

ARTICLE

“Right to Silence”: A Commentary on Misinterpretation and Violation by the Indian Judiciary

Sushil Kumar Jain¹ and Sujay Jain^{2*}

¹Senior Advocate, Supreme Court of India and ²Gujarat National Law University, India

*Corresponding Author: E-mail: sujaynlu@gmail.com

(Submitted 28 February 2022; revised 21 March 2022; accepted 3 April 2022)

Abstract

The Indian Constitution, being the lengthiest constitution in the world, seeks to accord the “right to silence” the status of a fundamental right, a particularly high threshold from which little to no derogation is permissible. This constitutional guarantee has also been given a statutory backing, wherein the silence of an accused cannot be used to draw an adverse inference against him. As a country which hails itself as a champion of personal liberty, it is disheartening to see that the reality of the situation is disappointing. The draconian pre-Constitution jurisprudence is still followed by most judgements, and often the silence of an accused is used as a “missing link” on the part of the prosecution to establish an accused’s guilt. This occurs either due to the correct provisions not being brought before the notice of the courts, or due to the courts adjudicating in derogation of statutory provisions and settled case laws. In this paper, the authors seek to establish the correct position of the law by taking into account its evolution in Indian and other jurisdictions, and then establish how India continues to fail to give effect to this right, by empirically analysing several judgements of the Supreme Court of India.

Keywords right to silence, *per incuriam*, *sub silentio*, missing link

INTRODUCTION

It is now well established that both civil and criminal laws differ in their fundamental jurisprudence. In civil law, the issues are to be proved by the preponderance of probabilities, whereas in criminal matters the entire burden to prove and establish the guilt of an accused lies on the prosecution. This is so because in civil matters the parties tend to be well aware about their title, pleas and rights, and the evidence required to prove the same. Further, whenever witnesses are cross-examined, they can probabilize their defence by putting specific questions or suggestions in the cross-examination. The parties, having no physical restrictions or hindrances in the collection of material documents, can utilize their resources to collect sufficient

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evidence about the issues raised and challenged. On the other hand, an accused under criminal law may be falsely implicated by the complainant and his witnesses. He may not be aware about the actual incident or its details, and could be physically restricted being in jail, and may hardly get the time or opportunity to discuss the case even with his own lawyer. The accused may not even be aware of the true and correct facts and evidence available to disprove the allegations. The accused is always handicapped in collecting evidence to prove his innocence. Thus, the right to silence assumes a more important role in criminal jurisprudence. This is especially true for a country like India, which claims to be the world's biggest democracy, and boasts of the lengthiest constitution in the world – around 30 times that of the Constitution of the United States (Bhattacharya 2019). India also has a very rich and complex historical background, and the importance of upholding the fundamental right to silence can be best illustrated using the words of Justice Krishna Iyer of the Supreme Court of India, who has eloquently opined:¹

The pulse of the agitated accused, hand-cuffed and interrogated, the rude voice and ready rod of the head constable and the psychic strain, verging on consternation, sobbing into involuntary incriminations, are part of the scenario of police investigation which must educate the Court as it unveils the nuances of Art. 20(3) and its inherited phraseology. A people whose consciousness of rights is poor, a land where legal services at the incipient stages are, rare and an investigative personnel whose random resort to third degree technology has ancient roots-these and a host of other realistic factors must come into the Court's ken when interpreting and effectuating the constitutional right of the suspect accused to remain silent.

In order to comment or criticize on the current legal provisions or the role of the Indian judiciary in protecting this fundamental right (or lack thereof), one needs to first understand the evolution of this right, and how it has been imported to India. The authors will undertake a brief comparative analysis of a few countries and conventions which have influenced the Indian law on this aspect.

The authors will then seek to establish the position before the promulgation of the Indian Constitution in 1950, and the impact of the amendments made via the Code of Criminal Procedure, 1973 (hereinafter "New Code"). While there is plenty of scope to even criticize the position before the Constitution on moral grounds, the erstwhile provisions of the Code of Criminal Procedure (hereinafter "Old Code") were tenable as statutory law, due to the lack of an umbrella Constitution to decide on the legality of the same. Thus, the pre-Constitution provisions will not be made subject to criticism in this paper.

With respect to the post-Constitution laws, a problem then arises on three fronts:

First, that despite the inclusion of this right as a fundamental right in the Constitution, the Criminal Code was amended to reflect this only in 1973;

Second, that even during this period between 1950 and 1973 with certain Supreme Court judgements recognizing this right, most of the subsequent

¹*Nandini Satpati v. P. L. Dani* (1978) 2 SCC 424.

judgements have continued to ignore and violate the fundamental rights accorded via the Constitution;

Third, that despite the formal statutory inclusion of this right (via a repeal), the courts to this date have continued to ignore this right. The courts have continued to misinterpret the law either due to not being aware of these provisions (doctrine of *sub silentio*), or have adopted an informal procedure in criminal procedures, ignoring the settled position of law and the judiciary (doctrine of *per incuriam*), and by adopting the doctrine of “missing link”.

Thus, after establishing the current legal position, the paper will seek to critique several judgements of the Supreme Court of India in detail, and the defects that these judgements may suffer from.

ORIGINS AND HISTORY OF THE RIGHT TO SILENCE

While it is difficult to trace the exact history of this now widely recognized right, the most popular theory dates it back to 16th-century England. It is based on the Latin maxim *nemo tenetur se ipsum accusare* (“no man is bound to accuse himself”), and originated as an opposition and counter to the highly controversial prosecutions taking place in the British Star Chamber and High Commission.² The British Crown adopted the inquisitorial system from the ecclesiastical courts (Christian church and its clergy). This system, along with a practice of gathering evidence from unidentified sources and even the use of torture, was systematically used to meet the Church’s own objectives (Gray 2013). In both these forums, the accused were compelled to take an oath known as the “*ex officio* oath” – under which an accused was made to compulsorily answer the questions posed without having been informed about the offences they were being accused of. This situation led to what has evolved to be characterized as a “cruel trilemma” – the accused was forced to choose either between committing perjury (lying under oath), contempt of court (refusal to answer), or “self-harm” (telling the truth to protect their honour) (Helmholz 1990). Certainly, none of the choices seem fair.

The masses started objecting to these laws, and judges started to step up. In the year 1568, Lord Chief Justice Dyer was successful in granting a writ of *habeas corpus* for the prevention of a detained accused from being forced to take such an oath. Another judge, Sir Edward Coke, confronted these *ex officio* oaths administered by these ecclesiastical courts by issuing writs of prohibition against the usage of these oaths, observing that these oaths were contrary to the common law system (Randall 1955). These laudable acts did achieve a limited victory in waning the powers exercised by these tribunals, and this power was gradually limited only to cases of misdemeanours, and generally the accused was required to be apprised of the charges imposed against them.

However, the inquisitorial regime saw a rise again in the initial half of the 17th century under the reign of Charles I. It was only in 1641 that Parliament formally abolished the Court of Star Chamber and High Commission, and barred inquisitorial criminal proceedings.

²Quinn v. United States (1955) 349 US 155 (99 LawEd 964).

At the same time, there are some who believe that any semblance to the current laws started taking place only in the 19th century. The changes made to the common law criminal procedure, primarily among them the presumption of innocence and the complementing requirement of establishing proof beyond reasonable doubt, supported by the development of jurisprudence of criminal evidence, were considered to be the chief reasons for the establishment of this right against self-incrimination.

Indian courts have also briefly taken cognizance of the historical evolution (and consequent need for this right) in their judgements. In *Nandini Satpati v. P. L. Dani*³ at paragraph 24, Justice Krishan Iyer observed:

... 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.

Evolution of Laws in Other Jurisdictions/Countries

To understand the history of Indian laws in this regard, it is important to understand how the laws evolved in other States and influenced Indian laws.

United Kingdom

The position of the United Kingdom is important to understand, since their laws have had a massive influence on Indian laws both before and after the independence of India in 1947. After abolishing the inquisitorial system as mentioned earlier, the justices of the King's Bench promulgated the Judges' Rules of 1912. These rules provided, *inter alia*, that a police officer is mandated to first apprise the accused that he has the right to remain silent, before questioning him. It was further observed in the case of *Ibrahim v. R*⁴ that an accused's confession to the authorities would only be admissible if it was made voluntarily to that authority. An admission or confession is considered to have been made voluntarily if it is so made in the exercise of a free choice to confess or to remain silent. This was further reiterated in the judgement of *R v. Leckey*⁵ by the Court of Criminal Appeal. However, the current position of UK law pursuant to the 1994 amendment is different and restrictive, and has been categorically criticized and rejected by the Law Commission of India in its 180th Report. Since the Indian law is vastly different from the United Kingdom's current laws, only the pre-1994 UK laws have been discussed to understand the history of this law and influence on Indian laws. After the amendment via

³See note 1.

⁴*Ibrahim v. R* (1914) AC 599.

⁵*R v. Leckey* (1943) 29 CAR 128.

the 1994 Act, this right has been curtailed to a certain extent by the United Kingdom, which shall not be subject to comments in this paper.

United States of America

The strongest proponent of this right to silence has to be the United States of America, particularly after the Fifth Amendment to the United States Constitution. This amendment was ratified as part of the Bill of Rights in 1791, along with nine other articles. The spirit, wordings and language of the Fifth Amendment are more or less similar to that of Article 20(3) in the Indian Constitution, and it would be fair to say that these have had a significant impact in the development of our Constitution.

However, the concept was fully elaborated in 1966, where the landmark judgement of *Miranda v. Arizona*⁶ was delivered by the US Supreme Court. Before the *Miranda* judgement, the courts used to decide each case on its facts and merits and there was no uniformity. With this case, important rules were laid down which still guide the courts until the present day. It evolved the classic and widely recognized line, which deserves to be reproduced here:

You have the right to remain silent. Anything you say can be used against you in court. You have the right to the presence of an attorney. If you cannot afford an attorney, one will be appointed for you prior to any questioning.

In the case of *United States v. Hubbell*,⁷ it was held that this right is not limited only to the accused but also to any person who gives evidence – thus expanding the scope to include both the witnesses and the accused.

International Covenants and Treaties

Certain developments in international law have also been influential in shaping the current Indian regime. Article 11.1 of the Universal Declaration of Human Rights 1948 incorporates the presumption of “innocence until proven guilty”. This is also incorporated under Article 6(2) of the European Convention for the Protection of Human Rights and Fundamental Freedoms. Furthermore, India is a party to the International Covenant on Civil and Political Rights 1966 (ICCPR), in which Article 14(3)(g) details certain “minimum guarantees” and provides that no one shall be compelled to testify against themselves or to inculcate themselves.

STATUTORY PROVISIONS PRIOR TO THE CONSTITUTION

Under Section 342 of the now repealed Criminal Procedure Code (CrPC), 1898, an accused had a right to give his version of the events and provide explanation. However, Section 342(2) of the Old Code specifically and expressly allowed drawing of an adverse inference from a refusal to answer a question posed to the accused.

⁶*Miranda v. Arizona* (1966) 384 US 436.

⁷*United States v. Hubbell* (2000) 530 US 27.

Section 342 regarding “Power to examine the accused” under the repealed CrPC, 1898, with emphasis added, reads as follows:

342.(1) For the purpose of enabling the accused to explain any circumstances appearing in the evidence against him, the Court may, at any stage of any inquiry or trial without previously warning the accused, put such questions to him as the Court considers necessary, and shall, for the purpose aforesaid, question him generally on the case after the witnesses for the prosecution have been examined and before he is called on for his defence.

(2) The accused shall not render himself liable to punishment by refusing to answer such questions, or by giving false answers to them; *but the Court may draw such inference from such refusal or answers as it thinks just.*

(3) The answers given by the accused may be taken into consideration in such inquiry or trial, and put in evidence for or against him in any other inquiry into, or trial for, any other offence which such answers may tend to show he has committed.

(4) No oath shall be administered to the accused.

There is a plethora of cases which have relied on Section 342 to draw an adverse inference against the accused, since this was based on very clear statutory provisions.

Another section which has been relied on to abrogate this right of silence of the accused is Section 114 (“Court may presume existence of certain facts”) of the Indian Evidence Act, 1872, particularly illustration (h), with emphasis added, as shown below:

114. The court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct and public and private business, in their relation to the facts of the particular case.

Illustrations

The Court may presume—

(h) that, if a man refuses to answer a question *which he is not compelled to answer by law*, the answer, if given, would be unfavourable to him.

There are pre-constitution judgements which have read Section 342 of the Old Code with Section 114 of the Evidence Act in tandem. The Lahore High Court, for instance, in *Sher Jang v. Emperor*⁸ held that refusal to answer can be used for drawing adverse inference due to explicit mention in Section 342 of the Code as well as provisions of the Evidence Act. Thus, Section 114 was used for drawing an adverse inference of an accused as well, apart from its application on a witness.

⁸*Sher Jang v. Emperor* AIR 1931 Lahore 178.

Another interesting aspect may be the intersectionality with Section 132 of the Evidence Act. It provides that any person who is acquainted with the circumstances of the case may be examined by the police, and can be compelled to answer questions posed to him even if these could expose him to a criminal charge, forfeiture or penalty. At the same time, this section provides a limited immunity to witnesses against arrests and prosecution. However, after the promulgation of the Constitution, an accused stands at a higher footing and the scope of such protection has been considerably widened for an accused, as will be stated below. The limited protection continues to be accorded to witnesses, and there is a clear legislative intent for differentiating between the two.

CONSTITUTIONAL AND STATUTORY FRAMEWORK AFTER THE CONSTITUTION

Under Article 20(3) of the Constitution the accused has the fundamental right against self-incrimination, which includes the right to remain silent. Additionally, the requirement of a fair, just and equitable procedure is now widely recognized as a fundamental right under Article 21, after the judgement in *Maneka Gandhi v. Union of India*,⁹ even for criminal cases. Article 20 reads as follows:

Article 20: Protection in respect of conviction for offences

20(3): No person accused of any offence shall be compelled to be a witness against himself.

Interestingly, one can even argue that the right to silence was actually accorded in theory even prior to the new act, after the 1955 Amendment to the Code. On 12 August 1955, the Code of Criminal Procedure (Amendment) Act (No. 26 of 1955) received presidential assent and came into force on 2 January 1956. It introduced a new Section 342A, which specifically provided that the court or any of the parties to the dispute cannot make the failure of the accused to put himself in the witness box a subject of any comment, and that no presumption can be drawn against the accused or any person charged together with him. It is reproduced here:

342A. Any person accused of an offence before a Criminal Court shall be a competent witness for the defence and may give evidence on oath in disproof of the charges made against him or any person charged together with him at the same trial:

Provided that—

- (a) he shall not be called as a witness except on his own request in writing; or
- (b) his failure to give evidence shall not be made the subject of any comment by any of the parties or the Court to give rise to any presumption against himself or any person charged together with him at the same trial.

⁹*Maneka Gandhi v. Union of India* (1978) 1 SCC 248.

This provision, read with Section 342 of the Old Code, according to the words of eminent jurist D. D. Basu (1973:46), created a “foregoing lacuna” in the 1898 Code, for the now omitted words of Section 342 (as italicized above: “the court may draw such inference from such refusal or answers as it thinks just”) have become anomalous, to say the least. If you cannot compel someone to take the stand and make a statement against themselves, then silence cannot lead to adverse inference, since that would oblige him to speak. This would be contrary to both Articles 20(3) and 342A of the 1898 Code itself! This has been beautifully summarized by Basu (1973) himself:

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.

In fact, the Supreme Court has interpreted the insertion of this new Section 342A *vide* 1955 amendment and its impact on the right of an accused to refuse to give evidence. In *Baidyanath Prasad Srivastava v. State of Bihar*,¹⁰ the Court noted that “under clause (b), of the proviso to Section 342-A, CrPC, it is specifically provided that the failure of an accused 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 time”. It was further held that:

4. It is in considering this plea that the High Court has commented upon the failure of Devendra Prasad to give evidence under Section 342-A, and the High Court has also taken the view that the same reasons will apply to the appellant’s defence also. That is, the failure of the appellant, to give evidence, has been commented upon, by the High Court, and it has also drawn a presumption, against him, both of which are illegal, under clause (b) of the proviso to Section 342-A CrPC.

In *Anant Gopal Sheorey v. The State of Bombay*,¹¹ the Supreme Court, while dealing with Section 342A, held that the section would have retrospective application as it is procedural in nature. It is not appreciated that while the case discussed this in detail, it failed to address the incongruences and inconsistencies in Sections 342 and 342A.

Despite the clear legal provisions, a multitude of judgements in the time period between 1955 and 1973 have completely ignored this aspect. This point was neither raised before the courts, nor have the courts appreciated it. This problem has persisted across different forums, and several Supreme Court judgements shall be analysed below to highlight how this particular provision was never used by the courts.

It is to be noted that despite these constitutional and statutory provisions, the courts have continued to rely on Section 114 of the Evidence Act as well for drawing inference against an accused.

¹⁰*Baidyanath Prasad Srivastava v. State of Bihar* AIR 1968 SC 1393.

¹¹*Anant Gopal Sheorey v. The State of Bombay* AIR 1958 SC 915.

A minority view of a five-judge bench of the Hon'ble Supreme Court in the case of *Ramnarayan Mor v. State of Maharashtra*¹² explicitly held that an inference adverse to the accused might be drawn from his refusal to answer. It relied on Section 114 of the Evidence Act to support this argument. It is interesting to note that this judgement was passed several years after the Constitution came into force, and the application of Article 20(3) on this section was neither contended nor decided. The majority view did not propound on whether a refusal to answer a question would lead to an adverse inference. The majority only noted that "Declining to avail himself of such an opportunity and reserving his right to make a defence at the trial do not amount to refusal to answer a question." It was not addressed whether a refusal would lead to an adverse inference.

It is also to be noted that after the Promulgation of Article 20(3), the provision does not apply to an accused anymore, and an accused cannot be treated as "a man" acquainted with the facts of the case, and thus cannot be compulsorily bound to answer truthfully the incriminating questions.

PROVISIONS OF THE LAW UNDER THE NEW CODE OF 1973

Provisions of the New Code now read as follows:

Section 313. Power to examine the accused.

(1) In every inquiry or trial, for the purpose of enabling the accused personally to explain any circumstances appearing in the evidence against him, the Court—

(a) may at any stage, without previously warning the accused, put such questions to him as the Court considers necessary;

(b) shall, after the witnesses for the prosecution have been examined and before he is called on for his defence, question him generally on the case: Provided that in a summons-case, where the Court has dispensed with the personal attendance of the accused, it may also dispense with his examination under clause (b).

(2) No oath shall be administered to the accused when he is examined under sub-section (1).

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

(4) The answers given by the accused may be taken into consideration in such inquiry or trial, and put in evidence for or against him in any other inquiry into, or trial for, any other offence which such answers may tend to show he has committed.

On reading (2) of Section 342 of the old act with sub-sections (3) and (4) of Section 313 of the new act it is clear and apparent that the legislature has specifically deleted

¹²*Ramnarayan Mor v. State of Maharashtra* (1964) 5 SCR 1064.

the words “but the Court may draw such inference from such refusal or answers as it thinks just”.

Further, Section 315 was also introduced, which is similar to Section 342A of the Old Code as discussed above:

315. Accused person to be competent witness

(1) Any person accused of an offence before a criminal Court shall be a competent witness for the defence and may give evidence on oath in disproof of the charges made against him or any person charged together with him at the same trial: Provided that—

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

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

The legislature while enacting Section 313(3) (new) of the CrPC omitted the words “the court may draw such inference from such refusal or answers as it thinks just” which were there in section 342(2) of the Old Code.

With regard to the unamended Section 114(h) of the Evidence Act, it is to be noted that it is not applicable to an accused in the light of Section 313 of the New Code and more fundamentally Article 20(3) of the Constitution, as an accused cannot be compelled to answer any question. The scope of the section has been changed but the same has not been noticed by the Hon’ble Supreme Court, and any judgement given prior to 1973 is no more applicable. Thus, the prosecution cannot take advantage of Article 114 Illustration (h) of the Evidence Act against an accused, since Article 20 provides protection only to the accused and not witnesses. Thus, Section 114 would continue to apply to witnesses, and is not unconstitutional – only that the scope has been curtailed.

EFFECT OF EXPLICIT REPEAL OF THE OLD CODE BY THE NEW CODE OF 1973

It is now a settled principle of law that material changes in law have to be given full effect.

The Old Code of Criminal Procedure, 1898 has been repealed expressly in the New Code by Section 484(1), which reads as: “Repeal and savings. – (1) The Code of Criminal Procedure, 1898 (5 of 1898), is hereby repealed.”

It is clear from a plethora of judgements that when an act repeals the previous act and the particular provisions cover the portion of the old act in substance, then such a repeal is tantamount to an amendment. In this respect, the Hon’ble Supreme Court in paragraph 12 of *Commissioner of Income Tax v. Venkateswara Hatcheries (P) Ltd.*¹³ has held that:

¹³*Commissioner of Income Tax v. Venkateswara Hatcheries (P) Ltd.* (1999) 3 SCC 632.

12. . . . It is a very well recognized rule of interpretation of statutes that where a provision of an Act is omitted by an Act and the said Act simultaneously re-enacts a new provision which substantially covers the field occupied by the repealed provision with certain modification, in that event such re-enactment is regarded having force continuously and the modification or changes are treated as amendment coming into force with effect from the date of enforcement of re-enacted provision.

The Hon'ble Supreme Court in its judgements in the cases of *Bhagat Ram Sharma v. Union of India*¹⁴ and *Ramkanali Colliery of BCCL (Bharat Coking Coal Limited) v. Workmen*¹⁵ has held that there is no difference between repeal and amendment to an act.

Section 313 of the New Code corresponds to Section 342 of the Old Code and governs the same aspects in substance. The deletion of the words "but the Court may draw such inference from such refusal or answers as it thinks just" amounts to an amendment. In view of the above, this deletion has changed the very basis of the old law and the judgements given by placing reliance on it (such as *Sher Jang v. Emperor*¹⁶). Thus, post-1973, no adverse inference or presumption against accused can be drawn on account of not giving any explanation or for giving false explanation.

Thus, if non-explanation of a circumstance by an accused is considered and used against the accused by drawing adverse inference or presumption then it will be contrary to Section 313(3) of the New Code as well as Article 20(3) of the Constitution of India.

CURRENT LEGAL POSITION IN INDIA

Since the implementation of the New Code of Criminal Procedure in 1973, and in particular the changes incorporated in Section 313, the position of Indian law stands fully clarified. After centuries of struggle and being influenced by other jurisdictions, Indian lawmakers have finally incorporated this both as a constitutional as well as a statutory right.

It is interesting that in *Shri Ram v. State of U.P.*,¹⁷ which was decided on 6 November 1974, the Apex Court though without even specifically referring to Article 20(3) or Section 313(3) of the New Code, and instead relying on Section 342 of the Old Code itself, noted that:

9. The High Court found fault with Violet for not having offered any explanation during the trial as to why she uttered the particular words. This approach is impermissible. The burden was on the prosecution to establish its case and no adverse inference could be raised against Violet for her failure to explain her utterance. Besides, an accused cannot while being examined under Section 342

¹⁴*Bhagat Ram Sharma v. Union of India* (1988) Supp SCC 30.

¹⁵*Ramkanali Colliery of BCCL v. Workmen* (2001) 4 SCC 236.

¹⁶See note 8.

¹⁷*Shri Ram v. State of U.P.* (1975) 3 SCC 495.

of the Code of Criminal Procedure be subjected to cross-examination and a bald assertion to explain a piece of conduct almost always fails to convince. We are, accordingly, unable to agree with the High Court that Violet would not have announced the arrival of Kunwar Singh “unless she was aware that the accused persons were lying in wait on the other side of the road and it was necessary to inform them so that they might accomplish their aim”.

While the Court did not expressly mention or rely on Article 20(3) of the Constitution to arrive at the aforementioned conclusion, a romantic would certainly feel that the bench comprising of Hon’ble Justices Y. V. Chandrachud and P. N. Bhagwati, in their eminent wisdom, realized this right even before the changes in the legislation (by deletion of the aforementioned words) were brought to their attention!

In any case, the judgements have been very clear since the changes were introduced via the New Code. The Supreme Court while considering the right to silence in the case of *Selvi v. State of Karnataka*¹⁸ has considered the changes made in the 1973 Code while considering the right to silence of accused and observed:

141. At this juncture, it must be reiterated that Indian law incorporates the “rule against adverse inferences from silence” which is operative at the trial stage. As mentioned earlier, this position is embodied in a conjunctive reading of Article 20(3) of the Constitution and Sections 161(2), 313(3) and Proviso (b) of Section 315(1) of the CrPC. The gist of this position is that even though an accused is a competent witness in his/her own trial, he/she cannot be compelled to answer questions that could expose him/her to incrimination and the trial Judge cannot draw adverse inferences from the refusal to do so. This position is cemented by prohibiting any of the parties from commenting on the failure of the accused to give evidence

142. The 180th Report of the Law Commission of India (May 2002) dealt with this very issue. It considered arguments for diluting the “rule against adverse inferences from silence”. Apart from surveying several foreign statutes and decisions, the report took note of the fact that Section 342(2) of the erstwhile Code of Criminal Procedure, 1898 permitted the trial judge to draw an inference from the silence of the accused. However, this position was changed with the enactment of the new Code of Criminal Procedure in 1973, thereby prohibiting the making of comments as well as the drawing of inferences from the fact of an accused’s silence. In light of this, the Report concluded:

“180. . . . 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 Article 20(3) and Article 21 of the Constitution of India. We recommend accordingly.”

¹⁸*Selvi v. State of Karnataka* (2010) 7 SCC 263.

The Supreme Court of India in a three-judge bench in *Nandini Satpati v. P. L. Dani*¹⁹ followed the earlier English law and the judgement of the American Supreme Court in *Miranda*. Justice Krishna Iyer observed that an accused was unconditionally entitled to keep silent and shall not be compelled to answer questions posed to him, if such questions were likely to inculcate him and expose him. This protection is available at both before and during the trial.

This decision was reiterated very recently in the three-bench decision in *Tofan Singh v. State of Tamil Nadu*,²⁰ wherein again the right to silence was upheld by the Apex Court.

RIGHT TO SILENCE VIS-À-VIS BURDEN OF PROOF UNDER SECTION 106 OF THE EVIDENCE ACT

The Indian Constitution has accorded the fundamental right of silence to accused and placed the burden on the prosecution to prove the guilt of an accused beyond reasonable doubt. There is always presumption of innocence unless guilt is proved beyond reasonable doubt. It is only after the burden is discharged by the prosecution and the presence of the accused is established that the accused is called upon to prove or disprove any facts within his special knowledge under Section 106 of the Indian Evidence Act, to be able to establish that he was not guilty (*Joydeb Patra v. State of West Bengal*).²¹ It is submitted that merely by not giving any explanation or taking false pleas no presumption about the presence of the accused can be drawn. The Supreme Court in the case reported in *Shambu Nath Mehra v. State of Ajmer*,²² while interpreting Section 106 of the Indian Evidence Act, held that in criminal cases the burden of proof still lies with the prosecution, and Section 106 is not intended to relieve the prosecution of this burden. This was further held in *State of W.B. v. Mir Mohammad Omar*²³ as well. In this case, death was proved to have been caused by the accused, and the accused was required to provide deviance in his support against the prosecution theory, but the primary burden to prove lay with the prosecution. Similarly, in the case reported in *Tomaso Bruno and Another v. State of Uttar Pradesh*²⁴ the Supreme Court held that to invoke Section 106 of the Indian Evidence Act the Prosecution had to establish the presence of the accused at the place of the incident. Thus, silence on the part of the accused cannot be said to amount to a disregard or breach of Section 106. Though constitutional right under Article 20(3) is always a higher right, the courts have construed the provisions of Section 106 of the Evidence Act and Article 20(3) of the Constitution in a harmonious manner to give effect to the fundamental rights accorded by the Indian Constitution. The provision of Section 106 of the Evidence Act will be attracted only for discharging burden of proof and cannot be used for drawing adverse inference against the accused for not explaining the fact. Even in Narcotic Drugs and

¹⁹See note 1.

²⁰*Tofan Singh v. State of Tamil Nadu* (2021) 4 SCC 1.

²¹*Joydeb Patra v. State of West Bengal* (2014) 12 SCC 444.

²²*Shambu Nath Mehra v. State of Ajmer* (1956) SCR 199.

²³*State of W.B. v. Mir Mohammad Omar* (2000) 8 SCC 382.

²⁴*Tomaso Bruno and Another v. State of Uttar Pradesh* (2015) 7 SCC 178.

Psychotropic Substances (NDPS) cases, where there is presumption of culpable mental state under Section 35 of the Narcotic Drugs and Psychotropic Substances Act, 1985 and presumption of illicit articles, the Hon'ble Supreme Court has taken the view that the primary burden to prove possession lies with the prosecution. In this respect, the Hon'ble Supreme Court, while placing reliance on the case of *Noor Aga v. State of Punjab*,²⁵ in the case of *Gangadhar v. State of M.P.*,²⁶ held that:

10. The stringent provisions of the NDPS Act, such as Section 37, the minimum sentence of 10 years, absence of any provision for remission do not dispense with the requirements of prosecution to establish a prima facie case beyond reasonable doubt after investigation, only where after which the burden of proof shall shift to the accused. The gravity of the sentence and the stringency of the provisions will therefore call for a heightened scrutiny of the evidence for establishment of foundational facts by the prosecution.

VIOLETION OF THE RIGHT TO SILENCE: AN ANALYSIS AND CRITIQUE OF VARIOUS SUPREME COURT JUDGEMENTS

In light of the fundamental right to silence accorded since 1950, as well as insertion of Section 342A in 1955, Section 342 of the Old Code allowing for drawing of an adverse inference should have been read down. It is unfortunate that the constitutionality of this provision was never challenged before the courts, since it could have clarified the position much before the 1973 amendment. However, the constitutionality was deliberated upon in passing in an Allahabad High Court judgement.

In *Banwari Lal v. State*,²⁷ the Allahabad High Court held that while false evidence may not be evidence directly, it may be used to prove a fact under Section 3 of the Evidence Act, as the scope of Section 3 is wider and may prove "considering the matters before it". Section 342(3) reads: "The answers given by the accused may be taken into consideration in such inquiry or trial, for or against him in any other inquiry into, or trial for, any other offence which such answers may tend to show he has committed."

However, Section 342(2) itself makes a distinction between answer and refusal to answer, when it says in sub-section 2 "but the Court may draw such inference from such refusal or answers as it thinks just". Thus, at most, a false answer may be used to prove by "considering the matters before it", but silence or refusal to answer cannot be considered by the court for any adverse inference in light of Article 20(3). More importantly, in this case, the constitutionality of the concerned portion highlighted above was not under challenge. The court held that the validity of such provision could still be challenged to be *ultra vires*. The court said:

47. If the particular provisions were unconstitutional, it was open to the appellants to Ignore it because it would be void and to refuse to answer the question

²⁵*Noor Aga v. State of Punjab* (2008) 16 SCC 417.

²⁶*Gangadhar v. State of M.P.* (2020) 9 SCC 202.

²⁷*Banwari Lal v. State* AIR 1956 All 385.

or to give a false answer to it; if the Court thought of drawing an adverse inference against them from their refusal or from their giving false answers, they could, plead that the provision (conferring the right to draw an adverse inference) was ultra vires.

However, this case is no more relevant inasmuch as Section 313 has omitted the drawing of adverse inference. Thus, the Allahabad High Court has erred in its reasoning, and in any case cannot be used to uphold the constitutional provisions of Section 342. In any case, by the words of the very court itself, a person has power to ignore the questions posed after removal of the provision in the new act under Section 313.

Another Allahabad High Court judgement in *Ram Swarup v. State*²⁸ had an opportunity to deal with reading Section 342 in light of the newly inserted Section 342A. Since the instant matter was concerned with “specimen writing”, it thus arrived at a different conclusion. While discussing oral evidence, under which false answers and silence can be covered, the court rightly foreseeing in their wisdom the conflict which could arise in light of Section 342A, and the need for omission of the provision relating to drawing an adverse inference, the court noted:

17. It is however open to the legislature to enact that no adverse inference be drawn, and consequently we find the new Section 342-A of the Cr. P. C, which allows an accused to be a competent witness for the defence in disproof of the charges made against him provided he does so on his own written request, definitely forbidding the parties or the Court to make any comment on, or draw any presumptions from, his omission to appear as a defence witness.

18. There is a similar provision in Section 7 of the Prevention of Corruption Act. Nevertheless it is clear from a reading of Section 342-A, Cr. P. C. that the prohibition is confined to the omission of the accused to furnish oral evidence; the statute does not forbid the drawing of appropriate presumptions in the case of evidence other than oral evidence. (Emphasis added)

ANALYSING THE DOCTRINE OF THE “MISSING LINK”

Before the promulgation of the New Code, the position of the judiciary was unclear. The courts in passing have remarked upon the absurdity created by the existence of Section 342 despite the aforementioned changed. For once, the other benches of different courts may be excused for not realizing this since it may not have been brought to their attention, or for not even appreciating the Apex Court’s judgement in *Shri Ram v. State of U.P.*²⁹ India is a common law country, which means that the position laid down by the judiciary ought to be followed in subsequent judgements. This doctrine of *stare decisis* has also been made explicit in the Indian Constitution under Article 141, which provides that the “law declared by the Supreme Court shall be binding on all courts within the territory of India.”

²⁸*Ram Swarup v. State* AIR 1958 All 119.

²⁹See note 17.

However, even after the statutory position being made clear in 1973 and several Supreme Court judgements clarifying the legal position, the Hon'ble Supreme Court and High Courts in plethora of judgements have, either directly or indirectly, without considering Article 20(3) of the Constitution, laid down the doctrine of the missing link. When the prosecution has been able to establish the case for the most part, but has not been able to explain a certain set of adverse facts, the silence of the accused or not explaining the said circumstance has been taken as the "missing link" for establishing the facts of the prosecution, instead of keeping the burden on the prosecution to establish the said facts. Based on the current legal regime as established above, it would be erroneous on the part of the courts to fortify the prosecution case by making such adverse inferences by the silence of the accused.

Of course, in certain judgements, the Hon'ble Supreme Court has sought to restrict the use of this doctrine implicitly, by holding that the chain of the prosecution case needs to be complete by itself. For instance, in the case of *Sharad Birdhichand Sarda v. State of Maharashtra*,³⁰ it was reaffirmed that when various other evidence and links are complete within themselves, then a false plea or defence may be used to lend assurance to the court. So ordinarily while a false statement by an accused may not be used by itself as evidence or circumstance against an accused, but if the case of the prosecution is complete within itself and does not suffer from any infirmity, then the false statement furnished by the accused can be used against him. This position is similar to that of the UK post-1994, wherein silence or false statements may be allowed to be used as evidence to lend assurance to prosecution evidence. This has also been upheld by the European Union where it has been held to not violate Article 6 of the European Convention inasmuch the discretion to use silence as evidence was exercised solely by the jury and not influenced by the judge (*Condron v. The United Kingdom*).³¹ However, as aforementioned, the Indian position is very clear on the subject, and is significantly different from the UK legislature.

Still, there are several Supreme Court judgements wherein the constitutional provisions under Article 20(3) or statutory provisions under Section 313 of the Code of Criminal Procedure, 1973 have not been considered. A multitude of Supreme Court judgements are highlighted below, along with the oversight committed by the courts in the particular judgements.

Very recently, in a recent three-judge bench judgement in *Prahlad v. State of Rajasthan*,³² the Hon'ble Supreme Court without making any reference to Article 20(3) or Section 313 of the New Code after amendment and deletion of the provisions in the erstwhile Section 342 of the Old Code, held that:

11. No explanation is forthcoming from the statement of the accused under Section 313 Cr.P.C. as to when he parted the company of the victim. Also, no explanation is there as to what happened after getting the chocolates for the victim. *The silence on the part of the accused, in such a matter wherein*

³⁰*Sharad Birdhichand Sarda v. State of Maharashtra* (1984) 4 SCC 116.

³¹*Condron v. The United Kingdom* (2001) 31 EHRR 1.

³²*Prahlad v. State of Rajasthan* (2019) 14 SCC 438.

he is expected to come out with an explanation, leads to an adverse inference against the accused. (Emphasis added)

Despite the “amendment”, these judgements have continued to read Section 313 in the same manner as Section 342, and some of them have even relied on cases based on Section 342 of the Old Code.

This similar line of thought and argument has been seen in multiple past judgements of the Hon’ble Supreme Court, such as in the cases of *Nagesh v. State of Karnataka*,³³ paragraph 32; *Rafiq Ahmad v. State of U.P.*,³⁴ paragraph 35; *Rajesh Bhatnagar v. State of Uttarakhand*,³⁵ paragraphs 35 and 38; and *Ramnaresh & Ors v. State of Chhattisgarh*,³⁶ paragraph 49.

These judgements have viewed the provisions of Section 313 in the 1973 Code without considering the deleted portion under Section 342 of the Old Code to mean that such an inference is possible. However, when one views Section 313 in light of the past Code, the legislative intent becomes clear and any ambiguity is removed.

Although Hon’ble Courts interpreted Section 313 CrPC in these cases, they have failed to notice the following deleted portion from the language of Section 342 of the CrPC: “the Court may draw such inference from such refusal or answers as it thinks just”. In the said judgement the Hon’ble Court also ignored Section 315(1)(b) which is akin to Section 342A of the Old Code, as aforementioned.

In the case of *State of Karnataka v. Suvarnamma*,³⁷ the Apex Court has explicitly held at paragraph 10 that an adverse inference can be drawn under Section 313 of the New Code, and the same would not be in contradiction to Article 20(3) of the Constitution:

Once the prosecution probalibilises the involvement of the accused but the accused takes a false plea, such false plea can be taken as an additional circumstance against the accused. Though Article 20(3) of the Constitution incorporates the rule against self-incrimination, the scope and the content of the said rule does not require the court to ignore the conduct of the accused in not correctly disclosing the facts within his knowledge. When the accused takes a false plea about the facts exclusively known to him, such circumstance is a vital additional circumstance against the accused.

In the judgements of *Ashok Kumar v. State of Haryana*,³⁸ as well as *Manu Sao v. State of Bihar*³⁹ at paragraph 10, the Court dealt with false statements and not refusal to answer. However, both of these elements have been accorded the same degree of treatment via the omission in the New Code, and thus the judgement requires reconsideration.

³³*Nagesh v. State of Karnataka* (2012) 6 SCC 477.

³⁴*Rafiq Ahmad v. State of U.P.* (2011) 8 SCC 300.

³⁵*Rajesh Bhatnagar v. State of Uttarakhand* (2012) 7 SCC 91.

³⁶*Ramnaresh & Ors v. State of Chhattisgarh* (2012) 4 SCC 257.

³⁷*State of Karnataka v. Suvarnamma* (2015) 1 SCC 323.

³⁸*Ashok Kumar v. State of Haryana* (2010) 12 SCC 350.

³⁹*Manu Sao v. State of Bihar* (2010) 12 SCC 310.

In the case of *Harivadan Babubhai Patel v. State of Gujarat*⁴⁰ at paragraph 28, the Hon'ble Supreme Court relied on the doctrine of "missing link" and held that when the prosecution was able to establish the case for the most part, but has not been able to explain a certain set of facts, the silence of the accused can be used as the "missing link" for establishing the facts of the prosecution. Further, in *Shankarlal Gyarasilal Dixit v. State of Maharashtra*⁴¹ paragraph 30 the Hon'ble Court held:

Besides, falsity of defence cannot take the place of proof of facts which the prosecution has to establish in order to succeed. A false plea can at best be considered as an additional circumstance, if other circumstances point unfailingly to the guilt of the accused.

The Supreme Court in *State of Maharashtra v. Suresh*⁴² at paragraph 27 has also applied the doctrine of missing link. However, this case did not rely or mention either Section 313 of the CrPC, 1973 or Article 20(3) of the Constitution. It is to be noted that this case pertained to a rape matter.

In *Munna Kumar Upadhyay v. State of A.P.*⁴³ at paragraphs 32–36, the Apex Court misinterpreted Section 313 of the New Code and held that it is now established that an adverse inference can be drawn from silence or false statements.

Apart from relying on incorrect reasoning, this court also relied on the judgement delivered in *Asraf Ali v. State of Assam*⁴⁴ (which further relied on *S. Harnam Singh v. The State (Delhi Administration)*)⁴⁵ to come to the conclusion in the cited paragraphs.

However, the cited portion of these judgements as relied on by the Hon'ble Supreme Court only held that absence of posing specific questions and indication of inculpatory material by court to an accused in its relevant facts only weakens the case of the prosecution, and vitiates the trial. The Supreme Court's reasoning is on a different provision under Section 313 of the New Code, and is for the benefit of the accused. How the Supreme Court used this reasoning to arrive at the conclusion that an adverse inference can be drawn against the interest of the accused, is beyond the authors' understanding.

VALIDITY OF THE CITED JUDGEMENTS, AND STANCE OF THE INDIAN JUDICIARY

The judgements which have been set out clearly appear to suffer from the doctrine of *sub silentio* or are *per incuriam*, being passed either due to non-consideration and non-appreciation of the correct law or decided case laws of the Hon'ble Supreme Court.

The words *per incuriam* literally translate to "through lack of care", and refer to a judgement which has been adjudicated without reference to a statutory provision or

⁴⁰*Harivadan Babubhai Patel v. State of Gujarat* (2013) 7 SCC 45.

⁴¹*Shankarlal Gyarasilal Dixit v. State of Maharashtra* (1981) 2 SCC 35.

⁴²*State of Maharashtra v. Suresh* (2000) 1 SCC 471.

⁴³*Munna Kumar Upadhyay v. State of A.P.* (2012) 6 SCC 174.

⁴⁴*Asraf Ali v. State of Assam* (2008) 16 SCC 328.

⁴⁵*S. Harnam Singh v. The State (Delhi Administration)* (1976) 2 SCC 819.

earlier relevant binding precedent.⁴⁶ While normally a judgement of the Apex Court is binding on the lower courts in India (by virtue of Article 141 of the Constitution), a judgement decided *per incuriam* ceases to be so.⁴⁷

The doctrine of *sub silentio* involves non-appreciation and non-application of the Court's mind to the correct position of law. This could be due to failure on the part of either of the parties to bring it to the notice of the court, or even the failure of the court to do so. Thus, when a judgement is passed without such conscious determination on that particular and relevant point of law, it cannot be considered as binding, and thus needs to be looked into again.⁴⁸

Despite the law and jurisprudence being absolutely clear on the subject, the attention of the courts has not been directed to the statutory changes so made to Section 313(3) of the New Code. The earlier decisions have failed to appreciate the insertion of Section 342A in the Old Code by the Amendment of 1955. In several post-1973 cases as well, the attention of the Court has not been drawn to the significant changes in Section 313(3) of the New Code in place of Section 342(2) of the Old Code, and have continued to read Section 313 of the New Code akin to Section 342 of the Old Code. Almost none of the cases have interpreted this right in light of Article 20(3). The Indian Courts have time and again failed to appreciate this particular right and have overlooked it on several instances.

CONCLUSION

It is very evident that that on several occasions spanning decades, the Indian courts have both implicitly and explicitly held that the silence of the accused would lead to an adverse inference. This is in clear contravention of Article 20(3) of the Constitution of India, as well as several statutory provisions of the CrPC, as aforementioned.

All these cases which have been cited were presided over by the top judges of the highest court in India. If these finer points are not even appreciated by the Apex Court of the country, one can only imagine how this "right to silence" would be dealt with at the lower levels.

Another related area of concern could be particular situations where a client was advised by the lawyer to remain silent on the bench. In our opinion, it does not seem fair that a client is made liable for the fault of his lawyer. This has in fact taken place in the UK, where even the solicitor was cross-examined as to the veracity about his advice to the client. This creates problems of efficiency as well, a problem also noticed and criticized by the Law Commission in its 180th report.

Towards the end, it is important to mention that certain lacunas in the law still persist. An important aspect would be the degree of silence. Suppose an accused answers along the lines of "I don't know". Would there be a difference in his verbal denial and his silence, or would the statement be considered as a false statement? This distinction was also pondered over by the 180th Law Commission of India Report in vain, where it noted:

⁴⁶*Government of A.P. and Another v. B. Satyanarayana Rao (dead) by LRs. and Others* (2000) 4 SCC 262.

⁴⁷*Siddharam Satlingappa Mhetre v. State of Maharashtra* (2011) 1 SCC 694.

⁴⁸*M/S. A-One Granites v. State of U.P.* AIR 2001 SCW 848.

It is imperative to understand the difference between the two, because while the legislature has treated both in the same footing under section 313 of the New Code, certain judgements have made a distinction between the two. (Law Commission of India 2002).

A country like India, which boasts the title of being the “World’s Largest Democracy”, should naturally extend fundamental rights to everyone claiming within it – including an accused person. The jurisprudence on the rights of an accused is firmly established, and the right of silence assumes a very important position in this regard. The judiciary, being one of the fundamental pillars in enabling such rights, is in fact expected to broaden and widen the scope of this right. While that could be a mammoth task involving years and decades of work, the least that can be done is to accord the constitutional and statutory provisions accorded to the accused.

In the context of criminology, an accused is like a soldier inside a fortress, waiting for the inevitable war to begin. The soldier, while mighty and strong individually, is but a mere speck of dust compared to the horde of battle-hardened veterans comprising of the prosecution and the complainant. The fortress walls are the fundamental rights of the accused – the bare minimum keeping him safe from slaughter at the hand of his enemies. The judiciary is the shield which the soldier holds in one hand; the last line of defence lest the walls break down and hell descend on him. If the judiciary is unable to protect the soldier’s rights, and should the shield break, the metallic clang as the sword cleaves the shield in two would be the lament of the authors and countless others, who rely on the shield as their ultimate tool for protection.

Thus, it is the humble opinion of the authors that a refusal to answer a question as a ground to implicate a person and draw adverse inferences is in any case not tenable under Indian law, and the Indian Courts have not appreciated and noticed these delicate points of law on several occasions. The majority of these judgements suffer from either being *per incuriam*, or attract the doctrine of *sub silentio*. It is imperative that more and more courts take cognizance of the correct position of law as well as the judiciary itself. The Indian courts, being the guardians and defenders of the people, ought to continue to grant people their constitutional and statutory rights, which they most certainly deserve after centuries of being deprived of their fundamental “right to silence”.

Acknowledgements. While the list of people who ought to be acknowledged is long, for the sake of brevity the authors would like to acknowledge and appreciate their respective family members and friends, for reviewing multiple drafts and their patient support throughout the entire process. We are also grateful to the editorial team for their constant guidance.

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TRANSLATED ABSTRACTS

Abstracto

La Constitución india, siendo la más larga del mundo, busca otorgar al "derecho al silencio" el estatus de un derecho fundamental, un umbral particularmente alto desde el cual se permite poca o ninguna derogación. Esta garantía constitucional también ha recibido un respaldo legal, en el que el silencio de un acusado no puede utilizarse para inferir una inferencia adversa en su contra. Como país que se proclama a sí mismo como un campeón de la libertad personal, es desalentador ver que la realidad básica es decepcionante. La mayoría de las sentencias todavía siguen la jurisprudencia draconiana anterior a la Constitución. A menudo, el silencio de un acusado se utiliza como un "eslabón perdido" por parte de la fiscalía para establecer la culpabilidad de un acusado. Esto ocurre ya sea porque las disposiciones correctas no se presentan ante los tribunales o porque los tribunales fallan en derogación de las disposiciones legales y la jurisprudencia establecida. En este artículo, los autores buscan dilucidar la posición correcta de la ley teniendo en cuenta su evolución en la India y otras jurisdicciones y luego establecer cómo la India continúa sin hacer efectivo este derecho mediante el análisis de varias sentencias de la Corte Suprema de Justicia del país.

Palabras clave derecho al silencio, *per incuriam*, *sub silentio*, eslabón perdido

Abstrait

La Constitution indienne, étant la plus longue du monde, cherche à accorder au « droit au silence » le statut de droit fondamental, un seuil particulièrement élevé à partir duquel peu ou pas de dérogation est permise. Cette garantie constitutionnelle a également reçu un fondement légal, selon lequel le silence d'un accusé ne peut être utilisé pour tirer une inférence défavorable à son encontre. En tant que pays qui se présente comme un champion de la liberté individuelle, il est décourageant de voir que la réalité du terrain est décevante. La plupart des jugements suivent encore la jurisprudence draconienne pré-constitutionnelle. Souvent, le silence d'un accusé est utilisé comme « chaînon manquant » par la poursuite pour établir la culpabilité d'un accusé. Cela se produit soit parce que les dispositions correctes n'ont pas été portées à la connaissance des tribunaux, soit parce que les tribunaux ont statué en dérogation aux dispositions légales et à la jurisprudence constante. Dans cet article, les auteurs cherchent à élucider la position correcte de la loi en tenant compte de son évolution en Inde et dans d'autres juridictions, puis à établir comment l'Inde continue de ne pas donner effet à ce droit en analysant empiriquement plusieurs arrêts de la Cour suprême du pays.

Mots-clés droit au silence, *per incuriam*, *sub silentio*, chaînon manquant

抽象的

印度宪法是世界上最长的宪法，它试图赋予“沉默权”一项基本权利的地位，这是一个特别高的门槛，几乎不允许减损。这一宪法保障也得到了法定支持，其中被告的沉默不能被用来对他作出不利的推论。作为一个自诩为个人自由捍卫者的国家，看到现实令人失望，令人沮丧。大多数判决仍然遵循严格的宪法前判例法。通常，控方会利用被告的沉默作为“缺失环节”来确定被告的罪行。发生这种情况的原因可能是没有将正确的规定提交法院通知，或者是因为法院判决减损法定条款和已解决的判例法。在本文中，作者试图通过考虑法律在印度和其他司法管辖区的演变来阐明法律的正确立场，然后通过实证分析印度最高法院的几项判决来确定印度如何继续未能实现这一权利。国家。

关键词：沉默权, *per incuriam*, *sub silentio*, 缺失环节

نبذة مختصرة

يسعى الدستور الهندي، باعتباره الأطول في العالم، إلى منح "الحق في الصمت" مكانة الحقوق الأساسية، وهي عتبة عالية بشكل خاص لا يسمح باي انتهاك من هذا. كما حظيت هذه الضمانة الدستورية بتأييد قانوني، حيث لا يمكن استخدام صمت المتهم لاستنتاج استدلال سلبي ضده. كدولة تشيد بنفسها على أنها نصيرة للحرية الشخصية، من المحبط أن نرى حقيقة الأرض مخيبة للآمال. لا تزال معظم الأحكام تتبع الاجتهاد الصارم لما قبل الدستور. في كثير من الأحيان، يستخدم صمت المتهم "كحلقة مفقودة" من جانب الادعاء لإثبات ذنب المتهم. يحدث هذا إما بسبب الأحكام الصريحة التي لم يتم تقديمها أمام إشعار المحاكم أو بسبب المحكم التي تفصل في عدم التقيد بالأحكام القانونية وقوانين القضايا المبتكرة. في هذه المقالة، يسعى المؤلفون إلى توضيح الموقف الصحيح للقانون من خلال مراعاة تطوره في الهند والولايات القضائية الأخرى، ثم تحديد كيفية استمرار الهند في عدم تفعيل هذا الحق من خلال التحليل التجريبي لعدة أحكام صادرة عن المحكمة العليا للبلد.

الكلمات المفتاحية: الحق في الصمت، في حالة الغش، الصمت الفرعي، الرابط المفقود

Sushil Kumar Jain is a senior advocate practising at the Supreme Court of India. With more than 45 years of experience in the field, he has represented more than 15,000 cases in the Supreme Court. He served as President of the Supreme Court Advocates-on-Record Association from 2007 to 2009, and then again from 2011 to 2013. He has served as the Additional Advocate General for the State of Rajasthan for a period of 2 years, and has served as the standing counsel for the Commercial Taxes Department for the State of Rajasthan, along with several State and Central Government Corporations.

Sujay Jain is a final-year student at Gujarat National Law University (GNLU). He has participated in several renowned moot court competitions such as the Foreign Direct Investment (FDI) International Arbitration Moot, and has served as an editor for several blogs. He has interned with some of the finest senior advocates of India, as well as leading law firms such as AZB & Partners and J. Sagar Associates (JSA). Post-graduation, he aspires to undertake a Judicial Clerkship at the Hon'ble Supreme Court of India, and eventually set up his own practice in due time. He is passionate about increasing access to justice, and believes that lawyers have a pivotal role to play in shaping the dynamics of a nation.

Cite this article: Jain, S. K. and Jain, S. 2022. "Right to Silence": A Commentary on Misinterpretation and Violation by the Indian Judiciary. *International Annals of Criminology* 60, 118–139. <https://doi.org/10.1017/cri.2022.8>