CONSTITUTIONAL LAW (FAIR TRIAL): THE RIGHT TO SILENCE: A CRITICAL
ANALYSIS OF ARTICLE 12 (1) (F) OF THE NAMIBIAN CONSTITUTION

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i. **Acknowledgements**

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- First and foremost God the almighty and sovereign
- Professor Nico Horn for his kindness, patience and assistance which was revealed to me in his guidance, in spite of his tight schedule.
I do furthermore and finally acknowledge that the errors of commission and omission in this dissertation fall squarely within my personal account.

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Andy Mokgatle

I, Professor Nico Horn, hereby declare that this research paper submitted as a dissertation for the purpose of obtaining the LLB degree was done under my guidance as supervisor.

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Prof. Nico Horn

iii. **List of abbreviations**

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iv. **Abstract**

While being cognisant of the challenge to be realistic of the need to conform with constitutional standards and hence protect, respect, and promote the right to silence unconditionally and the need for individuals to account fully for their unlawful actions the fundamental question arising is to what extent can the right to silence be limited constitutionally in the interest of justice? Some fundamental issues flowing from this research question are whether the right to silence is absolute and if not to what extent it is not.
Aspects of common law on the subject of silence as has evolved in the English legal system are a crucial source of reference and scrutiny in any discussion pertaining to the right to silence jurisprudence. As a result, the historical origins of the right to silence, its nature, its scope and its rationale will be exposed and scrutinized and will as such form the content of the subject-matter of discussion in this dissertation.

With controversy and uncertainty still surrounding the issue whether being compelled to give testimony against oneself or against one’s spouses in terms of Article 12 (1)(f) is limited to compulsion in terms of article 8 (2)(b) or not, the debate in this paper is centered, with special focus on an expansionist view of developing the right to silence jurisprudence in Namibia, as opposed to a retentionist and or abolitionist view.

This dissertation, with a view of suggesting reform and codification, will focus its discussion, having regard to case law and the Constitution as a whole, on the implications of the right to silence having the status of a fundamental human right as endorsed by Article 12 (1)(f) of the Namibian Constitution.

Chapter 1
The right to silence
An Introduction

1.1. Introduction
Understanding the right to silence is crucial for purposes of this paper. This right is enshrined in several human rights instruments.\(^1\) The context and extent of the discussion on the right to silence in this paper will be delineated in terms of Article 12 of the Namibian Constitution, and substantiated with an exposure and contextualization of the right, as endorsed in international treaties or instruments.

Although not expressly in the Constitution, the right to remain silent is implicit in article 12 (1)(f) read with article 12 (1)(d) of the Namibian Constitution. Article 12 (1)(f) provides: “No person shall be compelled to give testimony against themselves…” Article 12 (1)(d) provides: “All persons charged with an offence shall be presumed innocent until proven guilty according to law…”

1.2. **The purpose of this research**

This paper in essence purports to clarify, and resolve some of the uncertainties circumvening the right to silence. In particular, the paper attempts, to minimize the impact of perspectives undermining the right and to simultaneously minimize the impact of perspectives overemphasizing the right, thereby advancing a balanced perspective most appropriate for approval in Namibia.

In a nutshell therefore, the purpose of this research is to explore and advance for recommendation where necessity arises, a jurisprudentially well nourished perspective on the right to silence.

1.3. **The research problem**

\(^1\) Such as for instance in terms of Article 11 of the *Universal Declaration on Human Rights*, “everyone charged with a penal offence has the right to be presumed innocent until proved guilty according to law in a public trial at which he has had all the guarantees necessary for his defence.” Article 14 (2) of the ICCPR provides that “everyone charged with a criminal offence shall have the right to be presumed innocent until prove[n] guilty according to law” and further at Article 14 (3) that “in the determination of any criminal charges against him, everyone shall be entitled to the following minimum guarantees, in full equality… (g) not to be compelled to testify against himself or to confess guilt,” Article 66 of the Rome Statute of the International Criminal Court provides for the presumption of innocence and Article 67 provides for the right to remain silent, without such silence being a consideration in the determination of guilt or innocence.
The problem or rather the fundamental issues underlying this research, relate mainly to the nature, scope and impact of the word “compelled” in Article 12 (1) (f). The questions arising in this regard include *inter alia*:

(a) What is compelled testimony?
(b) Is the prohibition against self incrimination limited to self incrimination via compelled testimony?
(c) Is the right to silence limited as specifically suggested by some authors and case developments on the subject? Some of the sub problems surrounding this question include:

(i) whether the court in *S v Van den Berg*\(^2\) constitutionally accurate and sound in its interpretation and application of article 12 (1)(f);
(ii) whether some aspects of the right to silence are unnecessary, costly and detrimental to the administration of justice as suggested by some authors;\(^3\)
(iii) whether adverse inferences of guilt may be drawn from a choice to remain silent.

1.4. **The scope and focus of this research**

The search for answers and solutions to the problems and sub problems posed above will be contextualised and limited to Namibia. In this regard, although cognizance will be taken of contemporary international comparable trends and views on the subject-matter, focus will specifically be directed at the fundamental aspects of the right to silence in the context of Article 12 (1)(f) of the Constitution and the relevant history of Namibia.

1.5. **The relevance, significance and importance of this research**

There is or at least ought to be some concern over the impact of the right to silence on our daily undertakings and challenges as well as on the outcome of

\(^2\) 1995 NR 23 (HC).
some of our court decisions and especially that of *S v Van den Berg*. The research problem undertaken in this paper is likely to ease matters by exposing the impact of the right to silence, specifically its repercussions on the administration of justice, and at the same time by minimizing the materialization of any adverse judicial conclusions inspired by ill-application of the constitutionally entrenched right to silence.

The importance of this paper is that it will project a model of how a modern and sophisticated administration of justice should treat the right to silence, in compliance with its general obligation to promote and protect constitutionally entrenched fundamental rights.

1.6. **The anticipated contribution of the research to existing knowledge**

Existing knowledge on the subject-matter of this research as will be demonstrated in Chapters 2 and 3 somewhat, ranges from an exposure, analysis, and examination of the right to silence in general. No study in particular, seeks, sought, or posses information that seems to analyse, examine or evaluate the nature and scope of the right to silence exclusively as well as the extent, effectiveness and importance of the obligation of the three Organs of State, and citizens including juristic persons, to promote, protect and respect the right to silence as anticipated in the context of the vertical and horizontal application of fundamental human rights in article 5 of the Namibian Constitution, which this research undertakes.

1.7. **Hypotheses/ assumptions**

Owing to the vertical and horizontal applications of the internationally so called “Bill of Rights” recognized by Article 5 of the Namibian Constitution, the assumptions or rather unproven facts which this research seeks to proof are:

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(1) The Executive, Legislative and Judicial organs of state, as well as natural and juristic persons ought to and must observe, promote, protect and respect the right to silence;

(2) Courts as principal instruments of enforcement must promote, protect and respect the right to silence even in civil matters;

(3) Furthermore, owing to the liberation struggle and Article 12 of the Constitution everyone has to be realistic of the need to conform with constitutional standards and thus to protect, respect and promote the hard earned right to silence unconditionally;

(4) Furthermore, owing to Article 66 read with inferences drawn from Article 12 common law and statute law is valid to the extent to which it does not conflict with the constitution and therefore no statutory reverse onus presumptions of guilt are constitutional.

1.8. Research Methodology

The research methods of this paper primarily include: document analysis, examination and evaluation of scholarly opinions and views on the subject-matter; observation of case law trends; and e-net research. The research basically, therefore is desk research.

1.9. An outline of the Chapters of this research paper

This paper consists of five chapters. Chapter 1 titled “The Right to Silence” is introductory and essentially exposes the subject of the research, its focus and objectives including its significance and all other preliminary issues; Chapter 2 titled “A Critical Review of the Right and its Complexities” is a background and foundation of this study; Chapter 3 titled “A Critical Analysis of the right to silence” is a literature review; Chapter 4 titled “Reasons for the Conclusion” is a presentation of the research findings; Chapter 5 titled “Conclusion and Suggestions” is basically an ultimate summary of the research, its findings, conclusions and possible recommendations which hopefully will be of significance to all parties having an interest in the subject-matter.
Chapter 2
A Critical Review of the Right and its Complexities
Foundation of the Research

2.1. Introduction
This chapter will embark on a theoretical foundation of the study undertaken by this research. The chapter will proceed with a review of developments concerning the right to silence in Namibia and in other comparable common law jurisdictions. In the process a number of explicit and implicit assumptions which will culminate into researchable questions will be explored, exposed, and tested or evaluated. It seems appealing that in assessing the merits of the various positions or standpoints or perspectives concerning the right to silence effort should be directed solely towards issues material to the problem investigated in this dissertation and foretelling the standpoint of the researcher.

In a nutshell therefore, this chapter will examine, explore and expose the consequences and or problems inherent in some perspectives, views or opinions concerning the right to silence.

2.2. The foundation of the study (Article 12 (1)(f) in perspective)

Having regard to the problem and sub-problems of this research mentioned earlier in the first chapter and in particular concerning the nature, scope and impact of the word “compelled” in Article 12 (1)(f), I will hereby commence with an examination of the meaning of the constitutionally contemplated compulsion; and proceed with the issues, whether the protection against self incrimination is necessarily limited to self incrimination by compulsion; whether the subject-matter of the right is a settled numerous clauses and thus confined to specific instances and area of law; or whether it is limited and if so, to what extent? and finally, whether adverse inferences of guilt may be drawn under any circumstances from a suspect’s choice to remain silent.

2.2.1. What is compelled testimony?

To compel someone generally means to force someone to do something.\(^5\) It follows accordingly that the constitutional protection against compelled testimony is intended to prohibit forced testimony. Compelled testimony, therefore, may be

defined as any act aimed at forcefully obtaining evidence from a suspect without his consent and thus involuntarily, without his freewill, and with undue influence.\(^6\) This definition seems to be too broad. However, one needs to appreciate that each constitutional fundamental human right provision must be interpreted broadly so as to expose both its explicit and implicit meaning and purposes. Such an approach, in this dissertation, is not only highly recommendable by virtue of existing juridical interpretation trends and/or case law developments,\(^7\) but also because it is more likely to make clear the magnitude and explicit nature of the constitutionally entrenched right to silence.

One aspect this broad approach can however not appropriately account for is the question whether a truth seeking person’s continuous and insistent efforts to have a suspect answer self incriminating questions would \textit{prima facie} mean forcing or compelling him to do so. It accordingly, remains a task of interpretation to define the exact scope, nature, meaning, and extent of the force implicated in compelled testimony.

If we accept a broad definition of compelled testimony and have regard to the fact that it is a legal requirement that confessions should be made freely, voluntarily and without undue influence, an interesting question is why can testimony obtained from a suspect not be subjected to the very same prerequisites? Rendering compelled testimony, testimony that does not meet the free, voluntary and without undue influence requirements, will not only contribute towards the resolution of the ambiguity surrounding the nature and scope of the right to silence, but it will certainly also increase the probative value of any evidence elicited, thereby promoting the fairness of any inquiry or trial. In cases where for instance a suspect is forced by the police to answer questions which are potentially self incriminatory or self incriminatory, the free, voluntary and without undue influence requirements would act as a measuring instrument for an adjudicator to determine whether any testimony obtained from such suspect is actually compelled or not.

\(^{6}\) My emphasis.

\(^{7}\) Authorities for the view that the Constitution must be interpreted broadly and purposively include \textit{inter alia:} \textit{S v Acheson} 1991 NR 1 (HC);
The current trend of jurisprudence on the subject of compelled testimony generally seems to suggest that the compelled testimony prohibited by Article 12 (1)(f) of the Namibian Constitution is limited to testimony obtained in violation of Article 8 (2)(b). Whether this position holds true is a subject of contention. Thus

2.2.2. Is the prohibition against self incrimination limited to self incrimination via compelled testimony?

On the one hand, what is explicitly discernible as far as article 12 (1)(f) is concerned, is that it is a constitutionally entrenched provision specifically enacted for the prohibition against self incrimination and self incrimination by compulsion. What is unclear, however on the other hand, is the question of compulsion, its extent and impact, which is one of the fundamental issues underlying this research paper.  

An authority requiring scrutiny in this regard is *S v Minnies and Another* where the court acknowledged that the terms of article 12 (1)(f) are peremptory, but ironically concluded that only compelled testimony obtained in a manner contrary to the provisions of article 8 (2)(b) was inadmissible as evidence. This conclusion leaves an impression that article 12 (1)(f) is solely intended to protect suspects against self incrimination via compelled testimony obtained through torture or cruel, inhuman or degrading treatment or punishment. Whether this view is correct is a matter of controversy. Article 12 (1) (f) of the Namibian Constitution reads as follows:

“No persons shall be compelled to give testimony against themselves or their spouses, who shall include partners in a marriage by customary law, and no Court shall admit in evidence against such persons testimony which has been obtained from such persons in violation of Article 8(2)(b) hereof.”

On the one hand it makes perfect sense to argue that compelled testimony obtained in violation of article 8 (2) (b) is inadmissible as evidence but then the view that article 8 (2)(b) is a delineation and limitation of the constitutionally

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8 *S v Shikunga and Another* 1997 NR 156 (SC), *S v Minnies* 1990 NR 177 (HC) and *S v Van den Berg* 1995 NR 23 (HC).
9 1991 (1) SACR 355 (Nm).
contemplated scope and content of the right to silence, requires scrutiny of the highest possible standard.

In *S v Minnies*¹⁰ the accused had made a pointing out of rough-uncut diamonds and a confession after being assaulted and interrogated in a shed. Although the court held that the evidence was inadmissible because it violated article 8 (2)(b), it neglected to appropriately and comprehensively address the issue whether such evidence should be totally excluded. At best the court determined by necessary implication that there is a general judicial discretion to exclude or allow evidence obtained illegally and improperly and hence unconstitutionally. It held that in the final analysis the acid test should be whether the admission of such evidence will result therein that the accused will not have a fair trial.

It seems to appear from the obiter remarks that a court has discretion to allow or disallow compelled testimony by virtue of section 218 of the CPA regardless of the peremptory prohibitory terms of Article 12 (1)(f) of the Namibian Constitution. Surely, there is no doubt that this approach is undermining the supremacy of the Constitution.

It is in view of the above contentions and deliberations arguable that, on the one hand, if we accept the premise that compelled testimony is testimony that does not meet the free, voluntary and without undue influence requirements, it is grossly inappropriate to limit the prohibition against self incrimination, to testimony obtained in violation of Article 8 (2)(b) only. On the other hand, however, if we accept that somewhat/somehow compelled testimony inherently contains elements of torture or cruelty, inhuman or degrading treatment or punishment, the conclusion that the prohibition against self incrimination is limited to incrimination through compelled testimony is highly probable and indeed compelling.

My submission in this regard nonetheless, is that it remains a task of empirical research to determine and codify the nature and scope of the compulsion

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¹⁰ Ibid.
contemplated in Article 12 (1)(f) of the Constitution. In this regard emphasis will have to be placed on the violations contained in Article 8 (2)(b) such as: (i) torture or cruelty, (ii) inhuman or degrading treatment, and or (iii) punishment. The research will have to determine the exact meaning, nature and scope of the said violations. Furthermore it will have to determine whether the violations articulated are cumulative in nature or not, or whether it is the presence of any individual violation articulated that results therein that evidence obtained involuntarily from a suspect falls under the prohibited compelled testimony in Article 12 (1)(f).

My view is that the prohibition against self incrimination is definitely limited to self incrimination via compelled testimony but compelled testimony is not limited to testimony obtained in violation of Article 8 (2)(b); it extents beyond that limitation. In instances where for example a suspect is in a dilemma whatever he says, Article 8 (2)(b) cannot justify the suspects right to silence because none of its prohibited violations are applicable. However, such a suspect enjoys the right to remain silent by virtue of Article 12 (1)(f) alone.

2.2.3. Is the right to silence limited as specifically suggested by some authors and case developments on the subject?

- Criminal v Civil matters

The perception of the right as limited to criminal matters is one of the several tribulations and misgivings attributable to the common law and South African statute law on the subject. A contemporary misleading perception on the right was that in the South African case of *Nel v Le Roux NO*¹¹ wherein it was held by the Constitutional Court that the right to silence in the Constitution is only triggered when there is an arrested person or an accused person facing a criminal trial. The Constitutional Court upheld the validity of section 189(1) of the Criminal Procedure Act¹² which compels a witness to answer questions, distinguishing it from the prohibition against self incrimination provided for in the Constitution on

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¹¹ 1996 (3) SA 562 (CC).
¹² Act, No. 51 of 1977.
the basis that a witness is not an accused and that the rights to a fair trial created by the section only accrue to an accused.\textsuperscript{13} This view definitely finds enough validation in our common law but if we are to analyze our constitutional right to silence liberally and interpret it in a broad and purposive light the outcome will reveal that the right is not necessarily limited to “accused persons” but extents to all persons alleged to have committed an offence and an offence being any act or omission that attracts a penalty. Therefore, broadly speaking the right is also applicable in civil proceedings.\textsuperscript{14} This view by necessary implication finds support in section 1 of the Criminal Procedure Act, wherein a “charge” is said to “include an indictment and a summons” and wherein an offence is defined as “an act or omission punishable by law”. The emphasis is that if a charge may be defined to include a summons one would be inclined to assume that given the fact that civil actions commence by way of summons, a person charged is not necessarily an accused person in a criminal context but includes all persons legally alleged to have offended in a general sense.

Further support may be extrapolated from section 14 (1) of the Civil Evidence Act of 1968 in England which provided for

“\textbf{The right of a person in any legal proceedings other than criminal proceedings 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.}"

At first it so happened that this right was referred to as a privilege eventhough the section provides in explicit terms that it is a right. Denis accordingly found that at common law the privilege had a general application at the pre trial and trial proceedings to all persons in all civil proceedings including witnesses. He also found that the privilege included the right to refuse to incriminate one’s spouse.\textsuperscript{15}

The general trend of literature on the subject of the right to remain silent suggests that the right to silence is limited to criminal matters and does not extent to civil matters.\textsuperscript{16} This position is attributable to the first misconception of the right

\textsuperscript{13}At para 11.
\textsuperscript{14}Contra Bernstein \textit{v} Bester NO 1996 (2) SA (CC) wherein the SA Constitutional Court held at paras 107 – 23, that evidence obtained under compulsion may be used in subsequent civil proceedings against a person.
\textsuperscript{16}The subject-matter of this contention is comprehensively tackled in Chapter 3 below.
to silence as a privilege. Historically, the right to silence had crystallized into a right but it remained perceived as a privilege and as such acquired a less significant status is determining the fairness of a trial or inquiry. Consequently, today England is said to have reformed its law so as to suspend the right to silence in certain instances. Other common law countries like Australia have followed in the footsteps of England. These developments in my view are likely to contribute to a slow but gradual disappearance of the right to silence in future.

Denis in view of the English common law submits that there is a distinction between the privilege against self incrimination and the right to silence and accordingly, that the privilege against self incrimination deals with the right of a person in any legal proceedings to refuse to answer questions which may incriminate them, whereas the right to silence deals with the evidential consequences in a criminal case of an accused’s failure to answer police questions or to give evidence at his trial.\(^\text{17}\)

If we are to accept the premise that that the right to remain silent is inextricably linked to the right to legal representation, the right against self incrimination and the presumption of innocence in a Namibian context which unlike the South African context does not have a separate constitutional provision for fair trial in civil matters but a single fair trial provision applicable to both criminal and civil matters, we will be inclined to presume firstly, that legal representation in civil matters is also a fundamental right accruing to individuals by virtue of Article 12 of the Namibian Constitution; and secondly, that the right against self incrimination in conjunction with the right to remain silent presupposes that a suspect has a right to defend himself by remaining silent; and finally, that the presumption of innocence requires that the guilt or culpability of the suspect be proved on a preponderance of justice scale without the aid of the suspect. It remains a fact like in criminal matters that if a suspect chooses to remain silent in the face of evidence requiring an answer and thereby fails to disprove evidence tendered by an adversary, the tribunal or court hearing the matter will conclude based on the unchallenged evidence.

\(^\text{17}\) Denis I.H., Supra. at p. 120.
Police or Investigation Phase v Trial Stage

The right to silence at the police or investigative phase of a trial according to Uglow does not derive strength merely from the presumption of innocence, but also from the privilege against self incrimination and the right of privacy.¹⁸

The rationale justifying the right to silence during police interrogations or investigations accordingly: first, in terms of the common law is to be found in the maxim *nemo debet prodere se ipsum*¹⁹ and second, is based on privacy.²⁰

Some authorities on the subject-matter have gone as far as to allege that the ‘rationale underlying the right against self incrimination is the encouragement of persons to come forward to give evidence in courts of justice by protecting them “as far as possible” from injury or needless annoyance in consequence of doing so’.²¹ This view somewhat implies that the right against self incrimination means that a suspect must defend himself and he must do so by answering questions unconditionally and asking questions advancing his defence. The implication of this view on the right to silence is that a choice to remain silent is likely to attract adverse inferences for failure to answer incriminating questions. This view leaves me with no choice but to question, and express disapproval of such rationale. This is the case because apart from being narrowly construed this view lacks vital substantiation. Some questions arising in consequence are: what exactly is the extent of the protection contemplated? Does it mean suspects are only protected against police brutality before they appear in court; does it further mean that in court it is imperative that they answer incriminating questions? and lastly, what exactly is meant by annoyance in consequence of exercising the right? The right to silence is said to apply at all stages of the trial. Accordingly one may content that a suspect’s right to silence is not limited to the police or investigative phase of the trial but extents to the trial as well.

¹⁹ No one can be required to be his betrayer.
²⁰ Article 13 of the Namibian Constitution provides citizen with a right of privacy.
²¹ See in this regard *Magmoed v Janse van Rensburg* 1993 (1) SACR 67 (A) at p. 110 and authorities referred to therein.
I am generally of the view that the limitation of the right to silence should be assessed solely and squarely in terms of Articles 22 and 24 of the Namibian Constitution titled “Limitation upon Fundamental Rights and Freedoms” and “Derogation” respectively. If not the right should be interpreted and applied in a liberal, broad and purposive manner.

2.2.3.1. Whether the court in S v Van den Berg\textsuperscript{22} was constitutionally accurate and sound in its interpretation and application of article 12 (1)(f);

In S v Van den Berg\textsuperscript{23}, wherein after numerous threats of force, evidence of pointing out was obtained from the accused who was alleged to have been unlawfully dealing in rough and uncut diamonds, the court determined that any presumption which imposes a reverse onus on the defendant to prove his or her innocence “…as opposed to the prosecution being required to prove a defendant’s guilt beyond reasonable doubt with the aid of a presumption” is “unconstitutional not only because it infringes the presumption of innocence but also the prohibition against compelling a person to give evidence against themselves”.\textsuperscript{24} This position of the court is somewhat confusing. The questions underlying this position are whether there is a distinction between on the one side, a reverse onus imposing a burden on the defence to prove its innocence and on the other, requiring the prosecution to prove a defendant’s guilt beyond reasonable doubt with the aid of a presumption.

There may be a distinction with the latter, if the court intended the word presumption not to include reverse onus presumption at all. The effect would be that the prosecution would not be able to use to its benefit the accused person’s failure to disprove the presumption by remaining silent. As a direct consequence no adverse inference will be drawn from exercising the right to silence.

\textsuperscript{22} 1995 NR 23 (HC).
\textsuperscript{23} Ibid.
\textsuperscript{24} At p. 38 F-G.
From the aforegoing it may be argued that the position of the court should have been strengthened by totally outlawing or declaring unconstitutional all reverse onus presumptions.

2.2.3.2. Whether adverse inferences of guilt may be drawn from a choice to remain silent

In *S v Boesak* it had been stated by a South African court that the right to remain silent and to be presumed innocent could have inferred consequences attached to it and thus that if there is evidence requiring an answer and the accused remains silent, the court may conclude such evidence to be sufficient proof of the guilt of the accused. It is indeed incontrovertible that if there is evidence requiring an answer and the accused remains silent the court may conclude such evidence to be sufficient proof of the guilt of the accused. Whether this state of affair is what the court meant by inferred consequences nonetheless remains ambiguous. The seemingly suggested position that the right to remain silent and to be presumed innocent could have inferred consequences attached to it is one that is incapable of withstanding criticism and scrutiny.

In their effort to shed light on the subject-matter some authorities have gone as far as to allege that the ‘rationale underlying the right against self incrimination is the encouragement of persons to come forward to give evidence in courts of justice by protecting them “as far as possible” from injury or needless annoyance in consequence of doing so’. This view somewhat implies that the right against self incrimination means that a suspect must defend himself and he must do so by answering questions unconditionally and asking questions advancing his defence. The implication of this view on the right to silence is that a choice to remain silent is likely to attract adverse inferences for failure to answer incriminating questions. This view leaves me with no choice but to question, and express disapproval of such rationale. This is the case because apart from being narrowly construed this view lacks vital substantiation. Some questions arising as a con-

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25 2001 (1) SA 912.
26 See in this regard *Magmoed v Janse van Rensburg* 1993 (1) SACR 67 (A) at p. 110 and authorities referred to therein.
sequence are: what exactly is the extent of the protection contemplated? what exactly is meant by annoyance in consequence of exercising the right?

The most instructive authority on the subject of drawing adverse inferences from a choice to remain silent to date is *Thebus v S*\(^{27}\) wherein some of the most pertinent issues included *firstly* whether it is permissible to draw an adverse inference of guilt from the pre-trial silence of an accused; *secondly*, whether it is permissible to draw an inference on the credibility of the accused from pre-trial silence; and *thirdly* whether it is permissible for an accused person to be cross-examined on why he opted to remain silent.

Moseke J in dealing with the first issue referred to the common law rule in *R v Mashelele and Another*\(^ {28}\) and said that it is well established that it is impermissible for a court to draw any inference of guilt from the pre-trial silence of an accused person. In dealing with the second issue the court determined that it may be permissible although not lightly, to draw an inference on the credibility of the accused from pre-trial silence only if the accused has been informed of the right to remain silent and has been made to understand the adverse consequences of remaining silent. In dealing with the third issue the court held that it is impermissible to cross-examine the accused on why he opted to remain silent because firstly, no accused person should have to account for the exercise of a right entrenched in the Constitution and secondly, it would be unfair to allow such cross-examination in the light of the accused person having been informed of the right to silence without at the same time being informed that he might be requested to account for the positive exercise of the right at the trial.

Some aspect of this decision requiring further scrutiny is the proposition of the court that not only should the accused be informed of his right to silence but he should be made to understand the consequences of remaining silent and should further be informed that he may be requested to account for his choice to remain silent. This proposition seems flawless and highly recommendable. However, when closely examined it appears slightly derogatory from the very essence of

\(^{27}\) 2003 (10) BCLR.
\(^{28}\) 1944 AD 571.
exercising a fundamental right to silence. Firstly, one would wish to know the provision making it permissible to inform an accused that he will have to account for the choice to remain silent in the Namibian Constitution; would such permissibility not undermine the very notion of impermissibility of drawing adverse inferences on the silence of an accused?

It is the submission of the researcher that although the *Thebus v S*\(^{29}\) approach may be sound it would seem to undermine the peremptory terms of article 12 (1) (f) of our Constitution, because it tempers with the notion of the right as a fundamental human right for which no person has to account.

### 2.4. Preliminary remarks

Having regard to the above critical review of aspects having a bearing on the right to silence and the problem and sub-problems of this research mentioned earlier in the first chapter and in particular concerning the nature, scope and impact of the word “compelled” in Article 12 (1)(f), it is apparent that firstly, all relevant duty bearers are obliged to uphold, protect, respect and maintain all suspected persons’ right to silence; secondly, the protection against self incrimination is not necessarily limited to self incrimination by compulsion; thirdly, the subject-matter of the right is not a settled numerous clauses and is not confined to specific instances and area of law; and finally, no adverse inferences of guilt may under any circumstances be drawn from a choice to remain silent.

\(^{29}\) 2003 (10) BCLR.
Chapter 3
A Critical Analysis of the Right to Silence
A literature review

3.1. Introduction

There are a number of substantially significant scholarly articles on the subject of fair trial which embrace all provisions of article 12 of the Namibian Constitution. Many aspects concerning the right to silence, however, do not seem to have been comprehensively covered by these studies. It is against this backdrop that this chapter seeks to critically analyze and evaluate relevant studies and expose their shortcomings, their bias and unreliability and with the aid of helpful studies,
advance a concrete and more realistic theoretical perspective on the right to silence which supposedly will serve as a point of departure for Namibians challenged by the progressive threat posed to the significance of the right to silence by contemporary critics and some of the developments in our post-independence case law.

Most studies on the right to silence range from analyzing, exposing, identifying, to examining the relationship between the constitutional provisions dealing with the issue of fair trial and case law\textsuperscript{30}, journals,\textsuperscript{31} criminal procedure laws books,\textsuperscript{32} law of evidence books,\textsuperscript{33} constitutional law books, and the e-net\textsuperscript{34} are valuable sources of reference in this regard. No study in particular, however, to the best of my knowledge specifically and comprehensively demonstrates the exact nature and scope of the constitutional right to silence as endorsed in Article 12 (1)(f) which this paper undertakes.

In a nutshell, the researcher wishes to explore and expose the implications of the right to silence, its hidden relations, and what has not been said about it that ought to have been said.

3.2. The debate on the right to silence

The debate on the right to silence is mainly focused on two standpoints namely the abolishment standpoint and the retention standpoint. Four interrelated critical areas of concern are at the center of the debate namely: (i) the presumption of innocence; (ii) the right to legal representation; (iii) the privilege against self-incrimination; and (iv) the issue of drawing adverse inferences. These areas of

\begin{thebibliography}{99}
\bibitem{1} S v Shikunga and Another 1997 NR 156 (SC), S v Minnies 1990 NR 177 (HC) and S v Van den Berg 1995 NR 23 (HC), Miranda v Arizona 384 US 436 (1966), Mapp v Ohio 367 US 643 (1961), S v Ismael and Others (1) 1965 (1) SA 446 (N), S v Magwaza 1985 (3) SA 29 (A), S v Masilela en 'n Ander 1987 (4) SA 1 (A) etc.
\bibitem{3} Bekker P.M. et al., Criminal Procedure Handbook,4\textsuperscript{th} ed. 1994. Juta & Co Ltd: Kenwyn.
\bibitem{5} http://www.google.com
\end{thebibliography}
concern are not the focus of this chapter, but they merit a brief discussion, because they are integral to the discussion of the right to silence.

In the Namibian JTC practice notes compiled by Geldenhuys and updated by Miller and Matswetu, it is asserted that suspects and accused persons by virtue of Article 12 (1)(f) have a fundamental right to remain silent and that such right is based on the presumption of innocence and the fact that the onus to prove the guilt of the accused rests solely on the State.\(^{35}\) I have no doubts this assertion is an appropriate point of departure regarding issues pertaining to the right to silence anticipated by Article 12 (1)(f). However, one needs to be cognizant of the fact that although, on its face the assertion seems incontrovertible a few issues remain unclear, such as for instance: the definition of suspects, and whether the presumption of innocence is inextricably linked to the right to silence. The answer to the latter issue, for purposes of this paper, is in the negative. It is contentable nevertheless that, as far as concerns the issue of ‘suspects’ the term should be defined in a broad and purposeful perspective which this paper submits as “any person before any tribunal, court or any investigative body, against whom there is a reasonable suspicion or against whom there is an apprehension of involvement in any conduct that warrants a penalty”. In such context the term “suspects” is not only confined to accused persons in criminal trials but includes defendants or suspects in civil trials or investigations.

Currie, De Waal and Erasmus seem to have a contrary view, according to them the best view seems to be that suspects and persons who are not arrested do not have the right to remain silent or the right to be informed of the right to remain silent.\(^{36}\) Although the authors are of the view that the right to silence begins at the moment of arrest they seem to be receptive of the proposed definition of a suspect as a person about whom there is a reasonable suspicion that he may be implicated in the offence and in this context their view seems to be self-contradictory and more supportive of the definition submitted above for purposes of this paper.


Similarly to Geldenhuys’s updated JTC notes, Zeffertt, Paizes, and Skeen hold the view that the right of every accused person to a fair trial includes the right to be presumed innocent, to remain silent and not to testify during the proceedings as well as the right not to be compelled to give self-incriminating evidence.\textsuperscript{37} Here, however, the right to silence is given in a fair trial context and not exclusively analyzed and evaluated. These authors implicitly seem to have lefted the floor open for debate as far as concerns the nature and scope of the right.

In their analysis of the right to silence, Bekker, Geldenhuys, Joubert, Swanepoel, Terblanche and Van der Merwe argue that whether it be at the pre-trial stage, the investigative or police phase, the pleading phase or the sentencing stage, an “… accused can remain silent even if his answers would not be self-incriminating”.\textsuperscript{38} Their view seems to suggest that the right to silence is unlimited in application and that should an accused choose to exercise it, it should be considered to be an exercise of a right to which one is legally entitled and not a concealment or obliteration of crucial evidence or the like. Specifically, according to their view “if a person has certain rights, obviously he should not be penalized for exercising those rights, otherwise the right in reality amount to nothing at best and to liabilities or traps at the worst”.\textsuperscript{39}

The analysis of Bekker, \textit{et al}, highlights some reasons pertaining to the importance of the right to silence and identify its correlating terms in terms of the SA constitutional norms and values and among them the presumption of innocence and the right to a passive defence, Some of the reasons they advance pertaining to the importance of the right include \textit{inter alia}, that: an accused may think a state’s case is so weak that it does not merit an answer; or he may not

\textsuperscript{39} Ibid. at p. 17 – 18.
trust the court or legal system; or may simply want to exercise the right to silence about which he has been informed.\textsuperscript{40}

Their analysis furthermore, takes cognizance of the fact that if, however, the state proves every element of an alleged crime beyond doubt and the accused does not raise a reasonable doubt of any element and he then chooses to remain silent the court as a matter of fact will only conclude based on the undisputed state evidence.\textsuperscript{41} Surely this argument finds support in the fact that the pursuer must prove its case on the scales of preponderance without the aid of the adversary, or the fact that the prosecution must prove its case unaided by the accused.

Opponents of the right to silence have had their remarks since ages before our independence.\textsuperscript{42} Therefore contemporary proponents,\textsuperscript{43} of its abolishment should not be viewed as valuable contributors on the subject but rather as undemocratic and campaigners of an unsettled suppressive agenda. One such opponent is Van Dijkhorst who articulates in his journal article that some aspects of the right of silence have become a procedural impediment which is illogical, unnecessary, unwarranted, unworkable and costly beyond imagination.\textsuperscript{44} The author neglected giving his contentions some substantiation.

The problem with the silence principle according to Theophilopoulos is that it lacks a rational, moral and practical justification and that once it is elevated to the status of a fundamental human right it will become inflexible and difficult to negotiate.\textsuperscript{45} The said author seems to suggest that the right to silence should not be accorded the status of a right but rather that of a privilege, and as such it should be seen as a “special treatment awarded by the state as a favour”.\textsuperscript{46} This

\textsuperscript{40} Ibid. at p. 18.
\textsuperscript{41} Ibid.
\textsuperscript{42} Such as for instance Hiemstra, V.G., Abolition of the Right not to be Questioned: A Practical Suggestion of Reform in Criminal Procedure, (1965) 82 SALJ 85; and Dugard, J., in 87 (1970) SALJ 410.
\textsuperscript{44} Van Dijhorst K., The Right to Silence: Is the Game worth the Candle? SALJ 2001 at p. 59
\textsuperscript{46} Ibid. at p. 507.
point of view is one of the misgivings in a constitutional dispensation attributable to the uncertainty surrounding the origins, the common law and statute law nature and scope of the right to silence. The right to silence in Article 12 (1)(f) of the Namibian Constitution is a right, which Theophilopoulos in his distinction rightfully acknowledges to be “an expression of a fundamental human value which, by its very nature, demands an almost absolute degree of legal protection”.

Furthermore according to Denis if the right to silence is accepted without qualification it follows that the state may be denied access to a good deal of relevant and reliable evidence.\(^47\) He substantiates his view with a concern that access to evidence of identity, fingerprints, body/blood/urine samples, possession of drugs or stolen property, intoximeter tests etcetera may be impossible by virtue such unqualified adoption of the silence principle.\(^48\) In the US the right to silence has been said to protect persons from compelled communicative activity only and that it does not apply to noncommunicative activity such as the obtaining of blood samples or fingerprints or samples etc.\(^49\) This view certainly seems appealing for adoption in Namibia and as such Denis’s view would not hold ground for abolition or constriction or limitation of the right.

A striking contention of Denis nevertheless, was that public interest in truthfinding and the conviction of the guilty should prevail over interests in maintaining the integrity of the principle that the suspect should not be used as a source of incriminating evidence. Although this contention may be convincing on the face of it, it remains a task to establish whether at the core of public interest it is actually truthfinding or the fairness of the trial and or justice that matters. If we are to accept that it is justice and the fairness of the trial that matters mostly as far as public interest is concerned as this is the case in most instances, the conclusion that silence is essential is beyond any doubt. A probably comprehensive counterargument against Denis’s contention is that of Cross who acknowledges in his literature that the idea that a man should be compelled to give answers exposing him-

\(^{47}\) Denis I.H., Supra. at p. 132.
\(^{48}\) Ibid. at p. 132 – 133.
self to the risk of criminal punishment has always been repellent to public opinion.  

The right to silence should never be accorded the status of a privilege given the historical legal background of Namibia and its hard earned post-independence fair and transparent legal system that is subject to only the supreme Constitution. It is a fundamental human right and should enjoy that status and should, if further developed be amplified by adding more immunities to the already existing immunities rather than subtracting.

3.3. Preliminary remarks

It is probable as the literature review of the subject implies that the right to silence is unlimited, has its intrinsic ramifications, and should never be detracted. What is fundamental, nevertheless, to our understanding of the right to silence is the importance of the fact that suspects and accused persons by virtue of Article 12 (1)(f) have a fundamental right to remain silent and that such right is based on the presumption of innocence and the fact that the onus to prove the guilt of the accused rests solely on the State in criminal matters whilst in civil matters he who alleges must prove.

Some aspects of Van Dijkhorst’s study that vitalizes my submission in the previous chapter that the right should be equally seen to be applicable to civil matters relate to investigations permitted under the Inquests Act, Insolvency Act, Inspection of Financial Institutions Act, Companies Act 61 of 1973 and Criminal Procedure Act. My concern is whether it is really in the interest of justice when the court knows the truth by virtue of testimonies submitted in a civil trial and deliberately ignores or excludes the applicability of such evidence in a subsequent criminal trial. Van Dijkhorst submits that in 1999 Judge J H Hugo questioned the

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51 See Chapter 2 above.
52 Act No. 6 of 1993
53 Act No. 24 of 1936
54 Act No. 38 of 1984
55 Act No. 61 of 1973
56 Act No. 51 of 1977
right to silence when he poignantly recounted his obligation to discharge a murderer, who in court confessed to the crime in the trial within the trial, due to our strange rules of evidence which by virtue the right to silence prevented that fact to be used against him.\footnote{Van Dijkhorst K., Supra.} I agree that this indeed is a very strange rule but should it be rectified my proposal unlike that of Van Dijkhorst of abolition is that silence should equally be applied to civil matters in order to equally render the “truth the truth” whether it be in civil or criminal matters.

Chapter 4
Reasons for the Conclusion
Research Findings

4.1. Introduction

This chapter will embark on a brief discussion of the contents of Article 12 (1)(f) of the Namibian Constitution and elicit the magnitude that ought to be accorded to this Article in view of existing jurisprudential views and developments that have been reviewed and critically analysed in chapters 2 and 3 respectively.

4.2. The right to silence and its dimensions

Article 12 (1)(f) reads:
“No persons shall be compelled to give testimony against themselves or their spouses, who shall include partners in a marriage by customary law, and no Court shall admit in evidence against such person’s testimony which has been obtained from such persons in violation of Article 8 (2)(b) hereof.”

First and foremost the provision obliges all relevant duty bearers to uphold, protect, respect and maintain all suspected persons right to silence. It states in peremptory terms that “no person shall be compelled to give testimony against themselves or their spouses”. This renders all suspects incompellable and incompetent witnesses not only against themselves but also against their spouses. The provision furthermore and cumulatively prohibits the admission of evidence obtained from such suspects or their spouses through torture or cruel, inhuman or degrading treatment or punishment.

4.3. The right to silence: A Namibian post vs. pre-independence constitutional dispensation perspective

It is necessary to strictly adopt a liberal approach towards the interpretation and application of the right to silence in Namibia. Although opponents of an expansionist view of the right to silence deems it not so necessary nowadays, it seems that the necessity to adopt a liberal, broad and purposive interpretation is provoked by past injustices inherent in the pre-independence constitutional dispensation’s legal system.

Some very persuasive authorities on the subject-matter held that the right to silence is firmly rooted in our common law and statute. It was asserted that it is by virtue of the common law doctrine of *nemo debet prodere se ipsum*, that an accused has a right to defend himself by remaining silent or by not incriminating himself.

Although I do not dispute the fact the our criminal procedures and evidence rules concerning the right to silence have their origins in English common law and is

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58 Such as Hugo, J.H., A Tale of Two Cases 1999 SAJCJ 204; and Nugent, R.W., Self-Incrimination in Perspective, 1999 SALJ 501.

59 See in this regard Osman and another v Attorney-General, Transvaal 1998 4 SA 1224 (CC) at p. 17 and S v Boesak 2001 (1) SA 912.

60 Geldenhuys T., Supra. at p. 30.
apparent in some sections of the Criminal Procedure Act\textsuperscript{61}, and the Civil Proceedings Evidence Act\textsuperscript{62}, I do propose that the definition, nature and scope of the right should be explored, examined and exposed in a liberal and a purely post-independent Namibian context without reference to such common law and statutory provisions. This approach is necessary because an analysis of the right in a common law or statute context somewhat raises uncertain, ambiguous and improper conclusions and views that, seem to undermine the spirit of our democratic notion.

The prevailing trend of literature and case law on the right to silence has almost been exclusively focused on a common law and statute context. Although absolute divergence from such approach is not recommendable, it remains our duty in interpretation to uphold, protect and develop our right to silence jurisprudence in a manner that promotes the spirit, purport and objectives of fundamental human rights in a democratic society. This line of reasoning somewhat finds support in the words of the then Mahomed AJ in \textit{S v Acheson}\textsuperscript{63} where he said:

\begin{quote}
"The spirit and tenor of the Constitution must ... preside over and permeate the process of judicial interpretation ... Crucial to that tenor and that spirit of the Constitution ... is its insistence upon the protection of personal liberty, respect for human dignity ... and the presumption of innocence."\textsuperscript{64}
\end{quote}

A closer examination of this quotation reveals that, when interpreting, upholding or enforcing the premise of Article 12 (1) (f) any inquiry, interrogation, or examination should start with a supposition that the suspect is innocent, and regard should accordingly be had to protecting the personal liberty of the suspect and respecting his dignity. In so doing, an examiner will through his investigation, interrogation or examination, bear in mind the fact that the suspect has no obligation to assist the investigation or so. It is accordingly an exclusive task of the ex-

\textsuperscript{61} Act No. 51 of 1977. i.e. s 196 (1)(a) and s 203;
\textsuperscript{62} Act No. 25 of 1965. i.e. s 14.
\textsuperscript{63} 1991 NR 1 (HC).
\textsuperscript{64} At p. 3 B – C.
aminer or investigator to solely gather and establish enough evidence against a suspect without the aid of such suspect.

In the previous dispensation exclusionary rules did not apply and accordingly, all relevant evidence was admissible irrespective of how it was obtained. This fact alone somewhat raises doubt as to whether the right to silence had any significance in the fairness of the trial in pre-independent Namibia. It is in ove of this uncertainty, that the right to silence should be skeptically interpreted and applied in our democratic post-independent dispensation. The common law on the subject of silence is clouded with many uncertainties which will only open up a “Pandora’s box”. If the right is to be construed in terms of the common law it is most likely to favour the State, because most laws during the Parliamentary Sovereignty era were designed to be strategic tools to vest the prosecution or the State with somewhat infinite powers.

However, if a liberal view is to be adopted the peremptory terms of Article 12 (1) (f) would implicitly make it a non-derogable principle that courts do not enjoy a judicial discretion to allow or disallow evidence obtained in violation of the right to silence, but rather, that courts must as a matter of obligation disallow any evidence obtained in violation of the right to silence unconditionally. This exclusionary approach would be comparable and in line with the American jurisprudence on the subject, in terms of which unconstitutionally obtained evidence must be rigidly excluded.

4.3. Definition, nature and scope of the right to silence

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65 Notable exceptions of course related to admissions, confessions and to acts of pointing outs. Thus generally in terms of our common laws, a court would be obliged to concern itself only with the question of whether evidence obtained illegally and improperly is admissible, relevant and reliable and not how it was obtained. Authorities for these views include inter alia: Ferreira v Levin NO and Others; Vryenhoek and Others v Powell NO and Others 1996 (1) SA 984 (CC); S v Ismael and Others (1) 1965 (1) SA 446 (N); S v Magwaza 1985 (3) SA 29 (A); S v Masilela en ‘n Ander 1987 (4) SA 1 (A); S v Nel 1987 (4) SA 950 (W); and S v Mathebula and Another 1997 (10) SACR 10 (W).

The most commonly accepted and probably comprehensive definition of the right to silence is that referred to, by Lord Mustill in *R v Director of Serious Fraud Office, Exparte Smith*\(^{67}\), as a desperate group of immunities, which include:

1. A general immunity, possessed by all, from being compelled on pain of punishment to answer questions posed by other persons or bodies.
2. A general immunity, possessed by all, from being compelled on pain of punishment to answer questions the answers to which may incriminate them.
3. A specific immunity, possessed by all persons under suspicion of criminal responsibility whilst being interviewed by police officers or others in similar positions of authority, from being compelled on pain of punishment to answer questions of any kind.
4. A specific immunity, possessed by accused persons undergoing trial, from being compelled to give evidence, and from being compelled to answer questions put to them in the dock.
5. A specific immunity, possessed by persons who have been charged with a criminal offence, from having questions material to the offence addressed to them by police officers or persons in a similar position of authority.
6. A specific immunity (at least in certain unmentioned circumstances), possessed by accused persons undergoing trial, from having adverse comment made on any failure (a) to answer questions before the trial, or (b) to give evidence at the trial.

It is the submission of the researcher, having regard to the aforementioned post v pre-independence revelation, that the constitutional right to silence provided for in article 12 of the Namibian Constitution should be construed, understood and adopted in view of the above immunities. Such construction is in line with Articles 140\(^{68}\) and 66\(^{69}\) of the Namibian Constitution.

The right to silence accordingly may be said to be bold, in prohibiting the adoption of legislation or actions that compel individuals to answer self condemning questions. The prohibition as projected by the above immunities ought to be applicable to criminal as well as civil trials, and is not necessarily limited to criminal trials.

\(^{67}\) [1993] AC 1 (HL) at p. 30.
\(^{68}\) In terms of Article 140 titled “The Law in Force at the Date of Independence”

“(1) Subject to the provisions of this Constitution, all laws which were in force immediately before the date of Independence shall remain in force until repealed or amended by Act of Parliament or until they are declared unconstitutional by a competent Court.”

\(^{69}\) And Article 66 titled “Customary and Common Law” provides that

“(1) … the common law of Namibia in force on the date of Independence shall remain valid to the extent to which such … common law does not conflict with this Constitution or any other statutory law.

(2) Subject to the terms of this Constitution, any part of such common law … may be repealed or modified by Act of Parliament…”
This view can be supported using the flexibility inherent in international instruments.\textsuperscript{70} The nature and scope of the right in view of existing international instruments provisions on the subject is not delineated to specifically and exclusively accrue to criminal trials. Although most international provisions on the subject of silence seem to suggest application in criminal trials only, cognizance should be taken of the fact that none of those instruments explicitly or implicitly rule-out the applicability of the right to civil matters.

4.4. Preliminary remarks

It is crucial to develop a concrete perspective on the right to silence that is independent of colonial South African juridical influences which, seem to undermine the value of our Constitution. In Namibia, therefore the right to silence must be construed, understood and adopted in a manner that is in harmony with the spirit of our democratic Constitution. That view the researcher submits is one that takes cognizance of all immunities outlined by Lord Mustill in \textit{R v Director of Serious Fraud Office, Exparte Smith}\textsuperscript{71} in the widest sense.

Article 12 (1)(f) obliges all relevant duty bearers to uphold, protect, respect and maintain all suspected persons right to silence. In such regard the right to silence is not necessarily limited to criminal trials but extents to civil trials.

\textsuperscript{70} See fn 1 Chapter 1.

\textsuperscript{71} [1993] AC 1 (HL).
Chapter 5
Conclusion and Suggestions

5.1. Introduction

This chapter, taking cognizance of the discussed implications of the Namibian Constitution, aims to provide a synopsis of a few potential policy options, aimed at maximizing the positive impact of the Constitution on the right to silence.

5.2. Contextualizing the right to silence within Constitutional expectations

It is a general jurisprudential expectation that fundamental human rights should not be minimized, but should rather be expanded. Such expectation is consistent with and compliments the requirement that such rights must be interpreted
liberally, broadly and purposively. A fundamental issue of concern in this regard is whether there is a need to enact legislation and policies that could be instrumental in reforming our right to silence jurisprudence. It is in deed from a rational point of view appropriate and necessary to go for reform with a view of expanding the right to silence. This does however not imply that the right to silence is a right lacking real content, but simply that reforming will enhance the scope, content and implications of the right.

5.3. Conclusion

The subject of concern in this dissertation as demonstrated in chapters 1 and 2 is whether the constitutionally entrenched right to silence is limited to examinations or investigations compelling answers or the compulsion contemplated relates to evidence obtained in violation of Article 8 (2)(b) only. In this regard, the researcher has found compelling arguments from both standpoints of the debate on the subject. Such a position certainly favours the idea to reform our right to silence jurisprudence so as to have a comprehensive yardstick. Recommendations advanceable for policy consideration, in such regard include

*inter alia:*

- The right to silence, should be construed, understood and developed in terms the definition advanced by Lord Mustill as a “group of immunities”;
- The right need not necessarily be confined to criminal trials but must be extended to apply in civil investigations or matters that are associated with severe penalties;
- Maintain the current position that no adverse inferences may be drawn from a suspect’s choice to remain silent;
- Statutorily introduce the requirements for valid confessions to testimony obtained from a suspect i.e. that the testimony must be made while sober, freely, voluntarily and without undue influence;
- Rigidly exclude unconstitutionally obtained evidence, specifically if it violates fundamental human rights;
Legally consider suspects and their spouses to be incompellable and incompetent witnesses against themselves.

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