SILENCE IN COURT: THE EVIDENTIAL IMPLICATION OF AN ACCUSED PERSON'S FAILURE TO TESTIFY

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The fundamental objective of any criminal justice system is to prevent crime, punish the guilty, protect the innocent and provide justice for a victim of crime. The right to remain silent in criminal proceedings is a legal protection given to a crime suspect undergoing interrogation or standing trial. This right is not only a "shelter to the guilty" but also a "protection to the innocent". However, the mischievous invocation of this right by some dishonest suspects has raised concerns on the propriety of this right. This article examines the Right, its scope and application to determine the implication when an accused fails to testify. The article undertakes a comparative examination of the right in two jurisdictions, the US and the UK to locate the Nigerian perspective. The writer, therefore, postulates that failure of the accused to testify in court does not distort justice if properly applied. This constitutional right should, therefore, be applied objectively and without bias to achieve the desired result, which is justice.

Keywords: Accused, Confessions, Criminal justice, Right to Silence, Protection from self-incrimination.

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1. Introduction

The right to remain silent is a legal protection given to a crime suspect undergoing interrogation or standing trial. It is a legal right to the defendant to decline to testify at the trial.[1] This right is often viewed as obstructing justice in many climes even though still enshrined in many constitutions. Reported cases in this article show the bias with which security agents and courts have approached the right. This article therefore seeks to find out the evidential implication of failure of the accused to testify, or the accused person's right to silence, used interchangeably in this paper. It seeks to find out whether this right aid the guilty or misapplication of this right occasioned by bias.

In prosecuting an accused person, the Police or Prosecutors, are required to prove their case beyond a reasonable doubt. Consequently, the Police are inclined to relying too heavily on supposed confessional statements made by accused persons, as a means of proving the guilt of that person. It is known, even though an infamous fact in many countries that security agents often employ torture in extracting confessions from accused persons. To this end, confessions are inherently deceitful because on the one hand there is a huge propensity of them being extracted through abuses, and on the other hand, they are perceived as credible.[2]

Those involved in the administration of criminal justice such as the police, prosecutors, judges, and jurors are drawn to attaching value to the confessions because they often offer unique access

[1]M Berger, "Of Policy, Politics, and Parliament: The Legislative Rewriting of the British Right to Silence", (1995) 22 Am. J. Crim. L. 391.
[2]LGriffin, "Silence, Confessions and The New Accuracy Imperative" (2016) 65 Duke Law Journal p.698

to the defendant's thoughts, and seem self-authenticating.[3] False confessions or misinterpreted facts are often damaging; because a false confession or misinterpreted fact can delay or derail justice even after DNA testing conclusively establishes factual innocence.[4] For this reason, therefore, silence sometimes becomes the best strategy. The right of silence is therefore not only a "shelter to the guilty" but also a "protection to the innocent".[5]

Courts have noted that while procedural rules have their purposes, there is need to strike a balance between the goal of getting the facts of a case and protecting the suspect, and have often emphasized the 'truth-seeking function of the trial process" and the "general goal of establishing 'procedures under which criminal defendants are acquitted or convicted on the basis of all the evidence which exposes the truth.'[6] There is increased concern with the reliability of most systems of administration of criminal justice, given the heightened awareness of error in investigations and trials and greater understanding that the often, innocent participation of police and prosecutors in the establishment of evidence can lead to incorrect results.[7] Criminal suspects often admit to crimes that they did not commit for several reasons.[8] These confessions often illegally gotten and false, distort the train of events

[3]LGriffin. (Note 2) p.699
[4]LGriffin (Note 2) p.699
[5]LGriffin (Note 2) p.718
[6]LGriffin (Note 2) p.720
[7]LGriffin (Note 2) p.722
[8] Often innocent suspects out of fear of torture from security agents, shock, juveniles, those with learning difficulties, or those with mental illness, may confess to an offence that he or she did not commit.

throughout the trial and often lead to conviction even when they are innocent.

This article is divided into five parts. After the introduction, part two examines the origin and nature of the principle, part three examines scope and application in the US and UK because both jurisdictions have influenced the Nigerian legal system. Part four analyses to what extent the right protects the innocent or derail justice to determine what evidential value is attached to it. Part five examines the provisions and application of the right in Nigeria, and part six is the recommendation and conclusion.

2. Origin, Nature, and Application of the Right to Silence

The silence of the accused is a well-protected interest in the criminal justice system, whether one focuses on the unconditional right not to testify at trial or the somewhat more limited freedom from compelled self-incrimination before trial.[9] This stems from the generally accepted policy that the state should not be granted the authority to demand information that can then be used to prosecute the individual from whom it was obtained.[10]

[9] M Berger, "Of Policy, Politics, and Parliament: The Legislative Rewriting of the British Right to Silence", (1995) 22 Am. J. Crim. L. 391.

[10]More recent decisions of the Supreme Court of the United States have established that incriminatory documents may be subpoenaed from and used against a suspect as long as there is no self-incrimination arising out of the compelled act of production. See Doe v. United States, 487 U.S. 201, 219 (1988) (compelling the execution of a consent form directing the disclosure of foreign bank records);

There is a historical argument concerning the origin of the right not to testify in one's case.[11] While some scholars have argued that the right not to incriminate oneself had arisen out of the abolition of the Star Chamber in England in the 17th century.[12] Another school of thought saw the origin of the privilege against self-incrimination as more accurately placed at the end of the eighteenth century; and developed with the rise of an adversary model of criminal justice, which included the right to secure the assistance of defense counsel that could speak for the accused. [13] Initially, this right to silence applied to abusive investigations undertaken by the state against political and religious deviants. But with time the right applied to a wider variety of criminal cases and could no longer be seen as a procedural device aimed at ensuring the continued existence of political and religious

[11] Mark Berger, "Of Policy, Politics, and Parliament: The Legislative Rewriting of the British Right to Silence", (1995) 22 Am. J. Crim. L. 395

[12] The Star Chamber, High Commission, and Ecclesiastic courts administered an oath ex officio, which threatened imprisonment if incriminating questions were not answered truthfully. Victims of this procedure protested that judicial authority was being misused but found themselves still held in contempt. John Lilburne was a victim of this system. He was arrested for having sent seditious books from Holland to England but found himself subjected to irrelevant questioning. He protested the effort to entrap him and argued that he was under no obligation to answer the inquiries of his interrogators. See Trial of Lilburne & Wharton, 3 How. ST. TR. 1315 (1637). A more widespread political and religious dissent-which saw the removal and execution of King Charles I; produced legislation eliminating the Star Chamber and High Commission, as well as the power of ecclesiastical courts to administer the oath et officio. Cited in Mark Berger, "Of Policy, Politics, and Parliament: The Legislative Rewriting of the British Right to Silence", (1995) 22 Am. J. Crim. L. 396

[13] JH. Langbein, The Historical Origins of the Privilege Against Self-Incrimination at Common Law, 92 MICH. L. REV. 1047, 1047 (1994). Cited in Mark Berger, "Of Policy, Politics, and Parliament: The Legislative Rewriting of the British Right to Silence", (1995) 22 Am. J. Crim. L. 396

freedom. Instead, it was transformed into a right employable by all criminal defendants.[14] Yet another school of thought argues that the right did not originate from England but rather from roman canon law in the early seventeenth century whereas it became a feature under English Common law in the late seventeenth century.[15]

Critics on the origin of this principle, however, agree that the rules relating to modern-day privileges making up the right to silence are of common law origin; they are linked to the rival systems of criminal procedure of the common law courts and the ecclesiastical courts of England that maintained distinct spheres of jurisdiction as early as the thirteenth century.[16] By the end of the nineteenth century under English law, a suspect had the right

[14]MBerger, (Note 9) p.396

[15] See generally John H. Wigmore, *A Treatise on Evidence* (The McNaughton Revision 1960) Vol. VIII.

[16] The system of criminal procedure practiced in both courts differed with regards to the mode of investigating and obtaining evidence for adjudication in that while the common law courts favoured independent evidence, the ecclesiastical courts which had ties to ancient Rome employed the use of confessions as a key component of its criminal procedure. One of the earliest immunities that developed under the right to silence is traced to the Latin maxim *nemo teneturprodereseipsum* attributed to Saint John Chrysostom which was used as a defence under *ius commune*, (common law of roman and English origin) practiced by the ecclesial courts. The procedures of the Ecclesiastic court where judges of the Ecclesiastic courts had the power to interrogate an accused under oath before it became entrenched in English common law by the statute of 1940. The collection of principles that form present-day right to silence developed at different stages, cited in M.R.T Macnair, "The Early Development of the Privilege Against Self-Incrimination. (Great Britain)." *Oxford Journal of Legal Studies* 10.1 (1990): 66–84; Zalman, Marvin. "The Privilege Against Self-Incrimination: Its Origins and Development." (1998) *Criminal Justice Review* 23.1: 91.

to protect himself from self-incrimination by being quiet during police interrogation[17] and choosing not to testify during trial[18] Contemporary global settings, however, view the right to silence as part of the international standard of justice.[19] International conventions and laws on human rights recognise and guarantee several fundamental rights of the human person. These international instruments constitute the basis for human rights laws entrenched in the constitutions and laws of various countries as signatories in compliance with international norms and their application in these countries.

The International Covenant on Civil and Political Rights (ICCPR)[20] is a fundamental instrument which enumerates the international human rights. A review of the ICCPR discloses that the 'right to silence' is not explicitly guaranteed therein. It has been said that the right to silence is not a single right but consists of a cluster of procedural rules that protect against self-

[17] This principle developed with the establishment of the professional police force in England in 1829 as a result of the suspicions ways confessions were obtained. In Ibrahim v R (1914) AC 599, the English court established that an admission or confession would only be admitted if the prosecution established that it was made pursuant to a free choice to speak or remain silent.

[18] After the abolition of the Ecclesiastic courts and the procedure of trial by oath, the principle of protection from self incrimination was not fully established as a protection for criminal defendants in common law until when the practice of being represented by lawyers and the emergence of the law of evidence occurred in English justice system.

[19] Murray v UK (1996) 22 E.H.R.R. 29 (ECHR). See also Civil Liberties Organisation and Others v Nigeria (2001) 75 AHRLR.

[20] International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR)

incrimination;[21] thus to clearly understand the concept of the right to silence, it is necessary to look at other rights explicitly described in the ICCPR, namely the presumption of innocence and the right not to be compelled to testify against oneself and how those rights relate to the right to remain silent.[22]

Article 14(3) of the ICCPR provides that, 'Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law. Article 14(3) further provides that 'In the determination of any criminal charge…everyone shall be entitled to the following minimum guarantees, in full equality…not to be compelled to testify against himself or to confess guilt.' The Universal Declaration of Human Rights (UDHR)[23] makes similar provisions to the effect that everyone charged with a penal offence has the right to be presumed innocent until proved guilty according to the law in a public trial at which he has had all the guarantees necessary for his defence.[24]Although the above provisions do not make explicit mention of the right to silence, it can be inferred from Article 14(3) of the ICCPR that an accused person may choose

[21] E Skinnider and F Gordon, 'The Right To Silence – International Norms And Domestic Realities' (SINO Canadian International Conference On The Ratification And Implementation Of Human Rights Covenants Beijing, October 2001)p.89https://books.google.com.ng/books?id=puIzDwAAQBAJ&pg=PA91&dq=Canadian+International+Conference+On+The+Ratification+And+Implementation+Of+Human+Rights+Covenants+Beijing,+October+2001 accessed 8 November 2019

[22]E Skinnider and F Gordon (Note 21) p.90

[23] Universal Declaration of Human Rights (adopted 10 December 1948 UNGA Res 217 A (III) (UDHR) <https://www.refworld.org/docid/3ae6b3712c.html> accessed 8 November 2019

[24] UDHR 1948, Art 11

not to testify against himself and then remain silent. He is therefore not to be compelled to speak and must be presumed innocent of all charges proffered against him until such charges are sufficiently proven beyond a reasonable doubt.

Nigeria first adopted this law in her 1979 Constitution.[25]An accused person must therefore be free to remain silent in the face of his accusers. The Nigerian apex court in Adekunle v. State affirmed that;

> '... an accused person, is presumed innocent until he is proved guilty. There is, therefore, no question of his proving his innocence. ...The duty is on the prosecution, to prove the charge against him... beyond a reasonable doubt.' [26]

The wide acceptance of this right as an international human right which protects personal freedom, privacy, and human dignity, further endorses the philosophy behind its existence in a contemporary global society. Though originally a key element only in the adversarial system, the recognition under international instruments has provided 'universalisation' and subsequent introduction of core aspects of the right to silence to the inquisitorial criminal justice systems of civil law traditions during the late 20th century.

[25] 1979 Constitution of the Federal Republic of Nigeria. S. 33 (5) (11).
[26] (2006) LPELR-107(SC). See also Igbale v State See also (2006) 6 NWLR (Pt.975) 100, 39 per OgugbabuJSC

3. Right to Silence: Scope and Application in the United States and United Kingdom

The Right of silence of an accused person is modeled after the principle that nobody shall be compelled to give evidence against himself/herself nor incriminate themselves under oath.[27] The right crystallized in the English common law and migrated to the various British colonies.[28]

The self-incriminatory privilege of the Fifth Amendment[29] was one that could never be violated in the American Criminal Justice System. The application and scope of this right is very liberal. It stems from the fact of recognition that, to make their case, security agents attach undue importance to confessions from the accused persons, however ill-gotten and therefore often lead to incorrect consequences. The right of silence and privilege against self-incrimination are based on the notion of presumption of innocence.[30] Coercive interrogation techniques have expressly been disfavored because of their tendency to override the presumption that "one who is innocent will not risk his safety or prejudice his interests by an untrue

[27] Z D. Gajiev, "Turmoil Surrounding the Self- Incriminating Clause: Why the Constitution does not Forbid
Your Silence From Speaking Volume". (2015) 6 Faulkner Law Report p.2

[28] This law became what was popularly referred to as the Fifth Amendment of the United States. The language of the Fifth Amendment's Self-Incrimination Clause explicitly prohibits compelling individuals to incriminate themselves. As a result of the evolutionary trend in America and the enshrinement of the right in the Fifth Amendment to their Constitution, the right became increasingly entrenched in the Common law legal system throughout the World as other legal systems followed that of the US.

[29] U.S. CONST. amend. V ("No person... shall be compelled in any criminal case to be a witness against himself"). It is the same as the right to silence.

[30] Predicated on the popular belief in Blackstone's Ratio that "it is better for ten guilty persons to escape than for one innocent person to be convicted."

statement."[31]With that raised awareness, it becomes necessary to consider best practices with regards to reliability to investigative techniques including interrogations. In the US, the concern is for this right not to be used negatively on an accused during the trial. The Supreme Court in the United States in this regard expanded the scope of self-incrimination clause otherwise known as the right to silence of the accused person, beyond the literal meaning of its text, to include the following circumstances–

Any proceedings in which testimony is legally required; where the accused persons reasonably believe their responses could be used against them in criminal proceeding, or lead evidence that may be so used; Individuals can invoke the privileges in Federal and State civil court proceedings; in criminal prosecutions; in proceedings before a grand jury, legislative body or administrative agency.[32] The privilege also extends to circumstances where there is no legal compulsion to speak, for instance during police interrogations.[33] However, certain conditions are attached to the enjoyment of this right or privilege.[34]

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[31]Bram v. the United States, 168 U.S. 532, 541-44 (1897); cf. Brown v. Mississippi,
97 U.S. 278, 285-87(1936) (recognizing the fundamental unfairness of using an untrustworthy confession). Cited in
LGriffin (Note 2) p. 9

[32]Z D. Gajiev, (Note 27) p.257

[33]ZD. Gajiev (Note 27) p. 257

[34] The right was enjoyed only if the person wishing to invoke it satisfied the following general requirements
if responses will incriminate them; Non – Criminal liability does not apply here, harm to reputation or infamy and disgrace do not apply; it does not, however, apply to seizure of documents by search warrant or to lawful

In the US, the right also applies only when one is compelled to provide testimonial evidence. This means the compulsion places an individual in the 'cruel situation of choosing between contempt, perjury and self-incrimination'[35]. In the *locus classicus* case of ***Miranda v. Arizona***[36], the court held that a suspect's voluntary statements made to police during a custodial interrogation must be excluded at the trial if the suspect was not first properly warned of the right of silence and of the consequences of failing to assert the privilege before speaking.

On the other hand, however, the United Kingdom has a different approach to the right.[37] Under the Criminal Justice and Public Order Act 1994 (CJPOA 1994)[38], a clear distinction was drawn between the "right of silence" and the "privilege against self-

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demands or for the production of real or physical evidence, such as samples of a suspect's body. The right is personal and also not self-executing. Individuals who want to rely on this right must expressly invoke it.

[35]L K Griffin, (Note 2) p.705

[36]384 US @ 458, Vol. 461, 467 – 469

[37] In the UK the right is personal. It cannot be invoked on behalf of another person or organisation. This point was affirmed in the UK case of***Environmental Protection Authority v. Caltex Refining Company Pty Ltd.*** where the respondent corporation sought to rely on the privilege against self-incrimination so as not to be compelled to produce certain records. The High Court in refusing the privilege held that the right to silence was a human right designed to protect individuals from oppressive methods of obtaining evidence of their guilt for use against them. The right cannot also be invoked if immunity has been granted from prosecution; and most importantly, the privilege applies only against the governmental compulsion of incriminating responses. It applies to demands for production of documents by notice or subpoena

[38] Criminal Justice and Public Order Act of (1994) of the United Kingdom

incrimination"[39]. In other words the right to silence in the United Kingdom operates more as a privilege given to criminal defendants in certain situations than it does a right of criminal defendants subject to exceptions in certain situations.[40] While this Act does not abolish the right of silence, it however, affects the latter to a large extent[41] such that the silence of the accused person can be used to support the prosecution case, and has been viewed as interpreting silence to mean 'positive evidence of guilt'.[42] This is because, much as the law has not institutionalized the obligation to give evidence, in reality, these changes amount to an indirect obligation to give evidence.[43] The CJPOA 1994 allows the court to draw appropriate or 'proper' inferences from the silence of an accused. However, such inferences cannot in themselves provide sufficient evidence to

[39]Jeremy Bentham, an influential nineteenth century legal scholar, succinctly synthesized these notions in his famous dictum: "innocence claims the right of speaking as guilt invokes the privilege of silence." Cited in RMaloney, The Criminal Evidence (N.I.) Order 1988: A Radical Departure from the Common Law Right to Silence in the U.K.,(1993) 16 B. C. Int'l & Comp. L. Rev. 429.

[40]R Maloney, (Note 39) For this right to be invoked, the court must first satisfy itself that the accused is aware of his right to testify and of the fact that adverse inferences may be drawn from his failure to do so.

[41] T Bucke, R Street, and D Brown, "The Right of Silence: The Impact of the Criminal Justice and Public Order Act 1994". *A Research, Development and Statistics Report.* Home Office Research Study (2000). P.1

[42]B Hocking and L Manville, "*What of the Right to Silence; Still Supporting the Presumption of innocence or a Growing Legal Fiction"* (2000) 1 Macquire Law Journal p. 1. p.5 available on http://classic.austlii.edu.au/au/journals/MqLawJl/2001/3.html#Heading18 accessed on November 9, 2019.

[43]B Hocking and L Manville, (Note 42) p.5

secure a conviction.[44] The question becomes what amounts to the proper inference drawn from a particular situation.[45]
In the United Kingdom case, *John Murray v. the United Kingdom,*[46] John Murray chose to make an unsworn statement from the dock instead of giving evidence.[47] The act would have the same effect as silence because the accused will not be subjected to cross-examination. Some argued that drawing inference was a breach of the European Convention on Human Rights. The Court held that inferences drawn from silence did not in itself amount to breach on human right but denial of access to legal advice did[48]. Convictions, therefore, need not be based solely on inferences from silence; however, a conviction can be based mainly on such inferences.[49] Inferences drawn need not be adverse and drawing inferences is totally at the discretion of the court.[50]

Under this Act, therefore, legal advice to remain silent does not necessarily mean that the accused's failure to mention facts later relied on in court, precludes the basis for inferences to be drawn. It is only one issue in a range of assessments of whether silence

[44]T Bucke, R Street, and D Brown (Note41) p.
[45] For example, the Court may draw adverse inferences relating to a particular fact which the accused is expected to have mentioned during interrogation. When it is reasonable for the defendant not to mention a fact; and what exactly becomes a proper inference to be drawn.
[46] John Murray v. United Kingdom 1 (1996) (Excerpts) European Court of Human Rights available in http://hudoc.echr.coe.int/eng?i=001-57980 assessed on November 10, 2019
[47]T Bucke, R Street, and D Brown (Note 41) p. 19
[48]T Bucke, R Street, and D Brown (Note 41) p. 19
[49] Section 38(3)Criminal Justice and Public Order Act of (1994) of the United Kingdom as cited in TBucke, R Street
and D Brown (Note 41) p.41
[50]T Bucke, R Street and D Brown (Note 41) p. 56

was reasonable and considers why the suspect accepted such legal advice.[51] The provisions also introduces the possibility of adverse inferences if the accused does not testify at trial.[52]

4. The Implication of an Accused Person's Failure to Testify

The implication of the right not to testify in one's matter has been prejudiced by the objectivity in the application of this right. Scholars have been debating whether silence weighs in favour of the innocent or the guilty ever since, using all forms of social and theoretical lenses. Jeremy Bentham[53] was one of those who postulated that only guilty suspects invoke the privilege to silence, as the innocent suspect will always choose the right to speak.[54] Some other scholars have supported this theory and have added that the right not to testify lowers the conviction rate of the innocent by making their exculpatory accounts believable. The guilty suspects stay silent rather than offer dishonest exculpatory accounts.[55] There are yet other

[51] See the case of R. v. Condron and Condron (1997)cited in T Bucke, R Street and D Brown (Note 41) p.14/17

[52] Section 35 of the (1994) CJPOA of the UK, now enables the prosecution to comment explicitly on any failure to testify and a court to draw proper inferences from any such failure.

[53] English philosopher, jurist, and social reformer. He is regarded as the founder of modern utilitarianism. He also rejects the claim that the right of silence was needed to ensure fair procedure, nor did he believe that the right of silence was needed to protect religious and political freedom. See THE WORKS OF JEREMY BENTHAM, (Bowring ed. 1843), at 454. Cited in Mark Berger, "Of Policy, Politics, and Parliament: The Legislative Rewriting of the British Right to Silence", (1995) 22 Am. J. Crim. L. 397; See also (Note 39)

[54] L KGriffin, (Note 2) p.10, quoting Jeremy Bentham, A treatise on Judicial Evidence 241 (1825)

[55] D.J. Seidmannand A Stein, "The Right to Silence Helps the Innocent: A GameTheoretic Analysis of

scholars who claim that Bentham's theory on protections around silence "seems to work primarily to the advantage of the guilty defendant and very little if anything to protect the interests of innocent ones."[56]

Even though the Supreme court of the United States has recognized that the Fifth Amendment privilege (right to silence) is not only a "shelter to the guilty" but also a "protection to the innocent",[57] some Justices have expressed similar skepticism about the connection between silence and innocence. Justice Cardozo[58] remarked that justice would not be lost if the accused committed to the duty of responding to a logical inquiry.[59]However, there are of course many explanations for a suspect refusing to speak within the criminal justice process, including the realities of stress, fear, anger, confusion and frustration in the face of any such encounter with the law enforcement.[60] Most people, whether innocent or guilty when confronted by a law enforcement officer who asks them potentially incriminating questions are likely to exhibit some signs of nervousness.[61] This shows that the belief that innocent suspects have nothing to fear in responding to security is wrong.

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the Fifth Amendment Privilege"(2000), 114 Harv. L. Rev. 430,433

[56] L Laudan and E Lillquist, "The Sounds of Silence" (2012) 4 (Univ. of Tex. Sch. of Law Public Law & Legal
Theory Research Paper Series No. 215,

[57]See Murphy v. Waterfront Comm'n, 378 U.S. 52, 55 (1964) (quoting Quinn v. United States, 349 U.S.
155,162 (1955)); Twining v. New Jersey, 211 U.S. 78, 91 (1908).

[58] A Supreme Court Judge of the United States of America.

[59]Palko v. Connecticut, 302 U.S. 319, 326 (1937), overruled by Benton v. Maryland, 395 U.S. 784 (1969).

[60] L K Griffin, (Note 2) p. 22

[61]United States v. Millan-Diaz, 975 F.2d 720, 722 (10th Cir. 1992).

Innocent suspects often have good reasons to be apprehensive in the face of trouble and consequently, keep silent. The Supreme Court in the US has also stated that a system of criminal law enforcement which depends on confessions, in the long run, will become less reliable and more susceptible to abuse than a system which depends on evidence independently secured through skillful investigation.[62]

The (UK) CJPOA 1994, shows that the failure of the accused to give evidence makes it safer to draw inferences adverse to them. The High court has interpreted the situation as having allowed the accused person to defend himself/herself and testify in his/her favour. [63] Notwithstanding, legal advisers could still direct silence if there was insufficient police disclosure, weak evidence or vulnerable client and fear of the possibility of miscarriage of justice. There are safeguards precluding such inferences from being drawn, for instance, where the physical or mental condition of the accused makes it detrimental for him or her to give evidence.[64]

5. Provisions and Application of the Right to Silence in the Nigerian Judicial System

Several laws guarantee the right of silence of the accused person in Nigeria. The 1999 Constitution,[65] provides as follows:

> *'Any person who is arrested or detained shall have right to remain*

[62] L KGriffin (Note 2) p.24

[63]*Murray v. DPP* (1993) 97 Cr App R 151 and*R v. Corwan* (1995) 4 All E R 939: as cited in B A Hocking and L L Manville, (Note 42) p. 8

[64]T Bucke, R Street, and D Brown (Note 41) p.

[65]The Constitution of the Federal Republic of Nigeria, 1999

> *silent or avoid answering any question until after consultation with a legal practitioner or any other person of his own choice'*[66]

The Constitution further provides that no person tried for a criminal offence shall be compelled to give evidence at the trial.[67]In addition to the provisions of the 1999 Constitution, the Evidence Act and the Criminal Procedure Code also declare an accused person a competent but not a compellable witness[68]. Both the Criminal Procedure Act and the Criminal Procedure Code provide that an accused person who is called upon by the court for his defence, has an option of not saying anything at all in his defence if he so chooses.[69] The Administration of Criminal Justice Act (ACJA)[70] (2015), also acknowledges the right of the accused to remain silent.[71]

In spite of these extant laws however, the courts in Nigeria predicate the admissibility of confessions on the common law based Judges Rules and Evidence Act (Amendment) 2011, without linking it to the constitutionally guaranteed right to silence[72]. This is because of the popular belief that confessions are the best evidence. The absence of guiding principles for the

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[66] Section 35 (2)
[67]Section 36(11) 1999 Constitution of the Federal Republic of Nigeria.
[68]Sections 160(a) Evidence Act Cap 112 and 236 (1) (a) of the C.P.C.
[69] Section 287 (1) (a) (iii) of the C.P.A. and 236 of the C.P.C.
[70] Administration of Criminal Justice Act. Laws of the Federal Republic of Nigeria
[71]Section 6 (2) (a), Administration of Criminal Justice Act (ACJA) 2015.
[72]Esa, O. Onoja, "The Relationship between the Constitutional Right to Silence and Confessions in Nigeria",
African Journal of Legal Studies 6, (2013) 189 -211.

application of the right in the Nigerian laws has made silence from an accused person often viewed as the accused tacitly admitting guilt.[73] It therefore unwittingly moves the prosecutor and the judge away from the position of presumption of innocence and proof of guilt beyond reasonable doubt. The bias on this right often places justice for the accused person in jeopardy.

> In Fred Ajudua v. FRN[74] the right to silence of the accused person came under test. The issue was whether the appellant, (accused) had lost the chance to have his extrajudicial statement form part of the information filed before the court, because he refused to make the statement at the time he was asked to. The court held that because he had been given the chance to speak and he chose to be silent, though acceptable under the law, he had waived his right to speak. This position goes to the root of the application of this right. Questions are, will the accused have a fair trial without bias? Is this right literarily saying 'speak now or speak no more? At what stage of the trial does additional evidence from the accused become inadmissible?

The Supreme Court admits that the right of silence is one of the civil liberties in the Nigerian legal system and a cornerstone of her judicial system[75]. Its position however is that no accused person would be convicted for not talking but perhaps the prosecution could call the court's attention in appropriate cases to the accused person's silence where

[73]Esa, O. Onoja, (Note 72) p. 196
[74](2014) LPELR – 24126 CA.
[75]Okoro v. State (1988) 5 NWLR Pt. 94 P255.

evidence linking him to the offence charged exists. Then the irresistible inference of guilt from the evidence linking the accused person with offence charged might be abundantly clear.[76]

In *Igabale v. State*[77] the Supreme Court also acknowledges the constitutional right to silence of the accused. The prosecution, therefore, needs to prove the charge against him and is bound to prove its case beyond reasonable doubt. He, however, runs a risk because he will be obliged to make his defence to the charge, if his remaining silent will result in his being convicted on the case made against him by the prosecution[78].

6. Recommendation /Conclusion

The right to silence of the accused is a good law. However, with the application varying from jurisdiction to jurisdiction, there are inconsistencies in its application. Since the establishment of the *pro homine* principle,[79] which makes global and regional human rights instruments recognize the source and end of law to revolve around the human person,[80] laws abound which sometimes appear to over protectthe people who are most undeserving of such protection. The rights of a criminal are part of those. This is because even when a criminal is convicted, his or her rights as a human person still subsist and often enforced.

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[76]Okoro v. State (Note 74)
[77]6 NWLR PT(2006) 975 p. 100
[78]6 NWLR PT (2006) 975 (Note 76) p. 100
[79]VMazzuoli and DRebeirio, "The Pro Homine Principle as an enshrined feature of
International human rights law",(2016) ***Indonesian Journal of International & Comparative Law:*** Socio-Political Perspective 3,p. 77 p.78
[80]V Mazzuoli and D Rebeirio, (Note 78) p. 79

A cursory examination of the foregoing in relation to the US approach, vis-à-vis that of the UK, it can be gleaned that the right of silence is a right that ought to be applied with objectivity if the purpose for which the right was conceived is to be realized. It is trite that there are several reasons why an innocent person may remain silent during a police interrogation or trial, therefore the belief that only the guilty would keep silent on the face of police interrogation or prosecution should not be allowed to becloud and rob the innocent suspect of the genuine protection which this right is meant to give. It is proper therefore that in applying this right, the authorities must be objective. The application of this right in the UK provides a better understanding for its application in Nigeria. This is because it does not take away the right accorded the accused, but is strict in the application of the privileges against self-incrimination. This means that the prosecutors will have ultimately done their jobs by properly investigating and proving their cases beyond reasonable doubt. It follows therefore that when the prosecutor comes to court with overwhelming evidence, the judge, as well as the public will draw their inference on the silence of an accused person in the face of such overwhelming evidence.