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Conceptual foundations of the right to remain silent

Hon Justice T Chitapi¹ and Dr. Gift Manyatera²

Abstract

Criminal justice systems across the common and civil law divide have traditionally grappled with the nature, scope and ambit of trial rights generally, particularly the right to a fair trial. A key ingredient of a fair trial is the right to remain silent. This right to remain silent conceptual foundations contribution is the first part of a two series interrogation of the right in the Zimbabwean context. The analysis in this article is meant to provide the jurisprudential context and development of the right to remain silent as it currently manifests in criminal justice systems globally. The article analyses the scope of the right and its historical development at the international and African regional level invariably situating it in the broader right to a fair trial discourse.

1. Introduction

The right to remain silent is a criminal law principle that is recognized in many legal jurisdictions across the globe that employ the accusatorial system in arrests and prosecutions of suspects and accused persons. The right has with time been entrenched in most constitutions globally.³ It is grounded in international law jurisprudence and norms. In order to understand the scope of the right to silence in Zimbabwe, it is imperative to delve into its conceptual foundations at the regional and international level. Such an approach invariably reconciles the theory and praxis of the right to silence in Zimbabwe. Section 327 (2) of the Constitution provides for a dualist approach by addressing the extent to which international and regional instruments are applicable in Zimbabwe. Such instruments are not binding on Zimbabwe unless they have been domesticated. It should however be noted that it is proper and necessary for domestic courts, as part of the judicial process, to have regard to the state's international obligations, whether or not they have been incorporated into domestic law.⁴ This means that

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³ See for example Constitution of India. Article 20 protects a person accused of any offense against being compelled to be a witness against himself); Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, 11(c) (individuals "charged with an offence" may not be "compelled to be a witness in proceedings . . . in respect of the offence"); New Zealand Bill of Rights Act 1990 No. 109, 25(d) (individuals charged with an offense are granted the right not to be compelled to be a witness or to confess guilt).

⁴ *Mapingure v Minister of Home Affairs & Others* SC 406/12.

the state cannot act contrary to its international obligations despite it not having domesticated such instruments.

2. Historical development of the right to remain silent

The right to remain silent is more aptly defined as a common law privilege which protects suspects or accused persons from self-incrimination.⁵ This means that a suspect/accused person cannot be forced to give evidence which could lead to his or her conviction of an offence. The right has also been defined⁶ as a reflection of the procedural requirements of the privilege against self-incrimination and is integral to the protection of the natural legal person in a criminal justice system in which inquisitorial methods have no place. From the definition it is apparent that the police or court cannot compel a suspect or accused person to give evidence which is not in his favor. The definition does not clarify whether the right must be expressly invoked or may be exercised passively, however, doctrinal analysis supports recognition of both forms, subject to jurisdictional variation in their scope and effect.⁷ However, outright passive silence, without more ado, can cause judicial contestation whether there is an effective use of the right to silence.⁸

To further grasp what the right entails, it must be underscored that it comes as a two-tier concept. The first tier is its application at pre-trial stage and the second tier is the application at trial stage. Palmer sets out the distinction between the two tiers by stating that,

[T]he right to a pre-trial silence is based on notions of what constitutes fairness in the States methods of investigating and proving an alleged offence. The same rationale does not apply to the right not to testify, since here 'the accused is not asked to testify against himself (sic) but in favor of himself (sic).'⁹

It is basic that on the pre-trial tier, an individual should not be compelled, during pre-trial to answer questions put before him or her.¹⁰ Specifically, during police questioning in pre-trial

⁵ A Palmer, *Principles of Evidence* (1998) 160. See also C Theophilopoulos 'The European Convention on Human Rights and the right to silence: The lesson for South Africa' (2003) 36 *De Jure* 372 373.

⁶ *Environmental Protection Authority v Caltex Refining Company Pty Ltd* (1993) 118 ALR 392.

⁷ See *Murray v United Kingdom* 1996 ECHR 2; *Salina v Texas* 570 US 178 (2013).

⁸ Salinas *ibid*.

⁹ A Palmer, 22.

¹⁰ K. A. Cavanaugh *Emergency Rule, Normalcy Exception: The Erosion of the Right to Silence in the United Kingdom* *Cornell International Law Journal*, Volume 35 Issue 3 *Winter 2002* Article 4.

investigations an accused person may decline to answer some or all questions put to him or her, or may simply remain silent when asked any question or to provide specific information.¹¹ This is so because the suspect/accused person is under no obligation to self-incriminate himself or herself.

The second tier applies during trial. An accused person may choose to remain silent under questioning or may refuse to testify in his or her defense. The exercise of the right does not establish evidence against the suspect or accused person.¹² It should also be understood that the right to remain silent where not legislated applies at common law at the various stages of litigation.¹³

Historical scholarship locates the origins of the right to remain silent as a common law privilege which emanated in the second half of the seventeenth century, as part of the aftermath of the constitutional struggles that resulted in the abolition of the courts of Star Chamber and High Commission in England.¹⁴ These courts were so adverse to the extent that an outcry by the public was made against the accusatorial methods which they employed. The said ecclesiastical Courts¹⁵ would force accused persons to take oath to answer all questions honestly of which failure to take oath would result in them being considered as having confessed their guilt.

The further alternative to not taking an oath was to impose a punishment of imprisonment for contempt of the court. The situation was so dire that in other instances life imprisonment was imposed for contempt.¹⁶ This left accused persons with no choice but to answer all questions, no matter how incriminating, in order to avoid imprisonment.¹⁷

¹¹ *Petty & Maiden v R* (1991) 173 CLR 95, 90.

¹² *See R v. Gilbert*, 66 CRIM. App. R. 237, 244 (1977) "It is our opinion now clearly established by the decisions of the Court of Appeal and the Court of Criminal Appeal that to invite a jury to form an adverse opinion against an accused on account of his exercise of his right to silence is a misdirection".

¹³ K. A. Cavanaugh, 22.

¹⁴ J. H. Langbein, *The Historical Origins Of The Privilege Against Self-Incrimination At Common Law* (1994). Faculty Scholarship Series. Paper 550. Also available on http://digitalcommons.law.yale.edu/fss_papers/550 (Accessed on 31 August 2018).

¹⁵ G. W. O'Reilly, *England limits the right to silence and moves towards Inquisitorial System of Justice*, *Journal of Criminal Law and Criminology*, 85 (1994) 411.

¹⁶ G. W. O'Reilly, 411.

¹⁷ K Van Dijkhorst, 31.

The rationale of the origins of the right to silence were elucidated in the case of *Saunders v United Kingdom*¹⁸ where the court expressed that the rationale is rooted on the protection of the accused person against improper compulsion by the authorities, thereby contributing to the avoidance of miscarriage of justice. It can be deduced that the right rests on the protection of the accused person's rights which are more anchored on the presumption of innocence until one is proven guilty. Since no distinction can be made between a guilty party and an innocent one until a proper and fair trial is conducted, the right to remain silent is viewed as a safeguard. It is also submitted that since the burden of proof beyond reasonable doubt rests on the State to prove the accused's guilt,¹⁹ the accused should then not be compelled to assist the prosecution by adducing any evidence including that which would exonerate him. This should only be done voluntarily without reprisals.

The origins have also been debated by scholars such as Langbein²⁰ who argue that the true origins of the right to remain silent are to be found not in the high politics of the English revolutions, but in the rise of adversary criminal procedure at the end of the eighteenth century. He further argues that the privilege against self-incrimination at common law was the work of defense counsel. The right arose as a form of protecting accused persons from not only self-incrimination but giving evidence *in toto*. It is, however, generally accepted that the right emanated in England.

The right has further been said to have also evolved from distrusts shown by the English judiciary. As a result of such distrust at the beginning of the 19th century, the judges started to express their distrust on the confessions which were conducted by the authorities as they were not properly monitored and organized.²¹ It can on this reasoning be said that such reform came from the bench itself. The bench's alignment towards the right first came to light in 1568 when Lord Chief Justice Dyer advocated at first instance for accused persons to have the right to remain silent under the maxim: *nemo tenetur se ipsum prodere* (no man shall be forced to produce evidence against himself).²²

¹⁸ (1996) ECHR 65.

¹⁹ Lubanga, ICC T. CH. 1, 14 March 2012, para. 92; Ngudjido Chui, ICC T Ch. II 18 December 2012, para 34-6.

²⁰ J. H. Langbein *supra*.

²¹ K. A. Cavanaugh, 23.

²² Tánaiste and Minister for Justice, Equality and Law Reform: Balance in the Criminal Law Review Group Final Report, Dublin Balance in the Criminal Law Review Group, 2007, 18.

The right was only officially recognized in English law in 1921 when it was included in the Judges' Rule 1921.²³ The Judges Rules to date in England still remain as a set of code of conduct not reduced to law.²⁴ They aim at checking excesses and methods used by the police force in their investigations.²⁵ The rules check that any interrogations which would have been made under police custody should not be made under fear or without will. The right to remain silent was then included as law in the England Police and Criminal Evidence Act 1984.

After the Second World War, the need to prosecute certain individuals for their war crimes while preserving their human rights to remain silent took center stage on the international scene. The Nuremberg and Tokyo War Crimes Tribunals²⁶ represented milestones in the internationalization of human rights standards and their enforcement through international mechanisms which recognized the right to remain silent. In both the Nuremberg and Tokyo proceedings, the defendants were tried for crimes against peace, war crimes, and crimes against humanity before military tribunals rather than civilian courts. In each case, the governing charters provided that the tribunals would not be bound by technical rules of evidence but rather were to "admit any evidence which [the tribunal] deem[ed] to have probative value."²⁷

The Nuremberg Tribunal specifically held that this included the admission of voluntary pre-trial statements of an accused, even though defendants could not be called to testify against their will.²⁸ In the end, the Nuremberg and Tokyo War Crimes Tribunal cases and the domestic prosecutions that followed²⁹ resulted in convictions that reflected the international community's condemnation of war-related atrocities. This culminated into the formulation of the right to remain silent being recognized at international level through the Universal

²³ K. A. Cavanaugh, 22.

²⁴ *R v Voisin* [1918] 1 KB 578.

²⁵ *Murray v. United Kingdom* Eur. H.R. Rep. 29, 31 (Eur. Ct. H.R. 1996).

²⁶ The International Military Tribunal at Nuremberg was created by the four victorious Allied powers: the United States, Great Britain, France, and the Soviet Union. It was established pursuant to a charter contained in the London Agreement of August 8, 1945. See Agreement for the Prosecution and Punishment of Major War Criminals of the European Axis, Aug. 8, 1945, 59 Stat. 1544, 82 U.N.T.S. 279. The International Military Tribunal for the Far East, in contrast, was established pursuant to an order promulgated by General Douglas MacArthur in his capacity as Supreme Commander for the Allied Powers. See Charter of the International Military Tribunal for the Far East (1946). See also M. C. Bassiouni (2012) Introduction to International Criminal Law at 405–26.

²⁷ R May & M Wierda, (1999) Trends in International Criminal Evidence: Nuremberg, Tokyo, The Hague, and Arusha, 37 Colum. J. Transnat'l L. 725, 743–44.

²⁸ R May & M Wierda *supra*.

²⁹ R May & M Wierda *supra*.

Declaration of Human Rights 1948. The right has since then been adopted and incorporated into domestic laws of many jurisdictions.

3. International perspectives on the right to remain silent

The right to remain silent has to date been referred to as a 'generally recognized international standard'.³⁰ A cursory overview of the rights enumerated in the International Covenant on Civil and Political Rights (ICCPR) shows that the right to remain silent is not explicitly guaranteed in international law.³¹ The ICCPR provides a normative framework against which domestic laws and practices must conform,³² although it does not explicitly guarantee the right to remain silent.

This then raises questions such as whether States should compel suspects to answer questions during interrogations, to testify at trial or whether a suspect or accused person chooses to remain silent during these processes, can such silence be used against him in determining his guilt or innocence. To get a better understanding of State obligations under international law, one should consider other rights explicitly described in the ICCPR, namely the presumption of innocence and the right not to be compelled to testify against oneself and to then appreciate how those rights relate to the right to remain silent. Underlying all these rights are the broader rights of the protection of the dignity of the individual and fairness in criminal due process. It is the right of every person charged with a criminal offence to be presumed innocent until and unless proved guilty according to law after a fair trial.³³ Being treated as innocent is essential to a fair trial and intrinsically related to the protection of human dignity. Upholding this principle ensures the preservation of the basic concepts of justice and fairness.

³⁰ *Murray v United Kingdom* supra.

³¹ E Skinnider and F Gordon *The Right To Silence – International Norms And Domestic Realities*, Sino Canadian International Conference On The Ratification And Implementation Of Human Rights Covenants Beijing, 25-16 October 2001.

³² See Article 2 of the ICCPR

³³ The UNDHR, Article 11: everyone charged with a penal offence has the right to be presumed innocent until proved guilty according to law in a public trial at which he has had all the guarantees necessary for his defence. ICCPR, Article 14(2): everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law.

It is noted that rules of evidence and the conduct of a trial must not abrogate the principle that the prosecution bears the burden of proof beyond a reasonable doubt throughout the trial.³⁴ The principle is intertwined with the presumption of innocence and the right not to be compelled to testify against oneself or to confess guilt, as expressly set out in the ICCPR.³⁵ This means that authorities should not engage in any form of coercion, whether direct or indirect, physical or psychological to defeat the enjoyment of the right of the individual to remain silent. Furthermore, judicial sanctions should not be imposed to compel the accused to testify.³⁶ The current jurisprudential orientation internationally considers the right to remain silent as central to upholding human dignity and freedom of expression.

It is apparent that the right to remain silent is not a single right but consists of a cluster of procedural rules that protect against self-incrimination.³⁷ The right to choose whether or not to respond to questioning or to testify is founded on the right not to be compelled to testify against oneself or confess guilt.³⁸ There has been immense debate as to how this right should be protected in the context of a criminal trial where the consequences of exercising the right to remain silent may be determined by the judge or jury. Those who argue for permitting adverse inferences to be drawn where the right has been exercised³⁹ suggest that to do so does not violate the privilege against self-incrimination as it simply allows the court to make a common-sense assessment of all the evidence before it. They argue that the question is whether the power to draw adverse inferences is sufficiently coercive that the accused is not actually protected against self-incrimination. The other side of the argument is that any inferences drawn from remaining silent operate as a means of compulsion, shifting the burden of proof from prosecution to the accused.⁴⁰ The latter argument suggests that the law cannot grant a fundamental right and then penalize a person who chooses to exercise it.⁴¹

³⁴ BA Hocking and L L Manville, What of the right to silence: Still supporting the Presumption of Innocence, or a Growing Legal Action, *Macquarie Law journal* 1, No 1(2001), 63.

³⁵ ICCPR, Article 14(3): in the determination of any criminal charges against him, everyone shall be entitled to the following minimum guarantees, in full equality...(g) not to be compelled to testify against himself or to confess guilt.

³⁶ Amnesty International, "Fair Trials Manual" (December 1998), available on www.amnesty.org/ailib/intcam/fairtrial/fairtria.htm (accessed on 28 November 2018)

³⁷ Michael, J. and Emmerson, B. "Current Topic: The Right to Silence" (1995) 1 *European Human Rights Law Review* 4 at 6.

³⁸ J Bentham *Treatise on Judicial Evidence* (1825) 241.

³⁹ A Palmer *supra*.

⁴⁰ KA Cavanaugh *supra*.

⁴¹ These arguments are summarized in the article by Michael and Emmerson.

In order to fully understand the scope of this right in international law, an examination of the jurisprudence from international and regional bodies is essential. The Human Rights Committee is the treaty body established to monitor State Parties' compliance with the ICCPR. Through its jurisprudence, including General Comments, Concluding Observations on States' reports and decisions from individual petitions, the Committee has elaborated somewhat on the meaning of these rights and on States Parties obligations under the Covenant. The Committee, in General Comment 13, noted that in many countries, the presumption of innocence has been expressed in very ambiguous terms or entails conditions which render it ineffective.⁴² They have clearly stated that "by reason of the presumption of innocence, the burden of proof of the charge is on the prosecution and the accused has the benefit of the doubt. No guilt can be presumed until the charge has been proved beyond a reasonable doubt."⁴³ It is, therefore, a duty for all public authorities to refrain from prejudging the outcome of a trial. The Committee called on States to pass legislation to ensure that evidence elicited by means of such methods that compel the accused to confess or to testify against himself or any other form of compulsion is wholly unacceptable.⁴⁴

In 1995, the Human Rights Committee reviewed the fourth periodic report of the United Kingdom and found that the modification of the right to remain silent in allowing the judge and jury to draw adverse inferences in certain situations "violate various provisions of Article 14 of the Covenant [fair trial], despite a range of safeguards built into the legislation and the rules enacted thereunder".⁴⁵ This comment shows a drift between the application of the right to remain silent with limitations, against international expectations or obligations. In 1989, the Sub-Commission on Prevention of Discrimination and Protection of Minorities (a sub-commission of the United Nations Human Rights Commission) appointed two of its members as rapporteurs to prepare a report on existing international norms and standards pertaining to the right to a fair trial. In preparing a Third Optional Protocol to the ICCPR which was aimed at guaranteeing under all circumstances the right to fair trial, a Draft Body of Principles on the Right to a Fair Trial and a Remedy was developed.⁴⁶

⁴² Human Rights Committee, General Comment 13, Article 14 (Twenty-first session, 1984) Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, UN Doc. HRI/GEN/1/Rev.1 at 14 (1994).

⁴³ General Comment 13.

⁴⁴ General Comment 13.

⁴⁵ CCPR/C/79/Add 55, July 27, 1995 at para. 17.

⁴⁶ The Draft Body of Principles on the Right to a Fair Trial and a Remedy, Annex II of the "The Administration of Justice and the Human Rights of Detainees – The right to a fair trial: Current recognition and measures

The body of principles, in elaborating on the accused's right not to be compelled to testify against him or herself or to confess guilt, specifically sets out 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'. Furthermore, any confession or other evidence obtained by any form of coercion or force may not be admitted into evidence or considered as probative of any fact at trial or in sentencing. Elaborating on the presumption of innocence, the Draft Principles reiterate that the presumption places the burden of proof during trial on the prosecution and that all public officials shall uphold the presumption of innocence, including judges, prosecutors and the police.

More recent international documents have explicitly included the right to remain silent. Both the Rules of Procedure and Evidence adopted by the criminal tribunals established by the United Nations Security Council for the Former Yugoslavia and Rwanda provide for an explicit right to silence during investigation stage.⁴⁷ The Rome Statute of the International Criminal Court not only confers a right to silence, but also provides that silence cannot be used as "a consideration in the determination of guilt or innocence".⁴⁸ Such explicit expression of the right to remain silent in the most recent articulations of criminal justice in international instruments has been said to indicate the movement away from the position that allows for the imposition of any procedural measures which may have the effect of pressuring suspects and defendants into speaking against their will. Such position violates international human rights standards.⁴⁹

International instruments⁵⁰ show that a suspect or accused person has no onus to prove anything and he cannot then be compelled to give evidence if he chooses to remain silent. It lies on the prosecution to prove guilt of the accused person. It also extends to the police in conducting

necessary for its strengthening - Final Report prepared by Mr. Stanislav Chernichenko and Mr. William Treat", E/CN.4/Sub.2/1994/24, 3 June 1994.

⁴⁷ International Criminal Tribunal for Rwanda, Rules of Procedure and Evidence, adopted on 29 June 1995 and amended thereafter, consolidated text dated 31 May 2000, Rule 42 (found at www.ictr.org) and International Criminal Tribunal for the Former Yugoslavia, Rules of Procedure and Evidence, last amended 12 April 2001, Rule 42 (found at www.un.org/icty/basic.htm).

⁴⁸ Rome Statute of the International Criminal Court (UN Doc A/CONF.183/9) Article 66 (presumption of innocence) and Article 67 (to remain silent, without such silence being a consideration in the determination of guilt or innocence) (found at www.un.org/law/icc/statute/romeofra.htm).

⁴⁹ E Skinnider and F Gordon The Right To Silence – International Norms And Domestic Realities, Sino Canadian International Conference On The Ratification And Implementation Of Human Rights Covenants Beijing, 25-16 October 2001.

⁵⁰ See Article 66 of the Rome Statute of International Criminal Court; Article 14 of ICCPR.

their investigations. A proper investigation should present all facts which might assist the prosecution without relying on the accused person. Violation of the right to remain silent through compulsion to give evidence or limitation of the right only leads to violation of other conjoined rights such as the right to a fair trial.

The right to remain silent as noted from its conception discussed above to its international adoption is still an evolving principle which over the centuries has taken many forms through its expression in various other rights. Before all other rights are even employed, the right to remain silent lays the backbone for recognition of all other rights. Having canvassed the international dictates of the right to remain silent, it is critical to take a closer look at how the right has been provided for on a regional scale so as to see how Africa in the midst of the development of this right has adapted.

4. Regional Perspectives on the right to remain silent

Juxtaposed with the international context, African regional instruments do not expressly provide for the right to remain silent. African nations have gone so far as to adopt the principle through the African Charter on Human and Peoples' Rights (ACHPR).⁵¹ The treaty was adopted by the Organization of African Unity and is subject to the jurisdiction of the African Commission on Human and Peoples' Rights (hereinafter referred to as the African Commission). The ACHPR is the instrument which implicitly provides the right. The provision in the ACHPR which best alludes to the right to remain silent and which counters against self-incrimination is Article 8(2) (g) which expressly states,

[E]very person is entitled, with full equality . . . [to] the right not to be compelled to be a witness against himself or to plead guilty.

Other provisions of the ACHPR indirectly provide for the right to a free and fair trial without being specific to the right to remain silent. Article 5 provides for the protection of the right to human dignity of every individual and recognition of his legal status.⁵² One can say that this speaks to suspects or accused persons as they are entitled to their right to remain silent. The fact that a person has been accused of a criminal offence does not in any way take away their

⁵¹ See Charter.

⁵² 'Every individual shall have the right to the respect of the dignity inherent in a human being and to the recognition of his legal status. All forms of exploitation and degradation of man particularly slavery, slave trade, torture, cruel, inhuman or degrading punishment and treatment shall be prohibited.'

right to be treated fairly and in a dignified manner. It can be postulated that this includes not being compelled to self-incriminate themselves as they stand innocent until the prosecution proves them guilty.

Article 6 protects the right to liberty and security of person and prohibits the deprivation of freedom except for reasons and conditions previously laid down by law. In particular no one may be arbitrarily arrested or detained.⁵³ If there is no evidence of any criminal activity and the suspect chooses to exercise his right to remain silent then he should be released immediately. One should not be arrested to be investigated.

Article 7 provides that everyone shall have the right to have his cause heard. This encompasses the right to appeal, the right to be presumed innocent, the right to defense, and the right to be tried within a reasonable time by an impartial court or tribunal. It also refers, in subsection 2, to the principle of legality.⁵⁴ The most important part in this provision which relates to the suspect/accused person's right to remain silent is the presumption of innocence. Once a suspect or accused person is presumed innocent then that means he is under no obligation at all to prove his innocence unless there is prima facie evidence that proves otherwise. In the instance that the suspect/accused person elects to remain silent then due to him being presumed innocent, he cannot be expected to give evidence that negates that presumption.

Article 26 places a duty on state parties to guarantee the independence of the courts. The independence of the courts do not only extend to non-interference by the executive but also an impartial approach when dealing with cases. If a court is impartial, it therefore means that the accused persons are free to present their matters without fear of being quizzed as to why they did not respond to police interrogations before coming to court or having to testify in their defense. Upholding the courts' independence and impartiality also connotes that in criminal

⁵³ 'Every individual shall have the right to liberty and to the security of his person. No one may be deprived of his freedom except for reasons and conditions previously laid down by law. In particular, no one may be arbitrarily arrested or detained.'

⁵⁴(1)Every individual shall have the right to have his cause heard. This comprises: (a) the right to an appeal to competent national organs against acts of violating his fundamental rights as recognized and guaranteed by conventions, laws, regulations and customs in force; (b) the right to be presumed innocent until proved guilty by a competent court or tribunal; (c) the right to defence, including the right to be defended by counsel of his choice; (d) the right to be tried within a reasonable time by an impartial court or tribunal. 2 No one may be condemned for an act or omission which did not constitute a legally punishable offence at the time it was committed. No penalty may be inflicted for an offence for which no provision was made at the time it was committed. Punishment is personal and can be imposed only on the offender.'

trials, courts will unflinchingly uphold the principle that the burden of proof remains with the prosecution and not the accused person.

Although none of the ACHPR articles specifically contain provisions relating to the right to silence, the African Commission is mandated by article 45(1) (b) of the ACHPR to formulate and lay down principles and rules aimed at solving legal problems relating to human rights and freedoms. Following on its mandate, the African Commission drafted Principles and Guidelines which are however not binding on state parties to the ACHPR. They act as indicators on how the right to a free and fair trial is interpreted by the African Commission. The Principles and Guidelines have persuasive value in the African Court on Human and Peoples' Rights. In these Principles and Guidelines, the right to silence, including pre-trial silence, is expressly provided for. The Preamble of the Principles and Guidelines shows a union of international and regional standards in the formulation of principles and rules to strengthen and supplement the provisions relating to a fair trial as contained in the African Charter which reflects international standards.

The Principles and Guidelines are divided into various sections. All the sections numbered A to S have to do with the conduct of all legal proceedings by laying down principles and guidelines for fair and public hearings and independent and impartial tribunals. Section M of the Principles and Guidelines deals extensively with provisions applicable to arrest and detention. It lays down various guidelines regarding the rights of arrested persons which state parties should observe. The pre-trial right to silence is specifically protected in Part 2, which deals with rights upon arrest. Subsection 22 (f) deals with the right upon arrest not to be obligated to answer any questions or participate in any interrogation without the suspect's lawyer being present. Section N deals with provisions applicable to proceedings relating to criminal charges. Part 6 thereof (in subsection 23 (d)) deals with the accused person's right not to be compelled to testify against himself or to confess to guilt. Subsection 24 (d) (1) provides for the exclusion of any confession or other evidence obtained through coercion or force. An admission or confession obtained during incommunicado detention shall be considered to have been obtained by coercion and thus should be excluded from admissibility. Subsection (d)(2) provides 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.

From the above summary of the instruments, it is clear that the right to remain silent is protected by the African Charter, as expanded on by the Principles and Guidelines, as an integral part of the right to a fair trial. Invariably, the right comes as an absolute right without any limitations.

5. Conclusion

The right to remain silent is a universally recognized human right which should be afforded to suspects or accused persons. Though not expressly provided for in international law, the right is expressed through other related rights. Since the right is absolute in both international and regional instruments, it connotes that for a fair trial to exist, the burden of proof should lie on the state to prove one's guilt other than for the accused to try and prove his innocence. As the backbone of all criminal law rights, once the right to remain silent is violated, all other rights fall away.

An interesting observation from the preceding discussions is that the ACHPR fully and unequivocally provides for the right of accused persons to be protected from self-incrimination. The ACHPR through various principles, expands further on the right to remain silent to such an extent that there is no question as to application of the right.

Finally, the right to remain silent should be provided for without any limitations whatsoever. It is an absolute right which should be afforded to all suspects and accused persons. It is critical that persons whom it should be afforded to must be informed or reminded of such a right and be allowed to exercise it from pretrial to trial stages. It should be the obligation of the legislature, law enforcement and the bench to ensure that there is a system of checks and balances where the right is provided for and fully exercised. Any departures from this absolute application would be a fundamental human rights violation.



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