The Right of Silence and Privilege against Self-Incrimination in Criminal Proceedings: An Appraisal of the Ethiopian Legal Framework

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Abstract

Individuals can, theoretically, lead their lives without ever having to declare any kind of information or testimony to any other person or institution. However, there are a number of occasions whereby they may be lawfully required to provide information or testimony to a state. One such situation is during a criminal proceeding. In view of that, anyone suspected or accused of crime may be confronted with state authorities and thus may be questioned as to an alleged crime. Yet, persons suspected or accused of an alleged crime are entitled to certain minimum basic guarantees during criminal proceedings. Two such guarantees are the right of silence and the privilege against self-incrimination. The precise reach of the right to silence and the privilege against self-incrimination in criminal proceedings is both unclear and thorny. This article examines what they mean according to international standards. It primarily appraises the Ethiopian legal framework relating to such rights in light of the experiences of different countries of various legal traditions and some major international and regional human rights instruments.

Key Terms: the right of silence, self-incrimination, criminal proceedings, Ethiopia

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Introduction

The right of silence and the privilege against self-incrimination give protection to individuals against both the executive and judicial arms of governments not to be compelled to give evidence or to supply information that would tend to be self-incriminatory. This means that public authorities are prohibited from engaging in any form of coercion or compulsion, whether direct or indirect, physical or psychological, in obtaining evidence during criminal proceedings. The right of silence is the right of any individual not to speak or answer questions or provide information during police interrogations and trial; it is a protection given to individuals during criminal proceedings against any coercion and adverse consequences of not speaking (remaining silent).[1] The term "privilege" has different meanings. A narrower use of the term refers to "rules preserving a right to keep certain relevant information [and some other evidence] from one's adversaries…" and includes the privilege against self-incrimination.[2] As will be discussed in greater detail, the privilege against self-incrimination is currently considered as not merely a

[1]Asche, A. *et al*, 'The Right to Silence', 2002, p.4, retrieved from < http://lawdigitalcommons.bc.edu/lsfp/226 > [Accessed on 14 May, 2012]. [Hereinafter Asche *et al]*. However, it is not the right not to be questioned rather it is a right not to be compelled to answer questions and produce documents, though the later is controversial.

[2] Friedman, R., *The Elements of Evidence*, 3rd ed., West, a Thomson Business, USA, 2004, p.378.

rule of evidence but rather as a substantive human right.[3] Hence, like the right to silence, the privilege against self-incrimination in this article is to be understood as one of the substantive rights in the field of human rights law. The privilege against self-incrimination, which has much similarity to the right of silence, can be understood as "…an immunity against compulsion to give evidence or to supply information that would tend to prove one's own guilt."[4] That is, it is the right not to be compelled to incriminate oneself and to be protected against any pressure to make a statement or produce some evidence.[5] The right of silence and privilege against self-incrimination may seem one and the same thing. However, there are many areas of difference between the two that will be dealt with in this article.

The notion that persons suspected or accused of committing/omitting a crime are entitled to certain minimum basic guarantees, such as the right of silence and the privilege against self-incrimination, is incorporated in the different human rights instruments. The right of silence and the privilege against self-incrimination, apart from ensuring fair trial in criminal proceedings, are guaranteed as part of substantive human rights in many human rights agreements. Thus, they are generally recognized in international and regional

[3] Atkinson, R., 'The Abrogation of the Privilege against Self-incrimination', *Queensland Law Reform Commission*, 2004, retrieved from <LawReform.Commission@justice.qld.gov.au > [Accessed on 14 May, 2012]. [Hereinafter Atkinson].
[4] Ibid, p.2.
[5] Trechsel, Stefan, *Human Rights in criminal Proceedings*, Vol.XII/3, Oxford University press Inc., New York, USA, 2009, p.341. [Hereinafter Trechsel].

human rights instruments. They are also found in the domestic laws of many countries of the world. It is self-evident that they lie at the heart of the concept of a fair procedure in criminal proceedings. Consequently, they give safeguards to many other rights of individuals whenever they are confronted with public authorities.

The rights are grand constitutional rights to be protected during criminal proceedings in Ethiopia. The 1995 Federal Democratic Republic of Ethiopian (FDRE) Constitution and some other domestic laws, as well, have provided for these two rights. A critical appraisal of such laws dealing with these rights will be made in section three of the article. Despite the clear acceptance of the rights in Ethiopia, there are many debatable and unsettled issues relating to the right of silence and the privilege against self-incrimination. One such issue is the FDRE Constitution, in Art.19 (2), does not clearly impose an obligation on public authorities to warn a suspect (or an accused) of his right of silence. The Constitution merely requires the authorities to inform a suspect (or the accused) the consequence of making of statements ―police are only obligated to explain that any statement to be made by an arrested person may be used as evidence against him in court of law. But, warning a suspect or an accused about the consequences of his statements is not sufficient to protect the right of silence. It is also necessary to warn him, from the outset, that he has the right to remain silent. This right may be fully exercised if it is additionally accompanied by warning. Without this

additional warning, any confession or admission by a suspect or an accused is likely to be made under compulsion. Had a suspect or an accused been informed that he could remain silent, he might avoid confession or admission of guilt. An awareness of the consequences of making statements cannot be an assurance of real understanding and intelligent exercise of the right of silence. That is, a suspect or an accused may make statements without being aware of his right to remain silent.

Another dilemma with respect to the right of silence is that the Constitution does not explicitly give the right to accused persons. Unlike for arrested persons, there is no counter provision mentioning this same right in Art.20 of the Constitution which deals with accused persons. Does this mean that accused persons would not be entitled to the right to remain silent? This question will be scrutinized in section three of this article. Another issue on the subject of the right of silence is in relation to its scope. Art.19 (2) of the Constitution talks only about statements ―evidences having testimonial nature. Is the protection against compulsion through this right limited to statements? This is also a problem in case of the privilege against self-incrimination. Can a suspect or an accused person be protected against compulsion to produce real or physical evidence?

There may be also many doubts relating to the privilege against self-incrimination in Ethiopia. For instance, can threats, promises, inducements or

even tricks be considered as coercion within the meaning of Art.19 (5) of the Constitution so that individuals would be protected against such improper methods (of obtaining evidence) by the privilege against self-incrimination? Can there be an exception to the privilege against self-incrimination in Ethiopia in case of public interest like for terrorism cases? The 2009 Ethiopian Anti- Terrorism Proclamation No.652, in Art.23 (1), provides that "…intelligence report prepared in relation to terrorism, even if the report does not disclose the source or the method it was gathered," shall be admissible in court. By virtue of this provision, any evidence gathered in whatever method, be it through torture, threat, promise, inducement or coercion, seems to be admissible before court of law in case of crimes of terrorism. Can public safety or interest justify torture which is one of the very few absolute rights? Should a suspect or the accused not always be protected against torture through the privilege against self-incrimination even when the case would involve public interest?

The aim of this article is, therefore, to appraise the Ethiopian legal framework relating to the right of silence and the privilege against self-incrimination in light of some most important international and regional human rights instruments. In order to shed light on issues about which the FDRE Constitution is not clear, an attempt has been made, where appropriate, to cite the experiences of foreign jurisdictions that may, at least in the opinion of the author, contribute to an understanding of the right of silence and privilege

against self-incrimination in the Ethiopian criminal justice system. The primary objective of this article would be to initiate a debate within the academic circle whose concerted effort could no doubt facilitate the enhancement of understanding and proper application of the right of silence and the privilege against self-incrimination in Ethiopia during criminal proceedings.

1. Right of Silence and The Privilege against Self-Incrimination in Criminal Proceedings

1.1. Right of Silence

1.1.1. Definition

The right of silence, also called the right to remain silent, can be defined as "…the absence of an obligation to speak… [or the right] … to withhold information from … authorities… [and thus it is] …the absence of any legal obligation to help … authorities" in producing evidence during criminal proceedings.[6] It is most often the "…right of the accused or the defendant to refuse to comment or provide an answer when questioned, either prior to or during legal proceedings in a court of law."[7] The right of silence is, hence, the right of any individual, mainly the right of a suspect or an accused (and also a

[6] Nyeap, S., 'Curtailment of Right to Silence: Pre-trial Disclosure of Defence', 2005, p.2, retrieved from <http://www.isrcl.org/Papers/van%20Dijkhorst.pdf> [Accessed on 14 May, 2012]. [Hereinafter Nyeap].

[7] Right to Remain Silent,
retrieved from < http://www.mirandarights.org/righttoremainsilent.html> [Accessed on 14 May, 2012].

witness), in a criminal proceeding, not to speak. Widely, "[t]he right to remain silent includes the right to refrain from making both oral and written statements."[8] However, a suspect or one accused of a crime is not always entitled to withhold all types of information. Points relating to the limits or scope of right of silence will be further discussed in sub-section 1.1.4.

The right of silence is a combination of a number of rights and privileges recognized by a law. Some people claim that there is no such particular or single right to be called "right of silence" and thus, "… there is no single entitlement that can be pointed to."[9] They argue that the "right to silence", in fact, "…is really a right not to 'self-incriminate', or privilege against self-incrimination, i.e. not to provide … evidence that can later be used against the suspect in court."[10] But, though they might seem similar, there exists a distinction between the right of silence and privilege against self-incrimination.

> *The right of silence refers to a disparate number of immunities, including a specific immunity from having adverse comment made on failure to give evidence at trial. Each of these immunities is of great importance, but the fact that they are all important and that they are all concerned with the protection of citizens against the abuse of powers by those investigating crimes makes it easy to*

[8] Hails, J., *Criminal Procedure*, 3rd ed., Copper House Publishing Company, USA, 2003, p.97. [Hereinafter Hails].
[9] Boyce, P., 'Privilege against Self-incrimination', 2001, p.5, retrieved from <http://www.qlrc.qld.gov.au/reports/r59.pdf-for> [Accessed on 19 May, 2012].
[10] Nyeap, *supra* note 6, p.5.

assume that they are all different ways of expressing the same principle, whereas in fact they are not.[11]

The author will try to bring to light the distinction or similarity between the right of silence and privilege against self-incrimination later in this article. The above quotation shows that the right of silence covers several immunities, like the immunity from being adversely commented for failing to give evidence or immunity against the drawing of an adverse inference from silence. Therefore, the right of silence "describes a group of rights which arise at different points in the criminal justice system".[12] Generally, the right is a protection given to a person during criminal proceedings from coercion and adverse consequences of not speaking or remaining silent. The right protects individuals against both the executive and judicial arms of governments not to be forced to speak and against adverse inference from their silence (against implied assumption of guilt).[13] However, right of silence is not the right not to be questioned rather it is a right not to be compelled to answer questions.[14] Persons suspected or accused of a crime are supposed to be confronted with state authorities and thus may be questioned as to an alleged crime. But, one cannot be compelled to answer any question which might be self-incriminatory. Why? This question will be answered while dealing with the rationales of the right as well as

[11] *Id*, pp.2-3.
[12] Asche *et al*, *supra* note 1.
[13] Hails, *supra* note 8.
[14] Dijkhorst, V., 'The Right of Silence: Is the Game Worth the Candle?, 2000, p.7, retrieved from <http://www.isrcl.org/Papers/van%20Dijkhorst.pd> [Accessed on 14 May, 2012]. [Hereinafter Dijkhorst].

may incidentally be answered in discussing any point relating to the right.

1.1.2. Origin and Historical Development

The origin of right of silence is not clearly known. Some literature indicates that the idea of the right can be traced back to the Roman times. As Skinnider and Gordon indicated, "[t]he Latin phrase *'nemo tenetur prodere seipsum'*, meaning that no person should be compelled to betray himself in public, dates back to Roman times."[15] Nonetheless, during the Roman times, the idea of the right of silence was used to prevent the abuse of power by officials and thus it was not considered as a substantive right of anyone who was suspected or accused of a crime.[16] The right was well established in common law legal tradition, particularly in England. The right of silence was not totally available to accused persons in courts during trial until 1898, the year when England adopted the Criminal Evidence Act allowing the accused to be a competent but not compellable witness.[17] That is, the accused had the right to testify under oath but not the obligation. But, the right of a suspect, in England, to refuse to answer official questions during police interrogations was clearly accepted in 1912.[18] Then, by the (late) 19th century, "[m]ost

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[15] Skinnider, E. and Gordon, F., 'The Right to Silence – International Norms and Domestic Realities', 2001, p.7, retrieved from <http://www.icclr.law.ubc.ca/Publications/Reports/Silence-BeijingfinalOct15.PDF> [Accessed on 19 May, 2012]. [Hereinafter Skinnider and Gordon].

[16] *Ibid*.

[17] *Ibid.*

[18] *Supra* note 7.

former English colonies [including USA] adopted the right to remain silent during pre-trial interviews and at trial as part of their system of criminal procedure [and]… all continue to adhere to it, though subject to some modification."[19]

It is now clear that the right of silence was developed in the adversarial common law country, England, and spread to other common law countries. Due to the increased emphasis on due process protection in international law, the right of silence also spread across continental Europe ―though initially the right was unfamiliar to inquisitorial system ―throughout the late 20th century.[20] Consequently, today, the right is recognized in major international human rights instruments and thus is adhered by many countries of various legal traditions.

1.1.3. The Right of Silence in Adversarial and Inquisitorial Systems

Under the adversarial system ―which is based on the due process model of criminal justice―the right of silence is given to every person, including persons who are suspected or accused of having committed/omitted a crime. The right is, indeed, well rooted in common law legal system and connected to the adversarial nature of the system. An adversarial system of justice greatly emphasizes on rights of individuals suspected or accused of a crime not to contribute to a case against them. Accordingly, the right of silence

[19] *Ibid.*
[20] *Ibid.*

prohibits the state/prosecution from compelling of such individuals to speak as to any evidence which might be used to determine a case at issue. That is because, in an adversarial system, suspects or accused persons "…should not contribute to their own conviction by being forced to speak."[21] Rather, it is the state which is supposed to collect evidence legally and without looking from the suspect or accused. Because, "[t]he state has…all the resources necessary to investigate a matter" and thus "[t]here is little [or no] need to interfere with the right to silence…."[22] In adversarial system, the justification for the right of silence is on the basis that the "…burden of proof…lies with the prosecution… [that]…must prove its case against the defendant beyond reasonable doubt."[23] More interestingly, the suspect or accused "…could not be called to make his defense until the prosecution has ascertained a *prima facie* case against him."[24] Besides not to be forced to speak, suspected or accused persons, in most adversarial jurisdictions, have the right not to have adverse inference drawn against them from their refusal to supply information.[25] While a suspected or an accused person, in an adversarial

[21] "Advantages and Disadvantages of the Adversarial System in Criminal proceedings" retrieved from <http://www.lrc.justice.wa.gov.au/2publications/reports/P92-CJS/consults/1-3crimadvers.pdf> [Accessed on 19 May, 2012].
[22] *Ibid*.
[23] *Ibid*; consequently, the state or prosecution bears the legal burden to prove beyond reasonable doubt that the suspect or accused has committed/omitted the crime. That is, the suspect or accused is not obliged to assist the prosecution in any way to establish his own guilt.
[24] Nyeap, *supra* note 6.
[25] *Ibid*.

system, cannot be questioned by a police, prosecutor or judge unless he chooses to do so, he may, however, freely decide to testify, in which case he would be subjected to undertaking of oath and cross-examination and thus could be found guilty of perjury.[26] Since high emphasis is given to procedural rights in adversarial system, including the safeguard of exclusionary rule, the right of silence of suspected or accused persons has an important place in criminal proceedings.

In an inquisitorial system―which is mainly based on crime control model of criminal justice ―since all the component of criminal justice system, i.e. the police, the prosecutor, the defense lawyer, the court and the suspect or accused must help to secure justice, the right to silence of a suspect or an accused is compromised.[27] In inquisitorial system, the responsibility of finding the truth lies with an official body that acts with (judicial) authority and collects evidence that would be used both for and against a suspected or accused person.[28] Accordingly, suspected or accused persons are forced to cooperate in doing justice. As a result, there is undermining of the right of silence and reversal/shifting of burden of proof. As often as not, there is

[26] "Inquisitorial System" retrieved from < http://www.answers.com/topic/inquisitorial-system> [Accessed on 19 May, 2012].

[27] Acharya, M., 'The Adversarial v. Inquisitorial Models of Justice', *Kathmandu School of Law*, Vol.1, p.1, retrieved from < http://www.nylslawreview.com/wordpress/wp-content/uploads/2012/02/Findley-article.pdf> [Accessed on 20 May, 2012]. [Hereinafter Acharya].

[28] Nyeap, *supra* note 8.

"…greater pressure on an accused to explain away certain evidence gathered against him, irrespective of how probative that evidence may be, subtly shifting the onus [burden of proof] away from the prosecution."[29] Thus, an accused person may be convicted if he fails to defend himself without the prosecution being required to prove the case beyond reasonable doubt. Usually, "[s]ilence does not make a good impression."[30] As the process is supervised by a judge/court, the refusal of a suspect or an accused, though has the right to silence, to cooperate may entail adverse inference.[31] Moreover, suspected or accused persons can be compelled to give a statement albeit the statement is not subject to cross-examination by the prosecutor and not given under oath.[32] Since they are compelled to give a statement, "…almost all continental defendants choose to testify" and also their silence influences their detention.[33]

1.1.4. Scope and Cognate Rights

The scope of the right of silence is also contentious. In fact, in most cases, the right is not an absolute right to which individuals are always entitled. A suspect or an accused has no right to withhold all types of information. For instance, he has to provide his name and some other details to the police. In this regard, "[t]here is no right to remain anonymous and therefore a person

[29] *Ibid*.
[30] Acharya, *supra* note 27, p.25.
[31] *Id*, p.8.
[32] *Supra* note 26.
[33]Dijkhorst, *supra* note 14, p.23.

can legitimately be compelled to reveal his or her identity."[34] Does the right to silence extend to the right to be warned? Since the right is not necessarily known by every suspect or accused (and witness), it imposes a duty on authorities to give a formal warning to such persons. The right to silence is one of the Miranda rights, well known in the U.S. legal system, in which a police officer is required to tell a suspect as he has the right to remain silent and that anything that the suspect says could be used against him in a court of law.[35] To reiterate, the right to silence protects suspected or accused persons throughout the entire criminal process, which includes interrogation, trial and sentencing hearings.[36] So, the right applies to every phase of the criminal process, either prior to or during legal proceedings in a court.

However, the right of silence is only limited to testimonial or oral evidence. It "…only protects defendants from compelled production of ―testimonial evidence. The right does not extend to physical evidence…."[37] So, a suspect or an accused may be required/compelled to generate physical or real evidence. Like the privilege against self-incrimination, the right of silence

[34] Trechsel, *supra* note 5, pp.354-55.
[35] *Id*, p.352.
[36] Stein, A., 'Self-incrimination', 2011, p. 5, retrieved from <http://www.flpdinsyria.com/docs/human.pdf> [Accessed on 19 May, 2012]. [Hereinafter Stein].
[37] *Id*, p.7; The common law draws a distinction between information, which an individual is asked to communicate in the context of an inquiry or an investigation, and "real" evidence provided by the individual, which has an actual physical existence apart from the individual's act of communication. The right of silence protects the former because of its "testimonial" nature.

applies to self-incriminating information of a testimonial kind; it will not protect individuals from the obligation to provide certain other kinds of real or physical evidence.[38] Real evidence is already in existence; it exists as a physical fact, and is not susceptible of misrepresentation in any relevant sense.[39] The right of silence is "designed not to provide a shield against conviction but to provide a shield against conviction by testimony wrung out of the mouth of the offender."[40] Therefore, the right of silence is limited to information, the provision of which depends on an act of communication on the part of the individual from whom the information is sought. Yet, the right is controversial with regard to documentary evidence. If a suspect or an accused is required to testify about the document's nature and contents, it may be violation of the right of silence as that may lead to self-incriminating statements.[41]

The right of silence is only confined to criminal trials. Hence, "[t]he rule against adverse inference from the defendant's silence only applies in criminal trials."[42] It follows that, in civil cases and other non-criminal proceedings, there is no right of silence and thus adverse inferences are generally allowed. Why the right does not exist in civil and other non-

[38] *Ibid*.
[39] Atkinson, *supra* note 3, p.36.
[40] *Id*, p.35.
[41] Stein, *supra* note 36, p.8.
[42] *Ibid*.

criminal proceedings is "…because those proceedings do not involve innocents who face the possibility of wrongful conviction and punishment by incriminating themselves."[43] Also, the right to silence is most often not applicable during public emergency in many countries. In view of that, "[u]nder the emergency exception to the right to silence, a self-incriminating statement that the police obtain from a suspect while attending an ongoing crime-related emergency is admissible as evidence at the suspect's subsequent trial regardless of whether the suspect received the Miranda warnings."[44]

Still more on scope, the right of silence is given only to natural persons—not to corporate entities. It also does not extend to a corporate agent or employee who is required by law to provide documents or other information tending to incriminate the corporation.[45]

> *A corporate agent or employee can only claim the right in his personal capacity; and even this personal entitlement is qualified by the 'collective entity' rule. Under this rule, a person's assumption of a corporate job entails a duty to produce corporate documents regardless of the self-incriminating consequences to the person.*[46]
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> Obviously, the collective entity rule seems to be a serious departure from the right to silence. It can still be justified as a means of increasing the law enforcers' access to corporate documents so as to

[43] *Ibid.*
[44] *Id*, p.9.
[45] *Id*, p.10.
[46] *Ibid.*

ensure corporate liability for fraud and other illegal activities that often go undetected.[47]

It can be recalled that the right to silence is not a single right but consists of a number of many substantive and procedural rights. As a result, it is linked to several rights. The right is fundamentally linked to the principle of presumption of innocence in criminal matters. How the right of silence is connected to presumption of innocence is that "…silence by the accused may not be used as evidence to prove guilt and no adverse consequences may be drawn from the exercise of the right to remain silent."[48] Hence, both right of silence and the presumption of innocence require that the accused may not be compelled to testify against himself to prove his innocence (or his own guilt). No adverse inference should also be drawn from his silence as that would be against the principle of presumption of innocence.

The right of silence is also related to the privilege against self-incrimination. The underlying reason for granting the right of silence is to avoid any statements or "testimonial" communications that would incriminate oneself.[49] It consists of different immunities that protect one against self-incrimination. If statements of a suspected or an accused person would not result in subjecting himself to a criminal prosecution

[47] *Ibid*.

[48] Skinnider and Gordon, *supra* note 15, p.5. The right/principle of presumption of innocence imposes "...the burden of proof during trial on the prosecution and that all public officials shall maintain a presumption of innocence, including judges, prosecutors and the police" *(Ibid*). So, "[t]he corollary of the presumption of innocence is that the accused has the right to remain silent both before and during his trial" (*Id*, p.10). Thus, presumption of innocence requires that all public authorities when carrying out their duties should not start with the predetermined idea that the accused has committed the offence charged; the burden of proof is on the prosecution, and even any reasonable doubt should benefit the accused.

[49] Hails, *supra* note 8, p.93.

(self-incrimination), he has no right to remain silent, to refuse to answer questions.[50] To all intents and purposes, "[t]he privilege against self-incrimination confers an immunity from an obligation to provide information tending to prove one's own guilt."[51] Thus, when a person exercises his right to silence, he is indirectly entitled to the privilege against self-incrimination.

The right of silence is also much related to the freedom of expression. The right to freedom of expression may not necessarily need to be understood as a "positive right" that allows individuals, among others, to speak. The "…right to freedom of expression by implication also guarantees a 'negative right' not to be compelled to express oneself, i.e. to remain silent."[52] As a consequence, if a person is compelled to speak or to answer questions, it is not only his right of silence that would be violated but also his right to freedom of expression would be violated.

1.1.5. Justifications

There are many rationales justifying the right of silence. One justification is to prevent an abuse of power of a state.[53] Public authorities may use their power to oppress a suspect or an accused or a witness and compel that person to provide evidence against himself. Hence, "…there is considerable potential for internal corruption and misuse of … powers if they are not strictly regulated and controlled."[54] Since a conviction based on an abuse of a

[50] *Ibid*.
[51] Atkinson, *supra* note 3, p.7.
[52] Trechsel, *supra* note 5, p.343.
[53] Dijkhorst, *supra* note 14, p.16.
[54] Atkinson, *supra* note 4, p.24.

criminal proceeding, be it by a police, prosecution or court, would be miscarriage of justice, any room for abusive tactics of questioning of suspects of crime by zealous questioners should be regulated. In this regard, the right of silence prevents any risk of considerable physical and psychological pressure being applied to suspected or accused persons to cooperate by making incriminating statements.

Another justification is the principle of fairness. As Jackson notes, "... it is in principle unfair to require accused persons to do anything that might incriminate themselves…."[55] So, when a person is required to incriminate himself by his own mouth, apart from being an intrusion on the individual's dignity, it would be against the principle of fairness. The right to silence is designed to give protection to individuals against improper compulsion by public authorities. It is not only limited to duress, it is all about fair procedure.[56] Hence, the right gives protection to witnesses and suspected or accused persons against any improper compulsion by authorities thereby contributing to the avoidance of miscarriages of justice. The other justification is related to burden of proof in criminal proceedings. The right not to incriminate one's self, through exercising one's right of silence, presupposes that the prosecution in a criminal proceeding must prove the case

[55] Jackson, J., 'Re-conceptualizing the Right of Silence as an Effective Fair Trial Standard', *International and Comparative Law Quarterly*, Vol.58, pp.835–861, 2009, p.842, retrieved from<http://www.cslr.org.uk/index.php?option=com_journal&task=article&mode=pdf&format=raw&id=60> [Accessed on 19 May, 2012]. [Hereinafter Jackson].

[56] Trechsel, *supra* note 5, p.348.

against the accused without resorting to evidence obtained through methods of coercion or oppression.[57] In this sense, as noted previously, the right of silence is closely linked to the presumption of innocence.

The right is also justified on the basis of respect for the autonomy or free will of an individual. Pretty well, "[t]he right not to incriminate oneself is primarily concerned …with respecting the will of an accused person to remain silent."[58] And so, individuals should be granted the freedom to choose whether to speak or not in criminal proceedings. That is, "…any positive participation by the accused in the criminal process must be on a voluntary basis."[59] However, most of the time, "…persons facing criminal allegations are placed in a position where their freedom to choose whether to speak or not is extremely limited, all the more so when they are being questioned by the police in custody."[60] As a result, there would obviously be a difficulty in determining whether participation is made on the basis of voluntariness or not.

1.1.6. Limitations and Applications

Even though the right of silence can be justified for the above reasons, it operates within a set of limitations. The right suffers from the following strong criticisms. Jeremy Bentham stalwartly argued that the right of silence is only advantageous to suspects who are factually guilty while he claimed

[57] Jackson, *supra* note 55.
[58] Trechsel, *supra* note 5, p.348.
[59] Jackson, *supra* note 55.
[60] *Ibid*.

that innocent suspects do not exercise the right for a suspect can only gain advantage from the right if he exercises it.[61] He argued that "[i]nnocence [sic] claims the right of speaking, as guilt invokes the privilege of silence."[62] But, Bentham's idea is opposed by proponents of the right who have typically argued that "… it provides a safe haven for some innocent suspects, who would otherwise make false confessions."[63] There are also some proponents who hold that the right protects the interests of both factually guilty and innocent persons by protecting social interests other than accurate adjudication, such as rights to privacy and not to be subject to oppressive and abusive powers of public authorities.[64] Some people also argue that "…there is no value in protecting a guilty person from self-incrimination."[65] Nevertheless, as discussed above, since the right of silence prevents undue intrusion of government on one's personal autonomy—despite the fact that one may be factually guilty or innocent—any attempt of overstating or undermining the value of the right to such categories of suspects seems implausible.

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[61] Seidmann, D., 'The Effects of a Right to Silence', *The Review of Economic Studies*, Vol. 72, No. 2, pp. 593-614, 2005, p.593, retrieved from <http://www.jstor.org/stable/3700664> [Accessed on 20 May, 2012]. [Hereinafter Seidmann].
[62] *Supra* note 21.
[63] Seidmann, *supra* note 61, p.594.
[64] *Ibid*.
[65] Jackson, *supra* note 55, p.843.

Some critics against the right also indicate that "…it reduces the aggregate conviction rate by offering criminals a better alternative than confession."[66] This argument is justified on the premise that the right of silence does not encourage confession. Much sturdily, such critics have argued that "… a significant proportion of those who currently evade conviction by exercising the right would confess and then be convicted if the right were abolished."[67] However, there is no strong empirical evidence that shows "…reliance on the right to silence increases the chance of acquittal."[68]

Instead, "[t]he right to silence provides a safeguard for the vulnerable suspects against police misconduct as well as wrongful conviction."[69] An argument to support this assertion is that people of different backgrounds, having difficulty in understanding of a certain language or culture, may use their right to silence as an important protection against being misunderstood or misrepresented.[70] Thus, the right of silence may avoid an innocent person's conviction rather than solely increasing the acquittal of guilty suspects. Critics of the right to silence have further argued that "… it impedes truth-seeking to the exclusive benefit of criminals…."[71] In this sense, the right is seen as an unnecessary barrier to the findings of truth in criminal proceedings. That is

[66] Seidmann, *supra* note 61, p.607.
[67] *Id*, p.594.
[68] *Supra* note 21.
[69] Nyeap, *supra* note 6, pp.1-2.
[70] *Supra* note 21.
[71] Seidmann, *supra* note 61, p.607.

because it prevents law enforcement officers and courts or juries from using potentially informative evidence that could have been important to determine a given case earlier thereby promoting efficiency in administration of criminal justice.

The practical application of the right of silence greatly varies from jurisdiction to jurisdiction notwithstanding the right is recognized in both common law adversarial and continental inquisitorial systems. There is even a difference in the application of the right among common law countries. For instance, in England, though a suspected person has the right to be informed about his right to remain silent[72], the court or the jury can draw an adverse inference from the suspect's silence.[73] In England, several legislations provide for permissive adverse inference from an accused's silence. For example, the Criminal Justice and Public Order Act of 1994 provides that "…a court may draw adverse inference from a failure to mention any fact relied on in a defence, if that matter could reasonably have been mentioned to the investigating police officer."[74] Art.3 of the Criminal Evidence Order of 1988 also allows courts or juries, in determining whether an accused is guilty of a crime charged or not, to draw negative/adverse inferences from the

[72] Trechsel, *supra* note 5, pp.357-58.
[73] Seidmann, *supra* note 61, pp.594-96.
[74] Lambert, R., 'The Right to Silence: Exceptions Relevant to a Criminal Practitioner', 2010, p.13, retrieved from < http://www.criminalcle.net.au/attachments/Right_To_Silence_paper.pdf > [Accessed on 20 May, 2012].

silence of the accused.[75] Thus, in England, remaining silent may entail conviction upon adverse inference by a court or jury.

In the USA, under the Fifth Amendment to the Constitution, the Miranda warnings,[76] among which the right of silence is one type, are strictly required to be given to every criminal suspect prior to interrogation.[77] As a result, police is obligated to inform suspects that they are entitled to the right to remain silent. In the USA, "[b]ecause interrogation of a suspect carries with it a risk of coercion; confessions obtained by police are subject to constitutional attack under the Self-Incrimination Clause of the Fifth Amendment."[78] To avoid such a risk of coercion, suspects are guaranteed with legal counsel/attorney, which is also one of the Miranda rights.

However, the right to remain silent may exceptionally and "legitimately" be violated for reason of "public safety". In *New York v. Quarles* (1984)

[75] Trechsel, *supra* note 5, pp.356-57.

[76] Carmen, R., *Criminal procedure: Law and Practice*, 7th ed., Thomson Wadsworth, Belmont, USA, 2007, p.399. Miranda rights are well known in the U.S. legal system. These are rights that law enforcement officers must inform to suspects whenever there are interrogations. They must warn the suspects before any interrogation saying as follows: (1) you have a right to remain silent; (2) Anything you say can be used against you in a court of law;(3) You have a right to the presence of an attorney; (4) if you cannot afford an attorney, one will be appointed for you prior to questioning; (5) you may terminate this interview at any time (*Ibid*).

[77] Bradley, C., *Criminal Procedure: A Worldwide Study*, 2nd ed., Carolina Academic Press, Durham, North Carolina, USA, 2007, p.533 [Hereinafter Bradley].

[78] Scheb,J. and Scheb II, J., *Criminal Procedure*, 4th ed., Thomson Wadsworth, Belmont, USA, 2006, p.91.

case[79], a rape suspect, who was believed to be armed, was caught and asked by police to tell where he put the gun. The gun was finally found. The police asked the suspect without telling his right of silence. Both the statement of the suspect and the gun were admissible before the court though the suspect was not informed of his right of silence. The court, in accepting the statement of the suspect and the gun, stated that there is a "public safety" exception to Miranda rights in case of weapons or destructive devices.[80]

A suspected or accused person is not entitled to invoke his right of silence once he has waived it. In this respect, a suspected or accused person does not necessarily need to sign a written waiver and does not even need to specifically state that he wishes to waive. Thus, unless a suspected person expressly states that he wants to remain silent, merely answering of police questions after being informed of his right of silence is a sufficient warning of right of silence.[81] But, in the USA, courts or juries are prohibited from adversely inferring from an accused's silence.[82] Particularly, the prosecution's attempt to comment on the defendant's silence or testimony is strictly evaluated and then prohibited if that would mislead the juries and is found

[79] Bradley, *supra* note 77, p.535.
[80] *Ibid.*
[81] *Ibid.*
[82] Dijkhorst, *supra* note 14, p.12. Accordingly, "[t]he prosecution must prove all the essential elements of the crime. The accused may remain silent and offer no defense, relying wholly on the presumption of innocence for acquittal. No adverse inference of guilt may be drawn from his failure to testify… neither the judge nor the prosecutor may comment on such failure" (*Ibid*).

violating an accused's Fifth guarantees of right of silence and the privilege against self-incrimination.[83]

In France, in contrast, during a preliminary investigation, the police may question suspected persons but there are no formal rules governing questioning at this stage.[84] As a result, the right to silence appears to be not well protected during police interrogation at such early stage. Moreover, though a suspected or accused person has the right to remain silent, adverse inference from silence is permissible.[85]

In connection to permissible adverse inferences, some argue that "…any inferences from silence operate as a means of compulsion, shifting the burden of proof from prosecution to the accused."[86] Indeed, the right of silence would be useless if adverse inference is permitted. If there is permission of adverse inference from one's silence, the law cannot grant a right of silence rather penalizes a person who chooses to exercise it.

1.2. The Privilege against Self-Incrimination

1.2.1. Definition and Nature

The privilege against self-incrimination is "…the right not to be compelled to incriminate oneself, to be protected against any pressure to make a statement

[83] Ruebner, R., *Illinois Criminal Procedure*, 4th ed., Matthew Bender, USA, 2004, pp.193-202.
[84] Bradley, *supra* note 77, pp.216-17.
[85] Dijkhorst, *supra* note 14, p.22.
[86] Skinnider and Gordon, *supra* note 15, p.4.

[or produce document]."[87] The term "privilege against self-incrimination" "…refers to the situation of someone who enjoys enhanced protection."[88] So, this privilege gives individuals immunity against any self-incriminatory statements or evidences which could subject them to criminal prosecution. Literally, "[s]elf-incrimination means subjecting oneself to criminal prosecution."[89] Simply stated, the privilege against self-incrimination is "…an immunity against compulsion to give evidence or to supply information that would tend to prove one's own guilt."[90] Does the privilege protect individuals from direct incrimination only or it also protects from indirect incrimination? Unsurprisingly, "[t]he privilege against self-incrimination protects not only from direct incrimination, but also from making a disclosure that may lead indirectly to incrimination or to the discovery of other evidence of an incriminating nature."[91] Generally speaking, the privilege against self-incrimination can be described as a guarantee that no person "shall be compelled in any criminal case to be a witness against himself."[92] So, the privilege is an essential right that protects one from incriminating himself by being forced to be a witness to testify against himself.

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[87] Trechsel, *supra* note 5.
[88] *Ibid*.
[89] Hails, *supra* note 8, p.93.
[90] Atkinson, *supra* note 3.
[91] *Ibid*.
[92] Langbein, J., 'The Historical Origins of the Privilege Against Self-Incrimination at Common Law', *Michigan Law Review*, Vol. 92, pp. 1047-1085 , 1994, p.1047, retrieved from <http://digitalcommons.law.yale.edu/fss_papers/550 > [Accessed on 20 May, 2012].

Are the right to silence and the privilege against self-incrimination one and the same thing? Earlier in this article, it has been noted that the right of silence is not a single right but the one that is composed of several immunities. There is similarity between the two rights since the right of silence is aimed at, *inter alia*, avoiding of self-incrimination. Yet, "…the privilege against self-incrimination and the right to silence are not co-extensive…the privilege [against self-incrimination] protects the right of witnesses not to incriminate themselves, not their right to remain silent."[93] One notable difference between the two rights is also that "... [t]he right to silence is narrower in that it refers to acoustic communication alone, the right not to speak. [But], [t]he privilege [against self-incrimination] clearly [includes] further in that it is not limited to verbal expression. …it also protects against pressure to produce documents."[94] However, as mentioned above, the right of silence may also protect one against the pressure to produce documents, particularly if one is required to testify about the content and nature of the document which could subject him to self-incrimination. More precisely, the privilege against self-incrimination can be defined as the "…right not to be obliged to produce evidence against oneself, [thus the privilege against self-incrimination is] …the broader right encompassing the right to silence."[95] Regarding their area of interface, albeit blurred, "[t]he

[93] Atkinson, *supra* note 3.
[94] Trechsel, *supra* note 5, p.342.
[95] *Ibid.*

right of silence is closely related to the privilege against self-incrimination—the latter concerns the threat of coercion in order to make an accused yield certain information, whereas the former concerns the drawing of adverse inferences when an accused fails to testify or to answer questions…."[96]

The privilege against self-incrimination, currently, embodies the nature of human rights. In modern democratic societies, it has come to be considered as a significant factor in the protection of individual liberties. To further illustrate, "[t]he privilege [against self-incrimination] in its modern form is in the nature of a human right, designed to protect individuals from oppressive methods of obtaining evidence of their guilt for use against them."[97] As a result, "…it is now considered as not merely a rule of evidence but rather as a substantive right."[98] Thus, the privilege against self-incrimination is one of the substantive rights in the field of human rights law.

1.2.2. Origin and Historical Development

Like the right of silence, there is uncertainty about the historical origin of the privilege against self-incrimination. Some scholars maintain that the privilege against self-incrimination can be traced back to Talmudic law. In ancient Talmudic or Judaic law, there was a maxim, having relevance to the privilege

[96] Ashworth, A., 'Self-incrimination in European Human Rights Law—a Pregnant Pragmatism?', 2008, p.754, retrieved from <http://www.nylslawreview.com/wordpress/wp-content/uploads/2012/02/Findley-article.pdf> [Accessed on 17 May, 2012]. [Hereinafter Ashworth].

[97] Atkinson, *supra* note 3.

[98] *Ibid.*

against self-incrimination, that "a man cannot represent himself as guilty, or as a transgressor…."[99] But, some people claim that tracing the modern guarantee of the privilege against self-incrimination back to such ancient time is difficult. Much literature rather agrees that the privilege, having its origin in the common law, can clearly be traced back to the beginning of the second half of the 17th century, specifically in 1641, when the Star Chamber and High Commission in England were abolished and the courts' *ex officio oath* procedure was prohibited.[100] By the second half of the seventeenth century, the privilege was well established at common law, which affirmed the principle *nemo tenetur accusare seipsum* ―Latin to mean "no man is bound to accuse himself."[101] Currently, as pointed out before, the privilege against self-incrimination is often referred to as a substantive right and is recognized under international and regional human rights instruments.

1.2.3. Privilege against Self-Incrimination in Adversarial and Inquisitorial Systems

As has been discussed, unlike in an inquisitorial system, a suspect or an accused has no obligation to cooperate in evidence gathering/investigation in adversarial system. In an adversarial system, "…truth is found by contest

[99] Ciardiello, D., 'Seeking Refuge in the Fifth Amendment: The Applicability of the Privilege Against Self-Incrimination to Individuals who Risk Incrimination Outside the United States', *Fordham International Law Journal,* Vol. 15, No. 3, pp.722-70, 1991, pp.724-25, retrieved from < http://ir.lawnet.fordham.edu/ilj > [Accessed on 23 May, 2012].
[100] Trechsel, *supra* note 5.
[101] Atkinson, *supra* note 3, p.9.

rather than cooperation between the suspect and the prosecution."[102] Cooperation between prosecution and suspect or accused is in theory unknown to an adversarial procedure. In essence, adversarial system is "…reluctant to allow one party to use its adversary as a source of evidence, as this would disturb the balance and theoretical equality between the parties."[103] As a result, a suspect or an accused cannot be compelled in any way to testify against himself in a way that would potentially incriminate himself and thus it is the government/prosecution that has always the burden of proof. However, in an inquisitorial system a suspect or an accused can be compelled to give a statement that might incriminate himself.[104] Moreover, "…the adversarial system places greater emphasis on the process than on simple truth-finding."[105] Justice is done when there is procedural fairness. Therefore, any evidence obtained through improper means, like through compulsion, is susceptible to exclusion. Hence, self incriminatory evidence of a suspect or an accused person given under pressure/compulsion is most of the time intolerable. Nevertheless, in an inquisitorial system, justice can be done even

[102] Ringnalda, A., 'Inquisitorial or adversarial? The role of the Scottish Prosecutor and Special Defenses', *Utrecht Law Review*, Vol. 6, No. 1, pp.119-1140, 2010, p.136, retrieved from < http://www.utrechtlawreview.org/> [Accessed on 14 May, 2012].
[103] *Id*, p.120.
[104] Acharya, *supra* note 27, p.25.
[105] Findley, K., 'Adversarial Inquisitions: Rethinking the Search for the Truth', *New York Law School Law Review*, Vol. 56, pp.911-41, 2011/12, p.929, retrieved from <http://www.nylslawreview.com/wordpress/wp-content/uploads/2012/02/Findley-article.pdf> [Accessed on 23 May, 2012].

by compelling a suspect or an accused so long as the truth can be ascertained in that way.

In a nutshell, the adversarial system places emphasis on the individual rights of a suspect or an accused, whereas the inquisitorial system places the rights of a suspect or an accused secondary to the search for truth.[106] Consequently, an individual's right to the privilege against self-incrimination may be violated in an inquisitorial system while that does not work in an adversarial system.

1.2.4. Scope and Related Rights

The points to be said in relation to the scope and cognate rights to the privilege against self-incrimination are very similar to that of the right of silence discussed at length so far. For this reason, opening a wide discussion here on the scope and cognate rights to the privilege against self-incrimination would be repetition of what has been said. Thus, the author would like to remind readers to apply the scope and related rights to the right of silence, discussed previously, to the privilege against self-incrimination *mutatis mutandis*. For emphasis, however, some points about the scope and related rights to the privilege against self-incrimination follow: Like the right of silence, the privilege against self-incrimination is limited to the context of criminal proceedings. It does not apply outside of criminal proceedings as it is

[106] *Supra* note 26.

self-evident from the term "self-incrimination".[107] It does not prohibit the use of compulsory questioning powers in the course of non-criminal proceedings. However, the privilege may exist even in non-criminal proceedings whenever a circumstance seems to give rise to self-incrimination in any future criminal proceedings. The privilege "… enables a defendant to refuse to testify at a criminal trial and privileges him not to answer official questions put to him in any other proceeding, civil or criminal, formal or informal, where the answers might incriminate him in future criminal proceedings."[108] The further point that needs to be mentioned is that the privilege against self-incrimination is usually limited to oral or testimonial evidence as opposed to real or physical evidence.[109]

> *The right not to incriminate oneself is primarily concerned…with respecting the will of an accused person to remain silent. As commonly understood …. it does not extend to the use in criminal proceedings of material which may be obtained from the accused through the use of compulsory powers but which has an existence independent of the will of the suspect such as, inter alia, documents acquired pursuant to a warrant, breath, blood and urine samples and bodily tissue for the purpose of DNA testing.*[110]

The reference, in the above quotation, to materials that have an existence "independent of the will of the suspect" suggests evidence that can be found

[107] Trechsel, *supra* note 5, p.349.
[108] *Supra* note 7.
[109] Ashworth, *supra* note 96, p.758.
[110] *Id*, pp.758-59.

without the cooperation of a suspect. What is protected by the privilege against self-incrimination is compulsory securing of those evidences that require the cooperation of the suspect. Hence, the privilege against self-incrimination should be seen as applying to "…a certain means of obtaining information, a means that requires co-operation, and not to a particular type of information—answers to questions as opposed to physical material."[111] From this view, since bodily samples can be obtained without the cooperation of the individual, i.e., by using force to take them, they can therefore be differentiated from attempts to force someone to speak or to hand over documents. However, some documents such as diaries, though materially exist independent of a suspect, are protected by the privilege against self-incrimination since they contain statements which could incriminate a person who wrote them.[112]

The privilege against self-incrimination is also limited to a person required to testify or speak. That is to say, "[i]t applies only to statements that would result in criminal liability for the person making them and cannot be used to refuse to give answers [or testify] that would incriminate a friend."[113]

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[111] *Id*, p.759; generally, a suspected or accused person is protected by the privilege against self-incrimination for testimonial evidence and thus cannot refuse to cooperate in obtaining non-testimonial evidence even though it may be incriminating.
[112] Hails, *supra* note 8, p.93.
[113] *Ibid*.

A suspected or accused person is not entitled to invoke his right of privilege against self-incrimination once he has waived it. As a general rule, a suspect or an accused can waive any of his rights under the privilege against self-incrimination. The waiver, however, "…must be voluntary and informed in order to be considered effective."[114] Based on the waiver, the prosecution can use the suspect's or the accused's admissions to discredit his testimony and other evidence contradicting those admissions so long as the suspect or accused waived, without any compulsion, knowingly and voluntarily.[115]

With regard to those rights that are related to the privilege against self-incrimination, the rights that are closely related to the right of silence, highlighted previously, are also similarly linked to the privilege against self-incrimination. Therefore, the right not to incriminate oneself is closely linked to the presumption of innocence, free will of individuals, freedom of expression, liberty, privacy, etc. As noted above, the privilege against self-incrimination, apart from being one type of substantive human right, gives safeguards to many other rights of individuals whenever they are confronted with public authorities.

1.2.5. Justifications

A number of different rationales ―both historical and modern ―can justify the privilege against self-incrimination. Many, if not all, of the rationales for

[114] Stein, *supra* note 36, p.18.
[115] *Ibid*.

the right to silence can justify the privilege against self-incrimination. Generally, the rationales that have most often been put forward for the privilege against self-incrimination can be divided into two main categories ―systemic and individual. While systemic rationales "…are related to the criminal justice system and view the privilege as a means of achieving goals within that system, rather than as an end in itself, [individual rationales,] which are based on notions of human rights and respect for human dignity and individuality, are concerned with the privilege's intrinsic value."[116]

One of the commonly accepted systemic rationales for the privilege is to curb state power. That is because, "[t]he right against self-incrimination forbids the government from compelling any person to give testimonial evidence that would likely incriminate him during a subsequent criminal case."[117] Thus, the privilege enables individuals to protect themselves against oppressive governmental power by refusing to testify or to answer official questions where that might incriminate themselves in future criminal proceedings. Another systemic rationale is to prevent conviction founded on a false confession. Basically, "[t]his rationale is related to the principle that evidence of a confession is inadmissible unless it can be shown that the confession was made voluntarily. It is based on the premise that a confession made under

[116] Atkinson, *supra* note 3, p.23.
[117] *Supra* note 7.

duress is likely to be unreliable."[118] So, the privilege against self-incrimination —by forbidding public authorities from compelling an individual to confess or testify against himself —is used to avoid a false confession which is mostly a basis for conviction.

An added systemic rationale that justifies the privilege against self-incrimination is to protect the quality of evidence as well as the integrity or credibility of the judiciary.

> *…someone who is compelled to give self-incriminating evidence is likely to be tempted to lie in order to protect his or her own interests…without the privilege, there would therefore be a risk that unreliable evidence would adversely affect the ability of a court or jury to determine the facts of a particular case and that the credibility of the trial system would be compromised.*[119]

Consequently, the privilege against self-incrimination is necessary to ensure the reliability of evidence during criminal verdicts thereby protecting the reputation of the court system.

The second category of rationales is related to individual rationales. These categories of rationales are the privilege's intrinsic values that are based on notions of human rights and respect for human dignity. Generally, each of these rationales "…underpins the concept of the privilege against self

[118] Atkinson, *supra* note 3, p.25.
[119] *Id*, p.27.

incrimination as a human right rather than as merely a rule of evidence."[120] One such rationale is to protect human dignity and privacy. In dealing with the dignity of an individual, "…the desire to protect the human dignity of an accused person is a separate and important justification for the privilege, since it ensures that the prosecution must treat the accused as an innocent human being whose rights must be respected."[121] Kessel, in connection with this, has shown that "…[t]o leave a person with no way out-to force him to inflict injury upon himself, to be an instrument of his own destruction-is cruel." [122]

A propos the privacy aspect, it can be argued that "…compelled self-incrimination constitutes a serious intrusion into the right of privacy of an individual who is required to provide information."[123] Innately, "…freedom rests upon a fundamental right to privacy and human dignity. Central to…conception of privacy is the need for men and women to be custodians of their own consciences, thoughts, feelings, and sensations."[124] In view of that, forcing one to reveal these things, making him confess without his consent,

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[120] *Id*, p.30.
[121] *Ibid*.
[122] Kessel, G., 'Prosecutorial Discovery and the Privilege against Self-incrimination: Accommodation or Capitulation,' *Hastings Constitutional Law Quarterly*, Vol.4, pp.855-900, 1962, p.875, retrieved from <http://hastingsconlawquarterly.org/archives/V4/I4/van_kessel.pdf> [Accessed on 23 May, 2012].
[123] Atkinson, *supra* note 3, p.30.
[124] The Privilege against Self-Incrimination, retrieved from <http://legaldictionary.thefreedictionary.com/Self-Incrimination > [Accessed on 19 May, 2012].

deprives him of the things that make him individual.[125] It is patent that almost all the justifications for the right of silence can be applicable to the privilege against self-incrimination. So, those justifications related to the autonomy of an individual, presumption of innocence and burden of proof can also be justifications for the privilege against self-incrimination.

1.2.6. Limitations and Applications

Despite the above justifications and its widespread acceptance, the privilege against self-incrimination suffers from some criticisms. One of the limitations is it frustrates the truth-seeking functions of the trial by giving shelter to the guilty.[126] Hence, it has been strongly criticized for entailing the loss of the most reliable evidence, perhaps the only available evidence, of guilt. The following quotation helps elaborate this point.

> *The privilege has been subject to the criticism that it has the capacity to defeat the purpose of the criminal justice system by denying it access to a valuable source of cogent evidence about the commission of an offence. An individual who has committed an offence will be uniquely placed because of his or her knowledge of events. This is particularly so in relation to offences which occur in*

[125] *Ibid*.

[126] Green , M., 'The Paradox of Auxiliary Rights: The Privilege against Self-incrimination and the Right to Keep and Bear Arms', *Duke Law Journal*, Vol.52, pp.114-78, 2002, pp.143-44, retrieved from <http://www.flpdinsyria.com/docs/human.pdf> [Accessed on 23 May, 2012].

> *private and which may leave little or no tangible trace of their occurrence.*[127]

The privilege against self-incrimination may also be criticized for giving priority to offenders over victims of crime. Victims of crime may perceive that where an offence has been committed that has resulted in harm to them, the rights of the perpetrator are given priority over them.[128] Thus, the privilege against self-incrimination may come to have negative effect on victims' rights at least in the perception of the victims concerned.

One question that may arise at this juncture is regarding the application of the privilege against self-incrimination, within such limitations, in different countries. Is the privilege subject to exceptions? On the whole, the privilege against self-incrimination has relatively better applicability in adversarial (common law) countries than in inquisitorial (civil law) countries. This is because in adversarial common law countries, a suspect or an accused cannot be forced to assist the prosecution in proving his case against himself by providing testimonial evidence either at the investigation stage or at the trial. Needless to state, it is the prosecution alone that should prove the case beyond

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[127] Atkinson, *supra* note 3, pp.31-32. Consequently, the privilege against self-incrimination has been criticized for its negative effect on the prosecution's ability to collect evidence which ultimately produces an adverse impact on the criminal justice system.

[128] *Id*, p.32. It is argued that "…it is extremely hard to see how the state can justify giving priority to the interests of guilty suspects over those of their victims. From the perspective of the victim there is a double wrong perpetrated if the state refuses to vindicate the victim by placing evidential pressure on the offender to admit the offence" (*Ibid*).

a reasonable doubt. However, in inquisitorial civil law countries, as has been described above, a suspect or an accused should cooperate and thus can be forced to testify against himself. Is the privilege against self-incrimination an absolute right or is it subject to certain qualifications in order to provide balance between individual rights and public interest? Whether it is in adversarial or inquisitorial system, there are always competing interests in criminal proceedings between individual rights and public interest. Most of the time, where the public interest by far outweighs the individual right of the privilege against self-incrimination, the privilege may be subjected to limitation/qualification. It may, therefore, be "…in the overall public interest for an investigator to be able to compel an individual who might have relevant information … to disclose that information, even though, by so doing, the individual might incriminate himself or herself…."[129] Qualifications to the privilege against self-incrimination may be justified where there is an immediate need for information to avoid risks such as danger to human life, serious danger to human health, generally where there is a compelling circumstance that the information is necessary to prevent further harm from occurring.[130]

However, any interference with the privilege against self-incrimination must always be strongly justified. It is generally agreed that "…the privilege

[129] *Id*, p.50.
[130] *Id*, p.54.

against self-incrimination is a substantive human right. Governments should be extremely cautious about removing or tampering with a human right, in whatever context that might occur."[131] For instance, the privilege cannot be violated for a justification that it hinders truth-finding or investigation. That is, "[t]he fact that a body is charged with the obligation to investigate potential offences, and that investigation may be hampered by reliance on the privilege against self-incrimination, cannot and should not, justify the abrogation of that privilege."[132] Therefore, "[w]hilst it is important that the public interest issue be appropriately recognized and addressed, the rights of the individual should not be unnecessarily minimized, diminished or displaced."[133] It is when "…general public interest … [is] to justify a conclusion that the public interest in determining the truth of the alleged conduct outweighs the individual's privilege against self-incrimination" that it can be violated or limited.[134] Thus, for the purpose of protecting or advancing public interest, a suspect or an accused may be compelled in case he has relevant information even though, by so doing, he might incriminate himself. However, a suspect or an accused cannot in any way be tortured. Compulsion is allowed as long as it is short of torture. This is because freedom from

[131] *Id*, p.50.
[132] *Ibid*.
[133] *Ibid*.
[134] *Ibid*.

torture is absolute right and thus nothing can justify it.[135] Consequently, though countries may compel suspected or accused persons to testify against themselves during criminal proceeding for public interest, torture cannot and should not in any way be administered.

2. Right of Silence and Privilege against Self-Incrimination in Major Human Rights Instruments

In this section, the author provides information about the place/recognition of the right of silence and the privilege against self-incrimination at the international and regional arenas by having a look at the Universal Declaration of Human Rights (UDHR), the International Covenant on Civil and Political Rights (ICCPR) and African Charter on Human and Peoples' Rights (ACHPR).

2.1. Right of Silence and Privilege against Self-incrimination under UDHR

The right to remain silent, though not expressly mentioned under the UDHR, can arguably be considered to be one of the rights of a suspect or an accused during criminal proceedings. UDHR, in Art.10, provides for the protection of an accused's right to fair trial during criminal proceedings. That is, it protects the right to a fair trial of an accused. The right to fair trial has become legally

[135] Chapter 4: Rights of the Suspect and the Accused retrieved from <http://www.usip.org/files/MC2/MC2-7-Ch4.pdf> [Accessed on 14 May, 2012].

binding on all states as part of customary international law.[136] The right has actually found recognition in numerous international human rights instruments. It is an important right "… to preserving the suspect's physical and mental integrity not only during investigation, but also to enable the accused to benefit, to the fullest extent possible, from the fair trial rights guaranteed at the trial, if he is charged with the offence for which he is being investigated."[137] Without a shred of doubt, the right to remain silent is the most important right in ensuring the right to fair trial. In general, "[s]ilence and self-incrimination rights before trial are intimately bound up with the right to a fair trial and difficult to separate from the perspective of the accused at trial."[138]

It can also be argued that the right of silence under UDHR is protected as part of presumption of innocence. UDHR, in Art.11 (1), states "[e]veryone 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." By virtue of this provision, guilt cannot be presumed before the prosecution proves a charge beyond reasonable doubt and this principle applies until the judgment is made final. One of the ways in

[136] Jegede, S., "Right to a Fair Trial in International Criminal Law" retrieved from <http://www.nigerianlawguru.com/articles/international%20law/RIGHT%20TO%20A%20FAIR%20TRIAL%20IN%20INTERNATIONAL%20CRIMINAL%20LAW.pdf> [Accessed on 14 May, 2012]. [Hereinafter Jegede].
[137] *Ibid*.
[138] *Ibid*.

which presumption of innocence can be protected is by proscribing the drawing of adverse inference from a suspect's or accused's silence. The right to silence, in avoiding any implied guilt, gives protection against adverse inferences from one's silence. That is, it is the right not to confess guilt. In this sense, the right of silence can be understood as implicitly protected under UDHR as part of presumption of innocence.

The privilege against self-incrimination, like the right of silence, is not explicitly provided for under UDHR. Nevertheless, the right not to be compelled to testify against oneself and not to confess guilt (the privilege against self-incrimination) seems to be an implicitly recognized guarantee as it is part of the right to fair trial set out in Art.10 of the Declaration.[139] The privilege against self-incrimination is also implied under Art.5 of the Declaration. This provision reads as: "No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment." It is generally agreed that torture is not necessarily limited to physical acts or sufferings. Any form of compulsion or coercion, be it physical or mental, may constitute torture. It follows that the violation of the right not to be compelled to testify against oneself (the privilege against self-incrimination) would possibly be a violation of Art.5 of UDHR. This is because any form of compulsion, like through requiring a suspect or an accused to cooperate during interrogation or

[139] *Supra* note 135.

trial, can constitute a form of direct pressure or coercion and thus would be violation of the Declaration.

More to the point, "[a]s well as being related to the presumption of innocence, the right to silence and freedom from self-incrimination are also related to the right to freedom from coercion, torture, or cruel, inhuman or degrading treatment…because the freedom from self-incrimination and the right to silence prohibit the use of these techniques to compel testimony." [140] For instance, an actual or a threat of adverse inferences being drawn against a suspect or an accused for remaining silent is coercion or compulsion that can constitute a form of direct pressure exercised against the suspect or accused to obtain evidence. In such a situation, a suspect or an accused would unfairly be forced either to testify or, if he chooses to remain silent, he has to risk the consequences (of adverse inference from his silence), thereby automatically losing his protection against self-incrimination.[141] Therefore, though the right of silence and the privilege against self-incrimination are not expressly provided in the UDHR, they are implicit in the right to fair trial, presumption of innocence and freedom from torture, cruel, inhuman or degrading treatment or punishment set out in Arts.10, 11 and 5 of the Declaration respectively.

2.2. Right of Silence and Privilege against Self-incrimination under ICCPR

[140] *Ibid*.
[141] Jegede, *supra* note 136.

The right to remain silent is not explicitly guaranteed under ICCPR. The absence of clearly expressed provision as to the right in this binding instrument may arise some questions. The obvious questions that may arise include: Can states, under ICCPR, compel a suspect or an accused to answer questions during interrogations and testify at trial? Does this mean that if a suspect or an accused person chooses to remain silent, his silence can be used against him in the determination of guilt?

To determine the legal status of the right of silence under ICCPR, and state obligations thereof, it is necessary to look at other rights explicitly described in the Covenant, namely the right to fair trial, the presumption of innocence and the right not to be compelled to testify against oneself (privilege against self-incrimination) which are closely related to the right to remain silent. As has been discussed above, the right of silence is an essential element of fair trial, which is stipulated under Art.14 (1) of ICCPR. The right of presumption of innocence is also clearly enshrined in the Covenant in Art.14 (2). To this effect, the Covenant has ensured that the prosecution bears the burden of proof throughout the trial. Intertwined with the presumption of innocence is the right not to be compelled to testify against oneself or confess guilt, which is clearly outlined in Art.14 (3) (g) of the Covenant. This provision states that no one shall be compelled to testify against himself or to confess guilt. Art.7 of this same Covenant has also clearly prohibited torture or cruel, inhumane or degrading treatment or punishment. As indicated above, violating of the

right of silence, either by compelling a suspect to speak or by drawing an adverse inference, is a direct or indirect coercion or compulsion of a suspect or an accused to testify against himself which ultimately be a violation of Arts.7 and 14 (1) and (3) (g) of ICCPR specifically.

The Human Rights Committee (HRC) ―a treaty body established to monitor State Parties' compliance with the ICCPR ―in its Concluding Observations on Romania, stated that statements made by accused persons in violation of Art.7 of ICCPR should be inadmissible evidences.[142] More interestingly, the Committee has recommended that states should enact legislation that places "…the burden on the State to prove that statements made by accused persons in a criminal case have been given of their free will…"[143] The HRC, in its General Comment 13, also calls on States Parties to pass legislation to ensure that evidence obtained by means of methods that compel a suspect or an accused to confess or to testify against himself or any other form of compulsion is wholly unacceptable.[144] The HRC, in 1995, while reviewing the fourth periodic report of the United Kingdom (UK), has further indicated that UK violates the various provisions of Article 14 of ICCPR in allowing the judges and juries to draw adverse inferences from the silence of a suspect

[142] Joseph, S. *et al*, *The International Covenant on Civil and Political Rights: Cases, Materials and Commentary*, 2nd ed., Oxford University Press Inc., New York, 2004, p.450 [Hereinafter Joseph *et al*].
[143] *Ibid*.
[144] Skinnider and Gordon, *supra* note 15, p.5.

or an accused.[145] The HRC's comments on the UK have shown that "...a crucial aspect of one's right to silence is to be free from adverse inferences drawn from one's silence."[146] This indicates that any measure which may have the effect of pressuring suspected and accused persons into speaking against their will violates ICCPR. As a result, the right of silence seems to be strictly protected under ICCPR.

The privilege against self-incrimination is clearly recognized under ICCPR in Art.14 (3) (g). This provision forbids the compelling of suspected or accused persons to testify or confess guilt. Hence, any statements obtained through any form of compulsion, including torture, are inadmissible and cannot be used as evidence against the suspect or accused since they violate many provisions of ICCPR, including the privilege against self-incrimination.

2.3. Right of Silence and Privilege against Self-incrimination under African Charter on Human and Peoples' Rights (ACHPR)

Both the right of silence and the privilege against self-incrimination are not explicitly mentioned under the ACHPR. Yet, it can be convincingly argued that both rights are implicitly recognized in the Charter. One of the arguments can be made based on Art. 7 (1) (b) of the Charter which deals with the principle/right of presumption of innocence. As discussed already at length, it

[145] *Ibid*.
[146] Joseph *et al*, *supra* note 142.

can be argued that the right of silence and the privilege against self-incrimination under the charter are implicitly protected as part of presumption of innocence. Since we have seen previously in detail about how presumption of innocence is (necessarily) closely related to the right of silence and the privilege against self-incrimination, it is unnecessary here to spend time to show the conceptual relationship between such rights.

Another argument for the implicit recognition of the rights under the ACHPR is based on Art.5 of the Charter which deals with the prohibition of torture, cruel, inhuman or degrading punishment or treatment. As noted earlier, the rights of silence and freedom from self-incrimination are closely related to the right to freedom from torture, or cruel, inhuman or degrading treatment or punishment and thus the rights prohibit the use of these techniques to compel testimony.[147]

Torture, or cruel, inhuman or degrading treatment or punishment may be either physical or mental. It does not only involve physical acts. The HRC, in its General Comment 20, has stated that torture, or cruel, inhuman or degrading treatment or punishment "…relates not only to acts that cause physical pain but also to acts that cause mental suffering…."[148] It is clear that compelling a suspect or an accused either to speak or to testify against himself

[147] *Supra* note 135.
[148] *Ibid*.

would possibly constitute torture, or cruel, inhuman or degrading treatment or punishment, be it either physical or mental. And in effect, that would be violation of Art.5 of the ACHPR which deals with the prohibition of torture, cruel, inhuman or degrading punishment or treatment. Therefore, it can be safely concluded that the right of silence and the privilege against self-incrimination, despite the Charter's silence, are implicitly recognized under ACHPR.

2. The Right of Silence and Privilege against Self-Incrimination under the Ethiopian Criminal Justice System

In the previous sections, the right of silence and the privilege against self-incrimination by having seen the laws and practices of some jurisdictions of different legal traditions have been discussed. We have also examined that these rights have received greater emphasis in the different international and regional human rights instruments especially as essential ingredients of fair trial in criminal proceedings. Now, an appraisal of the Ethiopian legal framework with respect to the right of silence and the privilege against self-incrimination is forwarded.

3.1. The Right of Silence: An Appraisal of the Ethiopian Legal Framework

In relation to the right of silence, it is important to look first at Art.19 (2) of the FDRE Constitution. This provision reads: "Persons arrested have the right to remain silent. Upon arrest, they have the right to be informed

promptly, in a language they understand, that any statement they make may be used as evidence against them in court." That is, the right of an arrested person to refuse to answer official questions during police interrogations is clearly accepted. Thus, the right of silence is recognized under the FDRE Constitution as one type of human right for it is mentioned in the human rights part of chapter three of the Constitution. However, the above provision is not clear as to whether or not a police, upon arresting, should give a formal warning to the arrested person that he has the right to remain silent. The provision does not clearly provide that the police should tell to the arrested person his right of silence. It simply seems to impose an obligation on the police to inform the arrested person about the consequence of any statement that he might make. In connection with this, the previous sections have shown that the right of silence extends to the right to be warned.

> *Since the right to silent [sic] is not necessarily known by every suspect or accused, it imposes a duty on authorities to give a formal warning to such persons. The right to silence is one of the Miranda rights in which a police officer is required that he should tell to a suspect as he has the right to remain silent and as anything that the suspect says could be used against him in a court of law.*[149]

So, should the Constitution be criticized that it does not explicitly enshrine a "formal warning" that a police must give to a suspect? The argument as to "formal warning" that should have been added under

[149] Trechsel, *supra* note 5, p.352.

Art.19 (2) of the Constitution should be well considered in light of the comprehensive or general nature of a constitution. One of the basic features of constitutions is that they are considered to be "general laws as opposed to detailed ones."[150] That is, constitutions stipulate a little bit of everything in, *inter alia*, legal sphere. Hence, it can logically be argued that Art.19 (2) of the Constitution should be understood as intrinsically requiring "formal warning" while recognizing the right to remain silent. The 1961 Ethiopian Criminal Procedure is compatible with the spirit of the Constitution on this issue. Art.27 (2) of the Criminal Procedure Code provides that any arrested person "… shall not be compelled to answer and shall be informed that he has the right not to answer and that any statement he may make may be used in evidence." In this provision, the phrase "shall be informed that he has the right not to answer" can be interpreted to mean "the right to remain silent". That is, "the right to remain silent" is negatively provided as "the right not to answer". Therefore, police, in Ethiopia, should tell to arrested persons not only the consequence of a statement that may be made but also should (first) tell them as they have the right to remain silent.

Yet another controversial issue in Art.19 (2) of the FDRE Constitution is that the right to remain silent seems to be limited to arrested persons. There is no

[150] Getachew Assefa, *Ethiopian Constitutional Law, With Comparative Notes and Materials*, American Bar Association, 321 North Clark Street, Chicago, USA, 2012, p.17.

counter provision mentioning this same right in Art.20 of the Constitution which deals with accused persons. Despite the absence of clear provision to that effect, the right also appears to be exercised by accused persons. One ground to think in that way is Art.20 (3) of the Constitution which provides for presumption of innocence. This provision stipulates that "[d]uring proceedings accused persons have the right to be presumed innocent until proved guilty according to law and not to be compelled to testify against themselves." As has been repeatedly pointed out, presumption of innocence imposes the burden of proof on the prosecution. Accordingly, the accused person can remain silent without being required to prove his innocence. Thus, the right to remain silent can be considered as implicitly recognized in Art.20 (3) of the Constitution as part of presumption of innocence. Of course, the phrase "not to be compelled to testify against themselves" indisputably shows that accused persons can also have the right to remain silent.

As indicated in the previous section, the right of silence can also be considered as implicitly recognized as part of the prohibition of torture, cruel, inhuman or degrading punishment or treatment which is set out in Art.18 of the Constitution. The prohibition against cruel, inhuman or degrading punishment or treatment is one of the very few non-derogable human rights in the Constitution.[151] The Constitution, in Art.18 (1), provides that "[e]veryone

[151] Article 18 is found under rights that cannot be derogated in emergency situations. See Art.93 (4) (c) of the Constitution.

has the right to protection against cruel, inhuman or degrading treatment or punishment." A cautious reading of this provision reveals that the Constitution does not use the word "torture". Does that mean individuals are not constitutionally protected from torture? For two convincing reasons, the prohibition of torture can be considered to have been included in the prohibition of "cruel, inhuman or degrading treatment or punishment". The first reason is *a fortiori* argument. Since acts of cruel, inhuman or degrading treatment or punishment, all of which are acts less severe in pain than torture, are prohibited, *a fortiori* (for a stronger reason) torture should be prohibited.[152] The second reason is on the basis of international human rights instruments to which Ethiopia is a party. Freedom from torture is expressly guaranteed under Art. 7 of the ICCPR which stipulates that "[n]o one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment." Torture is also exclusively prohibited by the Convention against torture and other cruel, inhuman or degrading treatment or punishment (CAT). Since the interpretation of human rights provisions of the Constitution, according to Art.13 (2), is required to be conforming to international human rights instruments ratified by Ethiopia, ICCPR and CAT should be taken into account in understanding of the constitutional prohibition of cruel, inhuman or degrading treatment or punishment to include torture.

[152] Girmachew Alemu *et al*, *Ethiopian Human Rights Handbook*, American Bar Association, 321 North Clark Street, Chicago, USA, 2013, p.61.

At this juncture, it is necessary to indicate what exactly torture is and what is its relationship with the right to remain silent in Ethiopia. Since no definition is provided in the Constitution, it is appropriate to adapt the definition of torture and the purpose of its prohibition under the CAT for Ethiopia is a party to the Convention. The Convention, in Art.1 (1), defines torture as "… any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession…." According to this provision, no one can administer torture for the purpose of obtaining evidence during criminal proceedings. So, causing any infliction or suffering, whether physical or psychological, on individuals in gathering evidence during criminal proceedings is not allowed. Consequently, the right of silence is highly linked to the prohibition of torture for the former gives protection to individuals during criminal proceedings against any coercion to make a statement or provide some information. Having established the legal recognition of the right of silence in Ethiopia, let us now determine the scope of the same.

3.1.1. Scope

The scope of the right of silence in Ethiopia, as in many other countries, seems to be limited only to testimonial evidence. It was previously noted that many jurisdictions restrict it only to information communicated orally or in writing. It does not include real or physical evidence like blood test, etc. The

same seems to hold true in Ethiopia. Art.19 (2) of the FDRE Constitution provides that arrested persons should be informed about the consequence of any statement they make. The Constitution talks about statements that may be made by arrested persons. Accordingly, the type of information that is protected through the right of silence is of testimonial nature. It does not seem to include physical evidence. The same is true under Art.27 of the 1961 Ethiopian Criminal Procedure Code. The Criminal procedure Code protects only testimonial evidence through the right of silence. This is evident from Art.34 of the Criminal procedure Code which allows for physical examination such as a blood test.

Art.21 of the Ethiopian Anti- Terrorism Proclamation No.652/2009 has also provided that police may order a person suspected of acts of terrorism to give samples such as his fingerprint, photograph, blood, saliva and other body fluids, for investigation. Moreover, he may order the suspect to undergo a medical test. The suspect can be compelled to give samples. As a result, in Ethiopia, the right of silence is limited only to communicative information or information having testimonial nature. It does not extend to physical or real evidence that can be found independently of a suspect or an accused ―without the cooperation of a suspect or an accused.

The right of silence is also limited to criminal proceedings. It does not apply to civil proceedings. The 1960 Ethiopian Civil Code provides that "[w]here a

person refuses to submit himself to a medical examination not involving any serious danger for the human body, the court may consider as established the facts which the examination had the object of ascertaining."[153] That is, a court is allowed to draw adverse inference from a person's silence whenever the person appears to refuse to supply any information relevant to the determination of a (civil) case.

3.1.2. Limitations and Applications

One of the limitations of the right of silence in Ethiopia is that the FDRE Constitution, though it expressly guarantees the right, does not clearly impose obligation on public authorities to warn a suspect or an accused his right of silence. For public authorities not to abuse the right, the Constitution had to make clear that they should tell to persons suspected (or accused) of crime their right to remain silent. It simply seems to require the authorities to inform a suspect (or an accused) the consequence of making of statements. In regard to the right of silence, it is necessary to warn a suspect or an accused not only the effects of making statements but also it is necessary to warn him that he has the right to remain silent. As noted beforehand, the right of silence includes that warning. Without this additional warning, any confession or admission by a suspect or an accused is likely to be made under compulsion. Yet, as noted before, based on the general nature of the Constitution, it can be

[153] Civil Code of the Empire of Ethiopia, 1960, Art.22, Proc. No. 165/1960, *Negarit Gazeta* (Extraordinary Issue), Year 19, No. 2.

said that the FDRE Constitution, in Art.19 (2), has envisaged the "formal warning" while recognizing the right to remain silent.

Concerning the application of the right of silence, in the Ethiopian law, adverse inference from an accused's silence does not seem allowed in criminal proceeding. Under Art.140 of the Criminal procedure Code, it is provided that "[f]ailure to cross-examine on a particular point does not constitute an admission of the truth of the point by the opposite party." Thus, if an accused had not cross-examined the witnesses of the public prosecutor or remained silent while the public prosecutor examined his witnesses in chief, no guilt would be inferred. That is, the court is not allowed to draw adverse inference from the accused's silence. Furthermore, the Criminal Procedure Code, in Art.133 (1), stipulates that "[w]here the accused says nothing in answer to the charge …a plea of not guilty shall be entered". Even after an accused has formally entered a plea of guilty, the court may change into a plea of not guilty.[154] Consequently, no adverse inference from an accused's silence is permissible. This is also guaranteed by the FDRE Constitution. The Constitution, in Art.20 (3), guarantees accused persons that they have the right to be presumed innocent until proved guilty. This provision indirectly prohibits the court from inferring guilt from an accused's silence. Guilt is established upon the proof of the public prosecutor, not from the silence of the accused.

[154] Criminal Procedure Code of Ethiopia, 1961, Art.135 (1), Proc. No.185/1961, *Negarit Gazeta*, Year 32 [Hereinafter Criminal Procedure Code of Ethiopia] .

But, what if an accused keeps silent after the public prosecutor proved his case beyond reasonable doubt or to the extent required? Can the accused be compelled to speak? In connection to this, the Criminal Procedure Code, in Art.142 (1), provides that "[w]here the court finds that a case against the accused has been made out … it shall call on the accused to enter upon his defence and shall inform him that he may make a statement in answer to the charge and may call witnesses in his defence." As per this provision, an accused can be required to prove his case only after the public prosecutor had proved to the extent that the accused has committed or omitted the crime alleged. Once the public prosecutor had proved to that extent, the court may order the accused to defend himself. However, still the accused may insist on to exercise his right to remain silent and thus may not say anything to defend himself. That can be inferred from the phrase "shall inform him that he may make a statement in answer to the charge" in the above provision. That is, the accused cannot be compelled to speak even at this stage. What would be the consequence of the accused's failure to speak at this stage of the criminal proceeding? It is obvious that the court may pass conviction against him. Then, would that be violation of the right to remain silent? Absolutely not! That is because the court established guilt of the accused based on the proof of the public prosecutor. It would have been violation of the right of silence of the accused had the court established guilt by inferring from the accused's silence.

3.2. Privilege against Self- Incrimination

To start with the FDRE Constitution, the privilege against self-incrimination is one of the main constitutional rights to be protected during criminal proceedings. The Constitution, in Art.19 (5), clearly outlaws any evidence acquired through coercion. This provision provides that "[p]ersons arrested shall not be compelled to make confessions or admissions which could be used in evidence against them" and, in showing the fate of evidences of such type, confirms that "[a]ny evidence obtained under coercion shall not be admissible." That is, arrested persons cannot be compelled to testify against themselves and thus they have the right to the privilege against self-incrimination.

Accused persons are also constitutionally entitled to the privilege against self-incrimination. The Constitution, in Art.20 (3), states that "… accused persons have the right … not to be compelled to testify against themselves." Therefore, the FDRE constitution has recognized the right of suspected and accused persons to the privilege against self-incrimination. The privilege against self-incrimination can also be considered as implicitly recognized in Art.18 of the Constitution for the former is substantially connected to prohibition against torture and other cruel, inhuman or degrading treatment or punishment in terms of objective.

The Criminal Procedure Code has also recognized the privilege against self-incrimination, by default, while recognizing the right of silence as the latter

protects suspected or accused persons against self-incrimination. Interestingly, the Criminal Procedure Code gives protection to witnesses against self-incrimination. The Procedure Code, in Art.30 (1), provides that any person (witness) coming before an investigating police officer to testify about an alleged crime "…may refuse to answer any question the answer to which would have a tendency to expose him to a criminal charge." What is the extent of this privilege? This will be discussed in the following section.

3.2.1. Scope

The scope of the privilege against self-incrimination, similar to the right of silence, seems to be limited only to testimonial evidence. As it has been dealt with at length thus far in this article, almost all jurisdictions restrict the privilege against self-incrimination only to testimonial evidence. Since we have touched upon this issue while dealing with the scope of the right of silence, it is not necessary here to elaborately discuss the scope of the privilege against self-incrimination under Ethiopian law. However, to substantiate the argument that the privilege against self-incrimination does not include real or physical evidence, let us consider some provisions dealing with the same. According to Art.34 of the Criminal Procedure Code, an accused person may be compelled to undergo physical examination such as a blood test which is physical evidence. The 2009 Ethiopian Anti- Terrorism Proclamation No.652, in Art.21, has also provided that police may order a

person suspected of acts of terrorism to give samples such as his fingerprint, photograph, blood, saliva and other body fluids and to undergo medical test.

The privilege against self-incrimination also seems to be limited only to natural persons. It does not seem to extend to juridical persons. The Revised Federal Ethics and Anti-Corruption Commission Establishment Proclamation No.433/2005 provides that "[a]ny investigator who has the power to investigate corruption offences may require the production or examination of relevant documents or information from any Federal or Regional Public Office and Public Enterprise."[155] Such corporate bodies may be mandatorily required to deliver any relevant document whenever required. Even any public official or public employee working in such institutions may be required to produce a document relevant to an alleged corruption offence though that might be incriminating.[156] As we have seen so far, this is consistent with the practice of other countries where the privilege against self-incrimination does not extend to juridical persons.

3.2.2. Limitations and Applications

The FDRE Constitution, in Art.19 (5), clearly proscribes any evidence acquired through coercion.

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[155] The Revised Federal Ethics and Anti-Corruption Commission Establishment Proclamation, 2005, Art.26 (4), No.433/2005.
[156] *Ibid*.

In this regard, the Criminal Procedure Code has also provided that "[n]o police officer or person in authority shall offer or use or make or cause to be offered, made or used any inducement, threat, promise or any other improper method to any person examined by the police."[157] Which of these improper methods of obtaining of evidence is/are likely subject to inadmissibility in light of Art.19 (5) of the FDRE Constitution? That is, which of these improper methods is/are considered to be found under coercion within the meaning of the Constitution? Obviously, any evidence to be gathered under torture is absolutely prohibited under the Constitution for it is absolute right even during the time of public emergency.[158] So, every individual is protected through the privilege against self-incrimination in case of evidence found under the administration of torture.

There is also a little doubt that with respect to the other improper methods of evidence gathering such as threat, inducement, or promise, one can be protected through the privilege against self-incrimination. The words "[a]ny evidence…" in Art. 19 (5) of the Constitution shows that evidence obtained through compulsion of 'any degree of influence'[159] must be excluded from

[157] Criminal Procedure Code of Ethiopia, *supra* note 154, Art.31 (1).
[158] Constitution of Federal Democratic Republic of Ethiopia, 1995, Art.93 (4) (C), *Federal Negarit Gazeta*, Proc. No.1/1995, 1st year, No.1.
[159] Coercion under Art.19 (5) of the Constitution can be committed when 'any degree of influence', such as torture, threat or promise, is exerted against a suspect. See generally Wondwossen Demissie, *Ethiopian Criminal Procedure*, American Bar Association, 321 North Clark Street, Chicago, USA , 2012, pp.89-126.

evidence. It follows that since the right to the privilege against self-incrimination is a firmly guaranteed constitutional right to be protected during criminal proceedings, any evidence would not be admissible in court unless it is obtained without any coercion from a person in authority.

However, it may be debatable whether or not there can be an exception to the privilege against self-incrimination in Ethiopia in case of crimes of terrorism. The 2009 Ethiopian Anti- Terrorism Proclamation No.652 provides that "…intelligence report prepared in relation to terrorism, even if the report does not disclose the source or the method it was gathered," shall be admissible in court.[160] Does this mean that any evidence gathered in whatever method, be it through torture, threat, promise, inducement or coercion is admissible before court of law? The admissibility is mandatorily required by the term "shall" in the proclamation; and thus an accused does not seem to be successful to challenge the admissibility of any evidences gathered relating to terrorism cases. However, it can be argued that a suspect or an accused is always constitutionally entitled to the privilege against self-incrimination even in case of crimes of terrorism. In accordance with sub-Articles 2 and 5 of Article 19 and sub-Article 3 of Article 20 of the Constitution, if a forced confession or admission happens, the immediate effect of such compulsion, as provided in Article 19 (5) of the Constitution, is the inadmissibility of the evidence so obtained. As noted before, the Constitution, in Art.19, makes no exception to

[160] Ethiopian Anti- Terrorism Proclamation, 2009, Art.23 (1), No.652/2009.

the exclusion or inadmissibility of evidence obtained through coercion notwithstanding that public safety or interest may so require. In that sense, the Anti- Terrorism Proclamation is unconstitutional when it appears to allow evidence obtained through whatever method to be admissible.

Finally, the type of system, adversarial or inquisitorial, that Ethiopia follows and its relation to the right to silence and the privilege against self-incrimination needs to be considered. As Robert Allen Sedler noted, while the substantive codes in Ethiopia are based on the continental model, Ethiopia follows the common-law approach to procedure.[161] Accordingly, the 1961 Criminal Procedure Code is primarily "a common-law type code."[162] Under the Criminal Procedure Code, the "prosecution is adversary rather than inquisitorial, and the traditional guarantees of the criminal accused which form an integral part of common- law criminal procedure exist in Ethiopia."[163] That is, the Criminal Procedure Code manifests the features of common-law procedure. The right of silence and privilege against self-incrimination, as has been pointed out earlier, are rooted in common law countries which adopt adversarial system that does not require a suspect or an

[161] Sedler, R., 'The Development of Legal Systems: The Ethiopian Experience', *IOWA Law Review*, Vol. 53, pp.562-635, 1967, p.576, retrieved from < www.abyssinialaw.com > [Accessed on 23 January, 2015]. [Hereinafter Sedler]. See also the reasons why Ethiopia has adopted the common-law approach towards procedures despite the fact the substantive laws are anchored in the continental model *(Id, pp.576-586).*

[162] *See* Fisher, *Some Aspects of Ethiopian Arrest Law,* 3 J. ErTH. L. 463, 464 n.6, 1966 cited in Sedler, *supra note* 161, p.624.

[163] Sedler, *supra note* 161, p.622.

accused person to assist in finding the truth which is not true in inquisitorial system. In view of that, since Ethiopia follows the adversarial system of criminal proceedings, these internationally guaranteed and fundamental rights should be respected duly.

Concluding Remarks

The right of silence is a cluster of rights and privileges recognized by a law. It gives protection to individuals to refuse to answer official questions during police interrogations or to produce some evidences having testimonial nature. It also gives immunity against the drawing of an adverse inference from silence during trial. On the other hand, the privilege against self-incrimination is the right not to be compelled to incriminate oneself. Though their historical origin is disputable, the right of silence and the privilege against self-incrimination are generally understood to be well established in the common law legal tradition, particularly in England and then spread to the rest of the world as time went on. Currently, the rights are recognized under the various human rights instruments and thus are one of the rights in the field of human rights law. The rights are relatively better respected in adversarial system than its inquisitorial counterpart. Unlike in inquisitorial system, in adversarial system, there is greater emphasis given to rights of individuals and suspected or accused persons are not obligated to contribute to a case against them.

Both rights are closely related to each other though the privilege against self-incrimination sometimes appears to be broader than the right of silence. In regard to the scope of the rights, both of them are limited to the context of criminal proceedings, testimonial evidences and natural persons. There are a number of rights to which these rights are linked. They are linked to the presumption of innocence, free will of individuals, freedom of expression, liberty, privacy, etc. There are many rationales justifying such rights which include, *inter alia*, for curbing state power, for fairness and for respecting human dignity. Additionally, there are also many limitations attributed to the rights. The most serious limitations are that they are seen as barriers to the search of truth in a criminal justice system and are also criticized for ignoring victims' rights by giving priority to a suspect or an accused.

The right of silence and the privilege against self-incrimination are recognized under the FDRE Constitution as types of human rights. Though the Constitution does not clearly provide that police should tell to an arrested person his right of silence, from the perspective of the general nature of the Constitution, it should be understood as requiring "formal warning" while recognizing the right to remain silent. Since the Constitution clearly outlaws any evidence acquired through coercion, individuals are constitutionally protected through the privilege against self-incrimination during criminal proceedings and thus any evidence would not be admissible in court unless it is obtained without any coercion.

The author forwards the following recommendations to better implement the right of silence and privilege against self-incrimination in the Ethiopian criminal justice administration. Even though the FDRE Constitution, in Art.19 (2), does not clearly impose an obligation on police to tell an arrested person as he has the right to remain silent, it should be understood, in tandem with Art. 27 of the 1961 Ethiopian Criminal Procedure, in light of the general feature of the Constitution and interpreted as imposing an obligation on police to warn that right of the arrested person in addition to telling the consequence of making statements.

The 2009 Ethiopian Anti- Terrorism Proclamation No.652 which appears to violate individuals' right of privilege against self-incrimination should be amended in order for it not to acknowledge coercion, which may include administration of torture, in obtaining evidence in case of crimes of terrorism. No one argues or disagrees as to the seriousness of terrorism which justifies most violation of rights of individuals for the sake of the public at large. But, the use of torture to combat terrorism must also not be tolerated. The prohibition of torture is supremely absolute. The FDRE Constitution has also made it absolute right that cannot be violated even at time of public emergence. Ironically, the anti-terrorism law violates freedom from torture which is in effect a violation of the supreme law ―the Constitution. Even with respect to the other improper methods of evidence gathering such as threat, inducement, or promise, individuals are firmly protected against any

coercion. The words "[a]ny evidence…" in Art. 19 (5) of the Constitution connotes that evidence obtained through compulsion of 'any degree of influence' must be excluded from evidence irrespective of case of crimes of terrorism.

Confession or admission of a suspect before police without being warned or informed of his right to remain silent should be rejected. The explanation that anything the arrested person may say will be used as evidence against him in court should be accompanied by the warning of the right to remain silent. This warning is needed in order to make the arrested person aware of both the right of silence and the consequences of forgoing. An arrested person's confession of guilt which has been procured through physical violence, psychological intimidation, or improper inducements or promises should not be considered in evidence against him at trial. Confessions made under such pressures or through such improper methods are more likely unreliable as suspects may have admitted the alleged crime of which they may be innocent. They may admit simply to escape the pain of the physical and mental sufferings.

The author further recommends that there has to be sufficient safeguards to admit police interrogations as evidence before court of law. For example, arrested or suspected persons should be given the opportunity to have access to legal advice. Any expectation that a suspect should disclose his defense to

police at the time of questioning or interrogation should be based on proper safeguards that would avoid self-incrimination. For a suspect to give any information or evidence to police, he needs to have a clear understanding of the charges and relevant law which may call for legal advice. Guaranteeing suspects with access to legal advice at this early stage of the criminal proceeding is used to avoid the possibility of improper police interrogation. As noted before, in the USA, suspects are guaranteed with legal representation right during police interrogation. Thus, in order to better enable suspected persons to exercise their right of silence and privilege against self-incrimination plus to avoid miscarriage of justice, suspects in Ethiopia should be guaranteed with access to legal advice including government appointed legal counsel to those suspects who cannot afford the service.

In the absence of this safeguard, the author ardently recommends that police interrogation should be accepted as evidence before trial only if it is made in accordance with Art.35 of the 1961 Ethiopian Criminal Procedure Code. That is, the confession of a suspect should be used as evidence before trial if it was administered before any court. So, any confession by a suspect at police station without legal advice, when that was requested by the suspect, should be inadmissible before the trial court if persons suspected or accused of crime are to be entitled to the minimum basic guarantees of the right of silence and privilege against self-incrimination during criminal proceedings.