

# **Right to Silence and the Law: A Comparative Analysis**

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## **I. Introduction**

A civilised system of criminal jurisprudence generally accord to the judiciary some means of excluding confession or admission obtained by improper method. This is because in a civilised society it is vital that a person in custody or charged with an offence should not be subjected to ill treatment for extracting evidence. This 'Right to Silence' protects an innocent who find himself unable to corroborate the self-exonerating accounts by verifiable evidence. This right is a universally recognised right of the accused, which comes under the Adversarial System. The System is followed in most of the Common Law countries which has basic principle of 'presumption of innocence of the accused'. Undoubtedly, an accused is a good source of information about the commission of offence however, to collect the evidence from an accused some extra-constitutional means are adopted and sometimes the accused is even put under duress for the same. Coming to the case of India, Article 20(3) of the Constitution provides 'right against self-incrimination' for the protection of the accused. But the question is whether this protection is available to the accused only or even to a suspect? Does this Article give liberty to an accused to remain silent throughout the proceeding or in a limited sense? Can adverse inference be drawn against accused if he remains silent? These are the main issues which have been discussed in this paper. For this discussion a comparative analysis of provisions of different countries are taken into consideration. It also attempts to highlight the role of Indian Judiciary in this context. At the end of the paper some of the suggestions are muted as a part of the conclusion.

## **II. Concept of 'Right to Silence'**

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.<sup>2</sup> Most of the common law countries follow the

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<sup>2</sup> Law Commission of India, 180<sup>th</sup> Report on Article 20(3) of the Constitution of India and the Right to Silence, 2002, p.3.

Adversarial System where the concept of ‘presumption of innocence’ i.e. a person is presumed to be innocent unless the guilt is 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. 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 16<sup>th</sup> 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 to answer 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.<sup>3</sup> 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.<sup>4</sup> 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.

### III. Right to Silence and International Scenario

The Universal Declaration of Human Rights, 1948 includes some aspect of ‘right to silence’ in Article 11 para 1.<sup>5</sup> 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.<sup>6</sup> It also guarantees

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<sup>3</sup> Professor M.P. Jain, *Indian Constitutional Law*, Lexis Nexis, Butterworth Wadhwa, Nagpur, 2010, p.1163

<sup>4</sup> *Ibid.*

<sup>5</sup> Article 11 Para one provides “Everyone charged with a penal offence has the right to be presumed innocent until proved guilty according to law in a public trial at which he has had all the guarantees necessary for his defence.”

<sup>6</sup> Article 9 para 1 says, “Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law”.

clearly that everyone has a right not to be compelled to testify against himself or to confess guilt.<sup>7</sup>

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.<sup>8</sup> Similarly, Article 6(2) of the Convention states that everyone charged with an offence shall be presumed innocent until proven guilty according to Law.<sup>9</sup> 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.<sup>10</sup> It is the crux of the fair procedure that if police were questioning the accused regarding his self-incrimination, he could remain silent.<sup>11</sup> 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.<sup>12</sup> 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.<sup>13</sup>

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Article 9 para 2 says; that “anyone who is arrested shall be informed, at the time of arrest, of the reasons for his arrest and shall be promptly informed of the charges against him”.

<sup>7</sup> Article 14(3) (g) of International Covenant on Civil and Political Rights, 1966 provides, “in the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantee and full equality that not to be compelled to testify against himself or to confess guilt.

<sup>8</sup> Article 6(1) of the European Convention on Human Rights says, “every person charged has a right to a ‘fair’ trial.”

<sup>9</sup> Article 6(2) of the European Convention on Human Rights says “everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.”

<sup>10</sup> D. D. Basu, *Commentary on the Constitutional Law of India*, Lexis Nexis Butterworth, Wadhwa, Nagpur, 2008, p.2996.

<sup>11</sup> *Ibid.*

<sup>12</sup> Article 8 of the American Convention on Human Rights

<sup>13</sup> Article 7 of the African Charter on Human and People Rights

## IV. Provisions in Other Countries

### IV.I. Position in U.K.

It is a fundamental principle of English System of Criminal Justice that a person accused of an offence shall not be compelled to disclose any facts which incriminate himself. This principle of immunity is founded on the 'presumption of innocence'. The European Court in *Murray vs. United Kingdom*<sup>14</sup> held that the encroachments into the right to silence made in Ireland by the Irish law of 1988 did not violate the right to a fair trial nor the presumption of innocence mentioned in Article 6 of the European Convention. It was further held that the trial Judge could not draw an adverse inference merely on account of the silence of the accused and that the guilt of the accused must be *prima-facie* established by the prosecution. An additional condition was laid down that the new provisions could not be resorted to unless it was proved that the accused was given an opportunity to express his views. Therefore, no presumption can be raised on account of the silence of the accused unless a *prima-facie* case of guilt has been established by the prosecution, it is difficult to see, and several jurists have also stated similarly, there is no extra advantage in permitting the judge to rely on the silence of the accused. After this judgment the English Parliament, which had in the meantime introduced similar provisions in the Criminal Justice and Public Order Act, 1994, as applicable to England and Wales, amended the said Act by the Youth Justice and Criminal Evidence Act, 1999 by introducing provisions requiring the suspect or accused to be informed of his right to call an attorney.<sup>15</sup> Sub-section 2(A) was introduced in 1999 in Section 34 and that section deals with pre-trial silence.<sup>16</sup> A similar provision was introduced in Section 35 in the form of 3A which dealt with right to silence at the trial. In another case, *Condron vs. The United Kingdom*<sup>17</sup> which was rendered in may 2000, is the case directly arose under the English Act of 1994, the Court relied upon the judgment in *Murray's case* and stated that the right to silence was not absolute but at the same time a prima facie case must be made out and the safeguards mentioned in that judgment that an opportunity must be given to the accused or suspect to call for a lawyer, must be followed. In this case the accused persons exercised their right to call for a lawyer and as the lawyer advised them to remain silent during interrogation by the police, they remained silent and when cross-examined at the trial (a procedure which does not obtain in India), they said that they

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<sup>14</sup> (1996) 22 EHRR 29

<sup>15</sup> Supra note 1 p.12

<sup>16</sup> Section 34(2A) says; Where the accused was at an authorized place of detention at the time of the failure, sub-sections (1) and (2) above do not apply if he had not been allowed an opportunity to consult a solicitor prior to being questioned, charged or informed as mentioned in sub-section (1) above."

<sup>17</sup> Supra note 1 p.13

remained silent because of the advice of the lawyer. The Court in this case observed that, if the accused remained silent, they run the risk of an adverse inference. But if they seek legal advice and state that their lawyer advised them to remain silent, the Court would then say that there was a fair trial and that they had waived their privilege of confidentiality. The Court further observed that any other conclusion would be at variance with the fundamental importance of the right to silence, a right which, as observed earlier lies at the heart of the notion of a fair procedure. But presently a problem is taking place that in most of the cases, the accused would say, upon being questioned, that his lawyer had asked him to remain silent. When and what suggestion was given by the lawyer is not clear. Also, the present law requires the Court to draw a 'proper inference' against the accused that has remained silent when questioned by the Police or by the Court. There are no guidelines as to what type of inference should be drawn in different situations or facts. In England, it has been lamented that the Government had brought the changes in 1994 on the basis of the 11<sup>th</sup> Report of 1972 of the Criminal Law Review Committee even though two other Royal Commissions had recommended that the right to silence could not be encroached upon. However, the Privy Council in case of *Braw vs Scott*<sup>18</sup> observed that there was need for fair balance between the general interest of the community and personal right of the individual. This right is not absolute and the accused cannot remain silent throughout criminal proceeding, and if, the Court seeks to evaluate the evidences against him and he did not speak then adverse view may be drawn.

#### **IV.II. Provision in USA**

The Fifth Amendment of the U.S. Constitution relates to the fundamental right against self- incrimination. It states: "No person shall be compelled in any criminal case to witness against himself." First time the question relating to the right to silence came to be considered in case of *Adamson vs. California*.<sup>19</sup> In this case the minority opinion referred the Fifth Amendment and viewed that the right to silence was absolute and it could not be curtailed. Subsequently, in another case *Griffin vs. California*<sup>20</sup> the Supreme Court of USA stated that the defendant has an absolute right not to take the stand. An accused is permitted to give evidence on his own behalf if he so elects. But if he is unwilling to give the evidence and exercises his right to silence no adverse inference of guilt can be drawn. An innocent defendant may want to avoid taking the "stand" because he feels that he is likely to perform badly, being uninformed about the law as compared to an

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<sup>18</sup> (2001) 2 All ER 97

<sup>19</sup> (1947) 332 US 46

<sup>20</sup> (1965) 380 US 609

experienced prosecutor who is skilled in the artificial rules governing court rooms and that the prosecutor may be able to trip him up.<sup>21</sup>

In *Miranda vs. Arizona*<sup>22</sup> case the accused was arrested and taken to the interrogation room where the confession of accused was taken. But during interrogation police officer did not ensure the accused that he had free choice to make the statement. The Court in this case held that when a suspect person in police custody is subject to interrogation, it is duty of the police to give information to the person who is suspect of the offence in clear and unequivocal term that the suspect has a right to remain silent. He has also a right to the presence of his attorney during the questioning. Nowhere it has been laid down by the US Supreme Court that on account of the silence of the accused, an adverse inference can be drawn or that the silence can be treated as a piece of corroboration for inferring of guilt.

However, this privilege is not absolute, it has certain limitations which are as follow:<sup>23</sup>

- i. The accused is free to waive this privilege. But merely silence of accused does not allow to presume the waiver of this privilege. This is because the provision made against self-incrimination is made solely for the benefit of witnesses.
- ii. Where an accused has been pardoned or otherwise given immunity from prosecution he may be compelled to give such evidence.
- iii. This protection is available to the witness from giving evidence against his consent. If he himself voluntary wants to give the evidence this provision does not bar him.
- iv. It does not include any immunity from criminal liability for perjury committed while giving evidence. Justice Warren has also expressed his concern regarding protection against self-incrimination. He said that accused must be warned that he had right to remain silent anything he was saying could be used against him.

## **V. Indian Position**

Silence can always be consistent with innocence. This is because the accused might remain silent because of shock, confusion, embarrassment, or have desire to protect another person or to avoid reprisals. Sometimes, it may be that he has problem of language or literacy. This is the universally recognised right which has been conferred as fundamental rights under

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<sup>21</sup> Supra note 1 p.31

<sup>22</sup> (1966) 384 US 436

<sup>23</sup> Supra note 9 p. 2994

Article 20(3) of the Constitution of India in the form of protection against self-incrimination. It provides, “No person accused of an offence shall be compelled to be witness against himself.” From the analysis of the Article it appears that, (i) this right is available to a person ‘accused of an offence’; (ii) it provides protection against ‘compulsion’ to be witness, and (iii) it is a protection against such compulsion resulting in his evidence ‘against himself’. All these three things must be simultaneously present to get the protection of Article 20(3). The area within which this doctrine operates should not be enlarged, but within its limited area it should be given full effect.<sup>24</sup> Article 20(3) is a humane Article which guarantees and ensures dignity and integrity of an individual. The refusal of it is a violation of Adversarial System.

Similarly, section 315 of the Criminal Procedure Code, 1973 provides protection of the accused against self-incrimination.<sup>25</sup> The section says that an accused is always a competent witness for his defense but he cannot be compelled to give evidence unless he himself requests for that and his failure to give evidence is not subject to form adverse opinion. Not only this but section 164 of the Criminal Procedure Code also, provides that a person cannot be compelled to give evidence which incriminates him. The magistrate must inform him that he is not bound to give such evidence which incriminates him because that can be used against him.

The protection of accused against self-incrimination was available even prior to the Constitution of India. Section 24 of the Indian Evidence Act, 1872 excludes confession caused by any threat or promise.<sup>26</sup> However, this promise or threat should not be spiritual but it should be temporal in nature. Similarly, section 25 and 26 of the Act provides protection of the accused.<sup>27</sup> Section 27 also provides protection in limited sense.<sup>28</sup> However,

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<sup>24</sup> H. M Seervai, *Constitutional Law of India*, Voi. 2 1993, Universal Law Publishing C. Pvt. Ltd. New Delhi, p.1062

<sup>25</sup> Section 315(1) of The Criminal Procedure Code says; “Any person accused of an offence before a Criminal Court shall be competent witness for the defence and may give evidence on oath in disproof of the charge made against him or any person charged together with him at the same trial:

Provide that-

(a) He shall not be called as witness on his own request in writing;

(b) His failure to give evidence shall not be made the subject of any comment by any of the parties or the Court or give rise to any presumption against himself or any person charged together with him at the same trial.

<sup>26</sup> According to section 24 of the Indian Evidence Act, “A confession made by an accused is irrelevant in a criminal proceeding, if the making of confession appears to the Court to have been caused by inducement, threat or promise....”

<sup>27</sup> Section 25 of the Indian Evidence Act says; “No confession made to police officer shall be proved as against a person accused of any offence”

there are certain provisions under the Indian Evidence Act, 1872 which impose obligation on the accused to give evidence in his favour.<sup>29</sup> Although it is a cardinal principle of criminal jurisprudence that *actiori incumbit onus probandi* (burden of proof of an offence will always lie on prosecution).<sup>30</sup> But simultaneously, section 102 of the Indian Evidence Act says that once prosecution proves his case the onus of proof shifts on the other party to disprove the proof given by the prosecution. If he does not disprove the case then he can be held liable. Supreme Court in case of *A. Raghvamma vs. Chenchamma*<sup>31</sup> held that there is an essential distinction between burden of proof and onus of proof. Burden of proof lies upon the person who has to prove a fact and it never shifts but onus of proof shifts. Same view has been endorsed in *Anil Rishi vs. Gurubaksh Singh*<sup>32</sup> case. Although, the role of accused is just to create reasonable doubt against the evidence given by the prosecution, because the standard of proof in criminal cases under the Adversarial System is to prove the case 'beyond reasonable doubt', otherwise benefit of doubt is given to the accused. However, if the accused remains silent and does not create reasonable doubt he cannot avail such benefit. Similarly, section 105 of the Indian Evidence Act 1872 says that if a person is accused of an offence, it is to the accused to provide the circumstances or proof to bring the case within any of the general exceptions in the Indian Penal Code or within any special exception in any other Code. If the accused is unable to do so the Court shall presume the absence of such circumstances.

From the provision of Article 20(3) and other Indian Provisions it appears that benefit of the protection against self-incrimination is applied to the accused in criminal proceeding not in civil proceeding. And also, it does not protect all witnesses as in USA. This proceeding must be before a Court of Law or other Judicial Tribunal before whom a person may be accused of an offence.<sup>33</sup> The immunity of Article 20(3) starts when the name of the

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Section 26 of the Act provides; "No confession made by any person while he is in the custody of a police officer, unless it be made in the immediate presence of a Magistrate, shall be proved as against such person"

<sup>28</sup> Section 27 says "Provided that, when any fact is deposed to as discovered in consequence of information received from a person accused of any offence, in the custody of a police officer, so much of such information, whether it amounts to confession or not, as relates distinctly to the fact thereby discovered may be proved"

<sup>29</sup> Section 101, 103, 105 of the Indian Evidence Act, 1872

<sup>30</sup> Section 101 of the Indian Evidence Act provides; "Whoever desires any Court to give judgment as to any legal right or liability dependent on the existence of fact which he asserts must prove that those facts exist."

<sup>31</sup> AIR 1964 SC 138

<sup>32</sup> AIR 2006 SC 1971

<sup>33</sup> *Maqbool vs State of Bombay* (1953) SCR 710

person is mentioned as accused in the First Information Report or a complaint which would result in prosecution and he is compelled to make the statement.<sup>34</sup> But one more situation is there under section 41 of the Criminal Procedure Code, 1973<sup>35</sup> where the police officer may arrest a person on the basis of suspicion that the accused was involved in the commission of a cognizable offence or he was having such weapon which could be used for the commission of cognizable offences. During the custody if he makes some incriminating statement then it is inadmissible under section 25<sup>36</sup> as well as section 26<sup>37</sup> of the Indian Evidence Act, 1872 and these provisions are prior to the Constitution of India. However, section 27 of the Indian Evidence Act says that, if the arrested person makes confession and narrates some relevant statement (such as about the weapon used in the crime) which leads to discovery of the fact then the second part of the statement is relevant whereas the first part i.e. confessional part is inadmissible. But what will be the situation if the statement which leads to discovery was obtained under compulsion?<sup>38</sup> Section 24 of the Indian Evidence Act says that all confession made under inducement, threat or promise are irrelevant. However, there is no such provision under section 27 of the Act. So there is contradiction between section 24 and 27. However, the Supreme Court in the case of *Ramakrishna vs. State of Bombay*<sup>39</sup> said that Article 27 was an exception to sections 24, 25 and 26. So, section 27 allows that part of the statement made by the accused to the police “whether it amounts to confession or not” which relates distinctly to the fact thereby discovered, to be proved. Thus, even a confessional statement before the police which distinctly relates to the discovery of the fact may be proved under section 27.<sup>40</sup> But the Court made it clear in the case of *Pulukuri Kottaya vs. Emperor*<sup>41</sup> that the ‘fact discovered’ and ‘object produced’ cannot be treated the same. The “fruits of poisonous tree” doctrine which was incorporated in sections 24, 25 and 26 of the Indian Evidence Act forbids evidence obtained directly or indirectly as a result of violation of a defendant’s constitutional

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<sup>34</sup> M.P.Sharma v Satish Chandra 1954 SCR 1077 at 1088

<sup>35</sup> Section 41 of the Criminal Procedure Code

<sup>36</sup> Section 25 of the Indian Evidence Act provides, “No confession made to a police officer shall be proved as against a person accused of any offence”

<sup>37</sup> Section 26 of the Indian Evidence Act says; “No confession made by any person whilst he is in the custody of a police officer, unless it be made in the immediate presence of Magistrate, shall be proved as against such person.”

<sup>38</sup> Supra note 9 p.3013

<sup>39</sup> AIR 1955 SC 104

<sup>40</sup> Ram Jethmalani and D. S. Chopara, *The Law of Evidence*, Thomson Reuters, Legal 2013, p.434

<sup>41</sup> AIR 1947 PC 67

rights. It was said in the case of *Nandani Satpathi vs. PL Dani*<sup>42</sup> that the net of privilege should not be spread out in such a way as to misuse it.

Besides, the above discussed point another important issue in this regard is whether the immunity under Article 20(3) is confined to the statement made at the trial within the Court room or it extends to pre-trial statement too? It must be noted that section 161(1) of Cr. PC empowers police officer to ask the question to any person who is acquainted with the facts but such person is not bound to answer those question which would have tendency to expose him to a criminal charge. Section 161(2) casts a wider protective net to protect normally accused person as well as those who are examined as suspect and witness during the investigation stage.<sup>43</sup> Therefore, right against self-incrimination protects person who have been formally accused as well as those who are examined as suspect in criminal cases. Although, Article 20(3) uses the word accused for this protection. So a harmonious construction should be done between Article 20(3) of the Constitution and section 161(2) of the Criminal Procedure Code and include suspects of offences in the purview of its protection. Supreme Court in case of *M. P. Sharma v Satish Chandra*<sup>44</sup> said that the phrase used in Article 20(3) is 'to be witness' not 'to appear as witness' which reflects that 'to be witness' is not merely in respect of testimony given under compulsion before the Court-room but testimony obtained previously from him.

## VI. Rationality and Right to Remain Silent

As discussed in the preceding paragraphs of the paper 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 are made voluntarily.<sup>45</sup> 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

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<sup>42</sup> AIR 1978 SC1025

<sup>43</sup> Section 161(1) of the Criminal Procedure Code, 1973 says "Any police officer making an investigation under this Chapter, or any police officer not below the such rank as the State Government, may by general or special order, prescribe in this behalf acting on the requisition of such officer, may examine orally any person supposed to be acquainted with the facts and circumstances of the case.

(2) Such person shall be bound to answer truly all questions relating to such case put to him by such officer other than questions the answer to which would have tendency to expose him to a criminal charge or to a penalty or forfeiture.

<sup>44</sup> AIR1954 SC 300

<sup>45</sup> Supra note 39 p.373

inclined to extract information through such compulsion as a matter of course.<sup>46</sup> 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*<sup>47</sup> 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*<sup>48</sup> 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.

## VII. Conclusion

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.<sup>49</sup> 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. The basic objective of criminal justice system is to ensure public safety and the right to remain

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<sup>46</sup> ibid

<sup>47</sup> AIR 1961 SC 1808 Para 30

<sup>48</sup> AIR 1978 SC 1025

<sup>49</sup> Committee on Reform of Criminal Justice System Report, Vol. I, March, 2003, p.53

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*.