

**#7 – A Comparative Study of the Rule against Self-Incrimination in
Common and Civil Law Countries**

Kelly Neumann
12-19-03
War Crimes

Kelly Neumann
Topic #7
For 2 credits

This memo contains a comparative study of the rule against self-incrimination in common and civil law countries. Many countries deprive their people from the privilege against self-incrimination in some form or another. The citizens of the United States rely on the Fifth Amendment for their protection and no adverse inferences are allowed to be drawn. The German Federal Code is similar to the Fifth Amendment of the United States. However, in Germany adverse inferences may be drawn if the defendant selectively refuses to answer certain questions. However, even though England, Wales, and Northern Ireland have the privilege of self-incrimination, adverse inferences are allowed to be drawn. In Korea, illegal evidence is not always excluded unless the illegal conduct is the direct cause of the confession. In China, the privilege against self-incrimination does not exist.

Professor Siegel
War Crimes

TABLE OF CONTENTS

- I. **Introduction & Summary of Conclusions** Pg. 1.
- II. **Factual Background** Pg. 3.
- III. **Legal Discussion (*Common Law Countries*)** Pg. 4.
 - A. United States Pg. 4.
 - B. England & Wales Pg. 8.
 - C. Northern Ireland Pg. 9.
 - D. India Pg. 11.
- IV. **Legal Discussion (*Civil Law Countries*)** Pg. 14.
 - A. Republic of Korea Pg. 14.
 - B. Nigeria Pg. 17.
 - C. Germany Pg. 20.
 - D. China Pg. 23.
- V. **Conclusion** Pg. 25.

MEMO

January 8, 2004

Deputy Prosecutor of the International Tribunal for Rwanda

Re: #7 – A Comparative Study of the Rule Against Self-Incrimination in Common and Civil Law Countries

To Whom It May Concern:

I. Introduction & Summary of Conclusions

It is surprising how so many countries deny their people the privilege against self-incrimination. Each country views self-incrimination in their own way. Some countries believe that the privilege against self-incrimination should be denied because defendants should be compelled to tell the truth, so the guilty are not set free. Other countries believe that no defendant should be compelled to testify or speak against his will because the privilege represents freedom.

The differing common and civil law legal systems emerged in England and France in the 12th century and spread to those countries' colonies.¹ England developed

¹ Economic Consequences of Common Law versus Civil Law
<http://www.ncpa.org/pi/internat/pd090701e.html> (last visited October 19, 2003).

the tradition of the common law, while France and other continental European countries used a civil law system from the Romans.²

Common law comes from the root levels of a society.³ The development of common law was essentially a private affair concerning millions of people throughout dozens of generations and stretching across many centuries.⁴ It is a process that is self adjusting and goes on everyday unnoticed, usually without great expense to the state and without fractionalizing society.⁵ Common-law countries rely on independent judges and juries and legal principles supplemented by precedent-setting case law, which results in greater flexibility.⁶ Traditional common law norms are uniformity, certainty, predictability, and legitimacy.⁷ Some countries that have common law are the United States, Australia, India, Singapore, New Zealand, and former British colonies.⁸

In civil law countries, judges often are life-long civil servants who administer legal codes packed with specific rules, which hobbles them in their ability to cope with change.⁹ The basis of law in civil law jurisdictions is statute, not custom.¹⁰ Judges apply principles embodied in statutes, or law codes, rather than turning to precedent.¹¹ The body of civil law was developed from Roman law and used in continental Europe and most former colonies of European nations, including the province of Quebec and the

² *Id.*

³ The Common Law (visited October 19, 2003)

<http://www.blupete.com/Literature/Essays/BluePete/LawCom.htm>

⁴ *Id.*

⁵ *Id.*

⁶ *Id.*

⁷ Economic Consequences of Common Law versus Civil Law

<http://www.ncpa.org/pi/internat/pd090701e.html> (last visited October 19, 2003).

⁸ The Common Law <http://www.blupete.com/Literature/Essays/BluePete/LawCom.htm> (last visited October 19, 2003).

⁹ Economic Consequences of Common Law versus Civil Law

<http://www.ncpa.org/pi/internat/pd090701e.html> (last visited October 19, 2003).

¹⁰ *Id.*

¹¹ *Id.*

United States state of Louisiana.¹² The most significant codifications of modern civil law were the Napoleonic Code and the German Civil Code.¹³ French civil law formed the basis of the legal systems in the Netherlands, Belgium, Luxembourg, Italy, Spain, and many Latin American countries.¹⁴ German civil law is shown in Austria, Switzerland, the Scandinavian countries, and certain countries outside Europe, such as Japan, that have westernized their legal systems.¹⁵

II. Factual Background

The limitation on self-incrimination serves many purposes. Some examples include: 1) personal dignity of the accused; 2) privacy, which allows an area beyond government reach; 3) certain limits on government abuse; and 4) avoiding government involvement in coercion. The citizens of the United States rely on the Fifth Amendment for their protection and no adverse inferences are allowed to be drawn. The German Federal Code is similar to the Fifth Amendment of the United States. However, in Germany adverse inferences may be drawn if the defendant selectively refuses to answer certain questions. However, even though England, Wales, and Northern Ireland have the privilege of self-incrimination, adverse inferences are allowed to be drawn. In Korea, illegal evidence is not always excluded unless the illegal conduct is the direct cause of the confession. In China, the privilege against self-incrimination does not exist. As one can see, the right and meaning of self-incrimination varies from country to country.

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.*

III. Legal Discussion (*Common Law Countries*)

A. The United States:

The Bill of Rights prevents self-incrimination in the United States. The Fifth Amendment states that “no person...shall be compelled in any criminal case to be a witness against himself in any criminal case.”¹⁶ There are potentially many ways to “compel” testimony, such as testimony, fines, contempt, etc. A confession need not be “compelled” during a criminal trial for it to be excluded.¹⁷

In the United States, the privilege against self-incrimination is a personal one and it applies to 1) natural, as opposed to corporate, “persons;” 2) only in criminal cases (a witness cannot keep silent or withhold information in civil proceedings, which are not criminal in nature); and 3) it only applies to cases where the phenomenon of “compulsion” is present.¹⁸ “In order for something to be incriminating, it must not simply reveal criminal activity, but produce the real likelihood or risk of imprisonment.¹⁹ Likewise, something is compelled only if there is a risk of imprisonment for refusal to testify or produce documents.²⁰ The privilege in the United States also preserves some interesting features of the American adversarial system.²¹” When a defendant refuses to testify in their own trial, neither the prosecutor nor the judge can make any adverse comments about the failure to testify (the jury must also be cautioned not to make any

¹⁶ United States Constitution Amendment V.

¹⁷ Larry Glasser, The American Exclusionary Rule Debate: Looking to England and Canada, 35 *GWILR* 159, 177 (2003).

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Id.*

inferences from this fact).²² If the defense opens the door to it by commenting upon it in closing arguments, this prohibition ends.²³

Over the course of over 100 years, the United States Supreme Court has held that an individual is not required to produce self-incriminating documents,²⁴ to make self-incriminating statements during grand jury investigations,²⁵ to keep records that single out certain illegal activity,²⁶ or to be forced to testify under threat of “substantial economic sanction.”²⁷

The 5th Amendment applies to both federal, and state proceedings.²⁸ The Fifth Amendment was properly invoked in Malloy v. Hogan by a prisoner who had previously been convicted of pool-selling, when he was asked as witness in state gambling inquiry questions seeking to elicit the identity of one who ran the pool-selling operation.²⁹ The court held that the disclosure of his name might furnish a link in a chain of evidence sufficient to connect the prisoner with a more recent crime for which he might still be prosecuted.³⁰ However, in Chavez v. Martinez, respondent believed that an officer engaged in coercive interrogation tactics while respondent was undergoing medical treatment for potentially fatal injuries from being shot by another officer.³¹ The respondent contended that the interrogation was unconstitutional, even though respondent was never charged with a crime and his statements were never used against him.³² The

²² *Id.*

²³ *Id.*

²⁴ *Id.* (citing Boyd v. United States, 116 U.S. 616 (1886)).

²⁵ *Id.* (citing Counselman v. Hitchcock, 142 U.S. 547, 562 (1892)).

²⁶ *Id.* (citing Marchetti v. United States, 390 U.S. 39, 57, 60-61 (1968)).

²⁷ *Id.* (citing Leftkowitz v. Turley, 414 U.S. 70, 82-83 (1973)).

²⁸ Malloy v. Hogan, 378 U.S. 1, 3 (1964).

²⁹ *Id.*

³⁰ *Id.*

³¹ Chavez v. Martinez, 538 U.S. 760 (2003).

³² *Id.*

United States Supreme Court held that the officer was entitled to qualified immunity since the officer committed no violation of respondent's constitutional rights since the respondent was not compelled to be a witness against himself, and because the circumstances warranted the intense questioning to preserve respondent's version of events.³³

In one of the most famous cases in all of U.S. history, the court in Miranda v. Arizona held that statements obtained from defendants during incommunicado interrogation in a police-dominated atmosphere, without full warning of constitutional rights, were inadmissible as having been obtained in violation of the Fifth Amendment privilege against self-incrimination.³⁴ Unless other fully effective means are devised to inform an accused person of the right to silence, and to assure continuous opportunity to exercise it, a person must, before any questioning, be warned that he has right to remain silent, that any statement he does make may be used as evidence against him, and that he has right to presence of attorney, retained or appointed.³⁵ If an individual states that he wants an attorney, interrogation must cease until the attorney is present; at that time, the individual must have an opportunity to confer with the attorney and to have him present during any subsequent questioning.³⁶ The mere fact that the accused may have answered some questions or volunteered some statements on his own does not deprive him of his right to refrain from answering any further inquiries until he has consulted with his attorney and thereafter consents to be questioned.³⁷

³³ *Id.*

³⁴ Miranda v. Arizona, 384 U.S. 436 (1966).

³⁵ *Id.*

³⁶ *Id.* at 437

³⁷ *Id.* at 440

In a fairly new United States case, the court held that a prosecutor's comments during summation did not affect the jury or the defendant's case, even though the defendant had an opportunity to hear other witnesses testify, which enabled the defendant to tailor his testimony accordingly.³⁸ The court held this did not unlawfully burden the defendant's right to be present at trial, to be confronted with witnesses against him, or prevent the defendant from testifying in his own behalf.³⁹

Evidence can be excluded if the right to self-incrimination is violated. In Withrow v. Williams, statements made by a prisoner during an interrogation after threats of imprisonment by police officers, and before being given Miranda warnings, could not be used in determining his guilt.⁴⁰ However, the United States has a public safety exception to the right against self-incrimination.⁴¹ In New York v. Quarles, a police officer pursued the respondent suspect in a supermarket after a woman identified him as the man that raped her.⁴² The officer frisked respondent and discovered that he was wearing an empty shoulder holster and after handcuffing the respondent, the officer asked him where the gun was.⁴³ Respondent stated that "the gun is over there."⁴⁴ "After the officer obtained the loaded gun, he placed respondent under arrest and then proceeded to read him his Miranda rights.⁴⁵ The Court held that there was a "public safety" exception to the requirement that Miranda warnings be given before a suspect's answers could be

³⁸ Portuondo v. Agard, 120 S.Ct. 1119 (2000).

³⁹ *Id.*

⁴⁰ Withrow v. Williams, 507 U.S. 680 (1993).

⁴¹ New York v. Quarles, 467 U.S. 649 (1994).

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *Id.*

admitted into evidence, and that the availability of that exception did not depend upon the motivation of the individual officers involved.”⁴⁶

B. England and Wales:

Every person in England and Wales “has a right not to incriminate themselves, both under domestic law and under the fair trial provisions contained in Article 6 of the European Convention on Human Rights.⁴⁷ This right presupposes that the prosecution in a criminal case will seek to prove the case against the accused without resort to evidence obtained through coercion or oppression of the accused.”⁴⁸

If the court requires an accused to testify or draws negative inferences when the accused invokes the right to silence, in England and Wales, the burden of proof is shifted from the prosecution to the defendant.⁴⁹ The ability of the fact finder to draw adverse inferences from an accused’s exercise of the right to silence lowers the prosecution’s burden of proof needed to establish the guilt of the accused.⁵⁰ The fact finder can even consider adverse inferences alongside evidence, which alone may establish guilt.⁵¹ This may enable the fact finder to arrive at a guilty verdict on the basis of otherwise insufficient or false evidence.⁵² Concomitantly, a system that allows compulsion is

⁴⁶ *Id.*

⁴⁷ Collecting Witness Evidence-Witness Statements, available at <http://www.hse.gov.uk/enforce/enforcementguide/investigation/witness/witness.htm#P6713897> (last visited December 15, 2003); (See *Saunders v United Kingdom* [1997] 23 EHRR 313; approved in numerous subsequent English cases).

⁴⁸ *Id.*

⁴⁹ K.A. Cavanaugh, *Emergency Rule, Normalcy Exception: The Erosion of the Right to Silence in the United Kingdom*, 35 *CNLILJ* 491, 493 (2002).

⁵⁰ *Id.*

⁵¹ *Id.* at 493-494.

⁵² *Id.* at 494.

inconsistent with the right against self-incrimination.⁵³ Under this system, the accused must decide whether to remain silent, thereby subjecting oneself to adverse inferences, or to testify, which could amount to self-incrimination.⁵⁴

In 1999, silence legislation was amended in England, and Wales to prevent a court or jury from drawing adverse inferences unless the accused had access to a lawyer during questioning in a police station or “other authorized place of detention.”⁵⁵

C. Northern Ireland:

The right to silence in Northern Ireland was not curtailed until 1988.⁵⁶ Under the Criminal Evidence (Northern Ireland) Order (CENI) of 1988 that was implemented in December of 1988, the fact finder can draw inferences of guilt if a defendant chooses to remain silent.⁵⁷ An adverse inference may be drawn from pre-trial silence in three situations, and from silence during the actual trial in one situation.⁵⁸ Thus, the accused can either provide potentially self-incriminating information, or remain silent, which can be used as an admission to guilt.⁵⁹

Article 2 of the Criminal Evidence Order (CENI) specifies that adverse inferences, drawn from an accused’s exercise of the right to silence in Article 3-6 circumstances, can supplement but cannot serve as the foundation of the prosecution’s

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ *Id.* at 496-497 (*citing* Youth Justice and Criminal Evidence Act 1999, c. 23, § 58 (Eng.); Criminal Evidence Order, 1988, (N. Ir. 20), art. 3(6); Criminal Evidence (Northern Ireland) Order 1999 (SI 1999 No. 2789), art. 36.)

⁵⁶ *Id.* at 498.

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ *Id.*

case.⁶⁰ Article 3 “CENI” does not expressly require the accused to have access to legal council or advice.⁶¹ However, subsequent legislation does not allow a court or jury to draw inferences where a defendant has been denied access to legal counsel.⁶² Article 3 also does not require investigators to inform a defendant of the potential consequence of his or her silence.⁶³ Article 4 permits the fact finder to draw adverse inferences from the defendant’s refusal to answer questions at trial.⁶⁴ In R v. McLernon the court held that a refusal to answer questions may, with nothing more, increase the weight of a prima facie case to the weight of proof beyond a reasonable doubt.⁶⁵ McLernon, held “it is proper that a court should regard the failure of the plaintiff to give evidence as a matter for close scrutiny of the facts upon which he relies and as conformity of any inferences which may be drawn against him.”⁶⁶ The court further held that the evidence against the accused was far beyond suspicion and that the evidence was overwhelming.⁶⁷ Article 6 states that adverse inferences are permitted when a defendant fails to give the police an explanation for forensic evidence found on or near the person.⁶⁸ A defendant also risks adverse inferences by failing to account for his or her whereabouts at the time a crime was committed.⁶⁹

⁶⁰ *Id.* at 499 (*citing* Criminal Evidence Order, 1988, (N. Ir. 20), art. 2(4))

⁶¹ *Id.*

⁶² *Id.*

⁶³ *Id.* at 499 (*citing* Criminal Evidence Order, 1988, (N. Ir. 20), art. 4(2), 5(5), and 6(3)).

⁶⁴ *Id.* at 503.

⁶⁵ R v. McLernon & Others, Transcript, (Belfast Crown Court, Dec. 20, 1990, Kelly, J.) (Lexis, Northern Ireland Reported and Unreported Cases) (pg. 6 of 7 pages un-paginated LEXIS printout).

⁶⁶ *Id.* at 6-7.

⁶⁷ *Id.*

⁶⁸ 2000 Crim. L. Rev. 682 (Eur. Ct. H.R. 2000).

⁶⁹ *Id.*

The question should not be whether adverse inferences should be drawn from silence but rather what degree and weight should silence be given.⁷⁰

D. India:

Clause (3) of article 20 of the Constitution of India provides that “no person shall be compelled to be a witness against himself.”⁷¹ “Though the right has been defined broadly its scope has been confined by judicial interpretation to evidence which is of testimonial in nature.”⁷² In other words, the courts have held that the protection is available only to evidence which requires a volitional act on the part of the accused person thus rendering it testimonial or communicative in nature and the Constitution of India will not protect the taking of blood samples, fingerprints, etc., from the person that is being accused.⁷³ The protection is only available from the time the person is charged with an offence and does not extend to the pre-accusation or investigation stage.⁷⁴ “The immunity will not be available to a person against whom no accusation has been made when a compulsory process or notice is issued directing him under pain or penalty to produce a document though ultimately it may incriminate him for the commission of an offence.”⁷⁵

The Constitution of India explicitly empowers the Parliament to enact laws providing for preventive detention for instances that involve, “the Security of a State,

⁷⁰ Cavanaugh, Emergency Rule, Normalcy Exception: The Erosion of the Right to Silence in the United Kingdom, *supra* note 18, at 511.

⁷¹ Digital Cryptography and Self-Incrimination, available at http://www.asianlaws.org/cyberlaw/library/india/cc/crypto_self.htm (last visited Dec. 15, 2003).

⁷² *Id.*

⁷³ *Id.*

⁷⁴ *Id.*

maintenance of public order, or maintenance of supplies and services essential to the community.”⁷⁶ The Constitution also provides that no procedural safeguards listed in Article 22 (1) & (2) of the Constitution, will be applied to a preventive detention detainee.⁷⁷ Neither the Constitution nor current preventive detention legislation attempts to define either the range of acts considered threatening to “public order” and “State security” or the range of acts (or associations) supporting the inference that an individual is likely to commit such acts.⁷⁸ The lack of any clear prohibitions precludes individuals from adjusting their behavior to conform to the prevailing regime’s behavioral expectations.⁷⁹ This deficiency poses a fundamental challenge to the question of the legality of preventive detentions.⁸⁰

Detention Orders are to be executed in the same manner as normal warrants of arrest.⁸¹ Therefore, detention orders must be in writing, signed by the presiding officer of such Court, and shall bear the seal of the Court.⁸² The officer who is executing the order shall notify of the substance thereof to the person to be arrested, and, if so required, shall show him the warrant.⁸³ The officer must also bring the detainee before a magistrate without unnecessary delay, and under no circumstance should this delay exceed twenty-four hours exclusive of the time necessary for the journey from the place of arrest to the

⁷⁵ *Id.*

⁷⁶ Derek P. Jinks, The Anatomy of an Institutionalized Emergency: Preventive Detention and Personal Liberty in India 22 *MIJIL* 311, 323 (2001) (*citing* National Security Act §13 (1980)).

⁷⁷ India Const. art. 21 (2) & (3).

⁷⁸ Jinks, The Anatomy of an Institutionalized Emergency: Preventive Detention and Personal Liberty in India, *supra* note 41, at 328.

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ India Code Crim. Proc. (No. 2 of 1973), §§70-81 [hereinafter Cr.P.C.].

⁸² Cr.P.C., §70.

⁸³ Cr.P.C., §75.

Magistrate's Court.⁸⁴ India's Constitution states that "no law providing for preventive detention shall authorize the detention of a person for a longer period than three months unless an Advisory Board states in its opinion sufficient cause for such detention."⁸⁵

The Supreme Court held in the mid 1970's that the presidential order under Article 359 of the Constitution allowed the suspension of certain fundamental rights, including self-incrimination.⁸⁶ Tens of thousands were arbitrarily detained during the "emergencies" without the ability to petition the courts for redress.⁸⁷ The Constitution was later amended to limit the ability of the President to suspend fundamental freedoms under Article 359, which stated that the fundamental rights of Articles 20 and 21 of the Constitution are not to be suspended even in a state of emergency.⁸⁸ Article 20 of the Constitution prohibits being convicted of any offence except for violation of a law in force at the time of the commission of the act charged as an offense, and the individual may not be subjected to a penalty greater than that which might have been inflicted under the law in force at the time of the commission of the offense.⁸⁹ Double jeopardy is also prohibited, as well as involuntary self-incrimination under Article 20.⁹⁰ Article 21 of the Constitution states that "no person shall be deprived of his life or personal liberty except

⁸⁴ Cr.P.C., §76.

⁸⁵ India Const. Art. 22 (4).

⁸⁶ Jinks, The Anatomy of an Institutionalized Emergency: Preventive Detention and Personal Liberty in India, *supra* note 41, at 345. (See A.D.M. Jobalpur v. Shivakant Shukla, A.I.R. 1976 S.C. 1207; Union of India v. Bhanudas, A.I.R. 1976 SC 1027, 1029).

⁸⁷ Jinks, The Anatomy of an Institutionalized Emergency: Preventive Detention and Personal Liberty in India, *supra* note 41, at 345. (See Bhattacharjee, Administration of Law and Justice in India 163 (1982); Pannalal Dhar, Preventive Detention under Indian Constitution 144-45 (1986)).

⁸⁸ Constitution (Fourth-Fourth) Amendment Act, 1978, available at <http://www.constitution.org/cons/india/tamnd44.htm> (last visited Oct. 22, 2003).

⁸⁹ India Const., Art. 20.

⁹⁰ *Id.*

according to procedure established by law.⁹¹ It should be noted that there is no “due process” clause in Article 21 of the Constitution.⁹² The Constituent Assembly actually thought that such a due process provision might authorize the judiciary to invalidate preventive detention legislation.⁹³ The Advisory Committee on Fundamental Rights were fearful that the omission gave the legislature unrestrained power to deprive individuals of their personal rights that accompany personal liberty.⁹⁴ To avoid circumventing the legislature’s power to enact preventive detention laws, Article 22 was created and specifically stated that the rights therein did not extend to preventive detention cases.⁹⁵ Article 22 of the Constitution also includes a specific list of rights that must be given in preventive detention cases.⁹⁶

IV. Legal Discussion (*Civil Law Countries*)

A. Republic of Korea:

Before the new Constitution of 1987, there was much torture, illegal arrests, detentions, and illegally obtained evidence, as well as confessions in court.⁹⁷ This new Constitution established a blueprint for the “constitutionalization of criminal procedure” in Korea and created the Korean Constitutional Court as a watchtower to monitor unconstitutional laws and police practices.⁹⁸ Article 12 (1) and (3) of the Korean

⁹¹ India Const., Art. 21.

⁹² *Id.*

⁹³ Jinks, The Anatomy of an Institutionalized Emergency: Preventive Detention and Personal Liberty in India, *supra* note 41, at 347-348. (See Granville Austin, *The Indian Constitution: Cornerstone of a Nation* (1966) at 102. See also 9 Constituent Assembly Debates, 1535).

⁹⁴ *Id.* at 348-349. 9 Constituent Assembly Debates 1497.

⁹⁵ India Const., Art. 22, cl. 3.

⁹⁶ India Const., Art. 22 cl. 4-7.

⁹⁷ Kuk Cho, The Unfinished “Criminal Procedure Revolution” of Post-Democratization South Korea, 30 *DENJILP* 377, 377-378 (2002).

⁹⁸ *Id.* at 379.

Constitution have incorporated due process in criminal procedure. The “living” Bill of Rights of 1987 now includes very strict procedural requirements, including requirements for obtaining warrants,⁹⁹ the right against self-incrimination,¹⁰⁰ right to counsel,¹⁰¹ right to be informed of why one was arrested or detained,¹⁰² right to request judicial hearing for arrest or detention,¹⁰³ exclusionary rule of illegally obtained confession,¹⁰⁴ protection against double jeopardy,¹⁰⁵ right to fair trial,¹⁰⁶ and many more procedural safeguards. These rights are generally observed but only apply to a criminal offenses.¹⁰⁷

Defendants who are detained or arrested must be told of the reason therefore and of his right to assistance of counsel.¹⁰⁸ The family and other related persons, as designated by law, must also be notified without delay of the person’s accused, arrested, or detained, as well as the reason therefor and the time and place of the arrest or detention.¹⁰⁹ The right against self-incrimination is guaranteed by the Korean Constitution. Therefore, statements that are elicited without informing the defendant of the right to silence in interrogation are illegally obtained evidence and will be excluded, even if they are disclosed voluntary.¹¹⁰ Witnesses may also refuse to testify on the ground of self-incrimination concerning “such matters as may cause prosecution or

⁹⁹ The Constitution of the Republic of Korea art. 12(3), 16, available at <http://www.assembly.go.kr/english/laws/constitution/constitution2.html> (last visited Oct. 22, 2003).

¹⁰⁰ *Id.* at art. 12(2).

¹⁰¹ *Id.* at art. 12(4).

¹⁰² *Id.* at art. 12(5).

¹⁰³ *Id.* at art. 12(6).

¹⁰⁴ *Id.* at art. 12(7).

¹⁰⁵ *Id.* at art. 13(1).

¹⁰⁶ *Id.* at art. 27(1).

¹⁰⁷ Republic of Korea: Country Reports on Human Rights Practices 2000, available at <http://www.state.gov/g/drl/rls/hrrpt/2000/eap/723.htm> (last visited Dec. 15, 2003).

¹⁰⁸ *Id.* at art. 12(5).

¹⁰⁹ *Id.*

¹¹⁰ Cho, The Unfinished “Criminal Procedure Revolution” of Post-Democratization South Korea, *supra* note 61, at 383. (See Decision of June 26, 1992, 92 Do 682 [Korean Supreme Court].)

conviction or disgrace to himself” or to certain persons with whom he has an association or relation.¹¹¹

In a national security case in the 1990’s, several defendants requested to meet their attorney when they were detained but the National Security Agency officers rejected their request.¹¹² The defendants were referred to and interrogated by the prosecutor.¹¹³ The Court held that “the defendants’ self-incriminating statements were illegally obtained for violating their right to counsel, so they must be excluded.”¹¹⁴ The Court held that Article 12(4) of the Constitution provides people with the right to counsel when arrested or detained, accordingly Articles 30 and 34 of the Criminal Procedure Code prescribe the right of suspects or defendants to appoint counsel and communicate with counsel when they are in custody.¹¹⁵ The limitation of the right to meet and communicate with counsel violates the constitutionally guaranteed basic right.¹¹⁶

There are still many problems with Korean law, despite the advancement. Even though barbaric torture in interrogation has seemed to disappear after democratization, and Lee Guen-Ahn, who was a notorious torture specialist, known for a prevailing fascist social system, was sentenced to a seven-year imprisonment in 2000.¹¹⁷ Illegal methods of interrogation, including all-night sleepless interrogation, still prevalently exist.¹¹⁸ The Korean Supreme Court usually does not listen to the defendant’s statements of being

¹¹¹ Eric Ilhyung Lee, Expert Evidence in the Republic of Korea and Under the U.S. Federal Rules Of Evidence: A Comparative Study, 19 Loy. L.A. Int’l & Comp. L.J. 585, 632 (1997).

¹¹² *Id.* at 383-384. (See Decision of Sept. 25, 1990, 90 Do 1586 [Korean Supreme Court]).

¹¹³ *Id.* at 384.

¹¹⁴ *Id.*

¹¹⁵ *Id.*

¹¹⁶ *Id.*

¹¹⁷ *Id.* at 392 (See Dong-A Newspaper, Sep. 27, 2000; Hankyoreh Newspaper, Sep. 27, 2000).

¹¹⁸ *Id.* (See Lee Jae-Sang, Criminal Procedure Law 182, 91 (5th ed., 1998); Bae Jong-Dae & Lee Sang Don, Criminal Procedure Law 191, 528 (3rd ed., 1998)).

mistreated by the police unless there is proven bodily injury or other witnesses have testified.¹¹⁹ The defendant is often required to satisfy the burden of proof to prove the existence of illegal police conduct.¹²⁰ The Court does not always exclude tainted confessions even if police conduct was found, but rather requires that the illegal conduct be a direct cause of the confession.¹²¹

The Korean Supreme Court has often declined to exclude physical evidence that was illegally obtained by illegal search-and seizure, and has provided the rationale that “even though the seizure was illegal, the value as evidence does not change because the procedure did not affect the quality and shape of the substance itself.”¹²² As one can see, unless the illegally-obtained evidence is excluded, the constitutional requirement for the search-and-seizure warrant is almost non-existent.¹²³ Neither the Constitution nor the CPC provides any provisions regarding the exclusionary rule.¹²⁴ The rights of criminal suspects and defendants should be taken more seriously in Korean society, and the legislative and judicial endeavors to control the overgrown power of the investigative authorities should be reinforced.

B. Nigeria:

Corruption is a major problem in Nigeria and is one of the reasons why there is not a lot of self incrimination protection. The Foreign Corrupt Practices and other

¹¹⁹ *Id.* (See Park Sang-Ki & Tak Hwee-Sung, A Study on Confession Rules 200-01 (1997)).

¹²⁰ *Id.* at 392-393.

¹²¹ *Id.* at 393. (See Decision of Nov. 27, 1984, 84 Do 2252 (Korean Supreme Court)); Decision of Feb. 8, 1985, 84 Do 2630 (Korean Supreme Court).

¹²² *Id.* (See Decision of Sept. 17, 1968, 68 Do 932 (Korean Supreme Court); Decision of June 23, 1987, 87 Do 705 (Korean Supreme Court); Decision of Feb. 8, 1994, 93 Do 3318 (Korean Supreme Court)).

¹²³ *Id.*

¹²⁴ *Id.*

Related Offences Act prohibits many different corrupt practices by public officers and several others. The Act establishes an independent commission¹²⁵ with powers to investigate and prosecute all alleged crimes of corruption and other offences that are described under the Act.¹²⁶ Some other duties of the Commission are 1) “to examine the practices, systems and procedures of public bodies and where, in the opinion such practices, systems or procedures aid or facilitate fraud or corruption, to direct and supervise;”¹²⁷ 2) “to instruct, advise and assist any officer, agency or parastals on ways by which fraud can be eliminated or minimized by such officer, agency or parastatal;”¹²⁸ 3) “to educate the public on and against bribery, corruption and related offences;”¹²⁹ and 4) “to enlist and foster public support in combating corruption.”¹³⁰

An Officer of the Commission is allowed to search banker’s books, bank accounts, bank computer data, and safe deposit boxes.¹³¹ The Commission can even compel a suspect to disclose all information in any document, account, or any other related material.¹³² The Commission can also compel the suspect and their relatives or associates to make a written statement under oath to explain every piece of property the suspect has and how it was obtained.¹³³ The Chairman of the Commission can also order a suspect to surrender their passport or exit permits in their possession.¹³⁴

¹²⁵ Corrupt Practices and Other Related Offences Act § 3(1), available at <http://www.nigeria-law.org/Corrupt%20Practices%20and%20Other%20Related%20Offences%20Act%202000.htm> (last visited Oct. 23, 2003).

¹²⁶ *Id.* at § 6.

¹²⁷ *Id.* at § 6(b).

¹²⁸ *Id.* at § 6(c).

¹²⁹ *Id.* at § 6(e).

¹³⁰ *Id.* at § 6(f).

¹³¹ *Id.* at § 43 (2)(a)-(c).

¹³² *Id.* at § 43 (2)(d).

¹³³ *Id.* at § 44.

¹³⁴ *Id.* at § 50(1).

In Nigeria, there is an unexplained lifestyle offence. There are no clearly defined standards and no objective means to prove that one is living above one's means; a flair for flamboyance may be construed as living above one's means.¹³⁵ Therefore, the law leaves a huge gap for speculation that often may rest only upon conjectural evidence or the views of the Commission.¹³⁶ The Commission can easily invoke the unexplained lifestyle offence to harass and intimidate innocent citizens.¹³⁷

Those who favor this provision of this new law contend that it fills a void in the legal system that enabled guilty public servants from escaping punishment.¹³⁸ Professor Okonkwo, Nigeria's leading authority on criminal law, supports the unexplained lifestyle offence and states that "an officer whose abode is a suite in an expensive hotel, who gives expensive parties and travels abroad on holidays whenever he wants and has no visible assets should be made to explain how he can afford such luxuries."¹³⁹ This new offence implicates constitutional rights of the protection against self-incrimination¹⁴⁰ and the presumption of innocence.¹⁴¹ Nigeria's Constitution states that "no person who is tried for a criminal offence shall be compelled to give evidence at the trial."¹⁴² The Constitution also states that "every person who is charged with a criminal offence shall be presumed to be innocent until he is proved guilty."¹⁴³

¹³⁵ Okechukwu Oko, Subverting the Scourge of Corruption in Nigeria: A Reform Prospectus, 34 NYUJILP 397, 449 (2002).

¹³⁶ *Id.*

¹³⁷ *Id.*

¹³⁸ *Id.*

¹³⁹ *Id.* at 450. (citing C.O. Okonkwo, Legal and Institutional Mechanisms Against Corruption: A Model Structure and Mechanism 1 (unpublished paper) (on file with the author)).

¹⁴⁰ *Id.* (citing Nig. Const. § 36(11)).

¹⁴¹ *Id.* (citing Nig. Const. § 36(5)).

¹⁴² Nig. Const. § 36(11).

¹⁴³ Nig. Const. § 36(5).

An example of how the Unexplained Lifestyle Offence Act is a problem is illustrated in a hypothetical case of a public officer who drives a flashy car, lives in an expensive home, and generally maintains a flamboyant lifestyle.¹⁴⁴ The Commission suspects that he is living way above his means, but when they request him to explain how he is so wealthy, he invokes his constitutional right against self-incrimination.¹⁴⁵ This hypothetical case demonstrates the tension between the Act and the Constitution.¹⁴⁶ If the public officer remains silent, a constitutionally protected right, the Commission is allowed to infer guilt from his silence and commence prosecution.¹⁴⁷

C. Germany:

One of the most important evidence limitations in Germany that is designed to protect individuals is the privilege against compelled self-incrimination, which is in some respects broader in Germany than in the United States.¹⁴⁸ “For instance, the German privilege protects against incrimination of family members, not just the accused, and requires warning of the privilege whenever there is an actual danger of incrimination, even if the accused is not “in custody,” in addition, the limits on official deception are broader in Germany than they are in the United States.¹⁴⁹ Self-incrimination values are

¹⁴⁴ Oko, Subverting the Scourge of Corruption in Nigeria: A Reform Prospectus, *supra* note 105, at 450.

¹⁴⁵ *Id.*

¹⁴⁶ *Id.*

¹⁴⁷ *Id.*

¹⁴⁸ Richard S. Frase, The Search for the Whole Truth About American and European Criminal Justice 3 *Buff. Crim. L. Rev.* 785, 822 (2000).

¹⁴⁹ *Id.* (See Richard S. Frase & Thomas Weigend, German Criminal Justice As a Guide to American Law Reform: Similar Problems, Better Solutions? 18 *B.C. Int'l & Comp. L. Rev.* 317, 352-53 (1995)).

also placed above truth-seeking by the German rule that prohibits administering an oath to defendants and suspects.”¹⁵⁰ However, in America defendants are subject to perjury charges not only for their testimony, but also for certain out-of-court statements.¹⁵¹

“Witness testimonial privileges, designed to protect certain family or confidential relationships, are also quite extensive in Germany, and are probably broader than in the United States.”¹⁵² Thus, Germany recognizes more categories of privileges, not only for spouses but also for fiancées and relatives; as well as doctors, attorneys, clergy, dentists, pharmacists, drug counselors, midwives, tax advisors, public accountants, journalists, and employees.¹⁵³ “Furthermore, privileged materials cannot be seized from the privilege holder, and the latter must be warned of their privilege before being questioned.”¹⁵⁴ In addition, German privilege holders can waive the privilege, then reclaim it in later proceedings; American privileges are waived if not asserted at all stages of procedure.¹⁵⁵ Finally, German civil servants can only testify with the permission of their superiors, which may be refused if the testimony would endanger governmental interests.”¹⁵⁶

¹⁵⁰ *Id.* (See § 60(2) StPO [German criminal procedure statute]. The trial court also has discretion to not administer an oath to the victim and his/her dependents. See *id.* § 61).

¹⁵¹ *Id.* Brogan v. United States, 522 U.S. 398 (1998) (rejecting “exculpatory no” exception to federal false statements statute).

¹⁵² *Id.* (See Craig Bradley, The Exclusionary Rule in Germany, 96 *Harv. L. Rev.* 1032, 1062 (1983); See Gerhard Danneker & Julian Roberts, The Law of Criminal Procedure, in Introduction to German Law 431-35 (Werner Ebke & Matthew Finken eds., 1996); See Barbara Huber, Criminal Procedure in Germany 168, in Comparative Criminal Procedure (John Hatchard et al. 1996) (summarizing 1985 Draft proposal for bifurcated trials; parties would conduct initial questioning during the guilt phase, and would share responsibility during the sentencing phase)).

¹⁵³ *Id.* (See §§ 52, 53 stop).

¹⁵⁴ *Id.*

¹⁵⁵ *Id.* (See Christopher Mueller & Laird Kirkpatrick, Modern Evidence: Doctrine and Practice 353 (1995)).

¹⁵⁶ *Id.* (See § 54 stop).

A privilege against self-incrimination is constitutionally granted in penal and administrative proceedings because “to respect and protect is the duty of all state authority.”¹⁵⁷ However, it is generally accepted that defendants in a civil information action may not withhold information on the basis of self-incrimination.¹⁵⁸ The reasoning for this restrictive interpretation is that information plaintiffs should not be penalized by the criminal conduct of defendants.¹⁵⁹ The inadmissibility of evidence revealed through coercion accounts for a defendant’s interest in not being compelled to produce self-incriminating evidence in penal proceedings.¹⁶⁰

The German Federal Code is similar to the Fifth Amendment in the United States. Section 136(1) of the Code states that “at the commencement of the first examination, the accused shall be informed of the offense with which he is charged and of the applicable penal provisions.¹⁶¹ He shall be advised that the law grants him the right to respond to the accusation, or not to make any statements on the charges and, even prior to his examination, to consult with defense counsel of his choice.¹⁶² He shall further be instructed that he may request evidence to be taken in his defense.¹⁶³ In appropriate cases the accused shall be informed that he may respond in writing.¹⁶⁴” Section 243(4) states

¹⁵⁷ Grundgesetz Constitution art. 1(1), 20 (F.R.G.), available at <http://www.lib.byu.edu/~rdh/eurodocs/germ/ggeng.html> (last visited October 27, 2003).

¹⁵⁸ Alexander Bruns, Access to Media Sources in Defamation Litigation in the United States and Germany, 10 DUKEJICIL 283, 302 (2000). (See BGHZ 41, 318 (322); 1990 Neue Juristische Wochenschrift 510, 511.)

¹⁵⁹ *Id.* at 303.

¹⁶⁰ *Id.* (See BVerfGE 56, 37 (48-51). See also Rolf Stürner, *Strafrechtliche Selbstbelastung und verfahrensmäßige Wahresitsermittlung*, 1981 Neue Juristische Wochenschrift 1757.)

¹⁶¹ German Criminal Procedure Code § 136(1), available at <http://www.iuscomp.org/gla/statutes/StPO.htm#136> (last visited October 27, 2003).

¹⁶² *Id.*

¹⁶³ *Id.*

¹⁶⁴ *Id.*

that at the hearing, the defendant shall be informed that he may choose to respond to the charges or not to make any statement on the charges at all.¹⁶⁵

German courts may not draw inferences if the defendant refuses to answer any questions but may do so if the defendant selectively refuses to answer certain questions. Unlike many common law jurisdictions, German civil law procedure regarding evidence is not governed by the hearsay rule.¹⁶⁶ Therefore, individuals may testify about the contents of confidential conversations without revealing an informant's identity.¹⁶⁷

D. China:

In China the privilege against self-incrimination is an alien concept.¹⁶⁸ Prosecutions are often successful because China's criminal procedure law has an absence of the privilege against self incrimination.¹⁶⁹ Confession is considered a desirable, if not essential, step toward a defendant's reconciliation with society.¹⁷⁰ Painted on a cell wall in a jail in China stated the phrase promising "Lenience to Those Who Confess, Severity

¹⁶⁵ *Id.* at § 243(4).

¹⁶⁶ *Id.* at 304. (See Michael H. Graham, Federal Practice and Procedure: Evidence §§ 6691-7070 (Interim ed. 1997)).

¹⁶⁷ *Id.*

¹⁶⁸ Diane Marie Amann, A Whipsaw Cuts Both Ways: The Privilege Against Self-Incrimination in an International Context, 45 UCLA L. Rev 1201, 1295 (1998). (See Yinyi Situ & Weizheng Liu, An Overview of the Chinese Criminal Justice System, in Comparative and International Criminal Justice Systems: Policing, Judiciary and Corrections 130 (Obi N. Ignatius Ebbe ed., 1996)).

¹⁶⁹ Criminal Procedure Law of the People's Republic of China, article 93, available at <http://product.chinawe.com/cgi-bin/lawdetail.pl?LawID=288> (last visited October 27, 2003).

¹⁷⁰ Amann, A Whipsaw Cuts Both Ways: The Privilege Against Self-Incrimination in an International Context, *supra* note 167.

to Those Who Resist.”¹⁷¹ Defendants are urged, often tortured, to confess.¹⁷² This traditional view has been attributed to China’s desire that criminals not escape punishment, its “principle of ‘seeking truth from facts,’ with ‘facts’ here referring to the evidence that both parties concerned can provide in court,” and the Confucian emphasis on protecting society, even at the expense of individual rights.¹⁷³

Institution of a presumption of innocence is among the criminal-law reforms that took effect January 1, 1997.¹⁷⁴ Little information yet is available on whether the change has affected China’s criminal-justice practices, although it is noteworthy that in 1996, the same year the reforms were approved, China executed more individuals in one year than it had since 1983.¹⁷⁵

A right to counsel in China does not attach until after the first time the suspect has been questioned.¹⁷⁶ There is no requirement that police inform a suspect of his right to counsel.¹⁷⁷ As once can see, China has a thorough prosecution to target offenders.¹⁷⁸

Individual misconduct will be glossed over and tolerated until it represents a threat to the

¹⁷¹ *Id.* (See Asia Watch, Detained in China and Tibet xviii, [Xiao v. Reno](#), 837 F. Supp. 1506, 1369(N.D. Cal. 1993) (No. C-90-0350-WHO at xvii-xviii; see Transcript of Proceedings) (including testimony of government expert witness, James Feinerman). (The district court’s opinion in this case describes in detail interrogation practices in China.)

¹⁷² *Id.* (See Asia Watch, *supra* note 170, at xviii; U.S. Dep’t of State, China Country Report on Human Rights Practices for 1996, § 1(c) (released Jan. 30, 1997); See [Hungdah Chiu, China’s Criminal Justice System and the Trial of Pro-Democracy Dissidents](#), 24 N.Y.U.J. Int’l L. & Pol. 1181, 1184-87 (1992) (explaining that despite legal prohibition on use of torture during interrogation, problem remains “widespread”).

¹⁷³ *Id.*

¹⁷⁴ *Id.* (See Amnesty International, The Death Penalty in China: Breaking Records, Breaking Rules (issued Aug. 1997))

¹⁷⁵ *Id.*

¹⁷⁶ Mark A. Godsey, [Miranda’s Final Frontier--The International Arena: A Critical Analysis Of United States v. Bin Laden, and a Proposal for a New Miranda Exception Abroad](#), 51 Duke L.J. 1703, 1781 (2002). (See An Analysis of China’s Revised Criminal Procedure Law 39-40 (1996)).

¹⁷⁷ *Id.*

¹⁷⁸ Hilary K. Josephs, [The Upright and the Low-Down: An Examination of Official Corruption in the United States and the People’s Republic of China](#), 27 SYRJILC 269, 272 (2000).

legitimacy of the Chinese Communist Party.¹⁷⁹ Prosecutions are usually based on the core offense, not on ancillary crimes such as fraud, tax evasion, or money laundering.¹⁸⁰

Article 93 of China's Criminal Procedure law states that "when interrogating a criminal suspect, the investigators shall first ask the criminal suspect whether or not he has committed any criminal act, and they will let him state the circumstances of his guilt or explain his innocence; then they may ask him questions."¹⁸¹ The criminal suspect must answer the investigators' questions truthfully, but he does have the right to refuse to answer any questions that are irrelevant to the case."¹⁸²

V. Conclusion:

Many people who are given the privilege of not being a witness against themselves are lucky. As has been pointed out, not every person can be so lucky. Over the years, even the Fifth Amendment interpretation in the United States has resulted in expansion and contraction of this supposed (fundamental fairness) right, but given that the Supreme Court has not yet articulated its real meaning, it is perhaps best seen as a privilege, albeit a very broad privilege (one that protects not only direct answers to questions, but anything that would furnish a link in the chain of evidence needed to prosecute).¹⁸³

There are several negative factors for prohibiting self-incrimination. For example, compelling a defendant to testify might bring about the actual truth. After all,

¹⁷⁹ *Id.* (See Former Beijing Party Boss Expelled From Party For Corruption; Legal Process Started, BBCMIR, Sept. 10, 1997).

¹⁸⁰ *Id.*

¹⁸¹ *Id.*

¹⁸² *Id.*

¹⁸³ Self Incrimination: Right or Privilege, available at <http://faculty.nwc.edu/toconnor/410/410lect13.htm> (last visited October 28, 2003).

the defendant is the one who probably knows what happened best. If the defendant is told that there is no right to remain silent, there might be a better chance that the guilty will not be free.

However, it seems that there are many more positive factors for prohibiting self-incrimination. For example, if there was no prohibition against self-incrimination, defendants would have to testify against themselves, which is an intrusion on freedom. Also, if adverse or negative inferences are able to be drawn from silence, it is a form of compulsion, which can influence a defendant to compel a confession of guilt. The defendant might not even be guilty but the evidence that may be used to incriminate may threaten the defendant to open up. The right to a fair trial rests on a defendant not being compelled to testify against themselves.

INDEX

1. Economic Consequences of Common Law versus Civil Law
<http://www.ncpa.org/pi/internat/pd090701e.html> (last visited October 19, 2003). **Pg. 1, 2, 3.**
2. The Common Law <http://www.blupete.com/Literature/Essays/BluePete/LawCom.htm>
(last visited October 19, 2003). **Pg. 2.**
3. United States Constitution Amendment V. **Pg. 4.**
4. Larry Glasser, The American Exclusionary Rule Debate: Looking to England and Canada, 35 GWILR 159, 177 (2003). **Pg. 4, 5.**
Id. (citing Boyd v. United States, 116 U.S. 616 (1886)). **Pg. 5.**
Id. (citing Counselman v. Hitchcock, 142 U.S. 547, 562 (1892)). **Pg. 5.**
Id. (citing Marchetti v. United States, 390 U.S. 39, 57, 60-61 (1968)). **Pg. 5.**
Id. (citing Leftkowitz v. Turley, 414 U.S. 70, 82-83 (1973)). **Pg. 5.**
5. Malloy v. Hogan, 378 U.S. 1, 3 (1964). **Pg. 5.**
6. Chavez v. Martinez, 538 U.S. 760 (2003). **Pg. 5, 6.**
7. Miranda v. Arizona, 384 U.S. 436 (1966). **Pg. 6, 7.**
8. Portuondo v. Agard, 120 S.Ct. 1119 (2000). **Pg. 7.**
9. Withrow v. Williams, 507 U.S. 680 (1993). **Pg. 7.**
10. New York v. Quarles, 467 U.S. 649 (1994). **Pg. 7, 8.**
11. Collecting Witness Evidence-Witness Statements, available at
http://www.hse.gov.uk/enforce/enforcementguide/investigation/witness/witness.htm#P67_13897 (last visited December 15, 2003); (See Saunders v United Kingdom [1997] 23 EHRR 313; approved in numerous subsequent English cases). **Pg. 8.**
12. K.A. Cavanaugh, Emergency Rule, Normalcy Exception: The Erosion of the Right to Silence in the United Kingdom, 35 CNLILJ 491, 493 (2002). **Pg. 8, 9, 10.**
Id. at 496-497 (citing Youth Justice and Criminal Evidence Act 1999, c. 23, § 58 (Eng.); Criminal Evidence Order, 1988, (N. Ir. 20), art. 3(6); Criminal Evidence (Northern Ireland) Order 1999 (SI 1999 No. 2789), art. 36.). **Pg. 9.**
Id. at 499 (citing Criminal Evidence Order, 1988, (N. Ir. 20), art. 2(4)). **Pg. 9.**
Id. at 499 (citing Criminal Evidence Order, 1988, (N. Ir. 20), art. 4(2), 5(5), and 6(3)). **Pg. 10.**

13. R v. McLernon & Others, Transcript, (Belfast Crown Court, Dec. 20, 1990, Kelly, J.) (Lexis, Northern Ireland Reported and Unreported Cases) (pg. 6 of 7 pages unpaginated LEXIS printout). **Pg. 10.**

14. 2000 Crim. L. Rev. 682 (Eur. Ct. H.R. 2000). **Pg. 10.**

15. Digital Cryptography and Self-Incrimination, available at http://www.asianlaws.org/cyberlaw/library/india/cc/crypto_self.htm (last visited Dec. 15, 2003). **Pg. 11.**

16. Derek P. Jinks, The Anatomy of an Institutionalized Emergency: Preventive Detention and Personal Liberty in India 22 MIJIL 311, 323-328 (2001) (*citing* National Security Act §13 (1980)). **Pg. 11, 12, 13, 14.**
Id. at 345. (See A.D.M. Jobalpur v. Shivakant Shukla, A.I.R. 1976 S.C. 1207; Union of India v. Bhanudas, A.I.R. 1976 SC 1027, 1029). **Pg. 13.**
Id. (See Bhattacharjee, Administration of Law and Justice in India 163 (1982); Pannalal Dhar, Preventive Detention under Indian Constitution 144-45 (1986)). **Pg. 13.**
Id. 347-348. (See Granville Austin, The Indian Constitution: Cornerstone of a Nation (1966) at 102. See also 9 Constituent Assembly Debates, 1535). **Pg. 14.**
Id. at 348-349. 9 Constituent Assembly Debates 1497. **Pg. 14.**

17. India Const. art. 21 (2) & (3). **Pg. 12, 13, 14.**
 India Const. Art. 22 (4). **Pg. 12.**
 India Const., Art. 20. **Pg. 13.**
 India Const., Art. 21. **Pg. 13.**
 India Const., Art. 22, cl. 3. **Pg. 14.**
 India Const., Art. 22 cl. 4-7. **Pg. 14.**

18. India Code Crim. Proc. (No. 2 of 1973), §§70-81 [hereinafter Cr.P.C.]. **Pg. 12.**

19. Constitution (Fourty-Fourth) Amendment Act, 1978, available at <http://www.constitution.org/cons/india/tamnd44.htm> (last visited Oct. 22, 2003). **Pg. 13.**

20. Kuk Cho, The Unfinished “Criminal Procedure Revolution” of Post-Democratization South Korea, 30 DENJILP 377, 377-378 (2002). **Pg. 14, 15.**
Id. at 383. (See Decision of June 26, 1992, 92 Do 682 [Korean Supreme Court]). **Pg. 15.**

21. The Constitution of the Republic of Korea art. 12(3), 16, available at <http://www.assembly.go.kr/english/laws/constitution/constitution2.html> (last visited Oct. 22, 2003). **Pg. 15.**
Id. at art. 12(2). **Pg. 15.**
Id. at art. 12(4). **Pg. 15.**
Id. at art. 12(5). **Pg. 15.**

- Id.* at art. 12(6). **Pg. 15.**
Id. at art. 12(7). **Pg. 15.**
Id. at art. 13(1). **Pg. 15.**
Id. at art. 27(1). **Pg. 15.**
22. Republic of Korea: Country Reports on Human Rights Practices 2000, available at <http://www.state.gov/g/drl/rls/hrrpt/2000/eap/723.htm> (last visited Dec. 15, 2003).
Id. at art. 12(5). **Pg. 15.**
23. Eric Ilhyung Lee, Expert Evidence in the Republic of Korea and Under the U.S. Federal Rules Of Evidence: A Comparative Study, 19 *Loy. L.A. Int'l & Comp. L.J.* 585, 632 (1997). **Pg. 16.**
Id. at 383-384. (See Decision of Sept. 25, 1990, 90 Do 1586 [Korean Supreme Court]). **Pg. 16.**
Id. at 392 (See Dong-A Newspaper, Sep. 27, 2000; Hankyoreh Newspaper, Sep. 27, 2000). **Pg. 16.**
Id. (See Lee Jae-Sang, Criminal Procedure Law 182, 91 (5th ed., 1998); Bae Jong-Dae & Lee Sang Don, Criminal Procedure Law 191, 528 (3rd ed., 1998)). **Pg. 16.**
Id. (See Park Sang-Ki & Tak Hwee-Sung, A Study on Confession Rules 200-01 (1997)). **Pg. 17.**
Id. at 392-393. **Pg. 17.**
Id. at 393. (See Decision of Nov. 27, 1984, 84 Do 2252 (Korean Supreme Court)); Decision of Feb. 8, 1985, 84 Do 2630 (Korean Supreme Court). **Pg. 17.**
Id. (See Decision of Sept. 17, 1968, 68 Do 932 (Korean Supreme Court); Decision of June 23, 1987, 87 Do 705 (Korean Supreme Court); Decision of Feb. 8, 1994, 93 Do 3318 (Korean Supreme Court)). **Pg. 17.**
24. Corrupt Practices and Other Related Offences Act § 3(1), available at <http://www.nigeria-law.org/Corrupt%20Practices%20and%20other%20Related%20Offences%20Act%202000.htm> (last visited Oct. 23, 2003). **Pg. 18.**
Id. at § 6. **Pg. 18.**
Id. at § 6(b). **Pg. 18.**
Id. at § 6(c). **Pg. 18.**
Id. at § 6(e). **Pg. 18.**
Id. at § 6(f). **Pg. 18.**
Id. at § 43 (2)(a)-(c). **Pg. 18.**
Id. at § 43 (2)(d). **Pg. 18.**
Id. at § 44. **Pg. 18.**
Id. at § 50(1). **Pg. 18.**
25. Okechukwu Oko, Subverting the Scourge of Corruption in Nigeria: A Reform Prospectus, 34 *NYUJILP* 397, 449 (2002). **Pg. 19, 20.**
Id. at 450. (*citing* C.O. Okonkwo, Legal and Institutional Mechanisms Against Corruption: A Model Structure and Mechanism 1 (unpublished paper) (on file with the author)). **Pg. 19.**

- Id.* (citing Nig. Const. § 36(11)). **Pg. 19.**
Id. (citing Nig. Const. § 36(5)). **Pg. 19.**
26. Nig. Const. § 36(11). **Pg. 19.**
Id. § 36(5). **Pg. 19.**
27. Richard S. Frase, The Search for the Whole Truth About American and European Criminal Justice 3 *Buff. Crim. L. Rev.* 785, 822 (2000). **Pg. 20.**
Id. (See Richard S. Frase & Thomas Weigend, German Criminal Justice As a Guide to American Law Reform: Similar Problems, Better Solutions? 18 *B.C. Int'l & Comp. L. Rev.* 317, 352-53 (1995)). **Pg. 20.**
Id. (See § 60(2) StPO [German criminal procedure statute]. The trial court also has discretion to not administer an oath to the victim and his/her dependents. See *id.* § 61). **Pg. 21.**
Id. Brogan v. United States, 522 U.S. 398 (1998) (rejecting “exculpatory no” exception to federal false statements statute). **Pg. 21.**
Id. (See Craig Bradley, The Exclusionary Rule in Germany, 96 *Harv. L. Rev.* 1032, 1062 (1983); See Gerhard Danneker & Julian Roberts, The Law of Criminal Procedure, in *Introduction to German Law* 431-35 (Werner Ebke & Matthew Finken eds., 1996); See Barbara Huber, Criminal Procedure in Germany 168, in *Comparative Criminal Procedure* (John Hatchard et al. 1996) (summarizing 1985 Draft proposal for bifurcated trials; parties would conduct initial questioning during the guilt phase, and would share responsibility during the sentencing phase)). **Pg. 21.**
Id. (See §§ 52, 53 stop). **Pg. 21.**
Id. (See Christopher Mueller & Laird Kirkpatrick, Modern Evidence: Doctrine and Practice 353 (1995)). **Pg. 21.**
Id. (See § 54 stop). **Pg. 21.**
28. Grundgesetz Constitution art. 1(1), 20 (F.R.G.), available at <http://www.lib.byu.edu/~rdh/eurodocs/germ/ggeng.html> (last visited October 27, 2003). **Pg. 22.**
29. Alexander Bruns, Access to Media Sources in Defamation Litigation in the United States and Germany, 10 *DUKEJICIL* 283, 302 (2000). (See BGHZ 41, 318 (322); 1990 *Neue Juristische Wochenschrift* 510, 511.) **Pg. 22.**
Id. (See BVerfGE 56, 37 (48-51). See also Rolf Sturner, Strafrechtliche Selbstbelastung und verfahrensformige Wahresitsermittlung, 1981 *Neue Juristische Wochenschrift* 1757.). **Pg. 22.**
30. German Criminal Procedure Code § 136(1), available at <http://www.iuscomp.org/gla/statutes/StPO.htm#136> (last visited October 27, 2003). **Pg. 22.**
Id. at § 243(4). **Pg. 23.**
Id. at 304. (See Michael H. Graham, Federal Practice and Procedure: Evidence §§ 6691-7070 (Interim ed. 1997)). **Pg. 23.**

31. Diane Marie Amann, A Whipsaw Cuts Both Ways: The Privilege Against Self-Incrimination in an International Context, 45 UCLA L. Rev 1201, 1295 (1998). (See Yinyi Situ & Weizheng Liu, An Overview of the Chinese Criminal Justice System, in Comparative and International Criminal Justice Systems: Policing, Judiciary and Corrections 130 (Obi N. Ignatius Ebbe ed., 1996)). **Pg. 23.**
Id. (See Asia Watch, Detained in China and Tibet xviii, Xiao v. Reno, 837 F. Supp. 1506, 1369(N.D. Cal. 1993) (No. C-90-0350-WHO at xvii-xviii; see Transcript of Proceedings) (including testimony of government expert witness, James Feinerman). (The district court's opinion in this case describes in detail interrogation practices in China.). **Pg. 24.**
Id. (See Asia Watch, *supra* note 170, at xviii; U.S. Dep't of State, China Country Report on Human Rights Practices for 1996, § 1(c) (released Jan. 30, 1997); See Hungdah Chiu, China's Criminal Justice System and the Trial of Pro-Democracy Dissidents, 24 N.Y.U.J. Int'l L. & Pol. 1181, 1184-87 (1992) (explaining that despite legal prohibition on use of torture during interrogation, problem remains "widespread")). **Pg. 24.**
Id. (See Amnesty International, The Death Penalty in China: Breaking Records, Breaking Rules (issued Aug. 1997)). **Pg. 24.**
32. Criminal Procedure Law of the People's Republic of China, article 93, available at <http://product.chinawe.com/cgi-bin/lawdetail.pl?LawID=288> (last visited October 27, 2003). **Pg. 23.**
33. Mark A. Godsey, Miranda's Final Frontier--The International Arena: A Critical Analysis Of United States v. Bin Laden, and a Proposal for a New Miranda Exception Abroad, 51 Duke L.J. 1703, 1781 (2002). (See An Analysis of China's Revised Criminal Procedure Law 39-40 (1996)). **Pg. 24.**
34. Hilary K. Josephs, The Upright and the Low-Down: An Examination of Official Corruption in the United States and the People's Republic of China, 27 SYRJILC 269, 272 (2000). **Pg. 24.**
Id. (See Former Beijing Party Boss Expelled From Party For Corruption; Legal Process Started, BBCMIR, Sept. 10, 1997). **Pg. 25.**
35. Self Incrimination: Right or Privilege, available at <http://faculty.ncwc.edu/toconnor/410/410lect13.htm> (last visited October 28, 2003). **Pg. 25.**