

LAW COMMISSION OF INDIA

ONE HUNDRED EIGHTIETH REPORT
ON

ARTICLE 20(3) OF THE CONSTITUTION OF INDIA
AND THE RIGHT TO SILENCE

MAY 2002

May 9, 2002

No:6(3) (76) /2002 -LC (LS)

Dear Shri Arun Jaitley ji,

I am sending herewith the 180th report on “Article 20 (3) of the Constitution of India and the right to Silence” of a person accused.

2. The Law Commission had taken up the above said subject, suo motu, in view of some developments in U.K. and other countries diluting the right to silence of the accused at the stage of interrogation and in criminal trial proceedings. In India, the right against self-incrimination is incorporated in clause (3) of article 20 of the Constitution. Further, after

Maneka Gandhi V Union Of India, (1978 (1) SCC 248), Article 21 of the Constitution of India requires a fair, just and equitable procedure to be followed in criminal cases. In the present Report, an analysis and a comparative study of 'right to silence' is made based on recently decided English and European Court cases and the position currently obtaining in various countries like U.S.A., Australia, Canada, U.K. and China. Our recommendation is to emphasize that no change in the law relating to right to silence of the accused is necessary. The right is protected by Articles 20 (3) and 21 of the Constitution and sections 161 (2), 313 (3) and 315 of the Code of Criminal Procedure, 1973. If the changes made in U.K. or those proposed in Australia are introduced in India, such changes will be ultra vires of Articles 20 (3) and 21 of the Constitution of India. Our recommendation, therefore, is that no dilution of the existing right to silence need be made nor can be made.

With regards

Yours sincerely,

(Justice M.Jagannadha Rao)

Shri Arun Jaitley,
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Shastri Bhawan,
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Report

on

Article 20(3) of the Constitution of India and the Right to Silence

“.....throughout the web of English criminal law, one golden thread is always to be seen, that it is the duty of the prosecution to prove the prisoner's guilt” (per Viscount Sankey).

(Woolmington vs. DPP, 1935 AC 462 at 481)

The ‘right to silence’ is a principle of common law and it means that normally courts or tribunals of fact 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.

The origins of right to silence may not be exactly clear but the right goes back to the middle ages in England. During the 16th century, the English Courts of Star Chamber and High Commission developed the practice of compelling suspects to take an oath known as the “ex-officio oath” and, the accused had 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. The right to silence is based on the principle ‘nemo debet prodere ipsum’, the privilege against self-incrimination.

Wigmore regarded the principle of silence as having crept into the common law almost by accident in the mid-seventeenth century following the collapse of the political courts of Star Chamber and Commissions. Once the right was established, the right of the accused was extended to witnesses and to allegations of crime and to civil litigation. Wood and Crawford have argued that the device can be attributed to the widespread hostility aroused by compulsory testimony upon oath. They maintain that the right emerged in England as a basic democratic right established by public agitation long before it became the subject of judicial consideration. The second theory, offered by Maguire and Levy, traces the ‘privilege against self-

incrimination' to the English common law criminal procedure in the middle ages. Both Levy and Maguire agree with Wigmore that the right was extended later to witnesses in a criminal case and to allegations of crime made in civil proceedings. Mc Nair has a third view that the above authors have put "the cart before the horse". The privilege originated in Roman Common Law, applying first to witnesses and to allegations of crime in civil proceedings before it was extended to the accused in criminal law. The Criminal Law Revision Committee (UK) said in 1972 in its 11th Report that the principle did not emerge until the 19th century. (see 'The Right to Silence: A Review of the Current Debate) (1990) Vol. 53 Mod L Rev p. 709).

The 16th and 17th centuries show that the privilege against self-incrimination was closely related to the medieval version, which was involved in the protection against religious intolerance. In England, prerogative courts such as the Star Chamber and the High Commission and ecclesiastical courts used the oath ex-officio. In this procedure, any person on the street could be picked up, asked to take oath and answer questions for finding out if they were in disagreement on questions of theology with the Crown. The Privy Council on a motion from the House of Commons asked Coke and Chief Justice Popham when the oath could properly be administered. They replied, "No Man.... shall be examined upon secret thoughts of his Heart, or of his secret opinion": (see "An Oath before an Ecclesiastical Judge ex-Officio", 12 Coke's Rep 26 (3rd Ed, 1727). The Long Parliament abolished the Star Chamber and High Commissions and forbade ecclesiastical courts to use the oath ex-officio. (see "Origins of the Privilege against Self-incrimination": by R.H. Helmhotz 65. New York

Univ. Law Rev 962 (1990); Michael R.T. Mc Nair, “The Early Development of the Privilege against self-incrimination”: 10 Oxford J. of Legal Studies, 66 (1990); Eben Moglen, Taking the Fifth: Reconsidering the origins of the Constitutional Privilege against Self Incrimination 92, Mich L. Rev. 1086 (1994). (quoted at pp 216-217 by Prof. Akhil Reed Amar in his ‘The Constitution and Criminal Procedure, First Principles’ 1999, Yale University Press).

The right to silence has various facets. One is that the burden is on the State or rather the prosecution to prove that the accused is guilty. Another is that an accused is presumed to be innocent till he is proved to be guilty. A third is the right of the accused against self incrimination, namely, the right to be silent and that he cannot be compelled to incriminate himself. There are also exceptions to the rule. An accused can be compelled to submit to investigation by allowing his photographs taken, voice recorded, his blood sample tested, his hair or other bodily material used for DNA testing etc.

Some of the aspects relating to right to silence came to be included in the Universal Declaration of Human Rights, 1948. Art. 11.1 thereof reads:

“11.1 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.”

The International Covenant on Civil and Political Rights, 1966 to which India is a party states in Art. 9.1 that none shall be deprived of his

liberty except on such grounds and in accordance with such procedure as are established by law; Art. 9.2 states that any one who is arrested shall be informed, at the time of arrest, of the reasons for his arrest and shall be promptly informed of any charges against him. Art. 11.3 refers to the right to be produced in a Court promptly and for a trial. Art. 14(3)(g) refers to various “minimum guarantees” and states that everyone has a right:

“Art. 14(3)(g): Not to be compelled to testify against himself or to confess guilt.”

The European Convention for the Protection of Human Rights and Fundamental Freedoms states in Art. 6(1) that every person charged has a right to a ‘fair’ trial and Art. 6(2) thereof states:

“Art. 6(2) Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.”

In India, the right against self incrimination is incorporated in clause (3) of Art. 20 and after Maneka Gandhi’s case: (1978 (1) SCC 248), Art. 21 requires a fair, just and equitable procedure to be followed in criminal cases.

It is initially necessary to bear in mind the difference between burden of proving an issue (known as the legal or persuasive burden of proof), a burden which never shifts and the burden of adducing credible evidence (known as evidential burden), which can go on shifting during the trial. Several modern statutes, while maintaining the burden of proving a pleading or charge, alter the evidential burden. For example, in a civil case, a

plaintiff may have to prove that the defendant, having borrowed money, is indebted to him but under Sec. 118 of the Negotiable Instruments Act, the initial evidential burden is shifted to the defendant if he had executed a negotiable instrument in favour of the plaintiff. This method of shifting evidential burden has been resorted to in criminal cases too particularly where an accused is found in possession of certain property which the law declares it illegal to possess, such as drugs or stolen property etc. It is perfectly open to a legislature to shift the evidential burden.

For example, under the Prevention of Corruption Act, 1988 the evidential burden is shifted to an accused person from whom unaccounted monies or properties disproportionate to his known sources of income are recovered. Under the Excise and Customs laws, and laws relating to smuggling, such evidential burden is initially imposed on the accused in certain circumstances, where the accused may be having special knowledge about facts such as where contraband property is recovered from. Such provisions have been challenged as violative of the principle against self incrimination but have been upheld in as much as there is no shift in the burden of proof on the charge which lies on the State or the prosecution.

However, in recent times, the basic principle that the prosecution has to prove the charge of guilt against the accused beyond reasonable doubt is being diluted by the legislature in several statutes. This is contrary to basic rights concerning liberty. Glanville Williams, one of the greatest jurists on criminal law has stated as follows:

“Where it is said that a defendant to a criminal charge is presumed to be innocent, what is really meant is that the burden of proving his guilt is upon the prosecution.....Unhappily, Parliament regards the principle with indifference – one might almost say, with contempt. The Statute Book contains many offences in which the burden of proving his innocence is cast on the accused.....The sad thing is that there has never been any reason or expediency for these departures from the cherished principle; it has been done through carelessness and lack of subtleties.”

(see Glanville Williams, *The Proof of Guilt* (1963, 3rd Ed., Stevens pp 184-185).

It is in the above background and in the light of the constitutional provisions in our Constitution that we propose to consider whether any changes in the right to silence is necessary and whether, even if made, whether such changes will be valid.

We shall refer to certain recent developments in other countries.

U.K.

Initially in England, the law-makers were confronted with problems of terrorism in Northern Ireland. In order to combat the said problem, the Criminal Evidence (Northern Ireland) Order, 1988 was amended permitting inferences to be drawn from the silence of an accused where the accused had a duty to speak. Later on, similar changes were carried out in the English law by enacting sections 34 to 37 in the Criminal Justice and Public Order Act, 1994. These provisions permit ‘proper inferences’ to be drawn from

the silence of the suspect during interrogation or of the accused at the trial. The Court can comment on the silence in its summing up to the jury. The jury can take the silence into consideration.

In a case arising from Northern Ireland, under the Criminal Evidence (Northern Ireland) Order, 1988 the matter initially came up before the House of Lords in Murray vs. DPP (1993 Cr. App. Rep. 151). There, the statute enabled the Judge to taken silence into account. In N. Ireland the matters would not go before the jury, unlike the provisions in the English Act of 1994. Lord Mustill observed that though the statute in Ireland enabled ‘proper inference’ to be drawn in case of silence of the accused, it was first necessary that a prima facie case is made out against the accused. Only then the new provisions could be resorted to for the purpose of drawing conclusions about the guilt of the accused. The Court has to make a ‘common sense approach’. He made it clear that no finding of guilt could be arrived at merely based on the silence of the accused.

On appeal, the European Court in Murray vs. United Kingdom (1996) 22 EHRR 29, 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

call for an attorney at the time when he was interrogated by the Police or at the time of trial. This was a mandatory rule.

After the judgment above referred to, which arose from the Irish law, 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.

Sub-section 2(A) was introduced in 1999 in Section 34 and that section deals with pre-trial silence. Sub-section (2A) provides an opportunity to call a lawyer and reads as follows:

“Section 34(2A). 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.”

A similar provision was introduced in Sec.36 by way of Sub-section (4A). Section 36 deals with failure of the accused to account for objects, substances, and marks. Sub-section (3A) was introduced in Section 35. That section deals with right to silence at the trial. Similarly in Sec.37 which deals with the presence of the accused at the scene of offence, sub-sec.(3A) was introduced. All these new Sub-sections require that the accused must be informed that he has a right to the presence of an attorney whenever he is

questioned. If he had not been so informed, the fact that he remained silent, could not be taken into consideration.

If 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, that there is no extra advantage in permitting the judge to rely on the silence of the accused. Further, while the amendment to the English law has made a provision for raising “proper inferences”, the European Court in Murray Vs. UK has reduced its rigour by limiting the use of the silence for the limited purpose of an assurance or corroboration and that too, provided the accused was informed of his right to have a lawyer by his side at the time of the questioning.

But, according to the House of Lords and the European Court, silence of the accused enters into the decision-making process before arriving at a finding that the accused is guilty beyond reasonable doubt.

One may ask the question as to in how many cases Police Officers in India are strictly following the rules laid down by the Supreme Court in D.K.Basu's case? In a pending public interest litigation in the Supreme Court, it was reported by the amicus very recently that, according to the information received from various States, it was clear that D.K.Basu guidelines are not being followed in most of the States. Can anybody assure that in India, the Police invariably would inform a person in detention that he has a right to call a lawyer at the time of his interrogation? Even if we introduce a rule to that effect and even if the Police record in their diary that

such an opportunity was given, one cannot say how much credence can be given to such a noting in India. Even in England, it was stated that, if the signature of the accused was not obtained in the diary after recording that he was informed of his right to call an attorney, that would amount to a breach of section 78 of the Police and Criminal Evidence Act, 1984. One other thing to be noted is that Article 6(1) of the European Convention only speaks of a right to a fair trial and Art. 6(2) to a presumption of innocence. There is no reference to a right against self incrimination, as contained in Article 20(3) of our Constitution or as contained in the Fifth Amendment of the American Constitution. In Murray vs. UK, the European Court no doubt observed that if the silence of the accused was taken into account, after a prima facie case was established and the accused was informed of his right to call for an attorney, the provision as to fair trial in Art. 6(1) would not be violated.

We shall next refer to the recent decision of the European Court in Condon vs. The United Kingdom rendered on 2nd May, 2000. The case directly arose under the English Act of 1994. The Court relied upon the judgment in Murray's case already referred to 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 namely, giving an opportunity to the accused or suspect, to call for a lawyer, must be followed. Condon's case was one where 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

remained silent because of the advice of the lawyer. The Court then stated as follows:

“.....the Court would observe at this juncture that the applicants were subjected to cross examination on the content of their solicitor’s advice can not be said to raise an issue of fairness under Art. 6 of the Convention. They were under no compulsion to disclose the advice given, other than the indirect compulsion to avoid the reason for their silence remaining at the level of a mere explanation. The applicants chose to make the content of their solicitor’s advice a live issue as part of their defence. For that reason, they cannot complain that the scheme of sec. 34 of the 1994 Act is such as to override the confidentiality of their discussions with their solicitor”.

The above observations of the European Court lead to this. If the accused remains 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. They would be prejudiced either way.

We may further notice that in Condron’s case, the solicitor was also examined at the trial as to the advice he had given. This is clear from what the Court observed later:

“They (accused) testified that they acted on the strength of the advice of their solicitor who had grave doubts about their fitness to cope with police questioning....their solicitor confirmed this in his testimony in the voir dire proceedings.....then admittedly the trial Judge drew the jury’s attention to this explanation. However he did so in terms which left the jury at liberty to draw an adverse inference notwithstanding that it may have been satisfied as to the plausibility of the explanation.

It is to be observed that the Court of Appeal found in terms of the trial Judge's direction deficient in this respect...In the Court's opinion, as a matter of fairness, the jury should have been directed that it could only draw an adverse inference if satisfied that the applicant's silence at the police interview could only sensibly be attributed to their having no answer or none that would stand up to cross examination....

....As the applicants have pointed out, it is impossible to ascertain what weight, if any, was given to the applicant's silence (by the jury). In its John Murray judgment, the Court noted that the trier of fact in that case was an experienced Judge who was obliged to explain the reasons for his decision to draw inferences and the weight attached to them. Moreover, the exercise of the Judges discretion to do so was subject to review by the appellate courts...However, these safeguards were absent in this case. It was even more compelling to ensure that the jury was properly advised on how to address the issue of the applicants' silence. It is true that the Judge was under no obligation to leave the jury with the option of drawing an adverse inference from their silence, and left with the option, the jury had option to do so or not to do so. It is equally true that the burden of proof lay with the prosecution to prove the applicants' guilt beyond reasonable doubt and that the jury was informed that the applicants' silence could not "on its own prove guilt"...However, notwithstanding the presence of these safeguards the Court considers that the Judge's omission to restrict the jury's discretion must be seen as incompatible with the exercise of their right to silence at the police station."

The Court observed further

“...the Court of appeal had no means of ascertaining whether or not the applicants’ silence played a significant role in the jury’s decision to convict...”

The Court observed that sec. 34 of the English Act as introduced in 1994 gave the discretion only to the jury and inasmuch as the Judge did not give the discretion to the jury, the conviction was liable to be set aside. The Court further observed:

“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 guaranteed by Art. 6.”

We have set out passages from the judgment of the European Court in Condron’s case which arose out of the UK law as amended in 1994, in sufficient detail, only to show the ramifications into which the English law has been thrown after the 1994 amendments.

Let us, therefore, consider the new problems the English Courts are presently facing after the 1994 changes in the law relating to the right to silence. Presently in most cases, the accused would say, upon being questioned, that his lawyer had asked him to remain silent. Questions have arisen as to whether the lawyer has advised the accused to remain silent because the lawyer felt that the accused might not be able to withstand the hard questioning by the police or the clever or complicated questions of an able prosecutor. Questions have also arisen as to whether the lawyer knew about the guilt of the accused and felt that the accused should stand by his constitutional right. Yet another question that has arisen is whether the lawyer of the accused can be cross-examined, as done in Condron’s case to

reveal the details of the advise and whether that would or would not violate the basic principle of confidentiality between a lawyer and his client.

We shall refer to some more problems faced by English Courts after the changes of 1994. For example, the present law requires the court to draw a ‘proper’ inference against the accused who 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. Further, even after 1994, it is accepted that silence alone cannot be treated as evidence against the accused unless a prima facie case is made out first. Opinion about prima facie case can always differ. For example, an accused may want to remain silent as he does not recognise the authority of the person questioning his innocence. Jesus might have opted to remain silent as he did not accept the authority of Pontius Pilot to question his innocence. (see Mathew 27: 11-14; Luke: 22: 2-5) (quoted by Rosemarry Pattenden on “Inference from Silence” 1995 Cr.L. Rev. p 602). An accused may have been silent if he felt that the prosecution case was weak. He may have remained silent because his lawyer had asked him to remain silent.

It is again not clear what Lord Mustill in the House of Lords or later the European Court meant in stating that a prima facie case must first be established by the prosecution before any inference is drawn from the silence of the accused (see Murray vs. DPP (1993) Cr. App. Rep. 151 (H L.) and (1996) 22 EHRR 29). In the same judgment in the House of Lords, Lord Slynn used the words “clear prima facie case” and Kelley J in R vs. Murphy (NICA Unrep. 2-4-93), used the words “strong prima facie case”. It is again not clear whether the inference that may be drawn by the court

against an accused should relate to the specific facts or whether it could be a general inference about the guilt of the accused. But, Lord Mustill said that sec. 35 could apply to one issue and may not apply to other issues. It is not clear how this can be done in practice. In England, an accused may, in fact, rely on sec. 1(f)(ii) of the Criminal Evidence Act, 1898 and contend that he does not want to testify because of the risk of cross examination. What would happen to that right is not clear. For example, in R vs. Barkley (NICR, Nov. 27, 1992) the accused refused to say anything because he feared that the co-accused may threaten him if he pointed out that the co-accused was the really guilty person. Could it then be said that even in these circumstances, it was a fit case, to draw an inference against the accused, because he remained silent?

Silence can always be consistent with innocence – the accused might remain silent because of shock, confusion, embarrassment, a desire to protect another person or to avoid reprisals, or in order to conceal some other improper conduct of some other person or it may be his personal trait to generally be silent or he may be having a low I.Q. or there may be a problem of language or literacy; there may be drug dependency; he may not have understood the caution administered by the police; he may not have realised that certain facts known to him would prove his innocence; or as already stated, he may have remained silent because of a bona fide advice by a lawyer. An accused cannot be punished because of a wrong advice of a lawyer. In England it is also curious that except sec. 35 the other provisions, namely sec. 34, 36 and 37 even apply to children and those mentally ill or handicapped. What is to happen to the right to seek legal advice as permitted under sec. 58 of the Police and Criminal Evidence Act, 1984?

These questions have still not been answered satisfactorily. Supposing an accused, when questioned at the trial, answers “I do not know” or “it is not true”, can an inference be drawn against him on the ground that the above words amounted to silence? If not, is there any difference between his verbal denial and his silence?

As already stated, initially the encroachment into the right to silence started with the Criminal Evidence (Northern Ireland) Order, 1988 during times when terrorist activities started on a big scale in Ireland. The Law Revision Committee had earlier felt in 1972 that such an encroachment was necessary in the law relating to silence, in the case of suspected terrorists, serious crimes of armed robbery and in regard to businessmen suspected of sophisticated offences of serious fraud (see 11th Report on Evidence (1972) by the Criminal Law Revision Committee (Cmnd. 4991, para 21 (v) and 30) and Report of Fraud Trials Committee 1986 (para 2.32). A law which was proposed to tackle terrorism in Ireland, came to be accepted in England in 1994 and applied to all cases of crimes where an accused would choose to remain silent.

In England, it has been lamented that the Government had brought the 1994 changes on the basis of the 11th 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. (see Report of the Royal Commission on Criminal Procedure (Cmnd. 8092, 1981) paras 4.47 and 4.53 and the Report of the Royal Commission on Criminal Justice, Ch.IV, paras 20-25. (ibid, 1995 CrL. L. Rev. p. 4).

As to when a Court can say that a prima facie case has been proved and as to when a Court can say it has sufficient evidence of the accused having been advised of his right to call an attorney, these matters are capable of becoming serious issues in Indian courts. If the accused and the lawyers are also to be cross examined in India, as to what advise was given, there would be more confusion. It, therefore, appears obvious not to go by the changes of 1994 made in the English law. Otherwise, there will be more litigation, more uncertainty and more arguments for the defence and perhaps more acquittals in India. In fact, in Condrón's case, the European Court has referred to several judgments of the Court of appeal in England between 1994 and 2000 and the said judgments reveal that the English law has become more uncertain after 1994..

There are also several articles written by leading jurists published in the Criminal Law Review (UK) and other journals right from 1994 referring to the adverse consequences and serious problems that have crept into English law on account of these new changes.

Australia:

In New South Wales, though the prosecution is expressly prohibited from commenting to the jury on the fact that the defendant did not give evidence, the judge and any party (other than the prosecution) may comment to the jury if the defendant does not adduce evidence. However, there are restrictions in the nature of comments which are permitted. Any suggestion that the defendant did so because of a belief of guilt is prohibited.

Section 20 reads as follows: (NSW)

“Comment on failure to give evidence:

S.20. (1) This section applies only in a criminal proceeding for an indictable offence.

(2) The judge or any party (other than the prosecution) may comment on a failure of the defendant to give evidence. However, unless the comment is made by another defendant in the proceeding, the comment must not suggest that the defendant failed to give evidence because the defendant was, or believed that he or she was, guilty of the offence concerned.

.....

(5) If:

(a) two or more persons are being tried together for an indictable offence; and

(b) comment is made by one of those persons on the failure of any of those persons to give evidence,

the judge may, in addition to commenting on the failure to give evidence, comment on any comment of a kind referred to in paragraph

(b).”

Under sections 12 and 17, the defendant is a competent but not a compellable defence witness. In spite of the prohibition on prosecution comment, it can happen that the prosecution may refer to the judicial comment that the defendant remained silent. The prosecutor has however to take care to see that he is not adopting the judge’s comment as his own.

The question as to the limits of the right to silence indeed arose in Weissensteiner vs. The Queen (1993) 178 Com Law Rep 217. In that case, which arose from Queensland, by majority of four against three, Mason CJ, Brennan, Deane, Dawson and Toohey JJ upheld the trial judge's direction to the jury that an inference of guilt could be drawn if the defendant elected not to give evidence about facts which must have been within his special knowledge. They further held that adverse inference could be drawn from a defendant's election not to testify where the evidence established a prima facie case, and that the "silence" could then go into the evaluation of the evidence before the court. The majority, however, admitted that mere failure to testify, was not evidence of guilt and that silence could not fill up gaps in the evidence. The judge was bound to inform the jury that the defendant was entitled to remain silent and that there could be good reasons for his silence which was unrelated to his guilt.

As stated earlier, the above case arose from Queensland where, the relevant statute did not contain any prohibition against comment. There was no section corresponding to sec. 20 of the New South Wales law.

In the same case, the majority quoted some early English rulings to the effect that the right to silence was always part of the common law, both in civil and criminal cases, that a person who could be presumed to have knowledge of some facts, must speak out and if not, that could go against him. An earlier decision in Australia, namely, Petty vs. Queen: (1991) 173 Com L.R. 95 was distinguished. (In Petty, it was decided that, at trial it was not permissible to suggest that the accused's exercise of the right to silence before trial, could provide a basis for inferring consciousness of guilt or for

inferring that he was aiding a defence newly invented which he failed to mention earlier.) It was observed that Petty did not determine whether it was permissible for the trial judge to instruct the jury that an inference available from facts proved by the Crown could be drawn more safely when the accused elected not to give evidence on relevant facts which the jury perceived to be within the personal knowledge of the accused.

Mason CJ observed on behalf of the majority as follows:

“... doubts about the reliability of witnesses or about the inferences to be drawn from the evidences may be readily discounted in the absence of contradictory evidence from a party who might be expected to give or call it. In particular, in a criminal trial, hypotheses consistent with innocence may cease to be rational or reasonable in the absence of evidence to support them when that evidence, if it exists at all, must be within the knowledge of the accused.”

At the same time, the following exceptions were accepted:

“Of course, an accused may have reason not to give other than that the evidence would not assist his or her case. The jury must bear in mind in determining whether the prosecution case is strengthened by the failure of the accused to give evidence. Ordinarily, it is appropriate for the trial judge to warn the jury accordingly.”

“Not every case calls for explanation or contradiction in the form of evidence from the accused. There may be no facts peculiarly within

the accused's knowledge. Even if there are facts peculiarly within the accused's knowledge, the deficiencies in the prosecution case may be sufficient to account for the accused remaining silent and relying upon the burden of proof cast upon the prosecution. Much depends upon the circumstances of the particular case and a jury should not be invited to take into account the failure of the accused to give evidence unless that failure is clearly capable of assisting them in the evaluation of the evidence before them."

Mason CJ further observed:

"There is a distinction, no doubt a fine one, between an inference of guilt merely from silence and drawing an inference otherwise available, more safely, simply because the accused has not supported any hypothesis which is consistent with innocence from facts which the jury perceives to be within his or her knowledge. In determining whether the prosecution has satisfied the standard of proof to be requisite defence, it is relevant to assess the prosecution case on the footing that the accused has not offered evidence of any hypothesis or explanation which is consistent with innocence."

After referring to all these various possibilities, Mason CJ clarified:

"The failure of the accused to give evidence is not by itself evidence. It is not an admission of guilt by conduct. It cannot be, because it is the exercise of a right which the accused has, to put the prosecution to its proof. In some other circumstances, silence in the face of an

accusation, when an answer might reasonably be expected, can amount to an admission by conduct. (see e.g. Reg vs. Mitchell (1892) Cox. C.C. 503; Reg vs. Chandler (1976) (1) WLR 585 and discussion in Young, “Silence as evidence” Australian Law Journal, Vol. 66 (1992) p. 675). But when an accused elects to remain silent at trial, the silence cannot amount to an implied admission. The accused is entitled to take that course and it is not evidence of either guilt or innocence. That is why silence on the part of the accused at his or her trial, cannot fill in any gaps in the prosecution case; it cannot be used as a make-weight. It is only when the failure of the accused to give evidence is a circumstance which may bear upon the probative value of the evidence which has been given and which the jury is required to consider, that they may take it into account, and they may take it into account only for the purpose of evaluating that evidence. The fact that the accused’s failure to give evidence may have this consequence is something which, no doubt, an accused should consider in determining whether to exercise the right or not.”

The principles laid above, together with the exceptions referred to, leaves one absolutely confused. They, in fact, appear to be absolutely contradictory.

Brennan and Toohey JJ gave a separate judgment concurring with Mason CJ. They referred to sec. 3 of the Criminal Law Amendment Act, 1892 (Q) which made a person accused of an indictable offence and the wife or husband of every accused person, a competent but not a compellable witness. In 1961, this provision was carried into sec. 618A of the Criminal

Code. In 1977, sec. 8 of the Evidence Act, 1977 (Q) reproduced, with some variations, the earlier enactments. In several jurisdictions in Australia, similar laws precluded the making of any comment by the prosecution (Evidence Act, 1906 (West Australia); sec. 85(1)(c) of evidence Act, 1910 (Tasmania); R 18(1)(II) Evidence Act, 1929 (South Australia); S 74(1) Evidence Act, 1971 (ACT). In some instances, the statutes prohibited comment by the Judge (sec. 407(2) Crimes Act, 1900 (NS Wales); s. 9(3) of Evidence Act 1939 (NT); s. 399(3) Crimes Act, 1958 (Victoria), on the failure of an accused person to testify. No such provision was found in the Queensland statute.

We may point out that no provision from any Charter or Bill of Rights which guarantees a right against self-incrimination has been adverted by the majority in the above Judgment.

On the other hand, the minority Judgment of Garedron and McHugh JJ observe significantly that the right to silence is, of course, concerned with more than the presumption of innocence and the duty of the prosecution to prove guilt beyond reasonable doubt. They stated that, it is the presumption of innocence and the prosecution's burden of proof which preclude an adverse inference being drawn from silence. Silence does not amount to evidence. "Because of the presumption and because of the burden of proof, silence of that kind proves nothing and provides no basis for any inference adverse to the accused. Neither the presumption of innocence nor the burden of proof bears upon the situation in which failure to explain is, itself evidence. Nor does the privilege against incrimination in circumstances

involving an assumption that an innocent person would offer an explanation, the accused is not asked to testify against himself, but in favour of himself.”

In our view, the minority judgment is more consistent with the right against self-incrimination while, the majority judgment of Mason CJ and the other concurrent judgment contain mutually contradictory passages. The majority had no occasion to refer to any constitutional guarantee like Art. 20(3) of our Constitution nor to any international convention such as the ICCPR. As stated earlier, any trial Judge will find it extremely difficult to apply the exceptions to any given set of facts. The majority view is likely to lead to more litigation. Latter cases in Australia are R vs. O.G.D. (1998) 45 NSW CR 744, RPS vs. The Queen 2000 HCA 3, have also not been able to lay down the law in clearer terms.

Another unfortunate fact that has to be noted so far as Australia is concerned, is that the right of the defendant to make an unsworn statement at trial has been abolished in New South Wales in 1994, although the right still exists in some residual trials. Unsworn statements have now been abolished in all Australian jurisdictions. According to several jurists, this is yet another serious infraction of the right of an accused to speak, in case he wants to speak.

The Law Reform Commission of New South Wales, in its recent Report No.95 rendered in the year 2000, on the subject “The right to silence”, after a review of the law in various countries and within Australia, has made several recommendations. One of the important recommendations is Recommendation No.1 and is to the effect that legislation based on

sections 34, 36 and 37 of the Criminal Justice and Public Order Act, 1994 (UK) should not be introduced in New South Wales. However, Recommendation No. 5(a) and 5(b) appears to us to take away the effect of the Recommendation No. 1. The Recommendations 5(a) and (b) are important. Recommendation 5(a) states that the defendant shall be required to disclose the following material and information, in writing, unless the Court directs otherwise:-

“5(a) In addition to the existing notice requirements for alibi-evidence and substantial impairment by abnormality of mind, whether the defence, in respect of any element of the charge proposes to raise issues in answer to the charge, (e.g. accident, automatism, duress, insanity, intoxication, provocation, self-defence; in sexual assault cases, consent, a reasonable belief that the complainant was consenting, or that the defendant did not commit the act constituting the sexual assault alleged; in deemed supply cases, whether the illicit drug was possessed other than for the purpose of supply; cases involving an intent to defraud, claim of right.

Recommendation 5(b) reads as follows:

“5(b) In any particular case, whether falling within Recommendation 5(a) or not, the trial Judge or other Judge charged with responsibility for giving pre-trial directions may at any time order the defendant to disclose the general nature of the case he or she proposes to present at a trial, identifying the issues to be raised, whether by way of denial of the elements of the charge or exculpation, and stating, in general terms only, if actual basis of the case which is to be put to the jury.”

Recommendation No. 10 then refers to the consequences of an accused not complying with the direction to furnish the material specified in Recommendation No .5 ((a) and (b)). It reads as follows:

“10. The Commission recommends that Judges be given a discretion to impose any of the following consequences for non-disclosure or departure from the disclosed case during the trial:

- (a) A discretion to refuse to admit material not disclosed in accordance with the requirements.
- (b) A discretion to grant an adjournment to a party whose case would be prejudiced by material introduced by the other party which was not disclosed in accordance with the requirement.
- (c) In jury trials, a discretion to comment to the jury or to permit counsel to comment, subject, if appropriate, to any conditions imposed by the trial Judge.
- (d) In trials without jury, the trial Judge may have regard to the failure to comply with the disclosure requirements in the same way as a jury would be entitled to do so.”

It appears to us that while the N.S.W. Law Commission has not recommended the incorporation of provisions similar to sections 34, 36 and 37 of the English Act of 1994, it has however made recommendations to require the accused to disclose his defence in several respects and upon the failure to so disclose, make adverse comments. Both the prosecution and the Judge are permitted to comment on the refusal of the accused to speak. In our view the above restrictions on the right to silence do not amount to a fair

due process and further the jury and the Court cannot be allowed to take the silence into account before arriving at a finding that the prosecution has established guilt of the accused beyond reasonable doubt.

The Commission, no doubt, refers to a distinction between the silence at the time of questioning by the police, when no charges are framed and to the right at the trial, after charges are framed and states that silence at the stage of interrogation of police cannot have the same importance as silence at the trial, in as much as at that stage, there is no allegation or evidence. At the stage of interrogation, the suspect may remain silent because things are not clear. At the stage of trial, there is a charge and there is evidence and therefore there is less chance of a shock or confusion or inadequate preparation to answer the questions. Even so, it does not preclude silence at the stage of interrogation being taken into account by the Judge or the Jury.

The N.S.W. Law Commission in its Report indeed refers to various aspects relating to the right to silence and to Murray vs. UK decided by the European Court, but the Commission does not, however, refer to the conditions laid down by the European Court, namely, that a prima facie case must be made out first and that even so, silence cannot be relied upon unless the suspect or the accused has been informed of his right to call an attorney. We do not also find any justification for the Legislature in Australia in abolishing the right of the accused to speak if he so desires. In addition, the Commission has now recommended that, not only the Court, but even the prosecution can be permitted to comment on the silence because the jury may mistake the comment made by the judge as an indication that an

inference of guilt may easily be drawn. The N.S.W. Commission, in the body of the Report, recommended as follows:

“The Commission recommends that prohibition on prosecution comment in sec. 20(2) as Evidence Act 1995 (NSW) should be removed. Prosecutors should be permitted to comment upon the fact that the defendant has not given evidence, subject to the restrictions which apply to comment by the trial judge and counsel for the defendant and any accused. The prosecution should be required to apply for leave before commenting.”

As already stated, we are of the view that the above procedure is not a fair procedure. The law relating to prosecution in Australia, in our view, does not conform to the minimum standards prescribed by the ICCPR. Unfortunately, even the right of the accused to speak out has been abolished.

We shall next refer to the law in England and Canada, which is absolutely in favour of the right of the accused to remain silent.

U.S.A.

In The United States, the Fifth Amendment relates to the fundamental right against self incrimination and contains, more or less, the same language as in Article 20(3) of our Constitution. In fact, there is a federal statute of 1878 which declared that it would be competent for an accused to give evidence on his own behalf but that his failure to do so shall not be subject

to any unfavourable inference against him. Initially, in Adamson vs. California (1947) 332 US 46, the question relating to the right to silence came to be considered. The majority did not refer to the Fifth Amendment. But the minority laid down, while referring to the Fifth Amendment, that the right to silence was absolute in US. Subsequently, in Griffin Vs. California (1965) 380 US 609, the Supreme Court of United States refused to permit prosecutorial or judicial comment to the jury upon a defendant's refusal to take the 'stand' in his own behalf, because such comment was a "penalty imposed by courts for exercising a constitutional privilege" and it "cuts down on the privilege by making its assertion costly". The penalty "needlessly encouraged" a waiver of the defendant's Fifth Amendment right to plead not guilty. The Court has stated that the defendant has an absolute right not to take the "stand" and that no adverse inference of guilt can be drawn if the defendant exercises his right to silence. 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 experienced prosecutor who is skilled in the artificial rules governing court rooms and that the prosecutor may be able to trip him up.

However, American courts, have laid down a different principle, namely that, at a latter stage the silence of the accused can be taken into consideration by the court while deciding about the quantum of punishment. Such questions arise during plea bargaining. The Court said that the pressure to take the 'stand' in response to the 'sentencing issue' was not so great as to impair the policies underlying the self-incrimination clause. Similarly a notice by defendant regarding a plea of alibi does not offend the

right against self-incrimination. (see “The Constitution and the Criminal Procedure, First Principles” by Prof. Akhil Amar, Yale University, USA).

Even in Miranda Vs. Arizona (1966) 384 US 436, it was held that the police have to give a warning to the suspect and that the suspect has a right to remain silent. He has a further right to the presence of an attorney during questioning. It is also important to note that the US Supreme Court has nowhere laid down 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.

Canada:

We shall next refer to the judgment of Canadian Supreme Court in R Vs. Noble (1997) (1) SCR 874. The majority in that case held that the right to silence is absolute and the silence of an accused cannot lead to any adverse inference against him nor be used for the purpose of arriving at a finding of guilt beyond reasonable doubt.

Section 11(c) of the Canadian Charter of Rights and Freedoms provides that any person charged with an offence has a right not to be compelled to be a witness in proceedings against him in respect of an offence. Section 7 of the Charter also states that every person has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice. Section 11(d) codifies the common law presumption of innocence and the right to a fair trial.

Section 4(6) of the Canadian Evidence Act 1985, provides as follows:

“Section 4(6). The failure of the person charged or of the wife or husband of that person to testify shall not be made the subject of comment by the Judge or by counsel for the prosecution.”

In the above case, the judgment for the majority was pronounced by Sopinka J who observed that the right to silence was a fundamental principle of justice incorporated into sec. 7 of the Canadian Charter and that sec. 11(c) referred to the non-compellability of a person to be a witness against himself. The majority referred to R vs. Hebart 1990(2) SCR 151 wherein it was held that there was a right to silence upon arrest, charge or detention and that the State could otherwise trick a detained accused into making self incriminating statements by using an undercover police office eliciting information in the cell of the accused under the coercive power of the State. The right to silence vested in the accused could only be waived by an informed decision of the accused. The Court also referred to R vs. Chambers 1990(2) SCR wherein it was laid down that it would be a snare and a delusion to caution the accused that he need not say anything in response to the police officer's question and at the same time put in the evidence that the accused had exercised his right to remain silent and that the said silence suggested guilt. The court also referred to R vs. Amway Corp. 1989(1) SCR p.21 where in it was held that the silence of an accused could not be used to determine his guilt. After referring to the above decisions, Sopinka J observed as follows:

“...the use of silence to help establish guilt beyond a reasonable doubt is contrary to rationale behind the right to silence. Just as a person’s words should not be conscripted and used against him or her by the State, it is equally inimical to the dignity of the accused to use his or her silence to assist in grounding a belief beyond a reasonable doubt. To use silence in this manner is to treat it as communicative evidence of guilt...The failure to testify tends to place the accused in the same position as if he has testified and admitted his guilt.”

It was further held by the majority that sec. 11(d) protects the accused when it states that the silence of the accused cannot be placed on the evidentiary scales against the accused. The presumption of innocence indicates that it is not incumbent on the accused to present any evidence at all. If the Crown had proved the case beyond reasonable doubt, the silence of the accused may be referred to as evidence of the absence of an explanation, which could raise a reasonable doubt. In fact, in that event, the accused need not testify, and if he does not, the Crown’s case prevails and the accused will be convicted. It is only in this sense that the accused “need respond”, once the Crown has proved its case beyond a reasonable doubt. If, silence is taken into account after arriving at a finding of guilt, it does not offend either the right to silence or the presumption of innocence. Sopinka J further observed as follows:

“The right to silence and its underlying rationale are respected, in that the communication or absence of communication is not used to build a case against the accused. The silence of the accused is not used as inculpatory evidence, which would be contrary to the right to silence,

but simply is not used as exculpatory evidence. Moreover, the presumption of innocence is respected, in that it is not incumbent on the accused to defend him – or her – self or face the possibility of conviction on the basis of his or her silence. Thus a trier of fact may refer to the silence of the accused simply as evidence of the absence of an explanation which it must consider in reaching a verdict. On the other hand, if there exists in evidence a rational explanation or inference that is capable of raising a reasonable doubt about guilt, silence cannot be used to reject this explanation”.

The majority also referred to R vs. Francois 1994(2)SCR 827, and to R vs. Lepage 1995(1) SCR 654, and further observed:

“while it is permissible to conclude from the failure to testify that there is no unspoken, innocent explanation about which the trier of fact must speculate it is not permissible to use silence to strengthen a case that otherwise falls short of proving guilt beyond a reasonable doubt. If the totality of the evidence leads to guilt beyond a reasonable doubt, the accused’s silence simply fails “to provide any basis to conclude otherwise.”

Sopinka J further observed that silence was not either inculpatory or exculpatory. Silence could however confirm a finding of guilt already arrived at independently on the basis of the evidence led by the prosecution. Silence may indicate that the accused has not put forward any explanation or evidence to contradict or negative the evidence produced by the prosecution to prove guilt beyond reasonable doubt. In this limited sense, silence may be

used but if there is a rational explanation which is consistent with innocence and which may raise a reasonable doubt, then silence cannot be used to remove that doubt. The admissible uses of silence arise only after the trier of fact has reached the belief of guilt beyond reasonable doubt and therefore silence indeed is “superfluous”. Finally Sopinka J observed:

“I would therefore conclude that courts should generally avoid using the potentially confusing term ‘inference’ in discussing the silence of the accused. “Inference” could be taken to indicate that the trier of fact used silence to help establish the case for the guilt beyond reasonable which is not permissible use of silence. Indeed, because of the potential for confusion, discussion of the silence of the accused should be generally avoided. However where silence is mentioned by the trial Judge as confirmatory of guilt, given the totality of evidence, but not as a “make-weight”, there is no reversible error.”

It will thus be seen that according to the Canadian view it would be an error of law if the court directs the Jury to take into consideration the silence of the accused for arriving at a decision on the guilt of the accused. On the other hand, we have seen that the English view and the view of the European Court particularly in Condrón’s case is just the opposite. It is held there that the jury can be asked to take the silence into consideration for arriving at a decision on the guilt of the accused.

China

It is very interesting to note that in China, the latest policy is to introduce the right to silence into its criminal jurisprudence. Such a regulation has been introduced recently in the procuratorates in Shenyang, Dalian and other cities.

The following item on (see China Daily dt. 23.11.2000) ‘Right to Silence in China’s Judicial System’ is worth noting. (see <http://www.china.org.cn/English/2000/nov>)

“Procurators should prosecute suspects based on proof other than a confession in criminal cases, as announced by a procuratorate in Fushun of northeast China’s Liaoning Province in a newly-issued regulation.

The regulation guarantees people’s right to keep silence and entitles suspects to defend himself against accusations or keep silence during a criminal interrogation.

It is the first time for China’s judicial system to officially adopt right to keep silence for suspects, marking the country’s progress in protection of human right and freedom of the people.

According to the regulation, law officers will give no credit to confession, and a conviction will be based on other impersonal and reliable proof, explained by Yang Xiaodong, researcher with the Research Office of Liaoning Provincial People’s Procuratorate.

In spite of its subjectivity, a confession has been taken as the major source of proof in trying criminal cases in China. The right to silence application is believed to help eliminate inquisition by torture or extorting a confession.

The regulation practically admits the presumption of innocence and therefore has brought a radical change to the traditional judicial concept in the country, said Yang.

The presumption of innocence means that a suspect is supposed innocent when the interrogation begins and will not be convicted unless there is proof to prove his guilt. Jiang Xiaoyang, a lawyer with a Ph.D. degree from Beijing University, said that some real criminals might escape punishment after application of the presumption of innocence and right to silence, but that is the price the judicial system will have to pay in protection of innocent people.

It reflects the respect for human beings' dignity and spiritual freedom, said Jiang.

Judiciary justness has always been the focus of media and National People's Congress (NPC), the country's highest legislative body. China's top leaders have also pledged many times to curb unlawful acts inside the judicial system.

So far, the concept of right to silence has been introduced and implemented in procuratorates in Shenyang, Dalian and other cities in the province.

Chen Jie, judge in Dalian Intermediate People's Court said that though the right to silence is only at the beginning in China, it will trigger a series of innovations to the country's legal system.

China has been making reforms on its legal system in hope of protecting the citizens' rights and interests in an all-round way and ensures judicial fairness.

China established a new Criminal Law in 1996 and made amendments to the law in 1997 focusing on rescinding illegal privileges and assuring citizens' rights.

In 1998, China participated in United Nations' International Covenant on Civil and Political Rights, which guarantees the right against self-incrimination.”

(China Daily 11/23/2000)

India

In the Indian context, clause (3) of Art. 20 of the Constitution of India guarantees a fundamental right against self incrimination. Art. 21 grants a further fundamental right to life and liberty and states that the liberty of a person cannot be taken away except by a procedure laid down by the law. In

Maneka Gandhi's case it was further interpreted that the procedure envisaged by Art. 21 is a procedure which must be just, fair and equitable.

The Criminal Procedure Code contains several protections. Sub sec. (2) of sec. 161 of the Code of Criminal Procedure, 1973 grants a right to silence during interrogation by police. It reads as follows:

“Sec. 161(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 answers to which would have tendency to expose him to a criminal charge or to a penalty or forfeiture”.

Sub section (3) of sec. 313 again protects this right to silence at the trial. It reads as follows:

“313(3): The accused shall not render himself liable to punishment by refusing to answer such questions, or by giving false answers to them”

Sub section (1) of sec. 315 contains a proviso and clause (b) of the said proviso precludes any comment by any of the parties or the court in regard to the failure of the accused to give evidence. It reads as follows:

“provided that-

(a).....

(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.”

The above provision also creates a presumption against guilt.

In other words, sec. 161, 313 and 315 raise a presumption against guilt and in favour of innocence, grant a right to silence both at the stage of investigation and at the trial and also preclude any party or the court from commenting upon the silence. This is quite contrary to what the Australian law permits. Under the Australian law the Court can make a comment on the silence but the prosecution cannot make any comment. Now the New South Wales Law Commission has, as stated earlier, recommended amendment of the law, to permit even the prosecution to comment on the silence of the accused.

Our law in the Code of Criminal Procedure, 1973 is consistent with clause (3) of Art. 20 of the Constitution and Art. 21.

The earlier history of these provisions under the Criminal Procedure Code, 1898, is equally revealing. Durga Das Basu in his Commentary on Art. 20 of the Constitution (see Silver Jubilee Edition Vol.D p. 46, 47) refers to this aspect. Sec. 342A of the Code of Criminal Procedure, 1898, as introduced in 1955 made it possible for the accused to testify on his own behalf and also stated that “his failure to give evidence shall not be made the subject of comment by any of the parties or the court”. However, sub section (2) of sec. 342 of the said Code contained a provision which contradicted the above prohibition and read as follows:

“Sec. 342(2): The accused shall not render himself liable to punishment by refusing to answer questions or by giving false answers to them; but the court and the jury (if any) may draw such inference from such refusal or answers as it thinks fit.”

It will be seen that the underlined words in sec. 342(2) of the old Code permitted an inference to be drawn from the silence of the accused. This provision was not however repeated in the Code of 1973 and was dropped obviously because of the guarantee under clause (3) of Art. 20 of the Constitution of India which came in to force in 1950. The provision was dropped presumably because it was contrary to the constitutional protection against self incrimination. In fact Basu points out (ibid p.46) that the “foregoing lacuna” in the 1898 Code, was commented upon by the author at p. 38 of Vol.2 of the previous Ed. of this Commentary in the following words

“To the author, it seems that it is due to oversight that the legislature did not omit the italicised words, while inserting sec. 342A in 1955; for, after the insertion of sec. 342A, the italicised words have, at least become anomalous. They are inconsistent with proviso (b) of sec. 342A; for, the object of both sections 342 and 342A as already explained is to offer an opportunity to explain anything incriminating in the evidence against him. If, therefore, no inference may be made from the failure of the accused to take hold of the opportunity offered under sec. 342A by volunteering to testify on his own behalf, why

should such inference be permissible when the court questions him for the same purpose?

“Apart from the above statutory consideration, there is a constitutional implication if we take into account the observations of the dissenting Judges in Adamson vs. California (1947) 332 US 46.....If you cannot compel an accused to make a statement against himself, you cannot draw any inference against him because he remains silent, since that would obviously oblige him to speak, rather than remain silent.”

“To draw an adverse inference from the refusal to testify is indeed to punish a person who seeks to exercise his right under Art. 20(3). Just as no inference of guilt can be made from the fact that the accused is invoking the protection of Art. 20(3), so no inference of guilt can be made from the mere fact that he refuses to answer or to make a statement”.

Basu now says (Silver Jubilee edition Vol. D p 47) that it is gratifying to note that in view of the above comments in the earlier edition of his work, the legislature while it introduced the 1973 Act, it omitted the words in the later part of sec. 340(2) of the old Act of 1898. Basu states

“It is now clear, therefore, that the Court cannot draw any adverse inference against the accused from his silence or refusal to answer court questions, under any circumstances”.

The right to silence has been considered by the Supreme Court of India in a three-Judge Bench in Nandini Satpati vs. P.L. Dani 1978(2) SCC 424 where the Supreme Court followed the earlier English law and the judgment of the American Supreme Court in Miranda. Krishna Iyer J observed that the accused was entitled to keep his mouth shut and not answer any questions if the questions were likely to expose him to guilt. This protection was available before the trial and during the trial. The learned Judge observed as follows:

“.....whether we consider the Talmudic Law or the Magna Carta, the Fifth Amendment, the provisions of other constitutions or Article 20(3), the driving force behind the refusal to permit forced self incrimination is the system of torture by investigators and courts from medieval times to modern days. Law is response to life and the English rule of the accused’s privilege of silence may easily be traced as a sharp reaction to the Court of Star Chamber when self-incrimination was not regarded as wrongful. Indeed then the central feature of the criminal proceedings, as Holdsworth noted, was the examination of the accused.”

Summary:

A survey of the current law in various countries reveals that in USA, Canada and India in view of the constitutional provisions against self incrimination the Courts have required the prosecution to prove guilt beyond reasonable doubt and there has been no encroachment whether at the stage of interrogation or trial, into the right to silence vested in the suspect or

accused. It is only in UK that certain deviations have been made recently. The UK law of 1994 has not yet been tested under the Human Rights Act, 1998. No doubt, two cases have gone before the European Court and the said Court has laid down some conditions which must be satisfied before the Court or jury could take into consideration the silence of the accused. Firstly, a prima facie case as to guilt has to be made out by the prosecution. Secondly, the suspect or the accused must have been given an opportunity to call an attorney when he was questioned. This has led to the further amendment in the UK law in 1999 permitting the suspect or accused to call for an attorney's assistance. But then fresh problems have arisen where the accused has relied upon the lawyer's advice to remain silent. In such cases, the Courts are resorting to the cross-examination of the accused as well as his lawyers. A lawyer's wrong advice can lead to serious prejudice to the accused and this cannot be permitted. In the light of the above complications, criminal trials have become more complicated and the accused is having more grounds to question a verdict of guilt. In our view, it may not therefore be wise to introduce similar changes in our system. In fact, the New South Wales Law Commission has clearly recommended that provisions like sections 34, 36 and 37 which permit the Court or jury to draw inferences from the silence of the suspect or accused, should not be introduced into the statute in New South Wales. But, unfortunately, N.S.W. Law Commission has recommended that the accused can be compelled to disclose various facts relating to his defence failing which the prosecution and the Court can make comment. In our view, this does not amount to a fair trial and indirectly violates the right against self-incrimination. The Australian Courts have not referred to any constitutional prohibitions.

On the other hand, the American and Canadian Courts have not permitted any inroads into the right to silence. While English and European Courts and the Australian Courts permit the jury and the Courts to take the silence into consideration before arriving at a finding of guilt beyond reasonable doubt,- of course, where a prima facie case is made out, and the accused is informed of his right to an attorney - the American and Canadian Courts prohibit silence being taken into consideration before arriving at a finding of guilt beyond reasonable doubt. It is only after the Court comes to a finding of guilt beyond reasonable doubt, that the accused can be asked if he has any explanation.

It is interesting that China has introduced a regulation in some regions which entitles an accused to remain silent. It is indeed rather surprising that when China is introducing this principle into its laws some democracies like UK & Australia are introducing laws deviating from the old tradition as to right to silence.

The law in India appears to be same as in USA and Canada. In view of the provisions of clause (3) of Art. 20 and the requirement of a fair procedure under Art. 21, and the provisions of ICCPR to which India is a party and taking into account the problems faced by the Courts in UK, we are firmly of the view that it will not only be impractical to introduce the changes which have been made in UK but any such changes will be contrary to the constitutional protections referred to above. In fact, the changes brought about in the Criminal Procedure Code, 1973 leaving out the certain provisions which were there in 1898 Code, appear to have been the result of the provisions of clause (3) of Art. 20 and Art. 21 of our Constitution.

We have reviewed the law in other countries as well as in India for the purpose of examining whether any amendments are necessary in the Code of Criminal Procedure, 1973. On a review, we find that no changes in the law relating to silence of the accused are necessary and if made, they will be ultra vires of Art. 20(3) and Art. 21 of the Constitution of India. We recommend accordingly.

(Justice M. Jagannadha Rao)
Chairman

(Dr. N.M. Ghatate)
Member

9.5.2002

(Dr. T.K. Vishwanathan)
Member Secretary