal by 1892 but criminal prohibitions against paying people to vote were instituted in 1925.

Elections in the United States are mostly held by secret ballot, although some states use mail ballots instead, which violate requirements 3 and 4 of the "Australian ballot," as it is distributed to the home, and potentially marked in the presence of other people. The states of Oregon and Washington conduct all elections by mailed ballots. The Constitution for the state of West Virginia still allows voters to cast "open ballots".

(E) Indian Democratic Voting System:

It is fact that voting by secret ballot is an essential and fundamental principle of representative democracy, but the social history of the secret ballot has rarely been investigated, until now. Voting by secret ballot is a surprisingly recent phenomenon in the West. While it may indeed offer opportunities for broader political participation, its introduction has sometimes limited the electorate, excluding certain groups, even precipitating violence. This original and thought-provoking volume questions the universality of the supposed link between voting secrecy and individual political freedom. Case studies from around the world and various historical eras combine anthropology, political theory, and social history to good effect. The result is an innovative analysis of the cultural history of the Indian democratic norms and their imposition on other societies.

(i) Constitutional mandate:

It is a central right of an elector to cast his vote without fear of reprisal, duress or coercion as per Article 21 of the Indian Constitution. Protection of elector’s identity and affording secrecy is therefore integral

to free and fair elections and an arbitrary distinction between the voter who casts his vote and the voter who does not cast his vote is violation of Article 14, Article 19(1)(a) and Article 21 of the Indian Constitution. Right to secrecy has been internationally recognized. Article 21(3), of the Universal Declaration of Human Rights and Article 25(b) of the International Covenant on Civil and Political Rights deals with the "Right to secrecy". The manner in which general elections are held, secrecy of the voters is necessary in order to maintain the purity of the electoral system. Every voter has a right to vote in a free and fair manner and not disclose to any person how he has voted in direct elections to Lok Sabha or State Legislatures, maintenance of secrecy is a must and is insisted upon all over the world in democracies where direct elections are involved to ensure that a voter casts his vote without any fear of being victimized if his vote is disclosed.

In **Oil and Natural Gas Commission Karmachari Sanghatana v. Ministry of Petroleum, Mumbai**[1], the Mumbai High Court in Writ Petition No. 1785 of 1997, directed the Chief Labour Commissioner to adopt the method of secret ballot for the purpose of ascertaining the claim of majority membership of the Union. Ultimately, the election, as stated above, was held and recognition was given to the Union, who secured majority of votes in such election. Mr. Mehta for the Oil and Natural Gas Commission has also argued that in various parts of the country, Oil and Natural Gas Commission is following the said practice of giving recognition after the election through the secret ballot and that the system is working very well. As stated above, Mr. Mehta has submitted that the Oil and Natural Gas Commission has no objection if direction is given to hold verification of membership through secret ballot and on that basis,

[1] W.P. No. 1785/1997, dt. 5-5-1998

strength of the Union is found out. Mr. Mehta further submitted that Oil and Natural Gas Commission, being an All India Organisation, has to act fairly and in a just manner throughout the country and it may not follow different policies in different States. Therefore, considering the fact that the Oil and Natural Gas Commission is a Public Authority and it is supposed to act in a fair manner and it is supposed to call for negotiation a particular representative Union, which is having sufficient strength of the workmen, and for that purpose, if any verification of membership through secret ballot is held, naturally, the Union, which is having support of the majority of the workmen can emerge as a recognised Union and the Oil and Natural Gas Commission can call only such Union for negotiation and can extend whatever facilities which are given to such Union, which is having such majority. It is a sorry state of affairs that, in the instant case, since 1978, no verification is carried out by the Oil and Natural Gas Commission In my view, therefore, it would be reasonable and equitable to direct Oil and Natural Gas Commission to carry out verification of membership in order to find out the total number of members, who are part and parcel of a particular Union, Mr. Sinha, appearing for respondent Nos. 3 and 5 and Mrs. Mehta, appearing for respondent No. 4, also submitted that they agree to go for verification of membership, but their objection is about secret ballot system for the purpose of verification of membership. According to them, the check-off system, which is going very well, should be allowed to continue. At one point of time, Mr. Sinha also submitted that the secret ballot system may be a better mode to ascertain the membership, but he submitted that unless the policy in that behalf is finalised, the prevailing system, i.e. check-off system, should be allowed to be continued. However, it is required to be noted that, in fact, civil suits were also filed in Civil Court by the employees on the ground that without their willingness, deduction

of membership fees was effected from their salaries towards membership of respondent No. 3-Association, and Mr. Clerk has relied upon some correspondence in this behalf which is at page 63 in the compilation. Mr. Clerk has also placed on record copy of the order dated 29-9-2000 passed by the Second Extra Assistant Judge, Bharuch, in Civil Appeal No. 127 of 2000, in which it has been held by the appellate Court that Oil and Natural Gas Commission has no right to deduct any amount towards subscription from the members of the Union for want of any agreement in this behalf. Mr. Clerk submitted that the check-off system itself may not be a very scientific mode in order to find out the exact membership as compared to verification of membership through secret ballot system. Apart from the aforesaid fact, Oil and Natural Gas Commission itself has adopted secret ballot system at Mumbai and recognition has been given on the basis of declaration of result through secret ballot, and therefore, there is nothing wrong if Oil and Natural Gas Commission adopts the same procedure in Gujarat. As a matter of fact, Oil and Natural Gas Commission itself has shown willingness that they are ready to go for secret ballot system for verification of membership in Gujarat State. In that view of the matter, it is not open for the other Unions to contest the said position. Even otherwise, if Oil and Natural Gas Commission has decided to follow the secret ballot system for the purpose of finding out membership, it cannot be said that the said system adopted by Oil and Natural Gas Commission is in any way arbitrary and illegal and Oil and Natural Gas Commission must resort to check-off system.

Reference is also required to be made to a letter written by the Chief Manager (Industrial Relation) to the Gr. General Manager (Planning and Analysis), Oil and Natural Gas Commission., Mumbai as well as to the General Manager (Promotion and Advertising), Oil and

Natural Gas Commission, Nazira arid the Chief Manager (Purchase and Assumption), Oil and Natural Gas Commission, Calcutta, which is at page 173 in the compilation. In the said letter, it is mentioned that the relevance of secret ballot was felt to reduce inter and intra-Union rivalries to a great extent. The issue of holding secret ballot, was therefore, discussed in the Junior Chief Manager, held on 26-27 March, 1996 at Hyderabad and in the meeting of the President and General Secretaries of recognised Unions on 13th July, 1996, the Unions agreed to introduce the system of secret ballot for recognition of the Unions. The Management was requested to circulate the Policy and on that basis, the said Policy was circulated. However, according to Mr. Sinha, no consent was given by respondent Nos. 3 and 5, and therefore, this policy is merely a proposed policy. However, till the policy is finalised, in some parts of the country, if Oil and Natural Gas Commission has already undertaken verification of membership through secret ballot system to give recognition to the particular Union, it cannot be said that the Oil and Natural Gas Commission's action is in any way arbitrary or illegal. In the further affidavit-in-reply on behalf of respondent No. 2, at page 143, it is stated in Paragraph 3 that all over the work centres of Oil and Natural Gas Commission, the recognition of Union is given as per the guidelines mentioned in the policy of recognition of Unions. It is also stated in that secret ballot election is conducted by Central Industrial Relations Machinery of the Ministry of Labour, Government of India. Election held in Mumbai by Secret Ballot in 1998 is also given. As stated earlier, Oil and Natural Gas Commission is a Public Body and it is also a 'State' within the meaning of Article 12 of the Constitution and it has to act in a reasonable and fair manner and if this particular method is adopted for the purpose of verification of membership of the Unions, the said action cannot be said to be arbitrary, discriminatory or unreasonable. It cannot

be said that the Oil and Natural Gas Commission cannot take decision of giving recognition to the Union on the basis of verification of the membership of the Unions through secret ballot system. Oil and Natural Gas Commission cannot be compelled to follow only check-off system of membership even if it is found that the same may not be a useful or scientific system, as compared to secret ballot system.

Relying upon the said judgment, it is argued by Mr. Clerk that the checkoff system which once prevailed in the domain, has lost its appeal, and so efforts are on to find out which other system can foot the bill, and the system of secret ballot is gradually accepted.

In **Air India Employees Guild v. Air India Limited and others**,[2] Undertaking from Management and also all the Union(s) that they will accept the result of such secret Ballot as binding and (4) Undertaking from the Management that they will accord recognition on the basis of the verdict of the Secret Ballot and their consent has already been obtained by the Government.

By communication of 14.1.2004, the Ministry of Labour, Government of India informed the Unions listed therein, that the Government had decided to undertake verification of membership of Unions operating in Air India, through Secret ballot. They were required to furnish information in the proforma which was enclosed. Subsequent to that, office of the Regional Labour Commissioner held several meetings for drawing up the procedure for holding verification by secret ballot. By notification dated 24.3.2005 the schedule of holding secret ballot was declared. The General Secretary, Air India Service Engineers Association was informed by the Ministry of Labour that under the Code

[2] 2007 (109) Bom L R 1

of discipline approved by the Government of India, it was not possible to conduct verification of membership of their Association as it is a craft union. It may be mentioned that in the past by notification dated 26.6.1986, the Chief Labour Commissioner at the instance of the Ministry of Labour and upon consent of the Management of Air India and the Unions operating amongst technical and non technical category had organized a secret ballot on 16th and 17th May, 1986 to determine the relative strength of (i) Air India Employees Guild vis a viz Air Corporation Employees Union in regard to non technical categories of employees and certain technical categories and (ii) Air India Employees Guild vis a viz categories excluding those covered by (i) above for the purpose of conferring recognition on the majority Union. The department of Civil Aviation was advised Air India, to confer recognition on the Air India employees Guild which has emerged as the majority union in respect of both categories, for a period of two years under the Code of Discipline. From the record it appears that Air India employees Page 0006 Guild have opposed the holding of secret ballot for verification of a membership as being contrary to the Code of Discipline.

In the first instance, it would be appropriate that we consider Question No. 3, as to whether the judgment in Oil and Natural Gas Commission Karmachari Sanghatana was correctly decided. A Writ Petition came to be filed by Oil and Natural Gas Commission Karmachari Sanghatna, claiming that the issue as to which is the union commanding majority of membership should be decided by secret ballot. This was opposed by the rival unions pointing out that secret ballot is not known to the Code of Discipline, which has prescribed the method of verifying membership and the method of verification alone, should be adopted. A learned Division Bench, noted that the Appendix III of the Code of

Discipline prescribes the procedure to ascertain who has the majority of membership by physical verification of the membership by the authority concerned. The learned Bench however, noted that the Sanghatana had contended that this device is not completely free from defects and is capable of manipulation and there can be extraneous considerations, for the members while invoking their choice and in view of that secret ballot should be one of the methods which is less vulnerable. The attention of the learned Bench was invited to the Judgment in **Automobile Products of India Employees Union v. Association of Engineering Workers, Bombay**.[3] The learned Bench noted that the dictum laid down therein was that the procedure should not be completely derogatory to the scheme of the Act. The learned Bench then posed to itself a question, as to whether the method of secret ballot, if adopted, to ascertain the majority of membership would be derogatory to the Code of Discipline. It observed that the predominant feature of the Code of Discipline is to provide for recognition, on the basis of the criteria of majority. How to ascertain majority is incidental to the main Scheme. Reliance was then placed on the judgement in **Food Corporation of India Staff Union v. Food Corporation of India and Others**.[4] The learned Bench observed that the Supreme Court had occasion to consider this aspect. The observation of the Supreme Court that the method of secret ballot is being gradually accepted was noted and the learned Bench proceeded to hold that the claim of the Petitioners to adopt the device of secret ballot for ascertaining the majority is therefore, justified and accordingly issued direction for ascertaining majority membership of the Union by secret ballot.

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3 AIR 1990 SC 1159
4 AIR 1985 SC 488

It is thus clear that for rejecting the check off system of verification of membership as late as 2002, the 2nd National Commission for Labour has preferred the check off system to the method of secret ballot.

In **Maruti Bandu Patil v. Village Panchayat, Sidhanerli**,[5] the petitioner who is an elected candidate of Sidhanerli Village Panchayat in Taluka Kagal of Kolhapur district! has challenged the election of respondents Nos. 3 and 4 as Sarpanch and Up-sarpanch respectively of the said Village Panchayat, After the election to the Village Panchayat was held, the Presiding Officer for the elections of Sarpanch and Deputy or Up-sarpanch fixed the election for the said posts on 29th of May, 1978, At the time of this election of the Sarpanch and Up-sarpanch the petitioner Maruti Bandu Patil, who was also one of the candidates, filed a written application before the Presiding Officer requesting him that voting for the said election should be by a secret ballot This request was opposed by 7 members of the Village Panchayat and the said members contended that voting should take place by show of hands. The Presiding Officer took a decision that voting should take place by show of hands and for this decision he gave the reason that four members of the said Village Panchayat are illiterate and they would not be in a position to understand and follow the procedure of voting by secret ballot. Thereafter the elections to the posts of Sarpanch and Up-sarpanch were carried out by show of hands and the petitioner lost the election by a margin of one vote. Respondent No. 3 secured 7 votes and the petitioner got 6 votes. Voting for election of Up-sarpanch was also by show of hands. Being aggrieved by this result of elections the petitioner filed a dispute under Section 33 (5) of the Bombay Village Panchayat Act, 1958 before the Collector of Kolhapur. The Collector of Kolhapur came to the conclusion

[5] AIR 1981 Bom 378

that the refusal to allow the voting by secret ballot does not vitiate the election of Sarpanch or Up-sarpanch and therefore the Collector dismissed the said election dispute vide his order dated 22nd July, 1978.

On the other hand it is contended by Shri Jahagirdar, learned counsel appearing for the respondents that the authorities below were right in coming to the conclusion that the discretion has been rightly exercised by the Presiding Officer in not holding the election by a secret ballot as four members of the Village Panchayat were illiterate. He further contended that the provisions of Rule 10 are directory and not mandatory. He also contended that assuming that the said provision is mandatory, it is impossible to comply with the said provision as no procedure has been laid down in the said Rule as to how the election should be held by a secret ballot if a voter-member is illiterate. The learned counsel further contended that assuming that the said provision is mandatory, the election of the respondent cannot be set aside until it is established by adducing cogent evidence that because of the non-compliance of the said Rules the result of the election has been materially affected.

The words "any member present at the meeting so demands" were substituted in the year 1966 for the words "majority of the members present at the meeting so demand". Therefore the provision as to voting by ballot which was dependent upon the demand by the majority of the members present at the meeting was given a go-by and now by amended Rule a duty is cast upon the Presiding Officer to hold election by a ballot if any member present at the meeting so demands. The word used is "shall" which is obviously peremptory in nature. Normally an election is an expression of popular will. Therefore, obviously it will have to be so conducted that the will of the voter is properly expressed. The purpose of

voting by ballot is to keep voting secret so that it may not be known from the ballot paper itself as to who has voted for whom. This assurance against the disclosure of identity of the voter enables him to exercise his franchise in a free and fearless manner. This eliminates the chances of any evil consequences, at the instance of rival candidate for whom the voter may not have voted. To keep the election process free and fair the mode of poll by secret ballot has been introduced in all civilised societies and nations. Secrecy of vote is the fundamental principle of election in all democratic forms of local Governments. This also helps to maintain purity of elections. This is the object behind the provision as made in Sub-rule (2) of Rule 10. Apprehending that the election may not be free and fair if it is held by show of hands any member present at the meeting can make a demand that voting should be by ballot. If such a demand is made then an obligation is cast upon the Presiding Officer to hold the election by ballot alone and not by show of hands. It is no doubt true that only because the word "shall' is used, it cannot be held that a particular provision is ipso facto mandatory. Construction of the said expression depends on the pror visions of a particular Act or the Rules as well as the setting in which the said expression appears, the object for which the said provision is made and the consequences that would follow from the infringement of the direction and such other considerations. The question as to whether the provision is mandatory or directory depends upon the intention of the legislature. For determining the question whether the said expression is mandatory or directory the subject matter, the importance of the provision, the relation of that provision to the general object intended to be secured by the Act are all relevant.[6]

[6] Govindlal v. Agricultural Produce Market Committee AIR 1916 SC 263.

However, it is contended by Shri Jahagirdar, learned counsel appearing for the respondents that the said provision is impossible of compliance as no procedure has been laid down in the Rules, in case an election is to be held by a secret ballot. He further contended that it is nowhere laid down in the Rules as to what procedure the Presiding Officer should follow if voters are illiterate when an election is to be held by a secret ballot. Therefore, according to the learned counsel, if the provision made in the Rules in that behalf is wholly unenforceable in the absence of procedure to be followed then the Presiding Officer was right in rejecting the said demand when he found that four of the voters were illiterate. It is not possible for us to accept this contention for the obvious reasons. It is not correct to say that the said provision is impossible of observance, It is well established principle of interpretation of statutes that if a statute is passed for the purpose of enabling something to be done, but omits to mention some details which are necessary for the proper and effectual performance of the said work or duty, then the Courts are at liberty to infer that the statute by implication confers all necessary powers without which the said duty cannot be performed. This is what is popularly known as doctrine of implied power. Where an Act confers a jurisdiction, it impliedly also grants the power of doing all such acts, or employing such means as are essentially necessary for its execution. If the Presiding Officer is obliged to hold election by following the process of voting by ballot, then by necessary implication, he has ample powers to achieve the said object by following the necessary procedure. What should be that procedure must depend upon the facts and circumstances of each case. Guidelines in this behalf are not lacking in the enactment or the Rules. General elections to elect members to the village Panchayat are held by following the procedure of secret ballot. Detailed procedure in that behalf is laid own by the Act and the

Rules. The Rules called Bombay Nyaya Panchayat (Conduct of Election) Rules, 1959 also rovide for the procedure the Presiding Officer is expected to follow for holding the election by ballot. Therefore, it is not possible for us to come to the conclusion that the observance of the said Rule was wholly impossible in this case only because four voters were illiterate. It is common knowledge that in general elections even an illiterate voter is in a position to exercise his right of franchise.

In **Jaenenendrakumar P. Daftari v. Rajendra R. Mishra,**[7] The appellant and Respondent 1 were among the fifteen elected members of Seloo Gram Panchayat in the District of Wardha. They were the only contesting candidates in the election to be held for Sarpanch of that Panchayat on August 10, 1990 in the special meeting of the members convened for the purpose under the Bombay Village Panchayats (Sarpanch and Upa-Sarpanch) Election Rules, 1964 for short 'the Rules'. That special meeting was presided over by Respondent 2, Naib Tahsildar, who made the members cast their votes in favour of either of the contesting candidates, by secret ballot. Respondent 2 declared the appellant as successful candidate for the Officeof Sarpanch, as he had secured eight votes while Respondent 1, the other contesting candidate had secured one vote less, that is, seven votes. Respondent 1, the defeated candidate, however, challenged the election of the appellant as Sarpanch of Seloo, by raising an election dispute under Section 33(5) of the Act, before Respondent 3, the Collector, Wardha. Two grounds of challenge raised by Respondent 1 in that election dispute were (i) that the holding of Sarpanch's election by the Presiding Officer, Respondent 2, by resorting to secret ballot when none of the members had made a demand in that regard, was contrary to the requirement of Rule 10 of the

[7] AIR 1994 SC 586

Rules, and (ii) that one of the members, who was illiterate had since cast her vote by ballot which did not contain symbols allotted to the contesting candidates, it had materially affected the result of the election in that there was only one vote which had made the difference. The petitioner, who filed his written objection statement to the election petition beforethe Collector, did not specifically deny thereunder the allegation in the petition that there was no demand made by any member of the Panchayat to the Presiding Officer to hold the election by secret ballot. On the other hand, in the written objection statement, the denial related to the non-following of the procedure in Rule 10 by the Presiding Officer, Respondent 2, who held the special meeting. Respondent 2, although served with notice of election petition, did not appear before Respondent 3 and make any statement to the contrary. However, as to the ground of one illiterate member having cast her vote, although it was said in the written statement (reply) that there was no reason for the Presiding Officer, Respondent 2, to know about her illiteracy, it was admitted that the members were asked to put a tick-mark against the candidate's name in the ballot according to that voter's choice. The Collector allowed the Election Reference concerned and set aside the election of the appellant upholding ground No. (i) of election being conducted by secret ballot without any member making a demand for election being conducted by secret ballot. The appellant questionedthe order made on the Election Reference made by the Collector by filing an appeal therefrom before the Commissioner under Section 33(5) of the Act. In dismissing that appeal, the Commissioner not only upheld the order of the Collector made on the ground of the election having been held by secret ballot without a demand therefore from any member, but also on the ground that the election by secret ballot could not be held by showing the names of

the candidates without allotting them any symbol when there was illiterate voter.

Is an express demand by a member present in the meeting convened for holding election of the Sarpanch or Upa-Sarpanch under Rule 10, necessary for making the Presiding Officer to hold the election by secret ballot? If a demand is made to the Presiding Officer to hold the election of the Sarpanch or Upa-Sarpanch by means of secret ballot, is the Presiding Officer required to allot symbols to the contesting candidates and get the ballot papers to be used in such election printed with such symbols?

While sub-rule (2) of Rule 10, requires the Presiding Officer to proceed to elect the Sarpanch or Upa-Sarpanch, as the case may be, by show of hands unless there is a demand for permitting the members to vote by secret ballot, Rule 13 requires that the Presiding Officer shall record the names of members voting for or against a candidate or being neutral in the minutes of the meeting and on the conclusion of the meeting to read out the same to the members before signing the same resulting in their deemed confirmation and becoming available for inspection by any member of the Panchayat. Hence, it becomes obvious that voting by show of hands is a general method contemplated in the said rules while the voting by secret ballot is contemplated as an exception in a special situation. Thus, Rule 13 supports our view that the Presiding Officer of the meeting cannot call upon the members present in such meeting to vote by secret ballot in favour of one or the other candidates contesting the election for the Office of Sarpanch or Upa-Sarpanch unless a demand in that behalf is made by any member so present.

In the reference petition containing election dispute, there was a specific allegation made by Respondent 1 to the effect that there was no demand made to the Presiding Officer by any member of the Panchayat present in the meeting for holding the election by having recourse to secret ballot.The appellant did not deny this allegation specifically. In a situation as the one on hand, when the minutes of the meeting did not record that there was any demand made for voting by ballot, it cannot be said that the election disputes resolving authority, namely, the Collector was unjustified in drawing an inference that there was no such demand and that the Presiding Officer resorted to the method of conducting the election by secret ballot despite the absence of such demand. In the instant case, when the recorded minutes of the meeting did not show that there was any such demand, it cannot be inferred that there was such a demand merely because the election conducted by the Presiding Officer by resorting to secret ballot was done in course of discharge of his official duty under the Rules. Such a finding when is affirmed by the appellate authority, the High Court has very rightly, in our view, refused to interfere with such finding of fact, particularly, when the proceeding instituted before it was a writ proceeding where its extraordinary jurisdiction was invoked.

(III) Right to Privacy and Right to Information Act, 2005 :

A private individual's right to privacy is undoubtedly of the same order as that of a public servant. Therefore, it would be wrong to assume that the substantive rights of the two differ. Yet, inherent in the situation of the latter is the premise that he acts for the public good, in the discharge of his duties, and is accountable for them. The character of protection, therefore, which is afforded to the two classes - public servants and private individuals, has to be viewed from this perspective.

The nature of restriction on the right to privacy is therefore of a different order; in the case of private individuals, the degree of protection afforded is greater; in the case of public servants, the degree of protection can be lower, depending on what is at stake. Therefore, if an important value in public disclosure of personal information is demonstrated, in the particular facts of a case, the protection afforded by section 8(1)(j) may not be available; in such case, the information officer can proceed to the next step of issuing notice to the concerned public official, as a "third party" and consider his views on why there should be no disclosure. The onus of showing that disclosure should be made is upon the individual asserting it; he cannot merely say that as the information relates to a public official, there is a public interest element. Adopting such a simplistic argument would defeat the object of section 8(1)(j); the legislative intention in carving out an exception from the normal rule requiring no "locus" by virtue of section 6, in the case of exemptions, is explicit through the non-obstante clause. The court is also unpersuaded by the reasoning of the Bombay High Court, which appear to have given undue even over-whelming deference to Parliamentary Privilege (termed "plenary" by that court) in seeking information by virtue of the proviso to section 8(1)(j). Were that the true position the enactment of section 8(1)(j) itself is rendered meaningless, and the basic safeguard bereft of content. The proviso has to be only as confined to what it enacts to the class of information that Parliament can ordinarily seek; if it were held that all information relating to all public servants, even private information, can be accessed by Parliament, section 8(1)(j) would be devoid of any substance because the provision makes no distinction between public and private information. Moreover there is no law which enables Parliament to demand all such information; it has to be necessarily in the context of some matter, or investigation. If the

reasoning of the Bombay High Court were to be accepted, there would be nothing left of the right to privacy elevated to the status of a fundamental right by several judgments of the Supreme Court.[8]

In September 2013, India's President Pranab Mukherjee spoke about the inviolable right to privacy that citizens of India must enjoy, at the annual event of the Central Information Commission, a body constituted by India's Right to Information Act, 2005.

Both the Act and the Central Information Commission have empowered ordinary citizens to submit applications requesting information from government bodies, injecting a new phase of transparency in an infamously opaque bureaucracy. In fact, the Right to Information Act has been born of, and has encouraged, large Right to Information 'movements', that have exposed layers of corruption in numerous schemes across various government departments.

For citizens, the fact that a government official has to release information regarding budgets, forms, decisions and other facets of public governance has led to the belief that unchecked corruption might finally simmer down, and that they are not longer helpless against the system.

However, as the Right to Information movement has matured over the last decade, serious questions of privacy protection have also started making their way into public discourse. The Act itself excludes a number of security and police agencies from having to divulge any information, and private companies and Non Governmental Organizations do not fall under the Act.

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[8] Surupsingh Harya Naik v. State of Maharashtra, AIR 2007 Bom 121.

However, political parties that do fall under the act are furiously trying to legislate their way out from under the scanner. In fact, this move, supported by the ruling government that helped bring in the Right to Information has attracted a lot of criticism and well earned scepticism from the public. In a report on the matter, one of India's biggest English news channels, New Delhi Television Limited, wrote, "The government decided to amend the law after political parties opposed the Central Information Commission's order in June that six political parties including the Congress and the Bharatiya Janta Parti will be under the Right to Information as they were substantially funded by public money. This would mean political parties would have to disclose campaign funding or how members voted during a secret ballot." Indicative of the mistrust between government and the public, the report was called 'Divided on everything else, political parties unite against Right to Information Act.'

Therefore, when the conversation turns to a conflict between the right to information and privacy, in India, it can often become muddled. It can seem that wrongdoers might attempt to hide behind the excuse of 'privacy'. However, there is no escaping that protecting individual privacy is a genuine concern.

Many countries across the world that have enacted national Right to Information Acts also have privacy laws that carefully spell out the limits to which information about individuals can be disclosed. In general, information about personal life, sometimes including medical information, is exempt from the Right to Information. Should names be revealed from all official documents, are all court proceedings public? And finally, do some people necessarily lose some privacy because of a 'public interest' test?

The World Bank Institute released a paper that describes Right to Information and privacy as "two sides of the same coin, essential human rights in modern information society." It also goes on to add that, "privacy laws can be used to obtain information in the absence of Right to Information laws and Right to Information can be used to enhance privacy by revealing abuses," and that both have been designed for accountability.

India does not have a privacy law in place right now, although what should be in the law has attracted considerable debate. Therefore, the contours of privacy in the Right to Information gambit have resulted from various decisions and court orders given over the years. For example, in 2011, the then chief information commissioner of the Central Information Commission informed India's Reserve Bank of India that it had to reveal information, even if it meant public confidence in the institution might be adversely affected. And, as recently as early September 2012, the Mumbai High Court ruled that "disclosure of personal information in respect of service record, income tax returns and assets of an individual is illegal unless it is necessary in larger public interest." This judgement protected the individual against any disclosure that had nothing to do with public interest, but instead caused unwarranted invasion of privacy.

There have also been reports that some Right to Information applications are filed only to be a nuisance, with cases of Right to Information being used to blackmail public officials, with the threat of burying them under paperwork. In April 2013, one applicant was fined for filing over 100 applications.

Moving ahead, President Mukherjee's speech indicated that public authorities should be proactive and voluntarily put information in the public domain for the use of citizens, effectively inculcating a culture of transparency from the beginning.

However, until that happens, one can assume that the citizen will most certainly have to rely on the Right to Information for full disclosure about its government's activity, and the government will have to be wary of those using Right to Information applications for ulterior purposes. Most importantly, the individual right to privacy should not be lost in this paper war, between the two sides of the same coin.

The preamble of the Right to Information Act sets out that the citizens shall have the right to secure access to the information under the control of the public authorities, to promote transparency of information which are vital in the functioning of the public authorities, to contain corruption, to hold Governments and their instrumentalities accountable to the governed and thereby develop the participatory governance. However, few provisions have been incorporated in the Act exempting disclosure of certain categories of information with the mandate that whatever may be the provisions in the Official Secrets Act, 1923 or even the exemptions permissible under the Act, the public authorities may allow disclosure of such information if they are satisfied that the larger public interest justifies the disclosure of such information and such disclosure over weights the harm to the protected interests and further that the information which cannot be denied to the Parliament or a State Legislature shall not be denied to any person.

Many public authorities tend to deny disclosure of information taking the shelter of the exemption provisions provided under the Act. In

most of the cases, such denials were due to wrong interpretation of the exemptions permissible under the Act. The exemptions allowed under sections 8(1)(d), 8(1)(e), 8(1)(g), 8(1)(j) and Section 11 which deals with the third party information are also found to be mis-utilized with malafide intention to deny disclosure of information. Many public authorities are in the habit to deny disclosure of information if these are related to third party information without proper application of mind. Section 11(1) of the Act provides that if a State Public Information officer intends to disclose any information or record or part thereof on a request made under the Act, which relates to or has been supplied by a third party and has been treated as confidential by that third party, the State Public Information officer, shall, within five days from the receipt of the request, give a written notice to such third party of the request and of the fact that the State Public Information officer intends to disclose the information or record or part thereof, and invite the third party to make a submission in writing or orally, regarding whether the information should be disclosed, and such submission of the third party shall be kept in view while taking a decision about disclosure of information provided that except in the case of trade or commercial secrets protected by law, disclosure may be allowed if the public interest in disclosure out weights in importance any possible harm or injury to the interests of such third party. This means that a public authority should not straightway reject a written request for information simply on the ground that it relates to a third party. If the public authority is satisfied that the information sought for should be disclosed, he may obtain the submission of the third party and should take a decision keeping such submission in view.

In a Division Bench judgment reported in **Surup Singh Hrya Naik v. State of Maharashtra,**[9] the Bombay High Court has expressed the procedural safeguards being required to be met before divulging third party information and on the effect of the proviso appearing in Section 8(1) of the Right to Information Act, 2005. The question that is required to be necessary is the right of an individual, to keep certain matters confidential on the one hand and the right of the public to be informed on the other, considering the provisions of the Right to Information Act, 2005. For example, does a person convicted for contempt of court during the period of his incarceration can claim privilege. For example, does a person convicted for contempt of court, during the period of his incarceration can claim privilege or confidentiality in respect of his medical records maintained by a public authority. The contention in this regard is that the larger public interest requires that these information to be disclosed, as persons in high office or high position or the life, in order to avoid serving their remand in jail / prison or orders of detention or remand to police custody or judicial remand with the connivance of officials get themselves admitted into hospitals. The public, therefore, has a right to know as to whether such a person was genuinely admitted or was attempted to avoid punishment / custody and thus defeat judicial orders. The public right in such case must prevail over the private interest of such third person as the objectives of the Right to Information Act is to make the public authorities accountable and their actions open. The contention that the information could be misused is of no consequence, as the Parliament wherever it has chosen to deny such information has so specifically provided. The question then is what is the true import of the proviso, which sets out that the information, which cannot be denied to Parliament or a State Legislature shall not be denied to any person. Are

[9] AIR 2007 Bom 121

the medical records maintained of a patient in a public hospital covered by the provisions of the Act. Can this information be withheld to either in Parliament or the State Legislature on the ground that such information is confidential. Generally, such information normally cannot be denied to Parliament or the State Legislature unless the person who opposes the release of information makes out a case that such information is not available to Parliament or State legislature under the Act. By its very Constitution and the plenary powers which the Legislature enjoys, such information can not be denied to the Parliament or State Legislature by any public authority and, therefore, the public authorities shall be under obligation to make all such information readily available for their disclosure to a citizen on demand under the Act.

A written request made by a candidate seeking inspection and certified copies of her evaluated answer scripts of the Joint Entrance Examination including inspection of the tabulation sheets containing marks obtained by the candidates placed above her in the merit list was denied by the concerned public authority on the plea that such disclosure is exempted under section 8(1)(j) of the Act, which provides that the personal information the disclosure of which has no relationship of any public activity or interest, or which would cause unwarranted invasion of the privacy of the individual shall not be disclosed unless the State Public Information officer is satisfied that the larger public interest justifies the disclosure of such information. This exemption clause has protected the unwarranted invasion of privacy of an individual by disclosure of personal information. Therefore, the request of a candidate who has asked for inspection of her own evaluated answer scripts and the tabulation sheets cannot be treated as personal information of any other person, which could cause unwarranted invasion of privacy of that person, and,

therefore, should not have been denied by the concerned public authority taking the shelter of Section 8(1)(j) of the Act. The Tripura Information Commission, therefore, held that such information should be disclosed in order to serve the larger public interest and, therefore, directed the concerned public authority for disclosure. In a recent judgment passed by the Calcutta High Court in the case of **Pritam Rooj v. University of Calcutta and Others,**[10] has observed that the right to information is the most basic empowerment of the individual - the right of an individual to the source of any knowledge required for him to educate himself in any area he may choose and that if inspection of answer scripts is denied to the examinee, the spirit of the Constitutional right to expression and information may be lost and, therefore, directed that the Calcutta University should proceed immediately to offer inspection of the answer scripts that the petitioner sought for.

Similarly, a written request of an Indian Administrative Service officer seeking inspection of his Annual Credit Reports was also denied by the concerned public authority with the observation that such disclosure was not covered under the provisions of the Right to Information Act. Although, the decision of the public authority did not disclose the specific provisions of the Act, but in course if hearing, the State Public Information officer submitted that the information could not be disclosed since exempted under section 8(1)(j) of the Act. However, explanations offered by the State Public Information officer were not found inconsonance with the provisions of the Act and the Tripura Right to Information Rules, 2008.

As regards inspection of Annual Credit Reports dossiers, the matter is regulated by the All India Services (Confidential Rolls) Rules, 1970

[10] (WP No. 22176 of 2007) reported in AIR 2008 Calcutta 118

which provides that where the confidential report of a member of the service contains an adverse remark, it shall be communicated to him in writing together with a substance of the entire confidential report by the Government or such other authority as may be specified by the Government ordinarily within two months of the receipt of the confidential report and a certificate to this effect shall be recorded in the confidential report. The Department of Personnel and Training, Government of India vide communication no. 34/7/70-AIS(11) dated 09.07.1971 has clarified that it would meet the requirements of the All India Services (Confidential Rolls) Rules, 1970 if the gist of the good points and the entire adverse remarks are communicated to the officer reported upon.

The service records of a public servant are maintained for his services rendered for the public administration in public interest and, therefore, cannot be termed to be in personal interest. The Supreme Court in a judgment passed in the case of **Babu Ram Verma v. State of Uttar Pradesh,**[11] has interpreted that the expression "public interest" in common parlance means an act beneficial to the general public and an action taken for public purpose. Though the word 'personal' has not been defined in the Act, but according to the Concise Oxford Dictionary (10th edition), the word 'personal' means affecting or belonging to a particular person, involving the presence or action of a particular individual or concerning a person's private rather than professional life. Writing and maintenance of Annual Credit Reports is a part of normal functioning of the Government. These records are created by the Government to be used for promotion, gradation, deputation, premature retirement etc. of Government servants, which are done always in public interest only.

[11] (1971) 2 Serv. L.R.659

Therefore, the records of service including the Annual Credit Reports, must be regarded as falling within the scope of the expression of public interest. So, the contention that the inspection of the Annual Credit Reports dossiers could not be allowed for the sake of the larger public interest could not be accepted. On the contrary, it was held that the records pertaining to maintenance of Annual Credit Reports are not personal in nature and, therefore, an employee has the right to inspect his Annual Credit Reports dossiers.

Therefore, in a second appeal preferred before the Tripura Information Commission, the concerned public authority was directed to allow the appellant for inspection of his Annual Credit Reports dossiers as was sought for by him.

The Hon'ble Supreme Court of India vide its judgment passed in Civil Appeal no. 7631 of 2002 between Dev Dutt and the Union of India & Others opined that non-communication of the entries in the Annual Confidential Report of a public servant, whether he is in civil, judicial, police or any other service (other than military), certainly has civil consequence because it may affect his chances for promotion or get other benefits. The Apex Court by developing the principle of natural justice held that fairness and transparency in public administration requires that all entries (whether poor, fair, average, good or very good) in the Annual Confidential Report of a public servant, whether in civil, judicial, police or and other state service (except military), must be communicated to him within a reasonable period so that he can make a representation for its up-gradation. The Apex Court further held that when the entries in the Annual Confidential Report are communicated to the public servant, he should have a right to make a representation against the entry to the concerned authority and the concerned authority must decide the

representation in a fair manner and within a reasonable period. It was also held that the representation must be decided by an authority higher than the one who gave the entry, otherwise the likelihood is that the representation will be summarily rejected without adequate consideration as it would be an appeal from Caesar and Caesar. Therefore, such non-communication of Annual Credit Reports would be arbitrary and as such violative of Article 14 of the Constitution.

To know the antecedents of a candidate is the fundamental right of a voter under Article 19(1)(a) of the Constitution of India. The reason to have the right to information with regard to the antecedents of the candidate is that the voter can judge and decide in whose favour he should cast his vote. It is voter's discretion whether to vote in favour of illiterate or literate candidate. It is his choice whether to elect a candidate against whom criminal cases for serious or non-serious charges were filed but is acquitted or discharged. He is to consider whether his candidate may or may not have sufficient assets so that he may not be tempted to indulge in unjustified means for accumulating wealth. Disclosure of these information by the candidate would help a voter to exercise his right in favour of a clean and less polluted person who also satisfies his criterion of being elected as Member of Parliament or Member of Legislative Assembly and thus to govern the country.

Normally, the medical report of a person suffering from acquired immune deficiency syndrome is not supposed to be disclosed. But, the Supreme Court has held that if a prospective spouse has an apprehension that the other prospective spouse is suffering from acquired immune deficiency syndrome, the former has a right to seek information about the latter's disease from the hospital whether blood reports of the latter are available. This right is part of the right to life and, therefore, guaranteed

under Article 21 of the Constitution. Since "right to life" includes right to lead a healthy life as to enjoy all the faculties of the human body in their prime condition, the disclosure that the prospective spouse is a Human Immunodeficiency Virus Positive can not be said to have in any way either violated the rule of confidentiality or the right to privacy. Moreover, where there is a clash of two fundamental rights, namely the right to privacy which is part of the right to life and the right to live a healthy life which is a fundamental right guaranteed under Article 21 of the Constitution of India, the right which would advance the public morality or public interest would alone be enforced for the reason that moral considerations can not be kept at bay and the persons deciding the issues shall have to be sensitive in disclosure of such issues.

Since no rights are absolute including the right to privacy, I would conclude with the observations that the public authorities should deal with the written requests for information under the Act with an applicant friendly attitude and when there would be a conflict between the privacy of an individual and the right to information of citizens, the latter should get proper importance as it serves larger public interest and, therefore, disclosure be made accordingly.

(A)The Freedom of Information Principle :

The freedom of information principle holds that, generally speaking, every citizen should have the right to obtain access to government records. The underlying rationale most frequently offered in support of the principle are, first, that the right of access will heighten the accountability of government and its agencies to the electorate; second, that it will enable interested citizens to contribute more effectively to debate on important questions of public policy; and third, that it will

conduce to fairness in administrative decision-making processes affecting individuals. The protection of privacy principle, on the other hand, holds in part at least that individuals should, generally speaking, have some control over the use made by others, especially government agencies, of information concerning them. Thus, one of the cardinal principles of privacy protection is that personal information acquired for one purpose should not be used for another purpose without the consent of the individual to whom the information pertains. The philosophy underlying the privacy protection concern links personal autonomy to the control of data concerning oneself and suggests that the modern acceleration of personal data collection, especially by government agencies, carries with it a potential threat to a valued and fundamental aspect of our traditional freedoms.

(B) The Right to Information Colliding with the Right to Privacy:

The right to information often collides with the right to privacy. The government stores a lot of information about individuals in its dossiers supplied by individuals in applications made for obtaining various licences, permissions including passports, or through disclosures such as income tax returns or for census data.

When an applicant seeks access to government records containing personal information concerning identifiable individuals, it is obvious that these two rights are capable of generating conflict. In some cases this will involve disclosure of information pertaining to public officials. In others, it will involve disclosure of information concerning ordinary citizens. In each instance, the subject of the information can plausibly raise a privacy protection concern. As one American writer said one man's freedom of information is another man's invasion of privacy.

(C) Protection of Personal Information under Right to Information Act, Section 8(1)(j) :

The right to information, being integral part of the right to freedom of speech, is subject to restrictions that can be imposed upon that right under Article 19(2). The revelation of information in actual practice is likely to conflict withotherpublic interests including efficient operations of the Government, optimum use of limited fiscal resources and the preservation of confidentiality of sensitive information and, therefore, with a view to harmonize these conflicting interests while preserving the paramountcy of the democratic ideal, Section 8has been enacted for providing certain exemptions from disclosure of information. Section 8contains a well-defined list of ten kinds of matters that cannot be made public.

A perusal of the aforesaid provisions of Section 8reveals that there are certain information contained in Sub-clause (a), (b), (c), (f), (g) and (h), for which there is no obligation for giving such an information to any citizen; whereas information protected under Sub-clause (d), (e) and (j) are protected information, but on the discretion and satisfaction of the competent authority that it would be in larger public interest to disclose such information, such information can be disclosed. These information, thus, have limited protection, the disclosure of which is dependent upon the satisfaction of the competent authority that it would be in larger public interest as against the protected interest to disclose such information.

(D) Conflict in Right to Information and Privacy:

There is an inherent tension between the objective of right to information and the objective of protecting personal privacy. These objectives will often conflict when an applicant seeks access for personal

information about a third party. The conflict poses two related challenges for lawmakers; first, to determine where the balance should be struck between these aims; and, secondly, to determine the mechanisms for dealing with requests for such information.

The conflict between the right to personal privacy and the public interest in the disclosure of personal information was recognized by the legislature by exempting purely personal information under Section 8(1)(j) of the Act. Section 8(1)(j) says that disclosure may be refused if the request pertains to "personal information the disclosure of which has no relationship to any public activity or interest, or which would cause unwarranted invasion of the privacy of the individual." Thus, personal information including tax returns, medical records etc. cannot be disclosed in view of Section 8(1)(j) of the Act.

If, however, the applicant can show sufficient public interest in disclosure, the bar (preventing disclosure) is lifted and after duly notifying the third party (i.e. the individual concerned with the information or whose records are sought) and after considering his views, the authority can disclose it. The nature of restriction on the right of privacy, however, is of a different order. In the case of private individuals, the degree of protection afforded to be greater, whereas in the case of public servants, the degree of protection can be lower, depending on what is at stake. This is so because; a public servant is expected to act for the public good in the discharge of his duties and is thus accountable for them.

(III) Privacy in Medical Matters:

Medical privacy or health privacy is the practice of keeping information about a patient confidential. This involves both

conversational discretion on the part of health care providers, and the security of medical records. The terms can also refer to the physical privacy of patients from other patients and providers while in a medical facility. Modern concerns include the degree of disclosure to insurance companies, employers, and other third parties. The advent of electronic medical records has raised new concerns about privacy, balanced with efforts to reduce duplication of services and medical errors. In the course of having or being part of a medical practice, doctors may learn information they wish to share with the medical or research community. If this information is shared or published, the privacy of the patients must be respected. Likewise, participants in medical research that are outside the realm of direct patient care have a right to privacy as well. Many times the privacy of women was violated in criminal matters. In the matter of section 376, Indian penal code women are insulted on the issue of privacy. According to a sociological touched Bollywood movie "*Insaff Ka Tarazoo*" an opinion of society is that a large number of rape cases remain unreported because of social stigma attached to the victim of rape. The grievances of victims of rape are many and they take a number of forms. When a victim of rape enters into the gateway of the criminal justice system, firstly she has to approach the police station and faces with interrogation which leads to medical examination in an environment where she feels uneasy because the incident of rape is again brought on the surface of the mind of the victim which is followed by harassment, delay, adjournment in repeated court appearances, insult at the hands of the defence lawyer, loss of earnings, waste of time, when ultimately she painfully realizes that the system does not live upto its ideas and does not serve her at all. The accused raped the victim only one time but the investigation of police, medical examination, the cross question in the judicial trial and the societical trial raped regularly time to time. The victim girl is insulted during the trial and put to embarrassment in order

to elicit information that sexual intercourse was done with her consent. The trauma of rape is followed by the trauma of narrating facts to the police during interrogation mostly in the police station, which is followed by the trauma of undergoing an intimate medical examination, culminating in the trauma of the courtroom when the victim faces cross-examination mostly in open court of late crimes against women in general and rape in particular are on the increase. Rape is not merely a physical assault. It is often destructive of the whole personality of the victim. A murderer destroys the physical body of the victim; a rapist degrades the very soul of the helpless female. The Courts, therefore, shoulder a greater responsibility while trying an accused on charges of rape.[12]

It is really serious issue so the medical examination of a rape/sexual assault victim must necessarily take place under the supervision of a senior female obstetrician/gynaecologist. In the event an obstetrician/gynaecologist is not available, it shall be a senior female doctor who will examine a rape victim. We also recommend that in order to ensure that there is a consensus of opinion on the medical examination, a board of three doctors must examine a rape/sexual assault victim. We believe it is important that the deliberations of the said board of doctors be recorded as an audio recording, which must be later made available to a court to satisfy itself that there has been a fair consensus building in relation to the opinion formation as far as the victim is concerned.

The medical examination of a victim of sexual assault/rape ought to be conducted in the following minimum conditions:

a) The equipment used in the examination must be adequate for the purpose and must, to the extent possible, confirm to international standards;

[12] State of Punjab v. Gurmit Singh (1996)2SCC 384.

b) The examination room must be well ventilated and well lit with fixed lighting;

c) It is better, unless the victim is an adult woman of mature years, to examine orally first the mother or older relative by whom the victim is accompanied. The circumstances in which the offence is alleged to have been committed shall be ascertained from such relative;

d) In any event, a trained same-sex support person or trained health worker should be present during the course of the examination;

e) The examining doctor, with the help of the victim's relatives / health worker, must explain to the victim each step of the examination and why each such step is important to the examination;

f) The victim must be assured that she is in control of the pace, timing and components of the examination and that she will not be forced to undergo any particular step(s) of the examination if she is uncomfortable with the same;

g) In the event the victim does not consent to the whole or part of the medical examination, the medical examiner should refrain from making any adverse remarks in this regard;

h) The victim must be reassured that the examination findings will be kept confidential outside of the knowledge of the Investigation Officer and the court; and

i) The victim must be shown a copy of the report and the contents of the same must be explained to her.

(A) Role of Police:

(a) Every Police Station shall have available round the clock a lady police official/ officer not below the rank of Head Constable.

(b) As soon as a complaint of the offence is received, the duty officer receiving the complaint/ information shall call the lady police official/ officer present at the police station and make the victim and her family comfortable.

(c) The duty officer, immediately, upon receipt of the complaint/ information intimate to the "Rape Crises Cell" on its notified helpline number.

(d) After making preliminary inquiry/ investigation, the Investigating Officer along with the lady police official/ officer available, escort the victim for medical examination.

(e) The Assistant Commission of Police shall personally supervise all investigation into the office.

(f) The statement of victim shall be recorded in private, however, the presence of family members while recording statement may be permitted with a view to make the victim comfortable. In incest cases where there is a suspicion of complicity of the family members in the crime such family members should not be permitted.

(g) The Investigating Officer shall bring the cases relating to "child in need of case and protection" and the child victim involving in incest cases to the Child Welfare Committee.

(h) The accused should not be brought in the presence of victim except for identification.

(i) Except the offences which are reported during the night no victim of sexual offence shall be called or made to stay in the police station of National Capital Territory of Delhi shall ensure that Superintendents of the Foster Home for Women will provide necessary shelter till formal orders are secured from the concerned authorities.

(j) The Investigating Officer shall endeavour to complete the investigation at the earliest and he shall ensure that in no case the accused gets the undue advantage of bail by default as per the provisions of Section 167 of the Criminal Procedure Code, 1973. It is desirable that incases of incest the report under Section 173 of the Criminal Procedure Code, 1973 is filed within 30 days.

(k) Periodically Training to deal with rape cases should be provided to the Police Officers, Juvenile Police Officers, Welfare Officers, Probationary Officers and Support Persons. A Training Module be prepared in consultation with the Delhi Judicial Academy;

(l) The Police should provide information to the Rape Crisis Cell regarding the case including the arrest and bail application of the accused, the date of filing of the investigation report before the Magistrate;

(m) The Police should keep the permanent address of the victim in their file in addition to the present address. They should advise the victim to inform them about the change of address in future;

(n) Subject to the outcome of the titled **Rajeev Mohan v. State,**[13] pending before this Hon'ble Court in cases where the victim informs the police about any threats received by the accused family, the concerned Deputy Commissioner of Police should consider the matter and fresh First Information Report must be registered under Section 506 of the Indian Penal Code;

(B) Role of Doctor and Hospitals :

(a) Special rooms to be set up in all Government hospitals for victims to be examined and question in privacy;

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[13] W.P. (C) 2596/2007

(b) A sexual assault evidence collection kit or sexual assault forensic evidence kit consisting of a set of items used by medical personnel for gathering and preserving physical evidence following a sexual assault should be available with all the Government Hospitals. A sexual assault evidence collection kit should contain commonly available examination tools such as;

- Detailed instructions for the examiner.
- Forms for documentation.
- Tube for blood sample.
- Urine Sample container
- Paper bags for clothing collection
- Large sheet of paper for patient to undress over.
- Cotton swabs for biological evidence collection
- Sterile water.
- Glass slides
- Unwaxed dental floss.
- Wooden stick for fingernail scrapings.
- Envelopes or boxes for individual evidence samples.
- Labels.

Other items needed for a forensic / medical exam and treatment that may be included in the rape kit are :

- Woods lamp
- Toluidine blue dye.
- Drying rack for wet swabs and/or clothing.
- Patient gown, cover sheet, blanket, pillow.
- Needles/ Syringes for blood drawing.

- Speculums
- Post – It Notes used to collect trace evidence
- Camera (35 mm, digital, or Polaroid), film batteries.
- Med-scope and/or colcoscope.
- Microscope
- Surgilube
- Acetic acid diluted spray
- Medications
- Clean clothing and shower/ hygiene items for the victim's use after the exam.

(c) A detailed description of "Assault/ Abuse History" be mentioned by the attending doctors on the medico legal cases of victim; The doctor must ensure that the complete narration of the history of the case detailed by the victim and her escort is recorded.

(d) After the examination is complete the victim should be permitted to wash op using toiletries provided by the hospital. The hospital should also have clothing to put on if her own clothing is taken as evidence.

(e) All hospitals should co-operate with the police and preserve the samples likely to putrefy in their pathological facility till such time the police are able to complete their paper work for despatch to forensic lab test including Deoxyribo Nucleic Acid.

(C) Necessity in Courts

(a) The Magistrate unless there are compelling reasons shall record the statement of the victim under Section 164, of the Criminal Procedure Code, 1973 on the day on which the application is moved by the Investigating Officer.

The Magistrate before proceeding to record the statement shall ensure that the child is made comfortable and she is free from the extraneous pressure.

(b) An endeavour shall be made to commit such cases of offence to the Court of Sessions expeditiously and preferably within 15 days.

(c) The Hon'ble Supreme Court in **Delhi Domestic Working Women Forum v. Union of India**,[14] and reiterated by this Hon'ble Court in **Khem Chand v. State of Delhi**,[15] had directed that the victim be provided with a Counsel. The existing practice of the victims being represented by a Counsel from the Rape Crisis Cell may continue. In cases where the victim has a private lawyer, she may be allowed to retain the private lawyer.

(d) That as far as possible chief examination and cross-examination of the victim must be conducted on the same day;

(e) The Additional Sessions Judge/ District Judge shall maintain a panel of psychiatrists, Psychologists and experts in sigh language, etc. who would assist in recording the statement of witnesses as and when requested by the Sessions Courts.

(f) If it is brought the notice of the Court from a support person/ Rape Crises Cell Advocate/ victim, regarding threats received by the victim or her family members to compromise the matter, the Judge shall immediately direct the Assistant Commissioner of Police to look in to the matter and provide an action taken report before the Court within 2 days. The Court must ensure that protection is provided to the victim and her family.

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14 (1995) 1 SCC 14

15 2008 (4) JCC 2497

(g) In cases in which the witness is sent back unexamined and is bound down, the Court shall ensure that at least the travelling expenses for coming to and from for attending the Court are paid.

(1) Evidence and trial of rape / sexual assault cases:

Section 327 of the Criminal Procedure Code, 1973 now contains a proviso (enacted pursuant to the 42nd Law Commission Report) which enables the Presiding Judge or Magistrate, for reasons to be recorded, to direct an in camera enquiry and trial of rape and allied offences. In this regard, there are two important facets which need to be considered.

First, should the entire enquiry and the trial be conducted in camera? The Committee feels that, while to protect the testimony of the victim, the examination in chief and cross examination must be done in camera, we believe that unless there are compelling reasons, the remainder of the trial must be attempted to be conducted in open court because it is also important that women's organisations, members of the media and members of the general public should also be able to observe the conduct of the trial. In any event, the victim must have a member of the women's organisation inside to offer moral support.

In this context the following extract from the decision of the Supreme Court in **State of Punjab v. Gurmeet Singh,**[16] will be a guiding beacon:

"These two provisions are in the nature of exception to the general rule of an open trial. In spite of the amendment, however, it is seen that the trial courts either are not conscious of the amendment or do not realise its importance for hardly does one come across a case where the

[16] (1996) 2 SCC 384.

inquiry and trial of a rape case has been conducted by the court in camera. The expression that the inquiry into and trial of rape "shall be conducted in camera" as occurring in sub-section (2) of Section 327 of the Criminal Procedure Code, 1973 is not only significant but very important. It casts a duty on the court to conduct the trial of rape cases etc. invariably "in camera". The courts are obliged to act in furtherance of the intention expressed by the legislature and not to ignore its mandate and must invariably take recourse to the provisions of Section 327(2) and (3) of the Criminal Procedure Code, 1973 and hold the trial of rape cases in camera. It would enable the victim of crime to be a little comfortable and answer the questions with greater ease in not too familiar a surroundings. Trial in camera would not only be in keeping with the self-respect of the victim of crime and in tune with the legislative intent but is also likely to improve the quality of the evidence of a prosecutrix because she would not be so hesitant or bashful to depose frankly as she may be in an open court, under the gaze of public. The improved quality of her evidence would assist the courts in arriving at the truth and sifting truth from falsehood. The High Courts would therefore be well-advised to draw the attention of the trial courts to the amended provisions of Section 327 of the Criminal Procedure Code, 1973 and to impress upon the Presiding Officers to invariably hold the trial of rape cases in camera, rather than in the open court as envisaged by Section 327(2) of the Criminal Procedure Code, 1973. When trials are held in camera, it would not be lawful for any person to print or publish any matter in relation to the proceedings in the case, except with the previous permission of the court as envisaged by Section 327(3) of the Criminal Procedure Code, 1973. This would save any further embarrassment being caused to the victim of sex crime.

Wherever possible, it may also be worth considering whether it would not be more desirable that the cases of sexual assaults on the females are tried by lady Judges, wherever available, so that the prosecutrix can make her statement with greater ease and assist the courts to properly discharge their duties, without allowing the truth to be sacrificed at the altar of rigid technicalities while appreciating evidence in such cases. The courts should, as far as possible, avoid disclosing the name of the prosecutrix in their orders to save further embarrassment to the victim of sex crime. The anonymity of the victim of the crime must be maintained as far as possible throughout. In the present case, the trial court has repeatedly used the name of the victim in its order under appeal, when it could have just referred to her as the prosecutrix. We need say no more on this aspect and hope that the trial courts would take recourse to the provisions of Sections 327(2) and (3) of the Criminal Procedure Code, 1973 liberally. Trial of rape cases in camera should be the rule and an open trial in such cases an exception".

Secondly, it is important to have properly sensitized judges to conduct such trials. We have noted disturbing recounts of how rape victims have been actually pulverised in camera while suddenly facing a group of men in a hostile environment. The purpose of an in camera proceeding is to create an environment for the victim, which is conducive to the conduct of a fair trial. Here, we are of the opinion that judges who actually try rape cases must be carefully chosen by the Chief Justice of the High Court and there must be a very conscientious allocation of work when rape cases are tried by such judges. We are also of the opinion that High Courts suo motu issue appropriate guidelines to ensure that there is a friendly and non-hostile environment in such in camera proceedings in respect of rape/sexual assault cases. This can be easily undertaken by the

Court in the exercise of the High Court's jurisdiction under Article 235 of the Constitution, and has, in fact, been undertaken by the Delhi High Court in **Virender v. State of National Capital Territory of Delhi**,[17] where Gita Mittal J. directed that the following guidelines be implemented immediately in various courts in Delhi:

"(a) Police

(i) On a complaint of a cognisable offence involving a child victim being made, concerned police officer shall record the complaint promptly and accurately.

(ii) Upon receipt of a complaint or registration of First Information Report for any of the aforesaid offences, immediate steps shall be taken to associate a scientist from Forensic Science Laboratory or some other Laboratory or department in the investigations. The Investigating Officer shall conduct investigations on the points suggested by him also under his guidance and advice.

(iii) The investigation of the case shall be referred to an officer not below the rank of Sub- Inspector, preferably a lady officer, sensitized by imparting appropriate training to deal with child victims of sexual crime.

(iv) The statement of the victim shall be recorded verbatim.

(v) The officer recording the statement of the child victim should not be in police uniform.

[17] Criminal Appeal No. 121 of 2009 Judgment of the Delhi High Court dated September 29, 2009.

(vi) The statement of the child victim shall be recorded at the residence of the victim or at any other place where the victim can make a statement freely without fear.

(vii) The statement should be recorded promptly without any loss of time.

(viii) The parents of the child or any other person in whom the child reposes trust and confidence will be allowed to remain present.

(ix) The Investigating Officer to ensure that at no point should the child victim come in contact with the accused.

(x) The child victim shall not be kept in the police station overnight on any pretext, whatsoever, including medical examination.

(xi) The Investigating Officer recording the statement of the child victim shall ensure that the victim is made comfortable before proceeding to record the statement and that the statement carries accurate narration of the incident covering all relevant aspects of the case.

(xii) In the event the Investigating Officer should so feel the necessity, he may take the assistance of a psychiatrist.

(xiii) The Investigating Officer shall ensure that the child victim is medically examined at the earliest preferably within twenty four hours in accordance with Section 164A of the Criminal Procedure Code, 1973 at the nearest government hospital or hospital recognized by the government.

(xiv) The Investigating Officer shall ensure that the investigating team visits the site of the crime at the earliest to secure and collect all incriminating evidence available.

(xv) The Investigating Officer shall promptly refer for forensic examination clothings and articles necessary to be examined, to the forensic laboratory which shall deal with such cases on priority basis to make its report available at an early date.

(xvi) The investigation of the cases involving sexually abused child may be investigated on a priority basis and completed preferably within ninety days of the registration of the case. The investigation shall be periodically supervised by senior officer/s.

(xvii) The Investigating Officer shall ensure that the identity of the child victim is protected from publicity.

(xviii) To ensure that the complainant or victim of crime does not remain in dark about the investigations regarding his complaint/FIR, the complainant or victim shall be kept informed about the progress of investigations. In case the complainant gives anything in writing and requests the Investigation Officer, for investigations on any particular aspect of the matter, the same shall be adverted to by the Investigation Officer proper entries shall be made by Investigation Officer in case diaries in regard to the steps taken on the basis of the request made by the complainant. The complainant, however, shall not be entitled to know the confidential matters, if any, the disclosure of which may jeopardize the investigations.

(xix) Whenever the Sub-Divisional Magistrate/Magistrate is requested to record a dying declaration, video recording also shall be done with

a view to obviate subsequent objections to the genuineness of the dying declaration.

(xx) The investigations for the aforesaid offences shall be personally supervised by the Assistant Commissioner of Police of the area. The concerned Deputy Commissioner of Police shall also undertake fortnightly review thereof.

(xxi) The material prosecution witnesses cited in any of the aforesaid offences shall be ensured safety and protection by the Station House Officer concerned, who shall personally attend to their complaints, if any.

(xxii) Wherever possible, the Investigation Officer shall ensure that the statement of the child victim is also video recorded.

(b) Recording of Statement Before Magistrate

(i) The statement of the child victim shall be recorded promptly and at the earliest by the concerned Magistrate and any adjournment shall be avoided and in case the same is unavoidable, reasons to be recorded in writing.

(ii) In the event of the child victim being in the hospital, the concerned Magistrate shall record the statement of the victim in the hospital.

(iii) To create a child friendly environment separate rooms be provided within the Court precincts where the statement of the child victim can be recorded.

(iv) The child victim shall not be separated from his/her parents/guardians nor taken out from his/her environment on the

ground of "Ascertaining voluntary nature of statement" unless the parents/guardian is reported to be abusive or the Magistrate thinks it appropriate in the interest of justice.

(v) Wherever possible, the Investigation Officer shall ensure that the statement of the child victim is also video recorded.

(vi) No Court shall detain a child in an institution meant for adults.

(c) Medical Examination :

(i) Orientation be given to the Doctors, who prepare medico legal cases or conduct post mortems to ensure that the medico legal cases as well as post mortem reports are up to the mark and stand judicial scrutiny in Courts.

(ii) While conducting medical examination, child victim should be first made comfortable as it is difficult to make her understand as to why she is being subjected to a medical examination.

(iii) In case of a girl child victim the medical examination shall be conducted preferably by a female doctor.

(iv) In so far as it may be practical, psychiatrist help be made available to the child victim before medical examination at the hospital itself.

(v) The report should be prepared expeditiously and signed by the doctor conducting the examination and a copy of medical report be provided to the parents/guardian of the child victim.

(vi) In the event results of examination are likely to be delayed, the same should be clearly mentioned in the medical report.

(vii) The parents/guardian/person in whom child have trust should be allowed to be present during the medical examination.

(viii) Emergency medical treatment wherever necessary should be provided to the child victim.

(ix) The child victim shall be afforded prophylactic medical treatment against Subscriber Trunk Diallings.

(x) In the event the child victim is brought to a private/nursing home, the child shall be afforded immediate medical attention and the matter be reported to the nearest police station.

Medical issue on right to privacy is also a burning problem in foreign courts. In **Z v. FINLAND**,[18] The applicant is a Finnish national, resident in Finland, and was at the time of the events which gave rise to her complaints under the Convention married to X, who was not Finnish. They divorced on 22 September 1995. They are both infected with the human immunodeficiency virus.

On 10 March 1992 the Helsinki City Court convicted X and sentenced him to a suspended term of imprisonment for rape on O. on 12 December 1991. The City Court held the trial in camera and ordered that the documents submitted in the case remain confidential for a certain period. On 19 March 1992 X was informed of the results of a blood test performed on 6 March 1992, indicating that he was Human Immunodeficiency Virus positive.

Statement of general principles concerning importance of respecting confidentiality of health data - these considerations were

[18] ECHR 25 Feb 1997

especially valid as regards protection of confidentiality of information about a person's Human Immunodeficiency Virus infection, disclosure of which not compatible with Article 8 unless justified by an overriding requirement in the public interest - State measures compelling communication or disclosure of such information without consent of patient called for most careful scrutiny on the part of the Court, as did the safeguards designed to secure effective protection - at the same time not for Court to substitute its views for those of national authorities as to relevance of evidence used in judicial proceedings - these also enjoyed a margin of appreciation in striking fair balance between interest of publicity of court proceedings and interests in confidentiality of personal data.

Against this background, Court examined each measure in turn, whilst noting at the outset that the decision-making process did not give rise to misgivings and that remedies were apparently available for challenging the seizure and for having the limitation on the confidentiality order quashed.

(a) Orders requiring the applicant's doctors and psychiatrist to give evidence: measures were taken in context of the applicant availing herself of right not to give evidence against her husband, X - object was exclusively to ascertain when X aware of or had reason to suspect his Human Immunodeficiency Virus infection, which was capable of being decisive for whether guilty of attempted manslaughter in relation to certain sexual offences - no doubt that national authorities entitled to think that very weighty public interests in favour of investigation and prosecution of X for attempted manslaughter - the resultant interference with applicant's Article 8 rights was subjected to important limitations and

safeguards against abuse - no reason to question extent to which doctors required to give evidence - especially because proceedings were confidential and highly exceptional, the contested orders were unlikely to have deterred potential and actual Human Immunodeficiency Virus carriers from undergoing blood tests and seeking medical treatment.

***Conclusion*: no violation eight votes to one.**

(b) Seizure of the applicant's medical records and their inclusion in the investigation file: measures were complementary to the above orders, their context and object were the same and they were based on same weighty public interests - they were subject to similar limitations and safeguards against abuse - admittedly, unlike those orders, the seizure had not been authorised by a court but had been ordered by the prosecution - however, this fact could not in itself give rise to any breach since conditions for seizure were essentially the same as those for the orders to give evidence, two of which had been given by the City Court prior to the seizure and the remainder given shortly thereafter - would have been possible for applicant to challenge seizure before City Court - no reason to doubt national authorities' assessment that necessary to seize all the material concerned and to include it in investigation file.

***Conclusion*: no violation eight votes to one.**

(c) Duration of the order to maintain the medical data confidential: ten-year limitation on confidentiality order did not correspond to wishes or interests of litigants in the proceedings -production of medical information and material in issue without applicant's

consent meant that she had already been subjected to serious interference with her private and family life - further interference which she would suffer if the data were to be made accessible to the public after ten years, in 2002, was not supported by overriding reasons.

***Conclusion*: violation in the event of order to make the material accessible to the public in 2002 being implemented (unanimously).**

(d) Disclosure of the applicant's identity and HIV infection in the Court of Appeal's judgment: not supported by any cogent reasons.

***Conclusion*: violation unanimously.**

Anne-Marie Andersson v. Sweden[19]: -

The applicant, Mrs Anne-Marie Andersson was a Swedish citizen. She was born in 1943 and died in 1996 (see paragraph 6 above). She lived in Gothenburg, where she worked as a taxi driver. At the time of the events in question, Mrs Andersson was divorced and living with her youngest son, who was born in 1981. From May 1988 onwards, Mrs Andersson was unable to work as a result both of dental problems which caused her severe pain and anxiety about a dispute with her landlord. In April 1989 she contacted a psychiatric clinic in Gothenburg in order to receive a medical certificate which would enable her to claim sickness benefit from the Health Insurance Office. From 20 August 1991 the applicant was treated by the chief psychiatrist who drew her attention to the possible detrimental effect her situation might have on her son and advised her to seek support for him from the children's psychiatric clinic

[19] Application no 20022/92 [1997]

or the social authorities. Mrs Andersson, however, considered that her son was a normal child who was not in need of any particular help. In January 1992 the psychiatrist informed Mrs Andersson that since the child's health might be at risk, she (the psychiatrist) had an obligation under Swedish law to contact the social authorities (see paragraphs 16-17 below). Accordingly, the former telephoned a social welfare officer at the Social Council and informed her of the applicant's health problems. By letter the same day, the psychiatrist notified the applicant of the information imparted to the Council. The relevant part of the letter read as follows:

> *"As you know, I have several times asked you to seek support for your son who, naturally, cannot remain unaffected by your severe pains. As I have not been able to convince you that this is necessary, I have called a social welfare officer and expressed my concern. Unfortunately, I find myself obliged under the law to take this action in an attempt to reduce future problems for the boy (and thereby also for you)."*

The psychiatrist's concern for the applicant's son was shared by the headmaster and a teacher at the school he attended. In October 1991 they had contacted the Social Council and expressed concern about his learning difficulties and his general state of health. Following this, the Council commenced an investigation which, with Mrs Andersson's agreement, led to the placement of her son in a non-residential therapeutic school on 2 March 1992.

The applicant contended that there had been a violation of Article 6 § 1 of the Convention which, in so far as is relevant, reads:

"In the determination of his civil rights and obligations ..., everyone is entitled to a ... hearing ... by a tribunal..."

Under this provision, she complained that she had not been afforded a possibility, prior to the communication of the psychiatrist's statement to the Social Council, to challenge the measure before a court.

If chief psychiatrist possessed information about the applicant patient to the effect that intervention by Social Council was necessary for protection of her under age son, the psychiatrist was under a duty to report immediately to the Council - that duty extended to all data in her possession potentially relevant to Council's investigation into need to take protective measures with respect to the son and depended exclusively on relevance of those data - scope of this obligation and fact that the psychiatrist enjoyed very wide discretion in assessing what data would be relevant - in this regard, no duty to hear applicant's views before transmitting the information - a "right" to prevent communication of such data could not, on arguable grounds, be said to be recognised under national law.

Conclusions: inapplicable (five votes to four) and no violation (eight votes to one).

(2) Developments in right to privacy and abortion:

In one interesting development in connection with Gender Equality and the Privacy issue related to Abortion, men's rights activists in the United States is going to court for and on a behalf of a man, named Matt Dubay from Detroit, who says his ex-girlfriend had his child after telling him she could not get pregnant. They are to argue in court that fathers do

not have an obligation to pay money towards raising a child they did not want.

The landmark case of **Roe v. Wade,**[20] dealt with the right of an unmarried pregnant woman to an abortion. Upholding the woman's right to make that choice which affected her private life, the Supreme Court held that although the American Constitution did not explicitly mention any right of privacy, the Supreme Court itself recognized such a right as a guarantee of certain "zones or areas of privacy" and "that the roots of that right may be found in the First Amendment, in the Fourth and Fifth Amendments, in the penumbras of the Bill of Rights and in the concept of liberty guaranteed by the Fourteenth Amendment ".

Activists say men should have the same rights as women in dealing with the consequences of unintended pregnancy. Women's and children's groups have criticized the planned legal challenge. Leslie Sorkhe, of the Association for Children for Enforcement of Support, said a child "needs the emotional and financial support of both parents".

"The child is entitled to his or her equal protection under the law," the website of The Detroit News quotes her as saying. Mr Dubay says that his former girlfriend became pregnant with his child after assuring him she had a physical condition that prevented her from conceiving. He says she went on have the baby, despite knowing that he did not want to have a child with her.

He now wants the court to free him from his obligation to pay $500 in child support every month. The National Center for Men is filing a case on behalf of Mr Dubay at a court in the United States city of Detroit.

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[20] 410 U.S. 113 (1973)

The center's director, Mel Feit, told the Associated Press news agency: "There's such a spectrum of choice that women have - it's her body, her pregnancy and she has the ultimate right to make decisions. I'm trying to find a way for a man also to have some say over decisions that affect his life profoundly". In political spectrum things has changed a lot in past decade. Many states, like Tennessee and South Dakota, have introduced a bill and many are considering introducing the bill to restrict abortion.

In the recent past, the politics of abortion have essentially been turned upside down. Republicans are shying away from the issue and Democrats are eager to take it on. Republicans have been on the offense when it comes to the issue of abortion. Pressing a series of popular restrictions, Republicans have painted Democrats as extreme protectors of abortion at any point in pregnancy. But with a dozen states now considering bills to ban abortion outright, this year it's Democrats who are taking the offensive, saying Republicans are the ones whose views on abortion are extreme.

Thus right to privacy in medical matter is really covered under human rights protective system. Legislative and judicial body has protected it as a necessary elements of right to dignity specially privacy.

CHAPTER 5

THE ROLE OF MEDIA IN STING OPERATION OF RIGHT TO PRIVACY

Television channels have started a series of investigative attempts with hidden cameras and other espionage devices. The advent of miniaturized audio and video technology, specially the pinhole camera technology, enables one to clandestinely make a video/audio recording of a conversation and actions of individuals. Such equipment generally has four components- the miniaturized camera, often of a size of a 25 paisa coin or even smaller (pin top size), a miniature video recording device, a cord to transmit the signals and a battery cell. The use of the cord can be avoided through wireless transmissions.

In law enforcement, a sting operation is an operation designed to catch a person committing a crime by means of deception. A typical sting will have a law-enforcement officer or cooperative member of the public play a role as criminal partner or potential victim and go along with a suspect's actions to gather evidence of the suspect's wrongdoing. Now the moot question that arises is whether it is for the media to act as the ‘law enforcement agency’.

The carrying out of a sting operation may be an expression of the right to free press but it caries with it an indomitable duty to respect the privacy of others. The individual who is the subject of a press or television ‘item’ has his or her personality, reputation or career dashed to the ground after the media exposure. He too has a fundamental right to

live with dignity and respect and a right to privacy guaranteed to him under Article 21 of the Constitution.

The movement towards the recognition of right to privacy in India started with **Kharak Singh v. State of Uttar Pradesh and others**,[1] wherein the apex court observed that it is true that our constitution does not expressly declare a right to privacy as fundamental right, but the said right is an essential ingredient of personal liberty. After an elaborate appraisal of this right in **Gobind v. State of Madhya Pradesh and another**,[2] it has been fully incorporated under the umbrella of right to life and personal liberty by the humanistic expansion of the Article 21 of the Constitution.

Today, it is being witnessed that the over-inquisitive media, which is a product of over-commercialization, is severely encroaching the individual's right to privacy by crossing the boundaries of its freedom. Yet another observation of the court which touched this aspect of violation of right to privacy of the individuals, is found in the judgment of the Andhra Pradesh High Court in **Labour Liberation Front v. State of Andhra Pradesh.**[3] The Court observed as follows:

Once an incident involving prominent person or institution takes place, the media is swinging into action and virtually leaving very little for the prosecution or the Courts to examine the matter. Recently, it has assumed dangerous proportions, to the extent of intruding into the very privacy of individuals. Gross misuse of technological advancements and the unhealthy competition in the field of journalism resulted in obliteration of norms or commitment to the noble profession. The

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1 AIR 1963 SC 1295
2 AIR 1975 SC 1378
3 W.P. 23220 of 2004, Decided on Wednesday, December 29, 2004

freedom of speech and expression, which is the bedrock of journalism, is subjected to gross misuse. It must not be forgotten that only those who maintain restraint can exercise rights and freedoms effectively.

In **Mr. X v. Hospital Z**[4] the Supreme Court held that the right to privacy may, apart from contract, also arise out of a particular specific relationship, which may be commercial, matrimonial or even political. Public disclosure of even true private facts may amount to an invasion of the right to privacy.

The following observations of the Supreme Court in **R. Rajagopal and another v. State of Tamil Nadu and others,**[5] are true reminiscence of the limits of freedom of press with respect to the right to privacy:

A citizen has a right to safeguard the privacy of his own, his family, marriage, procreation, motherhood, child bearing and education among other matters. Noone can publish anything concerning the above matters without his consent - whether truthful or otherwise and whether laudatory or critical. If he does so, he would be violating the right to privacy of the person concerned and would be liable in an action for damages. Position may, however, be different, if a person voluntarily thrusts himself into controversy or voluntarily invites or raises a controversy.

United States law enforcement agencies use sting operations to target any entry point, which is being knowingly used to introduce proceeds of crime into the financial system. Sting operations have therefore been used against such entry points as car dealerships, restaurants, bookmakers, cheque-cashing services, pawnshops, and even

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4 AIR 2003 (SC) 664
5 AIR 1995 SC 264

churches. The justification for undercover operations generally has been expressed as follows:

Covert investigative techniques are often the most efficient, effective and, in the case of the most virulent strains of criminality, such as organized and major drug related crime, the only practical way of obtaining evidence for the purposes of prosecuting and convicting those responsible.

However, former United States Chief Justice Earl Warren in **Sherman v United States**,[6] made an important observation stating that 'a line must be drawn between a trap for the unwary innocent and a trap for the unwary criminal.'

On the other hand, the authorities of the United Kingdom have set down a defined and set code for the commission of undercover operations.

The ability to do great good rarely comes without some power to do harm, and the free press is no exception to this general rule. The press should do what it can to minimize the abuse of power (self-scrutiny can help and so can competition), but we should also try to understand with clarity why and how press freedom can enrich human lives, enhance public justice, and even help to promote economic and social development. Technology is being used by the media to throw light upon 'truths' which may never have been known to the public at large. However, the use of technology in a rightful manner is what needs to be adequately emphasized upon and proper guidelines be framed for the same.

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[6] 356 U.S. 369 (1958)

Sting Operations are undertook with a view to look into the working of the govt. or to see whether the acts of any individual is against the public order. On the basis of the purpose Sting Operations can be classified as positive and negative. Positive Sting Operation is one which results in the interest of the society, which pierces the veils of the working of the government. It is carried out in the public interest. Due to positive sting operation society is benefited because it makes government responsible and accountable. It leads to the transparency in the government. On the other hand negative sting operations do not benefit the society, but they do harm the society and its individuals. It unnecessarily violates the privacy of the individual without any beneficial results to the society. These types of Sting operations if allowed then it will hamper the freedom of the individuals and restricts their rights. Here are some examples which we can distinguish as positive and negative sting operations.

(I) Type of Sting Operations :

(A) Positive Sting Operations:

Sting operations on ultra-sound centers carried out by the Health officers in Karnataka for "serious enforcement'' of the Pre-Natal Diagnostic Techniques Act which bans sex determination of foetuses and consequent abortion of female ones to stop female foeticide.

The Ministry (by the Cable Television Networks Regulation Act, 1995 and Programme Code), has prohibited the transmission of Cine world channel for 30 days for showing "objectionable content." Because it "offended good taste and decency" and it "was obscene and likely to

corrupt public morality and was not suited for unrestricted public exhibition"

An operation by an online news site called Tehelka to catch top politicians and army officers taking bribes from journalists posing as businessmen. An operation in which a journalist posing as a struggling actress met actor Shakti Kapoor, who promised in the televised footage that his secretary would introduce her to movie producers and directors.

(B) Negative Sting Operations:

Instances over the years have shown that though sting operations do expose corruption in some cases, sometimes they seriously violate the rules of journalism in the pursuit of profit and short-term sensationalism. The Delhi High Court on Friday, 7th September, 2007, issued notices to the Delhi government and city police after taking suo motu cognisance of media reports alleging that a sting operation carried out by a Television channel, which claimed to have exposed a sex racket run by a government school teacher Uma Khurana, for allegedly luring her pupils into prostitution has now been revealed to be completely fabricated and was fake and distorted. The Supreme Court on Wednesday, 7th February, 2007, issued notices to a private news channel and its reporter for carrying out a sting operation carried out in the year 2004, which allegedly showed a non-bailable warrant could be procured against any person by paying a hefty amount in the court. These incidents are an example of how a sting operation can go wrong and become an exercise in trapping an innocent person. India Television's chief editor, Rajat Sharma, said that there was no violation of privacy in exposing such matters as political corruption or the trading of jobs for sex in Bollywood, a practice known in movie and theatrical business lore as the casting

couch. “If you are serious about exposing certain social evils, there is no other option but to use sting operations.”

Trial by media has created a ‘problem’ because it involves a tug of war between two conflicting principles – free press and free trial, in both of which the public are vitally interested. The freedom of the press stems from the right of the public in a democracy to be involved on the issues of the day, which affect them. This is the justification for investigative and campaign journalism.

At the same time, the right to fair trial, i.e., a trial uninfluenced by extraneous pressures is recognized as a basic tenet of justice in India. Provisions aimed at safeguarding this right are contained under the Contempt of Courts Act, 1971 and under Articles 129 and 215 of the Constitution of India. Of particular concern to the media are restrictions which are imposed on the discussion or publication of matters relating to the merits of a case pending before a Court. A journalist may thus be liable for contempt of Court if he publishes anything which might prejudice a ‘fair trial’ or anything which impairs the impartiality of the Court to decide a cause on its merits, whether the proceedings before the Court be a criminal or civil proceeding.

A number of decisions of the United Nations Supreme Court confirm the potential dangerous impact the media could have upon trials. In the case of Billie Sol Estes , the United Nations Supreme Court set aside the conviction of a Texas financier for denial of his constitutional rights of due process of law as during the pre-trial hearing extensive and obtrusive television coverage took place. The Court laid down a rule that televising of notorious criminal trials is indeed prohibited by the “due process of law” clause of Amendment Fourteen.

In another case of Dr. Samuel H.Sheppard , the Court held that prejudicial publicity had denied him a fair trial. Referring to the televised trials of Michael Jackson and O.J. Simpson, Justice Michael Kirby stated:

The judiciary which becomes caught up in such entertainment, by the public televising of its process, will struggle (sometimes successfully, sometimes not) to maintain the dignity and justice that is the accused's due. But these are not the media's concerns. Jurists should be in no doubt that the media's concerns are entertainment, money-making and, ultimately, the assertion of the media's power.

In England too, the House of Lords in the celebrated case of **Attorney General v. British Broadcasting Corporation,**[7] has agreed that media trials affect the judges despite the claim of judicial superiority over human frailty and it was observed that a man may not be able to put that which he has seen, heard or read entirely out of his mind and that he may be subconsciously affected by it. The Courts and Tribunals have been specially set up to deal with the cases and they have expertise to decide the matters according to the procedure established by the law. Media's trial is just like awarding sentence before giving the verdict at the first instance. The court held that it is important to understand that any other authority cannot usurp the functions of the courts in a civilized society.

Similarly there have been a plethora of cases in India on the point. The observations of the Delhi High Court in Bofors Case or **Kartongen Kemi Och Forvaltning AB and others v. State through Centre Bureau of Investigation,**[8] are very much relevant, as the Court weighed

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7 [2007] EWCA Civ 280
8 2004 (72) DRJ 693

in favour of the accused's right of fair trial while calculating the role of media in streamlining the criminal justice system:

It is said and to great extent correctly that through media publicity those who know about the incident may come forward with information, it prevents perjury by placing witnesses under public gaze and it reduces crime through the public expression of disapproval for crime and last but not the least it promotes the public discussion of important issues. All this is done in the interest of freedom of communication and right of information little realizing that right to a fair trial is equally valuable.

Such a right has been emphatically recognized by the European Court of Human Rights:

...Again it cannot be excluded that the public becoming accustomed to the regular spectacle of pseudo trials in the news media might in the long run have nefarious consequences for the acceptance of the courts as the proper forum for the settlement of legal disputes.

The ever-increasing tendency to use media while the matter is sub-judice has been frowned down by the courts including the Supreme Court of India on the several occasions. In **State of Maharashtra v. Rajendra Jawanmal Gandhi,**[9] the Supreme Court observed:

There is procedure established by law governing the conduct of trial of a person accused of an offence. A trial by press, electronic media or public agitation is very antithesis of rule of law. It can well lead to miscarriage of justice. A judge has to guard himself against any such pressure and is to be guided strictly by rules of law. If he finds the person

[9] 2005 (2) SCC 686

guilty of an offence he is then to address himself to the question of sentence to be awarded to him in accordance with the provisions of law.

The position was most aptly summed up in the words of Justice H.R. Khanna,: -

Certain aspects of a case are so much highlighted by the press that the publicity gives rise to strong public emotions. The inevitable effect of that is to prejudice the case of one party or the other for a fair trial. We must consider the question as to what extent are restraints necessary and have to be exercised by the press with a view to preserving the purity of judicial process. At the same time, we have to guard against another danger. A person cannot, as I said speaking for a Full Bench of the Delhi High Court in 1969, by starting some kind of judicial proceedings in respect of matter of vital public importance stifle all public discussions of that matter on pain of contempt of court. A line to balance the whole thing has to be drawn at some point. It also seems necessary in exercising the power of contempt of court or legislature vis-à-vis the press that no hyper-sensitivity is shown and due account is taken of the proper functioning of a free press in a democratic society. This is vital for ensuring the health of democracy. At the same time the press must also keep in view its responsibility and see that nothing is done as may bring the courts or the legislature into disrepute and make the people lose faith in these institutions.

The Hon'ble Supreme Court in the case of **Rajendra Sail v. Madhya Pradesh High Court Bar Association and Others,**[10] observed that for rule of law and orderly society, a free responsible press and an independent judiciary are both indispensable and both have to be,

[10] [2005] INSC 272 (21 April 2005)

therefore, protected. The aim and duty of both is to bring out the truth. And it is well known that the truth is often found in shades of grey. Therefore the role of both can not be but emphasized enough, especially in a 'new India', where the public is becoming more aware and sensitive to its surroundings then ever before. The only way of functioning orderly is to maintain the delicate balance between the two. The country can not function without two of the pillars its people trust the most.

A question mark is raised on Human Rights Commissions by the reputed News Channel Star News in a Sting Operation where Police Officials in a police station of Haryana and Agra are ready to torture anyone if money is given to them. For then Human Rights Commission is a non-existent body. It can be said that the state bodies meant for the purpose are non-functional or it do not want to take cognisance Human Rights. So, the role is taken by media of exposing such felonious act in the society through Sting Operations. But, at the same time this is called violation of a major Human Right by media, i.e., Right to Privacy, as in some way they intrude the privacy of a person. Privacy is what is demanded by and for each and every person in his or her life and this privacy literary means nothing but being aloof from society on some issues of personal life. But, the question is, can Sting Operation, known as '*Dansh Patrakarita*' in Hindi, can take away this privacy and make it public. This is the most burning issue in the entire world today. Article 12 of Universal Declaration of Human Rights (1948) defines Right to Privacy as—*No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence not to attack upon his honour and reputation. Everyone has the right to protection of law against such interference or attack.*

(II) Sting Operation vis-à-vis Right to Privacy :

Article 19(2) of the Constitution of India provides for nothing in sub-clause (a) shall affect the operation of any existing law in so far as it relates to, or prevent the state from making any law relating to libel, slander, defamation, contempt of court or nay matter which offends decency or morality or which determines the security of, or tends to overthrow the state.

In **Romesh Thappar v. The State of Madras,**[11] the Supreme Court laid down an important principle and giving restrictive interference to clause 2 of Article 19 having allowed the imposition of restrictions on the freedom of speech and expression for specified purposes, any law imposing restriction which are capable of being applied in causes beyond the express purposes cannot be held to be constitutional or valid to any extent.

On the other hand, '*Freedom of Press*' has been held to be a part of the Fundamental Right of '*Freedom of Speech and expression*' guaranteed by article 19(1)(a) to the citizens of India. Is had been held that '*Freedom of Press*' is necessary for exercise of fundamental freedom of citizens of 'speech and expression'.[12] And so '*Freedom of Press*' cannot be termed as unconstitutional and void. And as the Constitution says this can only be exercised till it does not harm the decency/morality of a person.

The Constitution of India gives full liberty to press but with stings attached. On 18th June, 1951, Amended Article 19(2) by adding "*reasonable*" to restrictions. The restriction must be reasonable. In other

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11 AIR 1950 S.C. 124

12 Hamdard Dawakhana v. Union of India, AIR 1960 S.C. 554

words, it must not be excessive or misappropriate. The procedure and the manner of imposition of the restriction also must be just, fair and reasonable.

In a landmark judgement in the case of **Sakal Papers Private Limited, and others v. The Union of India**,[13] the Supreme Court held that Article 19(2) of the Constitution permits imposition of reasonable restrictions on the heads specified in Article 19(2) and on no other grounds. It is, therefore, not open for the state to curtail the *Freedom of Speech and Expression* for promoting the general welfare of a section or a group of people unless its action can be justified by the law falling under clause 2 of Article 19.

And moreover it is valid point that at a certain point all Sting Operations do violate *Right to Privacy* in some degree because during a Sting Operation, in nearly all its cases, the person being filmed is not aware of the presence of a hidden camera. This means that he does not consent to be filmed, without which, in ordinary course, no one has the right to film anyone. However, it may be argued that a illegal act being committed by a public servant during his office hours and in abuse of spirit of his office are not worthy of protection under Right to Privacy law. Besides, what a public servant does while discharging his duty is in public domain. In such cases, public interest does seem to weigh heavier compared to *Right to Privacy*. If a person has no duty towards general public, his morality questionable conduct is not open to public scrutiny unless he violates the law by such conduct.

Right to Privacy is implicit to Article 21. According to Subba Rao J '*liberty*' in Article 21 is comprehensive enough to include privacy. His

[13] AIR 1962 S.C. 305

Lordship said that although it is true that he does not explicitly declare the *Right to Privacy* as a Fundamental Right but the right is an essential ingredient of personal liberty. It is regarded as a Fundamental Right but cannot be called absolute. It can be restricted on the basis of compelling public interest.[14] The court, however, has limited to personal intimacies of the family, marriage, motherhood, procreation and child bearing.[15]

On the other side, in the Sting Operations done by the media in India, only the working of the public servants in their offices is covered. The official work of the public servant should be transparent and open to all as it is in the public interest. But the court's decision the *Right to Privacy* does not cover this official work into the purview of its definition. Sting Operation began with a laudable objective of exposing corruption in high places and degenerated into cheap entertainment.

Sting Operations are generally carried out to trap the corrupt, the underworld dons and spies. They are also undertaken to establish adultery. Sting Operation can also be useful in the arrest of terrorists and anti-national elements. The spy camera of media caught 11 Member of Legislative Assemblies accepting bribe for asking question in the parliament. When the media gets all the evidence against the corrupt and the wrongdoer and their aim is public interest, why do media not file a case in court and submit these as proof? This will lead to punishing of these wrongdoers, which is in public interest. Or, even after getting such evidences, why no report is given to public authorities and make them take some actions? By interviewing Mr. Prakash Tiwari, Bureau chief, Sahara Samaya, Bhopal, and Mr. Brajesh, a correspondent of Star News, Bhopal and Mr. Rajendra, a correspondent of Zee News, Bhopal it was

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14 Govind v. State of M.P. (1975)2 SCC 148, AIR 1975 S.C. 1378

15 People's Union for Civil Liberties v. Union of India (1997)1 SCC 301, AIR 1997 S.C. 568

found that Sting Operations are a good way to get evidences for exposing things and submitting these in court. It is a way of helping law, as media is the fourth estate of governance.

But, on the other hand, such cases cannot be filed in courts with these tapes, or audio or video recording as evidence or proof because courts do not consider theses as credible evidence and proof. Moreover, as the Government Machinery is not functioning properly, that is why such instances are increasing and so what is the point taking it to public authorities. Apart from this, when all this is exposed by media, the general crowd gets aware of the illegal business going on in the so called "Government Machinery". The News Broadcasters Association justified Sting Operation as "illegitimate journalistic tool" . In a discussion with Mr. Kumar Shakti Shekhar, a correspondent of New Delhi Television Limited, Bhopal, he said that Sting Operation take place in public interest where public money is involved. Sting Operations are carried out in hospitals which bring out the problems of paucity of doctors in hospitals, absence of medicines and medication.

But, it can easily be made out from all these interviews that one of the basic reasons to carry out Sting Operation is to increase Trade Related Practices ratings or to '*interest the public*' rather than '*public interest*'. Hence the 17th Law Commission in its 200th report has made recommendations to the centre to enact a law to prevent the media from interfering with the privacy rights of the individuals.

(III) Legality of Sting Operations

Every citizen strives for a corruption free society and must expose corruption whenever it comes to his knowledge. He shall also try to

remove corruption at all levels of the State administration for better management of the State. The Delhi High Court recently in the case of **Aniruddha Bahal v. State,**[16] held that conducting a sting operation by any citizen is a legitimate exercise. Although there is no clear law which specifically allows or legalizes sting operation, but the court derived the right to conduct sting operation under Article 51A (b) of the Constitution of India. This particular Article imposes a duty upon the citizens to cherish and follow the noble ideals which inspired our national struggle for freedom. The court was of the opinion that in order to fulfill this duty there has to be a corruption free India and thereby making sting operation legal for the same purpose.

Sting operations can be classified into positive and negative sting operations based on their purpose. Positive sting operation takes place in the interest of the society, which helps to lift the *purdah* of the working of the government. On the other hand negative sting operation harm the society and its individuals. It unnecessarily violates the privacy of the citizens without any benefit to the society.

Freedom of press in India has been derived from freedom of speech and expression. Media has a right to impart information to the public in a fair manner, thus playing an important role in a democratic society. Journalism shall always be in public interest and sting operation for exposing corruption serve public interest. Sting Operations have also been criticized time and again because of the exaggerated television journalism in order to increase the Trade Related Practices. A sting operation may be an expression of right under freedom of speech and expression but it also comes with a duty to respect the privacy of others. The 200th Law Commission Report has made recommendations with

[16] Crl.M.C. 2793/2009, Decided on dated 17th September, 2010

regard to enacting a law to prevent the media from interfering with the privacy of individuals, which is recognized under right to life and personal liberty.

The Press Council of India provides guidelines for reporting a sting operation. A journalist should adhere to the guidelines laid down by the Press Council of India to avoid liability as the law affords him no protection. Still, he can be subject to defamation suit later on by the victim of the sting operation. A sting operation with genuine motive to create awareness or bring forward the ongoing corruption should not be prohibited.

A line has to be drawn between sting operations that invade privacy and those which exposes corruption and like others in order to protect the very essence of the Constitution of India.

(IV) Need of Sting Operations:-

The media plays an important role in a democratic society. It acts as the fourth institute outside the Government. Sting operations are methods of uncovering information. Although, the Indian Constitution does not expressly mention the liberty of the press, it is evident that the liberty of the press is included in the freedom of speech and expression under Article 19(1) (a). Various Constitutions have guaranteed free press or media as a fundamental right. Freedom of press is a special right under Article 19(1)(a) of the Constitution of India, 1950 but it has certain restrictions. The democratic credentials are judged by the extent of freedom the media enjoys in a particular state. Further the media has a right to impart the information to the public. Freedom of speech includes freedom to communicate, advertise, publish or propagate ideas and the

dissemination of information. Furthermore Article 19(1) also incorporates within itself right to receive information about any event, happening or incident etc. "The heart of journalism has to be public interest" and Sting operations, serve public interest.

In **Romesh Thappar v. State of Madras**[17] Court said, "…. The public interest of freedom of discussion (of which the freedom of press is one aspect) stems from the requirement that members of a democratic society should be sufficiently informed so that they may influence intelligently the decisions which may affect themselves. ….In some the fundamental principle involved here is the peoples' right to know."

This concept of peoples' right to know, which was found to be so essential for democracy, was located by the Court in Article 19(1)(a) in **Bennett Coleman and Company v. Union of India**[18] observing thus:

> *"Although Article 19(1)(a) does not mention the freedom of the press, it is settled view of the Court that freedom of speech and expression includes freedom of the press and circulation."*
>
> The Court held:
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> *"Press has a fundamental right to express itself; the community has a right to be supplied with information; and the Government has a duty to educate the people within the limits of its resources."*

Justice Mathews ruled in the case of **State of Uttar Pradesh v. Raj Narain**[19], "The people of this country have a right to know every public act, everything that is done in a public way by their public

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17 AIR 1950 SC 124
18 1973 SCR (2) 757
19 1975 SCR (3) 333

functionaries. Their right to know is derived from the concept of freedom of speech".

In **S.P. Gupta v. Union of India**,[20] "No democratic Government can survive without accountability and the basic postulate of accountability is that people should have the information about the working of the Government."

In **Prabha Dutt v. Union of India**[21] the Supreme Court upheld the right claimed by the press to interview prisoners that the right claimed by the Press was not the right to express any particular view or opinion but right to means of information through the medium of interview of the prisoners.

In **Indian Express Newspapers (Bombay) Private Limited and others v. Union of India and others,**[22] the Court emphasized that the freedom of press and information were "vital for the realization of human rights". The court relied upon the Article 19 of the Universal Declaration of Human Rights, 1948

(V) Decent Opinion to Sting Operation:

With great power comes great responsibility, therefore the freedom under Article 19(1)(a) is correlative with the duty not to violate any law. Every institution is liable to be abused, and every liberty, if left unbridled, may lead to disorder and anarchy. Television channels in a bid to increase their Trade Related Practices ratings are resorting to sensationalized journalism. Sting operations have now become the order of the day. The carrying out of a sting operation may be an expression of the right to free

[20] AIR 1982 SC 149
[21] 1982 SCR (1)1184
[22] 1950 S.C.R. 594

press but it caries with it an indomitable duty to respect the privacy of others.

In **Time v. Hill**[23] the United Nations Supreme Court said: "The constitutional guarantee of freedom of speech to press is not for the benefit of the press so much as for the benefit of all the people. The same principle was followed by Mathew, J. in **Bennett Coleman and Company v. Union of India**.[24]

Article 19(2) - An Exception to Article 19(1): It is however pertinent to mention that, freedom of speech and expression of press is not absolute but is qualified by certain clearly defined limitations under Article 19(2) in the interests of the public.

In **Romesh Thappar v. State of Madras**,[25] and **Brij Bhushan v. State of Delhi,**[26] the Court firmly expressed its view that there could not be any kind of restriction on the freedom of speech and expression other than those mentioned in Art 19(2) and thereby made it clear that there could not be any interference with that freedom in the name of public interest even when Clause (2) of Article 19 was subsequently substituted under the Constitution (First Amendment) Act, 1951 by a new clause which permitted the imposition of reasonable restrictions on the freedom of speech and expression of media.

(VI) Sting Operation against Right to Privacy:

The individual who is the subject of a press or television 'item' has his or her personality, reputation or career dashed to the ground after the

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23 385 U.S. 374 (1967)
24 [1960] 2 S.C.R. 1671
25 AIR 1950 SC 124
26 AIR 1950 SC 129

media exposure. He too has a fundamental right to live with dignity and respect and a right to privacy guaranteed to him under Article 21 of the Constitution. The Supreme Court, **Kharak Singh v. State of Uttar Pradesh**[27] held that right to privacy is inherent under Article 21. The Delhi High Court observed that right to privacy that flows from Article 21 couldn't be invoked against private entities. It can not be denied that it is of practical importance that a precarious balance between the fundamental right to expression and the right to ones privacy be maintained. 'Right to Privacy' has ceased to have any pragmatic value where 'sting operations' define the order of the day. The right to privacy is an alleged human right, which may restrain both government and private party action that threatens the privacy of individuals. It has been recognized as a fundamental right by the Hon'ble Supreme Court under Article 21.

The Supreme Court in **R. Rajagopal and Another v. State of Tamil Nadu and Others**[28] are true reminiscence of the limits of freedom of press with respect to the right to privacy:

"A citizen has a right to safeguard the privacy of his own, his family, marriage, procreation, motherhood, child bearing and education among other matters. No one can publish anything concerning the above matters without his consent - whether truthful or otherwise and whether laudatory or critical. If he does so, he would be violating the right to privacy of the person concerned and would be liable in an action for damages. Position may, however, be different, if a person voluntarily thrusts himself into controversy or voluntarily invites or raises a controversy."

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27 AIR 1963 SC 1295
28 AIR 1995 SC 264

In another landmark judgment which addressed the issue of privacy was the telephone tapping case of **People's Union for Civil Liberties v. Union of India,**[29] the Court observed:

"The right to privacy by itself has not been identified under the Constitution. As a concept it may be too wide and moralistic to define it judicially. Whether right to privacy can be claimed or has been infringed in a given case would depend on the facts of the said case…."

Against Public Morality: There is the classic ethical problem that haunts all sting operations: can you hold somebody responsible for a crime that he would not have committed if you hadn't encouraged him? The essence of all entrapment is that you promise a man a reward for breaking the law and then, apprehend him when he takes the bait. All sting operations involve making people commit crimes that they would not otherwise have committed and are therefore immoral. It is against the public morality and decency and hence falls within the purview of Article 19 (2).

The 17th Law Commission in its 200th report has made recommendations to the Centre to enact a law to prevent the media from interfering with the privacy rights of the individuals.

(VII) Problems of Sting Operations :

The classic ethical problem that haunts all sting operations: - can you hold somebody responsible for a crime that he would not have committed if you hadn't encouraged him? The essence of all entrapment is that you promise a man a reward for breaking the law and then, apprehend him when he takes the bait. A defence that can be taken by the

[29] AIR 2003 SC 2363

accused that the act had been committed as a result of inducement, and which he (the accused) did not intend himself to commit, or, in cases where lack of consent constitutes the offence, such as rape, that the consent had been implied by the inducement, where because of the 'trap' laid down for the accused, the impression given was that an offence had not been committed.

Fundamental rights can't be enforced against the individual or private entity:

When Maneka Gandhi sued Khushwant Singh over certain references to her in his autobiography "Truth, Love and a Little Malice" saying that it was a violation of her privacy, she lost the case. It is precisely because of this lack of legislation that we have numerous Sing Operations taking place almost daily thereby obtruding upon individual privacy. However, despite the growing invasion of privacy, there is no Indian legislation that directly protects the privacy rights of individuals against individuals.

Conflict of Laws:

Although on one hand, the Constitution confers the fundamental right of freedom of the press, Article 105 (2) of the Constitution of India provides certain restrictions on the publications of the proceedings in Parliament. In the famous Searchlight Case, the Supreme Court held that, the publication by a newspaper of certain parts of the speech of members in the House, which were ordered to be expunged by the Speaker constituted a breach of privilege.

Another major problem which we face today is against whom the sting operation is allowed? Some are of the opinion that it must be

allowed against the public servants. The definition of “Public Servant” is given in 2(c) of The Prevention of Corruption Act. Again a problem comes that can we have sting operation against the public servants when they are not in their course of duty? There are so many problems which arise because we do not have proper legislation. We can say the root of all these problems is the lack of legislation first and any thing after.

(VIII) Glimpses of Indian Sting Operations:

(A) Uma Khurana Case:

On 28 August 2007, the channel aired a sting operation covering a porn racket run by a schoolteacher in Delhi involving school girls. A lady in Vivek Vihar, where the teacher Uma Khurana used to teach at a girl's school, gave the lead to the channel, after which the reporter, acting as a customer, fixed up a meeting with Mrs. Khurana at Cross River mall in late August. The grainy footage allegedly aired shows a woman negotiating a deal of Rs. 4,000 for the girl's "services". He paid Rs. 400 to her and she handed over the 15-year-old girl, an ex-student at her earlier school. Later, the girl was taken into confidence, and revealed that Khurana's method was to serve the students a drink laced with drugs after which she would take pictures of them in an obscene pose. These were later used by her to blackmail students into prostitution.

The day following the broadcast which claimed that Uma Khurana was the lady in the video, a crowd of several hundred people gathered at the school. After burning a police van parked nearby, they entered the school premises, pulled the teacher out of the teacher's room, and thrashed her. A simple investigation and viewing of the unedited tapes led the police to declare the "scandal" a hoax: Khurana had been framed by a

businessman who claimed she owed him money. Subsequently on completion of the investigation, the Police had also submitted charge sheet in the case where it was made clear by the Delhi Police that no evidence was found against Ms. Uma Khurana to support the allegations of child prostitution made against her.

Later the aforementioned news item was published in the Hindustan Times which indicated that there was something more to the whole string operation than what met the eyes. In the aforesaid news item it was stated that the girl who had been shown as a student who was allegedly being forced into prostitution by Ms. Uma Khurana was neither a school girl nor a prostitute but a budding journalist eager to make a name in the media world.

This led to calls for sting operations being curtailed. The Ministry of Information and Broadcasting, which has been trying to stifle sting operations, especially against politicians, said that "It should have been left to the police to take action against the accused."

Meanwhile, the role of Live India, the channel which aired the sting is being scrutinised by the police. The police had arrested, Khurana, a teacher at the Government Sarvodaya Kanya Vidyalaya's Daryaganj branch, after the mob violence on Thursday.

But the police and parents claim that the channel's approach in broadcasting the expose was wrong. It is believed the channel had conducted the sting over a month back, when Khurana was a teacher at the Vivek Vihar branch of the school. The Indian Government banned the channel for a month due to the false sting. It was banned because it

breached the Cable Networks Regulation Act, 1995, by broadcasting an admittedly doctored sting operation.[30]

(B) Cobrapost Sting Operation :

Cobrapost is an Indian news website and television production house, known for its investigative journalism, which has involved sting operations. In 2005, along with Aaj Tak, Cobrapost conducted a sting operation named Operation Duryodhana that exposed eleven Members of Parliament accepting money for tabling their questions in the Parliament of India. This investigation led to expulsion of eleven Members of Parliament, the largest expulsion of Members of Parliament in the country's history.

In March 2013, its Operation Red Spider charged that some banks in India were involved in money laundering, using false accounts to convert black money into white.

In November 2013, Cobrapost along with the website Gulail claimed in tapes titled The Stalkers that in 2009, then Home Minister of Gujarat Amit Shah and his team stalked a woman for their Saheb. The Indian National Congress alleged that the saheb was Narendra Modi of the Bharatiya Janata Party, Chief Minister of Gujarat. In Operation Blue Virus, Cobrapost accused some Information Technology companies of using fake identities on social media to help politicians, especially Bharatiya Janta Party members, to improve their popularity. The Bharatiya Janta Party alleged that these were works of the Congress to defame Narendra Modi and the party.

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[30] Court On Its Own Motion v. State of Delhi, (2008)146 DLT 429

An undercover operation resulting in a video named Operation Falcon Claw showed that eleven Members of Parliament from different parties agreed to lobby for a fictitious foreign company, and also that Members of Parliament received money ranging from Rs. 50000 to Rs. 5000000 for issuing recommendation letters.

On 3 April 2014, Cobrapost publicly published on their website about their investigation, Operation Janambhoomi, into the conspiracy behind the demolition of the Babri Masjid, in which they bring to light the conspiracy behind the events of 6 December 1992, which rewrote the history of modern India on communal lines.

(C) Tehelka Operations:

One of the most infamous sting operations in the history of government of India is the “operation West End” carried out by Tehelka magazine in 2001. The operation was carried out to expose the deep rooted corruption in India’s Defence ministry. Many arms dealers and defense ministry officials were caught on tape accepting bribes. The expose led to the resignation of Defence minister George Fernandes from his post.

Tarun Tejpal and Aniruddha Bahal started Tehelka as a website in 2000, after they quit their jobs from Outlook magazine. Its office was set up in south New Delhi. After conducting its main sting investigation, "Operation West End" in 2001, the government started an inquiry, which the staff saw as a direct attack on them. Its reporters and main financial backer were arrested, judicial investigations were conducted on various grounds and there were tax-related raids. In 2003, its staff decreased from 120 to three and the website shut down because of debts. Bahal left

Tehelka in the same year, saying the government was "bogging us down with a lot of legal nonsense" and later founded Cobrapost.com.

In 2004, backed by more than 200 writers, lawyers, business people and activists, who donated money and supported it, Tehelka launched itself as a reader-financed weekly newspaper in tabloid format. Among the supporters were activist Arundhati Roy, politician Shashi Tharoor and Nobel laureate V.S. Naipaul. It called itself the "People's Paper" and the reporters took a tour around the country promoting what they called "free, fair and fearless" journalism. After its Naroda Patiya sting operation in 2007, it sold around 75,000 to 90,000 copies per week. It still suffered financial losses, since it was not backed by any large media or business groups.

Tejpal changed Tehelka from tabloid to magazine in September 2007 to encourage more potential advertisers, but found it difficult because of their sting operations. Tejpal started the Hindi language website in 2007 and then Tehelka's Hindi News magazine. Sanjay Dubey was the founder editor of the Hindi magazine. Tarun Tejpal became Tehelka's largest shareholder, most of its capital is from his personal contacts and Agni Media, his company, was the owner of the magazine in 2008. "Think Fest" was started in 2011 as an annual literary festival and promoted as an event of Tehelka. The program was run by an organisation called Thinkworks Private Limited, a company owned by Tejpal, his sister Neena and managing editor Shoma Chaudhury. It featured Bollywood actors, global thinkers and sessions on new technology. In November 2013, Tejpal stepped aside as editor after a female colleague accused him of sexual assault and Chaudhury resigned on 28 November because of the incident. As of 2014, Mathew Samuel is the managing editor.

(1) Match-fixing scandal (2000)

Bahal and Tejpal convinced cricketer Manoj Prabhakar to record conversations with his colleagues, after the South Africa cricket match fixing scandal involving Hansie Cronje in March 2000. Prabhakar and Bahal went around the country and Prabhakar, wearing hidden recording equipment, attended meetings with important Indian cricket board officials and players. He recorded conversations where they talked about links between players and bookmakers, matches being thrown in return for money, deliberate run-outs and the names of players involved. They recorded more than 40 hours of taped conversations, which the Central Bureau of Investigation used as evidence for its own inquiry. The Central Bureau of Investigation implicated Mohammad Azharuddin, Ajay Jadeja and Ajay Sharma as the cricketers involved. The documentary Fallen Heroes: The Betrayal of a Nation, which was released in May of the same year, showed Prabhakar's work and Bahal published his report on Tehelka.com.

(2) Operation West End (2001)

In 2001, Tehelka did its first major sting investigation called "Operation West End". It involved Mathew Samuel and Bahal, filming how they bribed several defence officials and politicians from the then-ruling National Democratic Alliance led Indian government, posing as arms dealers. Charging a commission from defence deals is illegal in India. They started their investigation in August 2000 because of hearing rumours of middlemen getting rich in such deals in the 1980s. They created a fake British company based in Regent Street, London called "West End". Bahal and Samuel then found out that the Indian army would be interested in obtaining thermal imaging cameras. They printed

business cards and photographs of particular camera models in Tehelka's office in suburban Delhi and Samuel did the main dealings.

They initially had to bribe junior officials in the defence ministry for amounts ranging from Rs. 10000 to Rs. 60000, to help them in securing deals with several middlemen. These middlemen said they "fixed" deals before involving jets and artillery; Samuel and Bahal recorded these conversations using hidden cameras. They dealt with Samata Party President Jaya Jaitley, the then Defence Minister George Fernandes belonged to this party), whom they paid Rs. 300000, and she agreed to tell Fernandes about them. After bribing other officials, they were introduced to the then Bharatiya Janta Party President Bangaru Laxman who accepted Rs. 150000 as a "small new year's gift". Laxman recommended they meet Brajesh Mishra, who was the National Security Advisor to Prime Minister Atal Bihari Vajpayee.

The operation took seven and a half months with Tejpal later saying that the total amount they paid in bribes was Rs. 1.5 million. The deals were in expensive hotels and few officials asked for branded whisky. By January 2001, their funds ran out and they began receiving phone calls from the people they had falsely promised more money to. In this whole operation, they recorded around 100 hours of video footage.

On 14 March, after working on their recordings for two months, Bahal and Samuel released their footage to the public. Laxman resigned the next day with four senior officials; he was sentenced to prison and bailed out later. Jaitley stepped down two days and Fernandes was forced to resign but was reinstated later. The government agreed on a judicial enquiry but no one was convicted. Tehelka posted on its website on that day that its reporters had successfully floated "a fictitious company

flogging non-existent thermal imaging binoculars." Prime Minister Vajpayee's coalition government was on the verge of collapse because allied party leader Mamata Banerjee quit. However, they got majority support when the "no confidence" motion was passed by the opposition parties. Some of the evidence released later led to the Barak Missile scandal.

Six months after Tehelka had made public its investigations, The Indian Express acquired and published transcripts of the video tapes. It showed that as part of the investigations, the reporters hired prostitutes to serve the officials. This raised ethical questions about the methods used. Tejpal later issued a statement denying that any of its women staff were provided as prostitutes. Politicians of the ruling parties called for the journalist's arrests for supplying prostitutes and questioned their ethics. Tejpal called that part of the investigation as a "needed transgression". The public and majority of their competitors supported them; The Times of India concluded that the issue of ethics "pales before the sleaze their team has dug up", The Hindu called it a "turning point in Indian journalism" but The Indian Express criticised their methods. Tejpal received death threats and was given police protection. His reporters said that their "extraordinary methods" were for the larger public and national interest.

In 2003, the Tehelka reporters said that the government was trying to bring them down. The main investor was in jail for two and a half months; one journalist spent six months. Defamation and cases under the Official Secrets Act were filed against them. Their offices were searched and there were income tax investigations. V S Naipal held a news conference and met the then Deputy Prime Minister L K Advani. Naipal told the media, "This thing that has happened to Tehelka has been

profoundly disappointing to me, It comes from another era. It serves no purpose. It seems to me it will profoundly damage the country." In 2004, the Centre Bureau of Investigation registered cases against Jaitley, Laxman and others in the army and the Ministry of Defence. In 2012, Laxman was sentenced to four years in jail by additional sessions Judge Kanwal Jeet Arora for this case. Author and journalist Madhu Trehan wrote a non-fiction book in 2009 on this incident, called Tehelka as Metaphor.

(3) Gujarat 2002 :

In 2007, Tehelka released footage filmed over six months, showing several Bharatya Janta Party politicians admitting they had a role in attacking the Muslim community during the 2002 Gujarat violence. The report, called "The Truth: Gujarat 2002", was published in its 7 November 2007 issue and the video footage was shown on Aaj Tak. It said that the violence was possible because of approval by the state police, as well as the then Chief Minister of Gujarat Narendra Modi. The recordings were authenticated by India's Central Bureau of Investigation on 10 May 2009.

The report had factual inaccuracies when compared with official records concerning the location of Modi and a police superintendent. The timing of its release, a month before the election, led to partisan criticisms especially for bias against the Bharatya Janta Party. Ashish Khaitan, the journalist who worked on the report, testified in court and submitted it as evidence. Among the 14 named were Bajrang Dal leader Babu Bajrangi and seven who were accused in the riot case.

In one video, Bajrangi said that a mob which he had led killed 91 Muslim men and women at Naroda Patiya; they then raped a pregnant women, slit open her womb and threw both the foetus and her into a fire. Bajrangi denied these charges and in 2010, the doctor who performed post mortem on the bodies at the time during the violence, testified before a special court. The court identified the deceased woman and found only evidence of 100 percent burns on her body during the post mortem.

(D) Cash for Votes Sting Operation:

Cable News Network-Indian Broadcasting Network carried out an undercover sting operation in 2008 to expose the cash-for-votes scandal, in which the Sonia Gandhi led United Progressive Alliance allegedly bribed other party Members of Parliament to survive a confidence vote in Parliament. Cash for votes' scandal really rocked the parliament and was made certain through a sting operation by Cable News Network-Indian Broadcasting Network, which showed on tape Amar Singh aide giving money to a Bharatya Janta Party Member of Parliament. The Bharatya Janta Party Members of Parliament waved money around the Parliament alleging that they were bribed by United Progressive Alliance to cast vote in their favor during the confidence vote on Indo-United States nuclear deal.

The cash-for-votes scandal was an Indian political scandal allegedly masterminded by then Opposition Party Bharatiya Janata Party politician Sudheendra Kulkarni in which the United Progressive Alliance, the majority-holding parliamentary-party alliance of India led by Sonia Gandhi, allegedly bribed Bhartiya Janta Party Members of Parliament in order to survive a confidence vote on 22 July 2008. The vote in the Lok Sabha arose after the Communist Party of India (Marxist)-led Left Front

withdrew support from the government, who wanted to pursue an Indo-United States nuclear deal.

(1) Evidence in Cash for Vote Case:

The Congress Party had worked to support the government in the vote and on 17 March 2011 Wiki Leaks claimed that Nachiketa Kapur, a Congress Party political aide, had boasted to United States Embassy officials in July 2008 that his party had funds to bribe Members of Parliament in order to obtain a favourable outcome. Kapur claimed that four Members of Parliament who were members of Rashtriya Lok Dal had already been paid off. The Hindu reported that Five days before the Manmohan Singh government faced a crucial vote of confidence on the Indo-United States nuclear deal in 2008, a political aide to Congress leader Satish Sharma showed a United States Embassy employee "two suitcases containing cash" he said was part of a bigger fund of Rs. 500 million ($13 million) to Rs. 600 million ($15 million) that the party had assembled to purchase the support of Members of Parliament."

Former United States Ambassador to India David Campbell Mulford commented that United States diplomatic cables were "generally accurate" but that all he could recall of the incident was that someone "turned out with a suitcase of money and dumped it on the table ... That was clear theatrics." In denying any wrongdoing, the Rashtriya Lok Dal pointed out that they only had three Members of Parliament at the time, not four as stated in the leaked cable. Satish Sharma, who was the person for whom Kapur acted as an aide according to the cable, said that he had no aide at all.

The revelations led immediately to further calls for the resignation of Manmohan Singh and also for an investigation of the activities of Kapur and Sharma. There were also calls for the issue of a First Information Report, which is the formal means by which the police record their notification of an offence.

It was announced on the following day, 18 March, that the police investigation into the original allegations was near to completion.

An application was made to the Supreme Court on 2 April requesting that it ordered a Special Investigation Team to probe the affair. The applicants were a group calling themselves the India Rejuvenation Initiative and they argued that the investigatory process had stalled since the report of the parliamentary committee. The hearing was adjourned to due a procedural irregularity in the application, and when this was resolved on 2 May the Court issued notices to the Delhi police and government that required them to provide information regarding the current status of the investigation. The petitioners said that the cash-for-vote incident showed the desperate depths to which certain political functionaries and parties stooped to ensure victory on the floor of the House, and these exposures represent both a gross moral degeneration and crass political opportunism of the government and had degraded and disgraced our sacrosanct traditions of parliamentary democracy,

On 7 July the Court voiced its frustration with the continued absence of the requested status reports and set a filing deadline of 15 July. The police had requested a further two months to fulfil the request. Upon being presented with the status report, the Court criticised the lethargy of the police investigation, complaining that little had been done and that

which had been done was poorly documented, inconsistent and in places factually incorrect.

The court was similarly disparaging of a second report which followed on from a burst of activity by the police. On 5 August 2011, Justice Loda said that what are you doing regarding these inferences? It is distressing that middlemen of the cheapest kind tried to manipulate Parliament proceedings. To some extent, they have succeeded. You must find out what is the source of the money. You failed to achieve anything substantial in the case for two years and got activated only after the apex court orders.

(2) Arrests in cash for vote case:

In September 2011, a former aide of India's top opposition leader LK Advani, Sudheendra Kulkarni, has been arrested in connection with an alleged cash-for-votes scandal. Kulkarni is alleged to have "master-minded" the operation. He says it was to expose corruption in the government. Kulkarni was an aide to senior Bharatiya Janata Party leader LK Advani at the time of the vote. He told the court that he was "a whistleblower" who intended to expose corruption. Police allege that Kulkarni approached Amar Singh's Samajwadi Party - an ally of the Congress-led government at the time of the vote - to offer bribe to Bharatya Janta Party Members of Parliament. He then got a television channel to secretly film the alleged bribe giving in order to nail the government, police allege.

Sanjeev Saxena, alleged to be an aide of the then Samajwadi Party general secretary Amar Singh was arrested on 17 July, two days after the police had been criticised by the Court. The police claimed to have

sufficient evidence to prove that he had delivered money to the three Bharatya Janta Party Members of Parliament and alleged that he had misled both their inquiry and that of parliament. They also announced that they had interviewed Bhahora and Kulaste, who were no longer Members of Parliament, but that their ability to interview Argal was hampered because he was still in office. They had applied to the Home Ministry for permission to interview him and Amar Singh, still a member of the Rajya Sabha, and further announced that they intended to re-interview Hindustani. The developments caused Deo to clarify that his committee had not absolved Singh of any involvement but rather that it had found no evidence to confirm involvement. He also had to explain that the decision not to interview Singh had been because the committee had no prima facie evidence of Singh's involvement, the summonsing process for a Rajya Sabha member would have been complex, and the outcome may have still been a failure to attend as Singh was not obliged to do so. Furthermore, he stated, the dissenting members of the committee had agreed with its conclusions but had disagreed with his chairmanship. Deo had become a cabinet minister on 12 July.

Delhi Police arrested Sohail Hindustani, a Bharatiya Janata Yuva Morcha activist was arrested on 20 July and announced that he would be repeating his previous statements that he had been approached by Singh and some members of the Congress Party who had wanted him to "arrange" Bharatya Janta Party votes. The police described him as the "orchestrator" and explained that he was working for the Bharatya Janta Party in an attempt to entrap the government, but his defence counsel has claimed that he was just a "whistleblower" and that as such he should not have been the primary focus of police attention. The Bharatya Janta Party took a similar line to defence counsel, claiming that the investigation was

an "eyewash", querying how police lethargy had turned so quickly and suggesting that they were being put under pressure by the government.

Amar Singh was interviewed on 22 July and on the same day the police announced that they wished to speak with Samajwadi Party Member of Parliament Rewati Raman Singh, whom the Bharatya Janta Party Members of Parliament alleged had approached them on behalf of Amar Singh. On the same day, the Court ordered that Hindustani and Saxena should be detained in custody for 14 days, despite defence arguments of police misconduct. The defence claimed that the police had not interviewed Hindustani and therefore had no new evidence upon which to base their recent claims of orchestration. When the police stated that interviews had taken place the defence counsel responded by noting that they had not been present for any such interviews and that their presence was a legal requirement. The detentions were subsequently extended to 18 August. Despite Amar Singh having previously fallen out with his party's leadership and being expelled from the party, Mulayam Singh, the leader of the SP, voiced his support for the ex-member on 24 July and claimed that Amar Singh had been framed. Rewati Raman Singh and Argal were interviewed by police on the following day, with Singh claiming that he gave them the same details as he had previously given to the investigatory committee, and Argal claiming that in fact Singh had approached him in relation to facilitating the alleged bribe. Kulkarni was interviewed on 14 July. Amar Singh was arrested on 6 September for his alleged involvement in the scam and was ordered to be remanded in custody until 19 September. He had appealed to the court to exempt him from appearing personally, stating that he was ill with an infection; however, his request was rejected. On 22 November 2013, a Delhi court accepted the statements of Amar Singh and three Bharatya Janta Party

men - Faggan Singh Kulaste, Ashok Argal and Mahabir Singh Bhagora - that their actions had been as whistleblowers. Saxena still stands trial under the Prevention of Corruption Act.

Conclusive remark

The Union Information and Broadcasting Ministry must favour the introduction of a clause to address "Sting Operations" in the Broadcasting Bill. The Ministry must make a clear distinction between stories that amount to an "invasion of privacy" and those which expose corruption or have political implications. However, "Sting Operations" which expose corruption and tell stories with political implications will be allowed, as any attempt to proceed against them would be seen as an effort to stifle the media.

What journalists and editors need to determine is who will benefit as a result of the reporting. If journalism is committed to democratic accountability, then the question that needs to be asked is whether the public benefits as a result of specific investigative reports. Does the press fulfill its social responsibility in revealing wrongdoing? Whose interests are being affected? Whose rights are being invaded? Is the issue at stake a matter of legitimate public interest? What the regulatory body will need to determine is who will benefit as a result of the reporting. Is the issue at stake a matter of legitimate public interest? These are some questions which need to be answered when going for a sting operation or going for making legislation on it.

The legislation must govern the conduct of the media and must define the extent media can sting a person's life and whom they can sting? In the United States for example, it is only the federal government

and the FBI alone has the right to use a hidden camera and go for sting operation. In India too some body like Centre Bureau of Investigation or any other body must only be legalized to perform sting and their conduct must be regulated through the legislations. This body must not be immune to any legal proceedings. There must be a proper authority like court or Attorney General, whose permission must be sought on proper proof against the subject of the sting. The subject of the sting must have the evidence of criminality.

Today the sting operations is taking place for commercial gains therefore the Supreme Court should take observations about it. Problem with the media is that it only campaigns for cases which appeal to its market and its imagination, which may result in its good reputation in front of the society.

To avoid falling into that trap, the sting operations need a code of conduct. Laws too, should be strengthened in this regard. Sting operations are completely justified if they are carried out with the protocol that has been talked about.

CHAPTER 6

THE DIGNITY OF A WOMAN: PROCEDURAL LAW AND JUDICIAL PRONOUNCEMENTS

In Indian society, woman occupies a vital position and venerable place. The Vedas glorified women as the mother, the creator, and one who gives life and worshipped her as Devi or Goddess. Women in India, today, are becoming the most vulnerable section as far as their safety and security is concerned. Violence against women can fit into several broad categories. Some of them are rape, domestic violence, sexual harassment, female infanticide etc.

Constitutional Provisions

The Constitution of India guarantees the right to equality to women. It embodies the general principles of equality before law and prohibits unreasonable discrimination between persons. Article 14 embodies the idea of equality expressed in preamble. Thus, in **Air India v. Nargesh Meerza,**[1] the Supreme Court struck down the offending regulations of Air India and Indian Airlines that provided than an airhostess would retire on attaining the age of 35 years, or on the first pregnancy, whichever was earlier.

Article 15(1) prohibits the state from discriminating on the basis of religion, race, case, sex, or place of birth, article 15(3) allows the state to make special provisions for women and children. Article 15 merely elaborates that same concept and acknowledges that women need special treatment for their up liftmen. Article 16 provides equality of opportunity

[1] AIR 1981 SC 1829

for all citizens in matters relating to employment or appointment to any office under the State. In **C. B. Muthamma v. Union of India,**[2] the Supreme Court held that a provision of the service rules requiring a female employee to obtain permission to obtain permission of the government in writing before getting married and denying her the right to be promoted on the ground of her being married was discriminatory.

Article 39 (a) Urges the state to provide equal right to adequate means of livelihood to men and women. Article 39 (d) Equal pay for equal work for both men and women. In the case of **Randhir Singh v. Union of India,**[3] held that equal pay for equal work is a constitutional goal and is capable of being enforced. In pursuance of Article 42 of the Constitution, the Maternity Benefit Act has been passed in 1961.Article 44 enjoins the state to secure for the citizens a uniform civil code throughout the territory of India. 51 A (e) says that it is the duty of the citizens to renounce practices that are derogatory to the dignity of women. Besides these constitutional provisions, there are several laws meant for the protection and benefit of women.

Chronology of Laws:-

The following is a list of some of the important national statutes which have a bearing on the promotion/protection of human Rights in India.

1829 - The practice of sati was formally abolished by Governor General William Bentick after years of campaigning by Hindu reform movements such as the Brahmo Samaj of Ram

[2] AIR 1979 SC 1868
[3] AIR 1982 SC 879

Mohan Roy against this orthodox Hindu funeral custom of self-immolation of widows after the death of their husbands.

1871 - Criminal Tribes Act 1871, was repealed by the government in 1952 and replaced by Habitual Offenders Act, 1952

1923 - Workmen's Compensation Act, 1923

1926 - Trade Unions Act, 1926

1929 - Child Marriage Restraint Act, prohibiting marriage of minors under 14 years of age is passed.

1933 - Children (Pledging of Labor) Act - Prohibit the pledging of the labour of children and the employment of children whose labor has been pledged.

1936 - Payment of Wages Act, 1936

1942 - Weekly Holidays Act, 1942

1946 - Industrial Employment Standing Orders Act, 1946

1947 - Industrial Disputes Act, 1947

1948 - Minimum Wages Act, 1948

1948 - Employees' State Insurance Act, 1948

1948 - Factories Act, 1948

1950 - The Constitution of India establishes a sovereign democratic republic with universal adult franchise. Part 3 of the Constitution contains a Bill of Fundamental Rights enforceable by the Supreme Court and the High Courts. It

also provides for reservations for previously disadvantaged sections in education, employment and political representation.

1950 - Caste Disabilities Removal Act, 1950

1952 - Criminal Tribes Acts repealed by government, former "criminal tribes" categorized as "denotified" and Habitual Offenders Act (1952) enacted.

1952 - The Employee Provident Funds and miscellaneous Provisions Act, 1952

1955 - Reform of family law concerning Hindus gives more rights to Hindu women.

1955 - Protection of Civil Rights Act, 1955.

1956 - Young Persons (Harmful Publications) Act - The Act seeks to prevent the dissemination of publications which are harmful to young persons.

1956 - Immoral Traffic Act, 1956

1960 - Orphanages and other Charitable Home (Supervision and Control) Act, 1960

1960 - Children Act, 1960

1961 - Apprentices Act, 1961

1961 - Maternity Benefit Act, 1961. This is an Act to provide maternity benefits, etc and to regulate employment of

women in certain establishments for certain periods before and after child birth.

1961 - Dowry Prohibition Act, 1961. This is an Act to prohibit the evil practice of giving and taking of dowry.

1966 - Beedi and Cigar Workers (Conditions of Employment) Act, 1966

1971 - Medical Termination of Pregnancy Act, 1971

1973 - Supreme Court of India rules in Kesavananda Bharati case that the basic structure of the Constitution is unalterable by a constitutional amendment.

1976 - Equal Remuneration Act, 1976

1976 - Beedi Workers Welfare Fund Act, 1976

1976 - Bonded Labor (System) Abolition Act, 1976 -The Act provides for the abolition of bonded labor system to prevent the economic and physical exploitation of the weaker sections of the people.

1978 - SC rules in Menaka Gandhi v. Union of India that the right to life under Article 21 of the Constitution cannot be suspended even in an emergency.

1985-86 - The Shah Bano case, where the Supreme Court recognized the Muslim woman's right to maintenance upon divorce, to nullify the decision of the Supreme Court, the Rajiv Gandhi government enacted The Muslim Women (Protection of Rights on Divorce) Act 1986

1986 - Environmental Protection Act, 1986

1986 - Juvenile Justice Act, 1986

1986 - Child Labor (Prohibition and Regulation) Act, 1986

1986 - Indecent Representation of Women (Prohibition) Act, 1986. This Act to prohibit incent representation of women through advertisements or in publications, writings, paintings, figures, or in any other manner.

1987 - Mental Health Act, 1987 - The Act regulates determination of lunacy, reception, care and treatment of mentally ill persons.

1987 - Commission of Sati (prevention) Act, 1987. This is an Act for effective prevention of the commission of Sati and its glorification.

1987 - National Commission for Scheduled Castes and Scheduled Tribes. Article 338 of the Constitution requires constitution of the National Commission for Scheduled Castes and Scheduled Tribes for better protection of the rights of the members of the Scheduled Castes and Scheduled Tribes.

1989 - Scheduled Caste and Scheduled Tribe (Prevention of Atrocities) Act, 1989 is passed.

1990 - National Commission for Women Act, 1990. An Act to constitute a National Commission for Women for better protection of the rights of women.

1992 - A constitutional amendment establishes Local Self-Government (Panchayati Raj) s a third tier of governance at the village level, with one-third of the seats reserved for women. Reservations were provided for scheduled castes and tribes as well.

1992 - National Commission for Minorities Act, 1992 An Act to constitute a National Commission for Minorities for better protection of the rights of the minorities.

1993 - National Human Rights Commission is established under the Protection of Human Rights Act, 1993

1993 - The South Asian Association for Regional Cooperation Convention (Suppression of Terrorism) Act, 1993

1993 - Employment of Manual Scavengers and Construction of Dry Latrines (Prohibition) Act, 1993 It provides for the prohibition of all manual scavengers as well as construction or continuance of dry latrines and for the regulation of construction and maintenance of water-seal latrines.

1994 - The Transplantation of Human Organs Act, 1994

1994 - The Pre-Natal Diagnostic Techniques (Regulation and Prevention of Misuse) Act, 1994

2001 - Supreme Court passes extensive orders to implement the right to food.

2005 - A powerful Right to Information Act is passed to give citizen's access to information held by public authorities.

2005 - National Rural Employment Guarantee Act, 2005 guarantees universal right to employment.

2006 - Supreme Court orders police reforms.

2009 - Delhi High Court declares that Section 377 of the Indian Penal Code, which outlaws a range of unspecified "unnatural" sex acts, is unconstitutional when applied to homosexual acts between private consenting individuals, effectively decriminalizing homosexual relationships in India.

2010 - The Right of children to Free and Compulsory Education Act came into force. This is a historic day for the people of India as from this day the right to education will be accorded the same legal status as the right to life as provided by Article 21A of the Indian Constitution. Every child in the age group of 6-14 years will be provided 8 years of elementary education in an age appropriate classroom in the vicinity of his/her neighbourhood.

2012 - Direct Cash Transfer Scheme launched.

2012 - Chhattisgarh Legislative Assembly passed the Food Security Bill aimed at providing food arid nutritional security to around 50 lakh families in the state.

2012 - Protection of Children from Sexual Offences Act, 2012.

2013 - Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013

2013 - National Food Security Act, 2013

2013 - Lokpal and Lokayuktas Act, 2013

2014 - Street Vendors Act, 2014

2014 - Whistle Blowers Protection Act, 2011

2015 - Citizenship (Amendment) Bill, 2015

2015 - Black Money (Undisclosed Foreign Income and Assets) and Imposition of Tax Act, 2015

(I) Supreme Court of India

Kharak Singh Petitioner

Versus

State of Uttar Pradesh & Others[4] Respondent

Fact of the cases:-

1. The petitioner alleges that several false cases have been filed against him in criminal courts by the police but that he was acquitted in all but two cases. He says that on the basis that he is a habitual criminal, the police have opened a history sheet against him and that he has been put under surveillance.

2. The petitioner says that the police are making domiciliary visits both by day and by night at frequent intervals, that they are secretly picketing his house and the approaches to his house, that his movements are being watched by the patel of the village and that when the police come to the village for any purpose, he is called and harassed with the result that his reputation has sunk how in the estimation of his

[4] AIR 1963 SC 1295

neighbours. The petitioner submits that whenever he leaves the village for another place he has to report tothe Chowkidar of the village or to the police station about his departure and that he has to give further information about his destination and the period within which he would return. The petitioner contends that these actions of the police are violative of the fundamental right guaranteed to him under Articles 19(1)(d) and 21 of the Constitution, and he prays for a declaration that Regulations 855 and 856 are void as contravening his fundamental rights under the above Articles.

3. In the return filed, it is stated that "the petitioner has managed to commit many crimes during the period 1960 to 1969. In the year 1962 the petitioner was convicted in one case under Section 452 of the Indian Penal Code, 1860 and was fined Rs. 100/- in default rigorous imprisonment of two months and in another case he was convicted under Section 456 of the Indian Penal Code, 1860 and was fined Rs. 501- and in default rigorous imprisonment of one month. In the year 1969 the petitioner was convicted under Section 55/109 Criminal Procedure Code and was bound over for a period of one year by Sub-Divisional Magistrate, Jatara. In the year 1969, the petitioner cot compounded a case pending against him under Section 325/147/324 of the Indian Penal Code, 1860."

Judgement:-

4. Justice Subba Rao, held that the word 'liberty' in Article 21 was comprehensive enough to include privacy also. He said that although it is true our Constitution does not expressly declare a right to privacy as a fundamental right, but the right is an essential ingredient of personal liberty, that in the last resort, a person's house where he lives with his

family, is his 'castle's that nothing is more deleterious to a man's physical happiness and health than a calculated interference with his privacy and that all, he acts of surveillance under Regulation 236 infringe the fundamental right of the petitioner under Article 21 of the Constitution. And, as regards Article 19(1)(d), he was of the view that that right also Was violated. He said that the right under that sub-Article is not mere freedom to move without physical obstruction and observed that movement under the scrutinizing gaze of the policemen cannot be free movement, that the freedom of movement in Clause (d) therefore must be a movement in a free country, that is, in a country where he can do whatever he likes, speak to whomsoever he wants, meet people of his own choice without any apprehension, subject of course to the law of social control and that a person under the shadow of surveillance is certainly deprived of this freedom. He concluded by say in that Surveillance by domiciliary visits and other acts is -an abridgement of the fundamental right guaranteed under Article 19(1)(i) and under Article 19(1) (a). He however did not specifically consider whether regulation 236 could be justified as a reasonable restriction in public interest falling within Article 19(5).

In my opinion the court declared 'liberty' in an absolute view for the fundamental rights protection. The court held that Article 21 was enough to include privacy also. Although it is true our Constitution does not expressly declare a right to privacy as a fundamental right, but the right is an essential ingredient of personal liberty and dignity of a person. In matter of a family, men and women both are living for the protection of women dignity right to privacy is essential.

Govind Petitioner

Versus

State of Madhya Pradesh & Another[5] Respondent

BENCH:-

MATHEW, KUTTYIL KURIEN; KRISHNAIYER, V.R.; GOSWAMI, P.K.

Fact of the case:-

1. The petitioner in a petition under Article 32, challenged the validity of Regulations 855 and 856 of the Madhya Pradesh Police Regulations made by the Government under the Police Act, 1961. Regulation 855 provides that where on information the District Superintendent believes that a particular individual is leading a life of crime, and his conduct shows a determination to lead a life of crime that individual's name may be ordered to be entered in the surveillance register, and he would be placed under regular surveillance. Regulation 856 provides that such surveillance, inter alia may consist of domiciliary visits both by day and night at frequent but irregular intervals.

2. It was contended that, (1) the Regulations were not framed under any provision of the Police Act, and (2) even if they were framed tinder Section 46(2) of the Police Act, the provisions regarding domiciliary visits offended Articles 19(1)(d) and 21.

[5] AIR 1975 SC 1378

Decision of the court:-

3. The Regulations were framed under Section 46(2)(c) of the Police Act and have the force of law. The paragraph provides that the State Government may make rules generally for giving effect to the provisions of the Act; and one of the objects of the Act is to prevent the commission of crimes. The provision regarding domiciliary visits is intended to prevent commission of offences, because, their object is to see if the individual is at home or gone out of it for commission of offences.

4. (a) Too broad a definition of privacy will raise serious questions about the propriety of judicial reliance on aright that is not explicit in the Constitution. The right to privacy will, therefore, necessarily, have to go through a process of case by case development. Hence, assuming that the right to personal liberty. The right to move freely throughout India and the freedom of speech create an independent fundamental right of privacy as an emanation from them it could not he absolute. It must be subject to restriction on the basis of compelling public interest. But the law infringing it must satisfy the compelling state interest test.

(b) Drastic inroads directly into privacy and indirectly into fundamental right will be made if the Regulations were to be read too widely. When there are two interpretations one wide and unconstitutional, and the other narrower but within constitutional bound, the Court will read down the over flowing expressions to make them valid.

(c) As the Regulations have force of law, the petitioner's fundamental right under Article 21 is not violated.

(d) It cannot be said that surveillance by domiciliary visit, would always be an unreasonable restriction upon the right of privacy. It is only

persons who are suspected to be habitual criminals and those who are determined to lead a criminal life that are Subjected to surveillance. If 'crime' in this context is confined to such acts as involve public peace or security, the law imposing such a reasonable restriction must be upheld as valid.

In my opinion the court held that right to privacy is essential against the torture of police for the protection of men and women protection. Policemen have a long experience of violation of privacy which is against fundamental rights.

Dattatraya Govind Mahajan Petitioner

Versus

State of Maharashtra[6] Respondent

1. "Our Constitution is a tryst with destiny, preamble with luscent solemnity in the words 'Justice – social, economic and political.' The three great branches of Government, as creatures of the Constitution, must remember this promise in their fundamental role and forget it at their peril, for to do so will be a betrayal of chose high values and goals which this nation set for itself in its objective Resolution and whose elaborate summation appears in Part IV of the Paramount Parchment. The history of our country's struggle for independence was the story of a battle between the forces of socio-economic exploitation and the masses of deprived people of varying degrees and the Constitution sets the new sights of the nation…..Once we grasp the dharma of the Constitution, the new orientation of the karma of adjudication becomes clear. Our founding fathers, aware of our social realities, forged our fighting faith

[6] AIR 1977 SC 915

and integrating justice in its social, economic and political aspects. While contemplating the meaning of the Articles of the Organic Law, the Supreme Court shall not disown Social Justice."

2. It is now very well recognized that the Constitution is a living character; its interpretation must be dynamic. It must be understood in a way that intricate and advances modern realty. The judiciary is the guardian of the Constitution and by ensuring to grant legitimate right that is due to Transgender's, we are simply protecting the Constitution and the democracy inasmuch as judicial protection and democracy in general and of human rights in particular is a characteristic of our vibrant democracy.

In my opinion the court held that right to privacy is essential element in relation to our constitutional direction. Our Constitution is a tryst with destiny, preamble with luscent solemnity in the words 'Justice – social, economic and political.' The three great branches of Government must remember this promise in their fundamental role and forget it at their peril, for to do so will be a betrayal of chose high values and goals which this nation set for itself in its objective Resolution and whose elaborate summation appears in Part IV of the Paramount Parchment.

Vishaka and others PETITIONER

Versus

State of Rajasthan and others[7] RESPONDENT

BENCH: Chief Justice of India Verma, Sujata V. Manohar, B. N. Kirpal

Subject Matter :- This case is related to a writ petition for protection of women from sexual harassment.

Facts of the Case in Brief :-

1. In 1992 Bhanwari Devi a social worker in Rajasthan was brutally gang raped by a number of upper class men, because she had tried to stop a child marriage. Bhanwari Devi was determined to get justice and lodged a case against the offenders. However, the accused was acquitted by a trial court. This appalling injustice, together with the fighting spirit of Bhanwari Devi, inspired several women's groups and Non-Governmental Organizations to file a petition in the Supreme Court under the collective platform of Vishakha. This Writ Petition has been filed for the enforcement of the fundamental rights of working women under Articles 14, 19 and 21of the Constitution of India in view of the prevailing climate in which the violation of these rights is not uncommon. With the increasing awareness and emphasis on gender justice, there is increase in the effort to guard such violations; and the resentment towards incidents of sexual harassment is also increasing. The present petition has been brought as a class action by certain social activists and Non Governmental Organizations with the aim of focussing attention towards this societal aberration, and assisting in finding suitable methods for realisation of the true concept of 'gender equality'; and to prevent sexual

[7] AIR 1997 SC 3011

harassment of working women in all work places through judicial process, to fill the vacuum in existing legislation.

2. The immediate cause for the filing of this writ petition is an incident of alleged brutal gang rape of social worker in a village of Rajasthan. That incident is the subject matter of a separate criminal action and no further mention of it, by us, is necessary. The incident reveals the hazards to which a working woman may be exposed and the depravity to which sexual harassment can degenerate; and the urgency for safeguards by an alternative mechanism in the absence of legislative measures. In the absence of legislative measures, the need is to find an effective alternative mechanism to fulfil this felt and urgent social need.

3. Each such incident results in violation of the fundamental rights of 'Gender Equality' and the 'Right of Life and Liberty'. It is clear violation of the rights under Articles 14, 15 and 21 of Constitution. One of the logical consequences of such an incident is also the violation of the victim's fundamental right under Article 19(1)(g) 'to practice any profession or to carry out any occupation, trade or business'. Such violations, therefore, attract the remedy under Article 32 for the enforcement of these fundamental rights of women. This class action under Article 32 of the Constitution is for this reason. A writ of mandamus in such a situation, if it is to be effective, needs to be accompanied by directions for prevention; as the violation of fundamental rights of this kind is a recurring phenomenon. The fundamental right to carry on any occupation, trade or profession depends on the availability of a "safe" working environment. Right to life means life with dignity. The primary responsibility fro ensuring such safety and dignity through suitable legislation, and the creation of a mechanism for its enforcement, is of the legislature and the executive. When, however, instances of sexual harassment resulting in violation of fundamental rights of women

workers under Articles 14, 19 and 21 are brought before us for redress under Article 32, an effective redressal requires that some guidelines should be laid down for the protection of these rights to fill the legislative vacuum.

4. The notice of the petition was given to the State of Rajasthan and the Union of India. The learned Solicitor General appeared for the Union of India and rendered valuable assistance in the true spirit of a Law Officer to help us find a proper solution to this social problem of considerable magnitude. In addition to Ms. Meenakshi Arora and Ms. Naina Kapur who assisted the Court with full commitment, Shri Fali S. Nariman appeared as Amicus Curiae and rendered great assistance. We place on record our great appreciation for every counsel who appeared in the case and rendered the needed assistance to the Court which has enabled us to deal with this unusual matter in the manner considered appropriate for a cause of this nature.

5. Apart from Article 32 of the Constitution of India, we may refer to some other provision which envisage judicial intervention for eradication of this social evil. Some provisions in the Constitution in addition to Articles 14, 19(1)(g) and 21.

6. Entering into treaties and agreements with foreign countries and implementing of treaties, agreements and conventions with foreign countries. In the absence of domestic law occupying the field, to formulate effective measures to check the evil of sexual harassment of working women at all work places, the contents of International Conventions and norms are significant for the purpose of interpretation of the guarantee of gender equality, right to work with human dignity in Articles 14, 15 19(1)(g) and 21 of the Constitution and the safeguards against sexual harassment implicit therein. Any International Convention

not inconsistent with the fundamental rights and in harmony with its spirit must be read into these provisions to enlarge the meaning and content thereof, to promote the object of the constitutional guarantee. This is implicit from Article 51(c) and enabling power of the Parliament to enact laws for implementing the International Conventions and norms by virtue of Article 253 read with Entry 14 of the Union List in Seventh Schedule of the Constitution. Article 73 also is relevant. It provides that the executive power of the Union shall extend to the matters with respect to which Parliament has power to make laws. The executive power of the Union is, therefore, available till the parliament enacts to expressly provide measures needed to curb the evil.

7. Thus, the power of this Court under Article 32 for enforcement of the fundamental rights and the executive power of the Union have to meet the challenge to protect the working women from sexual harassment and make their fundamental rights meaningful. Governance of the society by the rule of law mandates these requirements as a logical concomitant of the constitutional scheme. The exercise performed by the Court in this matter is with this common perception shared with the learned Solicitor General and other members of the Bar who rendered valuable assistance in the performance of this difficult task in public interest.

8. Gender equality includes protection from sexual harassment and right to work with dignity, which is a universally recognised basic human right. The common minimum requirement ofthis right has received global acceptance. The International Conventions and norms are, therefore, of great significance in the formulation of the guidelines to achieve this purpose.

9. In view of the above, and the absence of enacted law to provide fro the effective enforcement of the basic human right of gender equality and

guarantee against sexual harassment and abuse, more particularly against sexual harassment at work places, we lay down the guidelines and norms specified hereinafter for due observance at all work places or other institutions, until a legislation is enacted for the purpose. This is done in exercise of the power available under Article 32 of the Constitution for enforcement of the fundamental rights and it is further emphasised that this would be treated as the law declared by this Court under Article 141 of the Constitution.

Principal laid down :-

10. The Guidelines and Norms prescribed herein are as under:-

Having regard to the definition of 'human rights' in Section 2(d) of the Protection of Human Rights Act, 1993, taking note of the fact that the present civil and penal laws in India do not adequately provide for specific protection of women from sexual harassment in work places and that enactment of such legislation will take considerable time, It is necessary and expedient for employers in work places as well as other responsible persons or institutions to observe certain guidelines to ensure the prevention of sexual harassment of women:

A. Duty of the Employer or other responsible persons in work places and other institutions:

It shall be the duty of the employer or other responsible persons in work places or other institutions to prevent or deter the commission of acts of sexual harassment and to provide the procedures for the resolution, settlement or prosecution of acts of sexual harassment by taking all steps required.

Where any of these acts is committed in circumstances where under the victim of such conduct has a reasonable apprehension that in relation to the victim's employment or work whether she is drawing salary, or honorarium or voluntary, whether in government, public or private enterprise such conduct can be humiliating and may constitute a health and safety problem. It is discriminatory for instance when the woman has reasonable grounds to believe that her objection would disadvantage her in connection with her employment or work including recruiting or promotion or when it creates a hostile work environment. Adverse consequences might be visited if the victim does not consent to the conduct in question or raises any objection thereto.

B. Preventive Steps:

All employers or persons in charge of work place whether in the public or private sector should take appropriate steps to prevent sexual harassment. Without prejudice to the generality of this obligation they should take the following steps:

(a) Express prohibition of sexual harassment as defined above at the work place should be notified, published and circulated in appropriate ways.

(b) The Rules/Regulations of Government and Public Sector bodies relating to conduct and discipline should include rules/regulations prohibiting sexual harassment and provide for appropriate penalties in such rules against the offender.

(c) As regards private employers steps should be taken to include the aforesaid prohibitions in the standing orders under the Industrial Employment (Standing Orders) Act, 1946.

(d) Appropriate work conditions should be provided in respect of work, leisure, health and hygiene to further ensure that there is no hostile environment towards women at work places and no employee woman should have reasonable grounds to believe that she is disadvantaged in connection with her employment.

C. Criminal Proceedings:

Where such conduct amounts to a specific offence under the Indian Penal Code or under any other law the employer shall initiate appropriate action in accordance with law by making a complaint with the appropriate authority.

In particular, it should ensure that victims, or witnesses are not victimized or discriminated against while dealing with complaints of sexual harassment. The victims of sexual harassment should have the option to seek transfer of the perpetrator or their own transfer.

D. Disciplinary Action:

Where such conduct amounts to mis-conduct in employment as defined by the relevant service rules, appropriate disciplinary action should be initiated by the employer in accordance with those rules.

E. Complaint Mechanism:

Whether or not such conduct constitutes an offence under law or a breach of the service rules, an appropriate complaint mechanism should be created inthe employer's organization for redress of the complaint made by the victim. Such complaint mechanism should ensure time bound treatment of complaints.

F. Complaints Committee:

The complaint mechanism, referred to in (6) above, should be adequate to provide, where necessary, a Complaints Committee, a special counsellor or other support service, including the maintenance of confidentiality.

The Complaints Committee should be headed by a woman and not less than half of its member should be women.

Further, to prevent the possibility of any under pressure or influence from senior levels, such Complaints Committee should involve a third party,either Non Governmental Organization or other body who is familiar with the issue of sexual harassment.

The Complaints Committee must make an annual report to the government department concerned of the complaints and action taken by them. The employers and person in charge will also report on the compliance with the aforesaid guidelines including on the reports of the Complaints Committee to the Government department.

G. Workers' Initiative:

Employees should be allowed to raise issues of sexual harassment at workers meeting and in other appropriate forum and it should be affirmatively discussed in Employer-Employee Meetings.

H. Awareness:

Awareness of the rights of female employees in this regard should be created in particular by prominently notifying the guidelines in suitable manner.

Accordingly, we direct that the above guidelines and norms would be strictly observed in all work places for the preservation and enforcement of the right to gender equality of the working women. These directions would be binding and enforceable in law until suitable legislation is enacted to occupy the field. These Writ Petitions are disposed of, accordingly.

In my opinion this is a landmark judgement because for the first time sexual harassment had been explicitly- legally defined as an unwelcome sexual gesture or behaviour whether directly or indirectly. In this case sexual harassment was identified as a separate illegal behaviour. The critical factor in sexual harassment is the unwelcome ness of the behaviour. Thereby making the impact of such actions on the recipient more relevant rather than intent of the perpetrator- which is to be considered. For dignity and protection of liberty **Rupan Deol Bajaj v. K P. S. Gill**,[8] is also important. In this case a senior Indian Administrative Service officer, Rupan Bajaj was slapped on the posterior by the then Chief of Police, Punjab- Mr. K. P. S. Gill at a dinner party in July 1988. Rupan Bajaj filed a suit against him, despite the public opinion that she was blowing it out of proportion, along with the attempts by all the senior officials of the state to suppress the matter. The Supreme Court in January, 1998 fined Mr. K. P. S. Gill Rs.2.5 lacs in lieu of three months rigorous imprisonment under Sections. 294 and 509 of the Indian Penal Code.

[8] AIR 1996 SC 309 .

National Legal Services Authority … Petitioner

Versus

Union of India and others[9] … Respondents

Bench : K.S. Radhakrishnan, J.

Subject Matter :-

1. This case is related to the recognisaton of transgender community. This writ petition was filed by National Legal Service Authority to rule out the obstacle faced by the transgender community.

Fact in Brief :-

2. Seldom, our society realizes or cares to realize the trauma, agony and pain which the members of Transgender community under neither go, nor appreciates the innate feelings of the members of the Transgender community, especially of those whose mind and body disown their biological sex. Our society often ridicules and abuses the Transgender community and in public places like railway stations, bus stands, schools, workplaces, malls, theatres, hospitals, they are sidelined and treated as untouchables, forgetting the fact that the moral failure lies in the society's unwillingness to contain or embrace different gender identities and expressions, a mindset which we have to change.

3. Indian society thinks about the grievances of the members of Transgender Community who seek a legal declaration of their gender identity than the one assigned to them, male or female, at the time of birth and their prayer is that non-recognition of their gender identity violates

[9] Writ Petition (Civil) No.400 of 2012.

Articles 14 and 21 of the Constitution of India. Hijras/Eunuchs, who also fall in that group, claim legal status as a third gender with all legal and constitutional protection.

4. The National Legal Services Authority, constituted under the Legal Services Authority Act, 1997, to provide free legal services to the weaker and other marginalized sections of the society, has come forward to advocate their cause, by filing Writ Petition. Poojaya Mata Nasib Kaur Ji Women Welfare Society, a registered association, has also preferred Writ Petition, seeking similar reliefs in respect of Kinnar community, a transgender community.

Arguments :-

5. Shri Raju Ramachandran, learned senior counsel appearing for the petitioner the National Legal Services Authority, highlighted the traumatic experiences faced by the members of the transgender community and submitted that every person of that community has a legal right to decide their sex orientation and to espouse and determine their identity. Learned senior counsel has submitted that since the Transgender's are neither treated as male or female, nor given the status of a third gender, they are being deprived of many of the rights and privileges which other persons enjoy as citizens of this country. Transgender's are deprived of social and cultural participation and hence restricted access to education, health care and public places which deprives them of the Constitutional guarantee of equality before law and equal protection of laws. Further, it was also pointed out that the community also faces discrimination to contest election, right to vote, employment, to get licences etc. and, in effect, treated as an outcast and untouchable. Learned senior counsel also submitted that the State cannot

discriminate them on the ground of gender, violating Articles 14 to 16 and 21 of the Constitution of India.

6. Shri Anand Grover, learned senior counsel appearing for the Intervener, traced the historical background of the third gender identity in India and the position accorded to them in the Hindu Mythology, Vedic and Puranic literatures, and the prominent role played by them in the royal courts of the Islamic world etc. Reference was also made to the repealed Criminal Tribes Act, 1871 and explained the inhuman manner by which they were treated at the time of the British Colonial rule. Learned senior counsel also submitted that various International Forums and United Nations Bodies have recognized their gender identity and referred to the Yogyakarta Principles and pointed out that those principles have been recognized by various countries around the world. Reference was also made to few legislations giving recognition to the trans-sexual persons in other countries. Learned senior counsel also submitted that non-recognition of gender identity of the transgender community violates the fundamental rights guaranteed to them, who are citizens of this country.

7. Shri T. Srinivasa Murthy, learned counsel appearing and submitted that transgender persons have to be declared as a socially and educationally backward classes of citizens and must be accorded all benefits available to that class of persons, which are being extended to male and female genders. Learned counsel also submitted that the right to choose one's gender identity is integral to the right to lead a life with dignity, which is undoubtedly guaranteed by Article 21 of the Constitution of India. Learned counsel, therefore, submitted that, subject to such rules/regulations/protocols, transgender persons may be afforded

the right of choice to determine whether to opt for male, female or transgender classification.

8. Shri Sanjeev Bhatnagar, learned counsel highlighted the cause of the Kinnar community and submitted that they are the most deprived group of transgenders and calls for constitutional as well as legal protection for their identity and for other socio-economic benefits, which are otherwise extended to the members of the male and female genders in the community.

9. Shri Rakesh K. Khanna, learned Additional Solicitor General, appearing for the Union of India, submitted that the problems highlighted by the transgender community is a sensitive human issue, which calls for serious attention. Learned Additional Solicitor General pointed out that, under the aegis of the Ministry of Social Justice and Empowerment, a Committee, called "Expert Committee on Issues relating to Transgender", has been constituted to conduct an in-depth study of the problems relating to transgender persons to make appropriate recommendations to Ministry of Social Justice and Empowerment. Shri Khanna also submitted that due representation would also be given to the applicants, appeared before this Court in the Committee, so that their views also could be heard.

UNITED NATIONS AND OTHER HUMAN RIGHTS BODIES – ON GENDER IDENTITY AND SEXUAL ORIENTATION

10. United Nations has been instrumental in advocating the protection and promotion of rights of sexual minorities, including transgender persons. Article 6 of the Universal Declaration of Human Rights, 1948 and Article 16 of the International Covenant on Civil and Political Rights, 1966 recognize that every human being has the inherent right to live and

this right shall be protected by law and that no one shall be arbitrarily denied of that right. Everyone shall have a right to recognition, everywhere as a person before the law. Article 17 of the International Covenant on Civil and Political Rights states that no one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation and that everyone has the right to protection of law against such interference or attacks. International Commission of Jurists and the International Service for Human Rights on behalf of a coalition of human rights organizations, took a project to develop a set of international legal principles on the application of international law to human rights violations based on sexual orientation and sexual identity to bring greater clarity and coherence to State's human rights obligations. A distinguished group of human rights experts has drafted, developed, discussed and reformed the principles in a meeting held at Gadjah Mada University in Yogyakarta, Indonesia from 6 to 9 November, 2006, which is unanimously adopted the Yogyakarta Principles on the application of International Human Rights Law in relation to Sexual Orientation and Gender Identity. Yogyakarta Principles address a broad range of human rights standards and their application to issues of sexual orientation gender identity. Reference to few Yogyakarta Principles would be useful.

11. Judgments referred to above are mainly related to transsexuals, who, whilst belonging physically to one sex, feel convinced that they belong to the other, seek to achieve a more integrated unambiguous identity by undergoing medical and surgical operations to adapt their physical characteristic to their psychological nature. When we examine the rights of transsexual persons, who have undergone sex re-assignment surgery, the test to be applied is not the "Biological test", but the

"Psychological test", because psychological factor and thinking of transsexual has to be given primacy than binary notion of gender of that person. Seldom people realize the discomfort, distress and psychological trauma, they undergo and many of them undergo "Gender Dysphoria' which may lead to mental disorder. Discrimination faced by this group in our society, is rather unimaginable and their rights have to be protected, irrespective of chromosomal sex, genitals, assigned birth sex, or implied gender role. Rights of transgenders, pure and simple, like Hijras, eunuchs, etc. have also to be examined, so also their right to remain as a third gender as well as their physical and psychological integrity. Before addressing those aspects further, we may also refer to few legislations enacted in other countries recognizing their rights.

12. Article 21 of the Constitution of India reads as follows:

"21. Protection of life and personal liberty – No person shall be deprived of his life or personal liberty except according to procedure established by law." Article 21 is the heart and soul of the Indian Constitution, which speaks of the rights to life and personal liberty. Right to life is one of the basic fundamental rights and not even the State has the authority to violate or take away that right. Article 21 takes all those aspects of life which go to make a person's life meaningful. Article 21 protects the dignity of human life, one's personal autonomy, one's right to privacy, etc. Right to dignity has been recognized to be an essential part of the right to life and accrues to all persons on account of being humans. In **Francis Coralie Mullin v. Administrator, Union Territory of Delhi,**[10] this Court held that the right to dignity forms an essential part of our constitutional culture which seeks to ensure the full development and evolution of persons and includes "expressing oneself in diverse

[10] (1981) 1 SCC 608 (paras 7 and 8)

forms, freely moving about and mixing and commingling with fellow human beings".

13. Recognition of one's gender identity lies at the heart of the fundamental right to dignity. Gender, as already indicated, constitutes the core of one's sense of being as well as an integral part of a person's identity. Legal recognition of gender identity is, therefore, part of right to dignity and freedom guaranteed under our Constitution.

14. Article 21, as already indicated, guarantees the protection of "personal autonomy" of an individual. In **Anuj Garg v. Hotel Association of India**,[11] this Court held that personal autonomy includes both the negative right of not to be subject to interference by others and the positive right of individuals to make decisions about their life, to express themselves and to choose which activities to take part in. Self-determination of gender is an integral part of personal autonomy and self-expression and falls within the realm of personal liberty guaranteed under Article 21 of the Constitution of India.

15. The basic spirit of our Constitution is to provide each and every person of the nation equal opportunity to grow as a human being, irrespective of race, caste, religion, community and social status. The concept of equality in Article 14 so also the meaning of the words 'life', 'liberty' and 'law' in Article 21 have been considerably enlarged by judicial decisions. Anything which is not 'reasonable, just and fair' is not treated to be equal and is, therefore, violative of Article 14.

[11] (2008) 3 SCC 1 (paragraphs 34-35)

16. Speaking for the vision of our founding fathers, in **State of Karnataka v. Rangnatha Reddy**,[12] this Court speaking through Justice Krishna Iyer observed:

"The social philosophy of the Constitution shapes creative judicial vision and orientation. Our nation has, as its dynamic doctrine, economic democracy sans which political democracy is chimerical. We say so because our Constitution, in Parts III and IV and elsewhere, ensouls such a value system, and the debate in this case puts precisely this soul in peril….Our thesis is that the dialectics of social justice should not be missed if the synthesis of Parts III and Part IV is to influence State action and court pronouncements. Constitutional problems cannot be studied in a socio-economic vacuum, since socio- cultural changes are the source of the new values, and sloughing off old legal thought is part of the process the new equity- loaded legality. A judge is a social scientist in his role as constitutional invigilator and fails functionally if he forgets this dimension in his complex duties."

17. A most remarkable feature of this expansion of Article 21 is that many of the non-justiciable Directive Principles embodied in Part IV of the Constitution have now been resurrected as enforceable fundamental rights by the magic wand of judicial activism, playing on Article 21. A corollary of this development is that while so long the negative language of Article 21 and use of the word 'deprived' was supposed to impose upon the State the negative duty not to interfere with the life or liberty of an individual without the sanction of law, the width and amplitude of this provision has now imposed a positive obligation[13] upon the State to take

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12 AIR 1978 SC 215

13 Vincent Panikurlangara v. Union of India, AIR 1987 SC 990

steps for ensuring to the individual a better enjoyment of his life and dignity.

18. We are in the age of democracy, that too substantive and liberal democracy. Such a democracy is not based solely on the rule of people through their representatives' namely formal democracy. It also has other precepts like Rule of Law, human rights, independence of judiciary, separation of powers etc.

19. The aforesaid, thus, are my reasons for treating Transgender's as 'third gender' for the purposes of safeguarding and enforcing appropriately their rights guaranteed under the Constitution. These are my reasons in support of our Constitution to the two issues in these petitions.

Principal Laid Down :-

(i) Hijras, Eunuchs, apart from binary gender, be treated as "third gender" for the purpose of safeguarding their rights under Part III of our Constitution and the laws made by the Parliament and the State Legislature.

(ii) Transgender persons' right to decide their self-identified gender is also upheld and the Centre and State Governments are directed to grant legal recognition of their gender identity such as male, female or as third gender.

(iii) We direct the Centre and the State Governments to take steps to treat them as socially and educationally backward classes of citizens and extend all kinds of reservation in cases of admission in educational institutions and for public appointments.

(iv) Centre and State Governments are directed to operate separate Human immunodeficiency virus Sero-survellance Centres since Hijras/ Transgenders face several sexual health issues.

(v) Centre and State Governments should seriously address the problems being faced by Hijras/Transgenders such as fear, shame, gender dysphoria, social pressure, depression, suicidal tendencies, social stigma, etc. and any insistence for sex re-assignment surgery for declaring one's gender is immoral and illegal.

(vi) Centre and State Governments should take proper measures to provide medical care to Transgender's in the hospitals and also provide them separate public toilets and other facilities.

(vii) Centre and State Governments should also take steps for framing various social welfare schemes for their betterment.

(viii) Centre and State Governments should take steps to create public awareness so that Transgender's will feel that they are also part and parcel of the social life and be not treated as untouchables.

(ix) Centre and the State Governments should also take measures to regain their respect and place in the society which once they enjoyed in our cultural and social life.

In my opinion the Court has directed Centre and State Governments to grant legal recognition of gender identity whether it be male, female or third-gender. The court gave legal Recognition for Third Gender.

Further, non-recognition of third gender in both criminal and civil statutes such as those relating to marriage, adoption, divorce, etc. is discriminatory to the third gender. Centre and State Governments have

been directed to take proper measures to provide medical care to Transgender people in the hospitals and also provide them separate public toilets and other facilities. Further, they have been directed to operate separate Human Immunodeficiency Virus /Sero-surveillance measures for transgender people. Centre and State Governments have been asked to provide the community various social welfare schemes and to treat the community as socially and economically backward classes. They have also been asked to extend reservation in educational institutions and for public appointments.

Dr. Rajesh Talwar and another … Petitioners

Versus

Central Bureau of Investigation and another[14] …Respondents

Bench: S.A BOBDE, J.

Subject Matter of the case :-

1. This special leave petition has been preferred against the impugned judgment dated 19.7.2013, passed by the High Court of Judicature at Allahabad in Application under Section 482 No.20215 of 2013 whereby the petitioners' prayer for documents pertaining to scientific tests made in their application 405/Kha dated 11.6.2013 filed under Section 233 of the Code of Criminal Procedure, 1973 read with Section 91 was rejected.

Fact in Brief : -

2. The petitioners are being tried for charges of committing the murder of their daughter Arushi and their domestic helper Hemraj in their

[14] Special Leave Petition (Crl.) No.7966 of 2013.

house. At the initial stage, the investigation was conducted by the Uttar Pradesh Police, however, it was later transferred to the Central Bureau of Investigation. A closure report was submitted before the Magistrate who disagreed with it and has issued the process to the petitioners for the charge of committing the double murder.

3. The present stage of the trial is that the evidence of the prosecution is closed and the statements of the accused are being recorded under Section 313 of the Criminal Procedure Code, 1973. The application in question under Section 311 for examining 7 other left over witnesses was moved at this stage. Alongwith this application, another application under Section 233 of the Criminal Procedure Code, 1973 read with Section 91 has been moved on 11.6.2013, in respect of the reports of certain tests conducted on 3 persons who at one time were suspected accused and had been in police custody, namely, Krishna, Raj Kumar and Vijay Mandal.

4. These applications were disposed of by the trial Court by order dated 18.6.2013 allowing them partly.

Decision of the High Court :

5. It was contended by the petitioners that the said reports are essential for the defence since they pertain to those persons who were at one time suspected as being responsible for the offence and contain exculpatory statements favouring the petitioners. According to the petitioners, it is only upon examination of the reports by the Court that the petitioners will be able to put up their plea that the crime, in fact, may have been committed by Krishna, Raj Kumar and Vijay Mandal who were earlier suspected of the offence and had been interrogated. The High Court inter-alia rejected the petitioners' prayer on the ground that the

application is vexatious and intended to only delay the proceedings as was also found by the trial Court.

Arguments:

6. Shri U.U. Lalit, learned Senior counsel for the petitioners submitted that the production of the reports pertaining to the above named 3 persons is absolutely essential and relying on Section 91of the Criminal Procedure Code, 1973, submitted that the production of these reports being relevant, the prayer ought to have been allowed by the High Court. According to Shri Lalit, the reports, if produced, would not breach either Article 21 read with Article 20(3) which protects the accused from self-incrimination and/or would not be hit by Section 21 of the Evidence Act since the persons in respect of whom those reports have been prepared are not accused anymore. In any case, according to the learned counsel, the reason given by the High Court that such reports having been prepared on the basis of statements and data collected in contravention of Article 20are premature and this could only have been found after the reports were produced in courts.

7. Shri Siddharth Luthra, learned Additional Solicitor General vehemently opposed the prayer and submitted that the production of these reports is pointless in view of the law laid down by this Court in **Selvi and others v. State of Karnataka**,[15] wherein such reports are held to be inadmissible in evidence. The learned Additional Solicitor General further submitted that the timing of the application and the stage at which it was made clearly shows that the applications are vexatious and intended to delay the proceedings which are at a concluding stage. In support of his contention, Shri Luthra relied on sequence of events which

[15] (2010) 7 SCC 263

according to him show that the petitioners have at every stage tried to delay the proceedings by making one application after the other. The learned counsel further submitted that even the present special leave petition is delayed in view of the fact that it is preferred on the file on 18.9.2013 against the judgment of the Allahabad High Court which was passed on 19.7.2013. The order of the trial Court was, in fact, passed on 18.6.2013.

8. Shri Lalit, learned Senior counsel for the petitioners submitted that the petitioners have been occupied in the trial and could not challenge the order of the High Court earlier.

9. After considering the rival submissions on this point, we find no merit in the contention on behalf of the petitioners that they could not have approached this Court earlier. There is no reason why the petitioners ought to have waited from 19.7.2013 to 17.9.2013 to approach this Court and allowed the trial to proceed even further. We make this observation in the background of the observation of the High Court that even the initial applications were made at a stage where the prosecution evidence had been concluded and the defence had entered and almost concluded its evidence. In fact, the petitioners had, without raising any objection that the reports and documents allegedly proved by the witnesses have not been supplied to them or made part of the Court record, participated in the examination and cross-examination of two witnesses. We might note that criminal courts are not obliged to accede to the request made by any party to entertain and allow application for additional evidence and in fact, are bound in terms of Section 233(3) of the Criminal Procedure Code, 1973 to refuse such request if it appears that they are made in order to vex the proceedings or delay the same.

10. This Court in **Selvi J. Jayalalithaa and others v. State of Karnataka and others**.[16], after referring to its earlier judgments in **Smt. Triveniben v. State of Gujarat**,[17]; **Zahira Habibullah Sheikh (5) v. State of Gujarat**,[18]; **Captain Amarinder Singh v. Parkash Singh Badal and others**,[19]; **Mohd. Hussain @ Julfikar Ali v. State (Government of National Capital Territory of Delhi)**[20]; and **Natasha Singh v. Central Bureau of Investigation**,[21] dealt with the issue of fair trial observing:

Principal Laid Down :

11. "Fair trial is the main object of criminal procedure and such fairness should not be hampered or threatened in any manner. Fair trial entails the interests of the accused, the victim and of the society. Thus, fair trial must be accorded to every accused in the spirit of right to life and personal liberty and the accused must get a free and fair, just and reasonable trial on the charge imputed in a criminal case. Any breach or violation of public rights and duties adversely affects the community as a whole and it becomes harmful to the society in general. In all circumstances, the courts have a duty to maintain public confidence in the administration of justice and such duty is to vindicate and uphold the 'majesty of the law' and the courts cannot turn a blind eye to vexatious or oppressive conduct that occurs in relation to criminal proceedings.

12. Denial of a fair trial is as much injustice to the accused as is to the victim and the society. It necessarily requires a trial before an impartial judge, a fair prosecutor and an atmosphere of judicial calm. Since the

16 Writ Petition (Crl.) No.154 of 2013 decided on 30.9.2013
17 AIR 1989 SC 1335
18 AIR 2006 SC 1367
19 (2009) 6 SCC 260
20 AIR 2012 SC 750
21 (2013) 5 SCC 741

object of the trial is to mete out justice and to convict the guilty and protect the innocent, the trial should be a search for the truth and not a bout over technicalities and must be conducted under such rules as will protect the innocent and punish the guilty. Justice should not only be done but should be seem to have been done. Therefore, free and fair trial is a sine qua non of Article 21of the Constitution. Right to get a fair trial is not only a basic fundamental right but a human right also. Therefore, any hindrance in a fair trial could be violative of Article 14 of the Constitution.

13. Article 12 of the Universal Declaration of Human Rights provides for the right to a fair trial what is enshrined in Article 21 of our Constitution. Therefore, fair trial is the heart of criminal jurisprudence and, in a way, an important facet of a democratic polity and is governed by rule of law. Denial of fair trial is crucifixion of human rights."

14. Thus, from the afore-stated facts, it is evident that petitioners have been adopting dilatory tactics on every moment. The impugned order was passed on 19.7.2013. This petition was filed after about two months.

15. In view of the above, we are of the considered opinion that facts and circumstances of the case do not warrant any interference. The special leave petition is accordingly dismissed.

In my opinion it appears that the said murder of the raised some kind of public uproar. This case is a clear cut example of media trial because the accused was socially stigmatized even when the case was under consideration before the trial court. But the media trail is not good and the judiciary must have the independent working procedure.

(II) Various High Courts Cases

U.S. Verma, Principal, Delhi Public School ……Petitioner

Versus

National Commission for Women and others[22] ……...Respondent

Bench: HON'BLE MR. JUSTICE S. RAVINDRA BHAT

Subject Matter of the Case :-

1. This case is related to the modesty and sexual harassment of the women. In this case the Court directed in a writ petition that the management shall ensure the safety of the women.

Fact of the Case:

2. In Writ Petition No.1730/2001, two inquiry reports dated 29.06.1999 regarding the alleged sexual harassment at Delhi Public School, Faridabad issued by the National Commission for Women are impugned. The petitioner is hereafter referred to as "Verma". One report, as received by him, is alleged to be of a three-member committee and the other, of a four-member committee, received by the Delhi Public School Society; both these committees were constituted on 25.05.1999. It is stated that both committees were constituted to look into the same allegations made by the common complainants in complaints dated 09.04.1999. Both the reports are similar in content and their conclusions are based on evaluation of common facts and statements of the same witnesses. The complaints were made before the Chairman of the Delhi Public School Society, by the teachers. The Delhi Public School Society

[22] WP (C) No.1730/2001

has filed writ petition, and concerned allegations of sexual harassment by Verma, of the three complainants.

3. Verma alleges that the Commission could not have constituted two separate committees to investigate into the same matter on same date. It is pointed out that the four-member committee comprised of all the three members of the other committee, which was the three-member committee. The fourth member of the committee never participated in the proceedings. It was alleged that the no such committee was ever constituted and the reports were a sham, by pointing out that the petitioner was never informed about constitution of any committees. It is also stated that out of the four Writ Petitions complaints only one, dated 17.11.1998, was made to the Commission and the rest were addressed to the Chairman Delhi Public School Society. Verma states that on the back of these complaints contained an endorsement "delivered by hand, received by me on 17.05.1999" signed/- Shayeeda S. Hameed. Further, the two reports talk of the press conference held on 13.05.1999 held by the Commission along with the complainants. Thus, the Commission is put in the position of the complainants and as such it be could not be allowed to be a judge in its own cause. The approach of the Commission is challenged as being contrary to principles of natural justice and in transgression of all norms of exercise of legal authority since neither a copy of the complaints nor the material on which the investigation was initiated were ever supplied to Verma, despite repeated requests. His rights were prejudiced, as a notice of contents of the charges was never supplied to him; he was also never called upon to respond to any of the complaints; only summons were issued to him on 28.05.1999 to attend and depose before the Commission, without disclosing to him in what capacity and for what purpose was he had to report. The summons were

not issued by any of the two committees formed for investigating the matter.

4. It is stated that the committees summoned none of the witnesses rather it was the Commission that summoned the witnesses. Two witnesses' statements, that is Dr. Kamla Chowdhary and Justice (Retired) N.N. Goswamy, Chairman, Delhi Public School Society were recorded on 25.05.1999 and summons were issued to them on 21.05.2009, four days prior to the constitution of the two committees. In the absence of any committee the witnesses could not have deposed before such committees. It is also pointed out that no proceeding of the Commission ever took place. Verma states that only after repeated requests for providing a copy of the complaints and the documents, was he merely allowed to see and note down the contents of the complaints on 11.06.1999, and except for complaint dated 17.11.1998 WP(C) Nos..1730/2001, 1731/2001 & 1733/2001 Page 3 no other complaint was made to the Commission. The Commission by neither putting Verma to notice nor supplying him a copy of the complaints and other documents violated principles of natural justice. The two reports nowhere discuss the dates on which the complaints were received, by Commission. Verma was neither given any notice nor allowed to participate in the day-to-day proceedings before the committees, and he was not permitted to cross-examine the witness or engage the services of an advocate. The complainants were allowed assistance by lawyers and Non Governmental Organizations. Further the citation of the instances of sexual harassments, innuendo, assault, demand for sexual favour and verbal abuses made against him are devoid of any particulars, vague and unspecific. The reports do not point out instances relating to which complainants aired their grievances.

Arguments of the party:

5. Verma also challenges report of Dr. Kamla Chowdhary dated 17.02.1999, and other instances of sexual harassment, which were subsequently brought to the Commission's notice. He states that the four complaints shown to him were the complaints of Shyista Jabeen Raza, Jayshree Kannan and Shrini Kaul, dated 09.04.1999 and the complaint of Mrs. Anju Gupta dated 22.04.1999. Therefore it was not possible to give a report on the complaints two months before their presentation. He questions the veracity of the report of 17.02.1999 as it was without informing him of the charges against him or providing him a copy of the complaint and requiring him to appear. The authenticity of Dr. Chowdhary's report dated 17.02.1999 is also doubted as it does not mention of recording of statements of the witnesses, and, being conjectural, is based on no evidence. Verma contends that Dr. Chowdhary, in her letter dated 05.04.1999, admitted that no evidence was recorded by her before writing her report.

6. The finding in Ms. Choudhry's report regarding the Delhi Public School Society having not taken any action despite request by the Commission and letter dated 09.05.1999 of IFSHA / WP(C) Nos.. 1730/2001, 1731/2001 & 1733/2001 Page 4 SHAKSHI (NGOs) is alleged as incorrect. It is stated that a five member "complaints committee" was constituted by the Delhi Public School Society on 20.04.1999, and the fact was revealed to the Commission. Verma denies refusing to accept summons as stated in the impugned reports. He also challenges the Commission's action in examining the Vice Principal of Delhi Public School Faridabad, Mrs. Renu Mittal; she proceeded on leave on 08.05.1997 and rejoined on 26.08.1997 and the very next day she again proceeded on leave. Thereafter she got herself transferred to Delhi

Public School, R.K. Puram and remained there ever since. Thus, she could possibly have nothing to depose. The complaints pertain to the period that she was not at Delhi Public School, Faridabad. The conduct of the Commission in not letting the teaching staff depose in Verma's favour and when had also written letters to the Commission for this purpose, is also questioned. The finding in the impugned reports that any threats to complainants, intimidation or pressure to withdraw the complaints were brought to the notice of the school authorities is challenged.

7. It is pointed out that during a Press Conference on 13.05.1999 and at the time of lodging the First Information Report there were only three of the four complainants, the fourth complainant refused to respond to the summons issued by the Commission. In such circumstances it is hard to comprehend why the impugned reports were made in respect of four complainants. Verma alleges that a reading of the impugned reports shows that no witness supported the allegations or corroborated the complainants' version. It is submitted that the Faridabad Police, investigated the complaints and concluded in the report dated 22.06.1999 that they were baseless, recommending cancellation of the First Information Report registered against Verma. Further the impugned reports are challenged as beyond the jurisdiction of the committees in as much as they recommend reinstatement of the complainant teachers and staff members with full back-wages and continuity of service, and termination of the Principal. In terms of Section 10 of the National Commission for Women Act (the Act) the Commission merely has powers to investigate the matter. It is alleged that the conduct of the complainants, Respondents 2 to 6 was malafide and motivated in an attempt to lower the image of the school and Verma, its Principal. On the

basis of the above, quashing of the two impugned reports dated 29.06.1999 is sought.

8. The teachers and the Commission deny Verma's allegations, and urge that the report of the Sharda Nayak Committee cannot be accepted. They argue that the Commission's report, written after following principles of natural justice, and recording depositions on oath, indicts Verma, and should be accepted. Their position is similar to what is taken by them in their writ petition, and would be discussed in detail, later in the judgment.

9. The following questions, according to this court, arise for consideration: (1) Jurisdiction of the Commission and fairness of the procedure adopted by it; (2) Whether the Delhi Public School Society and the Delhi Public School Faridabad followed the Vishaka guidelines suitably, in addressing the allegations of sexual harassment at the workplace, by the teachers; (3) If the answer to the previous question is in the negative, the appropriate relief.

Principal Laid Down:

10. As a result of the above discussion, it is held that the Commission could at best have investigated into the matter, upon receipt of complaints from the teachers, with the aim of finding out if the management of the school had taken or was contemplating taking any step towards following the Vishaka guidelines, for determining whether any sexual harassment had taken place. It could certainly have commented if no response was taken, and suggested that or adequate measures to follow the guidelines had to be taken. However, it could not have inquired into the matter in a manner in which the Committee, required to be set-up under Vishaka,

could have. Saying that the Commission could have performed that role would be permitting it a function that had to be discharged primarily by the employer, in setting up the Vishaka mandated mechanism. That is clearly beyond the domain of the Commission's jurisdiction. Another way of looking at the matter is that wherever an employer does not act or acts contrary to Vishaka, automatically the Commission would be empowered to examine and decide on the nature of the compliance or non-compliance with the law- jurisdiction that is clearly that of the courts of law. The power to so decide is essentially a judicial one, and cannot - unless the controlling statute had so provided - be performed by the Commission. Here, the Commission not only looked into the materials, but also examined witnesses to decide whether the allegations were well founded, or not. Such an exercise cannot be termed as a "fact finding" one, aimed at investigating whether the Vishaka guidelines were followed; it clearly impinged on the merits and veracity the allegations, and decided the complaints. That the final recommendations suggested remedial action by appropriate authorities, does not detract from the objective fact that the report (of the Commission) reflects and decides the truth and veracity of the allegations. The findings in the report, on the merits, were, in the opinion of the Court, therefore, clearly beyond the Commission's jurisdiction.

11. It has now been 12 years since the declaration in Vishaka; no legislative framework is however, in sight. Its subsequent application, by the Supreme Court, in the **Apparel Export Promotion v. A.K. Chopra,**[23] establishes the binding nature of the declaration, and its universality to the workplace (the court even recognized that 'physical contact' is not an essential feature of sexual harassment). That sexual

[23] AIR 1999 SC 625

harassment at the workplace is an unacceptable behavior, by employers and co-employees alike, is now an established part of the judicial and legal lexicon. Whenever found, the perpetrator is expected to be dealt with through suitable sanctions. Vishaka, and its guidelines - that are to be adhered to in establishments, are aimed at ensuring a workplace safe from sexual harassment, and protection of female employees from hostile circumstances in employment, on that account. The elaborate guidelines, evolved and put in place were a sequel to the court's declaration of law that such gender based unacceptable behaviour had to be outlawed, and were contrary to Articles 15(1) and 21 of the Constitution of India.

12. Whenever such complaints of harassment arise, it is expected that the authority be it employer, regulator (of private enterprise, or agency, against which such complaint is made) is alive that such are outlawed not only because they result in gender discrimination, of the individual aggrieved, but since they create and could tend to create- a hostile work environment, which undermines the dignity, self-esteem and confidence of the female employees, and would tend to alienate them. The aim of the Vishaka was to ensure a fair, secure and comfortable work environment, and completely eliminate possibilities where the protector could abuse his trust, and turn predator, or the protector-employee would insensitively turn a blind eye.

13. In view of the above discussion, the Court is of the opinion that the Sharda Nayak Committee report did not comply with the directives in Vishakha and the subsequent judgments of the Supreme Court either as regards its constitution or the procedure adopted. Its composition was defective, and two of its members participation, were improper due to their concededly perceived closeness to Verma - a fact substantiated by their recusal on 17.06.1999, notwithstanding which they participated

later, and signed the report. The procedure adopted in recording statements without even the complainants' participation, shows an anxiety to exonerate Verma, and was also contrary to Vishaka.

14. Some of these writ petitions originally were filed before the Supreme Court; the Society appears to have approached this Court simultaneously and later all these matters came to be taken up by this Court in 2001. Eight long years have passed; Verma has since retired. Some of the teachers who complained have taken up alternative employments. Yet this Court is of the opinion that with the findings recorded above, that the Commission's report cannot be deemed an adjudication and at the same time holding that Sharda Nayak Committee was not constituted and did not conduct its proceedings in accordance with law; the conclusions can only provide cold comfort to the complainants. In the normal circumstances a finding that the disciplinary or enquiry proceedings were vitiated would have lead to the Court remitting the matter to the employer to take suitable steps for constituting another Committee in accordance with law. That course too however, is inappropriate having regard to the length of time and the situation of the parties now. The teacher-complainants' concerns therefore would have to go unredressed, with no further scope of enquiry into the truth or otherwise of their allegations. Delhi Public School society - which is known for the quality of education it imparts through its several schools, in the country, unfortunately, in this instance, does not emerge with a role that a model employer should have displayed, and was expected of it. The Vishakha guidelines are to be taken seriously, and not followed in a ritualistic manner. Had that been the position, the teachers' could not have complained - regardless of whether their allegations were justified, or not borne out. The Delhi Public School Society's initial reluctance, and later

faulty compliance has led to this sorry state of affairs, due to which the Court is constrained to enjoin an entirely unsatisfactory closure to the matter.

15. Having regard to the overall conspectus of the facts of this case, the Court deems it appropriate in the circumstances that the Delhi Public School Society should pay a sum of Rs.2.5 lakhs to each of the petitioners namely Ms. Jayshri Kannan, Ms. Shayista Jabeen Raza and Ms.Shrini Kaul they were also impleaded as respondents in the matter filed by Delhi Public School society. It should also pay a sum of Rs.1 lakh to the fourth employee/ teacher impleaded by it that is Ms. Anju Gupta.

16. The writ petitions are disposed in terms of the above findings and directions. The amount so awarded shall be paid by the Delhi Public School society within four weeks from today.

In my opinion Supreme Court's guidelines has not been adhered to , with regard to **Vishakha v. State of Rajasthan**.[24] Hence, the administration is also alleged of protecting the accused. because The teachers, are accusing U.S. Verma of spreading canards against them and scuttling their job prospects. "Initially when he patted my shoulder or put an arm around me I thought it was an appreciative gesture by a 63-year-old man," said Jayashree who joined Delhi Public School in 1995. "But I realized soon that his physical conduct was not decent and he openly started demanding sexual favours." It was the same with the other two and when the women complained they were allegedly victimized. Jayashree said her seniority was brought down, while Shayista's child was denied admission.

[24] (1997) 6 SCC 241

The Principal U.S.Verma counter-alleged these allegations as "false, baseless, fabricated and motivated by vested interestes," and said the charges had been levelled by the staff to hide their professional incompetence. An inquiry by the vice-president of Delhi Public School society had found prima facie evidence against Verma, but no action had been taken against him. The administration of the school has refused to set up a committee as per the apex court's guidelines. The National Commission for Women and Interventions for Support Healing and Awareness, a women's organization, have taken up the case as the apex body for the sexual harassment at the workplace. And the case decided in favour of justice for protection of women dignity.

Naz Foundation .... Petitioner

Versus

Government of NCT of Delhi and Others[25] .... Respondents

Fact of the case:-

1. This writ petition has been preferred by Naz Foundation, a Non Governmental Organisation as a Public Interest Litigation to challenge the constitutional validity of Section 377 of the Indian Penal Code, 1860, which criminally penalizes what is described as "unnatural offences", to the extent the said provision criminalises consensual sexual acts between adults in private. The challenge is founded on the plea that Section 377 of the Indian Penal Code, 1860, on account of it covering sexual acts between consenting adults in private infringes the fundamental rights guaranteed under Articles 14, 15, 19& 21 of the Constitution of India. Limiting their plea, the petitioners submit that Section 377 Naz

[25] WP(C) No.7455/2001

Foundation should apply only to non-consensual penile non-vaginal sex and penile non-vaginal sex involving minors. The Union of India is impleaded as respondent No.5 through Ministry of Home Affairs and Ministry of Health & Family Welfare. RespondentNo.4 is the National Acquired Immune Deficiency Syndrome Control Organisation a body formed under the aegis of Ministry of Health & Family Welfare, Government of India. The National Acquired Immune Deficiency Syndrome Control Organisation is charged with formulating and implementing policies for the prevention of Human Immunodeficiency Virus / Acquired Immune Deficiency Syndrome in India. Respondent No. 3 is the Delhi State Acquired Immune Deficiency Syndrome Control Society. Respondent No. 2 is the Commissioner of Police, Delhi. Respondents No.6 to 8 are individuals and Non Governmental Organizations, who were permitted to intervene on their request. The writ petition was dismissed by this Court in 2004 on the ground that there is no cause of action in favour of the petitioner and that such a petition cannot be entertained to examine the academic challenge to the constitutionality of the legislation. The Supreme Court vide order dated 03.02.2006 in Civil Appeal No.952/2006 set aside the said order of this Court observing that the matter does require consideration and is not of a nature which could have been dismissed on the aforesaid ground. The matter was remitted to this Court for fresh decision.

2. The petitioner Non Governmental Organization has been working in the field of Human Immunodeficiency Virus / Acquired Immune Deficiency Syndrome Intervention and prevention. This necessarily involves interaction with such sections of society as are vulnerable to contracting Human Immunodeficiency Virus / Acquired Immune Deficiency Syndrome and which include gay community or individuals

described as "men who have sex with men". For sake of convenient reference, they would hereinafter be referred to as "homosexuals" or "gay" persons or gay community. Homosexuals, according to the petitioner, represent a population segment that is extremely vulnerable to Human Immunodeficiency Virus / Acquired Immune Deficiency Syndrome infection. The petitioner claims to have been impelled to bring this litigation in public interest on the ground that Human Immunodeficiency Virus / Acquired Immune Deficiency Syndrome prevention efforts were found to be severely impaired by discriminatory attitudes exhibited by state agencies towards gay community, men who have sex with men or trans-gendered individuals, under the cover of enforcement of Section 377 of the Indian Penal Code, 1860, as a result of which basic fundamental human rights of such individuals/ groups (in minority) stood denied and they were subjected to abuse, harassment, assault from public and public authorities.

3. According to the petitioner, Section 377 of the Indian Penal Code, 1860 is based upon traditional Judeo-Christian moral and ethical standards, which conceive of sex in purely functional terms, that is, for the purpose of procreation only. Any non-procreative sexual activity is thus viewed as being "against the order of nature". The submission is that the legislation criminalizing consensual oral and anal sex is outdated and has no place in modern society. In fact, studies of Section 377 of the Indian Penal Code, 1860 jurisprudence reveal that lately it has generally been employed in cases of child sexual assault and abuse. By criminalising private, consensual same-sex conduct, Section 377 of the Indian Penal Code, 1860 serves as the weapon for police abuse; detaining and questioning, extortion, harassment, forced sex, payment of hush money; and perpetuates negative and discriminatory beliefs towards

same-sex relations and sexuality minorities; which consequently drive the activities of gay men and men who have sex with men, as well as sexuality minorities underground thereby crippling Human Immunodeficiency Virus / Acquired Immune Deficiency Syndrome prevention efforts. Section of the Indian Penal Code, 1860 thus creates a class of vulnerable people that is continually victimised and directly affected by the provision. It has been submitted that the fields of psychiatry and psychology no longer treat homosexuality as a disease and regard sexual orientation to be a deeply held, core part of the identities of individuals.

ARGUMENTS

4. Learned counsel appearing for the parties have addressed the Court at length. During the course of submissions, extensive references were made to voluminous material which included various reports, publications, articles, Indian and foreign judgments including those of United States Supreme Court, European Commission of Human Rights, Human Rights Committee etc. Counsel also provided comprehensive written submissions supported by authorities but as we understand it, the prime arguments can be generally summarised in this way:-

(i) The submission of Mr. Anand Grover, Sr. Advocate, appearing for the petitioner, and Mr. Shyam Divan, Sr. Advocate, appearing for respondent No.8, is that Section 377 of the Indian Penal Code, 1860 violates the constitutional protections embodied in Articles 14, 19 and 21. It suffers from the vice of unreasonable classification and is arbitrary in the way it unfairly targets the homosexuals or gay community. It also unreasonably and unjustly infringes upon the right of privacy, both zonal and decisional. It

also conveys the message that homosexuals are of less value than other people, demeans them and unconstitutionally infringes upon their right to live with dignity. Section 377 of the Indian Penal Code, 1860 also creates structural impediments to the exercise of freedom of speech and expression and other freedoms under Article 19 by homosexuals or gays and is not protected by any of the restrictions contained therein. Furthermore, morality by itself cannot be a valid ground for restricting the right under Articles 14 and 21 of the Constitution of India. Public disapproval or disgust for a certain class of persons can in no way serve to uphold the constitutionality of a statute. In any event, abundant material has been placed on record which shows that the Indian society is vibrant, diverse and democratic and homosexuals have significant support in the population. It is submitted that courts in other jurisdictions have struck down similar laws that criminalise same-sex sexual conduct on the grounds of violation of right to privacy or dignity or equality or all of them. Keeping in mind that Section 377 I of the Indian Penal Code, 1860 is the only law that punishes child sexual abuse and fills a lacuna in rape law, it is prayed that Section 377 of the Indian Penal Code, 1860 may be declared as constitutionally invalid insofar as it affects private sexual acts between consenting adults or in the alternative to read down Section 377 of the Indian Penal Code, 1860 to exclude consenting same-sex sexual acts between adults.

(ii) In reply, learned ASG submits that there is no fundamental right to engage in the same sex activities. In our country, homosexuality is abhorrent and can be criminalised by imposing proportional limits on the citizens' right to privacy and equality. Learned ASG submits

that right to privacy is not absolute and can be restricted for compelling state interest. Article 19(2) expressly permits imposition of restrictions in the interest of decency and morality. Social and sexual mores in foreign countries cannot justify de-criminalisation of homosexuality in India. According to him, in the western societies the morality standards are not as high as in India. Learned ASG further submits that Section 377 of the Indian Penal Code, 1860 is not discriminatory as it is gender neutral. If Section 377 of the Indian Penal Code, 1860 is struck down there will be no way the State can prosecute any crime of non-consensual carnal intercourse against the order of nature or gross male indecency. He hastens to add that Section 377 of the Indian Penal Code, 1860 is not enforced against homosexuals and there is no need to "read down" the provisions of Section 377 of the Indian Penal Code, 1860. Learned ASG further contends that spread of Acquired Immune Deficiency Syndrome is curtailed by Section 377 of the Indian Penal Code, 1860 and de-criminalisation of consensual - same - sex acts between adults would cause a decline in public health across society generally since it would foster the spread of Acquired Immune Deficiency Syndrome. He submits that Section 377 of the Indian Penal Code, 1860 does not impact upon the freedom under Article 19(1) as what is criminalised is only a sexual act. People will have the freedom to canvass any opinion of their choice including the opinion that homosexuality must be de-criminalised. He, therefore, submits that the Section 377 of the Indian Penal Code, 1860 is constitutionally valid.

(iii) Mr. Ravi Shankar Kumar, appearing for respondent No.6, and Mr. H.P. Sharma, appearing for respondent No.7, submitted that the

petitioner's arguments with respect to the spread of Human Immunodeficiency Virus and Acquired Immune Deficiency Syndrome are founded on propaganda and are not factually correct. Section 377 of the Indian Penal Code, 1860 prevents Human Immunodeficiency Virus by discouraging rampant homosexuality. According to them, Indian society considers homosexuality to be repugnant, immoral and contrary to the cultural norms of the country.

5. The notion of equality in the Indian Constitution flows from the 'Objective Resolution' moved by Pandit Jawaharlal Nehru on December 13, 1946. Nehru, in his speech, moving this Resolution wished that the House should consider the Resolution not in a spirit of narrow legal wording, but rather look at the spirit behind that Resolution. He said, "Words are magic things often enough, but even the magic of words sometimes cannot convey the magic of the human spirit and of a Nation's passion..... (The Resolution) seeks very feebly to tell the world of what we have thought or dreamt of so long, and what we now hope to achieve in the near future."[26].

6. If there is one constitutional tenet that can be said to be underlying theme of the Indian Constitution, it is that of 'inclusiveness'. This Court believes that Indian Constitution reflects this value deeply ingrained in Indian society, nurtured over several generations. The inclusiveness that Indian society traditionally displayed, literally in every aspect of life, is manifest in recognising a role in society for everyone. Those perceived by the majority as "deviants' or 'different' are not on that score excluded or ostracised.

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[26] Constituent Assembly Debates: Lok Sabha Secretariat, New Delhi: 1999, Vol. I, pages 57-65

7. Where society can display inclusiveness and understanding, such persons can be assured of a life of dignity and non- discrimination. This was the 'spirit behind the Resolution' of which Nehru spoke so passionately. In our view, Indian Constitutional law does not permit the statutory criminal law to be held captive by the popular misconceptions of who the lesbian, gay, bisexual, transgender are. It cannot be forgotten that discrimination is anti- thesis of equality and that it is the recognition of equality which will foster the dignity of every individual.

8. It is declared that Section 377 of the Indian Penal Code, 1860, insofar it criminalises consensual sexual acts of adults in private, is violative of Articles 21, 14 and 15 of the Constitution. The provisions of Section 377 of the Indian Penal Code, 1860 will continue to govern non-consensual penile non-vaginal sex and penile non-vaginal sex involving minors. By 'adult' we mean everyone who is 18 years of age and above. A person below 18 would be presumed not to be able to consent to a sexual act. This clarification will hold till, of course, Parliament chooses to amend the law to effectuate the recommendation of the Law Commission of India in its 172nd Report which we believe removes a great deal of confusion. Secondly, we clarify that our judgment will not result in the re-opening of criminal cases involving Section 377 of the Indian Penal Code, 1860 that have already attained finality. Thus the petition allowed.

Aruna Chadha ..... Petitioner

Versus

State of Delhi[27] ..... Respondent

Bench : HON'BLE MR. JUSTICE G.P.MITTAL

Subject Matter : This case is related to rape and murder of a Air Hostess. In this case the Additional Session Judge passed a order and order challenged in the Delhi High Court.

Fact of the Case : This petition under Sections 397/399/401 read with Section 482 of the Code of Criminal Procedure has been filed by the Petitioner for setting aside of the order dated 10.05.2013 passed by the learned Additional Sessions Judge whereby the charge for various offences was ordered to be framed against the Petitioner Aruna Chadha and the co-accused Gopal Goyal Kanda.

2. The deceased 'X' committed suicide on the night intervening 4-5th August, 2012 at the residence, that is Flat No.4-C, Block No.1, Pocket B, Ashok Vihar, Phase-III, Delhi. She left two suicide notes purported to be dated 04.08.2012 and 04.05.2012 wherein she held the Petitioner and the co- accused responsible for compelling her to take the extreme step to end her life. For the sake of convenience it will be apposite to extract these two suicide notes hereunder:-

"1st suicide note „I am ending myself today because I am shattered inside. My trust has been broken and I am being cheated. Two people responsible for my death is Aruna Chadha and Gopal Goyal Kanda. Both of them have broken my trust and misused me for their own benefits.

[27] CRL.REV.P. 305/2013 Judgement on 25th July, 2013.

They have ruined my life and now they are trying to sabotage my family members. My family is very innocent. Aruna and Gopal Goyal are liars, cheaters and crook. They can hurt and ruin anyone for their own purpose. I have forgiven them number of times but it was my biggest mistake. Gopal Goyal before also did hurt me and my family but we still forgave him but he again misused our innocence and trust. He is a cheat, and a fraud man. These two should be punished for their wrong deed and malicious intentions towards me and my family. They have made my life abnormal. I love my mom, dad and my bai. 2nd suicide note Gopal Goyal is a fraud. He always keep his bad intentions towards girls. He is a man of no shame and no guilt. He always takes advantage of others. He has illegal relationship with a woman named "Ankita" and a girl child also with her. Still he keep on hitting on girls. He is a shameless and worst man I have ever seen in my life. In the name of relationship, trust, God he cheats people and harasses. He always lies. He lies to his family, kids, people around, everyone. Now this time Aruna is also helping him to hurt me, harass me, sabotage my family. She use to act as my well wisher but eventually she has shown her true colors. For the sake of her job she can stoop down to any level. My biggest mistake was I trusted them, which is now costing my life. I will never ever forgive them. They are the one who have separated me today from my mom, dad and bai. I hate dem, these two.

3. The suicide notes led to the registration of the case First Information Report No.178/2012 at Police Station Bharat Nagar. During the course of investigation the police inspected the spot and examined various witnesses including Anuradha Sharma X's mother, Dinesh Sharma, Ankit Sharma and various employees of Murli Dhar Lakh Ram Airlines Private Limited where X was employed since October, 2006.

The family members of X informed the investigating officer regarding various acts committed by the Petitioner and the co-accused Gopal Goyal Kanda in harassing the deceased in various ways and putting pressure upon her.

4. The prosecution collected evidence to show that whenever 'X' left Murli Dhar Lakh Ram Groups she was compelled to rejoin the company. The family of the deceased informed the Investigation Officer that 'X' left Murli Dhar Lakh Ram Groups for good and proceeded to Dubai to join Emirates Airlines where she had been selected. She was harassed for issuance of the No Objection Certificate needed to join Emirates. After various attempts, she was issued no objection certificates. The Petitioner and the co-accused got issued a forged no objection certificate dated 22.05.2010 purported to be signed by Mr. Rajeev Prashar, Senior Vice President of Murli Dhar Lakh Ram Groups so as to put obstacles in the deceased's employment with Emirates, by showing the no objection certificate to have been forged by the deceased, if she was successful in joining the same.

5. The prosecution alleges that 'X' joined Emirates on 29.06.2010. Co-accused Gopal Goyal Kanda started pressurizing the deceased to return to India and to join Murli Dhar Lakh Ram Groups. The present Petitioner also helped the co-accused in putting pressure on the deceased to leave Emirates. It is the prosecution case that co-accused Gopal Goyal Kanda visited Dubai twice so as to compel 'X' to come back. In his second visit, Gopal Goyal Kanda was accompanied by the Petitioner AC. Gopal Goyal Kanda adopted various means to meet 'X' in spite of her refusal to meet him. The prosecution alleges that since 'X' did not agree to leave Emirates and return to Murli Dhar Lakh Ram Groups, the Petitioner and Gopal Goyal Kanda employed one Chanshivroop Singh. The present

Petitioner and co-accused Gopal Goyal Kanda sent said Chanshivroop Singh to Dubai with a complaint to Emirates that the no objection certificate dated 22.05.2010 submitted by 'X' to Emirates was not genuine. During the investigation, Chanshivroop Singh in his statement under Section 164 of Criminal Procedure Code, 1973 recorded by the Metropolitan Magistrate informed that the Petitioner Aruna Chadha had given him instructions as to what was to be done by him in Dubai in connection with putting pressure on 'X' and getting her to leave Emirates. The Petitioner arranged for the visa, tickets and all other documents required for his visit to Dubai. Chanshivroop Singh also informed the Metropolitan Magistrate that he used to update Petitioner 'AC' regarding all developments which took place in Dubai during his visit there.

Arguments of the Parties: It is the case of the prosecution that co-accused Gopal Goyal Kanda sent an email to Chanshivroop Singh along with a copy of the complaint, addressed to the Station House Officer, Police Station City, Gurgaon. Chanshivroop Singh gave the copy of the complaint to Mr. Shirish Thorat of Emirates which led to an inquiry being conducted against the deceased. During the course of investigation the police collected the record of inquiry conducted by Emirates. On account of the tactics adopted by co-accused Gopal Goyal Kanda who was assisted by Petitioner 'Aruna Chadha' Emirates asked 'X' to resign and leave the company and to obtain fresh no objection certificate.

7. 'X' resigned from Emirates and returned to India but she did not join Murli Dhar Lakh Ram Groups. According to the prosecution co-accused Gopal Goyal Kanda through his employee Chanshivroop Singh managed to send a fake email to the deceased from a fake email account created by Chanshivroop Singh in the name of Sheikh Basir Al Bhoram, Director, Emirates Group, Dubai which stated that proceedings will be

undertaken in Dubai for her extradition. A fake letter purported to be written to Mr. Sanjeev Verma, Counsel General of India was also attached with the fake email sent to the deceased.

8. On account of the pressure put by co-accused Gopal Goyal Kanda in conspiracy with Petitioner, 'X' had to rejoin Murli Dhar Lakh Ram Groups as Director on 13.01.2011. The prosecution alleges that 'X' again resigned from Murli Dhar Lakh Ram Groups on 22.12.2011 and handed over the charge to Petitioner 'Aruna Chadha' and one Ms. Khusboo Sharma on 24.12.2011. In spite of her resignation from the company she was repeatedly called to the Murli Dhar Lakh Ram Group's office.

9. After resigning from Murli Dhar Lakh Ram Groups 'X' joined Master of Business Administration. It is alleged that the co-accused Gopal Goyal Kanda again pressurized 'X' to join Murli Dhar Lakh Ram Groups and also stated that he will sponsor her Master of Business Administration programme. The prosecution alleges that the process of admission in the Master of Business Administration programme was facilitated by the present Petitioner. The Petitioner used to call 'X' on behalf of co- accused Gopal Goyal Kanda and asked her to attend Murli Dhar Lakh Ram Group's office daily after her classes.

10. The prosecution alleges that on 03.08.2012 Petitioner 'Aruna Chadha' called the deceased's mother and compelled her to send 'X' to Murli Dhar Lakh Ram Groups office for signing some documents. After receiving this call Anuradha Sharma on 04.08.2012 spoke to Gopal Goyal Kanda who also compelled her to send 'X' to Murli Dhar Lakh Ram Group's office and if she ('X') did not come Gopal Goyal Kanda will lodge a First Information Report against her. It is alleged that Gopal

Goyal Kanda made serious allegations against X's character to her mother.

11. According to the prosecution on X's complaint a case of theft had been registered against Ankita Singh and Nupur Mehta who were very close to Gopal Goyal Kanda. On 03.08.2012 while 'X' was at the Mumbai Airport for her flight to Delhi she ('X') was instructed to speak to an Advocate of Murli Dhar Lakh Ram Groups, who had given a message earlier to X's brother wanting to speak to her, and she was pressurized by him to withdraw the earlier said theft case. On account of her conversation with Mr. Ankit Aluwalia, the Advocate of Murli Dhar Lakh Ram Groups, 'X' became very tense. She missed her flight to Delhi and was able to return to Delhi only on the next day, that is, on 04.08.2012.

12. The prosecution says that when 'X' arrived at Delhi she noticed a number of calls on her mother's mobile received from co-accused Gopal Goyal Kanda and Petitioner 'Aruna Chadha' She insisted to her mother to disclose the details of the conversation. On account of the incident which took place at Mumbai Airport and on account of the receipt of these calls on her mother's mobile from Gopal Goyal Kanda and Aruna Chadha, 'X' got very distressed. On the fateful night intervening 4-5th August, 2012 'X' spoke to her brother Ankit Sharma at 1:16 Ante Meridiem and informed him that she was very disturbed because of Gopal Goyal Kanda and 'Aruna Chadha's behaviour.

13. On 05.08.2012 Anuradha Sharma got up at 7:00 Ante Meridiem and knocked at the door of X's room as it was bolted from inside. The door was not opened for a sufficiently long time so Anuradha Sharma and her husband reached the window of X's room and noticed that 'X' had hanged herself on the ceiling fan with the help of her Chunni. The

complainant and her husband went inside the room through the window and took 'X' down. 'X' was found dead. The complainant informed the police whereupon Demand Draft No.8-A was recorded in Police Station Bharat Nagar. Inspector Dinesh Kumar reached the spot and recorded statement of the complainant Anuradha Sharma. The complainant leveled serious allegations of harassment meted to the deceased at the hands of the co- accused Gopal Goyal Kanda and Petitioner Aruna Chadha. Two suicide notes were recovered from a spiral notebook lying on the left side of X's bed wherein also 'X' held the Petitioner and co-accused Gopal Goyal Kanda responsible for her suicide. On the statement of the complainant Inspector Dinesh Kumar, made an endorsement for registration of a case under Section 306/34 of the Indian Penal Code, 1860.

14. The charge for the offences punishable under Sections 120-B of Indian Penal Code, 1860, under Sections 466/471/120-B of Indian Penal Code, 1860, Sections 468/469/120-B of Indian Penal Code, 1860 and Sections 306/120-B of Indian Penal Code, 1860 was ordered to be framed against the Petitioner and co- accused Gopal Goyal Kanda. A further charge for the offence punishable under Sections 376 and 377 of Indian Penal Code, 1860 was framed against co-accused Gopal Goyal Kanda. The Petitioner was charged for abetment of the offence of rape and carnal intercourse against the order of nature under Section 376 read with Section 109 of Indian Penal Code, 1860 and under Section 377 read with Section 109 of Indian Penal Code, 1860.

15. It may be noted that although the police did not prefer to prosecute the co-accused under Sections 376 and 377 of Indian Penal Code, 1860 and the Petitioner for abetment of these offences, the learned Additional Sessions Judge referred to the postmortem report which indicated that 'X'

was habituated to vaginal and anal penetration, the learned Additional Sessions Judge took exception to the role of the investigating agency in not carrying out a proper investigation into the aspect of X's sexual exploitation by co-accused Gopal Goyal Kanda. He referred to and took assistance from the statement of Dr. Vishaka Munjal who had allegedly been approached by the deceased in company of the present Petitioner on 09.03.2012 as she had an early pregnancy which she wanted to abort. The Trial Court also took assistance from the supplementary disclosure statement dated 10.08.2012 purported to be made by the Petitioner wherein she had stated about illicit relationship between co- accused Gopal Goyal Kanda and 'X'. She also disclosed that as a result of said relationship the deceased had multiple pregnancies and she (the deceased) had undergone medical termination of such pregnancies.

16. I have heard Mr. U.U. Lalit, learned senior counsel for the Petitioner, Mr. Siddharth Luthra, learned Additional Solicitor General and Mr. Mukul Gupta, learned senior counsel for the State and have perused the record.

17. Mr. U.U. Lalit, learned senior counsel urges that the learned Additional Sessions Judge erred in framing charges against the Petitioner in as much as prosecution had not collected any material to presume that is as envisaged under Section 228 of Indian Penal Code, 1860 that the accused, that is the Petitioner herein had committed any offence. Relying on **Sajjan Kumar v. Central Bureau of Investigation**[28]; **Dilawar Balu Kurane v. State of Maharashtra**[29]; and **Union of India v. Prafulla Kumar Samal & Another** [30]; the learned senior counsel urges that the material collected by the prosecution simply raised a suspicion against the

[28] (2010) 9 SCC 368.
[29] (2002) 2 SCC 135.
[30] (1979) 3 SCC 4.

Petitioner. He contends that it is well settled that if two views are equally possible, the Sessions Judge is bound to discharge the accused as in the circumstances the charge has to be treated as groundless.

18. The learned senior counsel urges that at the stage of framing of the charge the material collected by the prosecution is not to be meticulously examined nor the Sessions Judge is expected to make any roving inquiry. He is expected to see probative value of the material collected and to apply his judicial mind to find out whether the commission of the offence by the accused is probable.

19. The learned senior counsel argues that although the learned Additional Sessions Judge referred to the earlier stated reports in Sajjan Kumar, Dilawar Balu Kurane and Prafulla Kumar Samal but failed to apply the test laid down therein and thus erred in framing the charge against the Petitioner.

20. Elaborating his arguments, Mr. U. U. Lalit urges that the offence with which the Petitioner has been charged can be broadly divided in three categories, that is, (i) the offence of forgery under Sections 468/469/471 of the Indian Penal Code, 1860 and Section 66 of the Information Technology Act, 2000 read with Section 120-B of the Indian Penal Code, 1860, (ii) the offence of abetment to suicide under Section 306 of the Indian Penal Code, 1860 and (iii) the offence of abetment to rape and abetment to carnal intercourse against the order of nature under Sections 376/109 of Indian Penal Code, 1860 and 377/109 of Indian Penal Code, 1860.

21. Mr. U.U. Lalit contends that the learned Additional Sessions Judge culled out the circumstances (a) to (y) in Para 73 of the impugned order

and opined that the circumstances by itself may not be sufficient to impel the deceased to end her life. The learned senior counsel argues that the learned Additional Sessions Judge opined that there was sufficient material to indicate that the deceased was sexually exploited by the co-accused Gopal Goyal Kanda. Although, the Petitioner being a lady cannot commit an offence under Sections 376/377 of the Indian Penal Code, 1860 but according to the learned Additional Sessions Judge, she facilitated and abetted the commission of the offence by the co-accused and thus she was charged under Section 376/109 of the Indian Penal Code, 1860 and 377/109 of the Indian Penal Code, 1860. The learned senior counsel contends that once the offence punishable under Sections 376/109 and 377/109 of the Indian Penal Code, 1860 are taken out which he would demonstrate, the material collected by the prosecution in the estimation of the learned Additional Sessions Judge fell short of the offence of abetment to suicide.

22. The learned senior counsel urges that the offence relating to forgery is not made out in as much as the deceased herself was aware that the no objection certificate dated 22.05.2011, which she used to get employment in Emirates, was not signed by Mr. Rajeev Prashar. Thus, the prosecution cannot be permitted to contend that the no objection certificate was forged by the co-accused or for that matter the present Petitioner. The learned senior counsel states that the learned Additional Sessions Judge himself opined that the blank affidavits alleged to be recovered from the co-accused have been found to be of no consequence in view of **Sheonandan Paswan v. State of Bihar**,[31] as the same was not used for any purpose by the co-accused. Thus, the charges for the forgery must fail.

[31] 1987 (1) SCC 288.

23. Learned senior counsel urges that Chanshivroop Singh's statement under Section 164 of the Criminal Procedure Code, 1973 alleging various acts of harassment and forgery purported to have been committed by Chanshivroop Singh at Gopal Goyal Kanda's behalf cannot be relied upon by the Court even for framing charges as statement of a witness who is in the nature of an accomplice is not a substantive piece of evidence and can be used only for the purpose of corroboration. In support of his contention, the learned senior counsel places reliance on **Hari Charan Kurmi Jogia Hajam v. State of Bihar**[32] and **Kashmira Singh v. State of Madhya Pradesh**.[33]

24. On the other hand, Mr. Siddharth Luthra, learned Additional Solicitor General for the State argues that the learned Additional Sessions Judge was fully justified in framing charges not only under sections 120-B of the Indian Penal Code, 1860, sections 466/471/120-B of the Indian Penal Code, 1860, sections 468/469/120-B of the Indian Penal Code, 1860 and sections 306/120-B of the Indian Penal Code, 1860 but also under sections 376/109 of the Indian Penal Code, 1860 and 377/109 of the Indian Penal Code, 1860 in spite of the fact that in the charge sheet the commission of the offence under sections 376/109 and 377/109 of the Indian Penal Code, 1860 was not specifically stated.

25. Relying on a three Judge Bench decision in **State of Maharashtra and others v. Somnath Thapa and others** [34], another three Judge Bench decision in **State of Orissa v. Debendra Nath Padhi**[35], and the latest judgment in **State of Madhya Pradesh v. Sheetla Sahai and Others** [36], he urges that at the time of framing of the charge as envisaged under

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32 (1964) 6 SCR 623.
33 1952 SCR 526.
34 (1996) 4 SCC 659.
35 AIR 2005 SC 359.
36 2009 (8) SCC 617.

Section 228 of the Code, the Sessions Judge is expected to take a tentative view of the matter on the basis of material produced by the prosecution. The learned Additional Solicitor General urges that if on the basis of material on record, the Court could come to the conclusion that commission of the offence is probable consequence, the Court will be justified in framing the charge against the accused. Mr. Sidharth Luthra contends that at the stage of framing of the charge the Court is not to see whether there is sufficient ground for conviction of the accused or whether the trial is sure to end in his conviction, at the initial stage of framing of charge even strong suspicion will be sufficient to frame charge and to proceed further with the trial.

26. Mr. Luthra contends that the learned Additional Sessions Judge ought not to have gone into a detailed discussion while ordering framing of the charge against the petitioner as probity of evidence cannot be judged at the stage of framing of the charge. He argues that it is a matter of satisfaction of the judicial conscience on the basis of the material placed before the court whether there are grounds for presuming that the accused had committed an offence. It is contended that there is sufficient material produced by the prosecution to uphold the charge as framed by the learned Additional Sessions Judge. From the two suicide notes and the evidence collected by the investigating agency it was borne out that the deceased was subjected to consistent course of harassment and mental torture by the Petitioner and co-accused Gopal Goyal Kanda, resulting in her taking the extreme step of ending her life. He urges that the circumstances (a) to (y) as culled out in Para 73 of the impugned order, particularly, circumstances (p), (s), (t), (u), (v), (w), (x) and (y) and the two suicide notes were sufficient to frame the charge under Section 306 of the Indian Penal Code, 1860 de hors the charge of sexual exploitation.

27. Mr. Luthra strenuously urges that the statement of Chanshivroop Singh in the nature of an accomplice is admissible in evidence, but the value to be attached to it has to been seen only at the final stage. Reliance is placed on **Chandran @ Manichan @ Maniyan and Others v. State of Kerala**.[37] Chanshivroop Singh in his statement under Section 164 of the Code not only stated about the Petitioner's and co-accused Gopal Goyal Kanda's role in causing harassment to deceased but also informed about the acts of forgery committed by him at their behest for the same.

28. It is argued that although there was no direct evidence with regard to commission of offence under Sections 376/377 of the Indian Penal Code, 1860 by co-accused Gopal Goyal Kanda and its abetment by the present Petitioner yet, on the basis of the postmortem report, Dr. Vishaka Munjal's statement under Section 161 of the Code and the supplementary disclosure statement of the Petitioner, the Court was justified in framing the charge under Sections 376/109 and Sections 377/109 of the Indian Penal Code, 1860 against the Petitioner and putting the burden on the Petitioner to prove the facts, especially those within her knowledge as provided under Section 106 of the Evidence Act.

29. Mr. Sidharth Luthra contends that the investigating agency made all efforts to unearth the truth by eliciting the evidence from all the sources whatever were available, that is, X's family and her former colleagues in Murli Dhar Lakh Ram Groups, yet even if there was any defect in the investigation, the same will not enure for benefit of the accused.

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[37] (2011) 2 SCC (Cri.) 551.

30. The Supreme Court considered the reports in Dilawar Balu Kurane, Prafulla Kumar Samal and its various other previous decisions in Sajjan Kumar.

31. Let us note the meaning of the word "presume". In Black's Law Dictionary it has been defined to mean "to believe or accept upon probable evidence". In Shorter Oxford English Dictionary it has been mentioned that in law "presume" means "to take as proved until evidence to the contrary is forthcoming", Stroud's Legal Dictionary has quoted in this context a certain judgment according to which "A presumption is a probable consequence drawn from facts as to the truth of a fact alleged."

32. The aforesaid shows that if on the basis of materials on record, a court could come to the conclusion that commission of the offence is a probable consequence, a case for framing of charge exists. To put it differently, if the court were to think that the accused might have committed the offence it can frame the charge, though for conviction the conclusion is required to be that the accused has committed the offence. It is apparent that at the stage of framing of a charge, probative value of the materials on record cannot be gone into; the materials brought on record by the prosecution has to be accepted as true at that stage."

32. In Praveen Pradhan relied upon by the learned Additional Solicitor General after referring to the various earlier decisions in Chitresh Kumar Chopra; and Ramesh Kumar it was opined that a tentative view would evoke the presumption referred to under Section 228 of the Code.

33. Thus, on the basis of the judgments relied upon by the parties and noting the language used in Sections 227 and 228 of the Code it can very well be stated that if on the basis of material placed before the Court the

commission of offence appears to be probable, the Court shall be duty bound to frame the charge against the accused. To put it differently, if two views are possible and there is strong suspicion against the accused again the Court would be justified in framing the charge. As against this, if there is only a mere suspicion and two views are possible, the Court on the basis of mere suspicion should not proceed to frame the charge against an accused and should in the circumstances discharge him without making him undergo the ordeal of the trial.

34. It is frankly conceded by the learned Additional Solicitor General that there is no direct evidence of commission of rape or unnatural offence by co-accused Gopal Goyal Kanda or its abetment by the Petitioner. The learned Additional Solicitor General challenges the observation of the trial court whereby the learned Additional Sessions Judge observed that the investigation carried out by the investigating agency was tainted or that the investigating agency intentionally did not go into the aspect of sexual exploitation of the deceased by the accused persons. It is argued that the investigating agency in its quest for truth examined various employees of Murli Dhar Lakh Ram Groups as also the family members of the deceased 'X' yet no direct evidence with regard to the sexual exploitation was available. He states that in this case no direct evidence was possible, except the disclosure of any incident relating to the offence by the deceased to any co-employee or to the family members. But none of the witnesses examined during investigation came forward with any such disclosure. Albeit, the learned Additional Solicitor General urges that in view of the statement under Section 161 of the Code of Dr. Vishaka Munjal, the postmortem report and the supplementary disclosure statement of the Petitioner dated 10.08.2012 recorded by the IO it can be inferred that deceased 'X' was being subjected to sexual

exploitation and thus, the Trial Court was justified in framing the charge under Sections 376/109 and 377/109 of the Indian Penal Code, 1860.

35. On the other hand, Mr. U.U. Lalit learned senior counsel urges that even if the material collected by the prosecution and as relied upon by the learned Additional Sessions Judge is taken on its face value still it cannot be inferred that any offence under Sections 376/377 of the Indian Penal Code, 1860 was committed by co-accused Gopal Goyal Kanda and thus there could not be any question of abetment of these offences by the present Petitioner. In her statement under Section 161 of the Code Dr. Vishaka Munjal informed the IO that deceased 'X' visited her clinic with Petitioner 'AC' on 09.03.2012, 'X' informed her about her early pregnancy and that she wanted to get it terminated by pills as she was unmarried. In her statement, Dr. Vishaka Munjal informed the IO that she gave abortion pills to the deceased with which she aborted successfully. According to Dr. Vishaka Munjal deceased 'X' visited her again alone on 14.05.2012 for a routine check-up. She last visited her alone on 19.06.2012 for a routine check-up.

36. Relying on the statement of Dr. Vishaka Munjal, the learned senior counsel argues that through Dr. Vishaka Munjal's statement what can be inferred is that the Petitioner simply accompanied the deceased to her own (Aruna Chadha's) gynecologist as a help to her. On the next two subsequent visits the deceased visited the doctor alone (without Aruna Chadha's company) and thus there was nothing to indicate from Dr. Vishaka Munjal's statement that she (the Petitioner) had abetted the commission of any offence under Sections 376 and Section 377 of the Indian Penal Code, 1860.

37. Referring to the observations in the post mortem report, e.g., "Vaginal Orifice: Remnants of hymen present as tags of epithelialisation at the rim of vaginal orifice, signs of old hymen rupture with healing. Recent mucosal excoriatins with reddened base in an area of 0.3 cm x 0.4 cm were present at the vaginal introitus.

38. Referring to the early pregnancy of five weeks noticed on 09.03.2012 by Dr. Vishaka Munjal, the learned senior counsel urges that admittedly the deceased was not in Gopal Goyal Kanda's employment since December 2011 till May, 2012. Thus, the pregnancy if any, on 09.03.2012, could not have been on account of any illicit sexual intercourse by Gopal Goyal Kanda or its abetment by the Petitioner.

39. Relying on the Privy Council decision in **Pulukiri Kottaya v. Emperor and Others,**[38] the learned senior counsel urges that the disclosure statement made by the Petitioner was totally inadmissible and cannot be looked into at all for any purpose being a statement made to the police, as under Section 27 of Evidence Act only that portion of the confessional statement is admissible which relates to any fact discovered in consequences of the information received from a person accused of any offence. Since there was no discovery of any fact, the learned senior counsel argues that the Additional Sessions Judge erred in taking aid of the disclosure statement.

40. Apart from the supplementary disclosure statement of the Petitioner 'AC' there is nothing to indicate that co-accused Gopal Goyal Kanda had illicit relations with 'X' or that she had multiple pregnancies. In the absence of discovery of any fact in pursuance of the disclosure statement, the same is clearly inadmissible in evidence and has to be kept

[38] AIR (34) 1947 PC 67.

out of consideration. The statement of Dr. Vishaka Munjal nowhere leads to the conclusion that the pregnancy carried by the deceased was due to any illicit relationship with co-accused Gopal Goyal Kanda particularly when she was not even in employment of Murli Dhar Lakh Ram Groups during the period of expected pregnancy. All the more, there is not even a shred of evidence to indicate that co-accused Gopal Goyal Kanda committed sexual intercourse with deceased 'X' or had carnal intercourse against the order of nature with her or that the same was against her (the deceased) will or without her consent or that the Petitioner facilitated in any act of rape or unnatural offence alleged to have been committed by Gopal Goyal Kanda.

Similarly, what could only be inferred from the postmortem report was that the deceased was habituated to vaginal and anal penetration, but there was nothing to indicate that it was co-accused Gopal Goyal Kanda who was responsible for the same and that the Petitioner had abetted the alleged vaginal and anal penetration against the deceased's will and without her consent. It is apparent that the learned Additional Sessions Judge unjustly admitted into evidence the confessional statement made by the Petitioner and illegally put the burden to prove the same on the co-accused and the Petitioner which is not permissible. The learned Additional Sessions Judge fell into gross error in framing the charge under Sections 376/377 against the co-accused Gopal Goyal Kanda which cannot be sustained. Since no charge against co-accused under these Sections could have been framed, the Petitioner could not have been guilty of abetting these offences.

41. In Madan Mohan Singh one Deepakbhai Krishnalal Joshi was serving as a driver in the Microwave Project Department of Ahmedabad Bharat Sanchar Nigam Limited. He had undergone a bypass heart surgery

in the year 2002 and he was asked by the doctor to avoid lifting heavy weights. Said Deepakbhai Krishnalal Joshi was working as a driver of a Tata Sumo car provided to the Petitioner Madan Mohan Singh who was working as Det in the project. Deceased Deepakbhai Krishnalal Joshi committed sucide and her widow Harshida Ben raised an accusing finger towards the Petitioner. She had informed the Investigation Officer that even after Madan Mohan Singh was transferred out of the project he (Madan Mohan Singh) went on continuously using the services of her husband. She stated that in the year 2007 said Madan Mohan Singh came back to Microwave Project as Det and had got angry with the deceased on the matter of not keeping the keys of the vehicle on the table. She further stated that said Madan Mohan Singh had allegedly threatened her husband of suspending him. He had also rebuked her husband that if he did not listen to him, he would create difficulties for him. Deceased Deepakbhai Krishnalal Joshi left for his duty on 21.02.2008 not to return back in the evening. His absence was reported to the police on 22.02.2008 and 23.02.2008. Ultimately, Harshida Ben came to know that her husband's dead body was lying in vehicle No.GJ 1G 3472 at Kiran Park.

42. In the instant case, in the two suicide notes the deceased clearly held the Petitioner and co-accused Gopal Goyal Kanda responsible for her death. She wrote down that both of them had ruined her life and were now trying to sabotage his family. In the suicide note 'X' stated that her family is innocent and the Petitioner and the co-accused are liars and crooks. The deceased further added that co-accused Gopal Goyal Kanda is a fraud, he cheats and harasses people in the name of relationship and trust. She had also stated that Petitioner 'Aruna Chadha' is also helping him to hurt her and that she could stoop very low for the sake of her job.

It is not only these two suicide notes but there is consistent course of harassment by the co-accused and Petitioner as stated in the various circumstances (a) to (y) narrated by the learned Additional Sessions Judge in his impugned order, including the visits made by Petitioner and co-accused to Dubai to pressurize her to quit her job with Emirates and to return to India to join Murli Dhar Lakh Ram Groups; the Petitioner and co- accused used Chanshivroop Singh to create false documents and used these to pressurize her to leave the job with Emirates; forcing her to resign from her job in Emirates by creating fake documents; they pressurized the deceased through Ankit Ahluwalia, Advocate of Murli Dhar Lakh Ram Groups, on 03.08.2012 to withdraw the theft case against Ankita Singh and Nupur Mehta; the Petitioner had a telephonic conversation with 'X's' mother on 03.08.2012 so as to compel 'X' to come to the office of Murli Dhar Lakh Ram Groups to sign some documents; the Petitioner in her telephonic conversation with 'X's' mother also leveled allegations against deceased's character; and the telephonic conversation between Gopal Goyal Kanda and 'X' on 04.08.2012 where he again leveled allegations against her character and supported what had been said by the Petitioner to X's mother. The fact that the Petitioner was not in employment of the co- accused for some time is not relevant as there is immigration record to show that even during that period the Petitioner and co-accused Gopal Goyal Kanda travelled abroad together.

48. This evidence, in view of the judgment of the Supreme Court in Amit Kapoor, Praveen Pradhan and Chitresh Kumar Chopra was sufficient to form an opinion at this stage that the Petitioner abetted the commission of suicide by the deceased. A charge for the offence punishable under Section 306 of the Indian Penal Code, 1860 was,

therefore, made out against the Petitioner even without the allegations of abetment of rape or sexual exploitation.

43. The circumstances relied upon by the prosecution and the evidence collected also show conspiracy to commit these offences by the accused persons.

44. In view of the foregoing discussion, the petition is partly allowed to the extent that the framing of the charge for the offence punishable under Section 376/109 and Section 377/109 of the Indian Penal Code, 1860 is set aside.

In my opinion this judgement is really protect the feminine jurisprudence. In above case rape and murder of an air hostess was committed. Both are heinous offence to the feminine community. So the judgement was really appreciable.

Satish Vasant Salvi ....Petitioner.

Versus

The State of Maharashtra and Others[39] ....Respondents.

Bench: T.V. Nalawade

Subject Matter :-

1. This case is related to the illegal detention by the police where as it has been held by the Apex Court that illegal detention is a violation of fundamental rights. It is also a violation of Human Rights become by the

[39] Cri.W.P. No. 725/14 Judgement on 9th June, 2015.

Universal Declaration of Human Rights, 1948, Right to Privacy is a human right.

Fact of the Case :-

2. The petitioner has claimed relief of declaration that his detention by police officer, respondent No. 2 from 15.00 hours of 12.4.2014 to 11.00 hours of 14.4.2014 was illegal. The petitioner has claimed the relief of direction to hold departmental inquiry against respondent Nos. 2 to 4 for his illegal detention. He has claimed relief of granting compensation of Rs. ten lakh in respect of his illegal detention.

3. Respondent No. 5 - Mrs. Pradnya is the wife of petitioner. Their marriage took place on 31.5.2013. The father of respondent No. 5 was working as Police Inspector in Ambad Police Station, District Jalna for about five years and he retired there. The marriage of petitioner with respondent No. 5 was solemnized at Ambad and after the marriage, respondent No. 5 cohabited with the petitioner in Airoli, Navi Mumbai where petitioner is staying due to his service. He is working as a Civil Engineer and he is Bachelor of Engineering, Masters of Business Administration.

4. It is the case of petitioner that respondent No. 5 left the matrimonial house for Ambad on 19.10.2013 for the place of her parents under the pretext that her father was sick. It is his case that respondent No. 5 then came to Airoli on 1.12.2013 with father and she said that the petitioner should live separate from his parents and only after that, she would cohabit with him.

5. It is the case of petitioner that when he refused to live separate from parents, respondent No. 5 returned to Ambad with her father.

6. Respondent No. 5 gave First Information Report to Ambad Police Station on 23.3.2014 against the petitioner and seven relatives of petitioner and crime at C.R. No. 58/2014 was registered on the basis of this First Information Report for offences punishable under sections 498-A, 323, 504, 506, 34 of the Indian Penal Code, 1860 and sections 3and 4 of Dowry Prohibition Act. Respondent No. 2 was attached to Ambad Police Station as Assistant Sub Inspector at the relevant time and he took over the investigation of this case.

7. It is the case of petitioner that he came to be arrested at Airoli on 12.4.2014 at about 15.00 hours and respondent No. 2 had come there to effect the arrest. It is his case that from Airoli, Navi Mumbai, he was taken to Ambad Police Station in a car hired by petitioner. It is his case that they reached to Ambad at 5.00 Ante Meridiem on 13.4.2014.

8. It is the case of petitioner that he was taken to Rural Hospital from Ambad for medical examination by respondent No. 2 on 13.4.2014 at about 12.00 hours. It is his case that he had not consented for such medical examination, but force was used against him. He has contended that respondent No. 2 gave requisition letter to Medical Officer for the medical examination of petitioner on following two points.

(i) Whether the petitioner is potent? and

(ii) Whether the petitioner can perform sexual intercourse?

It is the case of petitioner that the Medical Officer of Ambad Rural Hospital advised to get the petitioner examined from Government Hospital Aurangabad and then respondent No. 2 took the petitioner to Aurangabad Government Hospital by using force. It is the case of petitioner that by using force, he was medically examined in Government

Hospital at Aurangabad and there the samples of (i) blood, (ii) semen and (iii) prepuce swab were taken. It is his case that he had not consented for taking of such samples and for medical examination.

9. It is the case of petitioner that on 13.4.2014 at about 22.00 hours false record of his arrest was prepared in Ambad Police Station by respondent No. 2. It is contended that the petitioner was produced before the Judicial Magistrate, First Class, Ambad by the respondent No. 2 on 14.4.2014 at about 11.30 Ante Meridiem. He has contended that the Judicial Magistrate, First Class granted magisterial custody remand till 28.4.2014 and no police custody remand was requested for. The petitioner was released on bail on 14.4.2014 on the basis of order made by Judicial Magistrate, First Class in aforesaid crime. It is the case of petitioner that he was illegally detained by respondent No. 2 for the aforesaid period.

10. It is the case of petitioner that when he was taken to Ambad from Navi Mumbai, he was forced to take on hire a private car and threat was given to him that his brother in law may lose the job, if action is taken against brother in law. It is the case of petitioner that he was treated like accused from rape case and he was subjected to medical examination accordingly. It is the case of petitioner that he was humiliated and harassed due to the conduct of respondent No.2. It is the case of petitioner that ultimately the Government Hospital, Aurangabad gave report in favour of the petitioner that he is potent. It is the case of petitioner that an attempt was made by respondent No. 2 for getting examined the petitioner about his mental condition and requisition letter was given to ascertain the psychological disturbance. It is contended that the Government Hospital refused to do such medical examination as there was no order of Judicial Magistrate, First Class

11. It is the case of petitioner that respondent No. 2 took the aforesaid steps at the instance of father of respondent No. 5 and respondent No. 2 did not act fairly. It is the case of petitioner that father of respondent No. 5 joined political party after his retirement, he is active in politics and he used his political influence for getting aforesaid acts done through respondent No. 2. It is the case of petitioner that due to the aforesaid acts of respondent No. 2, he was hurt, harassed, humiliated and the acts were against his dignity. It is his case that the guidelines given by the Government and Courts were not followed when the aforesaid actions were taken by respondent No. 2.

12. It is the case of petitioner that by doing the aforesaid acts, respondent No. 2 had kept the petitioner in custody for more than 56 hours and if the period of 24 hours is deducted, the petitioner was kept in illegal detention for remaining period.

13. In reply affidavit, filed by respondent No. 2, he has contended that he was incharge of investigation and he did everything for the investigation of the case. He has contended that he had taken petitioner from Navi Mumbai to Ambad for the purpose of investigation and only due to insistence of petitioner, he had referred petitioner for such medical examination. He has contended that he had not used force against the petitioner for taking car on hire basis and also for referring him for medical examination.

14. It is the case of respondent No. 2 that they reached Ambad police station on 13.4.2013 at about 11.00 Ante Meridiem and not at 5.00 Ante Meridiem as contended by the petitioner. It is contended by respondent No. 2 that there were allegations of wife of petitioner that petitioner was not potent and so, he had given requisition letter for such medical

examination of the petitioner. He has also contended that the medical examination was taken as the petitioner himself insisted for such medical examination and there was no intention of humiliation or harassment of the petitioner. It is contended by respondent No. 2 that no complaint was made to Judicial Magistrate, First Class by petitioner in respect of ill-treatment and this fact is sufficient to infer that there was no harassment of petitioner.

15. It is the case of respondent No. 2 that the petitioner was formally arrested on 13.4.2014 at 10.00 Post Meridiem. It is contended that if the time required for the medical examination and journey is excluded, the petitioner was produced before the Judicial Magistrate, First Class within proscribed time. It is contended that false, frivolous and motivated allegations are made against him by the petitioner.

16. Respondent No. 5 has also filed reply and she has contended that false allegations are made by the petitioner. It is contended that only to mislead everyone including the Court such allegations are made by the petitioner.

17. One Superior Officer of respondent No. 2 has filed affidavit to the effect that the aforesaid incident is already reported to District Superintendent of Police. It is contended that the preliminary inquiry is proposed in the report and after the preliminary inquiry, further action will be taken by the department.

18. The First Information Report was given on 23.3.2014 and the crime at C.R. No. 58/14 was registered for offences punishable under sections 498-A, 323, 504, 506, 34 of the Code. and for the offence punishable under sections 3 and 4 of Dowry Prohibition Act. As per the

record, respondent No. 2 had taken the permission of Superior Officer (S.P.) on 23.3.2014 for going to Navi Mumbai for effecting the arrest of petitioner for the purpose of investigation of this crime. On 2.4.2014 similar letter was given by respondent No. 2. Requisition was given for issuing motor warrant for incurring expenses in respect of conveyance and such letters were given on 11.4.2014 and 13.4.2014. The sanction in respect of the amount which was required to be spent on conveyance of two constables and respondent No. 2 was obtained.

19. The record shows that on 12.4.2014 respondent No. 2 informed to Khale Police Station from Navi Mumbai that he had taken petitioner in custody within their jurisdiction and he was taking the petitioner to Ambad for the purpose of investigation. The entry of this intimation was taken in the station diary of Khale Police Station at about 15.35 hours of 12.4.2014. This circumstance shows that on that day, prior to 15.35 hours the petitioner was taken in custody by respondent No. 2. The station diary entry of this police station further shows that intimation of incident of taking the petitioner in custody was given to one Sachin Pakhare, a relative of petitioner.

20. A copy of station diary entry of Ambad Police Station produced on record shows that petitioner was taken to Rural Government Hospital Ambad on 13.4.2014 at about 12.00 hours. As per the record, the petitioner was shown to be formally arrested at 22.00 hours on 13.4.2014 in Ambad Police Station. The petitioner was produced before Judicial Magistrate, First Class, Ambad on 14.4.2014 after 11.00 Ante Meridiem.

21. As per the aforesaid record, the petitioner was taken in custody by respondent No. 2 on 12.4.2014 prior to 15.35 hours, he was taken to Government Hospital from Ambad at about 12.00 hours of 13.4.2014 and

he was produced before Judicial Magistrate, First Class, Ambad on 14.4.2014 after 11.00 Ante Meridiem. Thus, the petitioner was not produced within 24 hours from the time when he was taken in custody, before Judicial Magistrate, First Class, Ambad. The burden was on respondent No. 2 to explain the circumstances. There is specific allegations that respondent No. 2 was acting under the influence of father of respondent No. 5.

22. The affidavit of respondent No. 2 and the record show that respondent No. 2 had the intention to effect the arrest of petitioner at Navi Mumbai and for that, respondent No. 2 had left for Navi Mumbai. On 12.4.2014 prior to 15.35 hours petitioner was taken in custody by respondent No. 2, but he showed the formal arrest in Ambad Police Station on 13.4.2014 at about 22.00 hours. In view of the wording of the provision of section 46 of the Criminal Procedure Code, 1973 and the facts and circumstances of the present case, it needs to be presumed that the petitioner was arrested on 12.4.2014 itself prior to 15.35 hours in Navi Mumbai. When admittedly, petitioner was reached to Ambad Police Station at about 11.00 Ante Meridiem of 13.4.2014, it was necessary for respondent No. 2 to produce the petitioner before Judicial Magistrate, First Class, Ambad on 13th itself. The record and the conduct of the respondent No. 2 are sufficient to infer that he avoided to produce petitioner before Judicial Magistrate, First Class on 13th.

23. It is not disputed by respondent No. 2 that he got petitioner examined to ascertain as to whether the petitioner is potent or not. As per the record, respondent No. 2 attempted to get the petitioner medically examined also to ascertain as to whether there was psychological disturbance. Though the respondent No. 2 has contended that petitioner himself had requested for medical examination to ascertain as to whether

he is potent or not, there is no record like application given by the petitioner in that regard or even the record of consent of petitioner in that regard. There is specific allegation of petitioner against respondent No. 2 that force was used and the respondent No. 2 got such medical examination done at the instance of father of respondent No. 5. The copies of letters of requisition given by respondent No. 2 to Medical Officer are on the record and they show that respondent No. 2 was acting on his own and there was no consent or application of petitioner in that regard.

Arguments of the Parties:-

24. The learned counsel for respondent No. 2 has placed reliance on the case reported as **Sube Singh v. State of Haryana and Others,**[40] the learned counsel submitted that false allegations are made by the petitioner to give counter blast to the case. In the case on which reliance is placed, the Apex Court has observed that the Court has to stand guard against false motivated and frivolous claims in the interest of the society and to enable the police to discharge their duties fearlessly and effectively. There cannot be dispute over this proposition. In the same case, the Apex Court has observed that if the violation of fundamental right is gross and of a magnitude to shock the conscience of the Court, the public law remedy is available. It is further observed that every illegal detention irrespective of its duration and every custodial violence, irrespective of its degree of magnitude, is outright condemnable and per se actionable.

25. The learned counsel for respondent No. 2 placed reliance on one more case reported as **Narayan Dutt Tiwari v. Rohit Shekhar and**

[40] 2006 AIR SCW 779.

Another.[41] In this case when the putative son had requested for Deoxyribo Nucleic Acid test, such test was allowed. The matter was filed for relief of declaration and for perpetual injunction as there was denial of paternity. Thus, the facts were altogether different. In the present case, we are considering the action taken by the police and there are provisions of the Criminal Procedure Code, 1973 controlling the powers of police and giving duties of police. They are in accordance with the provisions of Articles 21 and 22 of Constitution of India.

26. In the cases of **Kartar Singh v. State of Punjab**[42] and **A.K. Gopalan v. State of Madras**,[43] the Apex Court has laid down as follows :-

"The term 'personal liberty used in Article 21 means freedom from physical restraint of a person by incarceration or otherwise. The deprivation of personal liberty is prohibited except in accordance with the procedure established by law. Personal liberty is to be construed strictly against the State and in favour of the person whose rights are affected".

27. The material produced does not show that the conditions laid down in the aforesaid provisions were satisfied and complied. On the contrary, respondent No. 2 showed formal arrest after more than 24 hours of the taking of petitioner in custody at Navi Mumbai. If there was no urgency of arrest, respondent No. 2 ought to have used the provision of section 41 (A) of the Criminal Procedure Code, 1973. From the fats of the case, this Court has no hesitation to observe that it was not the case of urgency. In the case reported as **Arnesh Kumar v. State of Bihar**,[44] the Apex Court has discussed provision of section 41 (1) of the Criminal Procedure Code,

41 (2012) 12 Supreme Court Cases 554.
42 (1994) 3 SCC 569.
43 AIR (37) 1950 Supreme Court 27.
44 AIR 2014 SC 2756.

1973 and few more directions are given for protection of the rights given under Article 21 and 22 of Constitution of India.

28. In the present matter, the petitioner was taken in custody in Navi Mumbai prior to 15.35 hours of 12.4.2014. It is admitted that in a car, the petitioner was taken to Ambad from Navi Mumbai. It is the case of petitioner that they reached Ambad at 5.00 Ante Meridiem of 13.4.2014 and it is the case of respondent No. 2 that they reached there at 11.00 Ante Meridiem of 13.4.2014. During submissions one more submission was made that respondent No. 2 had some work of investigation at Thane also and so, some time was spent there. No such record was produced and in view of the aforesaid provisions of law, such excuse is not available. It is already observed that the petitioner could have been easily produced before Judicial Magistrate, First Class, Ambad on 13th itself, but respondent No. 2 avoided to produce the petitioner before Judicial Magistrate, First Class on 13th. Thus, even if the best possible case for respondent No. 2 is considered and accepted, it needs to be held that the detention of petitioner by respondent No. 2 after 3.00 Post Meridiem of 13th till 11.00 Ante Meridiem of 14th was illegal.

29. In the present matter, the crime was registered for aforesaid offences and at the end chargesheet was filed for offences punishable under sections 498-A, 323, 504, 506, 34 of Indian Penal Code and sections 3 and 4 of Dowry Prohibition Act. If the ingredients of these offences are seen and considered, it is not difficult to say that there was no reason for medical examination of the petitioner/accused to ascertain as to whether he is potent. There was certainly no need of medical examination of the petitioner to ascertain as to whether there was psychological disorder as there was no such allegation in the First Information Report. For both the purposes, respondent No.2 made an

attempt to get the petitioner medically examined. The provisions of the Criminal Procedure Code, 1973 show that there was no power to respondent No. 2 to get such medical examination done and there is no record to show that petitioner himself had applied for getting such examination done. Thus, the medical examination for these two purposes was illegal and it needs to be presumed that such medical examination caused harassment and humiliation to the petitioner.

Decision of the High Court :-

30. There is no statutory formula and so, there is no uniform criteria for fixing the compensation for violation of the rights given under Article 21 and 22 (2) of Constitution of India. The quantum of compensation depends upon the facts and circumstances of the case. Though the aggrieved person has right to go to Civil Court for compensation in tort and he can go to Criminal Court under section 357 of the Criminal Procedure Code, 1973, such person can be awarded compensation under Article 226 of Constitution of India. The compensation under this Article cannot be only nominal and compensation needs to be something more than the nominal amount. In the present case, the violation of right is of two kinds already noted. This Court holds that compensation needs to be granted for violation in both ways to the petitioner. For each contravention, the petitioner is entitled to get Rs. one lakh as compensation. In the result, following order passed:-

(i) The petition is allowed with cost of Rs. 20,000/- (Rupees twenty thousand).

(ii) The respondent, State is to pay this cost to the petitioner within eight weeks from today.

(iii) The detention of the petitioner from 3.00 Post Meridiem of 13.4.2014 to 11.00 Ante Meridiem of 14.4.2014 in the custody of respondent No. 2 is held to be illegal, the medical examination of petitioner was also illegal and it was in violation of Articles 21 and 22 (2) of Constitution of India.

(iv) The respondent, State do pay the compensation of Rs. 2,00,000/- (Rupees two lakh) to the petitioner within eight weeks from the date of this decision. If the amount is not paid within the time fixed, the amount shall carry interest at the rate of 12% p.a.

(v) It is necessary for the State to hold an inquiry of respondent No. 2 for the aforesaid illegal detention of the petitioner and for medical examination of petitioner and such inquiry needs to be held for imposing major penalty and for the recovery of the amount which the State is made to pay in the present proceeding.

(vi) This decision will not come in the way of petitioner to claim compensation in tort in Civil Court and also to claim compensation in Criminal Court under section 357 of the Criminal Procedure Code, 1973.

In my opinion this case gave a mandatory direction for compensation on state for illegal detention. State does pay the compensation to the petitioner within prescribed time with interest. State has also hold an inquiry for the illegal detention. Along with this compensation the petitioner is also entitled to get compensation in law of tort in Civil Court and in Criminal Court under Criminal Procedure Code.

Naveen Jindal **..... Plaintiff**

Versus

M/s Zee Media Corporation Ltd and another[45] **..... Defendants**

Bench: Hon'ble Mr. Justice Jayant Nath

Subject Matter :-

1. This case is related to the Media Trial which is an obstacle in right to privacy. Media Trial is a weapon against the right to privacy.

Fact of the Case :-

2. This is another unfortunate case where two known corporate personalities are fighting each other tooth and nail oblivious of consuming precious judicial time. The present application is filed seeking an interim injunction to restrain the defendants, etc. from writing, telecasting or airing any material, article, news etc. directly or indirectly pertaining to the purported allegations made against the plaintiff pertaining to an alleged incident of the year 2001 and 2010 by a lady who has been described in the plaint as Mrs. ABC. Other connected reliefs are also sought.

3. As per the averments in the plaint, the plaintiff is said to be 2nd time Member of Parliament from the Kurukshetra Lok Sabha Constituency in Haryana. He is also described as the Chairman of M/s. Jindal Steel & Power Limited. His varied interests, including his educational qualifications from the University of Texas, United States of America, his crusade regarding the National Flag and having participated

[45] CS(OS) 143/2015.

in international level shooting events including the Asian Games have been described. Defendant No.1 is described as a controller of several news channels on national television.

4. It is averred that there is a past history of certain controversial conduct indulged in by the defendants and their promoters which has resulted in a deluge of litigations being filed between the plaintiff and the defendants and the person who controls the defendants. It is alleged that sometimes in September 2012, an enormous demand by way of extortion was made by the Editors of defendant No. 1 in conspiracy with the chairman of defendant No.1. This extortion call, it is said, was made pursuant to a vilification campaign against the plaintiff and his company in relation to purported coverage of coal-gate scam in which the plaintiff's company was sought to be falsely implicated. Money was sought with a promise to "go slow" on the vilification campaign.

5. Similarly the defendants/their officers have also filed various litigations, complaints, criminal prosecutions against the plaintiff and the companies which are under control of the plaintiff and its officers. The present controversy has arisen out of filing of writ petition No. 235/2014 before the Chattisgarh High Court by Mrs. ABC in which it is averred that in 2001 one Mr. D.K. Bhargava along with others went to the house of Mrs. ABC and asked her to sell her land. On her refusal, she was threatened. Some days thereafter the same Mr. D.K. Bhargava along with the plaintiff again went to her house, removed her clothes and robbed her chastity. It is further averred that her thumb impression and signatures were forcibly taken on some documents. She went to the police station to record her complaint but nothing happened. Mrs. ABC has further alleged that on 18.08.2010 she was forcibly dragged and brought before Mr. D. K. Bhargava where again criminal acts were done against her.

Arguments of the Parties:

6. It is averred by the plaintiff that the allegations made by Mrs. ABC are absolutely false. There were disputes between Jindal Steel & Power Limited and Mrs. ABC as regards the compensation of land and various transactions took place between Jindal Steel & Power Limited and Mrs. ABC since 1999. A legal notice was also issued on 10.06.2008 by Mrs. ABC and thereafter she filed a civil suit. The Trial Court passed a decree in favour of Mrs. ABC vide judgment dated 15.03.2013. An appeal is said to have been filed. It is stated that the allegations are belated, totally false and motivated. It is urged that the allegations have been made much after the alleged incident in 2001. Several legal proceedings have taken place between Mrs. ABC, the plaintiff and its associate companies but no such allegation was ever made earlier.

7. On 19.12.2014 when the said writ petition No.235 of 2014 was listed before the Chhatisgarh High Court, the High Court passed an order directing that reporting of the said matter with respect to the proceedings of the court in print and electronic media are stayed till the next date of hearing.

8. On 06.01.2015 the writ petition was disposed off holding that the petitioner may visit the office of Superintendent of Police, Raigarh for submission of her complaint. On such submission, the Superintendent of Police, Raigarh shall forward the same to the concerned police station who shall take steps in accordance with the judgment of the Supreme Court in the case of **Lalita Kumari v. Government of Uttar Pradesh and Others.**[46]

[46] (2014) 2 SCC 1

9. It is further urged that the matter is pending enquiry to be carried out in accordance with the law as was directed by Chattisgarh High Court in the said order dated 06.01.2015. It is further averred that in a clearly illegal, mischievous, malicious and vindictive manner defendants No. 1 and 2 are widely misusing the said order dated 06.01.2015 to conduct a media trial against the plaintiff to tarnish his image. It is averred that such acts of the defendants are causing irreparable harm and injury to the plaintiff.

10. It is averred that the defendants have aired more than 20 false, defamatory programmes against the plaintiff from 07.01.2015 to 15.01.2015 on the alleged incident of rape. It is pointed out as an illustration that various programmes are being aired asking questions and attempting to terrorize the police to push the police to take criminal action against the plaintiff. Suggestions have been put to the ASP that in a case of rape, a First Information Report should be registered first and enquiry should be conducted later. It is further urged that an attempt is being made to harp on the fact that the police is working under the pressure of the plaintiff. For example, a question is posed by the Anchor of the Programme as to who is responsible for the said delay that is Senior Superintendent of Police Raigarh, Inspector General Police, Director General (Chhatisgarh), Home Secretary, Home Minister and Chief Minister. Similarly, a reference is made to an interview of Additional Superintendent of Police, Mr. Prafful Kumar where the questions posed are accusatory in nature and blaming the police for not lodging a First Information Report against the plaintiff. It is urged that the defendants are interfering with the administration of justice and are trying to conduct a media trial which is causing deliberate harm and the prejudice to the plaintiff. Suggestions are being made in the course of the programmes to

suggest that the entire administrative machinery is acting in collusion with the plaintiff. It is further urged that though the version of the plaintiff is purportedly aired, it is a highly edited version and has been given inconsequential space and has no effect whatsoever on the viewers.

11. The defendants have filed their response to the interim relief application. It is pointed out that the plaintiff is making repeated attempts for a blanket stay and has made one earlier attempt. It is further urged that apart from the defendants there are various other publications and channels which have covered the order dated 06.01.2015 of the Chhatisgarh High Court in a similar manner. It is stated that prior to publication and broadcast the defendants had sought the comments of the plaintiff in terms of an order of this High Court dated 01.04.2014 passed by this court. It is averred that having followed the said order no cause of action arises in favour of the plaintiff. In fact the plaintiff has suppressed the said order dated 01.04.2014. In the response to the allegations in the plaint about the duration of the programmes or the frequency of the programme are not denied. What the defendant have argued is that the telecast time is only roughly around five hours for the 10 days in question and the average time per day is only 8 minutes per channel. The content and extract of interviews conducted by the reporters of the channels has not been denied.

12. Learned senior counsel appearing for the plaintiff has submitted that the present application should be allowed and appropriate injunction order should be passed against the defendant. It is averred that from 7.1.2015 to 15.1.2015 the defendants have aired more than 20 news programmes on various national and regional news channels. The programmes not only defame the plaintiff but also are said to interfere with the administration of justice inasmuch as the reporter of the

defendant are trying to pressurise the police into lodging of a First Information Report against the plaintiff. It is pointed out that there is a long history of litigation which is pending between the said Mrs. ABC and M/s.Jindal Steel & Power Limited of which the plaintiff is a Chairman. The said Mrs. ABC has filed a complaint to the police authorities earlier also on 26.07.2010 pursuant to which her statement was recorded on 28.08.2010. The allegations are highly belated pertaining to an alleged incident of 2001. It is averred that there is not even an iota of truth in the allegation being made by Mrs. ABC. It is further urged that the action of the defendants is motivated by malafides. Their only intent is to sensationalise the matter by making false, frivolous and defamatory allegations against the plaintiff and conducting a media trial. Based on this motive, the defendants are repeatedly publishing and airing false and defamatory programmes/ articles against the plaintiff. Further, it is urged that the repeated coverage being done by the defendants are contrary to the guidelines of News Broadcasting Standards Authority (NBSA). Reliance is placed on the judgment of this Court in the case of **Swatanter Kumar v. The Indian Express Limited and Others.**[47]

13. Learned senior counsel appearing for the defendant No.2 has submitted that discussion is a part of freedom of speech which may not be absolute but restrictions that are imposed on the same have to be an aid to the rule of law. Any restriction placed by this court would have the effect of curbing the freedom of speech which would be incorrect. It is further urged that at best the reports made by the defendant are a case of fair comment and justification. It is further urged that this is a complete defence to a suit for defamation and no stay can be granted. It is also urged that the plaintiff is a public figure having been a Member of

[47] 207(2014) DLT 221

Parliament. Public is interested in the activities of a figure like the plaintiff and there can be no restrictions imposed on a right to comment upon the conduct of the plaintiff.

14. Learned senior counsel appearing for the plaintiff have rebutted the contentions of the defendant in Rejoinder. It is urged that merely because a plea of justification that is fair comment and justification are raised that would not be a ground to decline injunction. To prove the case of justification and truth, the matter would have to go to trial. At this stage, in case the plaintiff makes out a prima facie case, this Court would grant injunction and would not refuse injunction merely because a plea of justification has been raised. Further, reliance is placed on Article 21 of the Constitution to claim that the rights of the plaintiff are being trampled upon and it would be the duty of this Court to protect the plaintiff. It is next urged that the reporting being done by the defendant is abnormal reporting. It is motivated on account of the history of the conduct of the defendant whereby defendants have been indulging in extortion. In 7 days it is urged that 20 programmes lasting 22 hours have been telecasted on various channels of defendant showing an abnormal and extra zeal. It is urged that this is not a case of a bona fide channel reporting facts and events or commenting on the same but a clear case of malicious reporting. It is also gross abuse of the process of law as the plaintiffs are hectoring and pressurizing the police to take action against the plaintiff and also harassing the police with a view to take action against the plaintiff. It is denied that the plaintiff is a public figure and inasmuch as he is an Ex Member of Parliament and not a public figure.

15. Learned senior counsel for the defendants have sought to respond to the rejoinder arguments of the plaintiff. It is stressed that the programmes aired by the defendants or the articles written do not cause

any interference in the course of justice. Merely asking inconvenient or uncomfortable questions to the police or about the plaintiff would not amount to interference in the cause of justice. It is further urged that there is no hectoring going on and the journalists of the defendants are only probing and trying to get to the veracity of the true facts.

16. The first question that arises in this case is whether this Court would have the powers to grant a pre-publication or pre-broadcasting injunction against the defendants. The above issue is no longer *res integra*. A Constitution Bench of the Supreme Court in **Sahara India Real Estate Corporation Limited and Others v. Securities and Exchange Board of India and Another**,[48] concluded that in most jurisdictions there is power in the Court to postpone reporting of judicial proceedings in the interest of administration of justice. That was a case in which Civil Appeals were pending filed by the petitioner challenging the orders passed by the Security Appellate Tribunal. Certain communications were exchanged between the counsel for the parties pursuant to a direction by the Court that the learned counsel should attempt to reach a consensus with respect to acceptable security in the form of an unencumbered asset. The communications exchanged between the counsels appear to have come on one of the Television Channels. In this background, the petitioner has stated that the Court should give appropriate directions with regard to reporting of matters which are sub-judice.

17. In **Naresh Shridhar Mirajkar and Others v. State of Maharashtra and Another,**[49] the Supreme Court was dealing with a issue where an order was passed by the High Court not to publish reports

[48] (2012) 10 SCC 603 ; MANU/SC/0735/2012
[49] AIR 1967 SC 1.

regarding the evidence of one of the witnesses. This was a curb on the principle of public trial in open Court. A nine Judge Bench of the Supreme Court held that the High Court has inherent jurisdiction to hold a trial in camera.

18. Similarly, reference may also be had to the judgment of Supreme Court in **Reliance Petrochemicals Limited v. Proprietors of Indian Express Newspapers, Bombay Private Limited and Others**[50] In that case the petitioner had made a public issue of Secured Convertible Debentures. A petition was filed in the Karnataka High Court and in the Delhi High Court challenging the consent of the Controller of Capital Issues. In the Transfer Petition, the Supreme Court granted an injunction order directing that the issue would be proceeded with without let or hindrance. Certain adverse reports were published commenting adversely on the debentures. The petitioners had objected to the reports claiming that the effect was to comment on a matter which was subjudice and to undermine the effect of interim order passed by this Court. Trial by newspaper on an issue which is sub-judice was argued to be grossest mode of interference with the due administration of justice. The Supreme Court issued an order of injunction restraining the respondents from publishing any article, comment, report or any editorial questioning the legality or validity of any of the consents, approvals or permissions for issue of the Secured Full Convertible Debentures. Hence, the Supreme Court ordered restraint on publication. Needless to add that after the time for subscription to the debentures had closed and the imminent danger to the subscription subsided, the Supreme Court held that continuance of the injunction is no longer necessary. The Supreme Court applied the test of real and imminent danger in order to infer as to whether the proposed

[50] AIR 1989 SC 190

publication would lead to interference in the course of justice for the purpose of grant or non-grant of interim injunction of prior restraint against publication.

19. Hence, courts have power to pass pre publication or pre-broadcasting injunction where the court is satisfied that interest of justice so require.

20. The next issue would be as to under what facts and circumstances, the Court should exercise its jurisdiction to grant an injunction regarding publication of news items or broadcasting of programmes.

21. This High Court had also the occasion to deal with the entire gamut of judgments on this issue in the case of **Swatanter Kumar v. The Indian Express Limited and Others.**[51] This Court held that it had power to restrain publication in media if it arrives at a finding that the publication may result in interference with the administration of justice or against the principle of fair trial or open justice.

22. The present matter is at the stage of preliminary enquiry by the police. The question is whether it will be appropriate for the Court to grant stay on publication at this preliminary stage. Do the powers of the court encompass within its sweep, the power to pass an injunction or prior restraint before or after a First Information Report is registered and before the court commences trial.

23. For the legal position in this regard, reference may be had to the judgment of the Supreme Court in the case of **Sidhartha Vashisht v. State (NCT of Delhi).**[52] That was a case in which the accused was tried

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51 CS(OS) 102/2014 passed on 16.01.2014
52 AIR 2010 SC 2352

for the offence of murder. In that case, the learned senior counsel appearing for the appellant submitted that the appellant had been specifically targeted and maligned before and during the proceedings by the media, despite his acquittal by the Trial Court. The Apex Court while discussing the role of the media and press opined that there is a danger of serious risk of prejudice if the media exercises an unrestricted and unregulated freedom. The Court further stated that certain articles and news appearing in the newspaper immediately after the date of occurrence did cause confusion in the mind of the public.

24. Reference may next be had to the judgment of this Court in the case of **Kartongen Kemi Och Forvaltning AB and Others v. State through Central Bureau of Investigation.**[53] In that case the public servants were charged for entering into criminal conspiracy to cheat the Government of India and cause wrongful loss to the tune of Rs.64 crores for the award of contract for supply of guns. The Court observed that after thirteen long years of investigation by the Central Bureau of Investigation no evidence has been collected against the public servants.

25. Similarly, reference may also be had to the judgment of the Bombay High Court in the case of **Deepti Anil Devasthali and Leena Anil Devastnali v. State of Maharashtra**.[54] In that case the accused were sentenced to death for abduction and murder. The appeal was filed against the conviction by the accused persons. The main attack of defence was the dishonest, shoddy and incomplete investigation by the police. The prosecution proved that the victim was made unconscious, killed and his body parts were dismembered. The police during investigation for the recovery of body parts arranged for a camera to shoot the recovery

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[53] 2004 (72) DRJ 693
[54] 2009 (111) BomLR 3981

process. The Special Prosecutor conceded that such disclosure by the Police in respect of their leads while collecting evidence affected the quality of investigation.

26. Reference may be had to be judgment in the case of **M.S. Ravi and Others.**[55] The High Court of Kerala in that case was dealing with a publication of an article relating to a case of murder of a Nun. The issue concerned was whether the article amounted to contempt of court.

27. The power of the High Court to order restrain of publication in the media would clearly encompass the stage when the criminal case against the accused is at the preliminary enquiry or investigation stage also. In the light of the said position, I will now see whether facts and circumstances exists which necessitate the passing of a pre-publication or pre- broadcasting injunction against the defendants.

28. At this point let me have a look at some of the judgments relied upon by the defendant.

29. The learned senior counsel appearing for defendant No.1 has also strongly relied upon the judgement of this High Court in the case of **Naveen Jindal v. Zee Media Corporation Limited and Another,**[56] which judgment was given on 01.04.2014. As per the facts given, the case dealt with a situation where the plaintiff appears to have been contesting the elections for the third time from the Kurukshetra Lok Sabha Constituency in Haryana. It was averred by the plaintiff in that case that the allegations which were subject matter of that suit were aired by the defendants in the news programmes from 01.03.2014 and 24.03.2014 were per se defamatory and were repeated 131 times against the plaintiff

[55] MANU/KE/1298/2009
[56] 209(2014) DLT 267

which not only effected the sentiments of a particular community and caste but also done with a view to damage the prospect of the plaintiff in getting elected to the Parliament in the ensuing elections. The allegations that were levelled against the plaintiff have been reproduced hereinafter when dealing with the preliminary submissions of the defendant.

30. It was averred by the plaintiff therein that the allegations made by the reporters of defendant No.1 against plaintiff No.1 were per se defamatory and that the defendants therein had unleashed a campaign of vilification.

31. Coming to the facts of this case. The background of the Complaint which is lodged by Mrs. ABC is to be noted. There are certain disputes pending between the Jindal Steel & Power Limited and Mrs. ABC regarding various transactions that took place regarding sale of land since 1999. Mrs. ABC filed a Civil Suit no.4A/2009 for possession of her land and claimed damages against Jindal Steel & Power Limited in 2009. The Suit was decreed vide Order dated 15.03.2013. Jindal Steel & Power Limited being aggrieved by the same filed an appeal which has been remanded back vide Order dated 02.01.2015. Further Mrs. ABC wrote a letter to the plaintiff dated 20.08.2008 seeking compensation for the land purchased by Jindal Steel & Power Ltimited. On 26.07.2010 Mrs. ABC wrote a letter to the Superintendent of the Police, Chattisgarh complaining that Jindal Steel & Power Limited has made unauthorized construction on the land belonging to her and also requested suitable compensation. On 18.08.2010, First Information Report no. 142/2010 under section 147, 148, 149, 294, 506and 323 of the Indian Penal Code, 1860 was registered at PS Raigarh by Mrs. ABC. First Information Report No.143/2010 was also lodged by Jindal Steel & Power Limited against Mrs. ABC on the same date. The allegations made before the

Chhattisgarh High Court are that in 2001 Mrs. ABC was threatened by one Mr.D.K. Bhargava. Thereafter the said Mr. Bhargava and the plaintiff went to her house and robbed her chastity and forcibly took her thumb impression on some documents. It is further stated that on 18.8.2010 while she was standing on the road she was dragged inside the factory of Jindal Steel & Power Limited where unnatural rape was committed on her. This is the nature of allegations on which an enquiry is being conducted by the Chhattisgarh Police. Steps are being taken pursuant to directions dated 6.1.2015 of the Chhattisgarh High Court.

32. Plaintiff has strenuously denied the above allegations against the plaintiff pointing out that the allegations are belated and stale, being made 12 to 14 years after the alleged incident. Further in the various proceedings earlier, no such allegation was made by Ms. ABC.

33. Another relevant fact is the running feud between the two parties. There are allegations made by the plaintiff that in 2012 an attempt to extort Rs.100 crores was made by Editors of defendant No.1 in conspiracy with the Chairman of defendant No.1 for "going slow" on the vilification campaign against the plaintiff and his company regarding reportage. It is the contention of the plaintiff that the demands of defendant No.1 were recorded by the officers of the plaintiff in a sting operation carried out at a hotel in New Delhi. Pursuant to this action, First Information Reports have been lodged. The details of various proceedings which have been filed against each other have been already narrated above.

34. The plaintiffs aver that defendants have aired more than 20 defamatory and false programs against the plaintiff w.e.f. 7.1.2015 to 15.1.2015. It is averred that there have been attempts to deliberately

misinterpret the orders of the Chhattisgarh High Court. Reference is made to a program aired on 13.1.2015 for a duration of 1 hour and 50 minutes where the anchor is stated to be impressing on the viewers that the police is not following the instructions of the High Court or directions of the Supreme Court. It is averred that the anchor was trying to point out as to whether the delay is on account of Senior Superintendent of Police (Raigarh), Inspector General of Police, Director General of Police (Chhattisgarh), Home Secretary, Home Minister and Chief Minister. Leading questions are said to be put to the police pointing out that in an allegation of rape, a First Information Report is to be lodged first and the question of enquiry would not arise. Reference is also made to an interview with Additional Superintendent of Police, Mr.Prafful Kumar which are accusatory in nature and blames the police for not lodging a First Information Report despite order passed by the Chhattisgarh High Court. It is averred that defendants are interfering with the administration of justice and are trying to conduct a media trial and to cause deliberate harm and prejudice to the plaintiff.

35. It is urged that the publication and televising of such articles and news programmes is raising a real and imminent threat to pending fair enquiry in the matter by the police.

36. Hence, essentially the plaintiff seeks to press for an ad interim injunction based on two contentions. Firstly, that the defendants are motivated on account of the past litigation between the parties where they were caught trying to extort large amount of money from the plaintiff. Hence, the defendants are actuated by malice and ill will towards the plaintiff. The second contention is the conduct of the defendant is such as to interfere with the administration of justice and hamper a fair enquiry. The said conduct is an intrusion to the right to open justice unbiased by

any public opinion expressed in publications. It is urged that the programmes not only defame the plaintiff but also tend to interfere with the administration of justice and that the entire attempt of the defendant/its reporters is to pressurize, browbeat or hectoring/pressurize the police into lodging a First Information Report against the plaintiff.

37. The court may at this stage take a closer look at the nature of programmes being telecast as reproduced by the plaintiff and not specifically denied by the defendant.

38. The nature of the programme, the questions and observations show they are likely to prejudice the police and hamper the course of investigation/ inquiry which is being conducted by the police. I am persuaded to come to this conclusion on seeing the nature of questions being put by the Anchor in various Telivision programmes. As an example, I may refer to the questions of the Anchor in asking the ASP as to who is responsible for the presumed delay that is Senior Superintendent of Police Rai Garh, Inspector General of Police, Director General of Police, Chattisgarh, Home Secretary, Home Minister or the Chief Minister. Another example is an observation by the reporter that the Women Commission and the police have maintained silence. Another example is the observation what the High Court has said can be done in two days if the police so desire. The programmes are replete with such questions/observations.

39. The nature of questioning done by the reporters of defendants, the extent of coverage being done by the defendants does show that an attempt is being prima facie made to prod the police if not pressurize. The plaintiff have made out a prima facie case.

40. In these facts would the plaintiff be entitled to an injunction to restrain the defendants from publishing reports or airing reports pertaining to the allegations which are pending before the police by Mrs. ABC. Legal position as explained above is quite clear. Any publication which gives excessive adverse publicity to an accused or which is likely to hamper fair trial and constitutes an interference with the course of justice could be a ground for grant of injunction. The court has ample inherent power to restrain publication in media in the event it arrives at a finding that the said publication may result in interference with the administration of justice or would be against the principle of fair trial or open justice.

41. The balance of convenience is in favour of the plaintiff. Serious prejudice will be caused to plaintiff in case injunction is not granted. Accordingly, the defendants 1 and 2, their associates are restrained by an order of injunction from publishing any article or right-ups or telecasting programmes on the allegations against the plaintiff as made by Mrs. ABC either in the complaint or before the police, till the time the police completes its enquiry and, if necessary, investigation and files an appropriate report/document before the court. The injunction passed is of a temporary nature and is applicable only till the police completes its preliminary enquiry or any other investigation if required that may be done at a later stage. However, the defendants are free to report about the court cases or about the final conclusion of the police in the course of preliminary enquiry covered under the ambit of fair reporting on the basis of true, correct and verified information. The application stands disposed of.

In my opinion this case decision protected the fundamental right of "right to privacy". The media should be banned for the illegal trails. By

this work the media defame anybody for act work which has not declared against law by the judiciary. This judgement is really appreciable and these types of judgement make the judicial system strong.

Shaikh Zahid Mukhtar ……. Petitioner

Versus

The State of Maharashtra[57] ……. Respondent

1. In this Judgement of 6 May, 2016 Consideration of the issues discussed by the separate opinion of Justice Gupte was left, which is what I seek to ddress. Justice Gupte tackles Section 9-B of the Maharashtra Animal reservation (Amendment) Act, 2015, which reads:

> *"In any trial for an offence punishable under sections 9 or 9A for contravention of the provisions of this Act, the burden of proving that the slaughter, transport, export outside the State, sale, purchase or possession of flesh of cow, bull or bullock was not in contravention of the provisions of this Act, shall be on the accused."*

2. The separate opinion struck down Section 9-B of the Act as unconstitutional. In this comment, I first give a basic introduction to reverse burden (or reverse onus) clauses, moving on to discuss the specific reasoning adopted in the Separate Opinion for holding the provision unconstitutional.

3. Ordinarily, in criminal cases the burden to establish the guilt of an Accused rests on the state. This dovetails with the essential principle of every Accused having a presumption of innocence in her favour. Over

[57] Writ Petition No.5731 OF 2015: Judgement on 6 May, 2016

time, though, many statutory inroads have been made into this principle. Beginning with requiring an Accused to establish certain facts (evidential burdens), today there are several instances of Accused persons requiring to establish innocence itself (legal burdens). The Supreme Court held these clauses to be constitutional even where they impose legal burdens, in **Noor Aga v. State of Punjab**.[58]

4. Consider an example from the Narcotic Drugs & Psychotropic Substances Act, 1985. This employs two reverse-burden clauses. Section 54 of that Act creates a presumption that the Accused is guilty of an offence, if she fails to 'satisfactorily account' for possession of contraband. Section 35 states that in a prosecution under the Narcotic Drugs & Psychotropic Substances Act, 1985 it would be presumed that the Accused has the 'culpable mental state' necessary for the offence.

The Separate Opinion's Analysis of Reverse Burdens

5. At the outset, I must applaud the opinion for having extensively discussed the issue of reverse burdens. The vociferous opposition initially faced by these clauses across the common-law world has certainly shifted to a resigned acceptance in light of the perceived needs of law enforcement. However, we are now in a time when legislatures resort to such egregious provisions at the drop of a hat, exhibiting numbness to the severe curtailment of liberties they entail. Parts of the opinion specifically address this problem, as Justice Gupte attacks the very need of having such a clause while dealing with a substance such as beef, which, as admitted by the state, carries no intrinsic harm or threat to society as opposed to say drugs.

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[58] (2008) 16 SCC 417.

6. Moving on to considering the opinion more substantively. Justice Gupte bases his attack upon Articles 14 and 21 of the Constitution of India. After citing various decisions, both Indian and foreign, Justice Gupte arrives at the following four-fold test for considering the validity of any reverse burden clause:

- Is the State required to prove enough basic or essential facts constituting a crime so as to raise a presumption of balance facts (considering the probative connection between these basic facts and the presumed facts) to bring home the guilt of the accused, and to disprove which the burden is cast on the accused?
- Does the proof of these balance facts involve a burden to prove a negative fact?
- Are these balance facts within the special knowledge of the accused?
- Does this burden, considering the aspect of relative ease for the accused to discharge it or the State to prove otherwise, subject the accused to any hardship or oppression?

7. The First Condition restates that the provision must require basic facts to be established by the prosecution before talk of any presumptions and reversing burdens. This must bear enough of a 'probative connection' with the presumption sought to be drawn. Going back to the example of Dharampal above, we can usefully juxtapose it with the decision in Bhola Singh. In the latter, the Supreme Court set aside the conviction for a co-owner of a truck which was caught transporting contraband based on the presumption. The Supreme Court held the presumption was not attracted, as the prosecution didn't prove any basic facts connecting the Accused with the contraband. The prosecution didn't show the Accused knew how

his truck was being used by the contractor, let alone him knowing that the truck was being used to smuggle contraband.

8. From this, the Second and Third Conditions address the kind of facts that are to be presumed. The idea behind this is an understanding that reverse burden clauses only make sense where the issue is lying within the 'special knowledge' of the Accused or to prove 'negative facts'. 'Negative facts' are the existence of permissions such as licenses or tickets, which play a role where offences rely on the inexistence of these permissions. 'Special knowledge' is a reference to mental states of an Accused. This is trickier. Any culpable mental state will always be a matter for the 'special knowledge' of an Accused, inviting the argument that in every trial the burden must be on the Accused to disprove intention after the prosecution establishes the physical act. Enter, the fourth condition, which places the handbrake on extending such logic too far. It reminds us of the fundamental David and Goliath nature of the contest though, and how difficult it is for an Accused to find and present evidence to establish his innocence beyond his own word for his deeds.

9. Overall, then, there is little to disagree with the framework Justice Gupte establishes for evaluating reverse burden clauses in his separate opinion. The first and fourth conditions are the actual 'tests' upon which the reverse burden clause will be tested. If you clear the first test, the framework requires determining what kind of presumption is placed on the Accused, before considering whether placing such a presumption is unduly burdensome and oppressive. Considering there is no such clear test available in judicial decisions at present, it is a welcome contribution which should prove helpful in providing a systematic consideration of the various reverse burden clauses we have at present, and are bound to have in the future.

10. Justice Gupte arrives at Sections 5 and 6, which were present before the Amendment. The analysis is crisp as it is brief – Sections 5 and 6 read with Section 9-B would involve a presumption of foundational facts, which would render its use unconstitutional for a violation of his First Condition.

11. Newspapers have already reported that the State of Maharashtra plans to challenge this decision in the Supreme Court. A part of me hopes this happens, as it would enable the Supreme Court to, hopefully, endorse the exposition of the Separate Opinion on reverse burden clauses. The test created is clear, and potentially allows for greater clarity in examining these provisions which currently abound our statute book. In its current form, Section 9-B is far too broad to be considered sustainable. One would assume that the chances of the Supreme Court overturning the verdict are unlikely.

12. The higher probability is of a modified Section 9-B emerging from the Maharashtra legislature, incorporating the position espoused by the Advocate General during the hearing before the Bombay High Court. A version of Section 9-B which explicitly places an initial burden on the prosecution would then place the focus squarely on the other condition created by Justice Gupte, of such a provision placing an Accused under oppression and undue hardship. That consideration, whenever it does happen, will prove to have a lasting impression on how reverse burden clauses are viewed in our criminal justice system.

In my opinion the court has protected the fundamental principal of criminal justice system. The burden of proof must be proved beyond doubt. The balance must be established for the criminal justice protective system. The rights of individual must be protected.

Vipulsinh Ramjubha Jadeja …….Petitioner

versus

State of Gujarat and Others.[59] ……Respondent

1. Learned advocate Ms. Ansuya K. Makwana waives service of notice of rule on behalf of respondent Nos. 2 and 3. Learned Assistant Public Prosecutor Mr. Manan Mehta waives service of notice of rule on behalf of respondent No.1

2. Heard learned advocate Ms. Payal M. Tuvar for learned advocate Ms. Kruti M. Shah for the applicant and learned advocate Ms. Ansuya K. Makwana for respondent Nos. 2 and 3. Perused the record.

3. Petitioner herein is husband, whereas respondent No.2 is wife and respondent No.3 is their minor daughter. The petitioner has challenged the judgment and order dated 30.05.2015 in Criminal Misc. Application No.595 of 2013 by the Family Court, Rajkot. By such impugned judgment, the Family Court has awarded an amount of Rs.6000/- towards maintenance of wife and Rs.3000/- towards maintenance of minor daughter from the date of application that is 27.06.2013 with cost of Rs.7,500/- The Family Court has awarded an amount of Rs.1,00,000/- as lumpsum amount for the purpose of provision for residence.

4. The petitioner has also challenged the judgment and order dated 13.05.2015 in Criminal Misc. Application No.454 of 2013 by the Family Court, Rajkot. By such impugned judgment, the Family Court has sentenced the petitioner for 35 months simple imprisonment, since

[59] R/CR.RA/683/2015; Judgement on 8 July, 2016.

petitioner has failed to pay the maintenance and deposit the amount for provision of residence as awarded by an order dated 30.05.2015.

5. The petitioner has challenged such orders on several grounds. However, if we peruse the impugned judgment, it becomes clear that present petitioner has defended the claim of maintenance before the Family Court. The petitioner has adduced his own evidence and produced relevant documentary evidence to prove his income so also income of the wife. However, the fact remains that so far as income of the wife is concerned, it is the case of the petitioner husband that wife is making Imitation Jewellary and earning Rs.30,000/- per month. However, there is no supporting or corroborating evidence to that effect except pleadings and statement by the petitioner.

6. As against that, petitioner is also owning 30 Vigha of agriculture land though it is stated that land is in the name of his parents. Even evidence of the petitioner husband has confirmed such situation and, therefore, there is reason to believe that husband is having reasonable income and thereby he can certainly maintain his wife and daughter.

7. Considering the rival submissions, when petitioner has not disclosed his correct income or relevant evidence for consideration of his income, the Family Court has relied upon the legal provisions regarding adverse inference and held that petitioner must be earning Rs.20,000/- to Rs.22,000/- for awarding compensation to his wife and minor child. Therefore, considering overall facts and circumstances so also requirement of wife to stay with dignity, the Court has awarded such amount as maintenance for two living persons and, therefore, I do not see any reason to reduce the same.

8. However, so far as additional amount of Rs.100,000/- towards provision of residence is concerned, it is clear that the Family Court has misinterpreted the decision in the case of **Lomalam Amma v. Kumara Pillai Raghavan Pillai,**[60] because, though it is true that provision for maintenance must include provision for residence with provision for food and clothing etc. and thereby though basic need of roof over head is to be considered and, therefore, though the Honourable Supreme Court has stated that provision for residence may be made either by giving lump sum in money or properties in lieu thereof or by providing money for necessary expenditure or by giving life interest in property, it becomes clear that under the provisions of Section 125 of the Code of Criminal Procedure, the Court is empowered to make arrangement for maintenance of wife which may include consideration for provision for residence but in my considered view, the Court while passing an order under Section 125 of the Code of Criminal Procedure does not have jurisdiction to award lump sum amount towards residential accommodation though it can be awarded under the provisions of Domestic Violence Act. It cannot be ignored that in such cited decision, the Honourable Supreme Court was dealing with the relief of maintenance under Hindu Adoption and Maintenance Act and not under provisions of Section 125 of the Code of Criminal Procedure. It is quite clear and obvious that both under Hindu Adoption and Maintenance Act and the Protection of Women from Domestic Violence Act, wife can claim a separate residential accommodation or provision for it and competent Court can grant such relief, but there is no similar power vested in the Court while dealing with the application under Section 125 of the Code of Criminal Procedure wherein jurisdiction of the Court is limited for making immediate arrangement for livelihood of the wife and children, though such

[60] AIR 2009 SC 636

maintenance must be enough for the wife to live with dignity. However, at the same time, such living should not be luxurious, though she should not be left to live in discomfort.

9. Therefore, though amount of monthly maintenance may not be disturbed, so far as lump sum amount for residential accommodation is concerned, the same needs to be quashed and set aside. Otherwise also it is quite clear and obvious that an amount of Rs.1,00,000/- would not be sufficient for residential accommodation in a city like Rajkot where wife is residing. In such circumstances, practically while considering quantum of maintenance to be paid to the wife, the Court can consider the proper amount of residential accommodation. In the present case, when Court has awarded total Rs.9,000/- towards maintenance of both applicants from the total income of Rs.20,000/-, it is made clear that this amount includes the provisions for rental accommodation and considering all such aspects, such amount is not reduced to any extent.

10. In view of above facts and circumstances, revision is partly allowed. Thereby impugned order so far as lump sum amount of Rs.1,00,000/- for the purpose of residence is quashed and set aside. Rest of the order regarding maintenance would remain in force. Interim relief shall stand vacated. Rule is made absolute accordingly. Direct Service is permitted.

In my opinion the court has protected the feminine rights. Women and men are two wheels of the society so the court held that the feminine jurisprudence must be developed and protected in a better way. If the rights of women may be violated the society cant not be developed.

(III) Foreign Cases

The Right to privacy is a fundamental right vis a vis human rights, not only Indian Courts but the foreign courts also protected the right to privacy. In **United States v. Virginia**,[61] is a landmark case in which the Supreme Court of the United States struck down the Virginia Military Institutes long-standing male-only admission policy in a 7-1 decision.

1. The Right to privacy is a fundamental right vis a vis human rights, not only Indian Courts but the foreign courts also protected the right to privacy. In **United States v. Virginia**,[62] is a landmark case in which the Supreme Court of the United States struck down the Virginia Military Institutes long-standing male-only admission policy in a 7-1 decision.

2. Writing for the majority, Justice Ruth Bader Ginsburg stated that because Virginia Military Institute failed to show "exceedingly persuasive justification" for its sex-based admissions policy, it violated the Fourteenth Amendment's Equal Protection Clause. In an attempt to satisfy equal protection requirements, the state of Virginia had proposed a parallel program for women, called the Virginia Women's Institute for Leadership, located at Mary Baldwin College, a private liberal arts women's college.

3. However, Justice Ginsburg held that the Virginia Women's Institute for Leadership would not provide women with the same type of rigorous military training, facilities, courses, faculty, financial opportunities, and/or alumni reputation and connections that Virginia Military Institute affords male cadets, a decision evocative of **Sweatt v.**

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61 518 U.S. 515 (1996).
62 518 U.S. 515 (1996).

Painter,[63] when the Court ruled in 1950 that segregated law schools in Texas were unconstitutional, since a newly formed black law school clearly did not provide the same benefits to its students as the state's prestigious and long-maintained white law school. In her opinion, she stated that "The Virginia Women's Institute for Leadership program is a pale shadow of Virginia Military Institute in terms of the range of curricular choices and faculty stature, funding, prestige, alumni support and influence."

4. Chief Justice William Rehnquist wrote a concurrence agreeing to strike down the male-only admissions policy of the Virginia Military Institute, as violative of the Fourteenth Amendment's Equal Protection Clause. However, he declined to join the majority opinion's basis for using the Fourteenth Amendment, writing: "Had Virginia made a genuine effort to devote comparable public resources to a facility for women, and followed through on such a plan, it might well have avoided an equal protection violation." This rationale supported separate but equal facilities separated on the basis of sex: "it is not the 'exclusion of women' that violates the Equal Protection Clause, but the maintenance of an all-men school without providing any institution for women. It would be a sufficient remedy, I think, if the two institutions offered the same quality of education and were of the same overall caliber."

5. **Rostker v. Goldberg**,[64] was a decision of the United States Supreme Court holding that the practice of requiring only men to register for the draft was constitutional. After extensive hearings, floor debate and committee sessions on the matter, the United States Congress enacted the law, as it had previously been, to apply to men only. Several attorneys,

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63 339 U.S. 629 (1950)
64 453 U.S. 57 (1981).

including Robert L. Goldberg, subsequently challenged the gender distinction as unconstitutional. The named defendant is Bernard D. Rostker, Director of the Selective Service System. In a 6-to-3 decision, the Supreme Court held that this gender distinction was not a violation of the equal protection component of the due process clause, and that the Act would stand as passed. In 1971 an anti-war group, the Philadelphia Resistance, gathered a group of young male high school students, including Andrew Rowland, his brother, David Sitman and David Fruedman to protest the draft. In **Rowland v. Tarr**,[65] the United States District Court for the Eastern District of Pennsylvania heard a challenge to the Military Selective Service Act, 1948 on several grounds, one of which was gender discrimination. In 1974, they were not granted a 3-judge court opinion because the draft was now discontinued. This group of men petitioned again in **Goldberg v. Tarr. Robert Goldberg,**[66] was a medical student at Penn State who registered and claimed to be a conscientious objector. In July 1980, just a few days before registration was to commence again, the district court offered an opinion claiming that the Military Selective Service Act, 1948 violated the Due Process Clause of the 5th Amendment. The director of the Selective Service System, Bernard Rostker, filed an appeal and the circuit judge stayed the court decision and registration began as scheduled. **Rostker v. Goldberg**,[67] moved up to the Supreme Court.

6. The Army and Marine Corps precluded the use of women in combat as a matter of established policy, and both the Navy and the Air Force restricted women's participation in combat. Even the president-who had originally suggested that women be included-expressed his

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65 341 F. Supp. 339 (ED Pa. 1972)
66 510 F.Supp. 292 (1980)
67 453 U.S. 57 (1981)

intent to continue the current military policy excluding women from combat. Since the purpose of registration was to prepare for a draft of combat troops, and since women are excluded from combat, Congress concluded that they would not be needed in the event of a draft, and therefore decided funds should not be used to register them. As one Senator said, “It has been suggested that all women be registered, but only a handful actually be inducted in an emergency. The Committee finds this a confused and ultimately unsatisfactory solution." As the Senate Committee recognized a year before, "training would be needlessly burdened by women recruits who could not be used in combat." All in all, the proponents of the current Military Selective Service Act, 1948 advocated not using government funds to register people who were excluded from the job anyway. The main point of those who favored the registration of females was that females were in favor of it because of gender equality principles; women, as full citizens, ought to have the same civic duties and responsibilities as men.

7. In the majority opinion, Justice William Rehnquist wrote "the existence of the combat restrictions clearly indicates the basis for Congress' decision to exempt women from registration. The purpose of registration was to prepare for a draft of combat troops. Since women are excluded from combat, Congress concluded that they would not be needed in the event of a draft, and therefore decided not to register them." Implicit in the obiter dicta of the ruling was to hold valid the statutory restrictions on gender discrimination in assigning combat roles. Men and women, because of the combat restrictions on women, are simply not similarly situated for purposes of a draft or registration for a draft therefore, there is no violation of the Due Process Clause. The Supreme Court therefore reversed the decision of the district court.

8. **United States v. Morrison**,[68] is a United States Supreme Court decision which held that parts of the Violence Against Women Act of 1994 were unconstitutional because they exceeded congressional power under the Commerce Clause and under section 5 of the Fourteenth Amendment to the Constitution.

9. In 1994, the United States Congress passed the Violence Against Women Act, which contained a provision for a federal civil remedy to victims of gender-based violence, even if no criminal charges had been filed against the alleged perpetrator of that violence.

10. That fall, at Virginia Tech, freshman student Christy Brzonkala was assaulted and raped repeatedly by fellow students Antonio Morrison and James Crawford. During the school-conducted hearing on her complaint, Morrison admitted having sexual contact with her despite the fact that she had twice told him "no." College proceedings failed to punish Crawford, but initially punished Morrison with a suspension (punishment later struck down by the administration). A state grand jury did not find sufficient evidence to charge either man with a crime. Brzonkala then filed suit under the Violence Against Women Act.

11. The United States District Court for the Western District of Virginia held that Congress lacked authority to enact. A three-judge panel of the Court of Appeals for the Fourth Circuit reversed the decision 2–1. The Fourth Circuit reheard the case en banc and reversed the panel, upholding the district court. In a 5–4 decision, **United States v. Morrison**[69] invalidated the section of the Violence Against Women Act of 1994 that gave victims of gender-motivated violence the right to sue

[68] 529 U.S. 598 (2000).
[69] 529 U.S. 598 (2000)

their attackers in federal court, although program funding remains unaffected. Chief Justice Rehnquist, writing for the majority, held that Congress lacked authority, under either the Commerce Clause or the Fourteenth Amendment, to enact this section.

12. The Court also held that Congress lacked the power to enact Violence Against Women Act under the Fourteenth Amendment, relying on the "state action" doctrine. This doctrine, which originated in **United States v. Harris**[70] and **The Civil Rights Cases**,[71] provides that the prohibitions of the Fourteenth Amendment do not constrain private individuals.

13. The United States Government argued that Violence Against Women Act appropriately enforced the Equal Protection Clause's ban on governmental gender discrimination. Specially, the Government argued that pervasive gender stereotypes and assumptions permeated state justice systems, and that these forms of state bias led to "insufficient investigation and prosecution of gender-motivated crime, inappropriate focus on the behavior and credibility of the victims of that crime, and unacceptably lenient punishments for those who are actually convicted of gender-motivated violence." This bias, the government argued, deprived women of the equal protection of the laws, and the private civil remedy of Violence Against Women Act was meant to redress "both the States' bias and deter future instances of gender discrimination in the state courts."

14. The Court responded that, even if there had been gender-based disparate treatment by state authorities in this case, precedents such as the Civil Rights Cases limit the manner in which Congress may remedy

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70 106 U.S. 629 (1883)
71 109 U.S. 3 (1883)

discrimination, and require that a civil remedy be directed at a State or state actor instead of a private party. Such precedents, said the Court, prohibit only state action— that is, action by state governments—and not private conduct. In other words, unequal enforcement of state laws caused by inaction is, by this interpretation, beyond the scope of the federal government's enforcement of the equal protection clause.

15. The majority reaffirmed the state action doctrine, and specifically reaffirmed the results reached in **United States v. Harris**[72] and **The Civil Rights Cases,**[73] both decided fifteen years after the Fourteenth Amendment's ratification in 1868. In the Civil Rights Cases, the Court had held that the Equal Protection Clause applied only to acts done by states, not to acts done by private individuals. Because the Civil Rights Act of 1875 applied to racial discrimination in private establishments, the Court said in the Civil Rights Cases, it exceeded congressional enforcement power under section 5 of the Fourteenth Amendment. In Harris, the Court ruled that the Clause did not apply to a prison lynching, since the Fourteenth Amendment did not apply to private actors, as opposed to state actors. A sheriff (a state actor) had tried to prevent the lynching.

16. According to Morrison, "assuming that there has been gender-based disparate treatment by state authorities in this case, it would not be enough to save § 13981's civil remedy, which is directed not at a State or state actor but at individuals who have committed criminal acts motivated by gender bias." The Court agreed with the government that there was a "voluminous congressional record" supporting the "assertion that there is pervasive bias in various state justice systems against victims of gender-

[72] 106 U.S. 629 (1883)
[73] 109 U.S. 3 (1883)

motivated violence," and the Court also agreed with the government that "state-sponsored gender discrimination violates equal protection unless it serves important governmental objectives." However, according to the majority, even if there is unconstitutional state action, that only justifies Congress in targeting the state actors, rather than targeting private parties.

17. The government's argument was that Violence Against Women Act had been enacted in response to "gender-based disparate treatment by state authorities," while in contrast there was "no indication of such state action" in the Civil Rights Cases. According to the Court, however, the Civil Rights Cases held that the Fourteenth Amendment did not allow Congress to target private parties in order to remedy the unequal enforcement of state laws. To support this interpretation of the Civil Rights Cases, the Court quoted one of the Congressmen who had supported the law that the Civil Rights Cases struck down: "There were state laws on the books bespeaking equality of treatment, but in the administration of these laws there was discrimination against newly freed slaves." To the majority, this quote indicated that the law deemed unconstitutional in the Civil Rights Cases was meant to combat the same kind of disparate treatment against which Violence Against Women Act was aimed.

18. The majority continued that even if the government's distinction between Morrison and the Civil Rights Cases was valid, the Violence Against Women Act still was unconstitutionally aimed not at state actors but at private criminal conduct. Under **City of Boerne v. Flores**,[74] the majority stated, Congress was required to adhere to the Court's interpretation of the Fourteenth Amendment, including the Court's interpretation of the state-action doctrine. The "congruence and

[74] 521 U.S. 507 (1997)

proportionality" requirement of Boerne did not allow Congress to exceed the Court's interpretation of the Fourteenth Amendment. Although it had been widely believed that section five of the Fourteenth Amendment was a "one-way ratchet," in which Congress could go beyond, but not fall short of, the Court's interpretation of the Equal Protection Clause, that interpretation had been rejected by the Court in Boerne in order to prevent what the Court described as "a considerable congressional intrusion into the States' traditional prerogatives and general authority."

19. The belief that section five was a "one-way ratchet" had been based on **Katzenbach v. Morgan**,[75] in which the Court had said that section five of the Fourteenth Amendment was "a positive grant of legislative power authorizing Congress to exercise its discretion in determining the need for and nature of legislation to secure Fourteenth Amendment guarantees." In Morrison, the Court, as it had in Boerne, again distinguished Morgan, on the ground that Morgan had involved federal legislation "directed at New York officials" instead of private parties. The Morrison Court also noted that, unlike the Violence Against Women Act, the legislation in Morgan "was directed only to the State where the evil found by Congress existed."

Bohlen v. Germany[76]

Facts of the case –

1. The applicant, a musician and artistic producer, published a book some passages of which were removed following court rulings. In October 2003 a tobacco company launched an advertising campaign referring to this event and including the applicant’s first name. At the

[75] 384 U.S. 641 (1966)
[76] ECHR, 53495/09 Judgement on 19.02.2015.

applicant's request, the company undertook in writing to refrain from further distributing the advertisement in question with the heading mentioning his name, but refused to pay him the compensation he claimed by way of a notional licence fee. The applicant then applied to the Regional Court, which granted his request. The Court of Appeal upheld the main findings of the Regional Court, but reduced the amount of the notional licence fee. However, the Federal Court of Justice quashed the Court of Appeal judgment in June 2008, finding in particular that the applicant's interest in not being named in the advertisement without his consent was outweighed by the tobacco company's right to freedom of expression.

2. Law – Article 8 of European convention of human rights: The applicant complained of the State's failure to protect him against the use of his first name by the tobacco company without his consent. The present application required the Court to examine the fair balance to be struck between the applicant's right to respect for his private life, from the standpoint of the State's positive obligations under Article 8 of the Convention, and the company's freedom of expression under Article 10.

3. The balancing of the right to respect for private life and the right to freedom of expression had to be carried out in the light of the contribution to a debate of general interest, the extent to which the person in question was in the public eye, the subject of the reporting, the prior conduct of the person concerned and the content, form and impact of the publication. In the instant case the advertising campaign had related to a topic of public interest, dealing in a humorous and satirical manner with the publication of the applicant's book and the ensuing proceedings shortly after the events had occurred. The applicant was a public figure who could not claim the same degree of protection of his private life as an

individual not in the public eye. The advertisement complained of had referred exclusively to a public event that had been covered in the media, and had not reported details of the applicant's private life. Moreover, in publishing his book the applicant had actively sought the limelight, so that his "legitimate the advertisement had not contained anything degrading or negative regarding the applicant, a non-smoker, and had not suggested that he identified in any way with the product being advertised.

4. The use of a public figure's name in connection with a commercial product without his or her consent could raise issues under Article 8 of the Convention. However, the advertisement in question had been of a humorous nature, bearing in mind that the company had sought to make a humorous connection between the image of a packet of its brand of cigarettes and a topical event involving a well-known person. Furthermore, only a small number of people would have been able to make the connection between the advertisement and the applicant, since neither his surname nor his photograph had featured in the campaign. Only persons familiar with the legal dispute concerning the book's publication would have understood the advertisement.

5. The applicant alleged in particular that the Federal Court of Justice had dismissed his claims primarily because the company's freedom of expression enjoyed greater legal protection than his right to protection of his private life. Some passages in the judgment in question appeared to suggest that, simply because it was enshrined in constitutional law, the company's right to freedom of expression carried greater weight in this case than the applicant's right to protection of his personality and his name, which were only protected by ordinary law. However, the Federal Court of Justice had specified that only the pecuniary aspects of personality rights were protected by the ordinary law, whereas the right to

the protection of one's personality, in so far as it protected non-pecuniary interests, was one of the fundamental rights guaranteed by constitutional law. The Federal Court of Justice had also taken into consideration the circumstances of the case in conducting a thorough balancing exercise between the competing interests at stake, before finding that priority should be given to the company's freedom of expression and refusing to grant a notional licence fee to the applicant, who had already obtained an undertaking from the company to refrain from further distribution of the advertisement. In those circumstances, and in view of the wide margin of appreciation left to the national courts in this sphere in weighing up the competing interests, the Federal Court of Justice had not failed in its positive obligations towards the applicant under Article 8 of the Convention.

In my opinion the court has protected right to privacy for any individual person. The company must protect these rights as an essential point for human rights protective system.

Y. v. Slovenia[77]

Principal facts

1. The applicant, Ms Y., is a Slovenian national who was born in Ukraine in 1987. She arrived in Slovenia in 2000 with her sister and mother, who had married a Slovenian. The case concerned the criminal proceedings brought against a family friend whom Y. accused of repeatedly sexually assaulting her.

2. Y.'s mother first lodged a criminal complaint against the family friend in July 2002, accusing him of having forced her daughter, who was

[77] ECHR, Application no. 41107/10, Judgement on 28.05.2015

14 years old, to engage in sexual intercourse with him between July and December 2001. The family friend, 55 years old at the time, often took care of Y., together with his wife, helping her to prepare for beauty contests.

3. In the course of the ensuing investigation and trial, the authorities questioned Y. and her alleged assailant – who denied having had any sexual relations with Y., examined a number of witnesses and appointed experts to clarify the conflicting testimonies. Thus, two gynaecological reports neither confirmed nor disproved Y.'s allegations and two other experts came to contradictory conclusions: the first, a psychologist, found that Y. clearly showed symptoms of sexual abuse; and the second, an expert in orthopaedics, considered that the defendant could not have overpowered Y. And performed the acts of which he was accused on account of a disability (his left arm had been disabled since birth). During the gynaecological consultation, the doctor confronted Y. with the findings, in particular, of the orthopaedics report and questioned her why she had not defended herself more vigorously.

4. Y.'s request that the legal representative of the defendant should be disqualified from the proceedings – on the grounds that, having known him previously, she and her mother had consulted him concerning the sexual assaults even before the police was informed – was rejected by the trial court, finding that there were no statutory grounds for such disqualification.

5. During two of the hearings in the case, the defendant personally cross-examined Y. He maintained that he was physically incapable of assaulting her and that her accusations against him were prompted by her mother's wish to extort money from him; several questions were phrased

in a way to suggest a particular answer and he continuously contested the veracity of Y.'s answers, alleging that she was able to cry on cue to make people believe her.

6. In September 2009, after having held 12 hearings in total, the first-instance court acquitted Y.'s alleged assailant of all charges. The State prosecutor's appeal against that judgment was rejected in May 2010, as was Y.'s request for the protection of legality with the Supreme State Prosecutor a few months later.

7. Complaints, procedure and composition of the Court Y.alleged, under Article 3 (prohibition of inhuman or degrading treatment), that the investigation into her allegation of sexual assault on her and the ensuing judicial proceedings had been unreasonably delayed – having lasted seven years between the lodging of her complaint and the pronouncement of the first-instance judgment – and ineffective, the authorities being biased against her on account of her Ukrainian origin. Secondly, she complained, under Article 8 (right to respect for private and family life), of breaches of her personal integrity during the criminal proceedings and in particular that she had been traumatised by having been cross-examined by the defendant himself during two of the hearings in her case.

8. The application was lodged with the European Court of Human Rights on 17 July 2010.

Decision of the Court

9. The Court noted with concern that the proceedings had been marked by several longer periods of complete inactivity. The police had submitted an incident report of Y.'s complaint to the prosecutor only a full year after their investigation had been concluded and upon being

urged by the prosecutor to do so. Following the prosecutor's prompt request for a judicial investigation to be initiated, the investigating judge took 21 months to decide on that request. Once the investigation had been concluded, the trial hearing was scheduled eight months after the indictment had been confirmed, in breach of national procedural rules. Due to several adjournments, the first hearing was held almost a year and a half after the defendant had been indicted.

10. While it was impossible to speculate whether the fact that it took more than seven years between Y. lodging her complaint and the rendering of the first-instance judgment had prejudiced the outcome of the proceedings, such a delay could not be reconciled with the requirements of promptness.

11. There had accordingly been a violation of the State's procedural obligations under Article 3.

12. Having regard to the fact that Y.'s testimony at the trial constituted the only direct evidence in the case and the fact that the other evidence – the psychologist's report and the orthopaedics report –was conflicting, it was in the interest of a fair trial that the defence be provided with an opportunity to cross-examine Y, who was moreover an adult at the time of the hearings. Nevertheless the Court had to determine whether a fair balance had been struck between her personal integrity and the rights of the defence.

13. In the Court's opinion, the fact that Y.'s questioning had stretched over four hearings, held over seven months, without an apparent reason for the long intervals between hearings, in itself raised concerns.

14. As regards the nature of the cross-examination by the defendant himself, the Court noted that, while the defence had to be allowed a certain leeway to challenge Y.'s credibility, cross-examination should not be used as a means of intimidating or humiliating witnesses. Some of the defendant's questions and remarks, such as his allegation that Y. could cry on cue in order to manipulate people, had aimed not only to challenge her credibility but also to degrade her character. Such offensive insinuations exceeded the limits of what could be tolerated for the purpose of mounting an effective defence. It would have been first and foremost the responsibility of the presiding judge to ensure that respect for Y.'s integrity was adequately protected from those remarks, an intervention which could have mitigated what must have been a distressing experience for her Concerning Y.'s assertion that the defendant's lawyer should have been disqualified as she had previously consulted him, it was not the Court's task to speculate on the question to what extent she had known the lawyer before. However, assuming that her allegation was true, the negative psychological effect of being cross-examined by him should not have been entirely disregarded.

15. Moreover, the information the lawyer might have received from her should not have been used to benefit a person with adverse interests in the proceedings. Nevertheless, her motion was rejected, as under national law there were no statutory grounds for dismissing a legal representative in the situation at hand. The Court therefore found that the Slovene legislation on disqualification of counsel, or the manner in which it had been applied, did not take sufficient account of Y.'s interests.

16. Finally, as regards the gynaecological consultation conducted in the course of the investigation, the

17. Court observed that the doctor – in particular by confronting Y. with the findings of the orthopaedics report and questioning her concerning her self-defence – had exceeded the scope of his task.

18. The Court acknowledged that the authorities had taken a number of measures to prevent Y. From being traumatised further, such as excluding the public from the trial and having the defendant removed from the courtroom when she gave her testimony. However, given the sensitivity of the matter and her young age at the time when the alleged sexual assaults had taken place, a particularly sensitive approach would have been required. The Court found that – taking into account the cumulative effect of the shortcomings of the investigation and the trial – the authorities had failed to take such an approach and to provide Y. with the necessary protection. There had accordingly been a violation of Article 8.

19. The Court held that Slovenia was to pay Ms Y. 9,500 euros in respect of non-pecuniary damage and 4,000 euros in respect of costs and expenses.

In my opinion the court has protected right to privacy as an essential element for human rights protection. This issue is important for the medical practitioner and patient relation. The doctors should remember that the dignity of a person especially women must be protected.

CHAPTER 7

CONCLUSION AND SUGGESTIONS

(I) Conclusion:

The aforesaid study reveals the following analytical and logical conclusion of the present work. Human rights are inherent, inalienable and universal. Inherent in the sense that these are the natural and birth rights of all human beings enjoyed simply by reason of their being human beings. In these rights right to privacy is really essential for live with dignity. If we think the right to dignity in relation to famine part of the world, it is really thinkable question. The researcher has analyzed this concept in following manner:-

In **chapter 1** the researcher dealt with the introductory part of this research. The researcher has concentrated on rational of research, definition of human rights, introductory aspect of right to privacy with historical development, general overview of Legislative and judicial Initiatives towards Protection of Dignity and Privacy of Woman, hypothesis, objective and methodology of the research.

In **chapter 2** the researcher has took the various dimension of human rights with right to privacy and dignity under article 21 of constitution of India. The researcher has found that the case of Menka Gandhi has change the scenario of right to life and personal liberty. After Menka Gandhi era, the judiciary interpreted Article 21 in various forms for the protection of life of a common man. In **A.K. Bindal v. Union of India**[1] it was held that no person should be deprived of his life and

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[1] (2003) 5 SCC 163

personal liberty except according to the procedure established by law. In **Lata Singh v. State of Uttar Pradesh,**[2] Justice Katju observed that right to merry is a absolute right under Article 21 of the Constitution. Thus the Article 21 has a large range to protect the right of the people. The researcher has analize the right to privacy in linking up many concepts like as Police Surveillance, Domiciliary Visits of Harassment, Prevention of Crime is Object Of Surveillance, Veracity of Testimony, Eavesdropping, Privacy And Morality, Residuary Liberties and Right of Franchise, Medical Care, Beauty Contest and Right to Privacy, Statement Made to Doctors and Privacy, Police Atrocities, Freedom of Speech, Religious Freedom, Duty of Disclosure.

In **chapter 3** the researcher has took the right to privacy in the Universal Declaration of Human Rights, 1948. Right to privacy is also included which is basic human rights. It is recognized that no one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, or to attacks upon his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks. Worldwide Influence of the Universal Declaration of Human Rights and the International Bill of Rights is also analyzed. Privacy is a fundamental human right recognized in the United States Declaration of Human Rights, the International Convenant on Civil and Political Rights and in many other international and regional treaties. Privacy underpins human dignity and other key values such as freedom of association and freedom of speech. It has become one of the most important human rights issues of the modern age. The publication of this report reflects the growing importance, diversity and complexity of this fundamental right.

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[2] AIR 2006 SC 2522

In **chapter 4** the researcher has dealt with right to privacy in various countries. Right to privacy is basic human rights. In Indian Constitution Right to Privacy is embodied in Right to life, Rule of Law which includes Natural Justice. For analyzing the right to Privacy it is important go through the right to life and personal liberty with due process of law. The legislative and judicial initiative of England, United States of America, Ireland, West Germany, Canada, and Bangladesh has analyzed in this chapter.

In **chapter 5** the researcher has analyze the concept of right to privacy in relation to right to information conflicts, election matter and medical matters. The right to information often collides with the right to privacy. The government stores a lot of information about individuals in its dossiers supplied by individuals in applications made for obtaining various licences, permissions including passports and many more issues. There is an inherent tension between the objective of right to information and the objective of protecting personal privacy. These objectives will often conflict when an applicant seeks access for personal information about a third party. The conflict poses two related challenges for lawmakers; first, to determine where the balance should be struck between these aims; and, secondly, to determine the mechanisms for dealing with requests for such information. Medical privacy is the practice of keeping information about a patient confidential. This involves both conversational discretion on the part of health care providers, and the security of medical records. The terms can also refer to the physical privacy of patients from other patients and providers while in a medical facility. Modern concerns include the degree of disclosure to insurance companies, employers, and other third parties. The researcher has deals many glimpses of legislative and judicial initiatives. Judicial

and legislative directions in relation to Role of police, court, medical staff and other agencies have also been analyzed. The concept of privacy is also affecting the election laws. The secret ballot is a voting method in which a voter's choices in an election or a referendum are anonymous, forestalling attempts to influence the voter by intimidation and potential vote buying. The system is one means of achieving the goal of political privacy.

In **chapter 6** the provision relating to Sting operations has been taken by the researcher. A sting operation is an operation designed to catch a person committing a crime by means of deception. A typical sting will have a law-enforcement officer or cooperative member of the public play a role as criminal partner or potential victim and go along with a suspect's actions to gather evidence of the suspect's wrongdoing. Now the moot question that arises is whether it is for the media to act as the law enforcement agency. Many legal provision and judicial view is also analyzed. Many incidents of sting operation like as Uma Khurana Case, Cobrapost sting operation, Tehelka Operations, Cash for votes sting operation has been taken by the researcher.

In **chapter 7** the researcher has took the judicial pronouncement of various courts like as Supreme Court of India, various High Courts, Foreigner Courts, Regional Human Rights Courts. In this chapter the *Ratio Decidenti* and *Obitor Dictum* of pronouncements has been deeply examined in relation to dignity and privacy of feminine section.

Thus the researcher wants to draw the conclusive remark:-

1. Before we get into a complete discussion of Right to Privacy first of all we need to know what does the word Privacy mean.

According to Black's Law Dictionary "right to be let alone; the right of a person to be free from any unwarranted publicity; the right to live without any unwarranted interference by the public in matters with which the public is not necessarily concerned".

2. Thus the right to privacy means any individual which include any man and women must be free from unwanted interference in personal life otherwise the role of human rights and liberty of a person are all in vain.

3. Article 21 of the Constitution of India states that "No person shall be deprived of his life or personal liberty except according to procedure established by law". After reading the Article 21, it has been interpreted that the term 'life' includes all those aspects of life which go to make a man's life meaningful, complete and worth living.

4. Like everything mankind has ever achieved, there has been a positive and a negative side to it. Technology has invaded every part of our lives whether the invasion was desired or not, we cannot be sure whether what we say has been heard by a third party as well whether that was desired or not. The proverbial Hindi saying of even walls having ears has never rung truer. The principle of the world today can be: whatever you may do, the world will get to know before you realize, ask a certain Tiger Woods about it.

5. In the earlier times in India, the law would give protection only from physical dangers such as trespass from which the Right to Property emerged to secure his house and cattle. This was considered to be the Right to Life. As the ever changing common

law grew to accommodate the problems faced by the people, it was realized that not only was physical security required, but also security of the spiritual self as well as of his feelings, intellect was required. Now the Right to Life has expanded in its scope and comprises the right to be let alone the right to liberty secures the exercise of extensive civil privileges; and the term "property" has grown to comprise every form of possession — intangible, as well as tangible.

6. The strategy adopted by the Supreme Court with a view to expand the ambit of Article 21 and to imply certain right there from, has been to interpret Article 21 along with international charters on Human Rights. The Court has implied the right of privacy from Article 21 by interpreting it in conformity with Article 12 of the Universal Declaration on Human Rights and Article 17 of the International Covenant on Civil and Political Rights, 1966. Both of these international documents provide for the right of privacy which was essential to every person that is man and women.

7. Right to privacy is not enumerated as a Fundamental Right in the Constitution of India. The scope of this right first came up for consideration in Kharak Singh's Case which was concerned with the validity of certain regulations that permitted surveillance of suspects. The minority decision of Justice Subba Rao deals with this light. In the context of Article 19(1) (d), the right to privacy was again considered by the Supreme Court in 1975. In a detailed decision, Justice Jeevan Reddy held that the right to privacy is implicit under Article 21. This right is the right to be let alone. In the context of surveillance, it has been held that surveillance, if intrusive and seriously encroaches on the privacy of citizen, can

infringe the freedom of movement, guaranteed by Articles 19(1)(d) and 21. Surveillance must be to prevent crime and on the basis of material provided in the history sheet. In the context of an anti-terrorism enactment, it was held that the right to privacy was subservient to the security of the State and withholding information relevant for the detention of crime can't be nullified on the grounds of right to privacy. The right to privacy in terms of Article 21 has been discussed in various cases.

8. Thus the case of Kharak Singh has brought a new ray of hope in the era of human rights that every person has a right to enjoy in personal life. No one can violate the right of personal freedom in his family. The right of freedom and privacy is vested in every man and women of any country because it is necessary to live with dignity. So it is not only a human right but also a fundamental right.

9. Beside India, International attempts for protection of Privacy are also relevant here. Article 12 of Universal Declaration of Human Rights (1948) states that "No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence nor to attack upon his honour and reputation. Everyone has the right to protection of the law against such interference or attacks." Article 17 of International Covenant of Civil and Political Rights (to which India is a party) states "No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home and correspondence, nor to unlawful attacks on his honour and reputation." Article 8 of European Convention on Human Rights states "Everyone has the right to respect for his private and family life, his home and his correspondence; there shall be no

interference by a public authority except such as is in accordance with law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the protection of health or morals or for the protection of the rights and freedoms of others."

10. The 'Right to Privacy', latent between the lines of the Article 21 of the Indian Constitution, epitomizes the interpretative capabilities of the Indian Judiciary. Though not expressly mentioned as a declared fundamental right, the Indian judiciary through a plethora of judgments starting from **Kharak Singh v. State of Punjab**,[3] has recognized it as an important variable of the expressed fundamental Right of Life and Liberty. This paper throws light on the development of this right through judicial pronouncements, establishes its current status and then uses it to critically examine one of the most ambitious projects of our Government — the Unique Identification project.

11. The literal meaning of the word 'privacy' goes like this: 'absence or avoidance of publicity or display; the state or condition from being withdrawn from the society of others, or from public interest; seclusion'.[4] The phrase 'Right to Privacy' means, 'the right to be let alone; the right of a person to be free from unwarranted publicity; and the right to live without unwarranted interference by the public in matters with which the public is not necessarily concerned'.[5]

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3 AIR 1963 SC 1295
4 The New Oxford Dictionary (vol. 2, 1993).
5 Black's Law Dictionary, 6th Edn., 1990.

12. The hallmark of a cultured existence, as in the words of Louis Brandeis, Right to Privacy" is the right most valued by a civilized man".[6] In the words of Winfield, right to privacy is the absence of unauthorized interference with a person's seclusion of himself and his property from the public. He also described it as the manifestation of legal appreciation of the individual personality.[7] India is also a signatory to the International Covenant on Civil and Political Rights and more recently India has also become a signatory to the European Convention of Human Rights. Both the said conventions recognize Right to Privacy as a human right.[8]

13. The Indian Constitution as stated earlier does not expressly recognize Right to Privacy. In fact there is a perception that the entire concept of privacy is alien to Indian Culture.[9] In the celebrated case of **Additional District Magistrate Jabalpur v. Shiziakant Shukla**,[10] the Supreme Court sought to determine if the right to personal liberty is limited by any limitations other than those expressly contained in the Constitution and statute law. As observed by Justice Khanna:

"Article 21 is not the sole repository of the right to personal liberty. No one shall be deprived of his life and personal liberty without the authority of law follows merely from common law, it

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6 Olmstead v. United States, (1928) 277 US 438, 478

7 P. Ishwara Bhatt, Fundamental Rights - A Study of their Inter-relationship,(2004) p. 324

8 This appears in article 8 of the European Convention on Human Rights, as well as article 17 of the International Covenant on Civil and Political Rights.

9 Legal experts like Upendra Baxi has expressed doubts regarding the evolution of privacy as a value in human relations in India. Everyday experiences in the Indian setting, from the manifestation of good neighbourliness through constant surveillance by the next-door neighbours, to unabated curiosity to other people's illness or personal vicissitudes, suggests otherwise, as referred to in Sheetal Asrani-Dann The Right to Privacy in the era of mart Governance Journal of the Indian Law Institute (vol. 47,2005).

10 AIR 1976 SC 1207

flows. Equally from statutory law like the penal law in force in India"[11]

14. This establishes that the right to privacy need not expressly be guaranteed, but may be implicit because of its inclusion in common law. The Supreme Court in recent years through judicial activism has preferred to "read into" the Constitution a fundamental right to privacy by a creative interpretation of the Right to Life guaranteed under Article 21. In the case of **M. P. Sharma v. Satish Chandra,**[12] and thereafter in the Kharak Singh case, judicial pronouncements categorically rejected that there exists any right to privacy. In the case of **Govind v. State of Madhya Pradesh,**[13] as well as thereafter in **R. Rajagopal v. State of Tamil Nadu**[14] and **People's Union for Civil Liberties v. Union of India,**[15] observes that this right emanates from Article 21. On a plain reading of Article 19. it appears that 'liberty' as defined is wide enough to indicate "the right to be let alone". However the Indian higher judiciary has remained rather ambiguous, to the extent of delivering contradictory rulings.[16]

15. The struggle to specifically incorporate privacy as a specific fundamental right under the Constitution is substantially attributable, in large measure to the rather amorphous character of this right. In the case of **M.P. Sharma v. Satish Chandra**,[17] wherein the contours of the police power of search and surveillance

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11 AIR 1976 SC 1207 (1208)
12 AIR 1954 SC 300
13 AIR 1975 SC 1378
14 AIR 1995 SC 264
15 (1997) 1 SCC 301
16 A.M. Bhattacharjee, Equality, Liberty and Property under the Constitution of India, 104- 105 (1997)
17 AIR 1954 SC 300

were outlined, it was held that there is no right to privacy under the Constitution. In reaching this conclusion, the Supreme Court preferred to base its interpretation in a rather narrow sense, limiting itself to simply the prescribed statutory regulations. This represented the prevailing judicial approach of simply limiting interpretation, along positivist lines. Therefore, the court concluded that it lacked the justification to import privacy into a totally different fundamental right by some process of strained construction. Thus, the courts adopted a narrow and formal approach by pointing to the absence of a specific constitutional provision analogous to the fourth amendment of the United States Constitution, to protect the right of privacy of Indians from unlawful searches.

16. The ruling has been followed a decade later, in the case of **Kharak Singh v. State of Punjab**[18] wherein the right to privacy was again invoked to challenge police surveillance of an accused person The contention raised is that the right to privacy was again invoked to challenge police surveillance of an accused person. The contention raised that the right to privacy may be identified in the 'personal liberty' as contained in Article 21. Citing with approval the observations of Justice Field, in **Munn v. Illinois**,[19] it referred to the fourth and fifteenth amendment of the American Constitution and other American and English judgments of **Wolf v. Colorado**[20] and **Semayne's case**.[21] In widening the scope of liberty under Article 21, the court held that "personal liberty" is contained in

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18 AIR 1963 SC 1295
19 (1877) 94 US 113 (142)
20 (1948) 338 US 25
21 (1604) 5 Co Rep 91a: 77 ER 194

Article 21 as a "compendious term to include within itself all varieties of rights which go to make up the personal liberty of man other than those dealt within several clauses of Article 19(1)".[22] However, notwithstanding this, it concluded that this right to privacy is not in existence under the Constitution, with Justice Ayyangar, laying down that:

> *"...the right of privacy is guaranteed under our constitution and therefore the attempt to ascertain the movements of an individual which is merely a manner in which privacy is invaded is not an infringement of fundamental right guaranteed by Part-III"*

17. As in the **M. P. Sharma case**,[23] the Supreme Court appears to be influenced by the absence of any provision similar to that of a prohibition on unreasonable search and seizure as is available under the Fourth Amendment of the United States Constitution. Thus the majority erred in regarding 'prohibition on unreasonable search and seizure' as the only facet of privacy. It remains surprising as to how the court arrived at the conclusion that secret surveillance is not unconstitutional and violative of personal liberty but at the same time quoted in a positive light **Semayne's case**[24] and opined that "the house to everyone is to him as his castle and fortress".[25]

18. Taking a more holistic view of the scheme of protection afforded by part III, the minority found that all acts of surveillance under the impugned regulations offended Articles 21 and 19(1)(d), as

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22 AIR 1963 SC 1295 (1303)
23 M.P. Sharma v. Satish Chandra, 1954 SCR 1077: 1954 Cri.LJ 865.
24 (1604) 5 Co Rep 91a: 77 ER 194
25 NemikaJha, Legitimacy of the Right to Privacy as a Fundamental Right, AIR 2001 (3) 325 (329)

movement under the shroud of police surveillance cannot be described as free movement within the meaning of the constitution. Thus the minority judgment found the clauses authorizing 'surveillance' as unconstitutional as they believed that even though there did not exist an express right to privacy in the constitution, such a right was built into the very fabric of Article 21 and secondly they were of the opinion that 'the right to move freely implied the right to move free from psychological impediments, which obviously cannot be the case if one knows he is under surveillance.[26] However, even the minority ruling rejects recognition of the right to privacy, although it concluded that the acts of surveillance are unconstitutional. At this point, it is pertinent to remember that the rationale on which the majority ruling is based in the Kharak Singh case that the rights contained in Article 19, are not contained in Article 21, which have been rejected following the Supreme Court's ruling in the celebrated Maneka Gandhi case, wherein a bench of the supreme court held, while referring to its earlier ruling in the Kharak Singh case:

"In our view, this is not the correct approach. Both are independent fundamental rights, though they are overlapping. The fundamental right to and personal liberty has many attributes and some of them are found in Article 19".[27]

19. The majority option in the Kharak Singh case relied upon the theory of 'carving out' in Article 21 the residue of the elements of personal liberty excluded in the ambit of Article 19(1). In rejecting

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[26] Sheetal Asrani-Dann The Right to Privacy in the era of mart Governance Journal of the Indian Law Institute (vol. 47,2005)

[27] AIR 1978 SC 597 (621)

this, subsequent ruling of the Supreme Court proceeded to detail upon the different manifestation of personal liberties as contained in both constitutional provisions, because of which Article 21 could not be treated as a residual provision. The judicial approach reflects the Supreme Court's categorical rejection of the right to strike in the **All India Bank Employees Association case,**[28] wherein it held that even upon a liberal interpretation of Article 19(1), it cannot be concluded that trade unions are guaranteed the right to strike. In a similar manner, there is no implied right to privacy, thereby reinforcing the plea that the right to privacy ought to be clearly articulated.

20. The Supreme Court, a decade later, examined the existence and scope of the fundamental right to privacy. In **Govind v. State of Madhya Pradesh**,[29] the Supreme Court again adjudicating upon the question of the constitutionality of police surveillance, side-stepped the rationale underlying the earlier rulings in M.P. Sharma and Kharak Singh. Tracing the origin of the right in the presumed intention of the framers of the Constitution, the Court, speaking through Justice Mathew said:

21. "There can be no doubt that the makers of our Constitution wanted to ensure conditions favorable to the pursuit of happiness. They certainly realized, as Justice Brandeis, said in his dissent in **Olmstead v. Unites States,**[30] The significance of man's spiritual nature, of his feelings and his intellect. They sought to protect individual in their beliefs, thoughts, their emotions and their

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[28] All India Bank Employees v. National Industrial Tribunal and others, AIR 1962 SC 171
[29] AIR 1975 SC 1378
[30] AIR 1975 SC 1378 (1384)

sensations. Therefore they must be deemed to have conferred upon the individual as against the government a sphere where he should be let alone".

22. The Supreme Court, while accepting the unifying principle underlying the concept of privacy, noted that the fundamental nature of the right is implicit in the concept of ordered liberty. Substantiated by recent rulings of the Unites States Supreme Court,[31] the judicial approach remained that there exists a penumbra or zone of privacy in terms of the different guarantees afforded by Part III of the Constitution of India, thereby anchoring the right of privacy in India's constitutional jurisprudence. However, remaining cautious, the Supreme Court also observed that in the absence of any legislative enactment, this right will pass through a "case-by-case development".

23. The Supreme Court's ruling in the Govind case was rendered by a Bench consisting of three judges, although rather contradictory to that as held by a Bench of six judges in Kharak Singh case, hereinbefore, referred to. Interestingly, the ruling in the Govind case fails to refer to earlier decisions on privacy, because of which it is possible to contend if the law as laid down in this case is valid, as it appears to be contrary to the ruling in the Kharak Singh case.

24. The Present: Post-Maneka Gandhi judgment Justice Bhagwati, in Maneka Gandhi's case, has actually struck the jurisprudential chord of distinguishing between a named right and a right which is

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[31] Griswold v. Connecticut, 381 US 479 (1965): 14 Law Ed 510; Roe v. Wade, 410 US 113 (1973): 35 Law Ed 2d 147.

a variable to a named right.[32] Distinguishing between the two kinds of rights Justice Bhagwati held that it was not enough that a right merely flowed from or emanated from a named right to be a part of the named right, it must be integral to the named right or must partake of some of the basic nature or character of the named right.[33] According to his opinion each activity which facilitates the exercise of the named fundamental right is not necessarily comprehended in that fundamental right. Since the right to privacy is not existing as a named right in order to become a variable of the named right of 'Right to Liberty', this has to be shown as an integral part of the named right of 'personal liberty' or partaking the same basic character as personal liberty.[34] The ruling in the Govind case, concluding that the right to privacy is a fundamental right, flowing and emanating as derivative and penumbral from the other named rights cannot be regarded as a good law as it does not satisfy the test of unnamed rights. Although the benefit of Justice Bhagwati's opinion was not available to Justice Mathew in the Govind case, the roots of this thesis was already embedded in **All India Bank Employee's Association case**.[35]

25. The Supreme Court in **R. Rajagopal v. State of Tamil Nadu**,[36] in the course of examining the right to privacy, came to the conclusion that this right is implicit in the right to life and personal liberty as guaranteed under Article 21 of the Constitution. This dispute arose out of the publishing of an autobiography of a convict

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32 AIR 1978 SC 597
33 AIR 1978 SC 597 (640)
34 AM. Bhattacharjee, Equality, Liberty and Property under the Constitution of India, 104- 05 (1997).
35 All India Bank Employee's Association v. National Industrial Tribunal (Bank Disputes), Bombay, AIR 1962 SC 171
36 AIR 1995 SC 264

sentences to death. The autobiography was written in jail and handed over to his wife for publishing, without the knowledge and approval of the jail authorities. It levelled serious allegations against a number of top officials of the Indian administration, causing the police to ask the editor to stop its publication.

26. The Supreme Court, referring to the rulings of the United States Supreme Court in **Griswold v. Connecticut**[37] **Roe v. Wade**[38] and **New York Times Company v. Sullivan**[39] held:

"The right to privacy is implicit in the right of life and personal liberty guaranteed to the citizens of the country by Article 21. It is a right to be let alone. A citizen has a right to safeguard the privacy of his own, his family, marriage, procreation, motherhood, child bearing and education among other matters. None can publish anything concerning the above matters without his consent.[40]

However, the two exceptions to these roles were carved out by the courts for materials based on the public records, and information about public officials conduct 'relevant to the discharge of their duties'. Thus, this is the first judgment which is an exposition of the current legal position as to the law relating to privacy expressly laying down that this is implicit in Article 21. According to the majority judgment in Kharak Singh's case, personal liberty even when construed as a 'compendious term' did not include privacy within it. Therefore it is unlikely that after Maneka Gandhi, when

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37 (1956) 381 US 479
38 (1973) 410 US 113
39 (1964) 376 US 254
40 AIR 1995 SC 264 (276)

rights under personal liberty are restricted only to those that is 'integral to' or 'partaking to some basic structure', privacy may still be a part of it."

27. The question of right to privacy has been, in more recent times, deliberated in the case of **People's Union for Civil Liberties v. Union of India**[41] in the context of telephone tapping. In this case, the Supreme Court held that right to privacy is a part of the right to life and liberty under Article 21 and it cannot be curtailed except according to the procedure established by law. The court stated that conversation on telephone are often of an intimate nature and constitute an important facet of a person's private life; therefore its tapping offends Article 21. However, far from continuing with the widening ambit of this right, it clarified that this right could be, curtailed by the procedure established by law, so long as this procedure is just fair and reasonable.

28. So far we have seen the development of the Right to Privacy in terms of judicial pronouncements. If we look at the road ahead for privacy laws in India, the most significant development in this regard has been the Unique Identification Number project. Considering a project of this magnitude an estimate suggests the project would cost around $2.5 billion one needs to critically examine project in terms of its pitfalls in this regard.

29. Beside the constitutional development the Indian legislative system also made many attempts to protect and develop the Indian feminine system. Legislative has framed many acts like a boon to

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41 (1997) 1 SCC 301

women at large to protect their dignity in society like as **Dowry Prohibition Act, 1961; The Protection of Women from Domestic Violence Act, 2005; The Commission of Sati (Prevention) Act, 1987; The Immoral Traffic Prevention Act, 1956; Indian Penal Code, 1960; Hindu Marriage Act, 1955; Child Marriage Restraint Act, 1929; The Medical Termination of Pregnancy Act, 1971; National Commission of Women Act, 1990; The Minimum Wages Act, 1948; Bonded Labor System Abolition Act, 1976; The Special Marriage Act, 1954; Foreign Marriage Act, 1969; Indian Divorce Act, 1969; The Indecent Representation of Women Prohibition Act, 1986; Guardians & Wards Act, 1869; Equal Remuneration Act, 1976.** This list is not conclusive but inclusive. These acts have given ample provisions to ensure the protection of women rights like minimum wages, protection from domestic violence, right of equal remuneration, prevention from immoral trafficking, prevention from indecent representation of women etc. So there is no doubt that our judiciary and legislature has taken various effective steps to ensure the dignity of women.

30. Several countries across the world have official Identity cards for their citizens that perform a number of functions. Such compulsory 'national' cards are prevalent in countries like France, Germany, Malaysia and Argentina.[42] Sociologists believe that race, politics

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[42] Julia Scheeres, "ID Cards Are de Rigueur Worldwide," Wired News, September 25, 2001 retrieved from http://www.wired.com/politics/law/news/2OOl/O9/47O73; Sun Microsystems, Press Release, "Belgium E-Government Initiative Starts 1st Phase of Deployment of Sun's Java-Technology Enabled Smart Cards," April 10, 2003, available at http://zvwzv.oracle.com/us/sun/index.htm; Raja M, "Smart Cards Make Inroads into Asia," Asia Times, October 2, 2004. Available at http://www.atimes.com/atimes/Soutfrj4sia/ PJO2DJO3.html last accessed on 1st August, 2011.

and religion often drive the deployment of Identity cards.[43] The idea is to differentiate better between the classified and the unclassified, with insurgents, illegal immigrants, etc., to be put in the latter category. With advancement in technology, 'Smart' Identity cards are being used in Malaysia, Singapore and Finland which serve the purpose of credit card, library card, health- care card, driver's licence and Government benefit program information, all at the same time.

31. On similar lines, a Unique Identification Authority of India has been established by the Government of India in February 2009, which will own and operate the Unique Identification Number Database.[44] The basic objective behind the project is to provide an identity for everyone, a database for residents of the country in the form of very simple biometric data.[45] The project in India has been called 'AADHAR'.

32. The 12-digit number, unique for every citizen, would be linked to the basic demographics and biometric information such as iris, fingerprint and photograph. However, no classification based on caste, creed, religion and geography would be made The Government has tried to ensure that the number is not misused, by not issuing a universal multi-purpose smart card that would have replaced things like Permanent Account Number card, ration card,

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43 Richard Sobel, The Degradation of Political Identity Under a National Identification System, 8 Boston University Journal of Science & Technology Law, 37 (48) (2002). See also National Research Council, "IDs - Not that Easy: Questions about Nationwide Identity Systems," 2002. Available at http://www.nap.edu/catalog.php?recordjd=10346 last accessed on 31st August, 2011.

44 Retrieved from http://www.hindu.com/2009/Q2/17/stories/2009021756751000.htm, last accessed on 30th August, 2011

45 Retrieved from http://articles.timesofindiaindiatimescom/2009-07-24/india/28202348_ 1_Uid number-nandan-nilekani-unique-identzflcation-authority last accessed on 30th August, 2011

etc. Instead, each ministry would be free to issue its own biometric card using this number.[46]

33. Moreover, participation in the project is entirely voluntary for the people, as provided in Clause 3 of the National Identification Authority of India Bill of 2010.[47] However, it is not hidden that those who opt out of the program will be unable to enjoy several services that require a Unique Idenfitication.

34. United Kingdom and Australia have seen protests against the national identity cards, particularly against consolidation of biometric data and information from other similar cards. United Kingdom plans to create the National Identity Register, and also has plans to create biometric visas and Identification cards for non-citizens. There have been several protests from organisations like Privacy International and reports highlighting the perils of such a system, including some from the London School of Economics.[48]

35. The use of biometric data includes fingerprints, retina/iris scans, and hand geometry also called "palm prints", and voice and face recognition. The Aadhar project is to include some of these basic data into the database for each person. This form of data is preferred because it is most difficult to tamper with one's own

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[46] Retrieved from http://arficles.economictinws.indiatimes.com/2009-07-16/news/28448725J_ration-cards-pan-cards-biometric last accessed on 30th August 2011.

[47] 3. (1) Every resident shall be entitled to obtain an aadhar number on providing his demographic information and biometric information to the Authority in such manner as may be specified by regulations. Provided that the Central Government may, from time- to-time, notify such other category of individuals who may be entitled to obtain an aadhar number; (2) On receipt of the demographic information and biometric information under sub-section (1), the Authority shall, after verifying the information, in such manner as may be specified by regulations, issue an aadhar number to such resident.

[48] London School of Economics & Political Science, "The Identity Project: An Assessment of the UK Identity Cards Bill & its Implications," March 21, 2005; London School of Economics & Political Science, "Update: The Identity Project: An Assessment of the UK Identity Cards Bill and Its Implications," June 27, 2005 available at [link].

physical and behaviour characteristics, unlike Identification cards or papers. However, concerns have been raised about the possible violations of privacy by widespread deployment of biometric identification technology, which could remove the veil of anonymity or pseudo-anonymity in daily transactions, and create an electronic trail of people's habits and movements.[49] It is believed that by storing data collected across various sources of a consolidated system running based on the Aadhar, chances of State surveillance would increase manifold. The major risk is that the personal information needed for a drivers' license, a rail ticket or a bank account, currently scattered in the public domain would converge at one place far too easily for every person.

36. The Constitutional validity of such national Cards has been successfully challenged on privacy grounds in several countries. In 1991, for example, the Hungarian Constitutional Court dec1ard unconstitutional a law creating a multi-use personal identification number.[50] Similarly, in Philippines in 1998, the Supreme Court ruled that a national id system violated the right to privacy guaranteed under the Constitution.[51] The Portuguese Constitution is a step ahead in this regard. There it was expressly declared in 1997 that "Citizens shall not be given an all-purpose national identity number."[52]

37. Facing widespread protests from the people, Taiwan and South Korea stopped their Card projects. Similarly, a coalition of civil

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49 Roger Clarke, "Biometrics and Privacy," April 15, 2001, Available at http:// wunu.rogerclarke.com/DV/Biometrics.html last accessed on 31st August, 2011.
50 "Constitutional Court Decision No. 15-AB of 13 April, 1991"
51 Ople v. Torres, G.R. 127685, July 23, 18.
52 Article 35 (5), Constitution of the Portuguese Republic 1976 (as amended).

society groups in United States of America produced a stiff resistance to the Government's plans to covert the state's driving licence into a nationwide identification scheme. There were also legislations by sixteen states in the United States rejecting the Real Identification Act in 2005,[53] aimed at creating the national identification system. The Act has so far been unable to fulfil its objectives owing to such resistance.

38. The Privacy Bill, 2011 says, "every individual shall have a right to his privacy confidentiality of communication made to, or, by him including his personal correspondence, telephone conversations, telegraph messages, postal, electronic mail and other modes of communication; confidentiality of his private or his family life; protection of his honour and good name; protection from search, detention or exposure of lawful communication between and among individuals; privacy from surveillance; confidentiality of his banking and financial transactions, medical and legal information and protection of data relating to individual."

39. The bill gives protection from a citizen's identity theft, including criminal identity theft, posing as another person when apprehended for a crime, financial identify theft, using another's identity to obtain credit, goods and services.

40. The bill prohibits interception of communications except in certain cases with approval of Secretary-level officer. It mandates destruction of interception of the material within two months of discontinuance of interception.

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[53] REAL ID Act, Public Law Number 109-13, 119 Stat. 231 (2005).

41. The bill provides for constitution of a Central Communication Interception Review Committee to examine and review the interception orders passed and is empowered to render a finding that such interception contravened Section 5 of the Indian Telegraphs Act and that the intercepted material should be destroyed forthwith. It also prohibits surveillance either by following a person or closed circuit television or other electronic or by any other mode, except in certain cases as per the specified procedure.

42. As per the bill, no person who has a place of business in India but has data using equipment located in India, shall collect or processor use or disclose any data relating to individual to any person without consent of such individual.

43. The bill mandates the establishment of a Data Protection Authority of India, whose function is to monitor development in data processing and computer technology; to examine law and to evaluate its effect on data protection and to give recommendations and to receive representations from members of the public on any matter generally affecting data protection.

44. The Authority can investigate any data security breach and issue orders to safeguard the security interests of affected individuals in the personal data that has or is likely to have been compromised by such breach.

45. The bill makes contravention of the provisions on interception an offence punishable with imprisonment for a term that may extend up to five years or with fine, which may extend to Rs. 1 lakh or

with both for each such interception. Similarly, disclosure of such information is a punishable offence with imprisonment up to three years and a fine of up to Rs. 50,000, or both.

46. Further, it says any persons who obtain any record of information concerning an individual from any officer of the government or agency under false pretext shall be punishable with a fine of up to Rs. 5 Lacs.

47. Right to privacy is an essential component of right to life and personal liberty under Article 21. Right of privacy may, apart from contract, also arise out of a particular specific relationship, which may be commercial, matrimonial or even political. Right to privacy is not an absolute right; it is subject to reasonable restrictions for prevention of crime, disorder or protection of health or morals or protection of rights and freedom of others. Where there is a conflict between two derived rights, the right which advances public morality and public interest prevails.

48. Justice Louis Brandeis in a celebrated judgment has said that right to privacy is 'the right most valued by civilized men." Lord Hoffmann has observed in relation to the complaints against media that there is no logical ground for saying that a person should have less protection against a private individual than he would have against the state for the publication of personal information for which there is no justification.

49. Judges of the American Supreme Court have talked about the right to privacy as an aspect of the pursuit of happiness. The pursuit of happiness requires certain liberties that we are guaranteed by the

state so that we may act in a fashion that we may deem fit, as long as it does not encroach upon the rights of others. Liberty is not a limited or quantifiable right. It is visible on the entire gamut of the legal spectrum.

50. If one looks at the earlier judgments of the apex court in its formative years, one can observe the desirability of the court to treat the Fundamental Rights as water-tight compartments. This was felt the most in the case of **A.K Gopalan v. State of Madras**[54] and the relaxation of this stringent stand could be felt in the decision of **Menka Gandhi v. Union of India**.[55] The right to life was considered not to be the embodiment of a mere animal existence, but the guarantee of full and meaningful life.

51. Being part of a society often overrides the fact that we are individuals first. Each individual needs his/her private space for whichever activity (assuming here that it shall be legal). The state accordingly gives each individual that right to enjoy those private moments with those whom they want to without the prying eyes of the rest of the world. Clinton Rossiter has said that privacy is a special kind of independence which can be understood as an attempt to secure autonomy in at least a few personal and spiritual concerns. This autonomy is the most special thing that the person can enjoy. He is truly a free man there. This is not a right against the state, but against the world. The individual does not want to share his thoughts with the world and this right will help protect his interests.

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54 AIR 1950 SC 27.
55 AIR 1978 SC 597.

52. In this day and age, this right is becoming more essential as every day passes. With all our lives being splattered over the media be it through social networking sites or the spy cameras, we need protection so that we can function in a way we want to and not think of others before our actions. After all, the only ones we owe an explanation to is ourselves, and not to the entire world.

(II) Suggestion:-

The researcher wants to make some recommendation for the betterment of human rights specially the right of women in relation to dignity and privacy:-

1. The equality of women, being integral to the Constitution, its denial is a sacrilege and a constitutional violation. Sustained constitutional violations mean that governance is not in accordance with the Constitution. A fortiori, all limbs of the State - the executive, the legislature as well as the judiciary - must respect women's rights and must treat them in a non-discriminatory manner in relation to dignity and privacy of women.

2. In respect of certain categories of cases, such as those where the victim is in custody of persons in authority including police and armed personnel, certain statutory presumptions must apply under Section 114A of the Indian Evidence Act, 1872. Every complaint of rape and sexual assault must be registered by the police and civil society should perform its duty to report any case of rape coming to its knowledge. The privacy should not be violated in the hospitals and court procedure.

3. Any officer, who fails to register a case of sexual assault and insult of women reported to him, or attempts to abort its investigation, commits an offence which shall be punishable as prescribed. We have also taken into account offences of eve teasing, voyeurism, stalking as well as sexual assault and unsolicited sexual contact.

4. It is settled law that every policeman is bound to obey the law and any order of a superior officer, which is contrary to law, is no defence for his illegal action, which may be a punishable offence. Accordingly, any political interference or extraneous influence in the performance of the statutory duty by a policeman cannot be condoned. This principle has to be clearly understood by every member of the police force - their accountability is only to the law and to none else in the discharge of their duty. Dereliction of this duty has to be punished according to the service rules and applicable law.

5. Human rights courts must be established at national, state and district court so these problems may be removed by judicial body.

6. The judiciary has the primary responsibility of enforcing fundamental rights, through constitutional remedies. The judiciary can take suo motu cognizance of such issues being deeply concerned with them both in the Supreme Court and the High Court. An all India strategy to deal with this issue would be advisable. The Chief Justice of India could be approached to commence appropriate proceedings on the judicial side. The Hon'ble Chief Justice may consider making appropriate orders relating to the feminine issue.

7. Social activists involved in curbing this menace could assist the court in the performance of this task. The question of award of compensation and rehabilitation could also be considered in such cases by the court.

8. It is time for the judiciary to step in to discharge the constitutional mandate of enforcing fundamental rights and implementation of the rule of law. In performance of this obligation, the Chief Justice of the High Court in every State could devise the appropriate machinery for administration and supervision of these homes in consultation with experts in the field. For the safety and physical security of children, women, persons with disabilities, inmates of mental homes and widows, monitoring by the judiciary is necessary. The immediate and ultimate guardianship of such persons has to be with the court, founded on the principle of parens patriae.

9. To augment the police force, there is a need to develop community policing by involving the local gentry, which would also motivate them to perform their duty as citizens. Respectable persons in each locality could also be appointed Special Executive Magistrates under Section 21, of the Criminal Procedure Code, 1973 and invested with powers to deal with the traffic offences and other minor offences. In addition, to assisting the maintenance of law and order in the locality, their presence would inspire greater confidence of safety in the locality.

10. The right to information act must be give importance to remove the problem of corruption.

11. Human rights awareness education may be given to all civil servants including Police. 'Human rights' may be included in the School syllabi from the 5th standard.

12. Inculcating public awareness is a categorical imperative for the effectual implementation of the human rights programme like right to life, right to privacy and many other rights.

Although the researcher has made many recommendation; but these are not last, only least. Efforts must be made time to time for the protection of dignity and privacy of the women. Women are the essential part of the society, if we break the dignity of women in our society we will not progress smoothly. Our judicial, legislative bodies with the help of Non Governmental Organization will have to made regular attempts for feminine protection.

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