



## I RESERVE THE RIGHT TO REMAIN SILENT

*By Nandish Munjal & Shivain Arora  
From University Institute of Legal Studies,  
Panjab University*

It's quite common place for the phrase "I plead the 5<sup>th</sup>" or "You have the right to remain silent" used by actors in various Movies and TV Serials centered around a dramatical recreation of the legal profession and the court proceedings. But, these phrases signify the essential right of any person, be it the accused, to remain silent in cases where silence is the only way to avoid self incriminatory comments. The freedom that one has to express and say whatever they want also enshrines them with the right to withhold their statements in cases where inclination towards restraint is the only way out for the person being questioned. This concept of **Right to Silence** isn't a codified concept in any provision, but a following and abiding by the essence of natural justice. The person being questioned, be it by the police or by the court, has the right to remain silent and the same has been enshrined under various procedural codes as an essential procedural aspect of any criminal trial. **Section 179 of the Indian Penal Code** talks about questioning by a Pubic Servant and **Section 91, 93, 161 and 313 of the Code of Criminal Procedure** also laying emphasis on the concept of Search and Seizure, Questioning by a Public Servant and a Court of Law and how the right to silence can be exercised in such cases. In cases of a civil nature, the concept of right to silence has been a topic of debate with various courts including the American Courts having

differing views on it. In India, there hasn't been a conclusive answer to this question either and it is still up for debate as India is party to **International Covenant on Civil and Political Rights** which provides for certain rights to the accused in a civil case with **Article 14 (3) (g)** stating that: "Not to be compelled to testify against himself or to confess guilt".

The Constitution of India given to the people of this country by themselves bestows various fundamental rights with an endeavour to confer upon them in essence the right to live freely and safely under Part III. These rights have turned to be highly valuable as an aid to those accused of an offence. Among these rights, freedom of speech and expression under Article 19(1)(a) of the Constitution is regarded as an essential element of any healthy democracy as it allows for its people to participate effectively, without any restrictions in the social and political process of a democratic country. This right is considered to be the most prominent liberty among other liberties so conferred under the Constitution. In fact, the freedom of speech and expression enshrines greater scope and meaning to the citizenship of a person, extending the concept from the level of basic existence to giving a person political and social life.

However, strikingly, Article 19(1)(a) is not restricted to mere outward expression of ones thought. Rather this multi faceted right includes under its ambit the **right not to express** which was recognised by the Supreme Court of India in *Bijoe Emmanuel vs. State of Kerala*<sup>1</sup>. The case pertains to an expulsion of children from school for not

<sup>1</sup>1987 AIR 748



singing the national anthem as an act in solidarity to their children's religious belief of Jehovah's Witnesses. Even though they were not party to the act of singing, they still stood up for the Indian National Anthem. The High Court of the State held them guilty under the Prevention of Insults to National Honour Act. It was only on an appeal to the Supreme Court that it was observed that there was no provision of law that compelled any person to sing the national anthem. The Court also observed that the same act of the children does not classify as an act of disrespect to the national anthem. The Hon'ble Court by its decision also protected the children's right under Article 25 as in the instant case, they being Jehovah's Witnesses, only believed, worshiped and supported the cause propagated by Jehovah, the Creator.

Right to silence is not only available under Article 19 but can also be understood in the light of the right against self-incrimination. The 5<sup>th</sup> Amendment of the American Constitution empowers the American people to exercise their right against self-incrimination by stating their intentions to do the same clearly through their choice of words in the court of law or during a police interrogation. *Nemo tenetur prodere accusare seipsum* – "No man is bound to accuse himself" is the legal maxim which governs the principle of Right to Silence and was for the very first time coined in the case of *Miranda vs. Arizona*<sup>2</sup>. The Indian principle regarding Self Incrimination under Article 20(3) of the Constitution is also based upon this same principle and was quoted in the leading case of *Mohammed*

*Ajmal Mohammed Amir Kasab vs. State of Maharashtra*<sup>3</sup>. Right against self incrimination is a concept of fair trial. Article 6 of European Convention on Human Rights elucidates the concept of fair trial in light of the right against self incrimination during an interrogation by a police officer. In India, neither oral nor documentary testimony can be forcefully acquired by compelling the accused. This concept was further enforced in the leading cases of *State of Kerala vs. Shankaran Nair*<sup>4</sup> and *MP Sharma vs. Satish Chandra*<sup>5</sup>. This is in view to control the exercise of powers by the police while conducting an interrogation for an investigation or restricting them to resort to immoral methods of extracting information and compelling the accused to confess about his role in the commission of the offence. In *MP Sharma vs. Satish Chandra*<sup>6</sup>, the Apex court held that the phrase "to be a witness" does not include things like thumb, palm or foot impression. Rather, furnishing the same does not tend to incriminate himself and does not constitute and abide by the term "being a witness against themselves". Reiterating the holding of *MP Sharma vs. Satish Chandra*<sup>7</sup>, the court in the case of *State of Bombay vs. Kathikalu*<sup>8</sup> held that "a person has a right to silence and he (accused) cannot be compelled to be a witness against himself". Further, it was held that acquiring finger impression and handwriting from the accused shall not attract the provisions enshrined under Article 20 (3) rather they act as corroborative evidence. *Selvi vs. State of Karnataka*<sup>9</sup>, the Narco Analysis Case, discerns that no individual can be forced to subjection of a Narco Analysis Test because it falls within

<sup>2</sup>384 U.S. 436 (1966)

<sup>3</sup>(2012) 9 SCC 1

<sup>4</sup>AIR 1960 Ker 392

<sup>5</sup> AIR 1954 SC 300

<sup>6</sup>Ibid.

<sup>7</sup> Ibid.

<sup>8</sup>1961 AIR 1808

<sup>9</sup> (2010) 7 SCC 263



the scope of “testimonial compulsion” where protection of Article 20 (3) can be taken.

In the case of *Dr. Shashi Tharoor vs. Arnab Goswami*<sup>10</sup>, a case for claiming damages on the grounds of defamation were filed, asking the court to compel the defendant to pay for making defamatory remarks in regard to the plaintiff in context of him being involved in the alleged suicide of the plaintiffs wife. In the said case, the Honourable High Court of New Delhi held that the plaintiff has a **Right to be Silent** on the fact of him being accused for subjecting his own wife to cruelty and abetting her to commit suicide. He can't be compelled to comment on the same under **Article 20 (3)**.

Contrastingly, if any person who is legally bound to answer the questions of a public servant truthfully, refuses to do so is punishable with a simple imprisonment of 6 months under section 179 of the Indian Penal Code, 1860. This provision clearly is in contravention to the provisions enshrined under Article 20 (3) of the Indian Constitution as the said provision compels the accused to truthfully answer the questions of the public servant and abstaining from doing the same leads to the accused being punished under Section 179 of the Code. In *Nandini Satpathy vs. PL Dani*<sup>11</sup>, the appellant was charged under the Prevention of Corruption Act and was asked to appear at the police station to answer some questions. The appellant refused to answer the questions during the interrogation, claiming protection under Article 20(3). Because of her actions, she was prosecuted under section 179 of IPC which provide for punishment to a person refusing to answer questions demanded by the public servant.

It was held by the court that in such cases, where there is a conflict of law, Article 20 (3) shall prevail and shall protect the appellant and section 179 shall not be applicable. Hence, in such a case, the Constitutional Provision shall reign supreme over the provisions mentioned under the Indian Penal Code.

Section 161 of the Code of Criminal Procedure, 1973 states that a person shall be bound to answer all questions as truthfully as possible when a public officer asks him to do the same pertaining a case. But, if the questions that have been asked by the public servant have a tendency to expose the person answering them to a certain criminal charge or a penalty, in that case that specific person has the right to remain silent. This provision has been enumerated by keeping in mind the concept of self incrimination under Article 20 (3) of the Indian Constitution as the accused can invoke his right of silence if the questions asked are of an incriminatory nature. Another provision of the Code of Criminal Procedure that deals with the concept of Self Incrimination is that under section 313. This section enumerates the instance when the court, without a previous warning, questions the accused as they deem necessary. This section lays specific emphasis on the concept of self incrimination which elucidates that refusing to answer the questions or giving false answers shall not render the accused to any kind of punishment. But in clause(4) it has been clearly mentioned that if the accused does decide to answer, in that case the same can be treated as evidence against him.

This section can be compared to the concept enumerated under Section 342 of the Code of

<sup>10</sup> cs(os) 253/2017

<sup>11</sup>1978 AIR 1025



Criminal Procedure, 1898 which states that the accused shall not render himself liable to punishment if either he refuses to answer the questions all-together or gives false answers to the questions asked by the court or the jury, and both the court and the jury can make any sort of inference on the basis of such silence or falsified answers. In the case of *Prasanta Biswas vs. State of West Bengal*<sup>12</sup>, the court went on to say that the accused was not obligated under Section 313 of CrPC to say where he was at the night of the incident. “An accused has the right to remain silent and such silence cannot be held to be admission of any charge brought against him. An accused is presumed innocent until proven guilty. The burden of proving him guilty is on the prosecution. The accused need not say anything at all” the bench concluded.

Under this section, the right to silence can be exercised but that does not stop the court from making an inference on the basis of that silence. [Held in *Ramnaresh & Ors. Vs. State of Chattisgarh*<sup>13</sup>]. It was observed that the court would be entitled to draw an inference on the basis of his silence if it adverse inference, as may be acceptable in accordance with the law in force at that time. But in the case of *Raj Kumar Singh @ Raju vs. State of Rajasthan*<sup>14</sup> it was held that the court, on the basis of his silence, can make an adverse inference only if the incriminating material against that person (accused) has been fully established and the accused isn't able to prove in contravention to that fact. The act of the court to make a negative inference on the grounds of silence of the accused has been heavily criticised by D.D. Basu in his commentary that refers to

the case of *Adamson vs. California*<sup>15</sup>. D.D. Basu criticised the said act on the grounds that making a negative inference on the basis of his (accused) silence would amount to the court assuming his silence as a testimony and therefore subjecting him to be guilty. Hence, he was of the opinion that the intention of the drafters of this provision was in essence to ensure that the accused does not endure persecution on the basis of an inference made on the accused being silent.

Protection of Article 20 (3) does not extend to a search made in pursuance of a summons issued under Section 91 and a subsequent seizure after an issuance of a warrant under Section 93 of the Code of Criminal Procedure, 1973. In this the court after issuing the summons, issues a warrant if it is of the belief that the person in possession of a certain document and other things, won't present the same. These provisions have been heavily criticised for being in contravention to the provisions of Article 20 (3) as the accused is compelled to provide incriminating documents and other things to avoid search and subsequent seizure of the same.

**“Silence is a defensive mechanism against the onslaught of the court”**

Right to Silence acts as a shield for an accused or any person enabling him to withhold his words pertaining to the questions being asked of him which ensure that his silence on the matter would be indicative of his attempts to avoid

<sup>12</sup> <https://www.livelaw.in/news-updates/right-to-remain-silent-147798>

<sup>13</sup> (2012) 4 SCC 257

<sup>14</sup> (2013) 5 SCC 722

<sup>15</sup> 332 U.S. 46 (1947)



incrimination of self in an instant case. The American and the European laws forged the way for this concept in India. This right of silence is vivacious and comes to life in cases of both pre trial and also at the time of the trial. An accused or a person can exercise this right during an interrogation by the police and also during the questioning by the court of law and ensure that his decision of withholding information is a mere attempt to prevent incrimination rather than an admission to guilt.

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In cases of confession, the Indian Evidence Act lays an emphasis on the same but there have been certain interpretations of this concept which lead us to believe that the same is considered as more of a privilege rather than a right. Honourable Justice Mr. Y.V. Chandrachud stated that: *“evidence of confession by an accused is not admissible unless it can be proved that such confession was voluntary and free<sup>16</sup>”*.

Hence, the Indian evidence Act lays specific emphasis on the Privilege against self incrimination with the same privilege forgone at the option of the accused if he voluntarily confess to a certain offence. Hence, this right of silence is an essential right to maintain and uphold the sanctity of the principle of natural justice which ensures that any person including the accused has a right to a fair trial and the same isn't marred by the negative inference derived by his calculated decision of remaining hush hush and exercising his right not to express on the questions put forth to him.

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[https://shodhganga.inflibnet.ac.in/bitstream/10603/207487/11/8\\_%20chapter%205.pdf](https://shodhganga.inflibnet.ac.in/bitstream/10603/207487/11/8_%20chapter%205.pdf)