
THE CORPORATE RIGHT TO SILENCE AND ITS ORIGIN: A COMPARATIVE ANALYSIS WITH THE US, UK AND EU

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ABSTRACT

The corporate right not to incriminate oneself is an interesting legal problem that is located at the intersection of the constitutional protection against self-incrimination and the corporate personhood doctrine. This article will discuss corporate privilege against self-incrimination and its historical development, starting with the Latin Maxim, “nemo tenetur se ipsum accusare”, and its development from Roman, medieval origins through 17th-century English reforms. A legal analysis is drawn from comparative jurisdictional research on corporate silence rights in India, the United States of America, the European Union and the United Kingdom. The paper employs a doctrinal research methodology and a comparative case law analysis. It also examines the following four research questions to consider: the regulatory framework of corporate silence, comparative analysis of jurisdictions, justification for extending privilege to corporations, and the history of the corporate right to silence. This paper shows that while there are differences between the jurisdictions examined, most Commonwealth jurisdictions refused to extend self-incrimination privilege to corporations on par with natural persons; there was also a recognition of the implications both practically and ethically at the infringement of their limitations on corporate governance and regulatory enforcement; therefore, once corporate silence would be legislated it was most definitely an eye opener for all jurisdictions. If this right is granted, it will be beneficial for the corporations, but it has drawbacks; it will be harmful when whistleblower protection is considered, as all the company needs to do is exercise this privilege when they need to disclose some information about themselves, which could be the main reason for the gap in legislation throughout the jurisdictions.

Keywords: Corporate silence, self-incrimination, the Fifth Amendment, EU Frameworks, UK regulations.

1. INTRODUCTION

The corporate right to silence is grounded in the basic principle that can be derived from the maxim "nemo tenetur seipsum accusare" (no one is bound to accuse himself), which, in turn, evolved from ancient jurisprudential constructs developed in response to the necessity of granting safeguards against the domineering power of the state¹. The principle was developed in the historical context to protect natural persons, but presents unique and complex problems when judicially applied to corporations². The conflict that results from trying to hold a corporation accountable while also respecting its right not to incriminate itself, brings up bigger issues about corporate personhood and how far legal entities should be given constitutional and statutory rights, which are based on public law and given to natural persons.³ In today's corporate governance landscape, corporate silence takes on a significance especially when the myriad regulatory duties that firms must shoulder across jurisdictions are taken into consideration⁴. Further importance lies in the interaction and the resolution of overlapping statutory rights, regulatory obligations, such as corporate governance requirements, criminal processes, and regulatory compliance requirements common to the regulatory space. The corporate personhood doctrine enables corporations to exercise rights similar to natural persons: contracting, property ownership, and legal standing. As a result, it has created a legal fiction that confuses the distinction between human beings and rights given to the corporation. The right to keep silent, or the right against self-incrimination, is probably the most basic of human dignitary rights, and it is deeply rooted in a long history of legal changes that were specifically made to limit state intervention and safeguard the dignity of the individual. Hence, whether the same protections against self-incrimination applied to human persons should also confer to artificial entities whose primary goal is often to maximize economic profit and shareholder value instead of protecting inherent human dignity, arises as the question. Regulatory Issues and cross-national issues also exist, as the existence of multinational corporations that operate in multiple jurisdictions raises additional complexities. For instance, a company that is doing business in the US, the UK and the EU simultaneously might be required to assess whether they have the privilege of silence or if they enjoy the same rights as a person in each legal area. In short, this study will incorporate a fully contextualised

¹ Ailbhe O'Neill, *The Right to Silence and the Company*, 39 Irish Jurist 111, 115-118 (2004).

<https://www.jstor.org/stable/44026989>

² *Nemo Tenetur Seipsum Accusare*, LawBhoomi (May 15, 2025), *Nemo Tenetur Seipsum Accusare*

³ Nicholas Bowie, *Corporate Personhood v. Corporate Statehood*, 132 Harvard Law Review 2009, 2015-25(2019) <https://harvardlawreview.org/print/vol-132/corporate-personhood-v-corporate-statehood/>

⁴ *The Right to Remain Silent*, LawBhoomi (Mar. 28, 2025), <https://lawbhoomi.com/the-right-to-remain-silent/>.

examination of an actual corporate right to silence, including its normative underpinnings, comparative triggers, interpretations, and practice. The research will be structured around four main research questions: (1) What is the historical development of the corporate right to silence, from ancient to contemporary? (2) Which are the regulatory frameworks applicable to corporate silence in India, the US, the UK and the EU? (3) What differences in these local governments can be found regarding the treatment of corporate silence rights? and (4) Is there any reason to grant a corporation the privilege of protection? By investigating these questions and analyzing the comparative data, this article intends to explain the area which might be considered as one of the most opaque and controversial aspects of corporate law.

2. Historical Origins and Development of Corporate Right to Silence.

2.1 Ancient and Medieval foundations

The right against self-incrimination has its origin in the common law tradition of recognising the injustice inherent in forcing a person to incriminate themselves.⁵ The Latin maxim *nemo tenetur seipsum accusare* was a product of the principle of Roman law that stated that it was the duty of the prosecution to demonstrate guilt through independent evidence as opposed to coercing the defendant into a confession.⁶ The *ex officio* oath was employed as a means of compelling testimony from persons by medieval ecclesiastical courts, the Star Chamber and the court of High Commission.⁷ Under the hand of force, suspects were compelled to swear an oath and answer every query truthfully, even though they had no clue what charges were being levelled against them, and the *ex officio* oaths came primarily in ecclesiastical and prerogative courts (Star Chamber, High Commission), not common law courts. The blunt approach provoked a vehement opposition. It was one of the factors that propelled the rise of the protections of privileges.⁸ The abolition of those tribunals, in 1641, was a milestone in the history of the evolution of the safeguards against self-incrimination.⁹

2.2 Constitutional Development

The building of constitutional safeguards against self-incrimination was a major step in the

⁵ John H. Langbein, *The Historical Origins of the Privilege Against Self-Incrimination at Common Law*, 92 Mich. L. Rev. 1047, 1050–65 (1994), https://law.yale.edu/sites/default/files/documents/pdf/Faculty/Langbein_Privilege_Against_Self_Incrimination.pdf

⁶ *Nemo Tenetur Seipsum Prodere*, 4 Harv. L. Rev. 393, 394–97 (1891). <https://www.jstor.org/stable/1321425>

⁷ *Self-Incrimination V Historical Background*, US Civil Liberties (Sept. 2, 2012), <https://uscivil liberties.org/4467-self-incrimination-v-historical-background.html>

⁸ *Id.*

⁹ *Id.*

evolution of the legal paradigm, which reflected a new understanding of the relationship between the rights of the individual and the power of the state.¹⁰ The change to the U.S. Constitution was basically an effort to safeguard human dignity and keep the government from abusing its power. However, the framers of the Constitution did not clearly define "persons" in a way that would include corporate entities, which was typical at the time when the Constitution was framed.¹¹ The subsequent evolution of the corporate personhood doctrine has caused conflicts with the traditional interpretation of the constitutional rights.¹² Even though many courts have recognised this right to silence, it is still limited to cater for individuals.¹³

2.3 Contemporary Adaptations and Challenges

The twentieth and twenty-first centuries have seen enormous alterations in corporate structure, regulation complexity and enforcement mechanisms, testing classical solutions to self-incrimination privileges.¹⁴ The rise of multinational companies, complex financial products and sophisticated compliance requirements has led to different scenarios in which corporate privilege protections have to be assessed.¹⁵ Innovations like AI in today's world have changed the scene profusely; it challenges the traditional conception of privilege.¹⁶ It can be taken as a clear indication of how traditional legal concepts have to change as per the technological advancements, while still ensuring the effective regulatory control, the EU's experience with automated competition law enforcement.¹⁷

3. Legal Framework Governing Corporate Right to Silence

3.1 Constitutional Bases in India

Article 20(3) of the Constitution of India says: "No person accused of any offence shall be compelled to be a witness against himself."¹⁸ The word "person" is used in the Constitution,

¹⁰ *Id.*

¹¹ US Constitutional Amendment. V.

¹² *Corporate Personhood: What it Means and How It has Evolved*, Purdue Global Law School.
<https://www.purduegloballawschool.edu/blog/news/corporate-personhood>

¹³ *Id.*

¹⁴ Elizabeth E. Pollman, *Reconceiving Corporate Personhood*, 2011 Utah Law Review 1629 1635-45
<https://dc.law.utah.edu/cgi/viewcontent.cgi?article=1865&context=ulr>

¹⁵ *Id.*

¹⁶ Peter Van Cleynenbreugel, *The Right to Avoid Self-Incrimination*, European Papers 1, 8–12 (2024).
https://www.europeanpapers.eu/system/files/pdf_version/EP_eJ_2024_3_SS1_4_Pieter_Van_Cleynenbreugel_00795.pdf

¹⁷ *Id.* at 15-18

¹⁸ Indian Constitution Article 20(3)

courts have typically interpreted that provision as applying almost exclusively to natural persons, rather than corporations. In *M.P. Sharma V. Satish Chandra*, the Supreme Court held that Article 20(3) was directly against self-incrimination for the accused person and reported that self-incrimination meant presenting evidence from personal knowledge, as opposed to the physical production of documents.¹⁹ The Indian Constitution basically relies on fundamental rights such as the right not to incriminate oneself and is primarily concerned with the protection of human dignity and individual freedom. In the landmark case *Nandini Satpathy V. P.L.Dani*, the Supreme Court went beyond the boundaries and endorsed a far wider meaning by declaring that the word "accused" can even embrace those persons who considered themselves as suspects during the investigative interrogation.²⁰ Subsequent rulings were more limited, especially in regulatory areas and particular to tax and customs investigations.

3.2 United States: The Fifth Amendment

According to the Fifth Amendment of the United States, no one "shall be compelled in any criminal case to be a witness against himself."²¹ Nevertheless, the Supreme Court has on numerous occasions affirmed that corporations are not entitled to claim Fifth Amendment rights to withhold information that may incriminate them²² starting with *Hale v. Henkel* (1906), a case that decided that companies being non-natural entities established by the state lack the right to self-incrimination, it differentiated between the corporate records and personal records of corporate officers.²³ In *Braswell v. United States* (1988), a Supreme Court case, it was made clear that the directors of a corporation who hold its documents cannot raise the Fifth Amendment as a ground for refusing to produce the documents, even if revealing the documents may lead to the bringing of an action against the director under the state laws.²⁴ The reasoning for the rulings, including *Braswell*, essentially was that allowing a corporate officer to invoke Fifth Amendment privileges against self-incrimination grants that privilege to a corporation that cannot invoke the privilege itself. This collective entity doctrine has been upheld in lower courts, building a clear consensus throughout the United States.

¹⁹ *M.P. Sharma v. Satish Chandra*, AIR 1954 SC 300, 308–10 (India)

²⁰ *Nandini Satpathy v. P.L. Dani*, (1978) 2 SCC 424, 434–38 (India)

²¹ U.S. Const. amend. V

²² Tracey Maclin, *Long Overdue: Fifth Amendment Protection for Corporate Officers*, 101 Boston University Law Review 1523, 1530–40 (2021). <https://www.bu.edu/bulawreview/files/2021/10/MACLIN.pdf>

²³ *Hale v. Henkel*, 201 U.S. 43, 74–77 (1906)

²⁴ *Braswell v. United States*, 487 U.S. 99 108–12 (1988)

3.3 EU Framework

The shield, against self-incrimination in EU competition law traces its roots to the *Orkem v Commission* decision of 1989 which fashioned for undertakings a right to refuse confessing guilt.²⁵ The Court of Justice of the EU drew a line between active testimony of forced admissions and passive cooperation, i.e. the mere provision of information, holding that firms cannot be pressured into self-incriminating answers, yet must surrender every document that could even indirectly establish liability.²⁶ By defining the regulation in such a limited way, the Commission was able to maintain the "punch" of its investigation without being involved in the issue of coerced confessions. The protection granted to companies was limited until the *DB v Consob* (2021) decision; the Grand Chamber's ruling expanded this protection to individuals, it addressed their right in administrative proceedings that could lead to criminal sanctions.²⁷ The CJEU decided that individuals who are subject to administrative proceedings which may lead to criminal sanctions have the right to silence, a principle that is consistent with ECtHR case law. Hence the safeguard now covers any type of statement that could be self-incriminating, not just admissions.²⁸ The Court, referring to *Orkem's* formulation, distinguished the protection of individuals based on the two core values of human dignity and autonomy, and pointed out that these concepts cannot be converted to corporate entities.²⁹ The split-track strategy still leaves open whether *Orkem's* standing document standard continues to be ECHR-compatible

4. Comparative analysis of different jurisdictions

4.1 United States: Collective Entity Doctrine Restrictive

The United States has the least permissive stance concerning corporate self-incrimination privileges recognised through the collective entity doctrine. The ruling in *Braswell* establishes that corporations, as pseudo-legal entities created by the state, may not invoke the Fifth Amendment privilege against self-incrimination.³⁰ The collective entity doctrine establishes a preference for efficiencies of law enforcement and accountability applied directly to corporate

²⁵ Case 374/87, *Orkem v. Commission*, 1989 E.C.R. 3283, para 34 [hereinafter *Orkem*]

²⁶ *Id.*, para.34

²⁷ Case C-481/19, *DB v. Consob*, ECLI:EU:C:2021:84, para 54 [hereinafter *DB v. Consob*]

²⁸ *Id.*, para 54-76

²⁹ *Id.* para 47-48

³⁰ *Braswell v. United States*, 487 U.S. 99, 104 (1988)

entities over individual exceptions of privacy. The collective entity doctrine applies to corporate entities, which range from small, closely-held entities to single-person entities, creating a fairness issue for small business owners.³¹ Those who criticise the collective entity doctrine claim that *Braswell* creates inequitable outcomes, especially when the distinction between an individual and a corporate entity becomes indistinguishable. Moreover, many of the recent cases have declined in creating exceptions for sole-proprietorships or closely-held corporations, to make the choice of conforming to categorical conclusions determined in *Braswell*.³²

4.2 United Kingdom: Co-operation with Regulators at a Corporate Level.

The UK can be regarded as not conceptualising a privilege regime but rather as a cooperation regime between corporations and regulators.³³ In this respect, common law and legislative safeguards of privilege would protect against self-incrimination and in contrast to the written constitutional protection mentioned above.³⁴ The UK usually allows the compulsion of testimony in regulatory investigations, albeit there are privileges for compelled testimony in criminal proceedings. In September 2025, the UK introduced a new law that established a new corporate offence of failing to prevent fraud. This again suggests that the UK's efforts are to improve corporate accountability and enforceability.³⁵ The UK's Serious Fraud Office has recently updated its corporate cooperation policy, which now permits self-disclosure of corporate wrongdoing. The UK Serious Fraud Office (SFO) now places greater emphasis on companies self-reporting wrongdoing at an early stage and fully cooperating, which can protect companies from prosecution and lead to their release in lieu of a Deferred Prosecution Agreement (DPA). In this context, the policy almost requires a corporation to cooperate with the authorities, rather than affording the corporation the discretion to remain silent.

4.3 European Union: Balanced Rights

The European Union has introduced the balanced rights framework to ensure that when

³¹ Brief of Arizona Attorneys for Criminal Justice as Amicus Curiae at 12–15, *Braswell v. United States*, 487 U.S. 99 (1988) (No. 87-140)

³² *In re Twelve Grand Jury Subpoenas*, 908 F.3d 525, 528–32 (9th Cir. 2018), *In re Subpoenas* | No. 17-17213 | 9th Cir. | Judgment | Law | CaseMine

³³ *How UK Law Reforms and Enforcement Trends Affect Corporate Crime Risk in 2025*, A&O Shearman (Jan. 27, 2025), *How UK law reforms and enforcement trends affect corporate crime risk in 2025 - A&O Shearman*

³⁴ Robert S. Gerstein, *The Self-Incrimination Debate in Great Britain*, 27 Am. J. Comp. L. 81, 85–95 (1979), <https://www.jstor.org/stable/839939>

³⁵ *How UK Law Reforms*, *supra* note 34

determining fundamental rights which portrays that efficiency is in existence³⁶, to which it has been established in case law decisions from the CJEU that businesses have the right not to be compelled to testify against themselves, regardless of whether a witness is or has familiarity with the case at hand. Under EU law, undertakings must answer purely factual questions and produce pre-existing documents, even if incriminating, but cannot be compelled to provide answers admitting infringement or implying a guilty mindset.³⁷ Statutory language further implies that, regardless of whether it is statutorily required to use all reasonable means to avoid self-incrimination or rights, it had been previously agreed with the agency that compliance with competition law would only be engaged if it is not sanctioned. Regardless of the approach the EU takes, it has acknowledged the reality of artificial intelligence oversight or compliance monitoring.³⁸ The right against self-incrimination must have a usable space worked out within the parameters of law.³⁹ This difference is very important: the EU shields companies from an “active” testimonial compulsion (a situation where they have to forcibly explain, interpret, or admit wrongdoing), but doesn’t give them any protection in case of “passive” production of documents (handing over the material records or data). Consequently, an enterprise is not allowed to be interrogated in a manner that requires it to admit guilt or clarify its state of mind in relation to competition law infringements. Nevertheless, that company is obliged to provide any contracts, emails, financial records, and other documents that were there before and can be used as evidence against it.

5. Benefits of Expanding Corporate Self-Incrimination Protection

5.1 Improved Compliance Programs

Qualified privileges for self-incrimination could be highly effective tools for promoting voluntary compliance programs.⁴⁰ The very existence of states progressively enacting environmental audit privilege statutes across the country shows that some privilege in regard to self-incrimination can encourage voluntary compliance behaviour without detracting from the usual regulation processes. For instance, businesses may be much more likely to undertake

³⁶Pieter Van Cleynenbreugel, *The Right to Avoid Self-Incrimination*, European Papers 1, 10–15 (2024), *The Right to Avoid Self-Incrimination: Yet Another Elephant in the Automated Competition Law Enforcement Room?*

³⁷ Case 374/87, *Orkem v. Comm'n*, 1989 E.C.R. 3283 para 27–35

³⁸ *Id.* Para 30

³⁹ Van Cleynenbreugel, *supra* note 37, at 15–18

⁴⁰John Davidson, *Privileges for Environmental Audits: Is Mum Really the Word*, 4 Se. Env'tl. L.J. 111, 115–25 (1995). *Privileges for Environmental Audits: Is Mum Really the Word*

compliance programming for compliance purposes if they believe that such a program will not ultimately result in penalties based on voluntary disclosures. There is also evidence gathered from experience with environmental audit statutes enacted in Oregon, Colorado, and other states, which demonstrates that qualified privileges can be a significant incentive for corporations to self-monitor.⁴¹ Such statutes related to audit privileges contained provisions that a voluntary audit would not be followed up by an enforcement activity related to penalties, at the same time, the liability for the original substantive violation was kept.⁴² The mentioned provisions encouraged the implementation of the law from the side of the party and its own control rather than a response based on the authority of the enforcement.⁴³

5.2 Enhanced Management Practices

Two improved management practises, the privilege of corporate silence may result in improved internal governance by enhancing open communication in corporations.⁴⁴ The overlap between corporate privilege and whistleblower protections creates complex considerations involving competing interests.⁴⁵ there can be an enhancement in the accountability of organisations by providing certainty that good faith attempts at effective compliance but only after strengthening the whistleblowing measures. For instance, the Indian Companies Act 2013 Section 177 is quite explicit in mandating that firms set up a whistle-blowing system, a scenario which might be at odds with the secrecy of the corporate silence.⁴⁶ The transparency obligations imposed by the SEBI (Listing Obligations and Disclosure Requirements) Regulations 2015, on the other hand, have to be carefully weighed against genuine privacy concerns.⁴⁷ Protecting data via a privilege, such as that against self-incrimination, can help create the necessary competitive advantages by setting up a fence that keeps proprietary data and business strategies away from the prying eyes. Thus, the different intentions of various laws on the matter can create quite a

⁴¹Virginia Morton Creighton, *Colorado's Environmental Audit Privilege Statute: Striking the Appropriate Balance*, 67 U. Colo. L. Rev. 443, 450–65 (1996). Colorado's Environmental Audit Privilege Statute: Striking the Appropriate Balance?

⁴²Michael Kidd, *Environmental Audits and Self-Incrimination*, 37 Comp. & Int'l L.J. S. Afr. 84, 90–100 (2004). Environmental audits and self-incrimination

⁴³ *Id.* at 105

⁴⁴ CS Simranjeet Kaur, *Understanding Whistleblowing Regulations in India's Corporate Sector*, Indian J. Integrated Res. L., 2024, at 5–10, UNDERSTANDING WHISTLEBLOWING REGULATIONS IN INDIA'S CORPORATE SECTOR

⁴⁵ *Id.* at 12

⁴⁶ Companies Act, 2013, § 177, No. 18, Acts of Parliament, 2013 (India).

⁴⁷ Securities and Exchange Board of India (Listing Obligations and Disclosure Requirements) Regulations, 2015, reg. 22 (India)

complex web and call for a very detailed chapter to discuss this further.

5.3 Competitive Information Protection.

The corporate privilege not to self-incriminate would promote large competitive interests by protecting the information about proprietors and business strategies.⁴⁸ For very competitive businesses, disclosure by compulsion of documents in-house could disclose trade secrets and strategic information that would spread far beyond the scope of investigation.⁴⁹ Protected privileges would protect the vital legitimate business interests of the business while still holding it accountable for any legal wrongs it may commit.⁵⁰ The operations of a multinational corporation also add an additional layer of complexity, since the corporation may face conflicting and irreconcilable legal obligations in different jurisdictions.⁵¹ Mainstream methods for the safeguarding of corporate privilege may significantly reduce the regulatory uncertainty and be a nice global standard for uniform compliance practices across worldwide markets.⁵²

6. New Challenges and Future Developments

6.1 The era of technology and Digital Evidence

This is an era of development and innovation, it has fundamentally changed corporate investigations and compliance, and brought new challenges to what we have always considered traditional privilege concepts.⁵³ Incriminating information of a huge volume is generated by electronic messages, data analysis, and automated surveillance systems, and this information might not even be in the classic privilege frames.⁵⁴ The use of artificial intelligence and machine learning has greatly contributed to the improvement of technology, and the implementation of these technologies by various regulatory bodies has resulted in certain challenges related to the protection of privileges in the corporate world.⁵⁵ The difference between active vs. passive document production is becoming more and more subtle when these

⁴⁸ Scott A. Trainor, *A Comparative Analysis of a Corporation's Right Against Self-Incrimination*, 18 Fordham Int'l L.J. 2139, 2145–55 (1995). A Comparative Analysis of a Corporation's Right Against Self-Incrimination

⁴⁹ *Id.* at 2160

⁵⁰ *Id.* at 2165

⁵¹ *Id.* at 2170-75

⁵² *Id.* at 2180

⁵³ *Privilege Under Pressure: The Shifting Data Breach Investigation Landscape*, Greenberg Traurig (May 25, 2020), *Privilege Under Pressure: The Shifting Data Breach Investigation Landscape | Insights | Greenberg Traurig LLP*

⁵⁴ *Id.*

⁵⁵ Van Cleynenbreugel, *supra* note 37, at 18–20.

changes go deeper into data systems and the use of algorithms for decision-making.⁵⁶ Automated screening systems may identify the patterns and linkages in corporate data that a traditional investigation would not be able to recognize, thus raising the question whether such analysis is a form of compelled self-incrimination.⁵⁷

6.2 Regulatory Cooperation and Evolution.

The new regulatory strategies today focus more on collaboration and voluntary disclosure as opposed to wholly compulsory punitive enforcement.⁵⁸ The U.S. Department of Justice's most recent development is Corporate Enforcement and Voluntary Self-Disclosure Policy.⁵⁹ This tendency to incentivise corporate cooperation is manifested in the Self-Disclosure Policy by incentivising these current trends, which indicate a possible application of qualified privilege safeguards that promote transparency and, at the same time, maintaining accountability.⁶⁰ The idea of regulatory settlements and deferred prosecution agreements is an indication of pragmatism in corporate responsibility that appreciates the power of collaboration.⁶¹ These mechanisms are effective in providing capped protection to the companies that voluntarily report the violations and take remedial measures.⁶²

6.3 Global Harmonization Needs

The large differences in the jurisdictional methods of corporate privilege generate doubt and compliance. Large differences in jurisdictional approaches create compliance issues for multinational corporations. As authorities become more networked across borders, investigations increasingly demand coherent privilege protections.⁶³ Multinational regulatory cooperation plays a key role in shaping corporate privilege defences as authorities become more networked across borders.⁶⁴ Coherent methods of privilege protection are more significant towards preserving good enforcement without infringing legitimate corporate

⁵⁶ *Id.* at 22

⁵⁷ *Id.* at 25

⁵⁸ *DOJ's Updated Enforcement Policy: A Game-Changer for Corporate America?*, Lexology (May 15, 2025), <https://www.lexology.com/library/detail.aspx?g=ad1baf88-b841-4083-9d97-19e048236e96>

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² *Id.*

⁶³ Trainor, *supra* note 49, at 2180–85.

<https://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?article=2580&context=ilj>

⁶⁴ *How UK Law Reforms*, *supra* note 34

interests, good safeguarding without violating legitimate corporate interests, for good enforcement and safeguarding legitimate corporate interests.⁶⁵

7. Recommendations and Analysis.

7.1 Framework of Qualified Corporate Privilege.

Through the comparative analysis, there should be a qualified framework on the corporate privilege against self-incrimination. Such a framework should distinguish between various forms of corporate entities, recognizing that small, closely-held corporations might be appropriate to different treatment than large multinational enterprises.⁶⁶ The framework must also indicate the distinction between various types of information and evidence, and existing documents may be covered by varying privileges than active testimony.⁶⁷ There must be some kind of protection against abuse in qualified privileges, yet incentives to do it voluntarily should exist. These may consist of restrictions on the use of privileged information, requirements of good faith cooperation and exceptions on serious violations which endanger the well-being of the people

7.2. Balance of Competing Interests.

The dilemma of corporate responsibility and protection of privileges must be well-balanced in terms of several items. Protections to whistleblowing under legislation such as India's Companies Act 2013 need to be maintained and in the instance of legitimate corporate privacy interests.⁶⁸ Environmental audit privilege models have shown how minimal safeguards may promote voluntary compliance without compromising the working of rules and regulations. There are ethical issues with the connection between corporate privilege and corporate social responsibility. Demanding advanced strategies, which take into account wider societal connotations.⁶⁹ Companies are also becoming more and more demanded to use. ESG requirements that can be inconsistent with extensive privilege safeguards entail needed

⁶⁵ *Id.*

⁶⁶ Mike Redmayne, *Rethinking the Privilege Against Self-Incrimination*, 27 Oxford J. Legal Stud. 209, 215–25 (2007). <https://www.jstor.org/stable/4494582>

⁶⁷ Case 374/87, *Orkem v. Comm'n*, 1989 E.C.R. 3283, para 35.

⁶⁸ Companies Act, 2013, § 177, No. 18, Acts of Parliament, 2013 (India).

⁶⁹ *Corporate Whistleblowing: Legal Safeguards and Ethical Aspects*, LawfullLegal (Sept. 24, 2024), <https://lawfulllegal.in/corporate-whistleblowing-legal-safeguards-and-ethical-aspects/>

balanced systems that meet agendas. these competing demands.⁷⁰

8. CONCLUSION

At the core of the corporate-silence controversy is a deep-seated clash, between two imperatives: holding companies accountable and protecting business interests, on the one hand corporations command social power and what they do can ripple through the lives of employees, consumers, shareholders and whole communities. Regulators in every jurisdiction examined argue that oversight of corporate activity hinges on gaining access, to company information and the authority to compel testimony and the production of documents. One of the most common arguments used to justify a denial of broad right of corporations to remain silent is that public need for accountability is more important than and should be placed above any corporate interest in confidentiality or protection from self-incrimination. Whereas corporations and their allies assert that if such restrictions on their silence are imposed, it would put them at a disadvantage in the field of litigation. They say that corporations must have the liberty to disclose business data, confidential attorney-client communications, and the products of their own work and that an outright negation of the right to silence leaves one wondering where the line is drawn between genuinely protected material and simply embarrassing or incriminating information. Besides that, they believe that setting standards for corporations as opposed to persons results in an arbitrary inconsistency in the application of legal doctrines throughout the system. This study reflects a potential tension with the defect resulting from the fragmented treatment of corporate silence, namely, the gap in whistleblower protection. Different jurisdictions, by not recognizing an explicit corporate right to silence, leave open the question of whether companies can use privilege as a means of preventing disclosure to the internal staff about the misconduct. The very fact of the ambiguity can in fact lead to the opposite of the intended goals of transparency and public protection. Every time a corporation manages to cleverly invoke it's right to remain silent it can hide away evidence of its wrongdoings. Hence, that silence is then converted into a shield which protects the corporation from the regulators. This, in turn, is an incentive: companies can harvest the fruits of misconduct by hiding it, while at the same time, staying insulated from the obligation to inform the authorities. On the flip side, should corporate silence protections not be in place, the confidentiality that serves as a foundation for business dealings and attorney-client privilege might be taken away to an extent that is far beyond what is really necessary for efficient

⁷⁰ *Id.*

oversight. The impact of the effect is such that it endangers the corporation's compliance mechanism as well as the legal advice it takes, without corporate accountability being sufficiently supported through internal investigations and the rectification of wrongdoing. Multinational companies that are operating in different jurisdictions, each with its own perspective, are now confronted with a fragmented legal terrain that not only causes them enormous compliance challenges but also exposes them to various business risks. A corporation that runs operations in all four of the jurisdictions surveyed must wrestle with four standards that govern its privilege rights. Such pressures often steer firms into cautious blanket-disclosure schemes simply because the strictest jurisdiction leaves them no room for manoeuvre. On the other hand, some companies may risk relying on the leniency of certain jurisdictions and, in the hope that their breach remains undetected, they do not take any further action. The knot of coordination sharply decreases in competition-law enforcement where the European Commission, authorities like the U.S. Department of Justice, the FTC, and the UK Competition and the Markets Authority could be conducting investigations of the same behavior at the same time. The differences in the regard for the right to silence in various places reveal a network of conflicts that support both the choice of forum and the temptation of precisely timing disclosures. The comparative research reveals that the current system is very inadequate and calls for a radical change in every area examined. It is evident that there is a lack in legislation, and this should not be seen as a win for accountability, but it shows a legislative gap and a lack of proper legislation. A principled point of view would mean that each jurisdiction would clearly state whether corporations have the right to keep silent in certain situations, and if so, indicate how far that right goes and where it ends. It would be better if such a decision were made publicly, supported by policy reasons, rather than being left to the present patchwork of ad-hoc judicial rulings and regulatory practices. Any overhaul must rest on a few basic tenets. To begin with, the conferring of silence rights ought to be dosed very sparingly and only in those instances where the origin of a person's right to remain silent can be logically extended to a legal entity. Secondly, the extent of silence should be sufficient to safeguard business interests and, at the same time, allow regulators to gain the necessary information for the protection of the public and the upkeep of market integrity. Thirdly, the restrictions on silence rights should be explicit and foreseeable, thus, cutting down on the chances of using litigation or manipulation by regulatory bodies. Fourthly, any such rights should include exceptions for conduct regulatory violations or any actions that put the public interest at risk. The corporate right to silence is not straightforward, either. Should companies be granted complete immunity from self-incrimination, or should they be left vulnerable? The

main challenge that systems face is to find the right calibration of that protection, which means that on the one hand, business interests need to be preserved and on the other hand, corporate accountability, effective regulation, and public safety have to be met – especially when multinational structures become more and more complicated and oversight more and more sophisticated. How that equilibrium will be eventually achieved will largely determine the form of law and enforcement for the next several decades.