UNIVERSITY OF NAIROBI

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TITLE: TOWARDS THE REALIZATION OF THE PRIVILEGE AGAINST SELF-INCRIMINATION: CHALLENGES AND PROSPECTS

A RESEARCH THESIS SUBMITTED IN PARTIAL FULFILMENT OF THE REQUIREMENTS FOR THE AWARD OF DEGREE OF MASTERS OF LAWS

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DECLARATION

This thesis is my original work and has not been presented and is not currently being presented for a degree in any other university.

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DEDICATION

I dedicate this work to my wife, Audrey Amanya, who has been my support throughout this research period, and to my parents, siblings, and family who have been a constant source of encouragement. Most of all, I dedicate it to Mr. Ahmednassir Abdullahi, S.C, who has been my mentor and continues to inspire me to do better.

LIST OF ABBREVIATIONS

ECHR	European Court of Human Rights
ECJ	European Court of Justice
EU	European Union
ICCPR	International Covenant on Civil and Political Rights
UDHR	Universal Declaration of Human Rights
UK	United Kingdom
UN	United Nations
USA	United States of America
CRIMPO	Criminal Justice and Public Order Act
PACE	Police and Criminal Evidence Act 1984

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CHAPTER 1 - BACKGROUND TO THE STUDY

2.1 Introduction

Of the countable rights to a fair trial in the Kenyan Constitution, the privilege against self-incrimination stands out for being recent. In the United States, the privilege is a constitutionally granted human right, whereas the United Kingdom does not limit it to humans alone;[1] for this reason, this paper will use the words "right" and "privilege" interchangeably to refer to the principle that no person should be compelled to incriminate himself or herself. In Kenya's previous constitutional dispensation, the privilege was not mentioned explicitly in the Constitution. In fact, the closest the Repealed Constitution came to associate with the right was through the prohibition of adverse inferences from an accused person's silence in court[2] and the presumption of innocence.[3] Of note is that the Repealed Constitution transferred these entitlements from the Independence Constitution that borrowed heavily from English precedence.[4] Under statutory law, the Evidence Act[5] provided immunity to witnesses against self-incriminating evidence obtained through legal compulsion in civil or criminal trials.[6] Notably, neither the Repealed Constitution nor the related statutes protected a suspect at the pretrial stage. In general, Kenya's previous dispensation lacked sufficient safeguards for the right against self-incrimination.

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[1] Leonard W Levy, *Origins Of The Fifth Amendment* (Ivan R Dee 1968) vii; The writer notes that the insertion of the English privilege in the Constitution of the United States graduated it from an English rule of procedure (privilege) to a human right.
[2] Constitution of Kenya (repealed) 2009, s. 77(7) that prohibits the compulsion of an accused person to give evidence during trial
[3] Ibid s. 77(2)(a)
[4] Charles Hornsby, *Kenya: A History Since Independence* (I. B. Tauris & Co Ltd 2012) 71. The Independence Constitution was negotiated by British colonial secretaries who emphasized on protection of civil and political freedoms
[5] No. 46 of 1963 and Chapter 80 of 2012
[6] Ibid s.128

Unfortunately, an absence of legal and constitutional frameworks to protect the privilege against self-incriminating evidence, which is fundamental to the right to a fair trial, was accompanied by a gross abuse of human rights under Kenya's previous constitutional dispensation. Thus, Kenya promulgated a new Constitution in August 2010 that guaranteed many rights to a due process. In Article 50(2) (l), the text grants every accused person the right to refuse to give self-incriminating evidence. Mainly, the privilege against self-incrimination is a procedural right that depends on other entitlements to operate effectively, so the constitution also guarantees the right to silence[7] and proscribes the admission of illegally obtained evidence at trials.[8] Most importantly, the Kenyan Constitution now protects suspects at the pretrial stage. Arrested persons currently have the right to silence, the right not be compelled to give a self-incriminating confession or admission, and the right to be cautioned about their right to silence and the consequences of foregoing that right, among others.[9] Since these constitutional entitlements are new, the country is yet to form sufficient legal and institutional frameworks required to enforce them.

One progressive characteristic of the 2010 Constitution is that it embraces international law. Under Article 2(5), the country adopts general rules of international law into local laws. In view of that, Kenyan courts can authoritatively cite instruments such as the European Convention on Human Rights (hereby shortened as ECHR)[10] in their rulings even though Kenya is not a party to the agreements.[11] In addition, Article 2(6) provides that any treaty or convention ratified by Kenya forms part of the Kenyan laws. Many of the international agreements that Kenya has

[7] Constitution of Kenya 2010, Art. 50 (2) (i)
[8] Ibid art 50 (4)
[9] Constitution of Kenya 2010,
[10] Council of Europe, *European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14*, 4 November 1950, ETS 5
[11] As has occurred in cases such as *Republic v Mark Lloyd Steveson* [2016] eKLR, where European Court of Justice's findings were used authoritatively in the judgement

entered concern the privilege against self-incrimination. Of these, the most significant are the Universal Declaration of Human Rights (UDHR)[12] and the International Covenant for Civil and Political Rights (ICCPR)[13]. In the former instrument, the privilege against self-incrimination is included under Article 10 that guarantees the right to a fair hearing, [14] while ICCPR provides for it in Article 14 (3) (g).[15] What this means is that all aspects of the privilege against self-incrimination will be protected in the country even when national legislation on the subject is inadequate.

Other protections for the privilege exist in the national values and principles that embody the spirit of the constitution. According to the text, the national values and principles of governance inform the interpretation of the constitution, the enactment of laws, and the implementation of policies.[16] With regard to the privilege against self-incrimination, the relevant values and principles are human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination, and the protection of the marginalized.[17] Mainly, the right to human dignity is critical for the observance and protection of the privilege.[18] In the Kenyan context, courts have continually relied on the human dignity principle to safeguard and advance the right against self-incrimination. For example, the appellate court in *C O I & another v Chief Magistrate Ukunda Law Courts & 4 others*[19] determined that the essence of human rights was the preservation of human dignity as is recognized in Article 19(2) of the Constitution; therefore,

[12] UN General Assembly, *Universal Declaration of Human Rights*, 10 December 1948, 217 A (III)
[13] UN General Assembly, *International Covenant on Civil and Political Rights*, 16 December 1966, United Nations, Treaty Series, vol. 999, p. 171
[14] UN General Assembly, *UDHR*, 1948, 217 A (III)
[15] Ibid (n13)
[16] Constitution of Kenya 2010, art. 10 (1) (a) (b) and (c)
[17] Ibid art. 10 (2) (b)
[18] Stefan Trechsel and Sarah J Summers, *Human Rights in Criminal Proceedings* (Oxford University Press 2009) 348.
[19] [2018] eKLR

subjection of petitioners to forced anal examinations violated their right to dignity and the privilege against self-incrimination. Overall, the national aspirations incentivize courts to expand the scope of the right against self-incrimination even when statutory provisions are limiting.

Indeed, courts have relied on the above guidelines to interpret the privilege against self-incrimination as envisioned in the 2010 Constitution. *In James Njenga Kihato v Director of Public Prosecution & 4 others,*[20] it was held that 'the right to refuse to give self-incriminating evidence is only applied to protect an accused person against testimonial evidence and not evidence that exists independently of his or her will.'[21] In arriving at this destination, the court followed the decision in *Saunders v United Kingdom*[22] that was argued at the European Court of Human Rights. Likewise, the court in *Republic v Mark Lloyd Steveson*[23] followed guidelines laid out in the *Saunders*[24] case to conclude that the constitutional privilege covered both testimonial and documentary evidence, and that confessional evidence acquired without proper cautioning of an accused person was inadmissible. Courts have also determined that there are insufficient statutory enactments in the area of self-incrimination. For instance, Justice Kamau in the *Republic v John Kithyululu*[25] case petitioned parliament to formulate a law to guide the taking of potentially self-incriminating samples from an accused person. The common thread in all these cases is that judges use comparative international law to expound the constitutional privilege against self-incrimination.

[20] [2018] eKLR
[21] Ibid
[22] 38 (1996) 23 EHRR 313
[23] [2016] eKLR
[24] ibid (n. 20)
[25] [2016] eKLR

2.2 Background to the Problem

Historically, Kenya has faced innumerable challenges in protecting the privilege against self-incrimination. Chief among these was the questionable independence of the judiciary. Since the president had the power to appoint the Chief Justice, who controlled the administrative processes of courts, the executive had undue influence over the judiciary. [26] Unfortunately, the state abused this power. An Executive-controlled judiciary often made rulings that supported the interests of the sitting government rather than human rights; thus, the enjoyment of fundamental freedoms was greatly curtailed. In addition, it was common for people in power to make edicts that supported extrajudicial resolution of crimes, such as shoot-to-kill orders that were directed towards perceived criminals when the government attempted to quell the Mungiki menace.[27] It is for this reason that the country promulgated a new constitution to repair the dented image of the justice system.

Another challenge that the country faced was the arbitrary limitation of human rights under the old dispensation. Certainly, the enjoyment of most human entitlements is subject to some form of restraint going by the Hohlfeldian conception of right and duty.[28] However, the Repealed Constitution of Kenya placed general as well as specific bottlenecks to the invocation of rights and fundamental freedoms. Such limitations included public interest, interests of justice, public order and morality, a search for balance in protecting individual versus group rights,[29] and the welfare of juveniles, or privacy of parties.[30]As a result, the state and powerful individuals

[26] Patricia Kameri Mbote and Migai Akech, 'Kenya: Justice Sector and the Rule of Law' (The Open Society Initiative for Eastern Africa 2011) 7.
[27] BBC News, 'Fury at Kenya Shoot-to-kill Order' 23 Mar. 2005, <http://news.bbc.co.uk/2/hi/africa/4374649.stm> accessed 9 November 2019.
[28] Wesley Newcomb Hohfeld, 'Fundamental Legal Conceptions As Applied In Judicial Reasoning' (1917) 26 The Yale Law Journal.
[29] Constitution of Kenya (repealed) 2009 s. 70 (3)
[30] Ibid s. 77 (11)

could easily manipulate these limitations to get away with abusing human rights. Remarkably, the 2010 Constitution remedied this issue by placing only specific limitations on rights as contemplated by the law.[31] Additionally, the new Constitution guarantees the greatest enjoyment of rights and necessitates courts to interpret human rights favorably.[32] Lastly, the 2010 Constitution also subjects human rights to a purposive interpretation guided by the national values and principles of governance under Article 10.[33] Therefore, the text of the present constitution favors a liberal enjoyment of rights.

Currently, policing, which espouses intelligence gathering, investigation, and arrest, is still characterized by poor performance and abuse. According to the Commission of Investigation into Post Election Violence (CIPEV), the Kenya Police Forces were sometimes deployed to repress citizens for political reasons. Even presently, police officers regularly arrest and detain suspects on random rounds during weekends to solicit bribes.[34] Besides, some officers also use their powers and authority to solve their personal issues in extrajudicial means.[35] To add to that, most police officers are unprofessional and use excessive force in their interaction with citizens.[36] Such issues are further exacerbated by the high frequency of corruption in the police force. With regard to their professional engagements, some officers use ungainly means of investigating crime, such as coercing suspects to volunteer information that furthers the investigations. Unfortunately, Kenyan laws only protect suspects from making confessions or submitting potentially incriminating admissions without considering the overall treatment of arrested

[31] Constitution of Kenya, Art. 19 (3) (c)
[32] Ibid Art. 20 (3) (b)
[33] Ibid Art. (20) (4)
[34] Kameri Mbote and Migai Akech, *Kenya: Justice Sector and the Rule of Law* (Johannesburg; The Open Society Initiative for Eastern Africa 2011) 12
[35] ibid
[36] ibid

persons. Consequently, the privilege against self-incrimination is subject to abuse by police officers in the absence of a legal framework to protect it during investigations.

2.3 Problem Statement

Despite the constitutional protection under Article 50 (2) (l) on the right against self-incrimination, the realization of the aspirations of the right against self-incrimination in Kenya remains a fallacy. It is regrettable that even as Kenya takes a monist attitude on international laws, the lack of a legal and institutional structure for the enforcement of the privilege preempts citizens from enjoying it as espoused under international law. This study seeks to identify challenges faced in safeguarding the right against self-incrimination. In addition, it aims to explore interventions that may be employed to advance the realization of the right in Kenya. It will predominantly focus on the right against self-incrimination as it relates to suspects and accused persons after it has canvased the topic broadly to give an overview of the privilege in practice.

2.4 Justification of the Study

This study attempts to make an authoritative case for the privilege under the 2010 constitution. Additionally, it aspires to inform the approaches that the country should take based on cases of international best practices on the application of the privilege against self-incrimination in progressive commonwealth jurisdictions.

An incisive analysis of the status quo with interventions to facilitate the achievement of this right will go a long way in attaining this fundamental human right.

2.5 Statement of Objectives

1. To underscore the legal foundations of the privilege against self-incrimination in Kenya.
2. To assess the shortfalls and impediments against the realization of the right against self-incrimination in Kenya.
3. To draw lessons from progressive jurisdictions on the realization of the right against self-incrimination in Kenya.

2.6 Research Question

1. What are the legal foundations for the privilege against self-incrimination?
2. What are the shortfalls and impediments to the realization of the privilege against self-incrimination?
3. What lessons can Kenya draw from progressive jurisdictions on the realization of the privilege against self-incrimination?

2.7 Hypothesis

The realization of the privilege against self-incrimination as envisaged in the constitution of Kenya remains unrealized despite the supporting legislative and institutional framework.

2.8 Theoretical Framework

According to the natural law theory, humans have some basic inalienable entitlements that exist independent of the government. Some natural law philosophers attribute these rights to a Supreme Being,[37] while others credit them to elementary principles of justice arrived at through

[37] St. Thomas Aquinas in Summa Theologica Lib. II, pt. II (1475) expressed the view that human rights came from God

higher reason.[38] In the *Second Treatise of Government,* [39] John Locke relied on natural law principles to develop a social contract theory, which he used to explain the source of civil rights. In this manner, he formulated a theory of natural rights that based civil liberties on political activity rather than the benevolence of monarchs.[40] Notably, this belief in the natural rights of man encouraged people to confront the authority of de facto rulers, leading to the French Revolution, the United States Declaration of Independence, and other social changes. Most importantly, it led to the creation of procedural safeguards to guarantee natural rights, such as the privilege against self-incrimination. Therefore, the privilege against self-incrimination is a progeny of people's belief in justice and equality in accordance with some higher ideals.

Moreover, the nature of the privilege against self-incrimination, along with its realization, is a subject of legal interpretation. In *Law as Interpretation,* Ronald Dworkin denotes that the law is political; thus, it is whatever the judge says it is.[41] The juror states that 'whenever judges pretend they are discovering the intention behind some piece of legislation, this is simply a smokescreen behind which the judges impose their own view of what the statute should have been.'[42] Interestingly, this view applies to both statutory and precedential application of laws. In Kenya, the privilege against self-incrimination is a newly conceptualized constitutional principle that depends on courts for enhanced meaning. Notably, Kenyan courts have an enhanced space to model Kenya's self-incrimination laws, including comparative international law and international agreements. However, Dworkin's conception of the law as political also means that the enjoyment of the privilege against self-incrimination depends on the political order to thrive. For

[38] Jerome J Shestack, 'The Philosophic Foundations of Human Rights' (1998) 20 Human Rights Quarterly 2, 206.
[39] John Locke and Richard H Cox, *Second Treatise of Government: An Essay Concerning the True Original Extent and End of Civil Government* (John Wiley & Sons 2014).
[40] John Locke and Robert Filmer, *Two Treatises on Civil Government* (Preceded by Sir Robert Filmer, George Routledge and Sons, 1884) 21.
[41] Ronald Dworkin, 'Law As Interpretation' (1982) 9 Critical Inquiry.
[42] ibid (n 43).

that reason, the political and social environment has to be favorable for courts to enhance the meaning of Article 50 on the right against self-incrimination.

Most importantly, the privilege against self-incrimination exists to promote the equal treatment of people; in this regard, it is geared to promote fairness. In the Rawlsian theory of justice, the two main principles behind fairness are liberty and difference.[43] The first principle takes cognizance of the fact that every person has certain inalienable liberties, while the difference principle advances proportionality in instances where equal treatment would be unfair. Notably, the liberty principle mandates that civil and political rights should not be curtailed because they are the fundamental requirements for an equal society. Additionally, Rawls' theory of justice formulates the concept of a "veil of ignorance," which implies that human rights should be judged from an original position where the observer assumes no prior knowledge about the society. From these perspectives, the privilege against self-incrimination exists as a guarantee of civil liberties that force court officials to judge crimes from behind a veil of ignorance.

2.9 Research Methodology

Mostly, this research will use desk-based qualitative research and will analyze content from sources such as the constitution, case law, statutes, and international treaties and customs. Among other things, that includes library research, searches on the internet, newspaper articles, a survey of relevant publications, and data analysis. Additionally, the paper will rely on legal articles, books, and websites that bear relevant information

This study will also consider the tools of analysis used by different scholars. It will attain this by perusing various historical analyses of the privilege, such as those that highlight its conceptualization, others that examine the inherent gaps in the frameworks for enforcing it, and

[43] John Rawls, *A Theory Of Justice* (Harvard University Press 2005).

materials that provide interpretations for why the realization of the privilege against self-incrimination is limited. In effect, this study will analyze countries who have dealt with issues surrounding the privilege, and where challenges regarding the right against self-incrimination have arisen.

2.10 Literature Review

This study has looked at various writings on the area of the right against self-incrimination and is informed by foreign materials on the topic, mostly because of a dearth in Kenyan articles and books on the field. Various sources explain the source of the privilege against self-incrimination and the core ideas that characterize it. Some of the literatures support the same ideas, while others build on each other to provide a comprehensive picture. However, some books and articles also offer convergent and divergent views.

One authoritative analysis of the privilege exists in Leonard Levy's *Origins of the Fifth Amendment.* The writer notes that before the privilege against self-incrimination became a constitutional right, it was only a rule of procedure at common law. In fact, that is why it is commonly referred to as a privilege rather than a right. The difficulty of conceptualizing the privilege against self-incrimination is what prompted Levy to study the early development of the right.[44] What is striking is that the privilege came earlier than most fundamental freedoms, such as the freedom of speech, press, and religion. Its conception is related to the development of the accusatorial system and the principle that governments can be limited by laws. In short, Levy reveals that the privilege against self-incrimination began at the onset of constitutionalism. Its origin was marked by struggles between the two early but rival systems of English criminal procedure: inquisitorial and accusatorial. The former used ex officio oaths to obtain confessions

[44] Leonard W Levy, *Origins of the Fifth Amendment* (Ivan R Dee 1968).

from accused persons, while the latter based criminal prosecution on investigations. From this background, Levy proposes that accused persons relied on the privilege to defend themselves from compelled confessions in the belief that a person should not accuse himself or herself of crimes.

Leonard Levy's *Origin of the Fifth Amendment* also illustrates the various social forces that influenced the inception of the privilege in medieval England. Chief among these was the religious struggle between the Catholic Church and the state. It was the Catholic Church who initially introduced the rule that people should not report themselves for crimes that they committed; however, the Church later abolished this principle to persecute religious dissidents. Notably, the throne's involvement in the affair, highlighted by the defiance of Henry IV, who created the Anglican Church to outdo Catholic influence, emboldened people's invocation of the privilege at the Common-Law courts after their persecution in Catholic Ecclesiastical courts. Other struggles such as the animosity between the Catholic Queen Mary and her Anglican successor Queen Elizabeth and how it intensified the need for the protection of citizen's procedural rights in the criminal trial are also discussed in Levy's book. Still, the most persuasive case for the privilege that is apparent is that it was invoked when King Charles I resorted to persecuting his political opponents by forcing them to confess. The unpopularity of such actions led to the English Civil War, the overthrow of the monarchy, and the disregard for every rule that the throne had imposed on the people. In effect, Levy argues that the privilege was not granted by the state to the citizens but was acquired through continuous struggle and tension between rulers and subjects.

Even though Levy predominantly credits English social turbulence that resulted in the 1649 civil war on the inception of the privilege, John Langbein posits that there were other more important causes. In 'The Historical Origins of the Privilege against Self-incrimination at

Common Law,' the writer explains that the privilege originated from the rise of the adversarial criminal procedure at the end of the eighteenth century.[45] According to this account, a person's right to speak at trial was paramount than his or her right to remain silent. At the time, speaking was the preferable option for innocent people to prove their innocence. Nevertheless, when defense counsel was admitted at trial in the later eighteenth century, accused persons started to claim the right to silence to let their lawyers test the prosecution's case. As a result, various legal principles came up, such as the beyond-reasonable-doubt standard of proof, the presumption of innocence, and the burden of proof.[46] Agreeably, Langbein's views make a stronger case for the privilege than Levy's do. In addition, he explains the relationship between the right against self-incrimination and other legal and evidentiary principles; thus, he shows why other states have adopted those practices in their laws.

Whereas both Levy and Langbein agree on the necessity of the privilege, Mike Redmayne finds its importance challenging to justify. According to him, the privilege lacks a foundational basis from a jurisprudential perspective. For example, while it serves to distance an accused person from the prosecution's case, it does not explain why a suspect is still mandated by law to collaborate with investigating authorities by providing blood samples, documents, and other non-testimonial evidence. Redmayne's analysis goes to the heart of the differential observation of the privilege in the United Kingdom of Great Britain (hereafter the UK) and the United States (US). In the former, a defendant can face adverse inferences for refusing to testify, whereas in the latter, the right to silence at trial is absolute. Fortunately, the European Court of Justice gave a more reliable account of the privilege as a right that 'presupposes that the prosecution proves their case

[45] John H. Langbein, 'The Historical Origins of the Privilege against Self-Incrimination at Common Law' (1994) 92 Michigan Law Review.
[46] Pat McInerney, 'The Privilege Against Self-Incrimination From Early Origins To Judges' Rules: Challenging The 'Orthodox View'' (2014) 18 The International Journal of Evidence & Proof.

against an accused person without resort to evidence obtained through methods of coercion or oppression in defiance of the will of the accused.'[47] Even then, it still does not explain why the right to silence should be derogable as has happened in the UK. In the concluding remarks, Redmayne determines that although the privilege has a rationale, its value is not easy to articulate.

While these materials on the privilege are informative, they leave some things out. Firstly, Leonard Levy does not explain how the structure for enforcing the privilege resulted. Indeed, the historical assessment of the problems that may have led to the birth of the privilege does not show why it was only recognized as a rule of procedure in court but not in investigations. This question is answered by Langbein, who asserts that it was defense counsel who forced courts to provide for the privilege against self-incrimination. Notably, both writers do not explain why statutes exist to protect the privilege if its essence and respectability was already established in the early days. Interestingly, even Mike Redmayne is unable to answer this last question in his incisive analysis of the privilege in search of a jurisprudential foundation. To get a better understanding, the writer sought external materials on the privilege's legal history, and these showed that the US' ratification of the right in the Fifth Amendment was not merely accidental. In fact, various states of the US already provided for the privilege in their constitutions before the country's federation, and they were influenced by their experiences under King Charles' I rule that made them flee England for the United States. Ultimately, various materials converge to provide a fitting picture of the privilege, and these form a solid case that the writer subsequently uses to define the best approaches that countries should adopt on the matter.

[47] Mike Redmayne, 'Rethinking The Privilege Against Self-Incrimination' (2005) 27 Oxford Journal of Legal Studies.

2.11 Limitations

Considering that this research is essentially library based, it is mostly constrained by inadequate authoritative literature on Kenyan privilege against self-incrimination. This is due to the embryonic nature of the concept in the Kenyan constitutional regime. This notwithstanding, much effort has been expended into ensuring that the objectives of this study are met.

2.12 Chapter Breakdown

2.12.1 Chapter One: Background of the Study

This chapter will introduce the study. It will define the topic of the study, its objectives, hypotheses, and then it will review the available literature on the topic before it justifies the need for the study.

2.12.2 Chapter Two: Conceptualization of the Right Against Self-Incrimination

In chapter two, the research will conceptualize the privilege against self-incrimination by exploring its origin and theoretical foundations.

2.12.3 Chapter Three: Establishment of the Privilege in Kenya

Chapter 3 will assess the provision on the privilege against self-incrimination in Kenya. It will investigate its judicial history, current protection, and potential future interpretations and assess the impediments against the realization of the right against self-incrimination.

2.12.4 Chapter Four: A Comparative Analysis of International Best Practices

Chapter 4 will make a thorough comparison of different legal regimes to compare how the privilege against self-incrimination is protected and abrogated. Some of the countries to be analyzed include the United Kingdom, the United States, and South Africa and draw lessons that will help in attaining the full realization of the right against self-incrimination.

2.12.5 Chapter Five: Conclusion and Recommendations

In chapter five, the study will summarize the results of the survey, and then it will suggest recommendations to improve the operationalization and enforcement of the privilege against self-incrimination in Kenya.

CHAPTER 2 – CONCEPTUALIZING THE PRIVILEGE AGAINST SELF-INCRIMINATION

3.1 Introduction

Fundamentally, the history of the privilege against self-incrimination provides informative insight on how it should operate within the judicial order. Of note is that this right, as some scholars regard it,[48] is older than the freedom of speech, press, and religion;[49] evidently, it is a more significant human entitlement than many other civil and political rights. Besides, tracing the background of the privilege against self-incrimination reveals the legal underpinnings that define it. Particularly, the privilege is connected to the presumption of innocence, the right to a counsel, the right to silence, and the core ideas that characterize the adversarial system.[50] In a way, the evolution of the right against self-incrimination established procedural fairness in trials and enhanced the core concepts of the criminal justice system. Accordingly, this chapter seeks to explore the historical origins of the privilege and the rationale for its existence and to conceptualize its foundations. Furthermore, the chapter will contextualize the existence of the privilege in criminal and civil proceedings and the scope of its application.

3.2 Origin of the Privilege against self-incrimination

3.2.1 European Jus Commune

Interestingly, the notion that a person should not be a witness against himself started from the teachings of the Catholic faith. Inherently, Catholicism required believers to confess their wrongdoings to a priest in the act of penance; however, it encouraged them not to institute

[48] Leonard W Levy, *Origins Of The Fifth Amendment* (Ivan R Dee 1968) vii
[49] Ibid viii
[50] John H. Langbein, 'The Historical Origins of The Privilege Against Self-Incrimination At Common Law' (1994) 92 Michigan Law Review, 1047.

criminal proceedings against themselves following their confession.[51] Therefore, the Latin maxim *nemo tenetur prodere seipsum*[52] exemplified the Church's teachings on contrition. Surprisingly, when Catholics sought to extirpate heresy from the church during the Inquisition, Pope Innocent III (1198 – 1216) instituted ecclesiastical courts that compelled accused persons to confess under oath and then used that evidence to prosecute them.[53] Ironically, that approach to criminal trial differed from the church's teachings on the confession procedure. In this manner, the church's investigative practices influenced the European mainland to develop an inquisitorial criminal system that disregarded the *nemo tenetur prodere seipsum* principles.[54] Following the resultant unfairness, more accused persons pled for their right not to incriminate themselves as the canon law provided.

While the Inquisition was ongoing in continental Europe, England was developing its own version of trials. Initially, the country employed residents to investigate civil or criminal issues in their area; over time, this system evolved into the grand jury, whose members later became judges of local problems.[55] Along these lines, the English system pitched an accuser against a defendant in the presence of a judge, thereby founding the accusatorial system. At the same time, the country permitted the entry of ecclesiastical courts from Europe to exercise jurisdiction over cases that involved the clergy and common offenses like fornication, adultery, and drunkenness.[56] Remarkably, ecclesiastical courts applied the jus cogens from mainland Europe with one notable difference: they initially upheld the *nemo tenetur prodere seipsum* tenets. Worth mentioning is,

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[51] Stefan Trechsel and Sarah J Summers, *Human Rights In Criminal Proceedings* (Oxford University Press 2009) 341; John B Taylor, *The Right To Counsel And Privilege Against Self-Incrimination* (ABC-CLIO 2004) 29.; John H. Langbein, 'The Historical Origins Of The Privilege Against Self-Incrimination At Common Law' (1994) 92 Michigan Law Review 1047, 1072.
[52] 'No one is bound to betray oneself'
[53] John B Taylor, *The Right To Counsel And Privilege Against Self-Incrimination* (ABC-CLIO 2004) 28.
[54] Langbein, The Historical Origins (1994) Hein Online 92 Mich L. Rev 1047, 1073
[55] Ibid 28
[56] Ibid 29

the maxim was not regarded as a right but a procedural guideline that ensured that prosecutors charged people using evidence other than forced confessions.[57] Whereas English courts used *ex officio* oaths in the same way as European courts, the English collected evidence from other sources besides the accused person.

During the medieval period, England's dual-court system developed supremacy struggles. At first, the ascendancy of the Church of England diminished the influence of the ecclesiastical courts.[58] As a result, its victims appealed their convictions to Common Law courts, which reversed those rulings in certain instances.[59] When Queen Mary (1553 – 1558) reverted the kingdom to Catholicism, ecclesiastical courts regained their influence, and they formed the Court of High Commission.[60] Accordingly, the new court claimed more power to suppress religious dissent, and it relied more on *ex officio* oaths to convict Puritans. Later, the English monarchy installed the Court of Star Chamber to prosecute political and criminal matters, such as treason, and it emulated the Court of High Commission in its use of compulsory, self-incriminating confessions.[61] Such unrestrained control by the monarch was unpopular and resulted in the English Civil War that pitted Parliament against the monarchy. When parliamentarians won the war in 1651, they abolished both the Court of High Commission and Star Chamber and banned *ex officio* oaths.[62] Ultimately, England eliminated compulsory confessions and set the stage for the development of the privilege against self-incrimination.

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[57] Ibid 33
[58] Ibid 24
[59] Ibid 32
[60] Ibid 34
[61] Ibid 26
[62] Langbein, The Historical Origins (1994) Hein Online 92 Mich L. Rev 1047, 1073

Even though the subsequent English procedures did not require people to confess to crimes, an accused person's sole defense at the time was to speak during the trial.[63] What they had earned was a right not to be compelled to answer incriminating questions under oath. In effect, judges and prosecutors could still question them, and a choice not to respond to questions resulted in adverse inferences from silence.[64] Moreover, accused persons did not have a right to counsel.[65] As a result, they had to defend themselves from any claims that prosecutors made; thus, failure to speak was often detrimental to their cause. Unfortunately, people who were unable to speak in public or who were unprepared to mount a defense stood no chance against a well-prepared prosecution case.[66] Throughout most of the eighteenth century, the concept of evidentiary burden was still unfounded, so the prosecution merely convinced the judge on a balance of probabilities.[67] Such occurrences worsened the dire situations of accused persons. Despite the provision in the laws that people had a right not to incriminate themselves, accused persons could not claim that privilege at trial.

3.2.2 Adversarial System's Procedural Rules

According to Professor John H. Langbein, it took the admission of defense counsel at trials for the privilege against self-incrimination to develop fully.[68] Notably, this significant change in criminal procedure occurred following the Treason Act of 1696 that bequeathed treason suspects access to defense counsel, a copy of the indictment in advance, and a right to use defense witnesses.[69] For most of the century, these rights were limited to treason charges. Gradually, they extended to felonies, and by the 1730s, they had entered ordinary criminal trials through the

[63] Ibid 1052
[64] Ibid 1053
[65] John Taylor, *The Right to Counsel and Privilege Against Self-Incrimination,* 31
[66] Langbein, The Historical Origins (1994) Hein Online 92 Mich L. Rev 1047, 1053
[67] Ibid 1056
[68] John H Langbein, *The Origins Of Adversary Criminal Trial* (Oxford University Press 2003) 68.
[69] Ibid note 20, 1056

discretion of judges.[70] Mainly, the state's use of prosecution counsel early in the sixteenth century resulted in a disparity against the prisoner; thus, judges allowed accused persons access to counsel to promote fairness.[71] Following this tradition, the Prisoners Counsel Act of 1836 recognized an accused person's right to full representation by a defense counsel. In this fashion, criminal proceedings became opportunities for lawyers to test the credibility of the prosecution's case.

Shortly after they were introduced, defense counsel evolved trials drastically in favor of accused persons. Whereas accused persons had to speak to vindicate themselves in the past, prosecutors lost all right to question them. Most importantly, this development allowed accused persons to be silent at trial. In addition, defense counsel increasingly cast doubts on the strength of the cases they oversaw. As a result, the evidentiary bar that prosecutors had to meet to prove their cases grew high. Ultimately, this led to the creation of the beyond-reasonable-doubt standard of proof. Following this high evidentiary burden, courts presumed all accused persons to be innocent until prosecutors proved the case against them successfully. Eventually, the concept of the presumption of innocence was born towards the end of the 18th century.[72] Of note is that these changes developed the law of evidence as well. For instance, defense counsel frequently objected to the use of specific evidence, and such practices prompted the justice system to formulate rules on admissibility. Primarily, involving defense counsel in criminal proceedings created rules of procedure that favored accused persons, with the most notable being the privilege against self-incrimination.

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[70] Langbein, supra note 4, at 1068
[71] Taylor, supra note 7, at 32
[72] Ibid (n 24)

Even as procedural fairness in the trial process improved, pretrial investigations were antithetical to the privilege. According to law historian Leonard Levy, inquisitorial tactics were routine in the mid-16th century when the right not to incriminate oneself was supreme in all proceedings.[73] For instance, justices of the peace, who were lay magistrates appointed from among local populations, could still examine felony suspects for confessions or damaging testimonials on condition that the suspect was not under oath during the examination.[74] Besides, investigators used tricks such as secret examinations, bullying, inducement, and threats. Surprisingly, any admissions derived from arrested persons in this manner were admissible in court. In cases where an accused person rescinded an admission or a confession, any two witnesses could prove it, and that was enough evidence to convict him or her.[75] Even more shocking was the fact that some investigators used torture to earn convictions. For example, investigators could force a suspect to plead guilty in court to an accusation through torture.[76] Manifestly, the supremacy of the right to self-incrimination during a trial was not sufficient to protect accused persons from schemes of ambitious investigators.

3.2.3 Codification

It was not until the right against self-incrimination became a constitutional guarantee that courts started to apply it strictly. Since the privilege developed as a Common Law principle based on the accusatorial system, the advent of British colonialism helped to spread it globally. Unfortunately, British colonies applied the privilege disproportionately owing to the inadequacy of trained defense counsel, English prejudice against local populations, and the chaotic order that

[73] Levy, supra note 2, at 325
[74] Ibid;
[75] Taylor, supra note 7, at 32
[76] Ibid 56

characterized colonialism.[77] Such conditions prompted newly independent states to formulate written laws to provide for the right of a person to refuse to give self-incriminating evidence expressly. For instance, the United States ratified the Fifth Amendment to its constitution in 1791, way before the United Kingdom codified the privilege in the Sir John Jervis Act of 1848.[78] On its part, Kenya enacted its rules of evidence in December 1963 shortly after it gained self-rule from the British. In the Act, Kenya defined the circumstances around which confessions and admissions were admissible in court and restricted involuntary confessions.[79] In effect, newly independent states expanded the scope of the rule against self-incriminatory evidence from a mere procedural privilege to a constitutional right.

3.3 Rationale for the Privilege

Presently, nearly all countries across the globe provide a suspect with a right not to incriminate himself in some form. This development follows the provision of that guarantee in different international treaties and conventions on human rights. For example, the International Covenant on Civil and Political Rights,[80] the European Convention on Human Rights,[81] the Rome Statute of the International Criminal Court,[82] and the African Charter on Human and People's Rights (Maputo Protocol)[83] enumerate the rights of an accused person to a fair trial. At the onset, it is not clear why these laws allow the accused not to cooperate with investigating authorities. Besides that, the ends that judicial systems aim to attain by recognizing suspects' privilege not to

[77] Ibid 33
[78] Langbein 1061. The Act was England's first attempt to protect an accused person from fraudulent or compelled examination at the preliminary hearing
[79] Evidence Act (Kenya) Number 46 of 1963
[80] Article 14 (3) (g)
[81] According to European Court Interpretations of Article 6's Right to a Fair Trial in cases such as *Funke v France*, *Saunders v United Kingdom*, and *Brown v Stott*
[82] UN General Assembly, *Rome Statute of the International Criminal Court (last amended 2010)*, 17 July 1998, ISBN No. 92-9227-227-6, Article 8
[83] Organization of African Unity (OAU), *African Charter on Human and Peoples' Rights ("Banjul Charter")*, 27 June 1981, CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), Article 7

incriminate themselves are not immediately apparent. Since many laws do not define what the privilege espouses, it is not apparent whether its protection promotes some goals of the criminal process or if it is merely ceremonial. For these reasons, it is paramount to justify the necessity of the right.

Historically, this privilege developed in association with other rights such as the presumption of innocence and the right to silence. Whereas the former concepts have fully developed in accusatorial jurisdictions, the rationale for applying the latter is still unelaborate.[84] To this end, courts around the world differ in their recognition of this entitlement, with some offering it in totality as others abrogate it for different reasons. Currently, the United Kingdom recognizes the right to silence as disparate from one's privilege to refuse to give self-incriminating evidence.[85] Meanwhile, civil law jurisdictions have found a way to incorporate these rights in their inquisitorial systems, while a few other countries do not recognize them completely. At the same time, the underlying principles for the privilege recognize its essence in protecting the innocent, preventing compulsion of suspects and witnesses, and limiting the admission of unreliable evidence at trial. In essence, this diversity of approach shows that different states conceptualize the right against self-incrimination differently.

3.3.1 Presumption of Innocence

At the core of the privilege is the need to dissociate suspects from the prosecution's case.[86] Since suspicion of crime can result in the infringement of one's liberty through arrests or detention, the state must have a credible case before it accuses a person. Inherently, the presumption of innocence also requires the state to build its case without the active participation

[84] Mike Redmayne, 'Rethinking The Privilege Against Self-Incrimination' (2005) 27 Oxford Journal of Legal Studies 2, 209.
[85] Ibid 210
[86] Susan M Easton, *Silence And Confessions* (1st edn, Palgrave Macmillan 2014) 80.

of the defendant. Involving suspects in discovering or verifying facts would pressure them to talk, and this would help the prosecution to collect evidence against them. Moreover, the evidentiary burden of proof rests on the state in criminal proceedings. Indeed, the prosecution has to prove, beyond any reasonable doubt, why a person is not innocent. According to a Chief Justice of the United States Supreme Court, the privilege against self-incrimination exists because of,

> Our sense of fair play, which dictates a fair state-individual balance by requiring the government to leave the individual alone until good cause is shown for disturbing him and by requiring the government in its contest with the individual to shoulder the entire load.[87]

In addition, the European Court of Human Rights held that the privilege against self-incrimination is indispensable to the presumption of innocence.[88] In all these cases, the privilege protects an innocent person in the pre-trial and the trial proceedings.

3.3.2 Prevention of Compelled Testimonies

Fundamentally, the right against self-incrimination aims to prevent the use of underhand methods to prosecute defendants. In the past, investigators in many jurisdictions used brutal methods of torture to extract confessions;[89] thus, this right discourages against such actions. Indeed, Professor Erwin Griswold characterized this aspect of the privilege as 'one of the great landmarks in man's struggle to make himself civilized.'[90] Moreover, the right inhibits the coercion of accused persons. By definition, coercion is the application of pressure on a suspect to derive information from him or her. Notably, coercion also applies when a suspect is under a legal duty to provide incriminating information.[91] The privilege also protects defendants from compulsion at the trial stage. In jurisdictions where confessions are admissible, the precondition

[87] Justice Earl Warren for majority in *Murphy v Waterfront Commission* 55 [1964]
[88] Trechsel, supra note 5, at 348
[89] Taylor, 16
[90] Erwin N Griswold, *The 5th Amendment Today* (Harvard University Press 1955) 7.
[91] Redmayne, supra note 36

is that they are voluntary and not compelled. Most importantly, this right respects the will and dignity of an accused person not to participate in his or her trial. According to Stefan Trechsel, forcing one to act against his or her interests causes feelings of humiliation, inferiority, and debasement in the person, which is degrading.[92] In essence, the right not to incriminate oneself promotes other fundamental rights such as human dignity, right to silence, and the presumption of innocence.

3.3.3 Exclusion of Unreliable Evidence

While the most rationale for respecting the privilege stem from the accused person's rights, the unreliability of testimonial evidence extracted from them dissuades the state from taking that course of action. In truth, most suspect's testimonies are misleading.[93] In many instances, the stressful environment of police interrogations may compel an accused to make a false confession owing to the expectations of the interrogating officer, coupled with the perceived authority of the police.[94] In line with this, compelling a person to incriminate himself or herself may lead to false evidence that increases the potential for injustice.[95] For this reason, the state has an incentive to prevent such methods because they are costly to the justice system.

3.4 Scope

From its inception to the present, the scope of the privilege against self-incrimination has expanded. At first, it only applied to cases of treason; now, witnesses can also claim it in civil proceedings.[96] Notably, the controversial aspects of the provision have been its application on physical evidence as opposed to testimonial evidence. Other concerns about the right relate to its

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[92] Stefan Trechsel 348
[93] Taylor, supra note 7, at 32
[94] Cosmas Moisidis, *Criminal Discovery: From Truth To Proof And Back Again* (Willan Publishing 2008) 129.
[95] Trechsel, 347
[96] Taylor, 100

application to legal persons, especially where evidence collected from corporations can incriminate real people. Due to these diverse views, it is essential to investigate the scope of the right.

3.4.1 Civil vs. Criminal Proceedings

Generally, the privilege against self-incrimination predominantly relates to criminal trials. Initially, the right only applied to compelled testimony under oath; however, its scope stretched to include testimonies made in many other proceedings. In the United States, the right applies in any proceeding that uses testimonial evidence as long as the answer may expose the testifier to criminal responsibility.[97] Notably, this also includes congressional investigation proceedings. Furthermore, the privilege applies to both accused persons and witnesses. Whereas defendants may not be compelled to speak, witnesses can be obligated if granted use immunity. In this regard, the privilege is not restricted to criminal trials alone.

3.4.2 Corporate Bodies vs. Natural Persons

In the United States, only natural persons are entitled to the right not to incriminate themselves. Even though juristic persons have many rights under the law, this right does not apply to them because investigators need to use the bodies' organizational records to enforce regulations against them. For this reason, custodians of organizational documents cannot claim the privilege even when the documents incriminate them personally.[98] However, in instances where the act of producing the documents is incriminating, the custodians can claim privilege.[99] In contrast, the United Kingdom applies the privilege equally to both real and juristic persons. The rationale for this is that both real and juristic persons can suffer harm when forced to

[97] Taylor, supra note 7, at 100
[98] Ibid 102
[99] Ibid 103

incriminate themselves; so, they both deserve the protection of the law. Overall, the application of the principle depends on the particular jurisdiction.

3.4.3 Testimonial vs. Real Evidence

Primarily, the privilege against self-incrimination only applies to testimonial evidence. Accordingly, the law does not extend to material that exists independent of the will of the accused, and that may be obtained through compulsory powers, such as documents acquired under a warrant, breath, blood, urine samples, or DNA for testing.[100] Recently, the Kenyan Appellate Court concurred with this view; however, the court expanded the scope further by directing that compelled non-testimonial evidence should not be admissible for the same reason that coerced admissions are illegal.[101] In effect, the right mostly applies to testimonial evidence but can extend to real evidence when the procedure for extracting the latter is illegal.

3.5 Conclusion

The evolution of the privilege against self-incrimination illustrates an increasing expansion of its application. According to scholars, the privilege stemmed from European jus cogens around the 10th and 11th centuries. It only entered common law after the English Court of High Commission, which was an ecclesiastical court from the European mainland, established it in England. Later, when the English Parliament abolished the Court of High Commission and the Star Chamber, they also criminalized ex officio oaths and set the stage for the development of the privilege against self-incrimination. Most importantly, the privilege against self-incrimination developed with the admission of defense counsel in trials. Counsels for defendants changed the nature of proceedings from a system where an accused had to speak, to one where suspects could

[100] Redmayne, 'Rethinking the Privilege Against Self-Incrimination,' 211
[101] *C O I & another v Chief Magistrate Ukunda Law Courts & 4 others* [2018] eKLR

remain silent while the prosecution proved its case. Mainly, defense counsels tested the prosecution's case and raised the evidentiary bar that prosecutors had to meet. In this regard, it enabled the conception of the presumption of innocence and the accompanying right to silence. Further development of the privilege occurred in the British North American Colonies, where its prejudiced application encouraged the drafters of the United States Constitution to include it in their written constitution. As a constitutional entitlement in the Fifth Amendment, its limitation superseded the outreach of the ruling elites. In addition, courts interpreted it more and expanded its application. In that manner, it grew to become a formidable component of the right to a fair hearing.

At its heart, the right against self-incrimination aims to protect and enhance the presumption of innocence, to limit the use of compelled testimonies, and to minimize the collection of unreliable evidence. By dissociating suspects from the prosecution's case, the privilege ensures that prosecutors arraign a person before a court only when it has credible evidence against him or her. Besides, limiting coerced evidence promotes human dignity, prevents torture, and encourages fact-finding in criminal investigations. Currently, the right applies in any proceeding that uses testimonies and where a person's answer can result in criminal culpability. In addition, it mostly covers testimonial evidence only as opposed to physical evidence. However, various jurisdictions apply the concept differently, so there is no international uniformity. For instance, Kenya recently illegalized the collection of physical evidence through compulsion. In effect, the privilege is an evolving right that follows international best practices and aims at maximum enjoyment of human rights.

What this chapter has revealed is that when Kenya adopted the privilege against self-incrimination in its post-colonial evidence laws, it did not investigate the underlying justifications. It is for that reason that the country grappled with the abuse of that right under its

Repealed Constitution. This chapter shows that protecting the privilege against self-incrimination is essential to the right to a fair trial, which is a supreme right under international law. When Kenya took the American approach to the right against self-incrimination by constitutionalizing it under the 2010 Constitution, it also applied the concepts that guide the privilege. For instance, that explains why it has a law that prohibits the admission of unfair evidence at trial under Article 50 (4). However, neither Kenya's constitution nor its laws delve into the scope of the privilege as other countries have done. Currently, it is not clear how the country would treat corporate privilege, for example. All the same, this chapter has answered most of the research questions that the writer had; therefore, this paper will build on Kenya's case on the privilege against self-incrimination by investigating how it applies to suspects and accused persons.

CHAPTER 3 – ESTABLISHMENT OF THE RIGHT AGAINST SELF-INCRIMINATION IN KENYA

4.1 Introduction

This chapter seeks to establish the extent to which the privilege has been anchored within the Kenyan legal system as envisaged in Articles 49 and 50 of the Constitution of Kenya. This will be addressed by juxtaposing the Kenyan legal landscape against the conceptual basis for the establishment of the privilege, as was demonstrated in the previous chapter. To accomplish this goal, it is necessary to investigate the historical background of the privilege against self-incrimination in Kenya. Indeed, Kenya has been a party to important treaties on the privilege, such as the ICCPR[102] that it ratified in 1972. However, it took the intervention of the 2010 Constitution to protect the privilege against self-incrimination despite the existence of authoritative international law on the same. Of note is that even though Article 2(5) and (6) of the Constitution expressly provide for the observance of international laws in the country, there are still occurrences of abuse of the right against self-incrimination. Consequently, this chapter hopes to go to the core of the problem to identify the causes of the challenges on the enforcement of the privilege against self-incrimination.

4.2 Background

When Kenya gained its independence from the United Kingdom in 1963, it retained British laws to govern the country as it transitioned into a sovereign republic. In fact, Kenya's first constitution was negotiated in London through the assistance of UK politicians and was

[102] UN General Assembly, *International Covenant on Civil and Political Rights*, 16 December 1966, United Nations, Treaty Series, vol. 999, p. 171

modeled after the British legal system.[103] In addition, a deficiency of laws prompted the country to adopt laws from other British colonies, such as India and other commonwealth states. For this reason, Kenya's evidence laws are primarily best practices derived from many constitutions across the world. Moreover, Kenya uses a Common-Law system that takes precedence from English courts. On rare occasions when the country has legal issues that have not been legislated upon, British judgments still form persuasive authorities. Since Kenya adopted the English adversarial system, it acquired the rules of evidence and procedure of English courts that included the exclusionary rules on confessions, and privileges for witnesses, such as the privilege against self-incrimination.

Until the country passed a new constitution in 2010, its legal and judicial system was still based on English procedures and laws. Fundamentally, Kenya's new constitution was ratified to handle the unique challenges that the country faced since most of its problems could not be obliterated through foreign approaches. Among the challenges that the country faced was an abuse of power by people in authority, rampant injustice, extrajudicial killings, and many other challenges that the old order could not resolve.[104] Mostly, an accused person's rights on the criminal trial were subject to abuse.[105] Issues such as unwarranted arrests and compelled confessions were also common.[106] A notorious illustration is a violent arrest and torture administered on individuals who demanded multipartyism in the infamous Nyayo era.[107] Indeed, these were unique problems that needed a new negotiated system that gave power back to the people.

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[103] Charles Hornsby, *Kenya: A History Since Independence* (I. B. Tauris & Co Ltd 2012).
[104] Patricia Kameri Mbote and Migai Akech, 'Kenya: Justice Sector And The Rule Of Law' (The Open Society Initiative for Eastern Africa 2011).
[105] Ibid
[106] ibid
[107] Charles Hornsby, *Kenya: A History Since Independence* (I. B. Tauris & Co Ltd 2012).

After the country promulgated the 2010 constitution, it has continued to amend its former laws to make them conform to the aspirations of the Kenyan people. For instance, Kenya's Evidence Act was amended in 2012 to bring it up to pace with the provisions of the updated and liberal Bill of Rights in Chapter 4 of the new Constitution.[108] Moreover, the 2010 constitution incorporates international laws in the national system, to guarantee that the country always meets international standards, especially on human rights protection. On its part, the constitution was drafted following comparative constitutionalism that guaranteed that the country adopted the best system. Among the nations that Kenya benchmarked with are the United States, South Africa, and the European Union. For example, Kenya's provisions on the rights to a fair trial follow the ECHR[109], while the right against compelled self-incriminating evidence resembles the American Fifth Amendment. Furthermore, Kenya copied how South Africa separated and constitutionalized the rights of arrested and accused persons to silence, legal counsel, and the privilege against self-incrimination. Accordingly, this chapter attempts to investigate gaps and systemic inefficiencies that affect the enjoyment of the privilege against self-incrimination.

4.3 Accused Person Privilege

4.3.1 Silence and Self-incrimination under the Repealed Constitution

From the onset, the Repealed Constitution[110] did not recognize an accused person's right to silence expressly. What the old order protected was the use of adverse inferences from trial silence.[111] In essence, the former constitution attempted to protect the right to silence but made no

[108] Beatrice Odalo, et al., *Taking Stock: Challenges and Prospects of Implementing the Constitution of Kenya, 2010* (AfriCOG 2014)
[109] Council of Europe, *European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14*, 4 November 1950, ETS 5, available at: https://www.refworld.org/docid/3ae6b3b04.html [accessed 2 December 2019]
[110] Constitution of Kenya (repealed) 2009
[111] ibid, s. 77(7)

mention of the right of a person not to incriminate himself or herself, whether that right extended to defendants or other parties to the proceedings. Unsurprisingly, many statutes passed under the former constitution required defendants to cooperate with the prosecution in their trial in one way or another. For example, the Anti-Corruption and Economic Crimes Act, No.3 of 2003, compelled suspects of corruption or economic crimes to provide information to the prosecution on request or to risk criminal culpability.[112] Similarly, the Traffic Act[113] also mandates persons arrested for specified traffic offenses to cooperate with the police or face criminal prosecution on their failure to comply. Interestingly, some of these acts are still in operation in the original state under the new system.[114] Evidently, Kenya's old constitution was unfriendly to an accused person's right, and some remnants of that system are still in place.

Under the former constitutional dispensation, an defendant's privilege against self-incriminating evidence was only exercisable at the trial phase. Making a ruling under the repealed Constitution, Justices Roseline Wendoh and Anyara Emukule held that:

> In the case of our Constitution, Section 77(2) (a), (the right to be presumed innocent) and Section 77 (7) (the right not to incriminate or bear testimony against self), the language of the Constitution is clear and unambiguous, admitting only of one meaning, that **the right to be presumed innocent and not to bear witness against self arise only upon being charged with a criminal offence, and not before.**[115]

In that same case, the judges recognized that our laws on the privilege against self-incrimination emanated from the United Kingdom, which derogates the right to silence and the

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[112] Anti-Corruption and Economic Crimes Act, No.3 of 2003, section 26 and 27
[113] Chapter 403 Laws of Kenya, 2012, s.112 and 113
[114] For instance, the Anti-Corruption and Economic Crimes Act, which was revised in 2014, still compels suspects to provide information with no mention of use immunity.
[115] *Christopher Ndarathi Murungaru V Kenya Anti-Corruption Commission & Another* [2006] eKLR; emphasis added

privilege against self-incrimination through statutory provisions. In that regard, they declared that it was possible for Parliament to statutorily abrogate the privilege against self-incrimination as was recognized under international treaties that Kenya had ratified.[116]

4.3.2 Pretrial Protections for Arrested Persons

It must have been the repealed constitution's blatant disregard for an accused person's right to a fair trial that impelled Kenya to upgrade those rights into constitutional entitlements. Following in the footsteps of Miranda safeguards,[117] the country opted to protect accused persons starting from the pre-trial phase all the way to the post-trial. Principally, Article 49 of the Constitution enumerates the legal guarantees attributable to an arrested person. Chiefly, arrested persons have the right to be informed to remain silent and to be cautioned about the evidentiary consequences of foregoing that right. In this manner, the country follows the US tradition that shields accused persons from manipulation by law enforcement officers to give self-incriminating evidence. Secondly, arrested persons have the right to remain silent. In effect, this means that they can decline to answer questions from investigating authorities, and that silence cannot be inferred to their disadvantage. In addition, arrested persons have a right to counsel, which guarantees that their fundamental rights against self-incrimination are protected. Most importantly, the constitution outlaws the compulsion of an arrested person for self-incriminating evidence, be it through a confession or an admission. Most of these rights have not been explored thoroughly by the courts, but can be claimed in court to challenge the prosecution's case.

4.3.3 Constitutional Privilege against Self-incrimination

Indeed, the 2010 Constitution has dramatically elevated the privilege against self-incrimination. Firstly, the constitution recognizes the place of international norms, treaties, and

[116] ibid
[117] *Miranda v Arizona* 384 U.S. 436 (1966)

conventions within our national legal system. By implication, Articles 2(5) and (6) of the Constitution insert the provisions of prominent human rights instruments such as the UDHR,[118] the ICCPR,[119] the ECHR,[120] and the African Charter on Human and People's Rights, among others, in our privilege against self-incrimination laws. By uplifting those rights into the apex of our laws, they are placed out of reach of reckless derogation. Secondly, the constitution expressly recognizes an accused person's right to refuse to give self-incriminating evidence. In Article 50 (2) (i), it grants an accused person the right to be silent at trial, and in Article 50 (2) (j), the privilege against self-incrimination. Furthermore, the Constitution precludes the admission of evidence obtained in an unfair manner, or those acquired pursuant to an infringement of the Bill of Rights.[121] What is more notable is that by prohibiting the admissibility of unfair evidence, the constitution has prescribed a reliability test that alters the previous constitution's voluntariness test. Certainly, this was the test applied in the case of *C O I & another v Chief Magistrate Ukunda Law Courts & 4 others*,[122]to expunge the prosecution evidence that had compelled defendants to provide self-incriminating physical evidence. Whereas the repealed constitution made no express mention of the privilege against self-incrimination, it is not central to the fair trial rights under the 2010 Constitution.

In the post-2010 Constitution court, the right to silence and the privilege against self-incrimination have become fundamental tenets of the right to a fair trial. In *Republic v Mark Lloyd Stevenson*,[123] Justice Joel Ngugi interpreted the provisions as follows:

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[118] UN General Assembly, *Universal Declaration of Human Rights*, 10 December 1948, 217 A (III)
[119] ibid
[120] Council of Europe, *European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14*, 4 November 1950, ETS 5
[121] Constitution of Kenya 2010, Article 50(4)
[122] [2018] eKLR
[123] [2016] eKLR

> The issue of self-incrimination goes to the now constitutionalized common law privilege that is now found in Article 50 (2) (i) and 50 (2) (l). These two provisions are also known, respectively, as the "right to remain silent" (otherwise popularized under the US Constitutional clause of similar import "the Fifth Amendment") and the "right against self-incrimination." These two rights are related and I will refer to both of them genetically as the right against self-incrimination…The right against self-incrimination covers both testimonial as well as documentary evidence. As long as the evidence sought to be adduced is or was compelled either in court or outside court by an Investigating Officer or some other person in authority, such evidence is given due to testimonial obligation and will be excluded from the criminal trial of the Accused Person who is so compelled.
>
> It follows that any questioning of or eliciting of any documents or things from an Accused Person without the proper administration of caution or under circumstances in which the rules on confessions would apply is covered by the right against self-incrimination.[124]

Indeed, this interpretation is not only liberal but also far-reaching. In one sitting, the court has deviated from the previous statutorily derogable English model, to the constitutionally based American approach. For one, it has merged the right not to speak at trial and the right against self-incriminating evidence. In essence, any future abrogation of either right will have to recognize expressly that it seeks to weaken an accused person's right to a fair trial. Secondly, Justice Ngugi has extended the protection of the privilege to documentary evidence. Notably, constitutional provisions made no mention of documentary evidence, so the court's interpretation

[124] ibid

has the ability to influence the development of self-incrimination laws. Most importantly, the interpretation puts the provisions of particular statutes in jeopardy, such as sections 26 and 27 of the Anti-Corruption and Economic Crimes Act, No.3 of 2003 that compel the production of documentary evidence from suspects with no mention of use immunity. No doubt, such statutes will have to be reviewed in the wake of these new rules.

4.3.4 Voluntariness of Confessions

Unfortunately, Kenya's Evidence Act still applies the outdated voluntariness doctrine in testing the admissibility of confessions. By definition, the voluntariness test was an old common-law rule that viewed confessions through exclusionary evidentiary rules rather than constitutional principles.[125] Currently, international trends on the privilege against self-incrimination use a reliability test that considers the conduct of investigating officers rather than the mind of the defendant. In the UK, the reliability test is applied under section 76 of the Police and Criminal Evidence Act (PACE), which moves the burden of proving the legality of a confession to the prosecution. On their part, the United States deviated from the voluntariness rule through *Bram v United States*[126] at first, followed by *Brown v Mississippi*[127] that established it in the law. Later, *Miranda v Arizona*[128] enumerated clear rules for extracting confessions, thereby moving the country from that ineffective doctrine. Specifically, the Miranda case noted that suspects could give voluntary evidence in the traditional term, but on closer analysis, they were in an unfamiliar and menacing environment that potentially compelled them to confess. In comparison, Kenya specifically prohibits confessions unless made under certain conditions; however, those

[125] Theophilopoulos, 'The Right to Silence and the Privilege Against Self-incrimination'
[126] 168 U.S 532 (1897)
[127] 297 U.S. 278 (1936)
[128] 384 U.S 436 (1966)

conditions can be met, and the defendant still gives an invalid confession owing to a soft manipulation by investigating authorities.

4.4 Witness Privilege

4.4.1 Statutory Privilege against Self-Incrimination

Since Kenya's witness privilege against self-incrimination is statutorily established, it has a limited operation. Arguably, the privilege can be traced to the English common law that Kenya inherited shortly after independence. In fact, most of the provisions on the witness privilege are founded on the rules of evidence rather than constitutional principles. According to section 128 of the Evidence Act:

> A witness shall not be excused from answering any question as to any matter relevant to the matter in issue in any suit or in any civil or criminal proceeding, upon the ground that the answer to such question will incriminate, or may tend directly or indirectly to incriminate, such witness, or that it will expose, or tend directly or indirectly to expose, such witness to a penalty or forfeiture of any kind, but no such answer which a witness is compelled to give shall subject him to any arrest or prosecution, or be proved against him in any criminal proceeding, except a prosecution for giving false evidence by such answer.[129]

Not only does the Act confer a privilege against self-incrimination, but it also offers use immunity for compelled testimonies. As the comparative constitutionalism of the UK and the US has revealed, witness privilege is equally essential and should be protected. Currently, Kenya does not offer any privileges to corporations or to documentary evidence produced by witnesses.

[129] Kenya Evidence Act Number 46 of 1963

In effect, Kenyan Constitution's silence on the matter may subject the witness privilege to continued infringement.

4.5 Conclusion

As the study has revealed, Kenya has a relatively elaborate privilege for accused persons based on international law. Historically, the country acquired its laws on the privilege from the English legal system through colonialism. Later, it created its own unique rules guided by the problems it sought to solve. Since the Repealed Constitution did not recognize the vital rights of an accused person to a fair trial, Kenya inserted these provisions directly in the constitution to eradicate abuses of human rights. Notably, courts have even ruled that the right to silence and the privilege against self-incrimination are of the same class, so they should not be separated. What is striking is that abuses of the privilege against self-incrimination are still prevalent despite the provision for them under the Constitution and international laws. Even though courts are working to give liberal interpretations of the privilege when invoked, this is not sufficient to protect accused persons around the country. This chapter has used Kenya's history to reveal that the main shortfall to the invocation of the right to refuse to give self-incriminating evidence is a lack of clear legislation on the area. The lacking legislation affects witness privilege as well. In the latter case, repercussions include the exposure of corporations and non-party witnesses with regard to the production of self-incriminating documents. All the same, Kenya's privilege against self-incrimination for accused persons has the potential to be broad and effectively enforced.

CHAPTER 4 - A COMPARATIVE ANALYSIS OF INTERNATIONAL BEST PRACTICES

5.1 Introduction

Historically, the privilege against self-incrimination originated from the United Kingdom. However, the United States was the first country to elevate the privilege into a constitutional right. Prior to the US Fifth Amendment ratification in 1791, the United Kingdom, which conceptualized the principle, only recognized it as a rule of procedure in the common law. Long after its inception, the United States constitutional right against self-incrimination was limited in operation. It took the onset of the civil rights movement of the 1960s to inspire the American Supreme Court to interpret the right favorably. On its part, UK's courts provided for the privilege against self-incrimination liberally until changing social values pushed its Parliament to formulate statutes to abrogate it. A comparative study of various jurisdiction's right to refuse to adduce self-incriminating evidence not only reveals the key differences in practice between American and English laws, but it also highlights the fundamental concepts behind the foundation of the privilege against self-incrimination. This chapter also makes a short comparison of South African laws because Kenya's Bill of Rights borrows a lot from the South African Constitution.

In general, this chapter shows that the United Kingdom treats its privilege as a right of procedure that is guaranteed to any person, legal or natural, especially in the civil process. On its part, the US considers the privilege against self-incrimination a human right whose invocation is limited to natural persons and is essential to protect them, especially in the criminal process. Interestingly, the UK privilege was a product of its courts and was subsequently abrogated by statutes, while the US right flows from its constitution and was limited in operation until courts began to interpret it favorably. Through these approaches, it manifests that the court's duty is to

interpret the principle, especially as is provided under statutes. This chapter will show that in the absence of a statute, then courts have to be activists to expand the scope of a right as central as the privilege against self-incrimination.

5.2 United Kingdom

5.2.1 Background

Owing to its unwritten constitution, the United Kingdom does not have a codified bill of rights. Its judge-made law solves cases on an *ad hoc* basis to relieve specific and immediate problems, while its parliament formulates statutes to protect or limit specific rights depending on the needs of the moment. For instance, before Jeremy Bentham advanced his utilitarian views criticizing the right to silence,[130] accused persons were neither competent nor compellable witnesses in the country. As utilitarianism grew popular, the UK amended its laws to allow accused persons to speak at trial;[131] later, it even penalized them for refusing to testify. In addition, contemporary challenges such as terrorism provoked demands for a stronger policing system with reduced favoritism towards suspects. As a result, the country opted to penalize defendants for failing to account for some facts in their case. For example, if a suspect intends to use an alibi defense, he or she must mention it at the pretrial stage; otherwise, the jury can make adverse inferences from his or her pretrial silence.[132] In a way, the lack of a single source of human rights has made certain rights flexible in the UK to accommodate the prevailing views of society.

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[130] Jeremy Bentham, *Rationale of Judicial Evidence* (London 1817)
[131] Criminal Justice and Public Order Act (United Kingdom) 1994 repealed section 1(b) of the Criminal Evidence Act (United Kingdom) 1898 that protected an accused person from adverse inferences.
[132] ibid

Because of its flexible laws, the British privilege against self-incrimination has no clear definition. In contrast to international best practices, the United Kingdom separates the privilege against self-incrimination from the right to silence. Before 1898,[133] both accused persons and non-party witnesses enjoyed the same blanket privilege against self-incrimination that existed since 1641 following the abolition of the Court of High Commission and Star Chamber. However, the 1898 Criminal Evidence Act disjointed the right to silence from the privilege against self-incrimination specifically for accused persons. Whereas non-party witnesses are still protected by the medieval privilege, accused persons are required to testify at their trial, and their refusal to do so can be interpreted against them.[134] Of note is that the privilege against self-incrimination is not an all-encompassing concept in the UK as it is in the United States; instead, the country regards the privilege as limiting compelled confessions under oath only – whether extracted from accused persons, non-party witnesses, or corporations.

Notably, global trends in human rights protection have affected the UK's treatment of the privilege against self-incrimination. Firstly, it assented to the 1948 Universal Declaration of Human Rights[135] (UDHR) that guarantees these human entitlements.[136] Secondly, the country ratified the International Covenant on Civil and Political Rights (ICCPR)[137] that is more explicit on the right of a person not to incriminate himself or herself.[138] Most importantly, the UK was a

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[133] This refers to the period following the collapse of the Court of High Commission and the Star Chamber, which were the primary judicial establishments that used ex officio oaths to charge accused persons. The former was used by the Catholic Church to prosecute Puritans, while King Charles I used the latter to prosecute his political opponents.

[134] Ibid (n 5)

[135] UN General Assembly, *Universal Declaration of Human Rights*, 10 December 1948, 217 A (III)

[136] Specifically, Article 5 of the UDHR abolishes torture and guarantees the right to dignity, while Article 10 recognizes the right to a fair trial.

[137] UN General Assembly, *International Covenant on Civil and Political Rights*, 16 December 1966, United Nations, Treaty Series, vol. 999, p. 171.

[138] On Article 14 (3) (g), ICCPR declares that a person is entitled 'not to be compelled to testify against himself or to confess guilt.'

party to the 1953 European Convention on Human Rights and Fundamental Freedoms[139] (ECHR), whose Court of Human Rights has greatly expanded the scope of the privilege against self-incrimination. Through the Court's interpretation of Article 6 of ECHR, it has reversed rulings made by English courts and expanded the purview of the right against self-incrimination.[140] Even more notable is the fact that the ECHR prompted the United Kingdom to pass its first-ever Human Rights Act in 1998 and made it consider formulating its own British Bill of Rights.[141] Mainly, the UK presently bases most of its written laws on the privilege on internationally agreed principles even as it deviates from some international norms.

5.2.2 Accused Person Privilege

5.2.2.1 Pretrial Silence

Contrary to international trends that upgrade or constitutionalize an accused person's right to silence, the UK abrogates that right from the pretrial stage. In the past, the common law upheld the right of a suspect to pretrial silence except in situations where the accuser was not the state. For instance, in the case of *Parkes v R* (1976),[142] the defendant was penalized for being silent when questioned by the mother of the victim he had been accused of stabbing. Nonetheless, the Criminal Justice and Public Order Act[143] (CRIMPO) altered this view that protected accused persons from interrogations by powerful parties. Specifically, sections 34 to 37 of the act outline the instances in which the court can draw adverse inferences from an accused person's silence.

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[139] Council of Europe, *European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14*, 4 November 1950, ETS 5.
[140] Decisions such as *Murray v UK* 140 (1996) 22 EHRR 29 where the Strasbourg Court declared the right of access to counsel as fundamental to the protection of the privilege against self-incrimination, and *Saunders v UK* 38 (1996) 23 EHRR 313 where the court recognized a vital connection between the privilege and the right to silence, differed from the holdings of English courts.
[141] Susan M Easton, *Silence And Confessions* (Palgrave Macmillan 2014) 69.
[142] [1976] 1 WLR 1251 32
[143] Laws of the United Kingdom, 1994

Some of the specified cases include a failure to mention facts later relied on in the defense,[144] a failure to account for objects, substances, or marks present on the scene or the body of the suspect at the time of arrest,[145] and the suspect's refusal to account for his or her presence at a particular place during arrest.[146] However, both the common law and the relevant statutes require an accused person to be cautioned before an interrogation.[147] Besides, an accused person is entitled to a solicitor who can help the person avoid incriminating himself or herself during questioning. Other than the listed cases where pretrial silence can be interpreted against an accused person, all other instances of silence are protected by the common law and by implication, the CRIMPO. In this manner, the UK deviates from the general standards that construe the right to a fair trial liberally.

5.2.2.2 Silence in Court

Despite the derogation of the right to silence under British statutes, an accused person is still a privileged witness. In this regard, he or she cannot be committed for contempt of court for refusing to speak at the trial. However, CRIMPO applies pressure on accused persons to speak by allowing the court to make inferences from their refusal to talk when asked for information.[148] Initially, the act requires the prosecution to establish a prima facie case before the defendant can rebut any claims made. Then, the prosecution's case must require an answer from an accused person, and he or she must be the proper person to give it. Once those conditions are met, the jury can make an inference from the accused person's silence, and the judge has to warn the defendant

[144] Criminal Justice and Public Order Act section 34
[145] Ibid section 36
[146] Ibid s. 37
[147] The police are required to warn the accused person that his silence can be used against him in court. In some instances, the police is even required to
[148] Theophilopoulos, 'The Right to Silence and the Privilege Against Self-incrimination'

of the evidentiary implication of his or her silence.[149] Particularly, adverse inferences are one of the many pieces of evidence that the judge and jury have to consider before proving guilt. In that regard, the prosecution still has to discharge its evidentiary burden. Notably, section 35 of CRIMPO allows a defendant, once on oath to answer questions, to decline to respond if the reply is self-incriminating. In addition, the act incorporates the common law by granting judicial discretion to permit the defendant not to speak if the court considers it proper. Mainly, the UK concludes that the trial stage offers numerous legal safeguards for a fair trial; therefore, it does not deem silence as essential to the protection of an accused person's rights.

5.2.2.3 Confessions

Indeed, an accused person's privilege originated from the treatment of confessions by courts. Historically, the common law evaluated confessions under the voluntariness doctrine – that is, whether a confession had been granted through free will or compulsion. In recent times, this rule has changed to provide for a reliability test that weighs a confession through the actions of the investigating officers. Essentially, the reliability test acknowledges that investigating authorities can use different tricks to make a suspect confess to a crime; therefore, voluntariness is not sufficient to protect an accused person. Arguably, this trend began in the United States through the Miranda safeguards, from where it spread to the English Police and Criminal Evidence Act 1984 (PACE). In section 76(2) of PACE,[150] any confession derived through illegitimate methods is inadmissible, whether it is true or not. In essence, PACE attempts to regulate abuse of power by police and to defend the moral authority of courts.

[149] Constantine Theophilopoulos, 'The Right to Silence and the Privilege Against Self Incrimination; A Critical Examination Of A Doctrine' (Doctoral Thesis, University of South Africa 2001), 338
[150] Police and Criminal Evidence Act 1984

5.2.3 Witness Privilege against Self-incrimination

Remarkably, any person can claim the UK privilege against self-incrimination. Presently, the English privilege is defined in an Act of Parliament, and the statutory definition modifies the common law position slightly. In the common-law case of *Blunt v Park Lane Hotel Ltd,*[151] Justice Goddard L. J expounded the principle thus:

> The rule is that no one is bound to answer any question if the answer thereto would, in the opinion of the judge, have a tendency to expose the deponent to **any criminal charge**, penalty, or forfeiture, which the judge regards as reasonably likely to be preferred or sued for. [152]

However, the present statutory definition omits the privilege from the criminal proceeding. In this regard, the Civil Evidence Act[153] (1968) defines the privilege against self-incrimination as:

> The right of a person in any legal proceedings **other than criminal proceedings**[154] to refuse to answer any question or produce any document or thing if to do so would tend to expose that person to proceedings for an offence or for the recovery of a penalty.[155]

Indeed, this interpretation clarifies why the UK separates the privilege from the right to silence. Following this train of thought, it is apparent that the country aspires to protect people from legally compelled self-incrimination in line with its history and traditions rather than to offer an abstract legal privilege[156] to its citizens.

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[151] 1942 2K.B. 235, 257 per Goddard L. J
[152] Emphasis added
[153] Laws of the United Kingdom, 1968
[154] Emphasis added
[155] Civil Evidence Act (United Kingdom), 1968, s. 14 (1)
[156] Professor Wigmore found no historical connection between the privilege against self-incrimination and confession rules. While the UK evolved to guarantee and protect the latter, the former was a creation of defense counsel and was not recognized expressly in the laws until later as a rule of procedure.

5.2.3.1 Corporate Privilege

Since the United Kingdom has not defined the privilege constitutionally, its common law has extended its protection to corporations as well. In *Triplex Safety Glass Co v Lancegaye Safety Glass Co* case (1939),[157] the court determined that even though companies were not sentient beings, they were able to suffer punishment and criminal convictions. In turn, such penalties could harm the corporation's trading ability and threaten its existence ultimately. As a result, the court decided that both natural and legal persons deserve the protection of the privilege. In tandem with the United Kingdom, the European Union has also awarded procedural defenses to corporations, which include the right to a fair trial and the privilege against self-incrimination.[158] In effect, corporations are impliedly protected under the United Kingdom Human Rights Act, which adopted the ECHR into law.

5.2.3.2 Documentary Evidence

Aside from corporate privilege, the UK also extends the privilege against self-incrimination to documentary evidence under both the common law and statutes. Section 14(1) of the Civil Evidence Act[159] includes a right to refuse to produce self-incriminating documents; however, this right does not extend to documents that can be acquired through a warrant.[160] In the Saunders V United Kingdom case at the European Court of Human Rights, the court provided the rationale for this perspective by pointing out that

> The right not to incriminate oneself is primarily concerned, however, with respecting the will of an accused person to remain silent (…) it does not extend to the use in criminal proceedings of material which may be obtained from the accused through the use of

[157] (1939) 2K.B. 395
[158] Theophilopoulos, 'The Right to Silence and the Privilege Against Self-incrimination'
[159] Civil Evidence Act (United Kingdom of Great Britain) 1968
[160] *Saunders v UK* 38 (1996) 23 EHRR 313

> 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.[161]

Therefore, documentary evidence is inadmissible if the process of producing it is incriminating, whereas the document is compellable if it exists outside the will of the witness or accused person.

5.2.3.3 Abrogation

Since the English privilege majors on protecting witnesses from ill-treatment or unfair confessions, the English Parliament is able to limit it statutorily on the condition that it protects witnesses and defendants from such injustices. Mostly, statutory abrogation of the privilege occurs in the areas concerning white-collar crime, such as banking, taxation, and fraud, among others.[162] In fact, most erosion of the privilege occurs in the commercial and financial arena to give the country a better chance at handling white-collar crime. In some instances, courts have favored an abrogation of the privilege to protect wider public interests. In the case of *Brown v Stott*,[163] the defendant was prosecuted for drunken driving using evidence derived directly from her. Particularly, the court felt that 'the balance between road safety and individual rights came down decisively in favor of the former.'[164] In addition, the English parliament has created use immunity to protect witnesses in cases where they have to be compelled to speak, such as in section 59 of the Youth Justice and Criminal Evidence Act 1999. In effect, this shows that the UK witness privilege is not an absolute guarantee.

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[161] Saunders vs. United Kingdom App. No. 19187/91 (17 December 1996)
[162] Constantine, The Right to Silence and the Privilege against Self-incrimination
[163] [2003] 1 AC 681
[164] Mike Redmayne, 'Rethinking The Privilege Against Self-Incrimination' (2005) 27 Oxford Journal of Legal Studies 2, 213.

5.3 United States

5.3.1 Background

In the United States, the privilege against self-incrimination resembled the English confessional safeguards until the country ratified the Fifth Amendment in 1791. Despite the express recognition of the privilege in the Constitution, its provisions took centuries to effect. Firstly, courts construed the Fifth Amendment to mean that it only applied to the extraction of incriminating interrogation under oath, to the application of torture, and to the use of unfair forms of coercive interrogation.[165] Subsequently, early investigators applied pre-trial pressure on accused persons, and juries made adverse inferences from their refusal to testify at trial, believing that those rights were not protected. Such interpretations meant that the right extended to witnesses, who were required to testify under oath, but not to accused persons who were not competent witnesses at the time.[166] Secondly, states understood the Fifth Amendment to be a federal right. In those early days, most states protected accused persons from compelled testimonies through the voluntariness doctrine.[167]However, the Supreme Court changed this view through *Bram v United States* (1897),[168] where it declared that courts had to adhere to the Fifth Amendment requirement while interrogating the voluntariness of a confession; still, it did not bind states to that rule. Often, early courts interpreted the Fifth Amendment restrictively, thereby limiting its scope.

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[165] This was also the English position on the privilege at the time, and it investigated all confessions through the voluntariness lens. If a confession was considered voluntary, it was admissible irrespective of how it was acquired. In some instances, police used persuasive techniques to trick defendants into confessing crimes; John Taylor, Right to Counsel and Privilege Against Self-incrimination

[166] John Taylor, Right to Counsel and Privilege Against Self-incrimination, 36

[167] Leonard Levy, Origins of the Fifth Amendment Privilege, 328

[168] 168 U.S 532 (1897).

It took the 1960s civil rights movement for courts to expand the reach of the privilege. Primarily, *Malloy v Hogan* (1964)[169] held the right binding to all states. Furthermore, courts extended the right to counsel to suspects immediately after their arrest and during their interrogation.[170] However, the most far-reaching decisions on the privilege against self-incrimination were *Griffin v California* (1965)[171] and *Miranda v Arizona* (1966).[172] While the former preempted states from drawing adverse inferences from silence, the latter formulated guidelines that protect defendants to date. Above all, the civil rights period oversaw numerous liberal analyses of the Fifth Amendment. For one, courts interpreted invocations of the privilege against self-incrimination to favor the claimant.[173] Additionally, courts held that the right could be claimed in any judicial proceedings, and that a waiver had to be made from an informed position.[174] Furthermore, US courts provided that an accused person's privilege at trial was all encompassing, whereas a witness could only invoke the right if a question elicited a response that posed a risk of criminal culpability. Lastly, courts also upheld an absolute right to trial silence. In effect, the US's protection of the right against self-incrimination has been a gradual process spearheaded by judicial interpretations.

5.3.2 Accused Person Privilege

5.3.2.1 Privilege against Self-incrimination

Agreeably, the US Fifth Amendment is the model that most jurisdictions used to formulate their right against self-incrimination. Interestingly, the American privilege was a creation of courts who interpreted a constitutional principle broadly to protect mostly ethnic

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[169] 378 U.S 1 (1964).
[170] This was done in *Massaih v United States* 377 U.S 201 (1964) and *Escobedo v Illinois* 378 U.S 478 (1964)
[171] 380 U.S. 609 (1965)
[172] 384 U.S. 434 (1966).
[173] *Counselman v Hitchcock* 142 U.S. 547 (1892)
[174] *Miranda v Arizona* 384 U.S. 436 (1966)

minorities from a racially prejudiced police system. In the text of the Fifth Amendment, American privilege is a one-sentence statement that prohibits the compulsion of people for self-incriminating evidence. Specifically, the section outlines that 'no person… shall be compelled in any criminal case to be a witness against himself.' Through a series of cases, the US Supreme Court has construed the provision to attain many far-reaching decisions. Of these, the most notable are the four critical conclusions identified in *Miranda v Arizona* (1966)[175]:

1. A jurisprudential basis for the constitutional right against self-incrimination
2. An analysis of the then prevailing common-law confessional rules and their shortfalls, which led the judges to formulate new rules to guide the taking of confessions
3. A guarantee of a right not to speak at trial; and
4. A guarantee of a right to be informed about the right to silence and the consequences of foregoing it[176]

In the US, an accused person enjoys more comprehensive protection of the privilege than a person in most other jurisdictions does. Owing to the constitutional entitlement, they have a guaranteed right to silence, to an absolute privilege against self-incrimination, and to access legal counsel.

5.3.2.2 Pretrial Rights

Through the Miranda safeguards, defendants now enjoy several pretrial rights and privileges. Firstly, they have a right to be informed of their right to silence and to be warned of the consequences of foregoing that right. In addition, they are protected from the use of their silence in substantial prosecutorial evidence. Clearly, this stands in stark contrast to the UK position. Besides, a suspect can refuse to be interrogated in the US within his or her constitutional

[175] 384 U.S 436 (1966)
[176] Theophilopoulos, 'Right to Silence and the Privilege Against Self-incrimination," 173

entitlements. Secondly, an arrested person has a right to an attorney, which must be provided to him or her at the cost of the state if he or she cannot afford one. In comparison, the UK's right to legal counsel is subject to the discretion of the investigating police and can be delayed in specified circumstances. Moreover, a defendant in the US can refrain from answering any questions until he or she consults an attorney if he or she deems it necessary during an ongoing examination. Most importantly, an arrested person is entitled to these rights unless he or she voluntarily, knowingly, and intelligently waives them. Clearly, Miranda rights aim to curtail police violence and to eliminate their steep power imbalance against suspects.

5.3.2.3 Trial Silence

Aside from pretrial no-inference rule, a defendant is also guaranteed trial silence. Ideally, this right preempts the prosecution from using an accused person's silence as evidence of guilt. Actually, trial silence is both a statutory and judicial rule. Before it was conceived by the Supreme Court in *Griffin v California* (1965),[177] it was already recognized under Title 18 of the United States Code.[178] Still, the notable contribution of the *Griffin* rule is that it connected trial silence to the Fifth Amendment privilege, holding that adverse inferences from trial silence amount to a direct infringement of the privilege against self-incrimination. To uphold this provision, a judge is required to inform the jury not to make adverse inferences from a defendant's silence at trial;[179] therefore, it upholds and protects the privilege against self-incrimination.

[177] 380 U.S. 609 (1965).
[178] Theophilopoulos, 'The Right to Silence and the Privilege Against Self-incrimination,' 218
[179] ibid

5.3.3 Witness Privilege against Self-incrimination

Unlike an accused person's right against self incrimination that is absolute, the witness privilege is a relative right. It can only be invoked if a response to a question poses imminent risk of a criminal prosecution. Interestingly, both privileges emanate from the Fifth Amendment; however, since courts have contributed the most to the expansion of the text of the constitution, they have also differentiated the accused privilege from its witness counterpart. Through judicial interpretations, witnesses are also guaranteed the right to silence at trial. In addition, they can claim the privilege whenever there is any form of legal compulsion – be it a subpoena, contempt, imprisonment, or a state induced sanction. Most importantly, the witness is privileged in any proceeding where a testimony that can be used against him or her is required. Of note is that the privilege applies to natural persons only. In the United States, corporations are understood to derive their existence from the state; therefore, they must be subjected to control of the state to protect the public interest. Furthermore, witness protection is a personal privilege that shields the person but not the information sought. In this sense, it excludes documentary evidence except for when its production would be an incriminating act. Particular interpretations of the privilege apply as shown in the following sections.

5.3.3.1 Natural versus Juristic Persons

Indeed, the recognition of a person's right not to be a witness against himself or herself as a human right rather than a rule of procedure has implications for legal persons in the US. According to the US courts, the Fifth Amendment is a human right; thus, it does not extend to legally sanctioned associations. Some of the bodies excluded from the privilege are companies, unincorporated labor unions, and small business partnerships. Besides, documents from such organizations are compellable even if they directly incriminate their custodian. Mostly, the court's rationale is that to protect the public from white-collar crimes and to enforce the

Companies Act, it must regulate juristic bodies by having unrestricted access to their records.[180] Even in instances where a corporation is run by a solitary shareholder, the law maintains the right to compel its shareholder to produce incriminating evidence that can be enforced against both the company and the individual. In effect, the US Fifth Amendment is strictly applicable to natural persons only.

5.3.3.2 Testimonial versus Non-Testimonial Evidence

In the wording of the Fifth Amendment, a person is shielded from having to be a witness against himself. To keep this provision within the practical limit of the privilege, the US Supreme Court construed it to apply to testimonial evidence only. Primarily, what distinguishes testimonial and non-testimonial evidence is the communicative nature.[181] Whereas testimonial evidence flows from the thought process of a person, physical evidence exists outside the person's will. Notably, the US privilege is limited to evidence collected through a communicative act, which may even include a nod of the head.

5.3.3.3 Immunity

Fundamentally, the Fifth Amendment right does not preempt the compulsion of witnesses; what it guarantees is that evidence obtained in that manner cannot be used to prosecute the witness who produces it. Until courts construed the privilege to bind the Federal Government and the state, federal and state witnesses were not guaranteed this protection. One state would grant use immunity to a witness in its jurisdiction, but a sister state would use the extracted evidence to prosecute the immunized witness under its laws. Accordingly, the Supreme Court resolved the

[180] Theophilopoulos, 'The Right to Silence and the Privilege Against Self-incrimination'

[181] ibid

disharmony by proscribing the Federal Government from using state compelled testimonies.[182] Currently, a witness has to claim immunity for every question asked, but if the response is central to a hearing, it can be immunized. In this manner, the right not to incriminate oneself is guaranteed.

5.4 South Africa

5.4.1 Background

Notably, the South African privilege against self-incrimination borrows its substance from the English and American models. In the country, the privilege is a constitutional right. Under Article 35 (1) (c) of the South African Constitution, an arrested person has the right not to be compelled to make any confession or admission that could be used in evidence against them. Furthermore, an accused person is protected under Article 35 (3) (j), which recognizes his or her right to a fair trial, including the right not to be compelled to give self-incriminating evidence.[183]

5.4.2 Privilege against Self-incrimination

A fundamental difference between the South African right against self-incrimination and the American privilege is that the latter is couched in absolute terms. In the South African Constitution, any right or fundamental freedom can be limited by law to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality, and freedom.[184] It is a balancing test against the absolutism of individual rights. Dr. Constantine defines Section 36 as a 'legal and social safety valve.' Under the Constitution, Section 36 reads as follows:

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[182] *Murphy v Waterfront Commission* 378 U.S. 52 (1964)
[183] Constitution of the Republic of South Africa, 1996
[184] Constitution of South Africa 1996, Section 36

> The rights in the Bill of Rights may be limited only in terms of the law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality, and freedom, taking into account all relevant factors including,
>
> a. the nature of the right
> b. the importance of the purpose of limitation
> c. the nature and extent of the limitation
> d. the relation between the limitation and its purpose, and
> e. less restrictive means to achieve the purpose.[185]

Notably, South Africa's constitutional provisions for the limitation of rights are similar to Kenya's Articles on the same.[186] Of note is that the Constitutional limitations to the Bill of Rights entrenched within the Kenyan[187] and South African[188] Constitutions are better than the American judicial limitation based on a balance of interests. Since the US Constitution lacks a Constitutional limitation, its balance of interests was developed by the dissenting judgement of Justice Harlan in the Supreme Court decision of *California vs Byers.* Therefore, South African and Kenyan models of the right against self-incrimination are a refinement of the American privilege.

In South Africa, just like in Kenya, the privilege against self-incrimination is limited to criminal proceedings. Thus, it does not operate as a bar to future civil claims. Section 202 of the Civil Procedure Act of South Africa is titled, 'Free Evaluation of Evidence,' and provides as follows,

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[185] Ibid
[186] Constitution of Kenya 2010, Article 24
[187] ibid
[188] Ibid (n178)

> A court shall determine, by its free conviction, whether or not an allegation of facts is true taking into account the whole purport of the pleadings and the results of the examination of the evidence, on the basis of the ideology of social justice and equity in accordance with the principles of logic and experiences. [189]

This section is read with section 42 of the Civil Proceedings Evidence Act, which provides that,

> The law of evidence including the law relating to the competency, compellability, examination, and cross-examination of witnesses, which was in force in respect of civil proceedings on the thirtieth day of May 1961, shall apply in any case not provided for by this Act or any other law.[190]

The import of section 202 is that the evidence, which was subject to the privilege against self-incrimination in other proceedings, is admissible in civil proceedings.

In South Africa, the privilege against self-incrimination is invoked in criminal, coroner's, civil, administrative, and inquest proceedings where there is the likelihood of criminal charges being opened against the witness. Court has a duty to caution the witness of the privilege and where it fails, the incriminating evidence cannot be admissible in future criminal proceedings against the witness. In South Africa, the privilege against self-incrimination is only admissible when the Court rules that the risk of self-incrimination is real and appreciable. Its application is on direct testimonial evidence that incriminates a witness and circumstantial evidence given innocently and which, when pursued, is likely to establish a causal link, thus exposing the witness to criminal culpability. A witness who has a statutory immunity against prosecution base on self-incrimination cannot claim the privilege.

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[189] Civil Procedure Act, South Africa
[190] Civil Proceedings Evidence Act 25 of 1965, Laws of South Africa

5.4.2.1 Corporate Privilege

In *Ferreira v Levin NO & Others*, the substance of the dispute was the winding-up proceedings of Prima Bank Holdings in which the applicant was a director. Pursuant to section 417 of the Companies Act,[191] the applicant was summoned by the company's provisional liquidators for examination and inquiry as to why the company was unable to pay its debts. At the examination by the provisional liquidator, the applicant objected to being compelled to respond. The Court found in favor of the applicant and declared section 417 (2) (b) of the Companies' Act unconstitutional for the reasons that the section did not provide a proviso that indicated that evidence obtained in the liquidation hearing could not be used in subsequent criminal proceedings.

On the question of the application of the privilege against self-incrimination in liquidation hearings, the Court rejected the applicant's contention that the privilege can be invoked. The Court upheld the public interest duty. Since companies transact with the public in dealings based on limited liability, especially on financing, then it must be responsible for its shareholders and creditors. If the court were to protect a company against its shareholders, then the public interest would find that decision inexplicable.

5.4.3 Non-Party Witness versus Accused Person

Notably, Section 35 of the Constitution of South Africa only protects the right of arrested and accused persons against self-incrimination. This privilege does not extend to a non-party's witness. South Africa's privilege against self-incrimination is predicated upon the presumption of innocence until proven guilty and the right to a fair trial. The South African Constitutional court has severally rendered itself on the limits and sanctity of the privilege against self-incrimination.

[191] No. 61 of 1973 Laws of South Africa

5.5 Conclusion

Broadly, two dominant attitudes characterize the privilege in adversarial systems: American and English. When the United States inserted the privilege in their Constitution, they arguably aspired to make it an absolute entitlement to every citizen. Through court interpretations, Americans not only made the right universal in their territory but also made it a precondition for custodial interrogation by law enforcement officers.[192] On the other hand, the United Kingdom left room for Jeremy Bentham's utilitarian critique of the right by making it a flexible rule.[193] Not only did they not codify the privilege, but they also separated it from the right to silence that is closely associated with it. As a result, the UK has been able to abrogate the right to silence by making adverse inferences,[194] while the US provides immunity for any testimony derived through compulsion.[195] In this manner, the US and the UK introduced parallel interpretations of the right against self-incrimination: one made it an ultimate constitutional entitlement and the other a privilege that is derogable to protect overbearing interests.

On its part, Kenya has taken the middle road with regard to the privilege. At first, it treated it in the same way as the UK, but the promulgation of the 2010 constitution marked the onset of an American constitutional model. What America's story shows is that courts can play a critical role in the expansion of a right, especially when there is supporting legislation. In the UK, the privilege against self-incrimination evolved over hundreds of years to form the unbroken rule of procedure that it has become. For that reason, English courts do not need to interpret the privilege any further. Subsequently, the British Parliament has attempted to limit some provisions

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[192] *Miranda v Arizona* 384 U.S 436 (1966)
[193] From the utilitarian standpoint, silence is more beneficial to the guilty than to the innocent, so the right protects criminals and hurts society
[194] Terrorism, Traffic Offences, are some of the cases in which the right to silence does not apply
[195] 'Fifth Amendment. Self-Incrimination' (1972) 63 The Journal of Criminal Law, Criminology, and Police Science 4, 505.

of the concept, especially on the right of an accused person to silence, and these changes have even been defended by English Courts. In view of that, it appears that courts generally support statutory provisions, so they are likelier to uphold legislation than they are to create new ones through purposive judicial interpretations or activism.

CHAPTER 5 - CONCLUSION AND RECOMMENDATIONS

6.1 Conclusion

Among the many aspirations that spurred Kenyans to promulgate the new constitution was the desire to join the international league of free democracies. Indeed, Article 10 of the Constitution of Kenya presented these wishes under the national values and principles of good governance. On text, Kenya's Constitution is progressive and has the ability to spur rapid improvement in the human rights space. Some of the major sections that guarantee this dream are Articles 2(5) and (6) that make international laws part of Kenya's internal laws upon ratification, and the Bill of Rights that constitutionalizes many human rights that were previously overlooked. Interestingly, the privilege against self-incrimination was once a subordinate right in Kenya; now, it is one of the few fundamental rights that may not be curtailed under the doctrine of the rights to a fair trial.[196] Evidently, this shows how much progress Kenya is making towards attaining its goals. As many observers have pointed out, the privilege against self-incrimination reflects man's desire to make himself civilized.[197] If that statement is accurate, then Kenya's aspirations are directly linked to the protection of the privilege against self-incrimination. In effect, the harder the country works to advance and protect this privilege, the likelier it is that it will reach its constitutional ambitions.

Certainly, the significance of the privilege against self-incrimination in the promotion of human rights cannot be overlooked. Mainly, the privilege is directly linked to the presumption of innocence, which is a critical right to a fair trial. Without the presumption of innocence, there can be no privilege against self-incrimination, and the reverse is true. Secondly, the privilege is also

[196] Constitution of Kenya 2010, Article 25
[197] Ibid (n.6)

essential for eliminating gross abuses of human rights such as torture and abuse of legal procedures. In jurisdictions where the right to a fair trial is not guaranteed, there can be no freedom or harmony. The reason for this is that the privilege against self-incrimination promotes the dignified treatment of people, which in turn increases their chances of social advancement. Particularly, states such as Kenya that have suffered from repeated abuse of power by people in authority need strong constitutional protections for their people's rights. Among the key human guarantees that can be awarded in such territories, the privilege against self-incrimination is very vital. On most occasions, increased observance of the privilege against self-incrimination raises the likelihood that other human rights will be upheld.

Historically, the privilege against self-incrimination evolved from different jurisdictions over many centuries. Even though the specific source of the privilege is contested, legal historians have advanced three theories to explain its origin. First of all, some connect the privilege to medieval European jus commune. In that era, Churches were influential in the conduct of society, so the Catholic doctrines of confession during an act of penance might have prompted people to believe in their right not to report themselves after wrongdoing. Particularly, the church taught its followers that after they had confessed their crimes to a priest, they did not have to institute criminal proceedings against themselves; instead, criminal investigators had to find facts about the crime on their own. Notably, the privilege would not have developed had the Catholic Church not established it in English courts, whose adversarial system supported the invocation of the privilege. As the church instituted Ecclesiastical courts to prosecute faith-related crimes, such as fornication, drunkenness, and adultery, it upheld the *nemo tenetur prodere seipsum* principles, which eventually spread in England. Over time, these European ideals developed in the English adversarial system and resulted in rules of procedure that prohibit self-incriminatory evidence.

Another theory for the advancement of the privilege is from John Langbein,[198] who argues that the admission of defense counsel at trial is what created the rules against self-incrimination. According to this view, early courts often abused the rights of accused persons through forced confessions, torture, and adverse inferences from silence. However, when England passed its Treason Act in 1696 that prescribed a death penalty for guilty persons, it offered accused persons the chance to be represented by defense counsel. At the time, the understanding was that prosecutors had a better comprehension of legal procedures than accused persons did, so the latter needed equally skilled representatives to defend themselves fairly. As defense counsel set down to work, they challenged rules of evidence and subsequently created various principles of evidence such as burdens and standards of proof, the presumption of innocence, and rules of admissibility. Of these developments, the privilege against self-incrimination and the right to silence grew to become recognizable rules of procedure.

Later, when the tyrannical leadership of King Charles I perpetrated abuses on British citizens, many of them escaped to the New World where the reach of the King was limited, and where they continued to observe the best practices of their mother country's laws. For instance, the American State of Maryland recognized an accused person's privilege against self-incrimination at a time when England was abrogating that provision. Eventually, the English Parliament revolted against the monarchy, and when it won the resultant civil war in 1669, it abolished all practices that were advanced by the king's rule. Among these were the Star Chamber and the Court of High Commission that repeatedly demanded self-incriminating evidence from accused persons in their proceedings. Consequently, England started to observe the privilege against self-incrimination more strictly. On their part, American's harrowing

[198] John H. Langbein, 'The Historical Origins of the Privilege Against Self-Incrimination At Common Law' (1994) 92 Michigan Law Review.

experiences under the abuses of tyrants in different kingdoms prompted them to form a binding document that enlisted their rights, and when they promulgated their constitution in 1787, they promptly inserted the privilege against self-incrimination in the document in 1791. In this manner, America initiated the global trend of constitutionalizing fundamental rights and privileges.

Currently, there exist two approaches to the exercise of the privilege against self-incrimination: American and English. Even though the source of the privilege is undisputed in this context, paths that the two jurisdictions have taken with it are slightly different. In the United States, the privilege is a personal right that passes for a human entitlement. On the other hand, the United Kingdom treats the privilege as a rule of procedure, so it is guaranteed to any person – natural or juristic – who rightfully claims it. Moreover, the constitutionalization of American privilege means that it is protected better than its English counterpart is. In the US, the Fifth Amendment applies in areas such as custodial interrogation, right to silence, pre-trial rights, the prohibition of adverse inferences, accused person privilege against self-incrimination, and even non-party witness privileges. On the other hand, English privilege is distinct from the right to silence and is statutorily abrogable. Mainly, the UK protects most of the rights covered under the Fifth Amendment using different statutory provisions, such as the Police and Criminal Evidence Act (PACE),[199] the Civil Evidence Act,[200] the Criminal Justice and Public Order Act (CRIMPO),[201] and the Human Rights Act[202] that ratified the ECHR into national law. For that reason, US privilege is more comprehensive and is preferred by many states that want to advance human rights through the constitution.

[199] Laws of the United Kingdom 1984
[200] Laws of the United Kingdom 1968
[201] Laws of the United Kingdom 1994
[202] Laws of the United Kingdom 1998

Among the countries that have adopted the privilege constitutionally is South Africa, which shares many similarities with Kenya. Fundamentally, South Africa is a common law country that uses the adversarial English system. In addition, most of its laws originate from England, since the latter was its colonial master. Unlike the UK, South Africa has a written constitution that spells out the rights and privileges of every person. When the law was drafted, it benchmarked heavily with the American constitution, especially on the right to silence and the privilege against self-incrimination. Accordingly, the South African privilege has elements of both the United States and the UK. Firstly, the country extends the protection of the privilege to both natural and legal persons. Notably, this approach contrasts the American model that extends the privilege to natural persons only. Secondly, the South African privilege is distinct from the right to silence. Even though it explicitly separates those two rights, the country protects both of them, unlike the United Kingdom that permits adverse inferences from an accused person's privilege. Moreover, South Africa only offers the protection of the privilege to accused persons and excludes non-party witnesses. In this manner, it deviates from the practices established by the two leading jurisdictions on the privilege to form laws that are peculiar to its needs. What this shows is that most countries prefer to merge the best approaches from the US and UK rather than to choose one system to apply.

Similarly, Kenya adopted the best practices of different jurisdictions on its provisions on the privilege. In consequence of its repealed constitution that perpetuated the abuse of citizen's rights, Kenya chose the American model of constitutionalizing the privilege against self-incrimination. However, unlike the United States, the Kenyan constitutional privilege is limited to accused persons. Its non-party witnesses still rely on the Evidence Act's privileges that are derogable and, therefore, susceptible to abuse. In some instances, Kenya has completely avoided taking a stand on the privilege against self-incrimination, such as on the inclusion or exclusion of

corporations in the protection of that right. Like South Africa, Kenya has separated the right to silence from the privilege against self-incrimination in the letter of the constitution. Nonetheless, in a recent court ruling, Judge Ngugi determined that those rights are similar and work together. At the same time, Kenya protects the right to silence just as firmly as it protects the privilege against self-incrimination, thereby differing from the UK. In this manner, the country selects the best practices from different jurisdictions that it then uses to improve its laws.

Surprisingly, Kenya's confession laws still follow the outdated common law approaches to the privilege against self-incrimination. In the past, English rules on the privilege were procedural guidelines that determined the exclusivity of confessions under a doctrine of voluntariness. In this guideline, the court viewed a privilege through the lenses of the defendant's mind – where it deemed a confession to have been involuntary, it declared it inadmissible, while all other voluntary confessions formed persuasive evidence. However, as most jurisdictions discovered, voluntariness alone was not sufficient to protect accused persons from abuse, compulsion, or inducement to confess by investigating authorities. Subsequently, the UK and the US adopted a reliability test to determine the admissibility of confessions. Under this rule, courts investigate the conduct of investigating authorities rather than the mind of an accused person. In the US, these rules are known as the Miranda Rights, while in the UK, they were formerly Judges Rules but have since been codified in the Police and Criminal Evidence Act 1984 (PACE). What this shows is that Kenya is still not protecting its accused persons effectively, especially for a country that has experienced repeated abuse of rights to a fair trial.

In summary, this paper has made the following findings regarding the research questions it set out to determine:

1. The privilege against self-incrimination began as a means of protecting accused persons through the trial process. Eventually, it expanded to include the pretrial stage, since that is where evidence that could be unfair or self-incriminating is collected.
2. Kenya currently lacks a structure for protecting suspects at the pretrial stage. The 2010 constitution lists the right against self-incrimination as an essential right to a fair process, but there is no supporting legislation to enforce it. For that reason, courts have to deal with issues of abuse of the privilege against self-incrimination repeatedly, and this has exposed suspects across the country to potential abuse.
3. In progressive jurisdictions, the privilege against self-incrimination is specially protected at the pretrial stage through rules and legislation. In the United States, the Miranda case went beyond an ordinary court decision to prescribe the practices investigating officers must adhere to when handling suspects in custody. Likewise, the United Kingdom has various statutes that guide police officers on the investigation process, and which grants courts the liberty to restrict evidence that it deems unfair to a defendant. Kenya also needs to formulate similar rules to eliminate the abuse of suspect's right to the constitutional right against self-incrimination.

Besides, the paper has disproved its hypothesis. While it hypothesized that there were supporting legislative and institutional frameworks on the privilege, the outcome is that those too are lacking.

A critical point made in this paper is the role of courts in expanding the scope of rights, and specifically, the privilege against self-incrimination. From the onset, it is evident that the privilege against self-incrimination was birthed at the court, and it is courts that have continued to expand its application. At the same time, legislation has been influential in enhancing the court's prerogative to interpret the right progressively. In the United States, the Fifth Amendment's

application was restricted to the federal government until courts declared it to be binding on states. After making the rule universal in the country, the US Supreme Court continued to expand its scope, resulting in Miranda rights that have guided many countries on proper criminal investigation rules. In the UK, courts create the privilege against self-incrimination and continue to apply it under different statutes to protect the rights of suspects. For example, an English court has discretion on specified instances to declare some evidence inadmissible if it goes against an accused person's privilege against self-incrimination. Kenya has also had instances where courts went beyond national laws to interpret and advance the privilege against self-incrimination using universal principles. In essence, the role of courts in protecting suspects' rights cannot be understated.

What is required to empower courts further is a legislation on the area of the right against self-incrimination. Indeed, the importance of this right in Kenya is apparent, given that it exists under both Articles 49 and 50 of the Constitution of Kenya. Besides, there are many recent cases where courts have determined that suspects' right to the privilege against self-incrimination has been infringed upon. In one instance, the court even petitioned parliament to formulate rules to guide their approach on the subject of self-incriminating samples. Besides, the privilege against self-incrimination is applied differently by different jurisdictions, and parliament is best placed to make the decision on the best approach that Kenya ought to take. Questions such as how samples should be treated, whether the privilege should be absolute or derogable in a criminal process, the extent of protection of non-party witnesses such as corporations, and the rules that police officers should follow during investigations are some of the matters that parliament is best placed to answer. This paper has shown that the absence of such legislation continues to affect the protection of the privilege against self-incrimination, and it believes that having that law in place would significantly enhance the enforcement of the right against self-incrimination in Kenya.

6.2 Recommendations

Having determined that the privilege against self-incrimination is vital to the right to a fair trial, which is, in turn, must be observed for a fair and society, this study makes the following recommendations:

6.2.1 Repeal the Voluntariness Rule in Confessional Laws and Replace it with the Reliability Test

Notably, Article 50(4) of the Constitution establishes the reliability test in the rules of evidence. However, Kenya's rules on confessions under sections 25A to 32 of the Evidence Act,[203] and the subsidiary Out of Court Confession Rules (2009), still apply an outdated Common-Law principle. Indeed, social and technological advancements have given investigating authorities so many techniques of obtaining confessions out of accused persons; for that reason, basing the admissibility of confessions on their voluntariness is inherently unfair to the accused person. In changing these confessional rules, Kenya would join the league of countries such as the United Kingdom and the United States that have long abolished the voluntariness doctrine.

6.2.2 Enhance Protection for Non-Party Witnesses

Arguably, Kenya omitted non-party witnesses from its constitutional provisions because it has not experienced issues of abuse of power in that area. However, as the study reveals, witness protection is just as important as the accused person privilege. Presently, the Evidence Act[204] provides immunities to non-party witnesses in instances where their confessions are compelled; however, Article 157 of that Act allows judges to make adverse inferences from the silence of a witness who has been compelled to answer a question. What this shows is that the privilege against self-incrimination available to a witness is weakly protected; therefore, Kenya should

[203] Number 46 of 1963
[204] ibid

promote that right by providing for immunities anytime answers are compelled from a non-party witness.

Besides, the Evidence Act is silent on corporate privilege and most documentary evidence. Indeed, companies are persons who can also commit crimes, and in the event that they do, they should be able to protect themselves. Since Kenya's provisions on the privilege against self-incrimination resemble South Africa's protection, the country should also acknowledge corporate privilege in the Evidence or the Companies Act.

6.2.3 Formulate law to guide criminal investigations

Part of the process of adopting the reliability test involves prescribing rules for police officers during investigations. Currently, existing laws do not define the expectations for investigating officers on how to guard the constitutional rights of suspects. In essence, the Constitution of Kenya has granted both arrested and accused persons the right against self-incrimination, but these can be infringed upon by police officers who are unaware of their duties as has happened in cases such as *C O I & another v Chief Magistrate Ukunda Law Courts & 4 others,*[205] among others. For that reason, the country needs a law that spells out the methodologies that officers should follow when handling suspects.

[205] [2018] eKLR

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