

THE RIGHT TO REMAIN SILENT: A ONE-EYED APPROACH TO TRUTH-SEEKING?

‘... Justice, though due to the accused, is due to the accuser also. The concept of fairness must not be strained till it is narrowed to a filament. We must keep the balance true.’

Cardozo J in *Snyder v Massachusetts* 291 US 97 122

MT Mokoena

Advocate of the High Court of South Africa, Senior Lecturer, School of Law, Unisa

Email: mokoemt@unisa.ac.za

ABSTRACT*

The right to remain silent is one of the most important symbols of a fair trial in the accusatorial legal systems, to which South Africa also belongs. In certain countries, such as the United States and South Africa, this right is constitutionally entrenched as a fundamental human right, which virtually guarantees that adverse inferences cannot be drawn against an accused who fails to disclose pre-trial information. The accused is thereby excluded as a critical source of information during this stage of the proceedings. In essence, this means that the criminal process is compelled to close one eye to a valuable and crucial source of information. Other jurisdictions within the accusatorial family, notably England and Scotland, have introduced legislation aimed at crime control which essentially compels the accused to break his or her silence during the pre-trial stage of the criminal process. The very essence of the right to remain silent as a fundamental human right is proving problematic to the South African Constitutional Court when considering it within the context of the limitation clause. It is argued, in this article, that the solution lies, first, in a substantive constitutional analysis of rights and, secondly, in interpreting the right as a functional evidentiary principle with the aim of securing procedural fairness.



INTRODUCTION

The *right to remain silent* and the so-called *privilege against self-incrimination* are often used interchangeably to explain the accused's right not to be compelled to disclose guilt by the threat of punishment to do so.¹ The result is that there is no universally accepted definition of either concept. Theophilopoulos provides a rather succinct and comprehensive definition.² Located between the two concepts above is the so-called *presumption of innocence*. This concept has been described as the 'governing principle behind the silence and self-incrimination rights of accused and arrested persons'.³ Referring to established South African jurisprudence, Schwikkard⁴ adopts a two-tier description of the presumption of innocence.

The right to silence may sometimes also be confused with the presumption of innocence, and in this regard Van Dijkhorst urges particular caution.⁵

The right to remain silent is universally recognised as one of the defining characteristics of the accusatorial legal system.⁶ Like the presumption of innocence, it is firmly rooted in our common law and statute.⁷ The right to remain silent, as it is applied in the 21st century, is very different from its *utilitarian* common-law ancestor.⁸ The traditional silence principle was a limited evidentiary rule based on the utilitarian necessity to preserve the truth-seeking process of the criminal justice pro-

1 * This article was presented as a paper at the International Conference on Societies in Transition: Balancing Social Security, Social Justice and Tradition, Morocco, 2–5 June 2010. RW Nugent 'Self-incrimination in perspective' (1999) 118 *SALJ* 501.

2 C Theophilopoulos 'The influence of American and English law on the interpretation of the South African right to silence and the privilege against self-incrimination' (2005) 19 *Temple International and Comparative Law Journal* 387 at 391. According to him, the right to silence usually applies to an accused person during criminal proceedings, whereas the privilege against self-incrimination is invoked by a non-party witness in civil or criminal proceedings. A right is an expression of a fundamental human value which, by its very nature, demands an almost *absolute degree of legal protection* (my emphasis).

3 S Woolman et al *Constitutional Law of South Africa* (2ed) (PULP, 2006) 55–144.

4 P-J Schwikkard *Presumption of Innocence* (2ed) (Juta & Co, 1999) 35: 'The South African case law shows that the presumption of innocence is used to describe two different phenomena:

(1) a rule regulating the location and standard of the burden of proof

(2) a policy directive that the subject of a criminal investigation must be treated as innocent at all stages of the criminal process irrespective of the probable outcome of the trial.'

5 K van Dijkhorst 'The right to silence: Is the game worth the candle?' (2001) 118 *SALJ* 26: 'The right to silence is not to be confused with the right to be presumed innocent, though both fall within the concept of a fair trial and are referred to in the same section of our constitution. The principle underlying the presumption of innocence is that a person must not be convicted where there is a reasonable doubt about his guilt. It seeks to eliminate the risk of conviction based on factual error.'

6 Theophilopoulos (n 2) 387.

7 *Osman v Attorney-General, Transvaal* 1998 (4) SA 1224 (CC) at para 17.

8 Theophilopoulos (n 2) 387.

cess.⁹ The pre-trial right to silence seeks to ‘oust any compulsion to speak’.¹⁰ It was narrowly intended as protection for the criminal defendant against coercive state practices, and as a prohibition against the admission of involuntary confessions.¹¹ Although this concept appears, on the face of it, to be a fair and equitable functioning of the judicial process, doubts have been expressed as to its ultimate efficacy in the balancing of the scales.¹²

The right to remain silent is protected to varying degrees by the accusatorial and the inquisitorial systems of criminal procedure, with the latter essentially encouraging accused persons to offer evidence of their innocence to the police and co-operate with them in clarifying matters, at least where they are not compelled to incriminate themselves in the process.¹³ Nations within the ‘accusatorial block’, however, go a bit further in protecting this right.¹⁴

RIGHT TO REMAIN SILENT: A COMPARATIVE ANALYSIS

England

English jurisprudence has no single foundation for the silence principle and depends on common law, judicial precedent and statute for its various definitions.¹⁵ Within this context the right to silence and the privilege against self-incrimination are bundled together into a ‘disparate group of immunities’.¹⁶ Unlike the United States, with its written, *human rights-based* constitution, the English rule of silence is premised on an age-old utilitarian substructure.¹⁷ Although an adverse inference may not necessarily be drawn from the pre-trial silence of the accused, it may, nonetheless, be drawn during the trial to evaluate other extraneous evidence.¹⁸

The inadequacies of the Judges’ Rules, which were, in effect, supposed to protect suspects against pre-trial oppression, and which had been in place for most of the 20th century, led to the introduction of the Police And Criminal Evidence Act

9 Ibid; Nugent (n 1) 503.

10 *Thebus v The State* 2003 (10) BCLR 1100 at para 55.

11 Theophilopoulos (n 2) 387.

12 MS Pardo ‘Self-incrimination and the epistemology of testimony’ (2008–2009) 30 *Cardozo Law Review* 1023 at 1043. The author prefers a *probationary presumption of innocence* whereby the suspect proceeds from a proverbial clean slate in terms of which fact-finders begin with no inculpatory evidence or prior belief about likely guilt. Just as the state cannot overcome its burden of proof by presuming guilt, it should not be able to overcome its epistemic burden by passing the epistemic burden to the defendant.

13 Van Dijkhorst (n 5) 30.

14 Ibid.

15 C Theophilopoulos ‘The right to silence and the privilege against self-incrimination: A critical examination of a doctrine in search of cogent reasons’ Unpublished LL.D. thesis, Unisa, 280.

16 *Smith v Director of the Serious Fraud Squad* (1992) 3 All ER 456 at 463–464.

17 Theophilopoulos (n 15) 282.

18 Theophilopoulos (n 15) sets out these circumstances and relevant case law in his footnotes 17–20.

(PACE).¹⁹ In terms of the latter's provisions,²⁰ adverse inferences may be drawn from the accused's silence under police interrogation in certain circumstances. The Act essentially seeks to regulate pre-trial interrogations within a controlled environment. Provision is made for the audio recording²¹ and visual recording²² of interviews of criminal suspects. It is important to note, however, that under the auspices of PACE,²³ confessions are now inadmissible if procured by coercion or by anything said or done that is likely to render any confession by the suspect unreliable.

English law has not, however, adopted a general exclusionary rule that evidence obtained in consequence of unlawful action by the police is inadmissible because of the illegality thereof.²⁴ The governing principle is that such evidence is prima facie admissible if it is relevant to the issue of the accused's guilt.²⁵ The PACE²⁶ does, however, provide for discretion in the admissibility of evidence on which the prosecution seeks to rely. Howsoever that may be, the test for admissibility in English law remains *relevance*, although a trial judge may still exclude evidence under s 78.

The common-law position has also been subjected to legislative amendment. Before 1994 the accused enjoyed a pre-trial right to silence.²⁷ The right was, however, conditional on a police caution about the right.²⁸ The result was that no adverse inference could be drawn against the accused's silence once the caution had been dispensed.²⁹

The Criminal Justice Public Order Act, 1994 now provides that where the accused failed to mention a fact during pre-trial interrogation by the police, and which he or she now advances as a defence during the subsequent trial,³⁰ the court or jury (as the case may be) may draw such inference as it may deem proper in the circumstance from such omission.³¹ The latter provisions are not without their critics,

19 1984.

20 Sections 34–38.

21 Section 60.

22 Section 60A.

23 Section 76(2).

24 I Dennis 'Instrumental protection, human right or functional necessity? Reassessing the privilege against self-incrimination' (1995) 54 (2) *Cambridge Law Journal* 342–359. In terms of s 76(4) the fact that a confession is excluded for want of legality 'shall not affect the admissibility in evidence of any facts discovered as a result of the search'.

25 Dennis (n 24) 360.

26 Section 78.

27 Theophilopoulos (n 15) 304.

28 *Ibid.*

29 *Ibid.*

30 Section 34(1).

31 Section 34(2).

though.³² The suggestion is that the main motivations for the enactment were purely and essentially instrumentalist.³³

The legislative provisions in England have, however, seemed to have received support from the European Court of Human Rights, which ruled in favour of the drawing of adverse inferences from the accused's pre-trial silence in the case of *Murray v The United Kingdom*.³⁴ These assertions were reaffirmed in *United Kingdom v Averill*.³⁵ While essentially reiterating the sentiment that the right to silence is not necessarily absolute, the court sounded caution that the drawing of adverse inferences from the accused's failure to disclose pre-trial information should nevertheless be used sparingly.³⁶ The accused's decision to remain silent should not, per se, be the only basis of a conviction against the accused, although cognisance may be taken of his or her silence in circumstances which 'clearly call for an explanation from him'.³⁷

The Grand Chamber did not, however, deem it fit, in *Saunders v United Kingdom*,³⁸ to adjudicate on the extent of the right as an 'absolute' or otherwise, but rather on the extent of the 'limitation' of the right. Within this prevailing chain of reasoning the court concluded that the notion of 'public interest' cannot be invoked to justify the use of compulsion to obtain answers from a suspect during the pre-trial stage of the proceedings.³⁹ This was in stark contrast to *Jaloh v Germany*.⁴⁰ The latter

32 R Leng 'Silence pre-trial, reasonable expectations and the normative distortion of fact-finding' (2001) 5 *International Journal of Evidence & Proof* 240.

33 R Leng (n 32) 241 lists the following considerations: 'First, the reform, which implied the safety and propriety of police interrogation, was a symbolic reaffirmation of faith in the police, with an overall aim of rebuilding confidence in the criminal justice system at a time when such confidence had been severely shaken by publicised miscarriages of justice and perceived rising crime rates. Secondly, by placing pressures on suspects to speak, the reform also serves the needs of the efficient production and distribution of knowledge in a criminal justice system whose fundamental task is to manage the risks presented by a suspect population and in which the police are fundamentally knowledge workers. Thirdly, the reform, by disempowering the suspect in his or her dealings with the police whilst in custody, may be seen as strengthening police detention as a means of discipline and social regulation.'

34 22 EHRR 29 (1996). While recognising the accused's privilege against self-incrimination (at para 45), the court nevertheless held (at para 47) that 'these immunities cannot and should not prevent that the accused's silence, in situations which clearly call for an explanation from him, be taken into account when assessing the persuasiveness of the evidence adduced by the prosecution'.

35 31 EHRR 36 (2001).

36 *Supra* at 840.

37 *Supra* at 840.

38 1996-IV Eur Crt HR 2066.

39 *Supra*.

40 44 EHRR 32 (2007) at 691: 'The general requirements of fairness contained in Art. 6 apply to all criminal proceedings, irrespective of the type of offence at issue. Nevertheless, when determining whether the proceedings as a whole have been fair the weight of public interest in the investigation and punishment of the particular offence at issue may be taken into consideration and be weighed against the individual interest that the evidence against him be gathered lawfully. However, public interest concerns cannot justify measures which extinguish the very essence of an applicant's defence rights, including the privilege against self-incrimination guaranteed by Art. 6 of the Convention.'

is, however, criticised for its failure to substantiate the *raison d'être* behind its articulation of the 'public interest' standpoint,⁴¹ a factor which is decisive in its difference from *O'Halloran and Francis v United Kingdom*.⁴²

What is evident regarding the above decisions is that although the United Kingdom may have clear and unambiguous ways of dealing with the right to remain silent, the decisions of the highest court of appeal at the European Court of Human Rights are still mired in controversy and apparent indecision, which makes adjudication on the right to silence open to interesting future developments. Also notable from the court's decisions is an apparent failure to distinguish clearly between the substantive and procedural dimensions of the right. In effect, the court focused more on those aspects of the right to do with upholding the dignity and will of the individual accused than on the more procedural aspects of the right which link it to defence rights when a suspect or accused is called upon to answer criminal allegations.⁴³

The United States

The privilege against self-incrimination in the United States is largely premised on the Fifth Amendment.⁴⁴ The case of *Miranda v Arizona*⁴⁵ stands out in American jurisprudence as an iconic symbol of the privilege against self-incrimination.

As far as the common law is concerned, the United States Supreme Court traditionally adhered to the common-law voluntariness doctrine, the litmus test of which was essentially the reliability of the evidence.⁴⁶ In this context, reference was not made to constitutional principles.⁴⁷

The question which was posed in *Miranda*⁴⁸ as to the applicability of the privilege against self-incrimination during pre-trial interrogation was answered in the affirmative.⁴⁹ It is well worth noting, in this regard, that the *Miranda* safeguards are not mandated by the Constitution.⁵⁰ They are, essentially, a meta-constitutional measure

41 A Ashworth 'Self-incrimination in European human rights law – a pregnant pragmatism' (2008) 30 *Cardozo Law Review* 751–762; J Jackson 'Re-conceptualising the right of silence as an effective fair trial standard' (2008) 30 *Cardozo Law Review* 835 at 836.

42 46 EHRR 21 (2008).

43 Jackson (n 41) 835 at 836.

44 'No person ... shall be compelled in any criminal case to be a witness against himself.'

45 384 US 436 (1966).

46 Theophilopoulos (n 15) 166.

47 Ibid.

48 *Supra* at 460.

49 *Supra* at 461: 'We are satisfied that all the principles embodied in the privilege apply to informal compulsion exerted by law enforcement officers during in-custody questioning ... As a practical matter, the compulsion to speak in the isolated setting of the police station may well be greater than in courts or other official investigations, where there are often impartial observers to guard against intimidation or trickery.'

50 Theophilopoulos (n 15) 171.

which, albeit not expressly elucidated in the Fifth Amendment, are intrinsic to its very fabric and structure. The decision therefore broke new ground by extending the Fifth Amendment into previously uncharted territory.⁵¹

The departure from *Miranda* was, however, almost immediate.⁵² One of the criticisms levelled against the decision is the court's 'impulse to subsume policing within the adversarial courtroom process'.⁵³ Another suggestion was that the Supreme Court had introduced unwarranted rigidity into a clear and unambiguous rule.⁵⁴ More simply, however, the Supreme Court seemed to have abandoned *Miranda*'s libertarian approach in favour of a more utilitarian one.⁵⁵

The privilege against self-incrimination in the United States has recently assumed new and dramatic dimensions, particularly in the wake of the Supreme Court judgment of *Chavez v Martinez*,⁵⁶ where it was held that coercive interrogation does not necessarily amount to a violation of the Fifth Amendment if the suspect '[is] never charged with a crime, and his answers [are] never used against him in any criminal prosecution'.⁵⁷ Although the judgment does not essentially alter the protections afforded by *Miranda*, its assertion implies, *prima facie*, that the suspect may be violated without any immediate recourse, just as long as he or she is not subsequently charged with a criminal offence.

Some critics⁵⁸ argue that in the aftermath of the 9/11 New York bombings the judgment has enhanced the power of the government at the expense of the individual.

51 Ibid.

52 Theophilopoulos (n 15) 177.

53 M Chertoff 'Chopping *Miranda* down to size' (1994–1995) 93 *Michigan Law Review* 1713 at 1714.

54 P Marcus 'A return to the "Bright Line" rule of *Miranda*' (1993–1994) 35 *William and Mary Law Review* 93 at 143.

55 *Harris v New York* 401 US 222 (1971), where Burger CJ delivered the majority decision at 226: 'The shield provided by *Miranda* cannot be perverted into a license to use perjury by way of a defence, free from the risk of confrontation with prior inconsistent utterances. We hold, therefore, that petitioner's credibility was appropriately impeached by use of his earlier conflicting statements.'

56 (01-1444) 538 US 760 (2003), 270 F3d 852.

57 Ashworth (n 41) at 764.

58 AM Dershowitz *Is there a right to remain silent? Coercive Interrogation and the Fifth Amendment After 9/11* (Oxford University Press, 2008) xix: 'There is a big difference between the fundamental right to remain silent and a narrow trial remedy limited to the exclusion of evidence. This difference is becoming increasingly important as coercive interrogation is used more frequently to obtain information deemed necessary to prevent future crimes (especially terrorism) than to secure evidence with which to prosecute past crimes. This may be part of a more general trend toward narrowing what many have long understood to be fundamental human rights – such as the presumption of innocence, the right to counsel, and the prohibition against cruel and unusual punishments – into limited trial and post trial rights for criminal defendants.'

Scotland

The Scottish legal system, although essentially accusatorial in nature, contains certain unique inquisitorial elements.⁵⁹ The Criminal Procedure (Scotland) Act⁶⁰ provides for pre-trial judicial examination before a sheriff (judicial officer).⁶¹ Adverse inferences may be drawn against the accused's silence during the judicial examination.⁶² The accused may be represented during these proceedings⁶³ and may consult his or her legal representative before answering any questions.⁶⁴ A record shall be kept of the judicial examination proceedings.⁶⁵

RIGHT TO REMAIN SILENT: A SOUTH AFRICAN PERSPECTIVE

The right to remain silent is one of the most jealously guarded rights protected under the South African Constitution.⁶⁶ In terms of s 35(1)(a) and (c), respectively, every suspect has the *right to remain silent* and the *right not to be compelled to make a confession or admission that could be used in evidence against that person*. These are further buttressed by the provisions of s 35(3)(h), in terms of which an accused person has the *right to be presumed innocent, to remain silent, and not to testify during the proceedings* – the so-called *presumption of innocence*.

Also precariously poised within this cluster is the *right*, in terms s 35(3)(j), *not to be compelled to give any self-incriminating evidence*. From the preceding it is clear that the right to a fair trial is protected at two phases, namely, the pre-trial and the subsequent trial stage.⁶⁷ The position of the right to remain silent during the trial stage is trite and established law, unlike the pre-trial stage, which, although seemingly cast in legislative stone, yet remains the subject of unrelenting controversy. The importance of the right to remain silent and the presumption of innocence are

59 Theophilopoulos (n 15) at 401.

60 1995.

61 Section 36(1): 'Subject to the following provisions of this section, an accused on being brought before the sheriff for examination on any charge may on any charge (whether the first or a further examination) be questioned by the prosecution in so far as such questioning is directed towards eliciting any admission, denial, explanation, justification or comment which the accused may have as regards anything to which subsections (2) to (4) below apply.'

62 Section 36(8).

63 Section 35.

64 Section 36(6).

65 Section 37.

66 Act 108 of 1996.

67 *S v Boesak* 2001 (1) SACR 1 (CC) at para 24.

underlined by the fact that even under the Interim Constitution⁶⁸ they enjoyed similar protection.⁶⁹

The South African right to silence was, prior to 1993, based mainly on English precedent.⁷⁰ With the advent of constitutionalism, South Africa chose to follow an American-type constitutional *due process approach* which elevates the silence principle into a *human right*.⁷¹ The result is that a human rights philosophy currently dominates the intellectual debate surrounding the accused's pre-trial rights.⁷² This is in large measure attributable to the country's apartheid legacy, where human rights were given scant regard.⁷³

However that may be, one of the major concerns of the academic debate within South Africa is the danger that the constitutional right to silence may be interpreted in inflexible terms which will prohibit the Constitutional Court from drawing adverse inferences from the accused's tactical invocation of silence.⁷⁴

Unlike its American counterpart, the South African Bill of Rights contains a limitation clause⁷⁵ in terms of which rights are not absolute, but may be curtailed, subject to certain conditions. The latter are essentially couched in both *Kantian* and *utilitarian* overtones, which may lead to problems of interpretation.⁷⁶ The manner in which the Constitutional Court decides to interpret this provision is critical, and it will eventually determine not only the ambit of fundamental rights, but also the shape of substantive criminal law.⁷⁷ A utilitarian reading of the limitation clause would then suggest that constitutional rights could be limited whenever they stand in the way of pressing social needs.⁷⁸

68 Act 200 of 1993.

69 *S v Bhulwana*; *Gwadiso* 1996 (1) SA 388 (CC) 389.

70 Theophilopoulos (n 15) at 383.

71 *Ibid.*

72 Theophilopoulos (n 15) at 385.

73 Theophilopoulos (n 15) at 386; in *Osman Attorney-General, Transvaal* supra (n 7) at para 10, the court expressed the view that the right to remain silent was honoured 'more in breach than in observance'.

74 Theophilopoulos (15) at 395.

75 Section 36.

76 VV Ramraj 'Freedom of the person and the principles of criminal fault' (2002) 18 *SAJHR* 225 at 252.

77 *Ibid.*

78 *Ibid.*

THE *THEBUS* CASE⁷⁹

The question whether the drawing of adverse inferences from the accused's pre-trial silence was constitutionally permissible was expressly left open by the Constitutional Court in the case of *Osman v Attorney-General, Transvaal*.⁸⁰

In *Thebus*,⁸¹ however, the most important issue to be adjudicated upon was whether an adverse inference may be drawn from a pre-trial failure to disclose an alibi. The court set out three questions to be answered, namely, whether it was permissible to:

- a. draw an inference of guilt from the pre-trial silence of the accused,
- b. draw an inference on the credibility of the accused from pre-trial silence, and
- c. cross-examine the accused on the failure to disclose an alibi timeously, thus taking into account his or her responses.⁸²

As regards the inquiry in (a), the court held that drawing an inference of guilt from the pre-trial silence of the accused would 'undermine the rights to remain silent and to be presumed innocent' and that 'an obligation to break his or her silence or to disclose a defence before trial would be invasive of the constitutional right to silence', and also that an inference of guilt from silence is 'no more plausible than innocence'.⁸³

On the question raised in (b), the court held that the drawing of an inference on the credibility of an accused as a result of a failure to raise a pre-trial alibi, although impacting on the accused's right to remain silent, was indeed admissible, and may be justified under the limitation clause.⁸⁴

Regarding (c), the court held that the cross-examination of an accused as to why he or she opted to remain silent on an alibi or any other defence is permissible and proper, and does not unjustifiably limit the accused's right to silence; it may even, according to the court, 'advance the truth-finding function of the criminal trial' and even 'test the veracity of a belatedly disclosed or fabricated defence'.

The minority decision (Goldstone J and O'Regan J) makes for interesting and provocative reading. The court was of the view that the warning relating to the right to remain silent, as it is currently couched, is fundamentally unfair, as it presents the

79 *Thebus* supra (n 10).

80 *Osman* supra (n 7).

81 *Thebus* supra (n 10).

82 *Thebus* supra (n 10) at 52.

83 *Thebus* supra (n 10) at 58.

84 *Thebus* supra (n 10) at 67. The court, however, qualified this decision by stating (at para 68) that regard still had to be had to the totality of the evidence as well as the reason(s) proffered by the accused for his failure to disclose the alibi timeously.

accused with a choice to remain silent while at the same time invoking punishment for the exercise of that right.⁸⁵

On the question of the inferences drawn in (b), the court drew a conceptual difference between the inferences going to credit and those going to guilt, as the accused would, in any case, have been treated unfairly in the light of the warning.⁸⁶ The court concluded, as regards (c), that allowing cross-examination on the reasons of the accused's failure to timeously tender an alibi or any other defence is a blatant infraction of the accused's right to remain silent, which is axiomatically, constitutionally guaranteed.⁸⁷

THE ACADEMIC DEBATE

One of the arch arguments often raised against any inroad into the right to remain silent is that any infraction would necessarily violate the presumption of innocence.⁸⁸ It is a fundamental procedural principle of the law of evidence that the prosecution bears the onus of proving its case beyond any reasonable doubt, without any assistance from the accused.⁸⁹ Therefore, by compelling the accused to disclose pre-trial information to the authorities, which may assist in unravelling the case, the accused would essentially be assisting the state in proving its case.

This argument, however, belies the essence of the burden of proof, which does not concern itself with the source of the evidence, but with whether the court can make a finding based on the *totality of the evidence*.⁹⁰ In essence, the court's duty is to assess the evidence before it in every factual and material respect, which makes it imperative for the court evaluate every piece of evidence in the context of the rest of the evidence before it.

Also, great emphasis is often placed on the argument that the right to remain silent is essentially aimed at the protection of innocent individuals, who may otherwise be wrongfully and erroneously convicted. This point of view dubiously fails to

85 *Thebus* supra (n 10) at 86.

86 *Thebus* supra (n 10) at 89. The court inferred, in this regard, that 'in the context of an alibi, the practical effect of the adverse inference to be drawn for the purposes of credit, namely, that the alibi evidence is not to be believed, will often be no different to the effect of the inference to be drawn with respect to guilt, namely that the late tender of the alibi suggests it is manufactured and that the accused is guilty'.

87 *Supra* (n 61) at para 91.

88 Nugent (n 1) at 516; Dennis (n 22) at 353; P-J Schwikkard 'Is it constitutionally permissible to infringe the right to remain silent?' (2001) 5 *International Journal of Evidence & Proof* 32 at 34.

89 *Ibid*; see also *Osman v Attorney-General, Transvaal* supra (n 7) at 13.

90 Nugent (n 1) at 516; Dennis (n 22) at 353. In *Thebus v The State* supra (n 61) the court held (per Goldstone J and O'Regan J) at para 84: '... our Constitution does not stipulate that only the State's evidence may be used in determining whether the accused has been proven guilty. Indeed our law has always recognised that the question of whether the accused has been proven guilty or not is one to be determined on a conspectus of all the admissible evidence, whatever its provenance.'

take into account the apparent advantages to the individual who chooses to disclose information to the authorities at the initial stages of the investigation. By so doing, the innocent suspect who chooses to divulge any knowledge or lack thereof at these initial stages of the proceedings effectively saves him- or herself a lot of time, anguish and anxiety by divulging information or a lack thereof, and in the process eliminates him- or herself as a possible suspect. By the same token, the authorities' efforts and energy may safely be diverted towards other, hopefully more fruitful leads, which may in turn lead to the apprehension and subsequent prosecution of the actual miscreant.

Schwikkard⁹¹ argues that the content of rights cannot be determined by instrumental arguments alone, and that when these are, in fact, taken into account at the limitations stage, they must have some evidential base. Ramraj⁹² contends, in the same vein, that within the context of s 36,⁹³ the task of the Constitutional Court should be to ensure that a proper balance is struck between the right under consideration and the countervailing legislative interest or objective.

Others, on the other hand, argue in favour of an instrumentalist approach. Support for the latter approach seems especially confined to practitioners, most notably from the ranks of the judiciary.⁹⁴ Nugent, for example, asks (rather cynically) whether, on a proper balancing of the scales, the right to remain silent or the privilege against self-incrimination may be interpreted to imply the 'suspect's right to conceal guilt'.⁹⁵

Van Dijkhorst, on the other hand, demonstrates the cost-ineffectiveness of a purely Kantian approach, which carries dire consequences, not only for the country's economic well-being, but most crucially for the administration of justice as well.⁹⁶

Theophilopoulos⁹⁷ contends that the human rights-based principle of silence is devoid of a sufficiently rational justification and also 'possesses neither logic, morality [n]or reason'. Failure to obtain pre-trial information from a suspect as a result of a slavish upholding of the right to remain silent may, it is contended, dampen public

91 P-J Schwikkard 'Instrumental arguments in criminal law: A mirage of tensions' (2004) 121 *SALJ* 289 at 303. She concludes, however (at 302), that the limitations clause is an express acknowledgement that instrumental arguments have a role to play in determining whether the limitation clause is justifiable, but that they will succeed only if they are clear and compelling and are able to withstand rational scrutiny (at 296).

92 Note 76 at 253.

93 *Ibid.*

94 Nugent (n 1); Van Dijkhorst (n 5).

95 Nugent (n 1) at 502.

96 He cites three cases (the *Vermaas* case 296/91, unreported; the *De Cock* case 266/94 and the so-called *NATPROP* cases (no citation), where the pre-trial right to remain silent was systematically abused and desecrated, with the result that the criminal justice system was reduced to a farcical nightmare.

97 Note 15.

confidence in the criminal process in some cases.⁹⁸ The perception may be created that guilty persons are not prosecuted as a result of a lack of evidence or are wrongly acquitted at trial.⁹⁹ The courts, in general, and the Constitutional Court, in particular, find themselves between two competing extremes, namely, balancing individual rights and public interests.¹⁰⁰ In this context Benthamite utilitarianism becomes almost too compelling to resist.¹⁰¹

South African courts have also, to some degree, expressed similar instrumentalist leanings in some cases. In *S v Van den Berg* 1995 (4) BCLR 479 (Nm) the court held¹⁰² that these rights must be given content within the context of the rights of ordinary law-abiding citizens who have been victims of crime. This sentiment was reiterated without qualification in *Attorney-General, Eastern Cape v Dhlabati* 1997 (7) BCLR (E).¹⁰³ More recently, it was expressed by the Constitutional Court in *Thebus*.¹⁰⁴

To this end, the South African Law Commission¹⁰⁵ has also made recommendations for amendments to the Criminal Procedure Act,¹⁰⁶ which will, if adopted, have far-reaching implications for the pre-trial right to remain silent.¹⁰⁷

98 Dennis (n 22) at 354.

99 Ibid.

100 M du Plessis 'Between apology and utopia: The Constitutional Court and public opinion' (2002) 18 *SAJHR* 1 at 2.

101 J Bentham *A treatise on judicial evidence* (JW Paget, 1825) 241: 'Let us now consider the case of persons who are innocently accused. Can it be supposed that the rule in question has been established with the intention of protecting them? They are the only persons to whom it can never be useful. Take an individual of this class; by the supposition, he is innocent, but, by the same supposition, he is suspected. What is his highest interest, and his most ardent wish? To dissipate the cloud which surrounds his conduct, and give every explanation which may set it in its true light; to provoke questions, to answer them, and to defy his accusers, this is his object; this is the desire which animates him. Every detail in the examination is a link in the chain of evidence which establishes his innocence.' RJ Allen 'Theorizing about self-incrimination' (2008–2009) 30 *Cardozo Law Review* 729 argues, in the same vein, that normative arguments purporting to support the right to remain silent are inconsistent with practical reality and consist of mere intellectual theorising which does not, in the final analysis, provide practical solutions to what are, in fact, practical legal aspects.

102 At 490A.

103 At 920F.

104 *Supra* (n 61) at para 107, where Yacoob J held as follows: 'Although a principal and important consideration in relation to a fair trial is that a trial must be fair in relation to the accused, the concept of a fair trial is not limited to ensuring fairness to the accused. It is much broader. A court must ensure that the trial is fair overall, and in the process, balance the interests of the accused with that of society at large and the administration of justice.'

105 Committee on the Simplification of Criminal Procedure, Project 73 (2002).

106 51 of 1977.

107 Committee on the Simplification of Criminal Procedure (n 105). These include:

- (1) the *drawing of adverse inferences* from pre-trial silence, in line with the provisions of the Criminal Justice and Public Order Act 1994 (England) 8.2
- (2) pre-trial *defence disclosure* 8.4
- (3) the holding of a *pre-trial conference* in order to narrow down disputes 8.8.

It is worth noting, however, that the constitutional entrenchment of the right to silence is not necessarily a novel introduction, as the right has always enjoyed recognition under the Criminal Procedure Act.¹⁰⁸ Section 217 of this Act contains provisions regarding the admissibility of confessions.¹⁰⁹ As already noted,¹¹⁰ however, the excesses of the authorities in the past relating to the right probably necessitated the enactment of what was supposed to serve as a buffer between law enforcement and individual rights.

The right to remain silent and the limitation clause

There is no general consensus in South African law on the primary question of how the Constitution itself or the Bill of Rights should be interpreted.¹¹¹ Adherents to a literal approach to interpretation argue that the Constitution protects a wide spectrum of rights and that its wording should simply be applied as strictly as possible to achieve the protection of liberty, dignity and equality.¹¹² Their opponents, on the other hand, argue for a wider and more contextual approach to Constitutional interpretation where rights are not spelled out literally.¹¹³ As a matter of fact, the latter approach is open to distortion where public opinion is misapplied in the quest for contextualisation.¹¹⁴ The proposed Interpretation of Legislation Bill, 2006 adopts a middle-ground approach.¹¹⁵

Axiomatically, recognition of the right to remain silent as a *fundamental human right* makes sensible the prohibition against the drawing of adverse inferences when the accused invokes the right.¹¹⁶ This peculiar status makes the right *almost* unassailable, subject, of course, to the limitation clause. A utilitarian construction of the silence principle would define it as no more than an instrumental evidentiary rule.¹¹⁷

108 51 of 1977.

109 In terms of subsec 1(a) a confession shall be admissible only if it is proved to have been made freely and voluntarily, and *only before a magistrate* or a designated peace officer (own emphasis).

110 Theophilopoulos (n 2) at 395.

111 AJ Burrow 'The Constitutional Court's bail decision: Individual liberty in crisis?' (2000) 16 *SAJHR* 307.

112 Ibid.

113 Ibid.

114 Ibid.

115 Section 5(1) When interpreting legislation:

(a) the meaning of a provision in that legislation must be determined by:

(i) its language; and
(ii) its context in the legislation.

(b) any reasonable interpretation of a provision in accordance with paragraph (a) that is consistent with the purpose and scope of that legislation must be preferred over any alternative interpretation of that interpretation that is inconsistent with the purpose and scope of that legislation.

116 Theophilopoulos (n 2) at 394.

117 Theophilopoulos (n 15) at 84.

Schwikkard¹¹⁸ submits that a more purposive and generous approach to interpretation would enhance the content of the right to remain silent by protecting suspects against coerced statements.

As a basic rule, no right enshrined in the Constitution is absolute.¹¹⁹ When determining whether a limitation of the right to remain silent is ‘reasonable and justifiable in an open and democratic society’, the court has to take the following factors into account, including:

- a. the nature of the right;
- b. the importance of the purpose of the limitation;
- c. the nature and extent of the limitation;
- d. the relationship between the limitation and its purpose; and
- e. the availability of a less restrictive means to achieve the purpose.¹²⁰

In arriving at a thorough interrogation of the limitation clause, the Constitutional Court needs to balance interests by undertaking a ‘complex sociological analysis’ of the issues.¹²¹ The analysis should not, however, be undertaken lightly, as was shown in other judgments.¹²²

The court in *S v Makwanyane*¹²³ eloquently expressed this requirement as ‘the weighing up of competing values, and ultimately an assessment based on proportionality’.¹²⁴ Curiously, the court, in interpreting the limitation clause also held that the difference in the nature of the rights implied that there is no ‘absolute standard’ to be laid down for determining reasonableness and necessity.¹²⁵

An analysis of the requirements stated in s 36 is therefore necessary and imperative in interrogating whether or not the right to remain silent can indeed be curtailed and, if so, to what extent. When assessing the ‘nature of the right’, the importance of the right cannot be overstated enough. The right to remain silent as a fundamental human right is essentially aimed, first, at the protection of the individual against the excesses of those in power and, secondly, at the protection of the integrity of the criminal process and of the criminal law itself.¹²⁶ In other words, it is meant to embrace the overall *interests of justice*. But is there any justification in coining the

118 Note 4 at 34.

119 *S v Manamela* 2000 (3) SA 1 (CC).

120 Section 36 of Act 108 of 1998.

121 Ramraj (n 76) at 254.

122 Here Ramraj (n 76) quotes the cases of *S v Mamabolo* 2001 (3) SA 409 (CC), where the court’s judgment, in spite of the use of words such as *balance* and *weight*, strangely did not reflect the *scientific analysis* (own emphasis) in line with its stated intention, the result being that it was not clear how the court had arrived at its conclusion on the balancing of interests.

123 1995 (3) SA 391 (CC).

124 *Supra* (n 123) at 404.

125 *Ibid.*

126 Dennis (n 22).

right as a *fundamental human right* instead of a *functional evidentiary rule* aimed at procedural fairness? The *raison d'être* seems to be firmly entrenched in human rights-based historical considerations rather than pragmatic actualities.¹²⁷

One is left, in the final analysis of s 36, to ponder whether there is indeed a 'less restrictive means' of achieving truth at the pre-trial stage of the criminal process without necessarily violating the individual's right to remain silent. The court in *S v Manamela* held, in this regard, that 'section 36 ... does not permit a sledgehammer to be used to crack a nut'.¹²⁸ In the same breath, the court agreed with the minority assessment¹²⁹ that 'the proportionality of a limitation must be assessed in the context of its legislative and social setting'.¹³⁰

It is submitted that it would, therefore, not be inimical in the process of analysis and interpretation to take societal interests into account when assessing the proportionality requirement.¹³¹ This approach does, needless to say, lean towards an instrumentalist interpretation of s 36.

In *S v Zuma*¹³² the Constitutional Court reaffirmed its approach to 'substantive' rather than 'formal' fairness. The notion of 'substantive fairness' has been interpreted to imply *substantive reasoning*, which essentially seeks to protect the rights of the individual against the 'vicissitudes of public opinion'.¹³³

The concept of 'substantive reasoning', as enunciated by the Constitutional Court in *Zuma* and other subsequent decisions,¹³⁴ is not borne out by the actual facts on the ground.¹³⁵ It is superficial, at best, and an oversimplification of the constitu-

127 Op cit (n 63).

128 Supra (n 119) at 34 and 37.

129 O'Regan J and Cameron J held at 95: 'The problem for the court is to give meaning and effect to the factor of less restrictive means without unduly narrowing the range of policy choices available to the Legislature in a specific area. The Legislature, when it chooses a particular provision, does so not only with constitutional rights, but also in the light of concerns relating to cost, practical implications, the prioritisation of certain social demands and needs and the need to reconcile conflicting interests.'

130 Supra (n 119) at 34.

131 Supra (n 119).

132 1995 (2) SA 642 (CC) at para 16.

133 Du Plessis (n 100) at 2.

134 *President of the Republic of South Africa v Hugo* 1997 (4) SA 1 (CC); *National Coalition for Gay and Lesbian Equality v Minister of Justice & others* 1999 (10) SA 6 (CC); *S v Jordaan* 2002 (6) SA 642 (CC); *Thebus v The State* (n 10).

135 In *Hugo* (n 134), the court simply glossed over the provisions of s 8 of the Constitution and applied what was essentially a formal and simplistic interpretation of the provision. Kriegler J's dissenting judgment, probing and informative, deserves particular attention. The opening words of his judgment are both illuminating and provocative (at para 63): 'This is a very hard case indeed.' He exhorts the reader to pay particular heed to the fact that 'hard and unpopular choices' need to be made in the adjudication of the merits. They further reveal, in tongue-and-cheek fashion, the perils which confronted the court in the course of constitutional interpretation and which were not adequately lived up to. What follows is a crisp, incisive, contextual and substantive analysis of the equality clause, which defies the conventional banality of the majority decision. In *S v Jordaan*

tional analysis, at worst, and ultimately bares the hallmark of a definistic fallacy. It is submitted that the concept will be better served by a more inquisitive and incisive approach to analysis.¹³⁶ Cockerel¹³⁷ is, therefore, not amiss in arguing that even though the Constitutional Court explicitly professes a substantive approach, its approach has, by and large, proved covertly formalistic.¹³⁸

In the *Thebus* case the Court was confronted with the unenviable task of interpreting what is, fundamentally, a human right, within the confines of a criminal procedural *fulcrum*, and which is, essentially, aimed at procedural fairness, and not necessarily at the protection of a human right. Whilst authoritatively declaring that any pre-trial compulsion to disclose information would be detrimental to the right to remain silent, the Court, nonetheless, left unstated the analytical process leading to the conclusion. The latter leads one to the obvious, yet unpalatable conclusion that a more thorough analysis would have compelled the court into ‘difficult choices’,¹³⁹ which would, in essence, have pierced through the veneer of a ‘substantive’ approach. The ‘substantive reasoning’ which was so eloquently and resolutely declared in *Zuma*¹⁴⁰ is glaringly conspicuous by its very absence.

The Court essentially adopts what Cockerel poignantly terms ‘the pleader’s strategy of confess-and-avoid’: admitting that constitutional adjudication involves substantive reasoning, whilst at the same time avoiding attendant the difficulties.¹⁴¹ Substantive reasons are, by their very nature controversial, and sometimes require ‘difficult choices’ to be made.¹⁴² Here it is submitted that a substantive approach to the interpretation of the right to silence inexorably necessitates an in-depth analysis of the substantive nature of the right to remain silent. This in turn will invariably lead

supra (n 134) the court was more unequivocal on the question of a *substantive approach* (at para 72): ‘Where, although neutral on its face, its substantive effect is to undermine the values of the Constitution, it will be susceptible to constitutional challenge.’ Although assiduously asserting that it was, in fact, busy engaging in a substantive analysis of the constitutional provisions under consideration, the court nonetheless apprehensively side-stepped prayers from *amicus curiae* (at para 64) for an in-depth analysis of the provisions of ss 8 and 9, which would, it is submitted, have provided a more substantive slant to the one which was subsequently articulated by the court.

136 RS Summers ‘Two types of substantive reasons: The core of a theory of common-law justification’ (1978) 63 *Cornell Law Review* 707 at 716, describes a good substantive reason as: ‘A reason that derives its justificatory force from a moral, economic, political, institutional, or other social consideration’.

137 A Cockerel ‘Rainbow Jurisprudence’ (1996) 12 *SAJHR* 1.

138 It is disturbingly notable that Cockerel’s view is still as cogent as it was at the time of the writing of the above article.

139 Du Plessis (n 100).

140 Supra (n 132).

141 Supra (n 137) at 37. I referred to the practice (above) as a ‘definistic fallacy’.

142 Cockerel (n 137) at 11 argues, further, that substantive reasons essentially require that hard choices be made between moral and political values which are inherently contestable, and over which rational people will disagree.

to the inquiry as to whether the right should, in fact, be regarded as a fundamental human right or a functional procedural right.

This conjectural analysis is not to suggest, however, that the court would inevitably have arrived at a different conclusion from the one at which it subsequently did. The contention is that a more rigorous and contextual application is calculated to unshackle the truth-finding process from its apparently positivistic manacles, which are at odds with the court's professed new-found flexibility. The interpretation of the content of the right and the limitation clause were not expansively enhanced by what Dugard¹⁴³ refers to as a 'mechanical or phonographic' approach. The court's glaring failure or omission to explicate meticulously the provisions of s 36 in curtailing the right to silence appear to be motivated by the reluctance to make 'hard choices',¹⁴⁴ which may potentially unravel the illusion of 'Rainbow Jurisprudence'.¹⁴⁵

The extension of the right to silence into a fundamental constitutional right has effectively 'taken privilege into areas of the law of evidence where it has no business to be'.¹⁴⁶ Hence, it is crucial to draw a clear and unambiguous distinction between substantive and procedural values.¹⁴⁷ The perils of equating rights contained in the Bill of Rights with other rights are self-evident, as was expressed poignantly in the Canadian case of *Hunter v Southam*.¹⁴⁸

'The task of expounding a constitution is crucially different from that of construing a statute. A statute defines present rights and obligations. It is easily enacted and as easily repealed. A constitution, by contrast, is drafted with an eye to the future. Its function is to provide a continuing framework for the legitimate exercise of governmental power and, when joined by a Bill or a Charter of rights, for the unremitting protection of individual rights and liberties. Once enacted, its provisions cannot easily be repealed or amended. It must, therefore, be capable of growth and development over time to meet new social, political and historical realities often unimagined by its framers. The judiciary is the Guardian of the Constitution and must, in interpreting its provisions, bear these considerations in mind.'

A purely literal–formalistic interpretation of the right to remain silent does not necessarily accord with the precepts of the Bill of Rights if a rigorous and substantive interpretation is applied to it. Conversely, the more radical approach also seems the most pragmatic: the recognition of the right to remain silent as a functional evidentiary right, rather a fundamental human right, whereby compulsion can be 'justified

143 J Dugard 'The judicial process, positivism and civil liberty' (1971) 88 *SALJ* 181 at 182.

144 Du Plessis (n 100).

145 Cockerel (n 137) at 11.

146 Dennis (n 24) at 373.

147 Dennis (n 24) at 352 describes substantive values as, inter alia, human autonomy and dignity, security of person and property from unjustified interference, privacy, and freedom from discrimination. Under procedural rights he lists, inter alia, the presumption of innocence, fair trial according to principles of natural justice, and probity on the part of state agencies entrusted with coercive powers.

148 1984] 11 DLR (4th) 641 (SCC) 649.

by reference to other values internal to the process of criminal adjudication'.¹⁴⁹ This would, in effect, alleviate the interpretational dilemma which tends to daunt the court into insipid inertia.

The taking of bodily samples is generally accepted in most jurisdictions as a necessary and acceptable method of obtaining pre-trial information from an accused or a suspected person. The most common rationale in favour of the extraction of such information (even if accompanied by legal compulsion) is that the exercise of such compulsory powers requires no co-operation from the suspect, whereas compulsion to speak or to hand over documents operates directly on the suspect's mind.¹⁵⁰ This assertion is, however, dismissed as disingenuous and unpragmatic.¹⁵¹

CONCLUSION

The edifice upon which the right to remain silent rests also appears to be its Achilles' heel. The problem lies not per se in the interpretation of the content of the right, but in the very essence of the right; not as fundamental evidentiary principle, but as a fundamental human right which, according to the Constitution, cannot easily be trammelled. The interpretation thereof as a procedural right would, it is submitted, go a long way towards levelling the playing field in the objective search for truth. Even Pardo's definition of the presumption of innocence as a 'constitutionally entrenched evidentiary rule'¹⁵² fails to acknowledge clearly and unambiguously that the right to silence and the presumption of innocence, in their present form, contain substantial and procedural dimensions which should be approached and addressed in their proper context.

The contention in this article is that a purely Kantian and libertarian approach to the interpretation of the right to remain silent essentially compels the criminal process to close one eye to an important and crucial piece of the puzzle, thereby obscuring the truth-seeking function. The accused is, in most cases, the person vested with the most intimate knowledge of the offence in question. It is submitted that in

149 Dennis (n 24) at 375. These include procedures such as fingerprinting, conducting identity parades and ascertaining bodily features, and also taking blood samples and photographs. In South Africa, this process is regulated by s 37 of the Criminal Procedure Act 51 of 1977. In *S v Huma & another* 1996 (1) SA 232 (W) the court (at 237J–238H) made a distinction between *real* evidence and *oral* evidence and concluded, in its analysis of the two, that procedures involved in the taking of fingerprints, blood samples and identification parades were part of the former and could, therefore, not be reconciled with the taking of oral or documentary evidence.

This decision is, however, open to criticism: it is difficult to decipher the rationale of why the compulsion to give body samples, which is most invasive of individual privacy and personal integrity, would be more harmful and intrusive than making a pre-trial statement within the same controlled environment, if this would be in the interests of objective truth-finding.

150 Ashworth (n 41) at 760, 773.

151 Ashworth (n 41) at 773.

152 Pardo (n 12) at 1035.

the normal course of events even the principles of natural justice would demand a pre-trial level playing field based on procedural fairness amounting to a pre-trial 'compulsion to speak' on the part of a suspect, in appropriate and controlled circumstances.

Some commentators have suggested the implementation of judicial examinations in the tradition of the Scottish legal system. The Law Commission, on the other hand, has also touted the introduction pre-trial interrogations similar those witnessed in England.

Although the Constitutional Court has bound itself to a more expansive, liberal and substantive interpretative culture, this approach still eludes the court, which appears still transfixed on the positivistic mode of analysis of South African courts. It is a state of arrested development from which the court needs to extricate itself, in spite of the inherent peril of 'hard cases' that may lead to unpopular judgments.