# RIGHT AGAINST SELF-INCRIMINATION: BANGLADESH'S POSITION COMPARED WITH THE USA AND INDIA

**Mohammd Zubair***

**ABSTRACT**

*The Constitution of the People's Republic of Bangladesh has started its journey, being the supreme law of the land, back in the year 1972. The high ideals of upholding rule of law, due process, fundamental human rights and freedom, equality and justice have been the core concern from its very inception. Among other salient features of this Constitution, the protection in respect of trial and punishment under Article 35 of the Constitution has unarguably glorified its locus in ensuring the justice to the people. One of the protections provided in this Article is- the right of an accused to be protected against self-incrimination in a particular criminal case. In Bangladesh, arbitrary arrest, use of force, inducement, threat and custodial torture during interrogation are often being used as the tool by police to make statements or to make confession by the accused which are self-incriminatory in nature. This paper contends that whereas the protection against self-incrimination or the right to remain silent has been developed so profusely in the USA and in India by case laws over the years, the safeguard as mandated by Article 35(4) of the Constitution of Bangladesh against self-incrimination has not been harboured duly in our country despite the existence of a landmark decision of BLAST vs. Bangladesh in this regard. This paper concludes by arguing that, misuse of law and extended use of power by the law enforcing and security agencies, non-incorporation of guidelines provided by the Supreme Court into the legal instruments, unwillingness of the executive organ of the State, lack of knowledge among the people about their rights, inefficient lawyering, lack of administrative reforms and training in police department, non-application of judicious mind in interpreting laws as well as rights and deficiencies in frequent use of existing case laws to promote and popularise this right are some of the reasons behind the frequent breach of this constitutional protection.*

## I. INTRODUCTION

The criminal justice system in Bangladesh is guided by some cardinal criminal standards of proof. One of these standards of criminal justice system is- a person is considered innocent unless proven guilty. The Constitution of Bangladesh, likewise other human rights documents of the world, envisaged such protections to those persons who are accused of any sort of crimes under

* **Muhammad Zubair**, LL.B, & LL.M, University of Dhaka, is currently working as Research Assistant at Bangladesh Institute of Law and International Affairs (BILIA). The author is also an Advocate at Dhaka Judge Court.

any law. Article 35 of the Constitution of Bangladesh enumerated certain safeguards to the person in respect of trial and punishment. In clause four (4) of this Article, the privilege against self-incrimination in a criminal proceeding is provided to the accused. The rationale behind incorporating this protection is to accommodate the fundamental principle of common law legal tradition that the prosecution, not the accused, is under obligation to prove the case beyond reasonable doubt and the accused cannot be compelled to make any statement in support of accusation. Besides, clause five (5) of the same Article prohibits any type of torture, cruel, inhuman and degrading punishment to any person. So, considering the accused as guilty while interrogating, any kind of coercion, threat, and promise by the police or other concerned authority to extract statements which are equivalent to self-incrimination is not in consonance with the underlying philosophy of the Constitution. Despite the existence of constitutional protections against self-incrimination and torture as discussed above, the prevalence of arbitrary arrest by the police misusing the power of arrest without warrant under section 54 of the Code of Criminal Procedure, 1898 (hereinafter referred as CrPC, 1898), custodial torture in the name of interrogation[1] under section 167 of the CrPC, 1898 and extraction of confession are definitely undermining the fundamental rights (guaranteed by the Constitution) of a citizen. Such interrogation in police custody is in fact an opposite idea of Constitutional mandate under Article 35(4) as well as Article 35(5) of the Constitution. Submitting that the voluntary confession in respect of a crime taken from an accused by the police in the presence of a Magistrate following all the requirements of due process, is a very valuable piece of evidence; this paper tries to sketch out the most feasible way and procedure of admitting such confession by comparing the practices and development made in this regard by case laws in other countries like the USA and India. It also shows how the common law practice of 'voluntary test' in the USA in admitting a particular confession given in police custody has evolved over the years and how the people of all ages of the USA get acquainted with their 'right to remain silent' enunciated in *Miranda vs. Arizona*[2] by frequent practice. This paper also discusses that, in spite of landmark decision of *BLAST vs. Bangladesh*[3] by the High Court Division of Bangladesh suggesting some guidelines to redress the arbitrary arrest, remand and torture in police custody, it could not initiate the norm creating practice in our country as like '*Miranda warning*' did in the USA. The unwillingness of the executive organ of the state to give effect to those guidelines together with other reasons remains as the key reason in this regard.

---

1 Popularly known as 'Remand', sought by the investigation officer from the Magistrate to interrogate the accused in police custody.

2 384 U.S. 436 (1966).

3 55 (2003) DLR (HCD) 363.

The core discourse of this paper is centering the forceful confession and related provisions of law since there always lies the possibility of being self-incriminated by such extraction of confession from the accused. So, the precursors of such self-incriminatory forceful confession such as arbitrary arrest, torture, interrogation in the police custody are discussed elaborately. This comparative study covers the development in the USA and India as both these countries follow the common law legal tradition and the accusatorial trial system as like Bangladesh.

## II. CONCEPT OF SELF-INCRIMINATION AND ITS DEVELOPMENT

Self-Incrimination means any statement made by any person which leads the maker of it "to an accusation or charge of crime; to involve oneself or another [person] in a criminal prosecution or the danger thereof."[4] The earliest expression of this privilege in English law was with the trial of John Liburne in 1637 in England. Liburne was brought to trial for smuggling some banned religious booklets. He refused to take the oath and answer truthfully to any questions put to him by the court. He contends that both the "law of God and the law of the land" support his right against self-accusation. Liburne was ultimately whipped and punished in public for refusing to take the oath as required by the court. But the parliament was compelled to declare Liburne's punishment illegal following huge public outcry and the government eventually recognized a person's right against self-incrimination.[5] Until the later part of the eighteenth century, the fundamental protection for the defendant in common law criminal adjudication was not the right to silent as it is now in the USA, rather the opportunity to speak as the defendant's counsel at that time could rarely examine the prosecution case. [6]

However, many countries under the then English colonial rule had begun to incorporate this right against self-incrimination into their jurisdiction after this Liburne case in England. There are 108 countries and jurisdictions that currently have Miranda-type warnings, which include the right to remain silent

---

4 Black's Law Dictionary (5th ed.). 1979 at p. 690

5 Sousanis, John., Grunow, Elizabeth Shaw., Pendergast, Tom., Pendergast, Sara., *Constitutional Amendments: From Freedom of Speech to Flag Burning,* 3 Volume Set, Edition 1. 1st, U.X.L (2001) at p. 101.

6 Helmholz, Richard H., "Origins of the Privilege against Self-Incrimination: The Role of the European Ius Commune"*,* 65 (1990) *New York University Law Review*, pp 962-990, at p. 981, available at: <https://chicagounbound.uchicago.edu/cgi/ viewcontent. cgi?article=2492&context=journal_articles#:~:text=Current%20orthodoxy%20holds%20that%20the,tradition%20to%20limit%20religious%20freedom>[Last accessed on June 18, 2019].