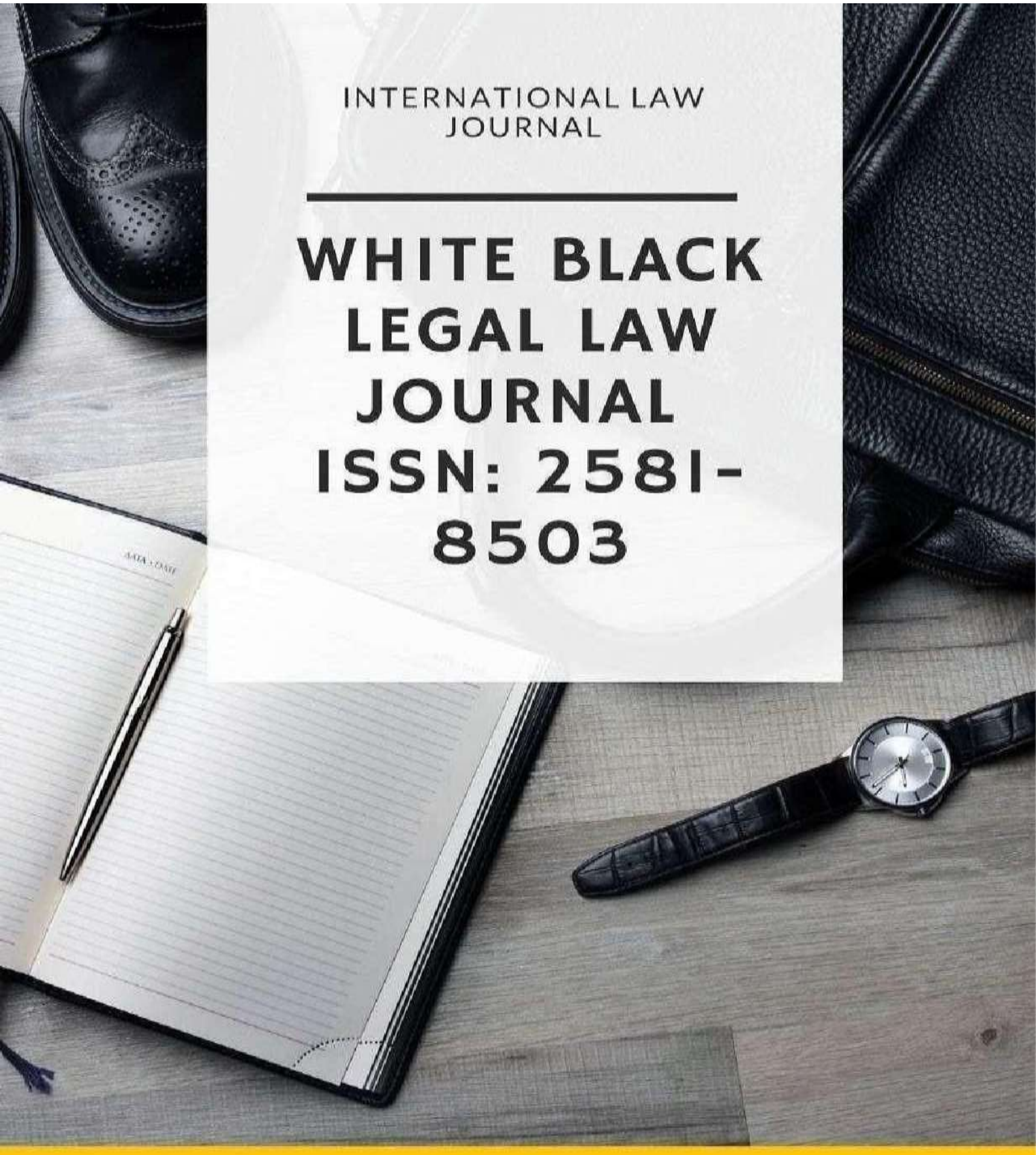

INTERNATIONAL LAW JOURNAL

WHITE BLACK LEGAL LAW JOURNAL

ISSN: 2581-8503

Peer - Reviewed & Refereed Journal

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WHITE BLACK LEGAL is an open access, peer-reviewed and refereed journal providededicated to express views on topical legal issues, thereby generating a cross current of ideas on emerging matters. This platform shall also ignite the initiative and desire of young law students to contribute in the field of law. The erudite response of legal luminaries shall be solicited to enable readers to explore challenges that lie before law makers, lawyers and the society at large, in the event of the ever changing social, economic and technological scenario.

With this thought, we hereby present to you

RIGHT TO SILENCE IN CRIMINAL JUSTICE SYSTEM-A LEGAL ANALYSIS

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Abstract:

The right to silence is comparatively a weak right which of itself appears not to provide very much protection against successful prosecution and conviction. The police led campaign against it has failed to produce any argument of substance which would justify its removal. On the contrary what ought to be redressed is its steady erosion over the years and the difficulties which suspects and defendants continue to face in exercising it effectively. It may not deserve a prominent place or a place at all, in an inquisitorial system. But it is a key component of an accusatorial process and fulfils both a symbolic function in defining the limits of state power vis-a-vis the citizen and offers the innocent suspect at least the possibility of protection against wrongful conviction. Its abolition would erode another related right: the right of a suspect, acting upon legal advice, to choose whether to take the risks necessarily inherent in remaining silent or those which may be associated with talking to the police or testifying in court. To maintain the judicial recognition of the right to silence developed during the 21st century as part of a growing desire to strike a balance between the power of the state and the rights of the individuals.

INTRODUCTION:

The 'right to silence' is a principle of common law and it means that normally Courts or Tribunals should not be invited or encouraged to conclude, by parties or prosecutors, that a suspect or an accused is guilty merely because he has refused to respond to questions put to him by the police or by the Court. Most of the common law countries follow the Adversarial System where the concept of 'presumption of innocence' i.e. a person is presumed to be innocent unless the guilt is

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proved against him, is applied. This presumption is different from the Inquisitorial System followed by the civil law countries, where there is presumption of guilt.

ORIGIN OF RIGHT TO SILENCE:

In earlier Indian system there was a philosophy that 'maunam sweekar laxanam' i.e. the silence on the question, means the acceptance of the same. The origin of right to silence may not be exactly clear but the right goes back to the middle age in England. During the 16th century, the English Courts of Star Chamber and High Commission developed the practice of compelling suspects to take an oath known as the "ex-officio oath" and, the accused had tanswer questions, without even a formal charge, put by the judge and the prosecutor. If a person refused to take oath, he could be tortured. These Star Chambers and Commissions were later abolished in 1641. This event is regarded as an important landmark event in the evolution of 'right to silence'. It is based on the principle that "No man is bound to accuse himself". This principle found its root from the maxim 'nemo debet prodere ipsum', i.e. there is privilege against self-incrimination. The privilege is a fundamental canon of Common Law Criminal Jurisprudence. The basic feature of this principle is; (i) the accused is presumed to be innocent, (ii) the prosecution is to establish the guilt, and (iii) the accused is need not to make any statement against his will. The maxim 'nemo debet prodere ipsum', had its origin in a protest against inquisitorial system and unjust method of interrogating accused persons. The 'right to silence' has various facets. One of them is 'actiori incumbit onus probandi' which means, the burden of proof is on the State or rather the prosecution to prove that the accused is guilty. Another philosophy behind 'right to remain silent' is that a person cannot be compelled to incriminate himself. Theoretically, the law requires the prosecution to prove their case without recourse who may not be obliged to answer the questions by the accused. This is sometimes called the privilege against self-incrimination but this may lead to confusion with the rule that witnesses need not answer questions which may incriminate them. The right to silence from a defendant's viewpoint encompasses the right to refuse to answer questions put by the police, the right not to go into the witness box and give evidence on oath and the right to make an unsworn statement from the dock which is not then subject to cross-examination during trial. The right of silence both in England and America is rooted in the reaction; some would say over-reaction, the practices of Star Chamber which made the rack its principal weapon of investigation that related to the incident. For a time this led to the accused being incompetent as a witness so that he was not

allowed to defend himself in case he incriminated himself. The judges allowed the defendant to make an unsworn statement from the dock but he was not to be cross-examined on this statement and, being unsworn, it did not carry the weight of sworn evidence and it is not the correct proof for the case.. At the end of the 19th century the accused was allowed to give evidence but he had the right to refuse to do so and the prosecution was forbidden to comment on this failure, though the judge was left free from the cases to do so. For some not easily defended reason, the Act making the accused competent also preserved his right to make an unsworn statement[2]. At the same time judges were adopting a somewhat ambivalent attitude to questioning by the police at the pre-trial stage in proceedings. Some would not sanction it, others were willing to do so provided the accused was cautioned that he need not answer questions. The ambiguity led to the issuing of rules of guidance, the Judge's Rules, which were supported by administrative rules to ensure fairness to the accused those who commit in an offence. Those first rules effectively forbade questioning of suspects once they had been arrested and were in custody. The interrogation led to evasion and in 1964 new rules were published which did in fact allow in custody interrogation. A suspect may now be arrested and questioned for some considerable time without a caution, and further questioned after a caution until charged with the offence or told that he will be prosecuted for the offence. The police operate deceptively and often illegally and one may confidently say that for many there is no real right of silence at the investigative proceedings. The purpose of such interrogation is to obtain confessional statements which often lead to a guilty plea, the police being equally anxious to avoid trials which take up a great deal of police time and require extra police investigation. The interrogation may therefore, at the same time judges were adopting a somewhat ambivalent attitude to questioning by the police at the pre-trial stage. Some would not sanction it; others were willing to do so provided the accused was cautioned that he need not answer questions. The ambiguity led to the issuing of rules of guidance, the Judge's Rules, which were supported by administrative rules to ensure fairness to the accused. Those first rules effectively forbade questioning of suspects once they had been arrested and were in custody. This bar or in custody interrogation led to evasion and in 1964 new rules were published which did in fact allow in custodial interrogation[3]. A suspect may now be arrested and questioned for some considerable time without a caution, and further questioned after a caution until charged with the offence or told that he will be prosecuted

[2] Criminal Evidence Act, 1898, section 1(h).
[3] Home Office Circular No. 31/1964. Now amended Rules H.O. Circ. No. 89/1978.

for the offence. The police operate deceptively and often illegally and one may confidently say that for many there is no real right of silence at the investigative stage. The purpose of such interrogation is to obtain confessional statements which often lead to a guilty plea, the police being equally anxious to avoid trials which take up a great deal of police time and require extra police investigation.[66] The interrogation might be seen as a means of denying a trial to an accused. Even where the accused does insist on a trial, the fact that he has made a confession makes it extremely difficult to defend the case and if the police witnesses are attacked the accused with previous convictions may find those convictions introduced as evidence by the prosecution which may convince a jury panel of the accused's guilt. If they are not attacked and the confession admitted by the accused is almost certain to be convicted. The judge has discretion to exclude a statement which is not voluntary in the sense that it has been obtained by fear of prejudice or nope of advantage exercised or held out by a person in authority, or by oppression. Inducements such as a promise of bail in return for a confession will render a statement inadmissible. Irrelevant questions are the kind that saps the will and makes a person speak when he does not wish to. Whether questioning is oppressive will depend on a number of factors such as the length of questioning, the period of rest and the characteristics of the person questioned. What may not be oppressive in relation to a tough man of the world, will be oppressive in relation to a housewife with no experience of police[4]. A similar ambivalence exists in relation to the comments of judges on the failure of the accused to give evidence on oath and submit to cross-examination. One judge may see the refusal as an exercise of an undoubted right which does not call for comment, apart from an indication that an unsworn statement from the dock carries weight than sworn evidence. Others of a different mentality may see the exercise of the right as an obstruction of the pursuit of truth and inform the jury of this in no uncertain terms. However, as with silence in the face of interrogation the comment must not go so far as to suggest that a failure to give evidence is enough to lead to an inference of guilt. The right to silence is seen by the police as a hindrance to investigation and it is alleged that top criminals rely upon on this to escape conviction[5]. This idea appears to have been accepted by the Criminal Law Revision Committee who has recommended the abolition of the right to silence. They recommended:

1. when the accused is being interrogated by the police and fails to mention a fact which he

[4] R. V. Prager [1972] 1 All. E.R. 1114. R. Hanghlon (1978) Times Law Report, 22 June
[5] Sir Robert Mark, 'Minority Verdict', The Listener, 8 November 1973. Heydon, Statutory Restrictions on the Privilege Against Self-Incrimination (1971) Law Quarterly Review 214.

afterwards relies upon at his trial, the Court may draw such inferences as appear in proper manner and determining the point at any issue, and that failure should be treated as corroboration of any evidence against the accused to which the failure is relevant.

2. The caution that the accused need not to say anything be abolished and replaced by a warning that failure to mention any fact on which he intends to rely in his defence may have an adverse effect on his case.
3. The right of an accused to make an unsworn statement be abolished and the accused be formally called upon to give evidence on oath. He may still refuse but the Court or jury may draw such inferences are proper from his refusal to give evidence (or answer permissible questions) and where there is any appropriate refusal it would count as corroboration of the evidence against him[6].

These recommendations would bring English system closer to that of the continental inquisitorial system and, had they been limited to the trial, they might have been more favourably received since in the majority of trials on indictment the accused is represented at the trial and protected from possible abuse. Unfortunately, the proposals give the police even wider powers of interrogation with no real safeguard for the accused since there is effectively no access to a solicitor during the interrogation stage. Since in practice there is, far the majority, no real right of silence at this stage, the proposal to allow adverse inferences to be drawn would put most accused at an even greater disadvantage. The suggestion that top criminals rely on the right to silence to escape conviction is not supported by the evidence. Indeed what evidence there is suggests that it is the lack of sufficient evidence which leads to acquittal of such persons[7]. The Committee's proposals would not improve the conviction rate in such cases since adverse inferences and silence as corroboration will not be enough to convict unless that other evidence exists. There can be no corroboration of insufficient evidence. The proposals would therefore strike hardest at the weakest who are already unaware of their right to silence. There are signs that the judges are moving toward their own abolition of the right to silence by the use of interpretation and extension of the existing common law. Silence in the face of an accusation is not generally evidence against the accused- of the fact stated "save in so far as he accepts the statement so as to make in effect of his own." An accused may accept such statement by words, conduct, action or demeanour, and it is the function

[6] Criminal Revision Committee, 11th Report - Evidence (General) (1972) Cmnd 4991
[7] McCabe and Purves, By-Passing the Jury, Oxford University Press (1972).

of a jury to determine whether such words etc. amount to an acceptance of the statement in whole or part. In a Privy Council decision, it was held that silence alone in the face of an allegation by a police officer cannot give rise to an inference that the person accepts the truth of that accusation. The Court made it clear that it was the disadvantageous position of the accused faced with police questions which is at the root of this principle. They went on to approve a direction in an earlier case in which it was said[8]. Undoubtedly, when persons are speaking on even terms and a charge is made, and the person charged says nothing and expresses no indignation, and dues nothing to repel the charge, that is some evidence to show he admits the charge to be true. Comment on silence after caution is still, it seems wrong but that caution is not necessary until the police have evidence upon which to base a charge. Therefore, the accused has no right of silence during the greater part of an interrogation when a solicitor is present since his failure to answer will result in adverse inferences being drawn in appropriate cases, including an inference of guilt, provided the correct intellectual process is followed. We are then very close to that which the Criminal Law Revision Committee sought to achieve. It would seem a logical step to abolish the right of silence altogether and pertinent inferences to be drawn from silence when a solicitor is present during police interrogation. There can be no injustice to an accused in requiring him to answer questions or face the prospect of inferences being drawn from silence when he has his solicitor present to advise him. The guilty would not then be able to behind the right of silence and the innocent need not be afraid to speak.

RIGHT TO SILENCE IN INTERNATIONAL SCENARIO:

The Universal Declaration of Human Rights, 1948 includes some aspect of 'right to silence' in Article 11[9]. Similarly, The International Covenant on Civil and Political Rights, 1966 to which India is also a party, provides about one or other aspect of right to silence. It also guarantees clearly that everyone has a right not to be compelled to testify against himself or to confess guilt. The European Convention for the Protection of Human Rights and Fundamental Freedom, 1950 (herein after called European Convention on Human Rights) came into force on September 1953. This Convention provides that in the determination of his civil rights and obligation, or of any criminal charges against him everyone is entitled to fair trial and public hearing within a reasonable time by an independent tribunal established by law. Similarly, Article 6(2) of the Convention states

[8] Parkes v. The Queen [1976] 3 All. E.R. 380 citing R. v. Mitchell (1892) 17 Cox. C.C. 503
[9] Professor M.P. Jain, Indian Constitutional Law, Lexis Nexis, Butterworth Wadhwa, Nagpur, 2010, p.1163.

that everyone charged with an offence shall be presumed innocent until proven guilty according to Law. However, the thing to be noted is that Article 6(1) of the European Convention only speaks of a right to a fair trial and Article 6(2) talks about presumption of innocence. There is no reference to a right against self- incrimination. While considering the concept of fair trial the European Court said that right to remain silent is the part of it.[74] It is the crux of the fair procedure that if police were questioning the accused regarding his self-incrimination, he could remain silent. By providing the accused with such a protection it was tried to avoid miscarriage of justice. The American Convention on Human Rights which came into force on July 11, 1978 stipulated a number of civil and political rights, for all persons. It provides that everyone, subject to the jurisdiction of the State parties, has right to fair trial. Similarly, African Charter on Human And People Rights which was adopted on 27 June 1981 and entered into force on October 21, 1986, provides that everyone has right to have his cause heard which comprises right to be presumed innocent until proved guilty.

RIGHT TO SILENCE IN INDIAN CONTEXT:

The 'right to silence' is an essential safeguard in the criminal procedure. Its underlying rationale broadly corresponds with two objectives. Firstly, that of ensuring reliability of the statement made by an accused, and secondly, ensuring that such statement had made voluntarily. If an accused is compelled to testify there is every likelihood of such testimony being false. Right against self-incrimination is also a check upon the working of the police during investigation against torture and other third degree methods adopted against the accused. If this right is not available the investigators would be more inclined to extract information through such compulsion as a matter of course. These concerns have been recognized in India as well as in foreign countries. Supreme Court of India in case of State of Bombay vs. Kathi Kalu Oghad[75]has said that "if it is permissible in law to obtain evidence from the accused person by compulsion why tread the hard path of laborious investigation and prolonged examination of other men, materials and documents? An abolition of this privilege would be an incentive for those in charge of enforcement of law "to sit comfortably in shade rubbing red peeper into a poor devils' eyes rather than to go about the sun hunting up evidence." And also if this right is abolished the accused persons may be induced to furnish false evidence against themselves under duress. Similarly, in Nandany Satpathy's case[10]

[10]*Nandini Satpathy v. P.L Dani,* AIR 1978 SC 1025.

the Court opined that the refusal of Article 20(3) of the Constitution of India is to convert adversarial system in inquisitorial system. Not only this but in the USA and Canada it has been provided that no adverse opinion can be drawn against accused if he remains silent and fails to testify.

Nandini Satpathy was charged under the Prevention of Corruption Act 1988 for allegedly misusing her position and obtaining pecuniary advantages by improperly allotting a plot of land in Cuttack valued at Rs. 24 lakhs to one Prafulla Kumar Rath. She was asked to appear before the Vigilance Police for questioning regarding these allegations. The Legal Battle: From High Court to Supreme Court: Nandini Satpathy, who was the Chief Minister of Orissa (June 1972 to December 1976), was issued a notice under Section 179 IPC and Section 161(1) CrPC to provide information regarding allegations of corruption and misuse of power against her. She refused to give any written statement and challenged the notices. This case originated in the Court of the Sub-Divisional Magistrate in Cuttack, where Nandini Satpathy argued that the notices violated her constitutional right against self-incrimination under Article 20(3). The Magistrate rejected her petition, leading her to appeal to the Orissa High Court.

The High Court ruled in her favor, stating that the right against self-incrimination also extends to the investigation stage. However, this judgment was later overturned by the Supreme Court, which held that Article 20(3) only protects an accused during the trial stage. It was heard by a five-judge constitutional bench in the Supreme Court, which examined whether the right against self-incrimination also applied during police interrogations under Section 161(1) CrPC. One of the key issues under scrutiny in this landmark case was the constitutional right to silence of the accused during police interrogation under Article 20(3). The prosecution argued that the right to silence was not absolute, and the accused could not refuse to answer questions by the police under Section 161 of the CrPC. They contended that the police had the power to examine the accused during the investigation stage.On the other hand, Nandini Satpathy's lawyers asserted that forcing the accused to answer self-incriminatory questions violated their constitutional right against testimonial compulsion under Article 20(3). They said the right to silence also flowed from the right to life under Article 21. The Supreme Court had to balance these arguments and interpret the scope of the right to silence. The Supreme Court's Judgment and its Implications on July 20, 1978. Chief

Justice M.H. Beg authored the unanimous decision, the Court held that the right against self-incrimination under Article 20(3) of the Constitution is available during trial and even at the investigation stage. Thus, the accused cannot be compelled to answer incriminating questions during police interrogation. The judges opined that the spirit behind Article 20(3) implies that an accused should not provide materials from which inferences can be drawn that could lead to their incrimination. The Court clarified that while voluntary answers during interrogation are permissible; forcing the accused to answer questions or extract information under compulsion, threat, or promise is impermissible. This is significantly strengthened the right against self-incrimination in India. The Impact on Section 161(1) and 179 IPC: The Court held that Section 161(1) CrPC and Section 179 IPC could not override the protections guaranteed under Article 20(3). While these provisions allow the compulsion of the accused during interrogation, they cannot compel self-incriminating testimony that violates Article 20(3). Thus, the Court made it clear that the right against self-incrimination would prevail over statutory provisions like Section 161(1) and 179 to the extent they contradict Article 20(3). This marked a significant development in constitutional jurisprudence in India.

The Nandini Satpathy case profoundly influenced the subsequent evolution of Indian criminal law and procedures relating to self-incrimination. The limits imposed on sec-161 of Cr.P.C, 1973 led to greater sensitivity regarding interrogation methods and the treatment of suspects in police custody. Later Supreme Court cases like DK Basu v State of West Bengal (1997) further developed guidelines for arrest and interrogation, prohibiting torture and mandating the humane treatment of detainees. The Nandini Satpathy legacy continues to shape Indian criminal jurisprudence on protections against self-incrimination**.** Reflections on the Case's Impact on Indian Democracy:The Supreme Court's strong affirmation of the right against self-incrimination was a victory for civil liberties and individual freedoms. At a time when Article 20(3) was being eroded by legislation and executive action, this judgment re-established its importance as a pillar of democratic rights. By limiting the coercive powers of the police, the Court strengthened constitutional safeguards for accused persons and political dissenters. The ruling upholds democratic values of liberty, dignity, and due process. The case's verdict has set a standard for safeguarding civil liberties, even in the name of national security. Its interpretation of the right to silence and the constraints on self-incrimination serve as a guiding principle for contemporary jurisprudence. The case will serve as an

inspiration for the judiciary to uphold personal freedoms against any authoritarian tendencies[11].

The Law Commission of India, in its 180th Report, recommended against making any such changes to the law regarding the right to silence of the accused. The Commission strongly believed that such changes would be violative of Article 20(3) and Article 21 of the Indian Constitution. It also expressed concerns about the practical difficulties that may arise in implementing the conditions set by the European Human Rights Court, such as establishing a prima facie case and providing access to a lawyer during questioning. The Commission supported the American and Canadian approach, suggesting that questioning the accused should only take place after guilt has been established beyond reasonable doubt. In conclusion, the Commission believed that any modifications should be in line with the principles enshrined in the Indian Constitution and that changes based on the United Kingdom pattern would be impractical and contrary to the constitutional rights. Right to silence is not really a right but a privilege which provides immunity to the accused. So the accused should not be forced to testify during trial. Although English law permits adverse inference being drawn when the accused remain silent both at the stage of investigation and at the stage of trial but this inference is subject to two conditions: (i) there is prima facie case against the accused and (ii) accused has access to lawyer. As far as the Indian context is concerned it is difficult to comply the English conditions. It is also difficult to expect a prima facie case being established before investigation is complete. However, such problem will not arise if the accused is questioned during the trial after charge is framed[12]. The latter is done only after investigation is complete and statement of witness and other relevant materials are collected and the Court is satisfied that there is prima facie a case. So far as access to lawyer is concerned it is also not difficult because the accused is entitled to take the assistance of a lawyer of his choice. But the Court should ask the question tactfully to discover the truth without affecting such right of accused. The provision does not protect the right of accused to remain silent but only protects improper method of interrogation. But it is very difficult to create a fair state-individual balance by allowing accused to remain silent in criminal cases.

[11] *Nandini Satpathy v. P.L. Dani*, 1978 SCR (3) 608.
[12] Committee on Reform of Criminal Justice System Report, Vol. I, March, 2003, p.53.

CONCLUSION:

The basic objective of criminal justice system is to ensure public safety and the right to remain silent protects guilty at the cost of such utilitarian objective. Right against self-incrimination does not deter improper practice during investigation instead it encourages the investigator to make false representation before the Court because they are under pressure to deliver result. Moreover, we must recognize the constitutional value in all branches of law. There should be a positive obligation imposed by law on the witnesses to assist in the investigation and if so required by the Court to give evidence. If accused is silent then Court should be allowed to draw proper inference by amending the Criminal Procedure Code of 1973. Also, in heinous crime and terrorist related activities the accused should not have any right to remain silent and refuse to answer the question. However, no change regarding adverse inference should be drawn, otherwise it will be ultravires.