

A Comparative Empirical Analysis of Testimonial compulsion in India and USA as per constitutional provisions and judicial views

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Abstract:

Collection of evidence and right against self incrimination or right to silence are safe guards of the citizens against torture and third degree methods. Several constitutional provisions of India and USA protect the interests of citizens against such third degree methods. In the present paper, we tried to review the salient features of the constitutional provisions, laws in USA and India and analysed judicial stand in respect of right against self incrimination or right of silence in these two countries. An attempt for comparative analysis of various constitutional and legal aspects of testimonial compulsion or right to silence in these two countries was done. This is done as USA and India are the biggest democratic countries in the world and also they are in the fore-front of human rights.

Key words : testimonial compulsion, right to silence, constitutional provisions, judicial stand, self incrimination

1.Introduction:

From the beginning of our Constitution, There is ambiguity and little confusion on the question of collection of evidence and conflicts between Article 20(3) and evidence act provisions. . Several times courts held the importance of provisions of the Indian Evidence Act, 1872. There are several judgements highlighting the necessity to facilitate collection of evidence by investigating agencies over right against self- incrimination as guaranteed in Article 20(3) of Indian constitution.

The right against self-incrimination was started in judiciary in The mid-18th and mid-19th centuries' in criminal trials. The privilages such as the 'beyond-reasonable-doubt' and 'burden of proof on the prosecution' has equipped to defend in trial against

the State. The provision against testimonial compulsion was well recognized long before our Constitution came into existence in UK laws based on ethics and reliability The right against self-incrimination serves to safeguard against torture and other 'third-degree methods'.

The present paper tries to review the sailent features of the constitutional provisions , laws in USA and India and analyse judicial stand in respect of right against self incrimination or right of silence in these two countries. The work is done for USA and India as they are worlds biggest democratic countries and run in fore front in protection of human rights.

2. An over view of article 20(3) and judicial stand in indian cotext:

The fundamental right guaranteed under Article 20 (3) is protective against testimonial compulsion for the persons accused of an offence to be witness against themselves. This protection, is not only to evidence before Court but also to prior processes like investigation of the offence. The protections available not only in respect of evidence given in a trial before Court but also at previous stages which may result in prosecution. The guarantee of Article 20 (3) is available only to the person accused of an offence. The protection against self incrimination envisaged in Article 20 (3) is available only when compulsion is used and not against voluntary statement, disclosure or production of document or other material. A statement given while in police custody necessarily cannot be taken to be under compulsion and no such inference can be drawn regarding a document or other material.

Compulsion may be physical or mental. Any non volitional positive act of an accused incriminating himself would be compulsion within the meaning of Article 20 (3).

Section 73 of the Indian Evidence Act reads as “**COMPARISON OF SIGNATURE, WRITING OR SEAL WITH OTHERS ADMITTED OR PROVED**”. In order to ascertain whether a signature, writing or seal is that of the person by whom it purports to have been written or made, any signature, writing or seal admitted or proved to the satisfaction of the court to have been written or made by that person may be compared with one which is to be proved although that signature, writing or seal has not been produced or proved for any other purpose. The court may direct any person present in court to write any words or figures for the purpose enabling the court to compare the words or figures, alleged to have been written by such person. The same applies with necessary modifications to finger print also.

In *Ram Swarup v. State and others*, Allahabad high court held that writing obtained by court from accused under Section 73 of the Evidence Act would not come within the expression 'evidence' as it not a document produced for inspection of court and direction by court does not affect Article 20 (3). In *M.P. Sharma v. Satish Chandra and others*, supreme court held that whether the order as to search and seizure under Cr.P.C. was violative of guarantee under Article 20 (3) of the Constitution. The court observed that section 139 of the Indian Evidence Act which says that a person producing a document on summons is not a witness was not a complete essence of word witness. Hon court held that if production of document in compliance with a notice to produce it would be testimonial act by that person but the same would not amount to compelled production of the document.

In the case of **State of Bombay v. Kathu kalu**, The Hon. Supreme court held that to be a 'witness' may be equivalent to furnishing evidence in the sense of making oral or written statements but in the larger sense of the expression giving of thumb impression or impression of palm or foot or finger or specimen writing or exposing a part of body by an

accused person for purpose of identification are not included in the expression 'to be a witness'. The court held that giving of finger impression or specimen signature or handwriting strictly speaking is not to be a witness. order to give handwriting, thumb impression, finger print etc. does not violate Article 20 (3),

3. Article 20(3) - A comparison with USA constitution provisions and legal stand :

3.1 U.S.A. constitution and law over view :

In United States, the fundamental right against self incrimination and is given in the Fifth Amendment of USA constitution. The fifth amendment of the U.S. constitution provides that “No person shall be compelled in any Criminal Case, to be a Witness against Himself ” The above provision has been given a privilege against Self-Incrimination which has been held to apply to witnesses as well as parties in proceedings—criminal and civil. It covers documentary evidence and oral evidence, and extends to all disclosures including answers which by themselves support a criminal conviction or furnish a link in the chain of evidence needed for a conviction. It almost contains the same language as in Article 20(3) of Indian Constitution. Earlier, The federal statute of 1878 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. In *Adamson vs. California* (1947) 332 US 46, the question relating to the right to silence was first came into picture. During the case while referring to the Fifth Amendment, it was stated that that the right to silence was absolute in US. It was observed by - 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.” later, in *Griffin Vs. California* (1965) 380 US 609 case, the Supreme Court of United States refused to permit prosecutorial or judicial comment, because such comment cuts down on the

privilege. 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, American courts, have laid down a different principle, namely the silence of the accused can be taken into consideration by the court while deciding about the quantum of punishment. 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. 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. It is important 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 important aspect for inferring the guilt

3.2 Indian law:

In India, , Art. 20 clause (3) of the Constitution of India guarantees a fundamental right against self incrimination. Article 20(3) reads that “No person accused of any offence shall be compelled to be a witness against himself” The privilege against self-incrimination is a fundamental canon of common criminal law jurisprudence. The characteristics features of this provisions are –

- (a) That the accused is presumed to be innocent,
- (b) That it is for the prosecution to establish his guilt, and
- © That the accused need not make any statement against his will.

Art. 21 gives fundamental right to life and liberty and reads 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 interpreted that the procedure envisaged by Art. 21 is a procedure which must be just, fair and equitable (*Maneka Gandhi’s* case). Similarly , The Criminal Procedure

Code, 1973, contains several protections. Sec 161 Sub sec. (2) of CR.P.c protects right to silence during interrogation by police, which states that A person shall be bound to answer truly all questions relating to such case put to him by 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 also protects right to silence at the trial. Sub section (1) of sec. 315 contains a proviso and clause (b) of that proviso precludes any comment by any of the parties or the court in regard to the failure of the accused to give evidence. The above provision also creates a presumption against guilt. Hence sec. 161, 313 and 315 provide a presumption against guilt and in favour of innocent and grant a right to silence during investigation and also at the trial and also preclude any party or the court from commenting upon the silence.. Thus The provisions of Code of Criminal Procedure, 1973 is consistent with Art. 20 clause 3 and Art. 21. The earlier provisions of the Criminal Procedure Code, 1898, mostly have same opinions. But in sec. 342(2) of the old Code permitted an inference to be drawn from the silence of the accused. This provision was removed in Cr.P.c of 1973 because of the guarantee under clause (3) of Art. 20 of the Constitution of India which came in to force in 1950 giving unambiguity between law and constitution.

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”.The right to silence has been considered by the Supreme Court of India 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* case. It was observed that the accused was entitled to keep silent and not answer any questions if the questions were likely to expose his/ her to guilt. This protection was available before the trial

and during the trial. 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 These systems are responsible for the Magna Carta or the Fifth Amendment or the provisions of other constitutions or Article 20(3). Law is to give life and the privilege of silence may easily be traced as a sharp reaction when self incrimination was not regarded as wrongful.

4. Conclusions:

An empirical comparative analysis of the testimonial compulsion or right to silence in the two countries i.e., India and USA, reveals that USA and India have same principles and ideology in aspect of right to silence during trail or before trial. They give top importance to the constitutional provisions against self incrimination. The Courts also have required the prosecution to prove guilt beyond reasonable doubt and there has been no overriding of the constitution in many cases during interrogation or trial, into the right to silence The law in India appears to be same as in USA . The changes brought about in the Criminal Procedure Code, 1973 discarding the certain provisions against the rule of silence which were there in 1898 Code, were to protect the provisions of Art. 20 clause (3) and Art. 21 of our Constitution and also in the interest of Human rights. The firther strenhthening of the law is required to prevent human injustice to innocents.

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