

THEORY OF VESTED INTEREST: FALLACY OF PUBLIC INTEREST

APPLICABILITY OF STATE PRIVILEGE IN CONTEMPORARY EVIDENCE LAW

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ABSTRACT

“Information is the currency of democracy”¹, broached Thomas Jefferson, trusted with the task of structuring the Government form, unknown, untold, and untested. Democracy was to break the ages old shackles of justification of arbitrary crown control on the maxim that Crown always operated in the interest of the subjects. Constitutional provision of Transparency in the Government of People’s Will was the direct American response to the historical abuse of authority by the British Crown. However, sparked off from *The Trial of Aaron Burr*², the right to withhold certain information from the public, finally crystallized in *United States V Reynold’s*³, where Courts formally recognized that withholding certain information and selective transparency in specific cases is in the public interest, which is paramount. This paper aims to critique the Doctrine of State Privilege by way of comparison with the original intent of the drafters, its need in the colonial era and present day conflict, post enforcement of the constitution of America and India.

¹ Beard, Charles A. "Thomas Jefferson: A Civilized Man." *The Mississippi Valley Historical Review* 30, no.2 (1943): 159-70. <http://www.jstor.org/stable/1892962>.

² Dunn, Fabius. *The Southwestern Historical Quarterly* 70, no. 3 (1967): 534-35. <http://www.jstor.org/stable/30237930>.

³ *United States v Reynold’s* 1 U.S. 345 (1953)

INTRODUCTION

State Secrets Privilege, historically a judicial construct derived from the Common Law is an evidentiary privilege that allows the Government to resist Court ordered disclosure of information during litigation if there is a reasonable danger that such disclosure would harm the public interest.⁴ This privilege had traditionally been read under the law of Crown Privilege. Crown Privilege was the law that had historically provided the crown and its arms with insulation from litigation in the Common Law. The Crown could not be sued in case of breach of any contract because the law was the legal manifestation of the idea that the gentleman in Whitehall necessarily knows what is the best.⁵ In the case of *Duncan v Cammell Laird and Co. Ltd.*⁶, The House of Lords held that Courts should take Crown Privilege at the face value. Continuous criticism of the rule led to formulation of Crown Proceedings Act, 1947, United Kingdom which provided for civil litigations against the Crown in a specified manner.⁷ It broke down Crown Privilege to Public Interest Immunity (PII) and effectively made it justiciable. However, Doctrine of Crown Privilege was severely crippled in the case of *Conway v Rimmer*⁸, where The House of Lords held that the minister's objections to present evidence on the grounds of public interest could not be conclusive. It was held that the Court would independently determine whether a piece of evidence could be allowed to be withheld after assessing the detriment that could accrue to the public interest. Further on, in the case of *R v Lewes*⁹, Courts disdained the term "Crown Privilege" for its repugnant connotations and bygone nature in the modern law and systems of governance. These two cases have provided concrete precedents to the law of England. Also, Lord Pearce's opinion in *Conway* clearly shows how English Courts have understood

⁴ Fisher, Louis. "The State Secrets Privilege: Relying on "Reynolds"." *Political Science Quarterly* 122, no. 3 (2007): 385-408. <http://www.jstor.org/stable/20202885>.

⁵ United Kingdom. *Parliamentary Debate*, Commons, vol. 558 cc 946-1038, 26 October 1956.

⁶ *Duncan v Cammell Laird and Co. Ltd* A.C. 624 (1942)

⁷ Street, Harry. "Crown Proceedings Act, 1947." *The Modern Law Review* 11, no. 2 (1948): 129-42. <http://www.jstor.org/stable/1090379>.

⁸ *Conway v Rimmer* A.C. 910 (1968)

⁹ *R v Lewes* 60 Cr. App. 93 (1991)

the potential for executive abuse in case Crown Privilege or any such immunity is taken at the face value.¹⁰

INCLUSION OF THE DOCTRINE IN LEGAL SYSTEMS POST COLONIALISATION

United States was the first independent nation to accept State Secrets Privilege as a ground for withholding information. In *Reynold's case*, the US Supreme Court laid down a two-step procedure to be used to evaluate whether a particular piece of evidence will qualify under State Secrets Privilege.¹¹ First, there should be formal privilege claim by the head of the Executive branch agency, after personal consideration into the matter. Second, the Court must independently decide for the admissibility of the evidence and validity of the Government's claim on the basis of circumstances of each case once the step one is completed. The second step of the procedure is the "present day difficulty"¹² and has led to the misuse and complete alteration in the applicability of the Doctrine. The Supreme Court has understood through chain of cases that "too much judicial inquiry into the claim of privilege would force disclosure of the thing, the privilege was meant to protect"¹³. Hence, case laws have put the burden on the Government to satisfy the reviewing court that Reynolds Reasonable danger standard is met.¹⁴ This has compromised the procedure laid down in *Reynold's case* with respect to the independent inquiry to check validity of the claim. Thus, an attempt to structure how a contention would qualify as State Secrets Privilege left contours of privilege

¹⁰ *Conway v Rimmer* A.C. 910 (1968); Lord Pearce's: "Ever since the date of Duncan's case [391 U.S. 145 (1968)], there has been an enormous increase in the extent to which the executive impinges on the private lives of citizens. New ministries have been created and the old have been enlarged. Inevitably the mass of documentation has proliferated. It now bears little relation to the 'State papers' or other documents of government to which some of the older cases refer. Yet the same privilege has been sought (and given) under the argument that the necessary candour cannot be obtained from civil servants if their documents are to be subjected to an outside chance of production in a court of law."

¹¹ *United States v Reynold's* 1 U.S. 345 (1953)

¹² Cappelletti, Mauro, and C. J. Golden. "Crown Privilege and Executive Privilege: A British Response to an American Controversy." *Stanford Law Review* 25, no. 6 (1973): 836-44. doi:10.2307/1227734.

¹³ *United States v Reynold's* 1 U.S. 345 (1953)

¹⁴ *Totten v United States* 92 U.S. 105 (1875)

unclear and speculative due to ambiguity and undefined boundaries in the *Reynold's* judgement.

Reynold's judgment came during the War of Hitler. The growth of international trade, commerce, infrastructure and industry post World War II was unprecedented. Undefined structure of the application of State Secrets Privilege in the American Law allowed it to gush out from limited top priority issues of National Security and Foreign Relations to more generic operations of the State such as trade and commerce. During this time, the Doctrine had begun to prove to be a significant impediment to the discovery of evidence.¹⁵ The courts have been unable to revoke the benefits of this privilege to the State post the World War II as the international setting of the time had evolved to be such that the conventional matters of international trade, manufacturing techniques, social unrest and even meteorological conditions could be said to have assumed enough strength to influence national security.¹⁶

Even State intervention in the personal life has been encouraged by the excuse of State Secret Privilege.¹⁷ Thus, the growth of industry and commerce lead to growth of information that could then be protected. This rendered the provisions provided by the *Reynold's* case which were earlier exclusive to Military data, extremely insufficient and incapable of dealing with the complex modern matters concerning contracts, issues of Government corruption, State intervention and other operations of welfare state. The inefficiency of the privilege has made it a tool to prevent disclosure of questionable or unlawful conduct of the state.¹⁸ The wide amplitude of the Doctrine allowing complete dismissals derives its characterization from an old Supreme Court case entitled *Totten v United States*¹⁹. Courts held in *Totten* that as a general public policy principle, litigation that could lead to disclosure of confidential information would not be allowed. Unfortunately, such a loosely constructed floating principle of *Totten*²⁰ has been a concrete precedent to several cases. In general

¹⁵ *Horman v Kissinger* 77 D.D.C. 1748 (1977)

¹⁶ *Carlston v Green* 14 U.S. 446 (1980)

¹⁷ *Hepting v AT&T Corporation* 06 Cir. 17131 (2007)

¹⁸ *Totten v United States* 92 U.S. 105 (1875)

¹⁹ *Ibid.*

²⁰ *Ibid.*

sense, application of this principle would dissuade litigation on secret espionages.²¹ It is ironic to have a provision in law that disallows justice to be served. “*Justice is the end, Law is but the means*”²², a principle on which formation and evolution of law rests falls defeated by the State Secrets Privilege.

An alarming aspect of application of the Doctrine is that it has been upgraded from a restrictive provision to an encouraging one.²³ *Reynold’s* admonished that the State Secret Privilege “is not to be lightly invoked”²⁴. However, starting from Watergate Scandal²⁵ in 1970s where use of Executive Privilege destroyed Richard Nixon politically leading to his resignation, the invocations of the State Privilege reached their epitome during the Bush’s administration where it was used for over twenty times in the span of six years.²⁶ This accounted for twenty eight percent more cases every year than the previous decade.²⁷ It is startling to note that even the *Totten Rule* of outright refusal to litigate a matter on grounds of public interest, was categorically reaffirmed by the Supreme Court in a 2004 case of *Tenet v Doe*²⁸ where two spies were denied justice when the Government went back on the terms of the contract. Such rustic remnants of the colonial laws set examples for how the public itself is operating under the influence of colonial mindset and how the Government is exploiting such mindset in the name of public interest. It also highlights the fact that even though the Common Law in England evolved after *Convay v Rimmer*²⁹, it could not incentivize nations following Common Law to re-examine its conventional application.

²¹ "The Military and State Secrets Privilege: Protection for the National Security or Immunity for the Executive?" *The Yale Law Journal* 91, no. 3 (1982): 570-89.
doi:10.2307/795930.

²² Georgetown Law school, Georgetown University (1870); motto: “*Justice is the end, Law is but the means*”.

²³ *United States v Reynold’s* 1 U.S. 345 (1953)

²⁴ *Ibid.*

²⁵ Olson, Keith W. *Watergate: The Presidential Scandal That Shook America*. Lawrence: University Press of Kansas, 2016. <https://muse.jhu.edu/> (accessed April 26, 2018).

²⁶ See Robert M. Chesney, *State Secrets and the Limits of National Security Litigation*, 75 GEO. WASH. L. REV. 1249 (2007), app.

²⁷ *Ibid.*

²⁸ *Tenet v Doe* 1 U.S. 544 (2005)

²⁹ *Convay v Rimmer* AC 910 (1968)

OUTSPREAD OF THE DOCTRINE BEYOND UNITED STATES

United States dodged the opportunity to present a range of progressive laws to the world by encapsulating provisions like the State Secrets Privilege. All the other and newer democracies followed the footsteps of the oldest one and did not bypass such a privilege. The case of India is one such example. Indian Evidence Act, 1972 provides for State Privilege under sections 123, 124 and 162.³⁰ Indian Evidence Act was drafted by Sir James Fitzjames Stephen who could be said to have intended to correspond Indian provisions with the Common Law as he also prepared a draft for the English Parliament that though contained similar provision as the Indian Law, was never adopted by the Parliament because of contentions over other laws that the draft dealt with.³¹ Whether or not Sir James wanted to have similar laws in India and England was only relevant until *Conway* judgment as it modified the original jurisprudence of the Common Law. India, however, is still stuck in the past. Even though Legislature did little to amend the rustic elements of the Evidence Act, Case Laws show that Indian Courts have become progressively restrictive in allowing privileges. Issue of State Privilege under S.123 and S.162 was first deliberated over in India in the case of *State of Punjab v Sodhi Sukhdev Singh*³² where it was held that the Courts cannot compel the Government to produce a document in case the head of the Government department refuses to give permission for presentation. The courts could only decide whether or not a particular document relates to the “affairs of the state”³³, and in case it was decided in affirmative, then it was on the head of department to decide on the presentation of the document in the court and the Courts cannot compel such production and cannot analyze whether such affairs of state are against the public interest or not. Law laid down in *Sukhdev* was reversed in the high profile case of *State of U.P. v Raj Narain*³⁴, where the courts held that Court reserved a residual right to decide whether production of any evidence could potentially harm the public

³⁰ *Indian Evidence Act, 1872*; Section 123 provides protection against presentation of unpublished official records; Section 124 provides protection against the disclosure of official communications; Section 162 limits the inspection of document allowed to Court.

³¹ *State of Punjab v Sodhi Sukhdev Singh* AIR 493 (S.C. 1961)

³² *Ibid.*

³³ *State of Punjab v Sodhi Sukhdev Singh* AIR 493 (S.C. 1961)

³⁴ *State of U.P. v Raj Narain* AIR 865 (S.C. 1975)

interest, and thus the decision of head of Government department would not be conclusive. Power of inspection for the purpose of determining the harm was also given to the Courts but it was advised to be used sparingly.

Justice Bhagwati took an even more liberal view in the *Judges Transfer Case*³⁵ where he explicitly held that no immunity to any class of evidence or document is absolute or inviolable. He held that immunity is to be balanced out by the Courts in all cases.³⁶ The law laid down in this case has been the precedent in the matter ever since. Therefore, application of otherwise liberal State Privilege has been restrictive in India owing to progressive judicial interpretations in this regard. India is effectively following the Common Law of *Conway* when American Law is still wallowing in the mires of colonial laws.

IMPACT OF ENFORCEMENT OF CONSTITUTIONS WORLDWIDE

State Secrets Privilege violates the Constitution of the United States on two levels. To begin with, it neutralizes the constitutional restraints on Executive powers such as prohibition of unauthorized espionage.³⁷ In the case of *Halkin v Helms*³⁸, the Court while reprimanding the Government for holding unauthorized espionage, held that the privilege is being used as shield by the Government for insulation from scrutiny after unlawful behavior. Whenever a privilege is claimed, it leaves the Court in dilemma: Should the Court respect the Constitutional responsibility of the Government to protect the National and Public interest or enforce the Constitutional restraints on Executive powers?³⁹ The point to be noted here is that though the American Democracy is the one of

³⁵ *S.P. Gupta v Union of India* 149 AIR (1982)

³⁶ *Ibid*; Justice Bhagwati: "There is nothing sacrosanct about the immunity which is granted to documents because they belong to a certain class. Class immunity is not absolute or inviolable in all circumstances. It is not a rule of law to be applied mechanically in all cases. The principle upon which class immunity is founded is that it would be contrary to public interest to disclose documents belonging to that class, because such disclosure would impair the proper functioning of the public service and this aspect of public interest which requires that justice shall not be denied to anyone by withholding relevant evidence. This is a balancing task which has to be performed by the court in all cases."

³⁷ *Halkin v Helms* 690 F.2d 977 (1982): "any kind of unauthorized surveillance is disallowed, even incidental surveillance is not allowed."

³⁸ *Ibid*; Privilege has become "a shield behind which the government may insulate unlawful behavior from scrutiny and redress by citizens who are the target of the government's surveillance".

³⁹ *United States v United States Dist.* 407 U.S. 297, 313-14, 317, 321 (1972)

division of powers, it also the one where the powers of each branch check and balance one another.⁴⁰ Judiciary is constitutionally apposite to harmonize these complex democratic demands by minimizing the impact of legitimate privilege claims – either by applying only those restrictions necessary to protect valid security interest alone or by compensating when possible for the loss of evidence.⁴¹ The ordinary judicial response of simple denial of discovery on a privilege without material investigation ignores the Constitutional obligations to be enforced on Executive powers.⁴² Courts underestimate the remedy of judicial techniques Constitutionally provided such as protective orders or *in camera* proceedings that could satisfy security and public interests needs and could also permit restricted access to the relevant information.⁴³ Such judicial techniques, in effect, could also provide for Constitutional protection against the abuse of powers.

The second Constitutional violation stems from a deeper problem. When the Government shields itself through the Privilege, it does not necessarily deny the allegations made in the complaints by plaintiffs. The blanket privilege however, denies parties any forum under Article III of the Constitution for the adjudication of the claims.⁴⁴ This interferes with the private Constitutional right to seek redressal that the Government should protect.⁴⁵ District of Columbia Circuit's Court of Appeal has remarked that dismissal of a suit, and consequent denial of a forum provided under the Constitution for dispute redressal is "draconian".⁴⁶ It has been held that outright case dismissal, in the absence of any minimum investigation or hearing, is in itself against public interest which it aims to protect.⁴⁷

⁴⁰ *Nixon v. Administrator of Gen. Servs.* 408 F. Supp. 321, 342 (1976)

⁴¹ *United States v. Nixon*, 418 U.S. 683, 709 (1974)

⁴² P. BREST, PROCESSES OF CONSTITUTIONAL DECISIONMAKING 9, rotext. See *United States v. Nixon*, 418 U.S. 683, 709 (1974).

⁴³ *Zweibon v. Mitchell*, 516 D. C. Cir. 594, 625 (1975)

⁴⁴ Woolhandler, Ann, and Michael G. Collins. "The Article III Jury." *Virginia Law Review* 87, no. 4 (2001):

587-699.

⁴⁵ *Ibid.*

⁴⁶ *In re United States*, 872 D.C. Cir. 472, 477 (1989).

⁴⁷ *Tenet v Doe* 1 U.S. 544 (2005)

Indian Apex Court has on several occasions pressed about the significance of the Right to Know and openness in the Government in a Democracy. It was held in the case of *Raj Narain* that in the Democratic Government of responsibility as ours, “people are *entitled* to know the particulars of *every* public transaction in *all its bearing*” to save the Government and Democracy from corruption and injustice.⁴⁸ It was held in *S.P. Gupta v Union of India* that “it is only when the people know how government is functioning that they can fulfill the role that Democracy assigns to them”.⁴⁹ Court went on to say that Democracy is an ongoing process which does not come to an end by mere casting of vote, rather its orchestration is pervasive and continuous, so continuous that it becomes the “habit of mind”.⁵⁰ They also said that disclosure of information is a rule in Democracy and “secrecy would be an exception justified only where the *strictest* requirement of public interest so demands.⁵¹ The pressing need to be aware of the Government functioning for the survival of Democracy guided the Courts to start reading Right to Information in the Fundamental Right guaranteed under Article 19(1)(a) of the Constitution of India. Article 19(1)(a) says that all citizens shall have the right to freedom of speech and expression.⁵² In the case of *Raj Narain*, the Court held that “people cannot speak or express themselves unless they know”⁵³. *Raj Narain* was one of the early cases that provided such creative interpretation to Article 19(1)(a) that paved way for carving of Right to Information that was finally adopted in 2005.⁵⁴ Right

⁴⁸ *State of U.P. v Raj Narain* 865 AIR (S.C. 1975); Justice Bhagwati: “Be you ever so high, the law is above you.”

⁴⁹ *S.P. Gupta v Union of India* 149 AIR (S.C. 1982), Justice Bhagwati: “No democratic government can survive without accountability and the basic postulate of accountability is that the people should have information about the functioning of the government. It is only if people know how government is functioning that they can fulfill the role which democracy assigns to them and make democracy a really effective participatory democracy.”

⁵⁰ *Ibid*

⁵¹ *Ibid*

⁵² *Constitution of India*, Article 19(1)(a): “All citizens shall have the right to freedom of speech and expression.”

⁵³ *State of U.P. v Raj Narain* 865 AIR (S.C. 1975), Justice Ray: “Whether it is the relations of the Treasury to the Stock Exchange, or the dealings of the Interior Department with public lands, the facts must constitutionally be demandable, sooner or later, on the floor of Congress. To concede to them a sacrosanct secrecy in a court of justice is to attribute to them a character which for other purposes is never maintained a character which appears to have been advanced only when it happens to have served some undisclosed interest to obstruct investigation into facts which might reveal a liability”.

⁵⁴ Semwal, M.M., and Sunil Khosla. "RIGHT TO INFORMATION AND THE JUDICIARY." *The Indian*

to Information has also been read in Article 21 of the Constitution by Justice Mukherjee in *Reliance Petrochemicals Ltd. v Indian Express Newspapers Bombay (P). Ltd.*⁵⁵ The status quo in India is that Right to Information has been captured as one of the Fundamental Rights guaranteed under Part III of the Constitution as it has been considered as an important pillar for survival of Democracy.

The Apex Court further held in the case of *S.P. Gupta* that “the language of a legislation is not a static vehicle of ideas and concepts and as ideas and concepts change, as they are bound to do in a country like ours with the establishment of a democratic structure based on egalitarian values, so must the meaning and content of the statutory provision undergo a change”.⁵⁶ The court was hinting at the fact that the law is not an antique to be taken down and put back on shelf without considering the social-economic and political setting within which it has to operate.⁵⁷ The Court acknowledged that it is the function of the judiciary to undertake the process of dynamic interpretation of the law to harmonize it with the prevailing concepts and values. This is the reason that the term *Crown Privilege* has been castled as *Public Interest Immunity* in England and elsewhere.⁵⁸ Therefore, the Supreme Court has often pressed about the need to interpret the Law in light of existing structure of different realms of the society.

The remarkable need to keep the essence of Democracy alive necessitates for Right to Information and transparency in the functioning of the Government. Ratio of judgments like *S.P. Gupta* paves way for creative and dynamic interpretation of the law. Therefore, such ratio should be the medium to align the nineteenth century law with the modern structures of society. This would allow to limit the scope of Section 123 of Evidence Act to the strictest

Journal of Political Science 69, no. 4 (2008): 853-64. <http://www.jstor.org/stable/41856475>.

⁵⁵ *Reliance Petrochemicals Ltd. v Indian Express Newspapers Bombay (P). Ltd* 190 AIR (S.C. 1989)

⁵⁶ *S.P. Gupta v Union of India* 149 AIR (S.C. 1982), Justice Mathew: “He [Judiciary] has to inject flesh and blood in the dry skeleton provided by the legislature and by a process of dynamic interpretation, invest it with a meaning which will harmonize the law with the prevailing concepts and values and make it an effective instrument for delivery of justice. We need not therefore be obsessed with the fact that section 123 [*Indian Evidence Act, 1872*] is a statutory provision of old vintage or that it has been interpreted in a particular manner some two decades ago. It is not as if it has once spoken and then turned into muted silence. It is an instrument which can speak again and in a different voice in the content of a different milieu.”

⁵⁷ *Ibid*

⁵⁸ Ganz, Gabriele. "Matrix Churchill and Public Interest Immunity." *The Modern Law Review* 56, no. 4 (1993): 564-68. <http://www.jstor.org/stable/1096828>.

exceptions only. If however, its amplitude is not restricted, it would continue to grossly violate Article 19(1)(a) of the Constitution and in effect would contravene with the true spirit of the democracy.

INCOHERENCE WITH GENERAL RULES OF EVIDENCE

A fundamental rule of Evidence Law is the *Best Evidence Rule*. Roots of this rule could be found in an eighteenth-century case of *Omychund v Barker*⁵⁹, where the Courts held that no evidence but “the best that the nature of the case allows” should be admissible. The rule was further deliberated upon in the case of *Ford v Hopkins*⁶⁰ where the Courts held that proponent of evidence concerning written document should present the original document or explain its nonproduction. Lord Denning, in 1969 however, broadened its interpretation by encapsulating all relevant evidence within best evidence.⁶¹ This interpretation was adopted in United States in 1975 through *Federal Rules of Evidence* that codified Evidence Law for the United States’ Federal Courts.⁶² The rule was broken down to two principles: that all relevant evidences should be admissible and “goodness or badness of an evidence goes only to its weight and not to admissibility”.⁶³ Lord Denning’s interpretation of the rule has continued to prevail till contemporary United States. The rule has been read in section 91⁶⁴ of the Indian Evidence Act, 1872 and has been called “cardinal principle”⁶⁵ of Indian Evidence Act on several occasions. It has been held by the Indian Supreme Court that in order to prove something that is said or pictured in a piece of writing, recording or photographing, the original *must* be proved.⁶⁶ Incontrovertibly, State

⁵⁹ *Omychund v Barker* 125 ER 1310 (1744)

⁶⁰ *Ford v Hopkins* 91 Eng. Rep. 250 (1700)

⁶¹ *Garton v. Hunter* 1 All ER 451 (1969)

⁶² Read, Frank T., James F. Bailey, and Oscar M. Trelles. *American Bar Association Journal* 67, no. 4 (1981):

460. <http://www.jstor.org/stable/20747081>.

⁶³ *Garton v. Hunter* 1 All ER 451 (1969)

⁶⁴ *Indian Evidence Act, 1972*; Section 91 necessitates production of primary or secondary evidence only to prove terms and conditions of the contract in question to maintain the sanctity of the evidences.

⁶⁵ *Janki Narayan Bhoir v. Narayan Namdeo Kadam* AIR 761 (S.C. 2003)

⁶⁶ *R.V.E. Venkatchala Gounder Vs. Aralmigu Viswesaraswami & V.A. Temple & another* AIR 4548 (2003)

Privilege limits the scope of *Best Evidence Rule* by allowing nonproduction of the best evidence available in the form of State records.

A standard argument in favor of such nonproduction of evidences with respect to Evidence Law is that it is in public interest. The problem with this argument springs up from the stringent application of the Privilege that makes no attempt to correct for the loss of the plaintiff from proceeding in the case.⁶⁷ Stagnation of other principles of Evidence Law leads to blatant asymmetry in the Courts when privileges are allowed. For instance, to rebalance the load on either side, the Courts could employ inferences or shift the burden of persuasion. The burden to show the best evidence while it cannot also be obtained, when everything else remains the same puts unfair burden on the plaintiff to make any progress in his case. Therefore, the argument of allowing privileges for public interest should only stand when there are some shifts in conventional Court procedures also.

CONCLUSION

State Privilege is not just used to exclude classified documents from litigation anymore, as propounded by *Reynold's*, but has reduced to merely bar judicial review of executive conduct. From a tool to dismiss the case against the Government to unprecedented and warrantless usage in unauthorized espionages, state privilege today is a hollow doctrine that merely serves as Government's plaything. It is an obstacle towards realizing the essence of democracy and transparency that it guaranteed. There is a pressing need for the Courts to start structuring the discovery of evidence to balance the need for secrecy against the rights of litigants. Judicial mind has crafted several procedures to protect privilege material such as requiring redactions, summaries, indexes, and other modifications and the same techniques should be more extensively and readily used instead of immediate grant of the privilege. The legislature should undertake to restrict the provisions of State Privilege to strictest realms of national security from the foreign threat only. Legislature should also make arrangements for increasing participation of relevant parties for the grant of privilege.

⁶⁷ "The Military and State Secrets Privilege: Protection for the National Security or Immunity for the Executive?" *The Yale Law Journal* 91, no. 3 (1982): 570-89. doi:10.2307/795930.

Finally, the public, in whose interest this Doctrine is applied, should fathom out the importance of Transparency between Government and them in a Democracy and raise their voices accordingly.

