



# INTERNATIONAL JOURNAL FOR LEGAL RESEARCH AND ANALYSIS

Open Access, Refereed Journal Multi Disciplinary  
Peer Reviewed Edition :

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INTERNATIONAL JOURNAL FOR LEGAL RESEARCH & ANALYSIS

ISSN

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# **ANALYSIS OF THE FUNDAMENTAL RIGHT AGAINST SELF-INCRIMINATION AS PER ARTICLE 20(3) OF THE INDIAN CONSTITUTION**

AUTHORED BY - SAI VAISHNAV

## **ABSTRACT:**

Right to silence is a legal principle developed from the right to protection against self-incrimination under Article 20(3) of the Indian Constitution. Article 20(3) states “*No person accused of any offence shall be compelled to be a witness against himself*”<sup>1</sup>, which extends to the person’s right to remain silent in the court. The legal principle originates from the middle-ages in England, based on the legal maxim of “*nemo debet prodere ipsum*” which means the privilege against self-incrimination. The Right against self-incrimination (right to silence) provided under Article 20(3) has been adopted based on the Fifth Amendment in the United States of America, and contains similar language as in the latter. This right provides that the prosecution or the State is burdened with proving the guilt of the suspect, and the suspect is acknowledged as “*innocent until proven guilty*”. The presumption that the accused is innocent until proven guilty should not under any circumstance be cast off solely based on the right to silence put into exercise by the suspect, as such a claim would weaken or deteriorate the legal significance of the presumption. Moreover, the prosecution has the obligation or the liability of establishing and proving the guilt of the suspect by providing evidence, and any deduction based upon the right to remain silent exercised by the accused would be in contrast to the principle that the prosecution has to prove that the accused is guilty, until then the person is innocent. The research is aimed at analysing the development of the legal principle with the help of judicial precedents.

*Keywords:* Self-incrimination, fundamental right, right to silence.

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<sup>1</sup> INDIA CONST. art. 20(3).

## INTRODUCTION

The right to silence/ right to remain silent is developed under the right against self-incrimination, which in simple terms means that a person cannot be compelled to be a witness against himself. The legal principle originates from the middle-ages in England, based on the legal maxim of “*nemo debet prodere ipsum*” which means the privilege against self-incrimination. In the early sixteenth century it was established by the English Courts of Star Chambers that the accused would have to take a vow which would compel him or her to address any question posed to the person, even without any legitimate charge. These were later nullified and the maxim of *nemo debet prodere ipsum* was established. In the United States, the Fifth Amendment to the Constitution provides “No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation”<sup>2</sup>. This was ratified in 1791 with nine other articles as a part of the Bill of Rights. India has adopted the right against self-incrimination and under that, the right to remain silent based on the Fifth Amendment of the Constitution of the United States, and it is covered under Article 20(3) of the Indian Constitution, which states that “*No person accused of any offence shall be compelled to be a witness against himself*”. The right to remain silent in India results in the prosecution being in a position to provide evidence to verify the guilt of the suspect. The suspect is acknowledged by the Court as an innocent, until he or she is proven guilty. Hence, only if the prosecution is able to establish the guilt of the accused by providing facts, the accused would be declared guilty. It also means that the accused has the right to remain silent if the prosecution attempts to question the suspect to obtain facts regarding the case. The prosecution has the liability of establishing the culpability of the defendant, and any deduction based upon the exercise of the defendant’s right to not testify against himself would be in contrast to the principle that the prosecution has to prove that the accused is guilty, and until the guilt of the accused is proven, he or she is innocent in the eyes of the law.

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<sup>2</sup>CONST. OF THE UNITED STATES, amend. V.

## **RESEARCH OBJECTIVES:**

The research focuses on the legal principle of the Right to Silence as provided in Article 20(3) of the Constitution of India, and the main objectives of the research are:

- To study the origin of the Right to Silence and its application in various parts of the world.
- To study and analyse the development of the principle in the U.S, England, and India, based on various case laws.
- To examine the principle of Right to silence under the right against self-incrimination and highlight the various facets as a result of the development of this principle.

## **RESEARCH QUESTIONS:**

The research has been conducted with focus on answering the following questions:

1. What is the foundation upon which the principle has originated?
2. How has the Right to silence developed in different nations, and how it has been applied?
3. How has the Indian Constitution interpreted it and provided as a principle under the Right against self-incrimination?
4. Why is the right to silence an issue for debate and what developments took place due to the conflicts?

## **RESEARCH METHODOLOGY:**

The methodology adopted by the researcher is doctrinal research, with the information being substantiated from secondary sources such as existing statutes, case laws, journal articles and reports, and other information from online databases and web portals. Doctrinal research is the ideal methodology to study, analyse and present the topic of right to silence.

## **LITERATURE REVIEW:**

There is a lot of literature available pertaining to the Right to silence in the Indian Constitution, Article 20(3), which deals with the right against self-incrimination, in the form of journal articles, case laws, books, etc. The researcher has referred to the following to facilitate in conducting the research:

**The benefits of a right to silence for the innocent**<sup>3</sup> is an article written by Shmuel Leshem wherein he talks about how an innocent person who is accused of committing any crime can benefit from using his or her right to silence under the right against self-incrimination during a trial or an interrogation. The author quotes from the judgement of the case *Murphy v. Waterfront Commission (1964)*<sup>4</sup>, “*the privilege [against self-incrimination], while sometimes a ‘shelter to the guilty’, is often ‘a protection to the innocent’*”. The right to silence is considered as an essential principle pertaining to criminal proceedings. The right suggests that the court or the jury should not reach a conclusion based on the decision of the accused to stay silent, rather it should give the judgement relying upon the evidence provided during the proceedings.

**1. The Effects of a Right to Silence**<sup>5</sup> written by Daniel J. Seidmann discusses that the court must base its decision disregarding the suspect exercising his right to silence and solely based on other evidence. The author mentions the case of *Miranda v. Arizona (1966)* with regard to the court conditioning its verdict considering the accused exercising his right to not answer the questions posed and be silent. The author also talks about when the right to silence was formalised in England in 1897, and was reduced to a level that permitted prosecutors to draw certain inferences based on the decision of the suspect to remain silent.

**2. A Peculiar Privilege in Historical Perspective: The Right to Remain Silent**<sup>6</sup>, a journal article published under the Michigan Law Review and written by Albert W. Alschuler highlights two viewpoints of the right to silence under the right against self-incrimination. The Court states “*the privilege is fulfilled only when the person is guaranteed the ‘right to remain silent unless he chooses to speak in the unfettered exercise of his own will’*”.

**3. The Right to Privacy**<sup>7</sup> by Samuel D. Warren and Louis D. Brandeis mentions that as per the common law, an individual would have protection in person and property, however the definition, extent and nature of such protection should be updated as the times go by. It is important that a law

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<sup>3</sup> Shmuel Leshem, *The benefits of a right to silence for the innocent*, 41 THE RAND JOURNAL OF ECONOMICS 398 (2010).

<sup>4</sup> *Murphy v. Waterfront Commission* 378 U.S. 52 (1964).

<sup>5</sup> Daniel J. Seidmann, *The Effects of a Right to Silence*, 72(2) THE REVIEW OF ECONOMIC STUDIES, 593 (2005).

<sup>6</sup> Albert W. Alschuler, *A Peculiar Privilege in Historical Perspective: The Right to Remain Silent*, 94(8) MICHIGAN LAW REVIEW, 2625 (1996).

<sup>7</sup> Samuel D. Warren and Louis D. Brandeis, *The Right to Privacy*, 4(5) HARVARD LAW REVIEW, 193 (1890).

or doctrine keeps developing based on various circumstances and case laws, and as such has the right to silence been developed over the years.

4. **Silence Rights**<sup>8</sup> is a journal article published under the Australian Indigenous Law Review, in which the writers David Dixon and Nicholas Cowdery talk about the extent of right to silence as per Article 14 (3) (g) of the International Government on Civil and Political Rights, as well as how the act is acknowledged and protected under sections 89 and 122 of the Evidence Act and Law Enforcement (Powers and Responsibilities) Act respectively. It also discusses the contribution of the New South Wales Parliament's contribution in the development of the right in the form of the *Evidence of Silence Act* in the United Kingdom and Australia. The Evidence of Silence Act is concerned with protecting the suspect or the accused from answering to the questions posed by the police at the time of interrogation and other proceedings.
5. **The Right to Silence: A Review of the Current Debate**<sup>9</sup> is a journal article written by Steven Greer, and published in The Modern Law Review wherein the writer has provided information with respect to abolishing or upholding the right to silence based on several nations' decisions regarding the right. The Government looked adamant on abolishing the right in the United Kingdom and Wales in the late 1990s or early 1991. Northern Ireland abolished the right in 1988, however, some nations like Scotland decided not to interfere with this issue for the meantime.
6. **Miranda v. Arizona (1966)**<sup>10</sup> is the landmark case which established that the Fifth Amendment under the United States Constitution prohibits prosecutors from using statements provided by the accused during interrogation as evidence under the proceedings or the trial unless the prosecution can establish that the accused or the suspect had been informed of his or her right to consult an attorney, and the right to silence under the right against self-incrimination. The prosecution is also burdened with proving that the accused was aware of these rights and willingly waived those rights.
7. **Nandini Satpathy vs Dani (P.L.) And Anr. (1978)**<sup>11</sup> is another case which contributed to the development of the right to silence under the right against self-incrimination. "The former

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<sup>8</sup> David Dixon and Nicholas Cowdery, *Silence Rights*, 17(1) AUSTRALIAN INDIGENOUS LAW REVIEW, 23 (2013).

<sup>9</sup> Steven Greer, *The Right to Silence: A Review of the Current Debate*, 53(6) THE MODERN LAW REVIEW, 709 (1990).

<sup>10</sup> *Miranda v. Arizona* 384 U.S. 436 (1966).

<sup>11</sup> *Nandini Satpathy vs Dani (P.L.) And Anr.* 1978 AIR 1025

Chief Minister of Odisha had been accused of using her political influence to gain wealth illegally, booked under Section 5(2) read with Section 5(1)(d) and (e) of the Prevention of Corruption Act, 1988 along with Section 161, 165, 120B and 109 of the Indian Penal Code by the Deputy Superintendent of Police, Vigilance, Cuttack”<sup>12</sup>. During the former CM’s interrogation, she exercised her right to silence under Article 20(3) of the Indian Constitution. One of the questions arising out of this issue was the constitutional validity of Article 20(3). When not in trial, under police custody, can the suspect resort to exercising his or her right to silence even if those are questions which can potentially expose the suspect of committing the crime he or she has been accused of. The court held that a person has the right to exercise the fundamental right of right to silence despite being outside of court or trial.

## ORIGIN AND HISTORY

### Origin

The right against self-incrimination originated in England in the middle-ages as the Star Chamber in the English Courts scrapped the need for the suspect to take the vow which puts him in a situation where he is liable to answer any question posed to him by the police during interrogation or even the prosecution during the trial proceedings. The elimination of this principle resulted in the right against self-incrimination and right to silence based on the legal maxim of “*nemo debet prodere ipsum*”. In England, thus, “the right to silence provided that the failure of an accused person when questioned to mention some fact which afterwards he relies on in his defence cannot found an inference that the explanation subsequently advanced is untrue, for the accused has a right to remain silent.”<sup>13</sup> The debate was studied and analysed upon, and the conclusion drawn was that not only should the right to remain silent remain a crucial part in the justice or judicial system in England and Wales, it should be further strengthened as well.

### Right to Silence in England

In the late 1990 and early 1991 there was discussion regarding the abolition of the right to remain silent under the right against self-incrimination. Northern Ireland had abolished the right in 1988, which led to the discussing taking place in England and Wales Meanwhile Scotland decided not to interfere with the issue of abolishing the right to silence. The decision by Northern Ireland

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<sup>12</sup> <https://indiankanoon.org/doc/1938988/> (last visited Apr. 17, 2021).

<sup>13</sup> Steven Greer, “*The Right to Silence: A Review of the Current Debate*”, 53(6) THE MODERN LAW REVIEW, 709 (1990).

drove a Home Office Working Group in 1989 to provide recommendation regarding the abolition of the right to remain silent. Moreover, there was pressure from the police as well in favour of this cause since it would help their work during interrogations. But the important question which is in favour of the right to silence is that can an innocent person be justified in not responding to the questions posed to him or her, if under suspicion, can be provided as evidence in the Court of Law. The Government came to the conclusion that it would be premature to abolish the right to silence completely. The question in debate gave rise to a need to clarify what exactly the right to remain silent is.<sup>14</sup> However, in 1994, the British Parliament adopted the proposal of the Prime Minister at the time, John Major, to curb or limit the right to silence significantly. The updated new law gives the judges and the jury to consider the suspect's failure to answer a question posed during interrogation or the refusal to testify in a trial as valid evidence. The groups advocating in favour of the new law argued that this was an important need of the hour since the right to remain silence was being exploited resulting in an advantage for the suspects who have committed unlawful activities.<sup>15</sup>

### **Right against self-incrimination in the U.S**

The right to silence in America is provided under the Fifth Amendment of the United States Constitution. The Right to remain silent is developed in the United States on the basis of the landmark case of *Miranda v. Arizona*<sup>16</sup> which led to the establishment of the the *Miranda rights*. This landmark case involved an accused, who upon hours of interrogation and coercion admitted to committing an offence that he had been accused of. The officers had not informed the defendant of his rights, which include his right to silence or not testify as a witness against himself, as well as his right to call a lawyer. The court acknowledged the suspect's written admission during the trial over his demurral, and he was found guilty. The Supreme Court established that the police had the liability or the obligation of informing and advising the suspect of his rights, provided the coercion involved in the interrogation process. It also provided that the interrogation must terminate if the defendant/accused exercised his or her right to remain silent or to consult an attorney. The *Miranda v. Arizona* case prohibits the use of any information provided by the suspect to the police during the time of interrogation unless it can be established by the prosecutor that the suspect/accused had been informed of his rights, including his right to remain silent under

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<sup>14</sup> Steven Greer, "The Right to Silence: A Review of the Current Debate", 53(6) THE MODERN LAW REVIEW, 709 (1990).

<sup>15</sup> Gregory W. O'Reilly, "England Limits the Right to Silence and Moves Towards an Inquisitorial System of Justice", 85(2) THE JOURNAL OF CRIMINAL LAW AND CRIMINALOLOGY, 402 (1994).

<sup>16</sup> *Miranda v. Arizona* 384 U.S. 436 (1966).

the Fifth Amendment of the United States Constitution.

*Twining v New Jersey*<sup>17</sup> is an important case pertaining to the right provided under the Fifth Amendment of the Constitution. Twining was a bank director charged of committing fraud against a bank manager. During the trial proceedings, Twining decided not to testify. The Court and the jury considered this failure to testify as reasonable evidence and the defendant was convicted. Twining appealed to the court that the jury's verdict is violative of his right against self-incrimination, which provides that the decision to remain silent cannot be taken into account while passing the verdict or the decision. The decision should be independent and disregarding of the on the defendant's decision right to remain silent under his right against self-incrimination. Prior to the implementation of the Fourteenth Amendment, the *Bill of Rights* inclusive of the Fifth Amendment, was inapplicable to state courts and was confined to federal courts. The Supreme Court established that the right to silence provided in the Fifth Amendment was applicable to case laws pertaining to federal court only. The decision made in the *Twining v. New Jersey* case was upheld later on in 1947 in the case of *Adamson v. California*<sup>18</sup>, wherein Admiral Dewey Adamson was charged with murder, and upon questions posed to him by the prosecution, he decided to not answer them under the Fifth Amendment rights. However, the prosecution provided that refusal to testify can be considered as admitting the guilt based on a California statute, and that the jury should take this into consideration while deciding upon the judgement. The attorney hired by Adamson appealed that this violates defendant's right against self-incrimination. The court decided that it would have been a breach of the defendant's rights if the case was fought in a federal court, and on the basis of the *Twining* case, the court established that the right against self-incrimination in this case is not violated and that the jury can base their decision considering the refusal to testify as admission to guilt.

The *Twining v. New Jersey* decision was overruled in 1964, in the case of *Malloy v. Hogan*<sup>19</sup> which established that the right against self-incrimination provided under the Fifth Amendment is applicable in the State courts as well as federal courts. Malloy was sentenced on the charge of unlawful gambling, and he had decided to not testify against himself when he was released and under probation. The court decided to keep him in jail until he testifies. However, this was appealed, and the Court in a 5-4 decision provided that the American Constitution provided a

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<sup>17</sup> *Twining v. New Jersey* 211 U.S. 78 (1908).

<sup>18</sup> *Adamson v. California* 332 U.S. 46 (1947).

<sup>19</sup> *Malloy v. Hogan* 378 U.S. 1 (1964).

right under the fifth amendment which allows the defendant to stay silent and not testify against himself in order to protect the suspect, and that the prosecution has to establish the guilt by providing evidence, and it should be independent of the statements made or the decision to remain silent by the defendant.

## RIGHT TO SILENCE IN INDIA

The right to silence in India was adopted on the basis of the Fifth Amendment of the Constitution of the United States of America, and it dictates and defines the right against self-incrimination. Article 20(3) of the Indian Constitution gives the right to silence and the right against self-incrimination in India, and states that “*No person accused of any offence shall be compelled to be a witness against himself*”.

### Analysis of the right to silence based on Case Laws

The right to silence is a grey area in law which even though might be a boon for the innocent, but can be used by guilty suspects to get away with the offence. The case of *Prahlad v. State of Rajasthan*<sup>20</sup> is a case in which the suspect was accused of raping and murdering an 8-year-old girl. The accused was charged with murder, as well as under POCSO, however, due to the exercise of his right to silence, the suspect was relieved of charges of POCSO due to inadequate evidence, and the right against self-incrimination provides that the court cannot base its judgement upon the refusal of the suspect to testify against himself or his decision to remain silent. The important point of the right to remain silent is that the judgement should be decided independent of the decision of the accused to not testify or remain silent. However, the case of *Ramnaresh v. State of Chhattisgarh*<sup>21</sup> established that the court has the liberty to take into account the silence of the suspect and deduce reasonable inferences based on the decision of the suspect to remain silent and not testify against himself. Similarly, in *Munish Mubar v. State of Haryana*<sup>22</sup> also it was dictated that the accused is obliged to answer certain questions posed to him, irrespective of whether it would have an impact on the judgement to be made by the court.

The *Prahlad* case showcase instances where the court deviates from its stance. There is a need to scrutinize whether Article 20(3) was decreed with the motive of providing the suspect with an

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<sup>20</sup> Prahlad v. State of Rajasthan SCC Online SC 2548 (2018).

<sup>21</sup> Ramnaresh v. State of Chhattisgarh 4 SCC 257 (2012).

<sup>22</sup> Munish Mubar v. State of Haryana 10 SCC 257 (2012).

opportunity to answer incriminating circumstances regarding him. The court is therefore allowed to deduce inferences only from answers provided with respect to the incriminating circumstances and not his silence. Coming to a conclusion and deductions on the basis of the silence of the accused breaches the rationale behind not directing an oath to the accused while making statements under Section 313. Article 20(3) of the Indian Constitution fortifies the right to silence of the suspect, and drawing inferences or basing decisions or judgements based on the silence of the accused would disregard and breach Article 20(3).

In the case of *M.P Sharma v. Satish Chandra*<sup>23</sup>, one of the issues was the violation of Article 20(3), the right against self-incrimination. It was held that the Right against self-incrimination, which extends to the right to silence, is not only available at the trial, but even during investigation and interrogation.

## CONCLUSION

Right to silence under the right against self-incrimination is an essential principle to protect the accused or the suspect from testifying against himself. Several debates have taken place regarding whether this right is good or bad in terms of it being a helpful tool for the actually guilty suspects in getting away with committing an offence. These debates throughout the world in different nations across different time periods has caused the development of the right in the various Constitutions of the world. The Right to Silence gives rise to certain facets. Firstly, the prosecution or the State is burdened with proving the guilt of the suspect, and the suspect is acknowledged as “*innocent until proven guilty*”. The presumption that the accused is innocent until proven guilty should not under any circumstance be cast off solely based on the right to silence put into exercise by the suspect, as such a claim would weaken or deteriorate the legal significance of the presumption. Moreover, the prosecution has the liability of establishing the culpability of the defendant, and any deduction based upon the exercise of the defendant’s right to not testify against himself would be in contrast to the principle that the prosecution has to prove that the accused is guilty, and until the guilt of the suspect is backed by evidence, he or she is innocent in the eyes of the law.

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<sup>23</sup> M.P Sharma v. Satish Chandra, 1954 AIR 300.

**TABLE OF CASES:**

<b>S. NO.</b>	<b>NAME OF THE CASE</b>	<b>CITATION</b>
<b>1.</b>	Munish Mubar v. State of Haryana	10 SCC 257 (2012).
<b>2.</b>	M.P Sharma v. Satish Chandra	1954 AIR 300
<b>3.</b>	Prahlad v. State of Rajasthan	SCC Online SC 2548 (2018).
<b>4.</b>	Murphy v. Waterfront Commission	378 U.S. 52 (1964).
<b>5.</b>	Miranda v. Arizona	384 U.S. 436 (1966).
<b>6.</b>	Twining v. New Jersey	211 U.S. 78 (1908).
<b>7.</b>	Adamson v. California	332 U.S. 46 (1947).
<b>8.</b>	Malloy v. Hogan	378 U.S. 1 (1964).
<b>9.</b>	Nandini Satpathy vs Dani (P.L.) And Anr.	1978 AIR 1025
<b>10.</b>	Ramnaresh v. State of Chhattisgarh	4 SCC 257 (2012).

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