# *PROCEDURAL SAFEGUARDS OF PRIVILEGE AGAINST SELF-INCRIMINATION UNDER FDRE CONSTITUTION*

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# INTRODUCTION

The most significant and pressing problem in a constitutionally governed society is the necessity to effect a balance between two fundamental interests in a society: the interest in prompt and effective law enforcement and the interest in preventing the right of individuals from being abridged by unconstitutional methods of law enforcement. Nowhere is this problem more evident than in the conflict surrounding the implementation of privilege against self-incrimination.

Under the constitution of FDRE, individuals are protected from compulsory self-incrimination. But the matter does not end there. At the time the police attempt to secure evidence of guilt from the suspect, the interest of the state and that of individuals squarely confront. This confrontation involves power that can put pressure on individual to endanger their privilege. Besides, lack of awareness of one's right on the part of individuals adds a fuel to the problem.

Accordingly, it is the core theme of this paper to see how the privilege against self incrimination is safeguarded at the very moment it is likely to be violated. In U.S.A in addition to the right to remain silent suspects will be cautioned of their right to counsel as a procedural safeguard to self-incrimination privilege. What about under FDRE constitution? Do suspects have the right to counsel at police interrogation stage of criminal process? What remedies are available for constitutional violations relating to self-incrimination clause? Are the existing checks on law enforcement effective to safeguard individual's privilege against self-incrimination? These and similar problems are to be dealt with in the paper.

In this light, the paper is divided in to three chapters with conclusion and recommendation. The first chapter deals with the privilege against self- incrimination, its concept, rational and coverage.

The second chapter looks in to the procedural safeguards, as existing under FDRE constitution, of privilege against self-incrimination. The right to remain silent is one of the procedural safeguards and the police are required to give warning of such right immediately after arrest. However, the matter is not so clear with the right to counsel. In this chapter it will be seen whether right to counsel is also a procedural safeguard under FDRE constitution.

In the third chapter, how effective are the safeguards to protect individuals from compulsory self- incrimination will be seen. Together with this, the remedies available for the violation of the privilege and related constitutional provisions will be seen. Police interrogation stage of criminal process is a high time for the likely violation of the privilege. So, this chapter also looks in to the sufficiency of existing procedure as a check on the police. The need of examination of suspect by an independent tribunal for the purpose of securing evidence of guilt is also part of this last chapter.

Finally, the discussion will come up with concluding remarks and recommendation.

# CHAPTER ONE

# PRIVILEGE AGAINST SELF INCRIMINATION

## 1.1. CONCEPT OF THE PRIVILEGE

The word privilege is defined as a peculiar right held by person or class, not generally by others.[1] Accordingly, the privilege against self-incrimination is peculiar right held by a person or class with out generally being available for others. The question is who are these persons or class holding the privilege. Since the privilege is meant to protect person from the evil engine of criminal law process, those persons as are subjected to the operation of the criminal justice system are holding the privilege.

In particular persons who are suspected of committing a crime, namely, suspects [2] are those predominantly availing of the privilege. In addition, there is a situation where a person is risking his future prosecution on the basis of self-incriminatory information. In this case, there is a potential subjection to the operation of criminal justice system. This happens when an ordinary witness, required to give his testimony to be used as evidence in a prosecution against another person, releases an information which is incriminatory to himself. The privilege is the right of these categories of persons to be free from compulsion of state requiring them to give evidence exposing the same to criminal liability.

The privilege against self incrimination is also an aspect of adversary system in which person subjected to the criminal justice system are not duty bound to cooperate the law enforcement officials in making a case against them. By contrast, in non adversary or inquisitorial system characterized by active fact finding process modeled on scientific investigation, the privilege would be inconceivable since, as the accused necessarily knows the most about the charge, the fact finder may elicit information the accused would not choose to produce on his behalf.[3] Needless to repeat, in a system where the accused's adversary posture towards the state is recognized, suspects have no legal

obligation to aid the prosecution by giving an information from their own mouth and necessary to condemn them before the law.

However, it does not mean that the criminal defendant is privileged from being approached at all or the official will decline to accept a spontaneous statement from him. It only means law enforcement official are bared from compelling the suspect to testify against himself but not from obtaining willed information from him. Thus, the way the privilege is recognized (i.e individuals are not privileged from giving willed self-incriminatory information but the compelled one) has a balancing effect between two important values-the interest of the state to prosecute those thought to be criminals and the interest of individual members of the state to be free from state interference. If the interest of the state is pushed to its extreme, individuals need not have the privilege. If again, the interest of the individuals is pushed to its extreme, they should even be privileged from the prosecution's use of willed self-incriminatory information against them as an evidence. But since any legal system is basically to govern the relationship between individual member of the society on one hand and the individual members and the state on the other; the conflicting situation between these relationships should result in the adoption of legal principle, which balances the same. The rational is that life and liberty could as much be endangered by irregular enforcement of the law as by actual criminal themselves and hence, the government should not have unfettered powers to prosecute. So the privilege against self-incrimination represents a basic adjustment of power and right of individuals and of the state.[4]

The essence of the privilege against self-incrimination, in short, is that no one should be required to betray himself out of his own mounth.[5] From all above observation, the privilege may be summarized as the freedom of persons, subjected actually or potentially to criminal justice process, from governmental coercion to give testimony which could be used as evidence in a criminal proceeding against them.

## 1.2. POLICY OF THE PRIVILEGE

The ethics of crime control is based on the proposition that the repression of criminal conduct, for the purpose of protecting the society from crime and criminals, is by far the most important function to be preformed by the criminal process. This in turn demands, perhaps, a high trust upon law enforcement officials. The privilege against self-incrimination; however, is based on the assumption that the governmental exercise of power in enforcing the law has the potential to negatively affect individual right and liberty and, hence should be limited. For this reason, the privilege has been criticized as favoring those thought to be criminals.

An early and still celebrated denunciation of the privilege was made by one prominent legal scholar who views its recognition as changing criminal trials into sporting events, where the purpose it would serve is to equalize the sides so that the event is more interesting .[6] So for him, the privilege changes criminal process into a fight or game making a fun out of the suspects chance of escape.

Furthermore, it has been argued that, the co-existence of the privilege with legitimated desire to obtain evidence has done a great deal to encourage abusive police tactics.[7] That is, on the one hand, it is legitimate under the privilege to obtain willed evidence of guilt from the suspect. On the other, the constitutional privilege that suspects should not be compelled to testify against themselves is a serious obstacle to the detection of crime. So, the police deprived of the assurance for orderly questioning, may tempt to bully their detainees in to admission suggesting line of investigation usable to turn up other evidence of guilt. Still other authorities have argued that the privilege should better be abolished for it presents an inconsistency:

> "We could indeed abolish the privilege and instead accord the suspect and the accused as well as the witness fearing incrimination a much more comprehensive relief, namely, immunity to lie.[8]

The idea of this argument is that, in some legal system predominantly of civil law nature, there is a comment to be made when the suspect, the accused or the witness claim the privilege. This is the inconsistence with the privilege. To dispense with this, the argument goes, the privilege should be abolished. In its place individuals should be allowed to lie when their interest and the interest of the community come in to conflict.

So, it is noteworthy that, the privilege against self-incrimination has not been accepted so far with out challenge. In particular, the privilege no doubt limits the power of the state to control crime, Hence such a limitation must be based on more basic policy considerations than for mere purpose of restricting the power of the government in the law enforcement.

One such a consideration, though very general, is based on the relationship existing between the state and its individual members. That is even though a person is thought to be criminal, the state must follow certain established procedures to prosecute him, for the state is a means than an end in itself to engulf its subjects.[9] Particularly the government should have a clean hand when it assumes the dubious right to punish.[10]

Other specific policy consideration of the privilege are: first, protection of individuals from governmental abuse of power. In a given state, the government is vested with the task of protecting the society from disorder and lawlessness. For this purpose, it exercises certain power capable of affecting the right and freedom of individuals. In particular, when the government enforces criminal law a suspect could be found to be the best source of evidence available for the prosecution. In such case, the law enforcement officials could resort to use physical brutality or psychological pressure against the suspect to extract self-incriminatory statement.

However, since the privilege entitles the suspect to a right not to testify against himself, it presumably protects him from such an abuse, " One of the most important function of the privilege is to protect all persons, whether suspect of crime or not, from abuse by the government of its power of investigation." [11]

On the other hand, the privilege, it is agued, has the effect of encouraging abusive police tactics than the reverse. However, one may compare the situation where there is prohibition of compelling the suspect to incriminate himself and where there is no such prohibition, to see in which case abuse is likely to occur. It goes without saying that abusive police tactics will be likely where there is no prohibition from compelling ( in the absence of the privilege), because in such case the suspect will have a duty and there will be right to compel him .Thus the privilege has as its important policy to protect individual's particularly criminal defendants from governmental abuse of power.

It is important to note that the protection of suspects from having undue physical and mental pressure is both for humane reason and because statements so obtained are likely to be unreliable .[12] But the reliability of evidence has no primary importance, for that will mean admission of evidence obtained under coercion if found out to be reliable by other facts collaborating it. Therefore protection from abuse of powers is an end in itself, which the privilege purports to ensure. To better express the point:

> "---- Despite the fact that the privilege, in effect may contribute to obtaining trustworthy statements from the accused, the policy of the privilege is not to ensure trustworthiness but to prevent the accused from being subjected to undue psychological pressure or to physical abuse. [13]

The second policy consideration of the privilege is establishing a fair procedure for criminal trial. The privilege against self-incrimination is one of the rules, which require the prosecution to prove the guilt of the accused with out the compulsory aid of the latter. In the setting of criminal trial, there are two parties-the state represented by the prosecution and the criminal defendant. The disposition of the case depends on the struggle between these two parties for just judgment. Such structure of an adversary system is not designed, as has been argued, to make a fun out of the game; [14] but is an efficient engine for the production of truth. [15]

In the absence of the privilege; however, the prosecution could call the accused as the first witness and attempt to elicit from him incriminating admissions.[16] The privilege protects him from being so called, as a witness against his will. More importantly the state is required or has a burden to prove the guilt of criminal defendant by independent evidence. Such a system not only contributes toward efficient production of truth but also establishes a fair procedure having regard to the position of the suspect and that of the state. Wigmore confirms this as:

> "The privilege contributes toward a fair state individuals balance by requiring the government to leave the individual alone until good cause is shown for disturbing him and by requiring the government in its contest with the individual to shoulder the entire load."[17]

However, requiring the state to rely only on independent evidence to prove guilt according to Canadian judge Riddle J. goes too far:

> "We have not yet arrived at the point that one accused of crime has so many and so high rights that the people have none. The administration of [our] law is not a game in which the cleverer and more astute is to win;---- it is the duty of every citizen to tell all he knows for the sake of the people at large;-----."[18]

It is true that the interest of the public to be protected from crime and criminal require a duty up on every citizen including the suspect to give any information to the state. But since the state has much better machinery as well as resources for protesting its interest than its subjects, it should be able to prove guilt by means of independently obtained evidence.[19] This in turn has the effect of strengthening fact-finding process in the administration of justice as it " spurs the prosecution to do complete and independent investigation,". [20] With out the privilege the system will suffer. In the words of Wigmore"---any system of administration which permit the prosecution to trust habitually compulsory self disclosure as a source of proof must itself suffer morally there by.[21]

nature of disclosure does it protect. One important and logical exclusion can be made at this point regarding the person to whom the privilege applies. That is, there is no the privilege of legal person, eventhough it may sometime be fined for certain violations; for one thing the very criminal liability of artificial person is questionable for want of intention element of crime. For another, even if an entity is found to be involved in certain violations entailing criminal liability, it cannot assert or claim the privilege through its representative because the privilege is personal in nature .[25]

Further, as will be seen in the latter parts of this section, the privilege protects disclosure of testimonial nature .[26] And there is no way that legal person can disclose testimonial evidence on its own. For all these reasons artificial person are excluded from the coverage of the privilege. Thus the privilege applies to physical person alone.

### 1.3.1. Persons Protected

As indicated above, only human person can avail of the privilege as opposed to legal person. But not every human person can practically claim, though it potentially protects all human persons. Thus some constitution provides the privilege for some category of person while other provide as applying to all persons. In the former category is the FDRE constitution providing the privilege for arrested person per Art 19(5) and for accused person per Art 20(3) of the same constitution. In the latter category is the U.S constitution providing in its Fifth Amendments as, "[N] o person ---- shall be compelled in any criminal case to be a witness against himself.[27] Under this constitutional provision every body whether actually suspected of committing a crime or not can claim the privilege. Under FDRE constitution; however, this does not seem to be the case and it needs analysis.

**A) Suspects**

A suspect by definition is a person who is reputed to be involved in a criminal activity.[28]. Due to such supposed involvement in the commission of crime, he will actually be subjected to the process of criminal justice system. The way the FDRE constitution provides the privilege in a limited fashion is logical because if a person is not

subjected to the process, there is no point to extend the privilege to him, as there is no danger of incrimination. But the problem is, the constitution in its language does not include even those who are actually subjected to the process.

To bring the matter down to earth, let see suspects in three categories: first there are suspects who are under arrest. Second, there are also suspects who are under investigation but not yet arrested. Thirdly, there are also suspects who are formally charged in the court of law. These latter suspects are called accused. The question is which of these categories of suspects are accorded the privilege under FDRE constitutions.

The constitution clearly provides the privilege for arrested [29] and accused [30] persons. However, it is not clear as regards the other category of suspects (those short of arrest). These suspects may be those summoned by police officer for purpose of investigation .[31] Two opposing view points could be made regarding the privilege of such suspects.

On the one hand, an arrested person is not to be compelled to testifying against himself and a person merely suspected but short of arrest should not be compelled for it will be unfair to so compel. On the other hand, burdening law enforcement officials to go on independent investigation with out first being required to establish a case before independent tribunal like in case of arrested person is, illogical and therefore the officials need co-operation of summoned persons. That means the privilege should not apply to summoned person.

However, the latter argument is weak by the fact that, while it is true that arrested and summoned persons are not on equal footing as regards the case against them, it is all the same because they face the same consequence under Ethiopia system. That is, both could only be released conditionally.[32] Therefore, the privilege should apply to summoned person as well, for fairness reason. The criminal procedure code of Ethiopia also provides for the privilege of summoned person.[33]

In Germany too, a person who has been validly arrested, or a person, although not arrested, who is suspected of having committed a crime is entitled to claim the privilege.[34]

In spite of all these, the FDRE constitution, it could be argued, has not provided for the privilege of summoned persons. But these persons can avail of the privilege per Art 27 of criminal procedure code of Ethiopia without contradicting the constitution; because even though it has not directly recognized, it has not excluded the possibility that statue may provide.

Given that suspects, as understood above, have the privilege against self-incrimination; it is in the nature of their privilege that they are entitled to decline from taking a stand against themselves. They are protected from giving any response to questions put to them what ever its nature is, just by the mere fact of being a criminal suspect (except questions regarding their name and address).[35]

It will, therefore, be a violation of the privilege, if the suspects are compelled to testify against themselves.[36] However they can legally be interrogated in spite of the privilege [37]. The implication here is that, the privilege could be waived. There is a strong policy reason for the waivability of the privilege in addition to the argument that the suspect can waive it because it is to his benefit. That is to control crime the state should be able to get willed information of the crime from the suspect. So, unless the suspect willingly waived it, the privilege protects him from any inquisition by the state.

For the party defendant in a criminal case, the privilege has been construed to permit him to refuse to answer any question whatever in the cause .[38] In this case, the defendant is protected from giving response that will incriminate or tend to incriminate him. But why is he entitled to refuse any question whatever its nature i.e. whether the answer is incriminating or not? Wigmore responds to this question in the following way:

> "The privilege applies to any fact which is relevant to a proceeding whose sole or essential object is to charge the claimant with a specific crime. The accused in a criminal case, therefore, is exempt from all answers, for ,--- they are incriminating ."[39]

So, when a criminally suspected person is under investigation, the response sought from him, in one way or another, relate to his alleged criminal activity. That is, it will at least tend to incriminate him. Hence the privilege entitles him to refuse to answer any question put to him by an official in charge. This position holds true under Ethiopia law from the fact that suspects have the right to remain silent.

**B) Witness**

Privilege of the witness, as opposed to that of a suspect, is merely an option to refuse and not prohibition of inquiry [40]. The witnesses are there to give their testimony about the criminal activity of another and they cannot claim the privilege on behalf of that another person. That is why they cannot totally refuse toe answer any question. If the witness could assert the privilege on behalf of another, proving the guilt of a person by the state will be very difficult, if not impossible. Therefore privilege against self-crimination could only be claimed personally.

The witnesses privilege is restricted not only by the fact that they have to specifically claim than out rightly refuse to answer any question put to them, but also by the difficulty of determining whether that specific answer will expose them to criminal charge. What appears incriminating for the witness may not be so for the investigator or the judge. In other words, the determination whether the answer will incriminate them is not left to the witness. This restricts witness privilege.

The criminal defendants privilege has been shown to be recognized under FDRE constitution and the criminal procedure code. But what about the witness privilege? The criminal procedure code provided for witness privilege but only of those under police examination .[41] So, whether witnesses in the court room could have the privilege is

unclear from the code. In addition, the FDRE constitution nowhere provides for the privilege of the witness. Thus it remains for the forthcoming statute like evidence law to come up with the privilege of witness in the full sense.

Eventhough not yet a law the Draft Evidence rules of 1967 has provision on witness privilege. It provides that ordinary witnesses are not excused from answering any question up on the ground that the answer will criminate or tend to criminate them .[42] This apparently means they do not have the privilege against self-incrimination. However, the privilege is restored by immunizing the witness from any future prosecution upon on the incriminating evidence so obtained .[43] That is, by definition the privilege is prohibition of compulsion to elicit incriminatory statements from a person so as to use it in criminal proceeding against him. So, if the evidence so obtained is not to be used in criminal proceeding against the persons compelled, there is no violation of the privilege. Thus witnesses have the privilege against self-incrimination under Draft Evidence rules of 1967.

Moreover, it is not similar with suspects' privilege in that, there is a duty to testify whether incriminatory or not in case of witness privilege. This duty may entitle the law enforcement to legally demand the testimony against the will of the witnesses. The question is, how could witness privilege succeed in protecting witnesses from abuse of power. The policy of the privilege to protect witnesses from abuse of power still works for; first, the duty to testify does not suggest the officials use of physical brutality or psychological coercion. Second, the witnesses testify in the courtroom where there is no danger of coercion. Third, the attitude of the government is not aggressively adversarial or prosecutorial toward ordinary witness to invite coercion.[44]

Further, imposing a duty up on witnesses to disclose even self incriminatory information is important because otherwise, the state will be handicapped in its search for ndependent evidence as there will always be a fear on the part of the witness to be nplicated. The total non- recognition of witness privilege may also discourage the eople to come to the aid of the state with pertinent information regarding the criminal tivity of the suspect for fear of their own incrimination. Therefore, it is interesting that

these two situations have been take in to consideration in the 1967 Draft Evidence rules of Ethiopia in that witnesses have the duty to testify whether they incriminate themselves or not, but immunized from future prosecution on the basis of that testimony.

### 1.3.2. Nature Of The Protection

The essence of the privilege against self-incrimination is that no one should be compelled to disclose facts that will be used as evidence in a prosecution against him. This facts protected from disclosure are distinctively facts involving criminal liability and hence facts involving civil liability are entirely beyond the scope of the privilege .[45]

Incidentally, since incriminatory facts could sought to be disclosed either in civil or criminal proceeding, the privilege could perhaps be extended to disclosure in both proceedings. Put another way, in as far as there is a possibility for compulsion to disclose self incriminatory fact, it seems, whether the proceeding is criminal or civil does not matter for the application of the privilege.

For instance, a summoned, arrested or accused person could be called as a witness or appear as a defendant in a civil suit. In such case, if these persons appear as defendant in the civil suit their position will be assimilated to that of ordinary witness for purpose of claiming the privilege. [46] That is, they claim the privilege with regard to specific questions and not an out right refusal because it can't be assumed, in a civil case, that all disclosures sought will be incriminatory matter.[47]

It is noteworthy that witness privilege as provided under Ethiopian Draft Evidence rule of 1967, [48] is less protective to suspects appearing in civil proceeding either as witness or a defendant, because the prosecution has already been started against them and; once they have disclosed the fact as they have the duty, it will be unfavorable for them. That is, under the said Draft rules of evidence witnesses have the duty to testify whether it is incriminatory to them or not, but immunized from future prosecution as has been seen under witness privilege. The immunity from future prosecution does not help for witness against whom the prosecution has already been started (i.e. suspects

appeasing as a witness in civil suit). So, the way witness privilege is recognized under draft evidence rule of 1967 per Art 102 is unfavorable for suspects appearing as a witness in civil proceeding

To come back to the point, the privilege in short protects facts entailing criminal liability as opposed to facts entailing civil liability whether that is sought to be disclosed in civil or criminal proceeding. However, not all incriminatory facts are protected. Thus, it is imperative to see what types of incriminatory facts are protected.

**A) Testimonial**

Evidence is said to be testimonial when elicited from a witness in contrast to documentary or real evidence. [49] It is this type of evidence that the privilege protects from compulsory disclosure.

> " The history or the privilege suggests that the privilege is limited to testimonial disclosure. It was directed at the employment of legal process to extract from the persons own lips an admission of guilt which would thus take the place of other evidence."[50]

In other words, the privilege is intended to prevent the use of legal compulsion to extract from a person, communication of his knowledge of facts, which would incriminate him. [51] It is important to note that a mere communication does not qualify for the protection, unless it is one's knowledge of facts that are addressed. So when a person is required to make a voice for identification purpose, he can't claim the privilege to refuse to speak because that is only a mere physical identification than one's knowledge of fact, which would incriminate him.

Confessions or admission, which an arrested person is protected from being compelled to make under FDRE constitution, [52] are testimonial in nature because both are statements of a person about criminal guilt. Confession is a direct acknowledgement of guilt while admission is a statement tending to prove guilt [53]. So, in both case

communication about one's knowledge of fact that would incriminate him is protected from compulsory disclosure.

**B) Non Testimonial**

Non-testimonial evidence is a documentary, or real or physical evidence. The privilege against self incrimination is a bar against compelling communication of testimony, but compulsion which make the suspect or accused the source of real or physical, evidence does not violate it .[54] That is, non testimonial disclosure does not fall with in the purview ofthe privilege.

The taking as evidence of physical characteristics of person by compulsion, such as finger printing, photographing, writing or speaking for identification, appearing in court, walking or making particular gesture, therefore will not violate the privilege. That is, the compelled display of identifiable physical characteristics infringes no interest protected by the privilege .[55] Mr. justice Holmes explained that,

> " The prohibition of compelling a man in a criminal court to be a witness against himself is a prohibition of use of physical or moral compulsion to extort communication from him not an exclusion of his body as evidence when it may be material."[56]

Some of the physical characteristics of a person are openly visible and hence easily accessible to the police while other may only be secured through intrusion in to the person's privacy. Among the latter are found the blood or urine test. These physical characteristics do not violate the privilege, but whether there should be a warrant procedure to secure such evidence may incidentally be asked. The police have the discretion under criminal procedure code to order physical examination, including blood test, of a suspect.[57] From this, it does not appear that warrant procedure exists to secure such physical evidence. But the intrusiveness of this examination would seem to require a fining that they are searches or seizure or; if intrusiveness a lone is not enough, the

possibility for police abuse are sufficient to justify employment of the warrant procedure.[58]

It has been shown that compulsory disclosure of testimonial evidence is protected under the privilege as a opposed to non testimonial evidence. But why is such distinction while both expose one to criminal liability is the question that comes to mind. First, it is only in testimonial disclosure that the fundamental sentiment supporting the privilege, private thought and belief of the individual, are involved.[59] Second a practical consideration militate against coverage of non testimonial evidence under the privilege, since when the persons body or physical characteristics is in issue, there is ordinarily no other or better evidence is available for the prosecution. [60] So, shifting the burden in favor of the state is reasonable because the state should not be expected to create such physical characteristic on its own. Thirdly, the forcible extraction of bodily evidence does not involve the cruel simple expedience of compelling evidence from the accused's own mouth and his participation is irrelevant to the result of the test. [61] In case of non-testimonial evidence the public interest also outweigh the private interest to justify the compulsory disclosure.[62]

# CHAPTER TWO

# PROCEDURAL SAFEGUARDS

The constitution guarantees individuals certain procedures to be followed by law enforcement officials when they are to be prosecuted for crime allegedly committed by them. The official should strictly follow such procedures for what matters is the means than the end. That is, even though society wants the conviction of the guilty, the means for establishing the same is more important to guard power against individual freedom and to afford protection for the innocent. Moreover what is involved in the investigation and prosecution of those thought to be criminals is, individuals life ant liberty. Hence the law should necessarily be enforced through constitutional means so that the terrible engine of criminal law is not used to overreach individuals who stand helpless against it.[1]

A democratic society in which respect for the dignity of all men is central, naturally guards against the misuse of the law enforcement process.[2] In such societies, men are not to be subjected to physical brutality or psychological pressure by officials charged with the investigation of crime to provide an information necessary to convict them before the law . In spite of such holding among modern democratic societies, a zeal in tracking down crime has made the law enforcement officials abuse their power. Therefore safeguards must be provided against the danger of the overzealous as well as the abusive power of the law enforcement officials. Among the procedural rights which protect suspects from deluded instrument of their own conviction are the right to remain silent and the right to counsel.

## 2.1 THE RIGHT TO REMAIN SILENT

The basis of the right to remain silent in modern democratic society is that, the burden of proving a case against the accused lies on the state not one the supposed preparatory of the law. For this reason, suspects have no duty to answer question put to them by the law enforcement officials. That is, the police may tear suspects from their home, friends and neighbours, to put them in an interrogation room , but the right of

silence entitles them, the suspects, to keep their mouth closed in the face of the interrogation . The interrogator could not legally compel them to speak. Hence the right of silence is an important safeguard against the self- incrimination of individuals.

It is indubitably important that the law be enforced and criminals be discovered and brought to justice. In this light the right to remain silent is a real danger to the solution of crime because it restrains the investigative activity of the police. But the idea that it is better to let a hundred guilty persons escape punishment than to imprison one innocent man involves a real restraint on the police for the sake of individual freedom .[3] Though the society has a compelling and legitimate interest in effective law enforcement, it has an overriding interest in freedom, in the maintenance of an atmosphere in which men and women can go their individual way, with out fear of arbitrary governmental interference , in which the law is genuinely supreme ,governing the official of the state no less than its citizens.[4]

### 2.1.1. The Relationship Between The Right To Remain Silent And Privilege Against Self-Incrimination

In modern legal systems, it is an established constitutional principle that no person may be compelled to testify against himself. Such is the privilege against self-incrimination. Under the privilege the law enforcement officials, in their investigation, are prohibited from compelling any testimony from the suspect on the ground that the latter has no duty to cooperate in the search for truth.

On the other hand, enforcement of the law against those who violate it entails power, which is at add with civil liberty. The power intended to prevent oppression by law breakers becomes, if not constrained and bounded, a means of oppressing individuals. [5] So, since it is the nature of power to be abused, the privilege could not stand upright without further procedural safeguards meant to protect it.

In other language, criminal investigation results in the confrontation between the police, who proceed on the objective of at most crime control with all such power of the

state, and the lone and weak individual suspect. In such circumstances, the police will unavoidably encroach up the right and liberty of the suspect in spite of any prohibition to the contrary. At any rate, the investigative activity of police officer is incompatible with the privilege against self-incrimination unless further protective measures are devised. One such a protective measure is the suspect's right to silence . If a person has no right to remain silent, there is no way that the privilege against self-incrimination be exercised. Thus the right to remain silent is the logical consequence of the privilege. Conversely, if the suspect is entitled to remain silent, in effect, he is protected from incriminating himself against his will. This means the rights to remain silent and the privileges are two sides of the same coin.

On the other hand, distinction could be made between the two. That is, though it is said that one needs to have the right to remain silent in order to exercise his privilege against self incrimination, not all who have the privilege have the right to remain silent. For instance, ordinary witnesses have the privilege against self-incrimination. But they may not have the right to remain silent in the proper sense. They may only refuse to respond if the answer will incriminate them, [6] or obliged to respond even if incriminatory under immunity from future prosecution on the basis of such evidence. [7]

Thus, even though the right to remain silent and privilege against self-incrimination are very much related, they are different in their area of coverage. The right to remain silent applies only to suspect or accused while the privilege extends to ordinary witness as well.

### 2.1.2. The Warning Clause And Its Policy

Interrogation of criminal defendant is based on the assumption that they are the best informed about the crime. Though suspects may be interrogated, they can keep their mouth closed in the face of interrogation, because they have the right to remain silent.[8] In addition, it is a requirement under the law that, the interrogators have to warn the suspects of their right before they make an interrogation. [9]

The warning clause consists in informing the suspect that he has the right not to answer any question put to him.[10] It seems immaterial whether the suspect is already aware of such right or not to give the warning. The U.S supreme court in a famous case of Mirnda Vs Arizona made it clear that, if a person in custody is subjected to police questioning, he must first be informed that he has the right to remain silent with out regard to his prior awareness of the right. [11] This is so because, there can be no presumption that suspects are aware of their rights and immunity, and even if such presumption were justified their awareness is undoubtly undermined when they are brought to the stationhouse and interrogated in secret. [12] So there should be no regard to prior awareness to give this warning. Though there is no clear indication to this effect under our law, warning should be given with out regard to suspect's prior awareness of his right.

In addition, the suspect should also be informed promptly in a language he understands that any statement he may make may be used in evidence against him in court.[13] This part of the warning clause helps the suspect to understand the consequence of forgoing the privilege.[14] The assumption is that when the suspect knows or become aware of his right and the consequence of forgoing it, he can freely and rationally choose whether he has to respond or remain silent. [15] When the suspect chooses to speak or waives his right to remain silent the resulting statement will be recorded.

The policies underlying the warning of the right to remain silent are two fold: first, to inform those who are ignorant of the right and second to overcome the pressure of interrogation atmosphere for those who are previously aware of the right .[16] Again even in the absence of coercive conduct by the police, a suspect subjected to questioning in a hostile atmosphere is likely to believe that there is an obligation to respond. Thus in order to prevent such misapprehension by the suspect the police should inform his option not to speak. The warning, in general, are necessary to make the exercise of the privilege against self incrimination possible, because, otherwise, the privilege of the suspect will be reduced to paper significance. The warning ensures that the individual knows he is free to exercise the privilege. [17]

### 2.1.3. When The Warning May Be Necessary

An investigation of the crime starts from obtaining an information about the commission of crime which may take the form of accusation or compliant. Information may also be gained by personal observation of the police. Once information is obtained the second step is to secure the presence of the suspect either by summoning, [18] or arresting [19] him. The police officer has the duty to interrogate such suspects so that they answer the accusation or compliant made against them.[20] Eventhough interrogation is an important step in obtaining evidence of guilt, individuals right to remain silent should be respected. Warning of the right to silence is indispensable for the implementation of the right to remain silent.

The FDRE constitution provides for the warning to be given for persons actually arrested. [21] But the warning the constitution recognizes is only that " any statement they may make may be used as evidence against them." It does not include the warning that they are not bound to answer the question. So, the constitution does not recognize the warning in full sense. The criminal procedure code per Art 27 (2) may remedy this gap. Under the constitution the police has to promptly give the suspect the said warning. [22] From this follows that the warning has to be given upon arrest whether the police is making interrogation or not. So warning is necessary when the police have arrested a person.

In the case of suspects not yet arrested, the constitution does not provide for the warning to be given. But there seem to be no question that a person who is subjected to interrogation, without actually being arrested, cannot be required to answer question of an incriminatory nature and other interpretation would be squarely contrary to protection against self-incrimination. Such suspects should have the right to remain silent to exercise their privilege. At the same time warning of the right is necessary because any interview of one suspected of crime by police official will have a coercive aspect to it simply by virtue of the fact that the police is part of law enforcement system which may ultimately cause the suspect to be charged with crime. [23] In line with this, the Ethiopia

criminal procedure code provide for the requirement of the warning to persons summoned by police official though these persons are not actually arrested. [24] In short, warnings are also necessary when a police official has focused on a suspect for purpose of interrogation with out making an arrest.

In judicial proceeding an accused can't be compelled to testify against himself. [25] But the question is whether an accused is entitled to the warning. Before the opening of preliminary inquire or trial, any court has the power to record any statement or confession made to it .[26] It is not a matter of ratification of police obtained statement or confession but the accused has to make it himself to the court. In such proceeding the court has to ascertain the voluntaries of the statement or confession before recording it.[27] Even though there is no explicit provision to that effect, the voluntariness requirement implies that the suspect should be informed his option not the speak. Again in the preliminary inquiry proceeding, it is clearly provided that the accused be informed that he is not bound to say any thing and any statement he may wish to make may be put in at trial .[28] So warning of the right to remain silent is further necessary when an accused appears before any court to make a statement or a confession or before a preliminary inquiry court.

On the other hand, there is no procedure for warning a suspect in the trial court. The court asks him whether he pleads guilty or not after the prosecution has made its own case. [29] When the accused remain silent a plea of not guilty will be entered. [30] If; however, adverse inference is to be drawn from silence, the accused privilege would have been illusory. Plea of not guilt when the accused remains silent implements his privilege.

The absence of procedure for warning at trial may not have an adverse effect on the accused because a lawyer might have already advised him of his right. Further, since trial proceeding are in public the accused will not be put under pressure to speak. Thus, it seems, warning are not necessary during trial.

In general, the warning as to the right to remain silent is necessary first, when a police has actually made an arrest or has focused on a suspect for purpose of

interrogation with out actually making an arrest. Second, when a suspect is brought before a court for purpose of making a statement or a confession and when an accused is brought before preliminary inquiry court.

But in the trial court and the plea process, though compulsion to make an admission or confession is prohibited, there is no procedure to warn an accused as to the right to remain silent. In the first place, in the trial and plea process, the accused has his own counsel or one appointed for him by the court. This counsel for the accused is expected to advise his client and it is not usually required of the court in the plea process or trial to give such advice to the accused. This is, perhaps, the reason for the absence of the procedure for the warning.

## 2.2 THE RIGHT TO COUNSEL

Right to counsel is a right individual enjoys in the criminal process. One consideration for the right to counsel in the criminal process, is the fact that the technicalities of the law makes it difficult for the layman to go through the process while, it will be easy for the one trained in law. In the process, counsel may only be restricted to giving of legal advice as when no case has been yet made against the criminal defendant or advising and representing the accused during the accusatory stage of the proceeding. Counsel may also be required to be present during police interrogation of a suspect. So one may say that, right to counsel is the constitutional right of an individual subject to criminal process to have the advice, presence or representation of an advocate.

In the criminal process two important interests are represented: the public interest to control crime and the interest of the accused to be protected from abuse of power by organized society. Nevertheless, these two interest are not necessarily at polar because the state's duty to maintain law and order consists in lawful enforcement of the law. In other words when law is enforced through established procedure or means, both maintenance of order and protection of the interest of the accused are served.

It is therefore, submitted that the public interest which is concerned with the suppression of crime and maintenance of order also comprehends an even more important end, the assurance of fair and impartial pretrial and trial procedures. [31] Moreover interest in the conviction of the guilty does not necessarily prevail over the public interest to secure that suspicion or accusation shall not put individuals beyond the protection of law.[32] Society's order is not to be preferred to individual liberty on a mere suspicion of involvement in crime. Of course, when guilt is legally established the restriction on individual's liberty or life is justified. But a mere suspect is not a violator of the law in legal terms. So the legal standard of a society must not differentiate between the law abiding citizen and the probable enemy of the law.[33] The right to counsel ensures that individuals have not been denied the protection of the law on mere suspicion.

In the criminal process there is no equality of arms between the state on the one hand and the suspect on the other. The right to counsel helps to establish a fair procedure between those unequal parties. If counsel is said to be necessary, for a suspect or accused, to be fair it should equally be available for the rich and the poor. Hence state obligation to provide counsel for the indigent.

From the above observation, right to counsel is right of a suspect or an accused to have a service of a lawyer in the criminal proceeding against him either at his own expense or otherwise at state's expense.

### 2.2.1. Right To Counsel And Privilege Against Self- Incrimination

Privilege against self-incrimination is the constitutional guarantee against the power of the state compelling individuals to testify against themselves. In spite of such guarantee, confrontation between unequal parties-the state and the weak suspect-make the exercise of the privilege difficult. The confrontation occurs starting from interrogation by the police. In the process of the interrogation, the suspect could be made under the physical force or psychological pressure compelling him to speak against his will. Counsel is a necessary restraint on such coercive power of the police .[34]

Even when the police exert no actual coercion, the presence of counsel will avoid the pressure inherent in the interrogation atmosphere. One writer expresses this in the following way:

> "Interrogation as it is now practiced is a perilous time for the accused, who is defenseless against the abuse of both physical and psychological coercion. Even when there is no intention to make the situation coercive, the questioning of an accused in an alien atmosphere must be inherently coercive. Counsel by serving in his traditional role as buffer against the state could remove the danger of the situation. [35]

What counsel could do at this interrogation stage of the criminal process is advise the suspect the proper statement to make should he wish to make statement, see to it that the police did not use brutal means to obtain a confession, and assure that the police did not trap the criminal defendant in to making statement against his will by eliminating much of the inherently coercive atmosphere of invisible police process.[36]

The right to counsel during police interrogation is thus, an important protection for the suspect not to incriminate himself against his will. That is, the suspect who feels the need of a lawyer and asks for one during police interrogation is asking for some protection the law can give against coerced confession. [37]

With out the aid of counsel, a suspect could not property handle himself in the criminal process against him, for one thing he is ignorant of his right under the law for another, the law enforcement official rarely appreciate if the suspect wish to exercise his right. In such circumstances, there is a potential danger for making incriminatory statements without properly recognizing its consequence or under pressure. The presence and proper advice of counsel could avoid such dangers. In the words of Bernard Weinberg, " introducing counsel into police station questioning would have the practical effect of giving life to the privilege against self incrimination prior to judicial stage of criminal proceeding."[38] In the judicial proceeding too, the accused could act only on the advice of the counsel and the latter will always make sure that the accused has not made

incriminatory statements. Thus right to counsel and privilege against self incrimination are so importantly related that the former will serve as a procedural protection of the latter.

In the criminal process the stage when the suspect is in the hands of a police for purpose of investigation is crucial in respect of the likely hood of violation of the privilege. This stage, as no case has yet been established against the suspect is mostly characterized by fact-finding process. This means the law enforcement officials are highly in need of evidence. On the other hand, the suspect has the privilege not to be the instrument of his own conviction. This shows how much the law enforcement officials and the suspect are at war. After a case has been established against the suspect (now the accused) the authorities have already secured the necessary evidence. So the likelyhood that the accused may be faced with rival force for purpose of evidence is rare. But this does not mean that there is no likely hood of violation of the privilege in this stage. In short, if the purpose the counsel serve as a safeguard of privilege against self-incrimination is to live up to its expectation, it is important that counsel is available starting from fact-finding stage through the criminal process. But is this really so? The following section will explore these issues.

### 2.2.2 When The Right To Counsel Attaches

**A) During Police Interrogation**

There is no consensus as to the stage at which the right to counsel attaches. The traditional view is that, the function of counsel is to help the accused work his case when the proceeding becomes formal, complex and intricate. Accordingly, before such formal accusatory stage, the suspect does not need to be represented by counsel because legal question are relatively simple and there is no opportunity to make a formal defense. [39]

However, informal proceeding like interrogation at police station are critical confrontation between the state and the individual where the right to counsel is as necessary as other formal preceding. Even what takes place in the secret confines of the police station may be more critical than what takes place at trial. [40] Besides, this period is

full of hazardous for the suspect so as to prejudice him to lose other constitutionally protected rights and the defense he may have. Further, to the extent that the decision to speak in the police station is equated with the decision to take stand at trial, counsel guidance in both instances is necessary in order to enable the defendant to determine whether he should take the risk of possible self-incrimination by answering question at police station.[41] So the traditional view that counsel should only attach after formal accusatory stage could not easily be sustained. During police interrogation, "society is at war with criminal and in war any thing goes." [42] So, counsel at this stage check the rival power of an organized society, against the suspect, in search of evidence.

Further, counsel at police interrogation could serve the following purposes. First, since the disorienting circumstance of secret police interrogation plus the ignorance and inexperience of the accused will often lead to confession, counsel could at this stage implement the exercise of the privilege against self incrimination; second even in the absence of pressure that will coerce the suspect to confess, there is too great a disparity between the resource of the isolated suspect and that of the police and counsel could rectify or redress such imbalance. [43] Thirdly, since it is difficult for a lawyer to protect his client after the latter has told all and turned any evidence over to the government, the trial will become no more than an appeal from interrogation and the right to a lawyer at trial will be reduced to hollow thing. Thus counsel at interrogation could serve to give meaning and protection to the right to be heard at trial itself. [44]

In spite of any argument that may be advanced in favor of right to counsel at police interrogation, the position under Ethiopian law is far from clear. That is, the constitution does not provide for the right to counsel at interrogation in black and white. One line of thinking is that, the right to counsel provision of the FDRE constitution could be interpreted to include right to counsel at police interrogation. This provision reads:

> "Accused person have the right to be represented by legal counsel of their choice, and if they don't have sufficient means to pay for it and mis-courage of justice would result, to be provided with legal representation at state expense." [45]

Accused person by definition includes person arrested as well [46] and there is no mention, in this provision, of stages at which counsel attaches. So, this constitutional provision entitles suspect the right to counsel at police interrogation is the argument.

The US Supreme Court in Escobedo Vs Illinois followed the same interpretation of the Six Amendment right to counsel. [47] The court stated that:

> "Where the investigation is no longer a general inquiry in to an unsolved crime but has began to focus on a particular suspect, the suspect has been take into police custody, the police carry out the process of interrogation that lends itself to eliciting incriminatory statement, ----- the accused has been denied the assistance of counsel in violation of six amendment to constitution."[48]

If similar interpretation is followed the right to counsel attaches during police interrogation under Ethiopia legal system too.

However, the problem with this line of interpretation is that, arrested person and person accused have been taken care of in the constitution separately and no right to counsel is provided under the provision dealing with right of arrested person. Therefore, the interpretation that is suggested above is far from being tenable under the constitution. One may on the same line argue that, the provision of Art 21(2) of FDRE constitution, which reads:

> " All person held in custody and convicted prisoners shall have the opportunity to communicate and to be visited by their legal counsel",

as providing for the right of person held in custody to consult with their legal counsel does not apply to arrested person. That is, no right to counsel is provided for the arrested person under Art 20(5) of FDRC constitution and the right to consult with an advocate per Art 21(2) of the same constitution should not apply for them.

On the other hand, even though it could be conceded that arrested persons have no right to counsel under Art 20(5) of FDRE constitution, an interpretation which renders

Art 21(2) of the same constitution inapplicable to person held in police custody would be against the interest of persons arrested. So, to protect them better the provision that provides for the right of persons held in custody to consult with their legal counsel should be interpreted to include person in police custody as well. In line with this, the criminal procedure code clearly provides for the right to counsel of persons detained on arrest or remand:

> " Any person detained on arrest or remand shall be permitted forth with to call and interview his advocate." [49]

Therefore, it could safely be argued that, under FDRE constitution arrested persons have the right to consult with their legal counsel during police interrogation proceeding.

Nevertheless, there are certain problems that reduce the effect of the right to paper significance. To start with, there is no clear procedure legally provided for informing the suspect that he has the right to counsel. It seems that the request will come from the suspect. But not every suspect knows whether he has such right or not. In addition, even if one has requested for his advocate what at most he can do is to get advice from his counsel, since there is no indication that counsel could present during the interrogation. This will make the intended procedural protection of counsel very insignificant, because if counsel only advises the suspect and interrogation is to be conducted without his presence, the police could easily undermine that advice in secret questioning.

A further and apparent deficiency in the system of right to counsel during police interrogation is its discrimination between the rich and the poor as it does not appear from the constitution that the state has the duty to appoint counsel for the indigent suspect at police station. Different treatment of those who request counsel and those who do not is insupportable and under the same reasoning any distinction in the availability of counsel between the rich and the poor is equally arbitrary and un acceptable. [50] Under the constitution, it appears, those who do not have "their legal counsel " have no avail while the well to do could consult with " their legal counsel" during police interrogation.

The possible consideration to provide only for the right to retained but not appointed counsel during police interrogation could be that the administrative difficulty and cost involved in introducing counsel at police interrogation would be much greater than the trial context. Besides, there are no sufficient numbers of trained lawyers in the country.

However, all persons are equal before the law and are entitled to equal protection of the law with out any discrimination on ground of property .[51] The state deprives the indigent of equal protection whenever it fails to furnish him with legal service equivalent to those the affluent defendant can obtain. [52] So, to comply with the constitutional right of equal protection, an indigent suspect should be provided with the counsel in the criminal proceeding where one can have the service of a lawyer at his expense. Thus even though the letter of the constitutions seems to the contrary, counsel should equally be available for the rich and the poor during police interrogation.

**B) During Judicial Proceeding**

The police are required under the law to produce an arrested person in to court with in 48 hours of their arrest.[53] From the time a suspect is brought to court, the judicial stage of criminal proceeding will commence. In such formal accusatory stage of the proceeding,

> "A defendant needs a lawyer as urgently as a sick man needs a doctor and in many instances even more urgently, for while nature often heals the sick without aid, it seems to have little concern for the plight of the accused."[54]

This is so because if an accused is obliged to combat the well equipped prosecution with out the assistance of counsel, ignorance of the substantive and procedural law and inexperience with the technicalities of presenting and challenging evidence, will create the danger that he will be innocently convicted. Thus right to counsel is important procedural right to protect the accused in the court proceeding, from being convicted with out there being guilt.

Another explanation for the right to counsel in this judicial proceeding is that, the defendant should have full knowledge of his legal situation and the probable consequence of his decision in making the grave choice whether to speak, lest his ignorance give the state the opportunity to secure his conviction through incriminating testimony.[55] In another language defendant lacking advice of counsel may plead guilty even though his conduct does not constitute the crime charged or the evidence against him is inadmissible.

For the above and similar considerations, accused persons have the right to representation by counsel (appointed if the person is indigent) under the FDER constitution. [56]

Generally, under Ethiopia legal system person arrested or accused are entitled to have the service of a lawyer in the criminal proceeding against them (whether affluent or indigent). In the process, counsel gives protection to individuals right and privileges that could otherwise be lost. Even if this is the case, arrested or accused person's right to counsel will only be theoretical unless there is a requirement of warning of the right under the law. This will be the next point of consideration.

### 2.2.3. The Requirement of the Warning as to The Right to Counsel.

It has been so far argued that arrested or accused persons have the right to counsel starting from police interrogation proceeding through the judicial stage of criminal process. In the whole proceeding; however, the law does not clearly require the police or the court to warn the suspect or the accused that he/she has the right to counsel. Though this is the case, courts in practice, as the writer learned from an interview with one of the Regional high court judge, ask the accused against whom a charge has been framed whether he can retain a counsel and if he has no the means it appoint one for him provided that the offence alleged to have been committed carries a penalty of five and above years of imprisonment.[57]