

The Political Correctness of Law when faced with the Silence of Accused: Comparison
between Pakistan and Common Law Countries

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ABSTRACT

The privilege against self-incrimination and the corresponding right of an accused person to remain silent constitute fundamental principles of criminal jurisprudence within the common law tradition. Rooted in the maxim nemo tenetur seipsum prodere, that no person is bound to accuse himself, these doctrines historically emerged as safeguards against coercive interrogation and the potential abuse of authority by law enforcement agencies. This article undertakes a comparative legal analysis of the right to silence in Pakistan and selected common law jurisdictions, examining its historical evolution, doctrinal foundations, and contemporary application. It analyses the constitutional and statutory protections afforded to the accused in jurisdictions including the United Kingdom, the United States, Canada, Australia, and India, while assessing how these legal systems reconcile the protection of individual liberties with the imperatives of effective criminal investigation and prosecution. Particular attention is given to recognised limitations and doctrinal exceptions to this right, such as the drawing of adverse inferences, the public safety exception, the use of silence for impeachment purposes, and the admissibility of compellable evidence. The article further evaluates the evidentiary significance of pre-trial silence, as well as the relationship between the right to silence, plea bargaining frameworks, and confessional statements within criminal proceedings. It also considers the treatment of this right in the context of counter-terrorism laws, where states often recalibrate procedural safeguards in response to national security concerns. Through this comparative inquiry, the article argues that although the privilege against self-incrimination remains an entrenched and indispensable component of modern criminal justice systems, contemporary legal frameworks have increasingly developed qualified limitations designed to balance the protection of accused persons with the broader interests of justice and the effective administration of criminal law.

Keywords: Criminal Justice Systems, Exceptions to the Right to silence, Pre-trial Silence, Adverse Inference, Plea Bargaining, Confessions, Anti-Terrorism Laws, Fair Trial Rights

INTRODUCTION

The right to silence is a criminal law precept that offers a person a chance to stay silent at some point of a police interrogation or trial court cases with none bad inference being drawn in opposition to them¹. The idea of this right is primarily based totally at the presumption of innocence, which holds that someone is harmless till validated responsible past an affordable doubt.

The importance of this precept lies in its position to defend an individual's trial rights. By permitting someone to stay silent, it protects them from self-incrimination and guarantees that they cannot be forced to offer proof in opposition to themselves. This precept is an important factor of crooked justice structures

¹ Greer, Steven. "The right to silence: A review of the current debate." *The Modern Law Review* 53, no. 6 (1990): 709-730.

in many nations across the world, which includes Pakistan and its sister jurisdictions such as other common law countries.

In Pakistan, this right is mentioned under Article thirteen of the Constitution of Pakistan, which presents everybody an honest and transparent trial. Similarly, in the United States, this right is covered below the Fifth Amendment² of the Constitution.

This right has giant implications for the crooked justice system. It serves to save you from coerced confessions, that could bring about wrongful convictions. It additionally enables to keep the integrity of the trial system via making sure that proof is acquired in an honest and independent manner. This privilege, in opposition to self-incrimination, applies only to criminal law and not to others such as tax regulations. The most apparent manner of violating the privilege from self-incrimination is the use of violence in opposition to the defendant to reap desired answers to posed questions. Violence, on this regard, is considered: bodily violence, threatening with enforcing criminal sanctions in case of non-compliance, mental violence, and insertion of some provocative agent. Although in some cases, use of DNA (blood, saliva, urine of the defendant) or polygraph may vitiate this privilege, and they're now no longer protected within the boundaries of the privilege against self-incrimination. Every individual might also additionally stay silent for different elements however is still obliged to reveal his/her identity.

HISTORICAL DEVELOPMENT AND EVOLUTION OF THE RIGHT TO SILENCE IN PAKISTAN AND COMMON LAW SYSTEMS

Having its roots in Roman regulation, in which it was understood as a precept of criminal regulations. The precept based totally at the concept that someone can now no longer be pressured to admit to a crime, as this will violate their dignity and integrity.

Nemo tenetur prodere seipsum

"Nemo tenetur prodere seipsum" is a Latin word that interprets to "nobody is forced to accuse himself." The word is usually called this right, and it's been a essential precept of criminal justice systems in view that historic times.

In medieval England, this right become identified withinside the common law. The precept became enshrined withinside the maxim "nemo tenetur prodere seipsum," which interprets to "no person is forced to accuse himself." This precept turned into a key detail of the English criminal justice system, and it prompted the improvement of this right in different common law jurisdictions.

"No one is bound to betray himself. In other words, nobody may be pressured to criminate himself". This maxim is first-rate defined in a discussion with police constables as Lord Brampton observed:

"Neither Judge, Magistrate nor juryman, can interrogate an accused character... or require him to answer the questions tending to incriminate himself. Much less, then ought a constable to do so, whose duty as regards that person is simply arrest and detain him in secure custody"³

It protects against three practical problems associated with confessions:

² Amar, Akhil Reed, and Renee B. Lettow. "Fifth Amendment first principles: the self-incrimination clause." Mich. L. Rev. 93 (1994): 857.

³ State of U.P. v. Deoman Upadhyaya, AIR 1960 SC 1125

- (1) untrustworthy confessions;
- (2) involuntary confessions;
- (3) confessions provoked through unacceptable force.⁴

Right to silence in Pakistan

This right is an essential precept of criminal justice systems across the world, which include Pakistan. The records of this right in Pakistani regulation may be traced to the country's colonial past.

During the British colonial period, this right was added into common law and became enshrined within the Evidence Act of 1872. The act furnished that no accused individual will be forced to reply to any query. This precept additionally mediated within the Code of Criminal Procedure of 1898, which furnished that someone accused of an offence shall now no longer be pressured to be a witness towards himself.

After independence in 1947, Pakistan retained lots of the British criminal justice system, consisting of this right. This right is now blanketed beneath Article thirteen of the Constitution of Pakistan 1973, which ensures every body the right to a fair trial. The Pakistan Penal Code (PPC) and the Criminal Procedure Code (CrPC) additionally offer statutory protections for this right.

Section 161 of the CrPC⁵ states that someone accused of an offence shall not be pressured to be a witness in opposition to himself. Additionally, Section 348 of the PPC criminalizes extortion of confession for up to 3 years in prison⁶. This right in Pakistan is covered through diverse laws, because of a huge wide variety of custodial torture instances, and a unique act towards torture became codified in Pakistan and is called "Torture and Custodial Death (Prevention and Punishment) Act, 2022"⁷. Similarly, the current Evidence law in Pakistan, the Qanun-e-Shahadat Order, 1984⁸ in Article 15 relates to witnesses and applies to the exam of a witness in courtroom docket or on commission. Such a witness can't refuse to reply questions regarding any question asked during proceedings in the suit⁹. The proof furnished with the aid of using this provision by the witness shall now no longer risk arrest or prosecution or as used as proof towards him in a criminal case, besides perjury¹⁰.

CONSTITUTIONAL AND STATUTORY PROTECTIONS OF THE RIGHT TO SILENCE IN PAKISTAN AND COMMON LAW SYSTEMS

This right is an essential precept of criminal justice systems across the world, consisting of Pakistan and common law jurisdictions. In this section, we can speak the constitutional and statutory protections of this right in Pakistan and common law structures.

⁴ Chiesa, Luis. (2009). Beyond Torture: The Nemo Tenetur Principle in Borderline Cases. Pace Law Faculty Publications

⁵ Pakistan Code of Criminal Procedure, Act V of 1898(Pak.).

⁶ Pakistan Penal Code, Act XLV of 1860. Section 25

⁷ Torture and Custodial Death (Prevention and Punishment) Act, 2022, 28 March 2022.
https://na.gov.pk/uploads/documents/62fcce84e1c58_437.pdf Retrieved on 22-04-2023.

⁸ The Qanun-e-Shahadat Order, 1984 Art. 15

⁹ PLD 1997 Karachi 41

¹⁰ AIR 1980 SC 1361; AIR 1989 SC 598

<https://academia.edu.pk/>

United Kingdom

This right is an essential precept of criminal justice system in England and Wales, and it's far covered each constitutionally and statutorily. This precept has a protracted records in English common law, and it has developed to be a key in the country's criminal system.

In phrases of constitutional protections, this right is identified withinside the Human Rights Act 1998, which includes the European Convention on Human Rights (ECHR) into domestic regulation. Article 6 of the ECHR ensures a fair trial, and this consists of the right to stay silent. This manner that any confession acquired through coercion can't be used as proof towards the accused¹¹.

In addition to constitutional protections, this right is likewise included through statutory regulation in England and Wales. The Police and Criminal Evidence Act 1984 (PACE)¹² sets out the rights of suspects during police questioning and provides important protections for the right to silence.

Under Section 58 of PACE¹³, someone who's arrested or detained should be knowledgeable in their rights such as the one to stay silent. They should additionally be knowledgeable of the outcomes of silence, including that it can be used as proof towards them in court. However, this isn't always absolute, and there are sure situations in which an unfavorable inference can be drawn if the suspect stays silent.

For example, under Section 34 of PACE¹⁴, an unfavorable inference can be drawn if the suspect fails to answer a fact regarding their defence in the course of questioning, which they later depose in court. However, the prosecution has to show that the suspect had the possibility to answer truthfully and that it's far affordable to deduce that the failure to say it changed because of their guilt.

In current years, there is a debate in England and Wales regarding the scope and obstacles of this right. Some criminal lawyers have argued that this right ought to be curtailed in under circumstances,¹⁵ which include in instances related to severe crimes or country wide security. However, this right stays an essential safety for suspects in England and Wales, and it maintains to play a crucial function withinside the country's criminal justice system¹⁶.

United States

This right is a vital aspect of American criminal justice system, and is covered through constitutional and statutory law. The Fifth Amendment to the United States Constitution prohibits forced self-incrimination,

¹¹ Berger, Mark. "Self-incrimination and the European Court of Human Rights: Procedural issues in the enforcement of the right to silence." *European Human Rights Law Review* (2007): 514.

¹² Brown, D. "REVISED POLICE AND CRIMINAL EVIDENCE ACT 1984 (PACE) CODES OF PRACTICE AND ACCESS TO LEGAL ADVICE." *Home Office Research and Statistics Department Research Bulletin* 33 (1993): 5-9.

¹³ Ibid

¹⁴ Ibid

¹⁵ O'Reilly, Gregory W. "England limits the right to silence and moves towards an inquisitorial system of justice." *J. Crim. L. & Criminology* 85 (1994): 402.

¹⁶ Greer, Steven. "The right to silence: A review of the current debate." *The Modern Law Review* 53, no. 6 (1990): 709-730.

which incorporates this right all through police procedure or a trial. This approach that the prosecution cannot use a suspect's silence as proof of guilt¹⁷.

Additionally, Supreme Court has interpreted the Fifth Amendment to require that suspect be knowledgeable in this right earlier than any custodial interrogation. This requirement became installed withinside the landmark case *Miranda v. Arizona* (1966)¹⁸, which held that police should tell suspects in their Miranda rights, consisting of the right to stay silent and others such as to an attorney, before questioning.

It is also included in statutory regulation withinside the US. The Federal Rules of Criminal Procedure and the regulations of many states offer precise protections for suspects at some stage in police questioning. For example, rule eleven of the Federal Rules of Criminal Procedure calls for that police should tell an accused regarding their rights to silence and the effects of waiving the same earlier than accepting a responsible plea¹⁹.

However, this isn't always absolute withinside the US, and there are a few instances wherein a detrimental inference may be drawn from a suspect's silence. For example, in *Salinas v. Texas* (2013), the Supreme Court held that a suspect's pre-arrest silence may be used in opposition to them in the event that they fail to expressly invoke their right to stay silent. This selection has been criticized by few criminal lawyers who argue that it undermines the safety of the accused's rights²⁰. While this right has a few limitations, it stays an essential guard in opposition to coerced confessions and wrongful convictions.

Australia

In Australia, this right is also covered via each constitutional and statutory regulations. It is enshrined withinside the common law and is identified as vital safety from self-incrimination and coerced confessions.

Under the Australian Constitution, the this right is not explicitly identified, but it has been identified and expressed through judicial interpretation of the Constitution. The High Court of Australia has held that this right is an inherent component of the presumption of innocence and the right to a fair trial²¹.

Additionally, in the statutory law such as, the Australian Evidence Act 1995 offers unique protections for suspects at some stage in police questioning. For example, section 128 of the Act permits a suspect to refuse to reply questions that can incriminate them²².

However, similar to other common law countries, this right in Australia is not absolute. In the same Act,²³ an unfavorable inference may be drawn from a suspect's silence if the prosecution can show that the silence was an attempt to mislead the court when proof of guilt is strong.

¹⁷ Treanor, William Michael. "The origins and original significance of the just compensation clause of the fifth amendment." *Yale LJ* 94 (1984): 694.

¹⁸ *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

¹⁹ Goldman, Edith A. "Rule 11 of the Federal Rules of Criminal Procedure: A New Strict in Context Approach." *BCL Rev.* 22 (1980): 815.

²⁰ *Salinas v. Texas*, 570 U.S. 178, 133 S. Ct. 2174, 186 L. Ed. 2d 376 (2013).

²¹ Skinnider, Eileen, and Frances Gordon. "The right to silence—International norms and domestic realities." In *Ponencia presentada en la Sino Canadian International Conference on the Ratification and Implementation of Human Rights Covenants*, Beijing. 2001.

²² Australian Evidence Act 1995, <https://www.legislation.gov.au/Details/C2021C00472> (last accessed April 25, 2023). §128

²³ *Ibid.* §89

In addition, a few Australian states have enacted rules that limits this right in certain circumstances. For example, in New South Wales, the Evidence Amendment (Evidence of Silence) Act 2013²⁴ allows a court to draw an adverse inference from a suspect's silence in cases involving serious indictable offences.

Overall, while the right to silence is a fundamental protection in Australia, it is not absolute, and there are circumstances where an adverse inference can be drawn from a suspect's silence. Nevertheless, the right remains a crucial safeguard against coerced confessions and wrongful convictions.

Canada

This right is a fundamental component of the Canadian criminal justice system and is protected by both constitutional and statutory law. The Canadian Charter of Rights and Freedoms guarantees the right against self-incrimination under section 7²⁵, which includes the right to remain silent during police questioning or a criminal trial.

It is also protected by statutory law in Canada. The Canadian Criminal Code provides specific protections for suspects during police questioning. For example, section 10²⁶ of the Criminal Code requires that a suspect be informed of their right to retain and engage counsel without delay and to be informed of that right in clear and simple language.

Additionally, the Canadian Supreme Court has held that suspects should be knowledgeable in their right to stay silent and to engage counsel before any custodial interrogation. This requirement became installed withinside the landmark case *R v. Hebert* (1990)²⁷, which held that police must inform suspects of their Charter rights before questioning.

However, this right isn't absolute in Canada, and there are a few instances wherein an unfavourable inference may be drawn from a suspect's silence. For example, in *R v. Singh* (2007)²⁸, the Canadian Supreme Court held that a suspect's post-arrest silence may be used in opposition to them if the prosecution can display that the suspect's silence was planned and influenced with the aid of using a preference to manufacture or tailor their evidence.

Overall, this right is a vital safety for suspects withinside the Canadian criminal justice system, and it's far blanketed through each constitutional and statutory law²⁹. While the right has some limitations, it remains an important safeguard against coerced confessions and wrongful convictions.

²⁴ Chu, Victor. "Tinkering with the Right to silence: The Evidence Amendment (Evidence of Silence) Act of 2013 (NSW)." *UW Sydney L. Rev.* 17 (2013): 25.

²⁵ Hickey, Joseph, and Denis Rancourt. "State Coercion to Receive Medical Injections Confirms Conflicting Interpretations of the Right to Life, Liberty and Security of the Person (Section 7 of the Canadian Charter of Rights and Freedoms)." *Liberty and Security of the Person (Section 7 of the Canadian Charter of Rights and Freedoms)* (October 14, 2022) (2022).

²⁶ Canadian Charter of Rights and Freedoms, s 10, Part 1 of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (UK), 1982.

²⁷ *R. v. Hebert*, 1990 S.C.R.2 151 (1990) available at <https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/625/index.do> last accessed 24 April 2023

²⁸ *R. v. Singh*, [2007] 3 S.C.R. 405, 2007 SCC 48. Available at <https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/2390/index.do> last accessed 24 April 2023.

²⁹ 2022. "Charterpedia - Section 10 – General." Justice. April 14, 2022. <https://www.justice.gc.ca/eng/cs/sj/rfc-dlc/ccrf-ccd/check/art10.html#shr-pg0>.
<https://academia.edu.pk/>

India

In India, this right is mentioned in constitutional and statutory law. This right is as mentioned in Article 20(3) of the Indian Constitution, which states that "no man or woman accused of any offence will be forced to be a witness towards himself"³⁰.

The right to remain silent is also protected by the Indian Criminal Procedure Code, which provides specific protections for suspects during police questioning. Section 161(2)³¹ of the Act allows a suspect to refuse to answer any question that may tend to incriminate them, and section 313(1)(b) of the Act allows a suspect to remain silent during their trial³².

However, just like different common law countries, this right in India isn't absolute. The Supreme Court of India has held that an unfavourable inference may be drawn from a suspect's silence if they do not want to reply a specific query related to an issue in a case towards them³³.

In addition, a few Indian states have enacted rules that limit this right in certain circumstances. For example, the Maharashtra Control of Organised Crime Act (MCOCA) permits for the drawing of an unfavourable inference from a suspect's silence in instances regarding prepared crime³⁴.

Overall, while the right to silence is a fundamental protection in India, it is not absolute, and there are circumstances where an adverse inference can be drawn from a suspect's silence.

EXCEPTIONS TO THE RIGHT TO SILENCE

This right is an essential precept of criminal justice systems across the world. It is a prison rule that lets in people accused of a criminal offense to stay silent and now no longer incriminate themselves throughout police questioning or in court. However, there are exceptions to this, which permit for proof received from a suspect, who stays silent, to be admissible in court.

Public Safety

One of the exceptions to this right is the public welfare exception. This exception lets in regulation enforcement officials to impeach a suspect without informing them their rights, in conditions in which there may be an approaching risk to public protection. In the United States, this exception is enunciated in the landmark case of *New York v. Quarles*³⁵. In Canada, the Supreme Court has recognized a similar exception in *R. v. Fearon*³⁶. Similarly, within the United Kingdom, the Terrorism Act of 2000 permits cops to impeach people suspected of involvement in terrorism without informing them their rights³⁷.

³⁰ Bakshi, Parvinrai Mulwantrai, and Subhash C. Kashyap. *The constitution of India*. Universal Law Publishing, 1982. Article 20

³¹ Gautam, Khagesh. "The Right Against Self-Incrimination Under Indian Constitution & the Admissibility of Custodial Statements Under the Indian Evidence Act, 1872." (2021).

³² *Ibid.* Page 30

³³ *Ibid.* Page 30

³⁴ Maharashtra Control of Organised Crime Act, 1999, § 17 and §22.

³⁵ Wright, Joanna. "MIRANDIZING TERRORISTS? AN EMPIRICAL ANALYSIS OF THE PUBLIC SAFETY EXCEPTION." *Columbia Law Review* 111, no. 6 (2011): 1296–1331. <http://www.jstor.org/stable/41305155>.

³⁶ *R. v. Fearon* 2014 SCC 77 ¶49 available at <https://scc-csc.lexum.com/scc-csc/en/item/14502/index.do> last accessed on 24 April 2023

³⁷ Terrorism Act, 2000 c. 11, (Eng.), § 41(3) and sched. 8, Part 11, para. 29(3)

India and Pakistan provide this exception to detain a person based on charges including terrorism³⁸, organized crime³⁹ and actions prejudicial to the defence of the country⁴⁰.

Impeachment

Another exception to this right is the impeachment exception. This exception permits for proof received from a suspect who stays silent for use to question their credibility in court. In the United States, this exception became enunciated in the case of *Harris v. New York*⁴¹.

Adverse Inference

This exception lets in for the prosecution to make an inference of guilt primarily based totally on a suspect's silence for the duration of police questioning or in court. This exception is diagnosed withinside the United Kingdom, in which the Criminal Justice and Public Order Act of 1994 permits for an adverse inference to be drawn from a suspect's silence⁴². In Pakistan, an adverse inference may be used as the sole basis for a finding of guilt or liability⁴³, but that too is subject to judicial scrutiny.

Compellable Evidence

A compellable witness is a person whom the law allows a party to compel to evidence⁴⁴. In Canada, a compellable witness is "one who may be forced using a subpoena to give evidence in court under the threat of contempt proceedings."⁴⁵ Under the Pakistan Code of Civil Procedure⁴⁶, if a defendant fails to provide a file that he's certain to supply, the courtroom docket might also additionally draw an unfavorable inference towards him. An equivalent regulation exists in Indian civil procedure, therefore in diverse proceedings, the privilege from self-incrimination can be levied if completed via civil matters.

USE OF PRE-TRIAL SILENCE AGAINST AN ACCUSED PERSON

It is an essential element of a fair trial, however the use of pre-trial silence by an accused man or woman has been a contentious debate in lots of criminal justice systems. If we study the usage of pre-trial silence withinside the United States, Canada, the United Kingdom, Australia, India, and Pakistan, we will see certain versions regarding how pre-trial silence may be used by an accused individual, with a few jurisdictions permitting it for use as proof of guilt, whilst others offer extra protections for this right

In the United States, the Supreme Court has held that the prosecution can not use an accused individual's silence earlier than arrest or at some point of custodial interrogation towards them at trial, as it might violate

³⁸ THE ANTI-TERRORISM ACT, 1997, Act XXVII OF 1997 (Pakistan) §21H

³⁹ Maharashtra Control of Organised Crime Act, 1999 (Mah. 30/1999)(India) §17 & 22

⁴⁰ The Security of Pakistan Act, 1952, ACT NO. XXXV OF 1952(Pakistan) §3

⁴¹ *Harris v. New York*, 401 U.S. 222, 91 S. Ct. 643, 28 L. Ed. 2d 1 (1971); see also *Walder v. United States*, 347 U.S. 62, 74 S. Ct. 354, 98 L. Ed. 503 (1954)

⁴² Bucke, Tom, Robert Street, and David Brown. *The right of silence: The impact of the Criminal Justice and Public Order Act 1994*. London: Home Office, 2000.

⁴³ Pakistan Code of Criminal Procedure, Act V of 1898, § 342(2) (Pak.).

⁴⁴ De Vos, Wouter. "The Competence and Compellability of Witnesses." In *Principles of Evidence*, pp. 449-474. 2016.

⁴⁵ *R v Darrach*, 2000 SCC 46 (CanLII), [2000] 2 SCR 443, per Gonthier J, at para 48; *R v Nguyen*, 2015 ONCA 278 (CanLII), 125 OR (3d) 321, per Gillese JA, at para 13

⁴⁶ Pakistan Code of Civil Procedure 1908, Order XI rule 21

the Fifth Amendment's safety from self-incrimination. However, if an accused character chooses to testify of their defence, the prosecution can cross them on their pre-trial silence⁴⁷.

Similarly, in Canada, the Supreme Court has held that the prosecution cannot use an accused person's pre-trial silence as evidence of guilt⁴⁸, as it might violate the Canadian Charter of Rights and Freedoms' protection in opposition to self-incrimination. However, the accused person's pre-trial silence may be used to question their credibility in the event that they pick to testify their defence. In the United Kingdom, the common law rule against using an accused person's pre-trial silence as evidence of guilt was abolished⁴⁹, but the accused person's right to remain silent remains protected. The prosecution can still use an accused person's pre-trial silence to undermine their defence if they choose to testify.

In Australia, the prosecution cannot use an accused person's pre-trial silence as evidence of guilt, as it would violate the common law right to silence⁵⁰. However, the accused person's pre-trial silence can be used to impeach their credibility if they choose to testify.

In India, the usage of an accused person's pre-trial silence in opposition to them at trial is controversial. While there's no unique constitutional or statutory safety towards the usage of pre-trial silence, a few courts have held that the usage of pre-trial silence as proof of guilt violates the law in opposition to self-incrimination⁵¹.

In Pakistan, there's no unique constitutional or statutory safety towards the usage of pre-trial silence. The suspect or witness is legally certain to give facts as in line with sections fifty-seven and one hundred and sixty-one of CrPC, however none of them may be incriminating.⁵²

BALANCING THE RIGHT TO SILENCE WITH THE NEED FOR EFFECTIVE INVESTIGATION AND PROSECUTION

Balancing this right with the want for investigation and prosecution is a vital problem in criminal justice systems worldwide. This right is an essential human-right as is identified in numerous global human rights instruments, together with the Universal Declaration of Human Rights⁵³ and the International Covenant on Civil and Political Rights⁵⁴. However, this right is not absolute and can be restricted in certain circumstances⁵⁵.

⁴⁷ Edwards, Brian T. "Permissibility of Impeaching an Alibi Witness with Evidence of His Pre-Trial Silence: The New York Court of Appeals Decision in *People v. Dawson, The*." *Buff. L. Rev.* 30 (1981): 223.

⁴⁸ Van der Walt, Tharien, and Stephen De la Harpe. "The right to pre-trial silence as part of the right to a free and fair trial: An overview." *African human rights law journal* 5, no. 1 (2005): 70-88.

⁴⁹ Mackenzie, Ian Alan. "Catching the fox: restricting the right to pre-trial silence in Canada." PhD diss., University of British Columbia, 2013.

⁵⁰ Gray, Anthony. "Constitutionally heeding the right to silence in Australia." *Monash University Law Review* 39, no. 1 (2013): 156-187.

⁵¹ Malimath, Justice VS. "Committee on reforms of criminal justice system." Ministry of Home Affairs, Government of India (2003).

⁵² Pakistan Code of Criminal Procedure, Act V of 1898(Pak.).

⁵³ Roosevelt, Eleanor. 2000. *Universal Declaration of Human Rights*. Bedford, MA: Applewood Books.

⁵⁴ *International Covenant on Civil and Political Rights*. Treaty Series, vol. 999, Dec. 1966, p. 171.

⁵⁵ Jackson, John. "Re-conceptualizing the right of silence as an effective fair trial standard." *International & Comparative Law Quarterly* 58, no. 4 (2009): 835-861.

In common law systems, including the United States, Canada, the United Kingdom, and Australia⁵⁶, this right is balanced with the want for investigation and prosecution thru diverse prison mechanisms. One such mechanism is the usage of unfavourable inferences, which permits the judiciary to attract an inference of guilt from a defendant's silence in circumstances. Another mechanism is the usage of confined use immunity, which gives a confined safety for a defendant who gives proof to the prosecution⁵⁷.

In Pakistan, this right is likewise identified as essential and is protected by way of numerous constitutional and statutory provisions. However, there are exceptions to this law, especially in instances regarding terrorism⁵⁸ and national security⁵⁹. In such cases, the government may restrict the right to silence to obtain information that is deemed necessary for national security purposes.

Balancing this right with the want for investigation and prosecution calls for a sensitive balancing act, as each the safety of man or woman rights and the pursuits of the country should be taken into account⁶⁰. To acquire this balance, it's far crucial to cautiously assess the occasions wherein this right may be constrained and to make sure that these sort of regulations are proportionate and necessary.

ADVERSE INFERENCE

Black's Law Dictionary defines this as "an inference that a fact-finder can also additionally draw from a party's failure to introduce a bit of proof or name a witness who might have been expected to offer beneficial proof, based on the notion that if the proof or witness could had been helpful, the party would have introduced or called them"⁶¹

This refers to the inference or a conclusion that a truth finder can also additionally draw from a party's failure to offer proof or testimony, that is inside their control or that they've a legal duty to offer. In different words, if a party fails to provide proof or testimony that might assist their case, the court can also additionally anticipate that the proof or testimony were not beneficial to the party's case and might draw a bad inference or end in opposition to them.

This precept is utilized in each common law jurisdictions internationally and Pakistan as a way of drawing inferences according to the proof provided in a case. However, the utility and scope of this inference may also vary throughout these criminal justice systems.

In common law countries such as the United States⁶², Canada⁶³, Australia⁶⁴ and the United Kingdom, an adverse inference is typically used as a device for encouraging supply of applicable proof. In criminal cases, the prosecution is needed to show the guilt of the accused past an affordable doubt. If the accused fails to supply proof that would moderately be anticipated to guide their defence, a negative inference can be drawn

⁵⁶ Billing, Fenella MW. *The right to silence in transnational criminal proceedings: comparative law perspectives*. Springer, 2016.

⁵⁷ Jackson, John. "The right of silence: Judicial responses to Parliamentary encroachment." *The Modern Law Review* 57, no. 2 (1994):Pg 272-273.

⁵⁸ THE ANTI-TERRORISM ACT, 1997, Act XXVII OF 1997 (Pakistan) §21H

⁵⁹ The Security of Pakistan Act, 1952, ACT NO. XXXV OF 1952(Pakistan) §3

⁶⁰ Waters III, T. H. "Between a Rock and a Hard Place: An Examination of a Costly Right to silence for Corporate Employees in Criminal Investigations." *Rev. Litig.* 25 (2006): 603.

⁶¹ Garner, B. A. (Ed.). (2019). *Black's law dictionary*. Thomson Reuters.

⁶² *Salinas v. Texas*, supra note 17

⁶³ *R. v. Singh*, supra note 26

⁶⁴ Australian Evidence Act 1995, supra note 22

towards them. Similarly, in civil cases, if a party fails to provide proof that would moderately be anticipated to help their case, an unfavourable inference can be drawn towards them.

In Pakistan, the precept of unfavorable inference is likewise used to inspire litigants to supply proof. However, the scope of inference is restrained in Pakistan compared to its sister countries. For example, in some cases, the accused has the right and can not be pressured to provide proof in opposition to themselves⁶⁵. As a result, a detrimental inference can not be drawn in opposition to the accused surely due to the fact they no longer to testify. A negative inference can also be drawn in case the plea of juvenility is raised at a belated degree of the judicial proceedings.⁶⁶

In addition, in Pakistan, the burden of proof rests with the prosecution in criminal cases⁶⁷. If the prosecution fails to supply proof that helps their case, an unfavorable inference can be drawn towards them. Similarly, if a plaintiff in a civil case fails to provide proof that helps their case, a unfavorable inference can be drawn in opposition to them.

The utility of inference in common law nations and Pakistan additionally differs in phrases of the evidentiary weight given to it. In common law nations, a negative inference can be used to locating of guilt or liability, however it isn't enough on its very own to set up guilt or liability. In Pakistan, an adverse inference may be used as the sole basis for a finding of guilt or liability⁶⁸, but only in limited circumstances where the party's failure to produce evidence is particularly significant⁶⁹.

PLEA BARGAINING

Plea bargaining is a "process whereby a defendant agrees to plead guilty in a criminal charge in exchange for a concession by the prosecutor, often a promise to recommend to the court a more lenient sentence than would be imposed if the defendant were convicted after a trial"⁷⁰

Plea bargaining is a system wherein a defendant pleads responsible to a crime in trade for a concession from the prosecutor. This concession frequently comes in the shape of a discounted sentence or the losing of some imprisonment. The use of plea bargaining has turn out to be extensive in lots of common law jurisdictions, along with the United States, Canada, Australia, and England. In the United States, plea bargaining has become a fundamental part of the criminal justice system⁷¹. According to some estimates, over 95% of criminal cases in the United States are resolved through plea bargaining⁷². This is because the

⁶⁵ Constitution of Pakistan, 1973, Article 13

⁶⁶ Iqbal, Khurshid, Judging Juvenility: Determination of Age of Juvenile Offenders under Pakistan's Juvenile Justice System (October 3, 2009). Pakistan Journal of Criminology, Vol. 1(3) October 2009, pp 105-118., Available at SSRN: <https://ssrn.com/abstract=2305488>

⁶⁷ Daudpota, Faisal. "Tort of Malicious Prosecution in Pakistan." Available at SSRN 1530241 (2010).

⁶⁸ Pakistan Code of Criminal Procedure, Act V of 1898, § 342(2) (Pak.).

⁶⁹ Majeed, Nasir, and Amjad Hilal. "THE BEST EVIDENCE PRINCIPLE: MEANING, DEVELOPMENT, CONSEQUENCES AND ITS APPLICATION IN PAKISTAN." Pakistan Journal of Social Research 4, no. 03 (2022): 446-455.

⁷⁰ Garner, B. A. (Ed.). (2019). Black's law dictionary (11th ed.). Thomson Reuters.

⁷¹ Miller, Herbert S., William F. McDonald, and James A. Cramer. Plea bargaining in the United States. Department of Justice, Law Enforcement Assistance Administration, National Institute of Law Enforcement and Criminal Justice, 1978.

⁷² Ross, Jacqueline E. "The entrenched position of plea bargaining in United States legal practice." Am. J. Comp. L. 54 (2006): 717.

criminal justice system is often overwhelmed with cases and the use of plea bargaining allows for more efficient case resolution.

Canada has additionally followed plea bargaining as a method to solve cases. However, there are a few variations among plea bargaining in Canada and the United States. In Canada, the technique is typically greater limited, and the usage of plea bargaining is frequently reserved for much less severe cases. Additionally, they prefer that the plea is voluntary and that the accused completely is aware the character and results of the plea⁷³.

In England and Wales, plea bargaining isn't always as extensively used as it is withinside the United States or Canada. However, there's growing strain to undertake plea bargaining as a method to lessen the backlog of instances withinside the courts⁷⁴.

Australia has additionally followed plea bargaining as a way to clear up crook cases. The method is just like that withinside the United States, with the prosecutor supplying concessions in trade for a guilty plea. However, using plea bargaining is regularly confined in Australia than withinside the United States⁷⁵.

In Pakistan, plea bargaining was delivered via the National Accountability Ordinance, which permits accused individuals to go into a plea with the National Accountability Bureau (NAB)⁷⁶ in cases of corruption and financial crimes. The process has been criticized for allowing corrupt individuals to escape with minimal punishment and for lacking transparency.

There are a few issues with using plea bargaining. One problem is that it could cause wrongful convictions, as a few defendants may also plead responsible even though they're harmless to keep away from a harsher sentence.⁷⁷ Another concern is that it may lead to unequal treatment of defendants, as those who cannot afford to hire a lawyer may be pressured into accepting a plea bargain, even if they are innocent.

In conclusion, plea bargaining is a process used in many common law jurisdictions to resolve criminal cases. While it has been criticized⁷⁸ for leading to wrongful convictions of individuals, it stays a broadly used device withinside the criminal justice system. Each jurisdiction has its very own regulations and boundaries for using plea bargaining, and a comparative evaluation of those policies and boundaries should shed light at the strengths and weaknesses of the system in distinct criminal justice systems.

CONFESSIONS

The admissibility of confessions in a trial has been a surprisingly debated topic, specifically in relation to this right. Black's Law Dictionary defines confession as "a statement by a person admitting to the

⁷³ Di Luca, Joseph. "Expedient McJustice or Principled Alternative Dispute Resolution-A Review of Plea Bargaining in Canada." *Crim. LQ* 50 (2005): 14.

⁷⁴ Brook, Carol A., Bruno Fiannaca, David Harvey, and Paul Marcus. "A comparative look at plea bargaining in Australia, Canada, England, New Zealand, and the United States." *Wm. & Mary L. Rev.* 57 (2015): 1147.

⁷⁵ *ibid*

⁷⁶ Shah, Syed Fakharuddin, Zafar Abbas, and Abdul Qayyum. "An Evaluation of the National Accountability Bureau (NAB) as Anti-Graft Body in the Political Perspective of Accountability in Pakistan." *Public Integrity* (2021): 1-13.

⁷⁷ Blume, John H., and Rebecca K. Helm. "The unexonerated: Factually innocent defendants who plead guilty." *Cornell L. Rev.* 100 (2014): 157.

⁷⁸ Schulhofer, Stephen J. "Plea bargaining as disaster." *Yale LJ* 101 (1991): 1979.

commission of a crime or offence."⁷⁹ And according to the Oxford English Dictionary, confession means "a formal statement admitting that one is guilty of a crime".⁸⁰

In common law countries, the admissibility of confessions is subject to the voluntariness rule⁸¹. This rule calls for that the confession should be made voluntarily and with out coercion or inducement. If the confession is acquired via coercion, it'll be inadmissible as evidence. In addition, the common law acknowledges this right, this means that an accused individual has the can't be forced to incriminate themselves.

In Pakistan, the admissibility of confessions is ruled via the Pakistan Code of Criminal Procedure⁸². Section 26 of the Code affords that no confession made to a police officer will be admissible as proof towards an accused person, with exceptions. For example, a confession made withinside the presence of a Justice of the Peace can be admissible if the Justice of the Peace is happy that it turned into made voluntarily.

However, with the admissibility of confessions in Pakistan, there is evidence of police coercion and torture to extract confessions from suspects⁸³. This has caused wrongful convictions and the violation of this right. In current years, the courts in Pakistan have taken steps to restrict using confessions acquired via coercion and to shield this right.

THE RIGHT TO SILENCE AND TERRORISM

The use of this right in instances concerning terrorism has been a topic of controversy among Pakistani and common law systems. In Pakistan, the Anti-Terrorism Act (ATA) affords the felony framework for managing terrorism-associated offences. The ATA lets in for using unique investigative techniques, together with the interception of communications and the detention of suspects for prolonged intervals with out charge, to save you and look into terrorist activities.

Under the ATA, this right isn't always absolute in terrorism-associated instances. The regulation permits for the admission of proof acquired via interrogation through a police officer, now no longer underneath the rank of District Superintendent of Police withinside the absence of a lawyer, which can be used towards the accused character in court. However, the admission of such proof is situation to judicial scrutiny, and the courts have emphasised the want to make sure that the accused man or woman's fundamental right to a fair trial isn't compromised.⁸⁴

⁷⁹ Black's Law Dictionary, 11th ed. s.v. "Confession" (Thomson Reuters, 2019).

⁸⁰ The Oxford Dictionary of Law, 9th ed. s.v. "Confession," edited by Jonathan Law (Oxford University Press, 2020).

⁸¹ Van Caenegem, William. "New trends in illegal evidence in criminal procedure: general report-common law." In XIII World Congress of Procedural law, Rio de Janeiro, Brazil. <https://research.bond.edu.au/en/publications/new-trends-in-illegal-evidence-in-criminal-procedure-general-repo> (access: 18.11. 2020). 2007.

⁸² Pakistan. Code of Criminal Procedure. Act V of 1898, as amended by Act XXVII of 2002.

⁸³ An organisation of human rights "Madadgar Foundation" has collected 2071 cases of police torture involving torture to men, women and minors, reported throughout Pakistan between years 2000 to 2013.208 This number of cases is, undoubtedly, just a little percentage of the real number as most of the cases could not have be reported by victims due to many reasons, like; fear of death, plotting by landlords and political icons with police and other investigating authorities, untraceability of detained persons due to use of private lockups and torture cells, etc; Haider, Zishan. "RIGHT TO REMAIN SILENT: COMPATIBILITY WITH SHARĪ 'AH AND POSITION IN PAKISTAN." Islamabad Law Review 1, no. 4 (2017): 31-56.

⁸⁴ THE ANTI-TERRORISM ACT, 1997, Act XXVII OF 1997 (Pakistan)§21H

In common law systems, the use of this in terrorism-related cases has also been the subject of debate. In the United Kingdom, the Terrorism Act 2000⁸⁵ allows for the admission of evidence obtained through interrogation in the absence of a lawyer, subject to judicial scrutiny. The use of such evidence has been controversial, with some arguing that it undermines the right to a fair trial.

In the United States, the usage of this right in terrorism-associated instances has been the situation of several criminal challenges. The Supreme Court has held that it is blanketed below the Fifth Amendment, however the use of the law in terrorism-associated instances has its own limitations. For example, under the case of *Salinas v. Texas*, the Court held that this right is restrained to court cases after arrest or after the individual has been announced their Miranda rights.⁸⁶

CONCLUSION

Having its roots in Roman law the right to silence or protection from forced self-incrimination was put in place to keep a check on custodial torture and coercion, which made such evidence illegal and inadmissible in court. With time this law became a core principle in Evidence law of all countries, some merely making it illegal while others provided punishment for obtaining evidence in this manner. There has been an ongoing debate on whether such law provides a gap for criminals to avoid incrimination, to solve that problem all common law countries have placed laws and precedents that mention circumstances in which this law loses its absoluteness. Exceptions according to the seriousness of the offence such as a threat to national security, terrorism and organized crime were added, with exceptions that cover the type of evidence being hidden like driving an adverse inference were added. The need for balancing the right to self-defence and the need for effective prosecution is a concern for modern legislators which is often solved by plea bargaining, adverse inference and confessions. In future, especially in Pakistan, there is a need for legislation on police laws which should make it compulsory for the investigating officer to explain the legal rights of the accused, as the current practice even ignores the humane treatment of the accused. There should be consistency in laws, the law of evidence i.e., Qanun-e-Shahadat and Anti-Terrorism Act both give opposing viewpoints which should be adjusted and elaborated so that a clear picture of the right of an accused of terrorism is built.

⁸⁵ The Terrorism Act, 2000, part VII. Section 76 (United Kingdom)

⁸⁶ Gee, Harvey. "Salinas v. Texas: pre-Miranda silence can be used against a defendant." *Suffolk UL Rev.* 47 (2014): 727.