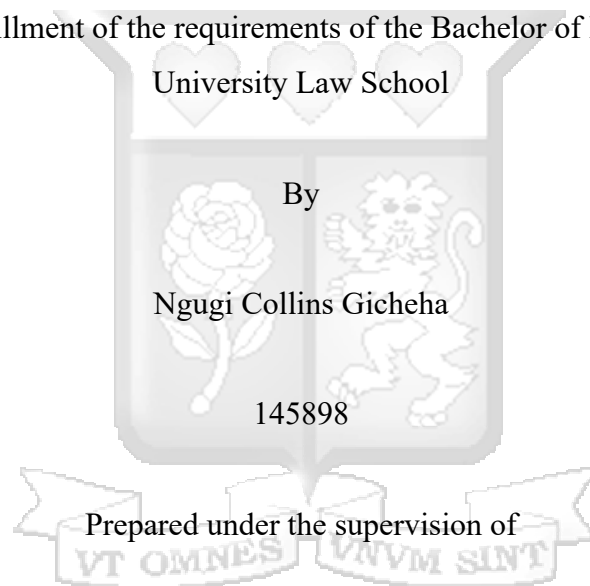


# **THE IMPACT OF TAXATION OF ILLEGAL GAIN ON THE RIGHT AGAINST SELF-INCRIMINATION IN KENYA.**

Submitted in partial fulfillment of the requirements of the Bachelor of Laws Degree, Strathmore



University Law School

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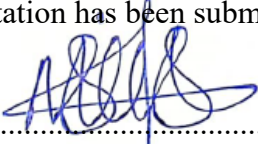
**Declaration**

I, NGUGI COLLINS GICHEHA, do hereby declare that this research is my original work and that to the best of my knowledge and belief, it has not been previously, in its entirety or part, been submitted to any other university for a degree or diploma. Other works cited or referred to are accordingly acknowledged.

Signed: .....  .....

Date: 9<sup>th</sup> April 2025

This dissertation has been submitted for examination with my approval as University Supervisor.

Signed: .....  .....

MOSES ANTONY ODHIAMBO

Date: .....10<sup>th</sup> April, 2025.....



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## List of Legal Instruments

Black's Law Dictionary

Constitution of Kenya, 2010

Kenya Revenue Act, No. 12 of 2015

Income Tax Act (Cap 470)

Tax Procedures Act (No. 29 of 2015).

Value Added Tax Act (No. 35 of 2013).

Customs and Excise Act (Cap. 472).

Evidence Act (Cap. 80).



## List of Cases

### Kenyan cases

*Republic v. Kenya Revenue Authority ex parte Yaya Towers Limited (2016) eKLR.*

*Richard Dickson Ogendo & 2 others v Attorney General & 5 others (2014) KEHC 6197 (KLR).*

*David Mwaure Waihiga v Public Service Commission & 4 others (2017) eKLR*

*Kenya Human Rights Commission v Communications Authority of Kenya & 4 others (2018), eKLR*

*Galaxy Paints Company Limited vs Falcon Guards Limited [1999] eKLR*

*Hancock v General Reversionary and Investment Company (1919)*

*Commissioner of Domestic Taxes v Kenya Maltings Limited (2013) eKLR*

*Income Tax v T Ltd (No. 2) (1971) EA.*

*Commercial & Industrial Credit Ltd v Commissioner of Income Tax (1986) eKLR*

*Southern v Borax Consolidated Ltd*

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*Sullivan v United States (1927), The Supreme Court of the United States.*

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*Garner v United States (1976), The Supreme Court of the United States.*

*Rutkin v United States (1952), The Supreme Court of the United States.*

*James v United States (1961), The Supreme Court of the United States.*

*JP Harrison (Watford) Ltd v Griffiths (Inspector of Taxes) (1962),*

*Welch v Helvering, The Supreme Court of the United States.*

*Heininger v Commissioner (1952), The United States Court of Appeals for the Seventh Circuit.*

*Allen v Farquharson Bros & Co (1932)*

*McKnight v Sheppard (1999)*

*Partridge v Mallandaine (1886)*

*Garner v United States (1976), US Supreme Court.*

*Miranda v Arizona (1966), US Supreme Court.*

*Shapiro v United States (1948), US Supreme Court.*

### South African cases

*MP Finance Group CC (in liquidation) v C: SARS (2007), The Supreme Court of Appeal of South Africa.*



## List of Abbreviations

KRA -Kenya Revenue Authority

COK- Constitution of Kenya

USA- United States of America

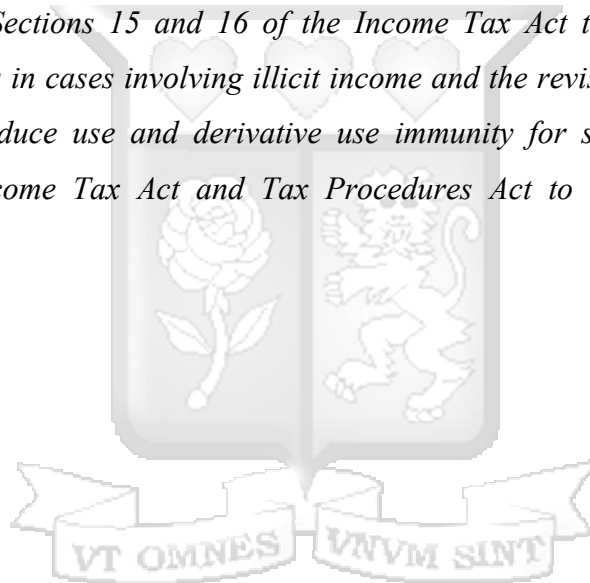
MDR- Mandatory disclosure rules

IRS- Internal Revenue Service



## **Abstract**

*This research examines the taxation of illicit income in Kenya and its impact on constitutional protection against self-incrimination. It examines the intersection of Kenyan tax legislation, specifically the Income Tax Act and Tax Procedures Act, with constitutional safeguards, identifying potential legal complications for taxpayers involved in unlawful activities. The study evaluates the risk of self-incrimination from mandatory income disclosure and taxation of illicit earnings and suggests the need for legal reforms. The research uses a doctrinal methodology, analyzing legislative texts, judicial rulings, and academic discussions. The results show a significant deficiency in protection against self-incrimination, with unclear immunity provisions and uncertainty regarding the deductibility of expenses associated with illegal income. The study recommends review of Sections 15 and 16 of the Income Tax Act to define permissible and impermissible deductions in cases involving illicit income and the revision of the section 97 Tax Procedures Act to introduce use and derivative use immunity for self-disclosed information modifications to the Income Tax Act and Tax Procedures Act to ensure uniformity in tax enforcement.*



## Chapter One: Introduction

### 1.0 Background of Study

The word “illegal” in the Black’s Law Dictionary means that it is not authorized by law and contradicts the principles of the law rather than the mere procedures of the law.<sup>1</sup> The term illegal income is broad. Income can be derived from a much wider range of unlawful activities than bootlegging, embezzlement, and extortion.<sup>2</sup> The taxpayer could derive economic advantages from misconduct that constitutes merely a minor aspect of an otherwise legitimate business operation.<sup>3</sup> A corporate officer might engage in the unlawful practice of utilizing insider information to purchase shares in their own company. The taxpayer might derive advantages from an enterprise that, while operating unlawfully, could still function within legal parameters, albeit with diminished profitability.<sup>4</sup> A case in point is a mail-order business that participates in deceptive advertising practices.

Furthermore, the taxpayer could benefit from endeavors that are not connected to any bona fide business operations.<sup>5</sup> An exemplary instance of this is murder-for-hire. The illicit conduct may be limited to a single instance of wrongdoing, which the taxpayer does not plan to replicate; it may include actions that would have been recurrent had law enforcement not intervened, or it may represent an ongoing enterprise.<sup>6</sup>

The system of taxation is founded on principles articulated by Adam Smith. The principles that significantly influence tax collection include certainty, convenience, equality, ability to pay, and cost-effectiveness in the collection process.<sup>7</sup> Taxation of illegal income in Kenya fails to meet the principle of certainty because the Income Tax Act does not provide for the deductions of expenses in the taxable income of unlawful activities. Sections 15<sup>8</sup> and 16<sup>9</sup> of the Income Tax Act explicitly refer to expenses of a legal activity business.

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<sup>1</sup> Garner, Bryan A., ed. *Black's Law Dictionary*. 11th ed., Thomson Reuters, 2019.

<sup>2</sup> Colliton, ‘The tax treatment of criminal and disapproved payments’ 9th edition Virginia Tax Review, 1989, 273-274.

<sup>3</sup> Muller E, ‘The taxation of illegal receipts. A pyramid of problems! A discussion on ITC 1789 (Income Tax Court – Natal)’ 28(1) Obiter, 2007, 166.

<sup>4</sup> Muller E, ‘The taxation of illegal receipts. A pyramid of problems! A discussion on ITC 1789 (Income Tax Court – Natal)’ 28(1) Obiter, 2007, 166

<sup>5</sup> Muller E, ‘The taxation of illegal receipts. A pyramid of problems! A discussion on ITC 1789 (Income Tax Court – Natal)’ 28(1) Obiter, 2007, 166.

<sup>6</sup> Colliton, ‘The tax treatment of criminal and disapproved payments’ 9th edition Virginia Tax Review, 1989, 273-274.

<sup>7</sup> Lusty D, ‘Profiting the untouchables who profit from organized crime’ 10 Journal of Financial Crime 3, 2003, 2

<sup>8</sup> Section 15, Income Tax Act (Cap 470).

<sup>9</sup> Section 16, Income Tax Act (Cap 470).

Taxation of illegal income as a concept tax began in the United States when Congress exercised its authority under the Sixteenth Amendment.<sup>10</sup> The Sixteenth Amendment grants Congress the authority to impose taxes on “income from whatever source derived.”<sup>11</sup> In 1913, Congress initially utilized its powers granted by the Sixteenth Amendment to implement a tax on net income derived from multiple sources, encompassing “any lawful business carried on for gain or profit.”<sup>12</sup> Three years later, Congress eliminated the qualifying term “lawful” from the statute; however, no explanation was offered for this modification.<sup>13</sup> A dollar of profit from illicit activities holds equivalent purchasing power to a dollar acquired through lawful avenues.<sup>14</sup>

The distinction is evident. The absence of a requirement for the lawbreaker to forfeit their gains results in a sustained advantage for them. Even in such an obligation, they maintain a favorable position. Their situation resembles that of a businessperson providing a money-back guarantee. Based on previous observations, the businessperson understands that the likelihood of customers requesting a refund is minimal if it exists at all.

It is incumbent upon governments globally to ensure the provision of fundamental services to their citizenry. To fulfill this obligation, it is necessary to allocate public funds. Taxation serves as the primary source of revenue for the government. Different nations implement distinct taxation systems and regulations that govern the enforcement of these systems. The income liable for taxation can originate from legal and illegal sources.

The taxation of income derived from illegal sources or activities was established by the significant ruling of the Court of Appeal of Kenya in *Republic v Kenya Revenue Authority ex parte Yaya Towers Limited*, where the Kenya Revenue Authority aimed to compel an applicant's employee to remit his income tax obligations. Although the court determined that the employee's employment contract was illegal, it nonetheless ruled that the income generated from that contract was subject to taxation.<sup>15</sup>

The right against self-incrimination, as articulated in the 2010 Constitution Article 49 (1) (d), states, “An arrested person has the right not to be compelled to make any confession or admission

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<sup>10</sup>Bittker B, ‘Taxing income from unlawful activities’ 25 Case Western Reserve Law Review, 1974, 130.

<sup>11</sup> Bittker B, ‘Taxing income from unlawful activities’ 25 Case Western Reserve Law Review, 1974, 131.

<sup>12</sup> Bittker B, ‘Taxing income from unlawful activities’ 25 Case Western Reserve Law Review, 1974, 131.

<sup>13</sup> Bittker B, ‘Taxing income from unlawful activities’ 25 Case Western Reserve Law Review, 1974, 131.

<sup>14</sup> Bittker B, ‘Taxing income from unlawful activities’ 25 Case Western Reserve Law Review, 1974, 131.

<sup>15</sup> *Republic v Kenya Revenue Authority ex parte Yaya Towers Limited* (2016) eKLR.

that could be used in evidence against the person.”<sup>16</sup> Article 50 (2) (L) asserts, “Every accused person has the right to a fair trial,<sup>17</sup> which includes the right to refuse to give self-incriminating evidence” has been lauded as “one of the greatest landmarks in man’s struggle to achieve civilization and signifies a significant advancement in the evolution of our liberty.” It reflects many of our fundamental values and most noble aspirations. However, it is not enough to endorse a constitutional principle with generous praise unless it can be translated into logically consistent applications of a clearly understood purpose.

Income tax legislation mandates that people report all sources of income. There is no legal protection for taxpayers from self-incrimination resulting from revealing unlawful money. The privilege against self-incrimination originated during the trials of individuals deprived of freedom of thought who suffered under the inquisitorial system of canon law. This privilege emerged as a countermeasure to the inquisitional oath, or the oath of Veritate dices, mandating the accused to respond honestly to all inquiries. In spite its seemingly legitimate intent, the oath was an "inescapable trap designed to elicit self-incrimination." The accused had a quandary: declining to take the oath resulted in condemnation, but accepting it subjected them to the danger of punishment for perjury.

Today's taxpayers with illicit money have a similar 'hammer and anvil' predicament. By submitting an accurate report that reveals their money and its origins, they are essentially admitting to a crime. Filing a false return to hide the illicit source of income exposes them to perjury charges and fines for tax evasion. Failure to submit a return becomes a criminal offense.

The Kenya Revenue Authority<sup>18</sup> can tax all kinds of income. In the case of Kenya Revenue Authority vs. Yaya Towers Ltd, the Court of Appeal decided how to read Section 3(1) of the Income Tax Act. In its ruling, the court said that any income from work or business actions must be taxed.<sup>19</sup> This decision said that money made from things like prostitutes, selling weapons, smuggling, and drug crime, among other things, would be taxed. This ruling made it easier to increase the tax base by including income from sources previously seen as illegal.<sup>20</sup>

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<sup>16</sup> Article 49(1)(d), Constitution of Kenya (2010).

<sup>17</sup> Article 50(2)(L), Constitution of Kenya (2010).

<sup>18</sup> *Republic v Kenya Revenue Authority ex parte Yaya Towers Limited* (2016) eKLR.

<sup>19</sup> *Republic v Kenya Revenue Authority ex parte Yaya Towers Limited* (2016) eKLR.

<sup>20</sup> *Republic v Kenya Revenue Authority ex parte Yaya Towers Limited* (2016) eKLR.

### **1.0.1 Role of the Kenya Revenue Authority**

The Kenya revenue Authority's primary responsibility is to collect revenue.<sup>21</sup> Additional responsibilities include advising the government on taxes, tax assessment, and tax administration.<sup>22</sup> The task comprises identifying and collecting all possible revenues.<sup>23</sup> Revenue collection is critical for the government to carry out its tasks successfully. The Kenya Revenue Authority (KRA) is only authorised to levy taxes as specified in current law.<sup>24</sup> The national government has the exclusive ability to impose an income tax.<sup>25</sup> In terms of taxes, the Kenya Revenue Authority serves only as the government's agent.<sup>26</sup>

The Income Tax Act makes filing an erroneous or false return criminal offence.<sup>27</sup> Nondisclosure of such income may be tax evasion<sup>28</sup>. It compels the person who created the criminal revenue to declare it.<sup>29</sup> The revelation is fundamentally self-incriminating, and there are no legal protections in tax law to ameliorate the situation. This conduct is unlawful and violates the right to self-incrimination. Article 25 gives the right to a fair hearing a basic and non-negotiable guarantee.<sup>30</sup> The concept of self-incrimination can be used when the government is forcing someone to do something. People shouldn't feel like they must file tax forms, because the act of filing isn't meant to be used as proof in a crime case. But if this kind of information is gathered to be used against a person in a criminal case,<sup>31</sup> it affects the right to self-incrimination.<sup>32</sup> Consequently, the implementation of procedural constraints is essential. The research contends that the right to avoid self-incrimination is not applicable when submitting tax returns to tax authorities.

Nevertheless, criminal investigations pertaining to tax-related issues shouldn't require people to show their tax records because it could affect them. Indeed, requiring individuals to present their tax records would result in the disclosure of self-incriminating information. It is not permissible

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<sup>21</sup> Kenya Revenue Authority Act, No. 12 of 2015, s. 5

<sup>22</sup> Kenya Revenue Authority Act, No. 12 of 2015, s. 5

<sup>23</sup> Kenya Revenue Authority Act, No. 12 of 2015, s. 3

<sup>24</sup> Article 209, Constitution of Kenya (2010).

<sup>25</sup> Article 210, Constitution of Kenya (2010).

<sup>26</sup> Kenya Revenue Authority Act, No. 12 of 2015, s. 3

<sup>27</sup> Section 110, Income Tax Act (Cap 470).

<sup>28</sup> Section 111, Income Tax Act (Cap 470).

<sup>29</sup> Section 97, Tax Procedures Act (No. 29 of 2015).

<sup>30</sup> Article 25, Constitution of Kenya (2010).

<sup>31</sup> MP Finance Group CC (in liquidation) v C: SARS (2007), The Supreme Court of Appeal of South Africa.

<sup>32</sup> Sullivan v United States (1927), The Supreme Court of the United States.

for an individual to be forced to testify against their interests. A taxpayer under investigation for a potential criminal violation of tax-related laws ought to be able to utilize the privilege.

Judicial rulings from the jurisdictions of South Africa and the United States of America<sup>33</sup> significantly influenced the decision. Several court decisions have been made in these areas about refunds and self-incrimination in relation to illegal income.<sup>34</sup> The parts of the general subtraction formula don't say that discounts and grants aren't allowed when someone is doing something illegal.<sup>35</sup> When figuring out taxes on income from illegal actions, it has been common practice in many places to not allow costs to be deducted. Tax law says that discounts should not be given to bad people so that they don't get ahead financially from their illegal actions.<sup>36</sup>

The laws that govern income tax are set up so that taxes are based on net income.<sup>37</sup> To find net income, take the income after taking out all the costs of making returns.<sup>38</sup> There is still a lot of uncertainty in the law about what claims can be made for illegal income. That's because Section 15 of the Income Tax Act says that all costs that are only spent to make money can be deducted.<sup>39</sup> Still, since it was just recently decided that illegal income is taxed, it's still not clear if the rules about what kinds of exemptions are allowed apply to this kind of income.

### **1.1 Problem statement**

Kenya's legal framework on taxation has historically been lacking explicit provisions for the taxation of illegal income. This gap was acknowledged by the Court of Appeal in *Republic v Kenya Revenue Authority ex parte Yaya Towers Limited* (2016) eKLR. Despite this, Kenya's Income Tax Act remains silent on critical aspects of taxing illegal income, such as deductible expenses and protection against self-incrimination. This lack of clarity violates the principle of certainty in taxation and puts taxpayers in a precarious position, infringing on their constitutional right against self-incrimination. The research aims to critically examine Kenya's legal framework on illegal income taxation, identify legislative gaps, and propose reforms to ensure certainty in taxation and constitutional safeguards for taxpayers.

### **1.2 Research objectives**

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<sup>33</sup> *Republic v Kenya Revenue Authority ex parte Yaya Towers Limited* (2016) eKLR

<sup>34</sup> Lund S, 'Deductions arising from illegal activities' 13(1) Revenue Law Journal, 2003, 7.

<sup>35</sup> Lund S, 'Deductions arising from illegal activities' 13(1) Revenue Law Journal, 2003, 1

<sup>36</sup> Lund S, 'Deductions arising from illegal activities' 13(1) Revenue Law Journal, 2003, 1

<sup>37</sup> Section 15, Income Tax Act (Cap 470).

<sup>38</sup> Section 15, Income Tax Act (Cap 470).

<sup>39</sup> Section 15, Income Tax Act (Cap 470).

1. To examine the ramifications of the taxation of illicit money on the right against self-incrimination.
2. To investigate the extent to which Kenya's taxation regime protects taxpayers' right against self-incrimination within mandatory disclosure and taxation of illegal income
3. To benchmark best practices of the United States Jurisdiction on addressing risk of self-incrimination in mandatory income disclosure and the taxation of illegal income.

### **1.3 Research questions**

1. Whether the taxation of illicit money in Kenya infringes on the taxpayer's right against self-incrimination.
2. Whether Kenya's taxation regime provides adequate safeguards to protect taxpayers from self-incrimination in the context of mandatory disclosure and taxation of illegal income.
3. Whether international best practices offer effective solutions for mitigating the risk of self-incrimination in mandatory income disclosure and the taxation of illegal income.

### **1.4 Hypothesis**

The taxation of income derived from illegal activities compels individuals to disclose incriminating financial information, thereby violating the right against self-incrimination.

### **1.5 Justification of the study**

This study holds significance as it examines the legal and constitutional ramifications of taxing income generated from illegal activities, a topic that continues to be inadequately addressed within Kenya's tax and criminal law framework. This research explores the relationship between tax enforcement and constitutional protections, enhancing our comprehension of the effective application of tax laws while safeguarding fundamental rights.

This study's findings will provide significant insights for multiple stakeholders. Legal practitioners will acquire a deeper understanding of the intricate legal issues related to the taxation of illicit income and the associated implications for criminal liability. Legislators and policymakers can utilise the study to evaluate the necessity for legislative reforms that clarify the balance between tax compliance and constitutional rights. Furthermore, students and researchers will gain from a comprehensive body of knowledge that enhances subsequent academic discussions on tax law, constitutional law, and criminal justice.

This research aims to inform policy discussions regarding the enhancement of legal safeguards, ensuring that tax enforcement mechanisms adhere to constitutional rights, which in turn promotes a fair and transparent legal system.

## **1.6 Theoretical framework**

### **1.6.1 Natural rights theory and the right against self-incrimination**

Natural rights theory holds that individuals possess certain inherent rights that exist outside of society.<sup>40</sup> These rights are called "natural rights," and they exist before a person becomes a part of any society.<sup>41</sup> Natural rights are inalienable and cannot be revoked by any governmental authority.<sup>42</sup> The idea of "natural rights" is based on the idea that all people have the same set of freedoms, powers, and competencies, despite differences in caste, religion, race, gender, and nationality. Political scholars have emphasized the significance of natural rights theory, considering it a hallmark of political and modern legal thought. The contemporary conception of natural rights is rooted in mediaeval and ancient doctrines, particularly those pertaining to the notion of natural law. Natural law posits that human beings are creations of both God and nature, and as such, they are expected to adhere to the principles and regulations established by either divine authority or the natural order. The rights to liberty, life, and property constitute fundamental natural rights afforded to individuals.<sup>43</sup>

The concept of natural law underwent significant expansion, leading to the emergence of individualism in the 17th century. The doctrine of natural rights underwent modification to emphasise the principle of individualism, positing that individuals possess certain rights that cannot be infringed upon by any member of society. The theory of natural rights encompasses the concept of private ownership in connection with the subjective status afforded to individual human beings.<sup>44</sup> The rights arising from the subjective status of individuals are both imprescriptible and inalienable in nature. Any endeavour to extinguish or renounce natural rights will result in the cessation of an individual's personhood. For instance, in the context of slavery, multiple arguments are presented, as it is fundamentally based on the notion of natural inequalities and infringes upon

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<sup>40</sup> Arundathi K and Awasthi S, 'The Critical Analysis of Natural Rights Theory' 3(4) 2020, 2.

<sup>41</sup> Arundathi K and Awasthi S, 'The Critical Analysis of Natural Rights Theory' 3(4) 2020, 2.

<sup>42</sup> Arundathi K and Awasthi S, 'The Critical Analysis of Natural Rights Theory' 3(4) 2020, 2.

<sup>43</sup> Arundathi K and Awasthi S, 'The Critical Analysis of Natural Rights Theory' 3(4) 2020, 2.

<sup>44</sup> Arundathi K and Awasthi S, 'The Critical Analysis of Natural Rights Theory' 3(4) 2020, 2.

the inherent human rights related to both physical and intellectual capacities. The primary characteristic of natural rights lies in their political implications. Natural rights are a category of rights that cannot be restricted by the government or any individual within society.<sup>45</sup> If a government endeavours to suppress the rights of an individual, it forfeits any legitimate claim to the obedience of its citizens. Natural rights supersede any public or communal rights, as well as any rights that have been established by political institutions. The doctrine of natural rights imposes limitations on the exercise of political authority. The doctrine of natural rights posits that when individual rights are infringed upon, it legitimizes the defense of resistance in the context of revolution.<sup>46</sup>

Natural Rights Theory posits that individuals have intrinsic freedoms that the state is obligated to respect, which includes the right against self-incrimination. The right to silence serves as a crucial protection for individuals, ensuring they are not forced to give testimony that may lead to their own criminal liability. The taxation of illegal income creates a distinct dilemma, compelling individuals to reveal financial details that could potentially incriminate them in unlawful activities. In jurisdictions such as the United States, the Fifth Amendment safeguards taxpayers from self-incrimination by permitting them to refrain from making such disclosures. Tax authorities frequently establish stringent reporting obligations, leading to a conflict between the obligation to fulfil tax responsibilities and the constitutional right to maintain silence. This examination delves into the ways in which taxing illicit income compromises the right against self-incrimination, prompting essential enquiries regarding the equilibrium between governmental objectives in revenue generation and the legal safeguards afforded to individuals.

Critics contend that the natural law approach, especially concerning self-incrimination, lacks legal validity and poses challenges for efficient law enforcement.<sup>47</sup> From a Positive Law perspective, rights require codification and state enforcement to possess legal significance.<sup>48</sup> Natural rights, being independent of legislation and not enforceable by sovereign authority, do not provide a valid foundation for legal protections. Consequently, depending on natural rights to oppose tax

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<sup>45</sup> Arundathi K and Awasthi S, 'The Critical Analysis of Natural Rights Theory' 3(4) 2020, 2.

<sup>46</sup> Arundathi K and Awasthi S, 'The Critical Analysis of Natural Rights Theory' 3(4) 2020, 2.

<sup>47</sup> Robert P. George, "Review: Recent Criticism of Natural Law Theory," *The University of Chicago Law Review*, vol. 55, no. 4 (Autumn 1988), 1371-1429, reviewing Lloyd L. Weinreb, *Natural Law and Justice*, and Russell Hittinger, *A Critique of the New Natural Law Theory*, [Stable URL](#).

<sup>48</sup> Robert P. George, "Review: Recent Criticism of Natural Law Theory," *The University of Chicago Law Review*, vol. 55, no. 4 (Autumn 1988), 1371-1429, reviewing Lloyd L. Weinreb, *Natural Law and Justice*, and Russell Hittinger, *A Critique of the New Natural Law Theory*, [Stable URL](#).

disclosure mandates is not supported by legal principles and may jeopardise the integrity of the rule of law.<sup>49</sup>

This issue holds particular significance in tax compliance, where self-reporting plays a crucial role in ensuring effective administration. Allowing taxpayers to withhold financial disclosures based on self-incrimination could potentially establish a systemic loophole that hinders revenue collection. In legal frameworks characterised by Positive Law, rights and obligations are derived from legislative enactments rather than from abstract moral principles. Consequently, the safeguards against self-incrimination in taxation ought to be evaluated in relation to the current legal statutes, rather than through references to natural rights, which lie beyond the realm of enforceable law.<sup>50</sup>

Additionally, it has been acknowledged by courts that, although individuals should not be forced to make self-incriminating statements in criminal cases, certain regulatory frameworks, including tax administration, may require a level of compelled disclosure. This guarantees that legal responsibilities—like taxation—are fulfilled while preventing individuals from evading compliance under the pretext of natural rights. Ultimately, a strictly positivist approach indicates that taxation and self-incrimination protections ought to be harmonised through legislative mechanisms instead of depending on an unlegislated theory of natural rights.<sup>51</sup>

## **1.7 Literature review**

### **1.7.1 Taxation of illegal income in Kenya.**

Edward Paranta and Eva Maina's study on the taxation of income derived from illegal activities in Kenya examined the Republic v. Kenya Revenue Authority ex parte Yaya Towers Limited case, which established a significant precedent in Kenya's tax law.<sup>52</sup> The article indicates that the judicial

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<sup>49</sup> Robert P. George, "Review: Recent Criticism of Natural Law Theory," *The University of Chicago Law Review*, vol. 55, no. 4 (Autumn 1988), 1371-1429, reviewing Lloyd L. Weinreb, *Natural Law and Justice*, and Russell Hittinger, *A Critique of the New Natural Law Theory*, [Stable URL](#).

<sup>50</sup> Robert P. George, "Review: Recent Criticism of Natural Law Theory," *The University of Chicago Law Review*, vol. 55, no. 4 (Autumn 1988), 1371-1429, reviewing Lloyd L. Weinreb, *Natural Law and Justice*, and Russell Hittinger, *A Critique of the New Natural Law Theory*, [Stable URL](#).

<sup>51</sup> Robert P. George, "Review: Recent Criticism of Natural Law Theory," *The University of Chicago Law Review*, vol. 55, no. 4 (Autumn 1988), 1371-1429, reviewing Lloyd L. Weinreb, *Natural Law and Justice*, and Russell Hittinger, *A Critique of the New Natural Law Theory*, [Stable URL](#).

<sup>52</sup> Maina E and Paranta E, 'Taxing income from illegal activity: The Kenyan perspective' 2(1) *Strathmore Law Review*, January 2017, 3.

stance regarding the taxability of illegal income has changed throughout history.<sup>53</sup> The High Court's initial ruling indicated that an unlawful contractual relationship could not serve as a foundation for tax assessment, as it would contravene public policy. The Court of Appeal, however, reversed this stance, emphasising that taxation is applicable irrespective of the legality of a business or service. Critics contended that imposing taxes on illegal income placed the state in a role as an implicit financial beneficiary of criminal activities, thereby compromising public policy.<sup>54</sup> The research further investigated the potential for deducting expenses associated with illegal enterprises for tax considerations. The authors suggested that Section 15 of the Income Tax Act ought to be interpreted in accordance with Article 10 of the Constitution, highlighting the principles of rule of law, transparency, and accountability.<sup>55</sup>

### 1.7.2 Right Against Self-incrimination

The Self-Incrimination Clause of the Fifth Amendment functions as an essential protection within American constitutional law, ensuring that individuals are not forced to provide testimony that could be self-incriminating.<sup>56</sup> Although the phrasing seems simple, legal scholarship—especially Levy's work in *Origins of the Fifth Amendment: The Right Against Self-Incrimination*—uncovers a nuanced and developing interpretation influenced by historical circumstances and judicial practices.<sup>57</sup> Levy examines the origins of the clause and its evolving parameters, especially concerning contemporary regulatory demands like the taxation of illicit income.<sup>58</sup> He highlights the significance of the clause in assessing whether tax disclosure obligations, particularly those related to illegal gains, violate constitutional protections against self-incrimination.<sup>59</sup> Levy examines the existing implementation of the clause, emphasising the concept of "testimonial

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<sup>53</sup> Maina E and Paranta E, 'Taxing income from illegal activity: The Kenyan perspective' 2(1) *Strathmore Law Review*, January 2017, 6.

<sup>54</sup> Maina E and Paranta E, 'Taxing income from illegal activity: The Kenyan perspective' 2(1) *Strathmore Law Review*, January 2017, 10.

<sup>55</sup> Maina E and Paranta E, 'Taxing income from illegal activity: The Kenyan perspective' 2(1) *Strathmore Law Review*, January 2017, 13.

<sup>56</sup> Levy L, *Origins of the Fifth Amendment: The Right Against Self-Incrimination* (Oxford University Press, 1968) 561.

<sup>57</sup> Levy L, *Origins of the Fifth Amendment: The Right Against Self-Incrimination* (Oxford University Press, 1968) 562.

<sup>58</sup> Levy L, *Origins of the Fifth Amendment: The Right Against Self-Incrimination* (Oxford University Press, 1968) 562.

<sup>59</sup> Levy L, *Origins of the Fifth Amendment: The Right Against Self-Incrimination* (Oxford University Press, 1968) 563.

immunity"—the notion that although compelled statements ought to be excluded from court proceedings, evidence derived from them may still be permissible.<sup>60</sup> This presents notable consequences for tax enforcement, as individuals may be obligated to reveal potentially damaging financial details in their tax filings.<sup>61</sup> His examination also considers the wider constitutional tensions, including those between the Fifth and Sixth Amendments, as well as the changing notion of "compulsion" in both in-court and regulatory contexts.<sup>62</sup> Levy's analysis of the historical foundations of the Self-Incrimination Clause presents a compelling case for a more coherent and principled framework.<sup>63</sup> This framework aims to achieve a better balance between individual rights and the requirements of contemporary tax regulation, especially in instances involving illicit income.<sup>64</sup>

### 1.7.3 Mandatory Disclosure Rules

Noked, Marcone, and Tsang examine the progression of Mandatory Disclosure Rules (MDRs) over the last forty years, mapping their growth in relation to advancements in international tax policy.<sup>65</sup> The analysis reveals three distinct phases characterised by an expanding array of reportable schemes, an extension of reporting obligations to encompass various intermediaries, and an enhancement of multilateral collaboration aimed at addressing tax evasion and avoidance.<sup>66</sup> MDRs are designed to improve tax transparency; however, they present considerable legal challenges, particularly in relation to their possible conflict with the right against self-incrimination, especially in situations concerning the taxation of illicit income.<sup>67</sup> The early stages of MDRs in the 1980s concentrated on particular tax shelters in the United States

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<sup>60</sup> Levy L, *Origins of the Fifth Amendment: The Right Against Self-Incrimination* (Oxford University Press, 1968) 564.

<sup>61</sup> Levy L, *Origins of the Fifth Amendment: The Right Against Self-Incrimination* (Oxford University Press, 1968) 563.

<sup>62</sup> Levy L, *Origins of the Fifth Amendment: The Right Against Self-Incrimination* (Oxford University Press, 1968) 565.

<sup>63</sup> Levy L, *Origins of the Fifth Amendment: The Right Against Self-Incrimination* (Oxford University Press, 1968) 565.

<sup>64</sup> Levy L, *Origins of the Fifth Amendment: The Right Against Self-Incrimination* (Oxford University Press, 1968) 565.

<sup>65</sup> Noked N, Marcone Z and Tsang A, 'The Expansion and Internationalization of Mandatory Disclosure Rules' 13(2) *Columbia Journal of Tax Law*, 2022, 122.

<sup>66</sup> Noked N, Marcone Z and Tsang A, 'The Expansion and Internationalization of Mandatory Disclosure Rules' 13(2) *Columbia Journal of Tax Law*, 2022, 124.

<sup>67</sup> Noked N, Marcone Z and Tsang A, 'The Expansion and Internationalization of Mandatory Disclosure Rules' 13(2) *Columbia Journal of Tax Law*, 2022, 125.

and Canada, with the U.S. implementing registration rules aimed at assisting the IRS in recognising and limiting abusive avoidance tactics.<sup>68</sup> This foundation developed in the 2000s, broadening disclosure requirements to encompass material advisors engaged in questionable transactions, in addition to tax shelter promoters.<sup>69</sup> The expanded scope intensified the conflict between tax enforcement and constitutional rights, as compulsory disclosures had the potential to reveal individuals to criminal liability.<sup>70</sup> International initiatives, notably the OECD's 2015 recommendation and the EU's implementation of DAC 6, have heightened these concerns by requiring the disclosure of potentially illicit activities. The authors rigorously analyse this trajectory, highlighting the necessity of balancing strong tax enforcement with the essential legal safeguard against self-incrimination.<sup>71</sup>

#### **1.7.4 Taxing Income Derived from Illegal Activities, Focusing on Drug Trafficking**

Radosav Risimovic explores the debate of taxing income derived from illegal activities, focusing on drug trafficking.<sup>72</sup> It examines the legal, ethical, and practical dilemmas surrounding whether such income should be taxed or seized, a topic with significant implications for criminal justice and financial regulation.<sup>73</sup> The discussion is framed within the context of recent amendments to Serbia's Criminal Code, which removed the term "legal" in relation to income.<sup>74</sup> The author compares Serbia's legal approach with that of the United States, highlighting the broader consequences of such a policy shift.<sup>75</sup> The author also examines the effectiveness of practical enforcement mechanisms, particularly regarding the seizure of illegal income. The author argues

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<sup>68</sup> Noked N, Marcone Z and Tsang A, 'The Expansion and Internationalization of Mandatory Disclosure Rules' 13(2) *Columbia Journal of Tax Law*, 2022, 125.

<sup>69</sup> Noked N, Marcone Z and Tsang A, 'The Expansion and Internationalization of Mandatory Disclosure Rules' 13(2) *Columbia Journal of Tax Law*, 2022, 122.

<sup>70</sup> Noked N, Marcone Z and Tsang A, 'The Expansion and Internationalization of Mandatory Disclosure Rules' 13(2) *Columbia Journal of Tax Law*, 2022, 127.

<sup>71</sup> Noked N, Marcone Z and Tsang A, 'The Expansion and Internationalization of Mandatory Disclosure Rules' 13(2) *Columbia Journal of Tax Law*, 2022, 125.

<sup>72</sup> Radosav Risimovic, "Seizure or Taxation of Illegal Income - Example of Drug Trafficking" [2017] 2017:4 *Strani Pravni Zivot* 199.

<sup>73</sup> Radosav Risimovic, "Seizure or Taxation of Illegal Income - Example of Drug Trafficking" [2017] 2017:4 *Strani Pravni Zivot* 199.

<sup>74</sup> Radosav Risimovic, "Seizure or Taxation of Illegal Income - Example of Drug Trafficking" [2017] 2017:4 *Strani Pravni Zivot* 199.

<sup>75</sup> Radosav Risimovic, "Seizure or Taxation of Illegal Income - Example of Drug Trafficking" [2017] 2017:4 *Strani Pravni Zivot* 199.

for a more structured and cooperative approach between law enforcement and financial oversight bodies to improve asset confiscation strategies.<sup>76</sup>

### **1.7.5 Public Policy in taxation of illegal income**

Melville E. Locker discusses the taxation of illegal income, highlighting the legal, ethical, and practical considerations that shape public policy.<sup>77</sup> It argues that taxing all income, whether legally or illegally obtained, is necessary to prevent tax evasion, ensure fairness, and generate revenue for the government.<sup>78</sup> The legal framework governing taxation of illegal earnings is based on the idea that tax liability is separate from income legality.<sup>79</sup> The article also discusses the ethical dilemmas of taxing illicit earnings, such as whether it legitimizes criminal activities, and the conflict between taxation and asset forfeiture.<sup>80</sup> It also discusses the practical challenges of enforcing taxation on illegal income, such as the international dimension of criminal enterprises like drug trafficking and money laundering. The author proposes policy recommendations, including strengthening enforcement mechanisms, enhancing collaboration between tax authorities and law enforcement, and resolving the conflict between taxation and asset forfeiture.<sup>81</sup>

### **1.7.6 Self-Incrimination and the Use of Income Tax Returns in Non-Tax Criminal Prosecutions**

John Francis Hanzel explores the intricate legal and constitutional challenges associated with self-incrimination protections and the application of income tax returns in non-tax criminal prosecutions.<sup>82</sup> The text examines the complex situation encountered by individuals obligated to submit tax returns, highlighting the potential risk of self-incrimination if their declared income is associated with unlawful activities.<sup>83</sup> The article focusses on the Fifth Amendment's safeguard

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<sup>76</sup> Radosav Risimovic, "Seizure or Taxation of Illegal Income - Example of Drug Trafficking" [2017] 2017:4 *Strani Pravni Zivot* 199.

<sup>77</sup> Melville E. Locker, "Public Policy in the Taxation of Illegal Incomes" (1940) 29(3) *Georgetown Law Journal* 356.

<sup>78</sup> Melville E. Locker, "Public Policy in the Taxation of Illegal Incomes" (1940) 29(3) *Georgetown Law Journal* 356.

<sup>79</sup> Melville E. Locker, "Public Policy in the Taxation of Illegal Incomes" (1940) 29(3) *Georgetown Law Journal* 357.

<sup>80</sup> Melville E. Locker, "Public Policy in the Taxation of Illegal Incomes" (1940) 29(3) *Georgetown Law Journal* 358.

<sup>81</sup> Melville E. Locker, "Public Policy in the Taxation of Illegal Incomes" (1940) 29(3) *Georgetown Law Journal* 362.

<sup>82</sup> John Francis Hanzel, "Self-Incrimination and the Use of Income Tax Returns in Non-Tax Criminal Prosecutions" (1973) 30(1) *Washington and Lee Law Review* 182.

<sup>83</sup> John Francis Hanzel, "Self-Incrimination and the Use of Income Tax Returns in Non-Tax Criminal Prosecutions" (1973) 30(1) *Washington and Lee Law Review* 185.

against self-incrimination, which ensures that individuals cannot be forced to give testimony that may be utilised against them in a criminal proceeding. The article examines the role of tax returns as evidence in criminal prosecutions that are not directly related to taxation, highlighting their status as highly credible evidence.<sup>84</sup> The article presents policy concerns about the equilibrium between law enforcement interests and individual rights, indicating a necessity for more precise legal frameworks that delineate the usage of tax return information in non-tax prosecutions while upholding constitutional protections.<sup>85</sup>

### **1.7.7 Research Gap**

While existing research has extensively examined the taxability of income derived from illegal activities, a significant gap remains in the analysis of how Kenya's taxation framework mitigates the risk of self-incrimination in mandatory income disclosure.

### **1.8 Research methodology**

This study adopts a doctrinal legal research approach, focusing on the examination of legal sources to analyse the taxation of illicit income and its implications for the right against self-incrimination in Kenya. The research relies on primary sources, including the Constitution of Kenya, the Income Tax Act, and judicial decisions, alongside secondary sources such as legal commentaries and scholarly articles. A comparative analysis with the United States is included because the U.S. has a well-established legal framework on the taxation of illegal income. Kenya's Taxation law can benchmark best practices from the United States in mitigating self-incrimination risks associated with mandatory income disclosure and the taxation of illegal income. Given that the U.S. operates under a written constitution that explicitly guarantees the right against self-incrimination, its legal framework provides valuable insights that can inform potential reforms in Kenya's tax regime. The data will be analyzed through textual interpretation to clarify the concept of illicit income and a comparative precedential approach to evaluate judicial rulings in both jurisdictions, ultimately identifying legal gaps and proposing reforms.

### **1.8 Chapter breakdown.**

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<sup>84</sup> John Francis Hanzel, "Self-Incrimination and the Use of Income Tax Returns in Non-Tax Criminal Prosecutions" (1973) 30(1) *Washington and Lee Law Review* 187.

<sup>85</sup> John Francis Hanzel, "Self-Incrimination and the Use of Income Tax Returns in Non-Tax Criminal Prosecutions" (1973) 30(1) *Washington and Lee Law Review* 192.

### **1.8.1 Chapter One: Introduction**

This chapter introduces the dissertation. This chapter includes background information, problem description, research questions and goals, methods, limits, and assumptions.

### **1.8.2 Chapter Two: the ramifications of the taxation of illicit money on the right against self-incrimination.**

This chapter examines the legal foundations of self-incrimination and its balance with mandatory disclosure in taxation. It discusses the taxation of illicit income, its implications, and the enforcement of tax laws. The Kenyan Constitution enshrines the right against self-incrimination, but tax laws override this. To address this, reforms should introduce protections against prosecution, clarify liability distinctions, and ensure targeted investigations.

### **1.8.3 Chapter Three: Safeguarding Taxpayers from Self-Incrimination: Assessing Kenya's Taxation Regime on Mandatory Disclosure and Illegal Income**

The deductibility of costs from illicit activities for tax purposes in Kenya remains unclear, as seen in *KRA v. Yaya Towers Limited*. Deductible expenditures must be solely for revenue generation, with permissible deductions varying by company type. The Income Tax Act does not explicitly address expenses violating state laws.

### **1.8.4 Chapter Four: Whether international best practices offer effective solutions for mitigating the risk of self-incrimination in mandatory income disclosure and the taxation of illegal income.**

The chapter aims to do a comparative analysis between Kenya and the United States of America, trying to get lessons that can be learnt from them to achieve the taxation of illegal income.

### **1.8.5 Chapter Five: Conclusion and Recommendations**

This chapter aims to give recommendations and give feedback to whether the hypothesis was proved or disproved.

## **Chapter Two: Ramifications Of the Taxation of Illicit Money on The Right Against Self-Incrimination.**

### **2.0 Introduction**

This chapter aims to examine the ramifications of the taxation of illicit money on the right against self-incrimination. It begins by laying a foundation of self-incrimination and taxation by defining five concepts that intertwine them both. The discussion then traces the historical evolution of tax legislation, drawing comparisons with judicial precedents such as *Sullivan v. United States* and *Rutkin v. United States*, to evaluate the balance between taxing illicit profits and upholding fundamental rights. Further, the chapter examines the role of mandatory disclosure requirements in tax law, weighing the need for transparency against the constitutional prohibition on self-incrimination. Finally, the chapter assesses the broader legal challenges posed by Kenya's current approach to taxing illicit income and considers potential reforms to align taxation policies with constitutional safeguards.

### **2.1 Concepts involving the taxation of illicit money and the right against self-incrimination**

This study is based on five fundamental concepts: self-incrimination, spending, illegal income, taxation, and mandatory disclosure. These concepts are fundamental to comprehending the nexus between the taxation of unlawful revenue and the right against self-incrimination in the compilation of tax documents. Taxing illicit earnings aims to ensure offender accountability, although it must be reconciled with constitutional protections, particularly with criminal investigations. The principles of taxes, first stated by Adam Smith—certainty, convenience, equality, ability to pay, and cost-effectiveness—serve as the basis for contemporary tax policy and administration. These principles should also regulate the taxes of unlawful revenue, since taxation is essentially a legal and fiscal instrument, rather than one based on moral or ethical considerations. The subsequent topic pertains to expenditure. Tax legislation acknowledges both deductible and non-deductible expenditures. A taxpayer may deduct costs directly related to the company in accordance with income tax regulations. It delineates permissible costs, which may be deducted from taxable income, and disallowable expenses, which cannot be deducted from illicit revenue. Sections 15<sup>86</sup> and 16<sup>87</sup> delineate acceptable and disallowable deductions, respectively. The costs

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<sup>86</sup> Section 15, Income Tax Act (Cap 470).

<sup>87</sup> Section 16, Income Tax Act (Cap 470).

associated with obtaining illicit money may be classified as either legal or unlawful. Expenses like transportation, salary, and electricity costs are classified as legal expenditures.<sup>88</sup>

Conversely, bribes for contract acquisition is an illicit expenditure. Individuals profiting from illicit revenue may claim a deduction for the legal expenditures paid. The state's initiative to impose taxes on illicit revenue may substantiate this. The state may prohibit deductions for both legal and unlawful costs to discourage individuals from obtaining illicit revenue.

Illegal income lacks a self-evident definition due to its extensive extent. Judicial bodies have contended with the taxation of illicit money since the medieval era. The first occurrence of legal engagement with the taxes of illicit money was in the case of *Sullivan v. United States*,<sup>89</sup> whereby the defendant was charged with neglecting to disclose income derived from the illegal sale of alcohol<sup>90</sup>. The Court said during the dispute, "It does not correspond with one's sense of fairness to charge taxes on those involved in legal operations while permitting those who benefit by criminal methods to dodge such duties."<sup>91</sup> Congress did not likely want to let someone create wrongdoing in order to evade taxes, therefore burdening people who legally worked." The Court later decided that Bootlegger's income was taxable; yet, the Fifth Amendment's protection against self-incrimination protected him from punishment for neglecting to submit a tax return requiring the revelation of his illegal income.<sup>92</sup> Although the Supreme Court adjudicated the *Sullivan* case in 1927, the extent of the privilege against self-incrimination remains ambiguous.

In *Rutkin v United States*, the Supreme Court had to decide whether the defendant's income was taxable on \$250,000 extorted by him from an ex-partner in a "high seas venture" (i.e., bootlegging) by threats to kill the victim and his family.<sup>93</sup> In theory, extortion resembles embezzlement in imposing an obligation on the wrongdoer to reimburse his victim on demand. However, in practice, an extortioner is less likely to be asked for repayment; if the victim's fear of exposure or violence keeps him from complaining to the police when he is first approached, he will probably remain silent thereafter.<sup>94</sup> For this reason, the Supreme Court held in the *Rutkin* case that extorted funds are taxable: Both lawful and illicit gains become taxable income when the recipient has sufficient

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<sup>88</sup> Section 15, Income Tax Act (Cap 470).

<sup>89</sup> *Sullivan v United States* (1927), The Supreme Court of the United States.

<sup>90</sup> *Sullivan v United States* (1927), The Supreme Court of the United States.

<sup>91</sup> *Sullivan v United States* (1927), The Supreme Court of the United States.

<sup>92</sup> *Sullivan v United States* (1927), The Supreme Court of the United States.

<sup>93</sup> *Rutkin v United States* (1952), The Supreme Court of the United States.

<sup>94</sup> *Rutkin v United States* (1952), The Supreme Court of the United States.

control over them, hence deriving readily evident economic value.<sup>95</sup> This occurs when cash, as previously said, is given to the taxpayer in a manner that allows the recipient to use it at their discretion, notwithstanding potential objections from others having a higher claim to the funds. Another party may challenge his right to use it if they acquired it fraudulently.

In *James v. United States*, about a union official who stole over \$700,000 from his union and a related insurance company, the Supreme Court said that income from illegal activities is taxed, even if the recipient is legally required to pay back the money. Mr. Chief Justice Warren contends that the taxpayer's lack of intention to fulfil this duty, combined with the practical reality that he possesses sufficient control over the funds to derive economic advantage, warrants the dismissal of the offsetting responsibility<sup>96</sup>. James stated that restitution to the victim would qualify the taxpayer for a deduction in the repayment year. In the absence of exceptional situations where the offender effectively persuades the Internal Revenue Service or judicial authorities that the contested funds were "borrowed" with the intention of repayment, the James case encompasses all unlawful earnings<sup>97</sup>. Two of the three justices suggested that the same principle ought to be applied to funds acquired through extortion; however, three justices James v. contended that the Wilcox case did not accurately interpret the Internal Revenue Code in determining that an embezzler does not realize "income."<sup>98</sup>

Two principal arguments for the taxation of illicit income have emerged throughout this tortuous judicial history. Firstly, a dollar of illegal profits possesses equivalent purchasing power to a dollar of legitimate profits.<sup>99</sup> This comparison is evident when the criminal is not required to relinquish his earnings. Still, even if he were compelled to do so, he would gain just as much as a merchant selling his products with the promise of reimbursements for dissatisfaction, knowing from experience that few, if any, customers would request a refund.<sup>100</sup> If a legitimate corporation's revenues are subject to a set-off requirement, the company pays taxes on the whole amount received. Unlike the exclusion of loans due to a set-off obligation to return, this case is deemed

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<sup>95</sup> *Rutkin v United States (1952)*, The Supreme Court of the United States

<sup>96</sup> *James v United States (1961)*, The Supreme Court of the United States.

<sup>97</sup> *James v United States (1961)*, The Supreme Court of the United States.

<sup>98</sup> *James v United States (1961)*, The Supreme Court of the United States.

<sup>99</sup> Bittker B, 'Taxing income from unlawful activities' 25 Case Western Reserve Law Review, 1974, 137.

<sup>100</sup> Bittker B, 'Taxing income from unlawful activities' 25 Case Western Reserve Law Review, 1974, 137.

too unlikely, and removing receipts from revenue is not permitted since the whole amount may need to be refunded to customers.<sup>101</sup>

The second argument posits that the phrase 'income from unlawful business' lacks clarity and does not convey its meaning on its own.<sup>102</sup> Income may be produced from a larger variety of unlawful acts than the bootlegging, embezzlement, and extortion covered in the prior situations.<sup>103</sup> The taxpayer can derive financial benefits from actions that are tangential to, yet illegal within, a legitimate business context (such as insider trading by a corporate officer to acquire shares of their own company).<sup>104</sup> This includes illegal activities that could have been executed legally, though potentially with lower profitability (like selling products via mail orders using deceptive advertisements), or actions that are illegal and not connected to any lawful business (for example, contracting someone for murder).<sup>105</sup> The illegal activity might consist of a singular instance of wrongdoing that the taxpayer does not plan to continue; it could include behavior that would have repeated itself if not for the police's involvement; and it may entail participation in a business practice. It is not always the case that the victim will get a refund. For example, in cases where bribery of a public official does not qualify as victimizing behavior, the government may be allowed to seize the profits made from the crime.<sup>106</sup> Conversely, there are instances involving 'fruits of crime' where the legal status of unlawful gain lacks clear legal backing. The situation could escalate to a criminal offence, leading to potential fines and imprisonment for the offender.<sup>107</sup> Alternatively, it may be deemed unlawful, prompting the courts to require restitution of a specified amount or imposing a different type of civil penalty. If the penalties are criminal, then the misconduct may be repugnant to society, actively prosecuted by the police, or maybe ignored or even encouraged by 'polite' society.

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<sup>101</sup> Lusty D, 'Taxing the untouchables who profit from organized crime' 10 Journal of Financial Crime 3, 2003, 2

<sup>102</sup> Lusty D, 'Taxing the untouchables who profit from organized crime' 10 Journal of Financial Crime 3, 2003, 2.

<sup>103</sup> These cases include ; *James v United States*, *Commissioner v Wilcox*, *Rutkin v United States* and *Sullivan v United States*.

<sup>104</sup> Maina E and Paranta E, 'Taxing income from illegal activity: The Kenyan perspective' 2(1) Strathmore Law Review, January 2017.

<sup>105</sup> Maina E and Paranta E, 'Taxing income from illegal activity: The Kenyan perspective' 2(1) Strathmore Law Review, January 2017.

<sup>106</sup> Maina E and Paranta E, 'Taxing income from illegal activity: The Kenyan perspective' 2(1) Strathmore Law Review, January 2017.

<sup>107</sup> Maina E and Paranta E, 'Taxing income from illegal activity: The Kenyan perspective' 2(1) Strathmore Law Review, January 2017.

The fourth concept is mandatory disclosure, an international tax standard aimed at mitigating tax avoidance and evasion. Numerous governments have either implemented or are in the process of instituting mandatory disclosure regulations as deterrents and information-gathering mechanisms. Mandatory disclosure rules (hereinafter referred to as MDRs) have gained significant traction in recent years, particularly with the enactment of the EU Council Directive 2018/822 (DAC 6) and the release of the OECD Model MDRs for Common Reporting Standard Avoidance (CRS MDRs).<sup>108</sup> Since 2018, over 30 jurisdictions have introduced new forms of MDRs, with indications that additional countries are likely to follow.<sup>109</sup> These advancements are part of broader trends in international tax policy and enforcement aimed at intensifying efforts to combat tax avoidance and evasion, focusing on the facilitators of such practices, and embracing a multilateral approach to tax norm-setting and enforcement.<sup>110</sup>

Mandatory disclosure as an international standard has been incorporated into Kenyan tax legislation through various acts. The Tax Procedures Act delineates the rules governing tax administration and outlines multiple provisions for tax collection. Section 24 mandates that every taxpayer submit returns and establishes penalties for non-compliance with the information requirements set forth by the Kenya Revenue Authority.<sup>111</sup> Section 82 imposes sanctions for the failure to maintain records as required by the Authority.<sup>112</sup> Section 84 stipulates penalties for the submission of false statements.<sup>113</sup> These provisions necessitate complete disclosure, with non-compliance resulting in penalties.

MDRs have been integrated into the Income Tax Act. All individuals are obligated to pay income tax and must submit a return, irrespective of the income source. Consequently, abstaining from filing is not a viable option for those attempting to hide income from illicit activities. Nevertheless, once a taxpayer involved in illegal activities is compelled to file, the safeguard against self-incrimination may be completely forfeited, as the information could be utilized as evidence.

Section 109 of the Income Tax Act delineates various offences related to the failure to submit tax returns.<sup>114</sup> The implications of these provisions necessitate the disclosure of illicit income. The

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<sup>108</sup> OECD, *Mandatory Disclosure Rules, Action 12 – 2015 Final Report*, 2015.

<sup>109</sup> OECD, *Mandatory Disclosure Rules, Action 12 – 2015 Final Report*, 2015.

<sup>110</sup> OECD, *Mandatory Disclosure Rules, Action 12 – 2015 Final Report*, 2015.

<sup>111</sup> Section 24, Tax Procedures Act (No. 29 of 2015).

<sup>112</sup> Section 82, Tax Procedures Act (No. 29 of 2015).

<sup>113</sup> Section 84, Tax Procedures Act (No. 29 of 2015).

<sup>114</sup> Section 109, Income Tax Act (Cap. 470).

statute criminalizes the submission of inaccurate returns by taxpayers.<sup>115</sup> Furthermore, it mandates that taxpayers furnish any requisite information and respond to lawful inquiries. This provision empowers the Kenya Revenue Authority to compel individuals to disclose potentially self-incriminating information, thereby infringing upon the right against self-incrimination.

The mandatory disclosure requirement has been integrated into the Value-added Tax Act (VAT). The statute mandates comprehensive disclosure in tax returns as outlined in section 44.<sup>116</sup> The act stipulates that non-compliance incurs a penalty, highlighting the duty of disclosure and the potential for self-incrimination.<sup>117</sup> The act establishes extensive taxation on the provision of goods and services. Section 6 specifies that this tax applies to all businesses. Subsection 4 of this provision assigns liability to the individual supplying the goods and services.<sup>118</sup>

Section 13 of the VAT Act delineates the timeline for tax payment, stipulating that it must be remitted by the twentieth day of the designated month.<sup>119</sup> Section 43 empowers the Commissioner for Tax to mandate the submission of books and records.<sup>120</sup> Under this provision, the Commissioner possesses the authority to compel any individual to present any records, accounting books, or other documents essential for verifying adherence to the VAT Act. The Commissioner may inspect and replicate such documents and request any additional information pertinent to tax matters.<sup>121</sup> These powers are vital for ensuring compliance and the precise assessment of VAT obligations. Compliance necessitates the submission of records upon request, even if such records are self-incriminating. The Act does not preclude the Commissioner from forwarding these records to criminal enforcement authorities should incriminating evidence be discovered.<sup>122</sup>

Mandatory disclosure is established as a rule and norm in section 187 of the Customs and Excise Act.<sup>123</sup> This provision mandates complete and accurate disclosure.<sup>124</sup> A contravention may result in imprisonment for three years or a fine not exceeding one million five hundred thousand shillings. Violations may occur through various actions, including false entries, refusal to respond to

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<sup>115</sup> Section 110, Income Tax Act (Cap. 470).

<sup>116</sup> Section 44, Value Added Tax Act (No. 35 of 2013).

<sup>117</sup> Section 44, Value Added Tax Act (No. 35 of 2013).

<sup>118</sup> Section 6 (4), Value Added Tax Act (No. 35 of 2013).

<sup>119</sup> Section 13,, Value Added Tax Act (No. 35 of 2013).

<sup>120</sup> Section 43, Value Added Tax Act (No. 35 of 2013).

<sup>121</sup> Section 43, Value Added Tax Act (No. 35 of 2013)

<sup>122</sup> Section 43, Value Added Tax Act (No. 35 of 2013)

<sup>123</sup> Section 187, Customs and Excise Act (Cap. 472).

<sup>124</sup> Section 187, Customs and Excise Act (Cap. 472).

inquiries from a customs officer, and making false statements. These provisions necessitate full disclosure when submitting returns.<sup>125</sup>

The final concept is self-incrimination. The privilege against self-incrimination is a product of the adversarial system of criminal procedure.<sup>126</sup> The modern common law privilege is linked to the doctrinal maxim *nemo tenetur prodere seipsum*, which was developed in earlier centuries for different purposes.<sup>127</sup> This maxim is commonly translated as "no one is obliged to accuse himself."<sup>128</sup> The Black Dictionary defines self-incrimination as indicating one's involvement in a crime or exposing oneself to prosecution, particularly through a statement. The privilege against self-incrimination is enshrined in Article 50 of the Constitution of Kenya, 2010.<sup>129</sup> This right is a crucial principle in ensuring a fair hearing for the accused.

After establishing the concepts that integrate self-incrimination the mandatory disclosure obliged by taxation, we must evaluate the ramifications of the taxation of illicit money on the right against self-incrimination. This is achieved by the proportionality test. In the proportionality test, the study aims to balance the right against self-incrimination and the mandatory disclosure obliged by taxation.

## 2.2 Proportionality

The principle of proportionality asserts that all laws limiting human rights must be proportionate and reasonable.<sup>130</sup> It comprises three sub-principles: adequacy, necessity, and reasonableness *stricto sensu*.<sup>131</sup> Consequently, a measure must effectively achieve the lawmaker's intended purpose in the least restrictive manner while maintaining a reasonable balance in its application. Additionally, the measure must not alter the context of the human rights involved and should only restrict the right to a permissible extent necessary to fulfill the legitimate objectives of the legislator.<sup>132</sup> It is crucial to ascertain the immutable essence of a human right prior to considering

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<sup>125</sup> Section 187, Customs and Excise Act (Cap. 472).

<sup>126</sup> Redmayne M, 'Rethinking the privilege against self-incrimination' 27 *Oxford Journal of Legal Studies*, 2007, 210.

<sup>127</sup> Redmayne M, 'Rethinking the privilege against self-incrimination' 27 *Oxford Journal of Legal Studies*, 2007, 210.

<sup>128</sup> Redmayne M, 'Rethinking the privilege against self-incrimination' 27 *Oxford Journal of Legal Studies*, 2007, 210

<sup>129</sup> Article 50(2)(L), Constitution of Kenya (2010).

<sup>130</sup> Cianciardo J, 'The principle of proportionality: The challenges of human rights' 3(1), *Journal of Civil Law Studies*, 2010, 179.

<sup>131</sup> Cianciardo J, 'The principle of proportionality: The challenges of human rights' 3(1), *Journal of Civil Law Studies*, 2010, 179.

<sup>132</sup> Tsakyrakis S, 'Proportionality: An assault on human rights?' 7(3), *International Journal of Constitutional Law*, 2009, 474.

its restriction. Thus, the principle guarantees that neither the rights of the respondent nor those of the petitioners are subjected to unreasonable and unnecessary interference.<sup>133</sup>

Proportionality in human rights law consists of a three-part evaluation. Initially, it assesses the appropriateness of a measure that limits a right in relation to its intended objective. Secondly, it evaluates the necessity of the measure in achieving the specified objective. Ultimately, it evaluates whether the burden placed on the individual is disproportionate to the benefits intended by the measure.

Consequently, the Court addresses questions on purpose, reasonableness, and necessity before embarking on the task of balancing the competing interests.<sup>134</sup> In balancing interests, the Court attaches 'abstract weights' to determine whether a measure is important enough to be pursued despite its impact on the rights of the petitioners.<sup>135</sup> In short, do the benefits outweigh the costs? These weights are assigned in comparison with other rights or the constitutional provisions on the matter. Even where a limitation leaves nothing of the right in the case of one individual, as long as its core remains untouched, the limitation may be considered proportionate. This exercise has been criticized for assuming that public interest can always be weighed against human rights and generally prevail unless the restriction they impose is excessive compared to the benefit it secures.<sup>136</sup> An example of such an outlook by the judiciary in Kenya can be seen in the finding by a High Court judge in the Constitutional and Human Rights division that there can be no discrimination where the law or conduct being complained of has a legitimate aim.<sup>137</sup>

Notwithstanding the criticisms directed at proportionality, it is regarded as a defining feature of the 'culture of justification', signifying a transition from a 'culture of authority'.<sup>138</sup> Furthermore, mandating the government to substantiate its actions and decisions confers legitimacy upon its coercive powers. In addressing the matter of proportionality in the limitation of human rights, Kenyan courts have asserted that a law or measure is deemed justified solely when it is

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<sup>133</sup> Tsakyrakis S, 'Proportionality: An assault on human rights?' 7(3), *International Journal of Constitutional Law*, 2009, 474.

<sup>134</sup> Cianciardo J, 'The principle of proportionality: The challenges of human rights' 3(1), *Journal of Civil Law Studies*, 2010, 179.

<sup>135</sup> Cianciardo J, 'The principle of proportionality: The challenges of human rights' 3(1), *Journal of Civil Law Studies*, 2010, 179.

<sup>136</sup> Klatt M and Meister M, 'Proportionality – a benefit to human rights?' 10(3) *International Journal of Constitutional Law*, 2012, 690.

<sup>137</sup> *David Mwaure Waihiga v Public Service Commission & 4 others* (2017) eKLR, 9, para. 52.

<sup>138</sup> Cohen-Eliya M and Porat I, 'Proportionality and the culture of justification' 59(2) *The American Journal of Comparative Law*, 2011, 475.

proportionate.<sup>139</sup> Proportionality is assessed through a four-part test to ascertain whether there exists an equitable balance between public interest and the encumbered right<sup>140</sup>. The evaluation of a governmental action that restricts a right entail multiple critical factor. Initially, it is essential to assess whether the action pursues a reasonable and sufficiently significant objective that warrants the limitation of the right. Furthermore, a logical relationship must exist between the employed methods and the intended objectives. Third, the procedures utilised must be essential, implying that they should minimally infringe upon rights while considering alternative methods to achieve the same objective. The advantages of the restriction must ultimately surpass its adverse effects. In posting these inquiries, the Court evaluates whether other, less severe methods exist to achieve the government's objective. The enabling legislation must have been enacted lawfully for the restriction to be deemed constitutional.<sup>141</sup>

## **2.4 Implementation of the Proportionality Test.**

### **2.4.1 Assessing Whether Governmental Limitations on Rights Serve a Legitimate and Sufficiently Significant Aim?**

The constitutional right against self-incrimination, established in Article 50 of the Constitution, affirms that every accused individual has the right to decline providing self-incriminating evidence.<sup>142</sup> This essential protection prevents individuals from being coerced into disclosing information that could potentially implicate them in criminal activity. Nevertheless, the obligatory disclosure mandates stipulated in Kenyan tax legislation, specifically in the Tax Procedures Act (2015)<sup>143</sup>, generate a conflict with this constitutional protection.

According to these regulations, taxpayers are obligated to furnish comprehensive and precise financial information to the Kenya Revenue Authority (KRA), encompassing specifics about their income, assets, and financial transactions.<sup>144</sup> Non-compliance, whether through omission or false declarations, incurs serious repercussions, including criminal prosecution.<sup>145</sup> Although this mandate aims to uphold legitimate goals of tax compliance, prevent tax evasion, and safeguard public revenue, it raises substantial concerns regarding the right against self-incrimination.

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<sup>139</sup> *Kenya Human Rights Commission v Communications Authority of Kenya & 4 others* (2018), eKLR, para 71 – 74.

<sup>140</sup> *Kenya Human Rights Commission v Communications Authority of Kenya & 4 others* (2018), eKLR, para 71 – 74.

<sup>141</sup> Article 24, Constitution of Kenya (2010).

<sup>142</sup> Article 50(2)(L), Constitution of Kenya (2010).

<sup>143</sup> Section 97, Tax Procedures Act (No. 29 of 2015).

<sup>144</sup> Section 110, Income Tax Act (Cap. 470).

<sup>145</sup> Section 111, Income Tax Act (Cap. 470).

The proportionality test offers a structured approach to assess the validity of this limitation. At the outset, the mandatory disclosure requirement serves a legitimate and crucial purpose—ensuring tax compliance and protecting revenue are essential for sustaining public services and maintaining economic stability. Furthermore, there is a clear relationship between mandatory disclosure and its intended objective; accurate financial statements are essential for the efficient implementation of tax laws.

However, the degree to which the limitation slightly undermines the right against self-incrimination reveals a shortcoming in the existing legal framework. The objective holds merit; however, the current Kenyan tax legislation does not provide adequate safeguards for individuals concerning self-incrimination. There are no clear guarantees that information disclosed voluntarily will not be used against a taxpayer in subsequent criminal cases. The legal framework often blurs the line between administrative penalties and criminal liability, placing taxpayers at risk of prosecution due to their mandatory disclosures. This disparity raises concerns regarding the proportionality of the restriction in relation to the benefits gained. The significance of the purpose cannot be overstated; however, insufficient legal safeguards present an unjustifiable risk of infringing upon the constitutional right against self-incrimination.

In conclusion, while the requirement for mandatory disclosure in Kenyan tax legislation serves a legitimate public interest, it falls short in effectively protecting the right against self-incrimination. The legal framework should incorporate immunity provisions to align with constitutional requirements, ensuring that self-reported information remains inadmissible in criminal prosecutions. Moreover, it is crucial to establish a clear distinction between administrative enforcement actions and criminal responsibility for non-compliance. Without these protections, the ongoing conflict between tax compliance and constitutional rights remains unresolved.

#### **2.4.2 Are the methods logically aligned with the objective?**

The right against self-incrimination, enshrined in Article 50 of the Constitution, ensures that every accused individual has the right "to refuse to provide self-incriminating evidence."<sup>146</sup> This right protects individuals from being forced to disclose information that may directly or indirectly implicate them in criminal liability. Nonetheless, obligatory disclosure mandates stipulated in

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<sup>146</sup> Article 50(2)(L), Constitution of Kenya (2010).

Kenyan tax legislation, specifically the Tax Procedures Act (2015), are at odds with this constitutional protection.<sup>147</sup>

Taxpayers must furnish accurate and detailed financial information, including income, financial transactions, and activities related to taxation. Failure to comply due to false declarations or omissions can result in criminal prosecution. While the purpose of these laws—to promote tax compliance, discourage tax evasion, and safeguard public revenue—is clearly important, it is essential to evaluate whether the method of mandatory disclosure is suitable and well-structured to achieve this objective.

At first glance, mandatory disclosure appears to be rationally associated with a valid goal. Accurate and clear financial reporting is essential for effective tax administration and enforcement, enabling the Kenya Revenue Authority to detect and prevent fraudulent activities. The absence of such disclosure would significantly hinder the detection and prosecution of tax evasion, thereby threatening the integrity of the tax system.

Upon closer examination, the suitability of mandatory disclosure in its current form raises concerns when compared to the right against self-incrimination. The core problem lies in the dual-purpose characteristic of the information that has been disclosed. The main goal is tax compliance; however, the same information could also be employed in criminal cases involving the taxpayer. Unlike jurisdictions that offer protections like use immunity, which bars the use of disclosed information in criminal cases, or derivative use immunity, which stops evidence derived from such disclosures from being used, Kenyan tax laws lack clear safeguards against self-incrimination.

The absence of protective measures forces taxpayers to reveal information under the risk of penalties, with no assurance that their disclosures will not be used against them in subsequent criminal cases. Consequently, while mandatory disclosure may achieve the valid objective of ensuring tax compliance, the approaches utilized fall short in effectively protecting the right against self-incrimination.

In conclusion, while there exists a logical correlation between mandatory disclosure requirements and the legitimate objective of improving tax compliance, the lack of sufficient safeguards compromises this correlation when evaluated in light of the constitutional right against self-incrimination. To resolve this conflict, it is essential for Kenyan tax legislation to include immunity provisions that clearly protect taxpayers from the utilization of self-disclosed information in

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<sup>147</sup> Section 110, Income Tax Act (Cap. 470).

criminal proceedings. In the absence of these protections, the logical connection is inadequate, leaving the right against self-incrimination vulnerable to infringement.

### **2.4.3 Are the techniques used to achieve the purpose essential, specifically in terms of minimally infringing upon the restricted right, while evaluating other methods to get the same goal?**

The constitutional right against self-incrimination, established in Article 50 of the Kenyan Constitution, ensures that no person can be forced to furnish evidence that could potentially implicate them in criminal liability<sup>148</sup>. Conversely, the Tax Procedures Act (2015) mandates taxpayers to disclose precise and comprehensive financial information to the Kenya Revenue Authority<sup>149</sup>. Non-compliance, whether through omission or false declarations, may lead to administrative sanctions or criminal prosecution.

The aim of these mandatory disclosures is valid, ensuring tax compliance, preventing evasion, and protecting public revenue, yet the necessity test necessitates an assessment of whether these measures minimally infringe upon the right against self-incrimination. Essentially, the inquiry is whether the state could attain the same goal through less intrusive alternatives that more effectively uphold constitutional protections.

Initially, mandatory disclosure appears crucial for efficient tax administration. Precise financial reporting allows the KRA to identify fraud, guarantee compliance, and safeguard the revenue needed for public services. Nevertheless, a more in-depth examination uncovers substantial deficiencies in the relationship between this obligation and the right against self-incrimination.

The fundamental problem resides in insufficient legal protections within the Kenyan tax system. Taxpayers are obligated to reveal information that may render them susceptible to criminal liability. Nonetheless, there are no immunity provisions ensuring that such disclosures will not be utilized against them in future criminal proceedings. In other jurisdictions, safeguards like use immunity (which prohibits the use of disclosed information in prosecution) and derivative use immunity (which prevents the use of evidence derived from such disclosures) are commonplace<sup>150</sup>. These protections are notably absent in Kenyan tax legislation.

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<sup>148</sup> Article 50(2)(L), Constitution of Kenya (2010).

<sup>149</sup> Section 110, Income Tax Act (Cap. 470).

<sup>150</sup> Levy LW, 'The right against self-incrimination: history and judicial history' 84(1) Political Science Quarterly, March 1969, 14.

Furthermore, there is a significant overlap between administrative and criminal consequences arising from mandatory disclosure. The data provided to meet administrative obligations under tax laws may simultaneously serve as grounds for criminal prosecution. The lack of clear legal boundaries between these two enforcement pathways leaves taxpayers persistently vulnerable to prosecution stemming from their compelled disclosures.

The necessity test assesses the availability of less intrusive methods to achieve the goal of tax compliance. There are certainly various options available. Kenyan tax legislation could potentially include provisions for use and derivative use immunity, thereby protecting self-disclosed information from criminal prosecution. It is important to differentiate between administrative and criminal liability, as this distinction ensures that disclosures made for compliance purposes do not automatically expose taxpayers to criminal penalties. Furthermore, tax enforcement may progressively rely on focused investigations triggered by particular red flags instead of blanket compulsory self-incrimination requirements.

The presented alternatives demonstrate that the current mandatory disclosure framework is not the most rights-respecting approach to achieving tax compliance. The absence of immunity protections and the unclear differentiation between administrative and criminal consequences suggest that Kenyan tax laws significantly infringe upon the constitutional right against self-incrimination.

## **2.5 Conclusion**

This chapter examined the complex ramifications of taxing illicit income on the right against self-incrimination. This text outlines key concepts such as self-incrimination, expenditure, illicit revenue, taxes, and compulsory disclosure. The chapter examines historical tax legislation and judicial precedents to achieve a balance between taxing profits and fundamental rights. The analysis delves into mandatory disclosure requirements and the current tax approach in Kenya. The chapter undertakes the proportionality test that highlights the potential conflicts with constitutional safeguards. The chapter concludes that indeed there are ramifications of taxing illicit income on the right against self incrimination.

## **Chapter Three: Safeguarding Taxpayers from Self-Incrimination: Assessing Kenya's Taxation Regime on Mandatory Disclosure and Illegal Income**

### **3.0 Introduction**

The primary objective of this chapter is to assess whether Kenya's taxation regime provides adequate safeguards to protect taxpayers from self-incrimination. To achieve this, the chapter begins by exploring the contentious nature of expense deductions under the Income Tax Act, which requires that expenses be incurred solely for revenue generation to qualify for deductions. Additionally, the chapter outlines the criteria for permissible deductions, including qualifying expenses, explicitly prohibited deductions, and the treatment of losses, penalties, and legal costs related to illegal activities. Finally, it evaluates whether Kenya's legal framework adequately addresses these issues and highlights the need for further judicial interpretation to clarify the intersection between tax law and illicit activities.

### **3.1 Constitutional Safeguards in the Disclosure of Illicit Income**

The Constitution, as the paramount legal authority, nullifies any laws that contradict its stipulations. The revelation of income derived from illicit activities may result in an individual's conviction in a non-tax criminal prosecution. Justice Majanja, in the case of *Dickson Ogendo vs. Attorney General*<sup>151</sup>, asserted that the government should endeavor to obtain evidence independently rather than coercing it from the accused.<sup>152</sup>

The Constitution of Kenya 2010, establishes the Bill of Rights, ensuring the rights of every individual. It obligates the state to respect, promote, and uphold these rights. The state serves as the duty bearer regarding the protection of human rights. The defense and promotion of human rights seek to maintain human dignity, foster social justice, and actualize human potential. Fundamental rights and freedoms may only be restricted according to the principles outlined in the Constitution.

Proponents assert that the right against self-incrimination protects the guilty and diminishes the likelihood of establishing their culpability, as it significantly amplifies the evidentiary burden on

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<sup>151</sup> *Richard Dickson Ogendo & 2 others v Attorney General & 5 others* (2014) KEHC 6197 (KLR).

<sup>152</sup> *Richard Dickson Ogendo & 2 others v Attorney General & 5 others* (2014) KEHC 6197 (KLR)

the government.<sup>153</sup> They contend that an innocent individual cannot self-incriminate. Adherents of this viewpoint maintain that the guilty tend to remain silent, whereas the innocent are more inclined to provide testimony.<sup>154</sup> Nevertheless, these assertions may lack authenticity, as there are instances where the guilty may indeed confess.<sup>155</sup>

The right to self-incrimination is a restricted privilege for an apprehended individual. Conversely, the right to a fair trial is an inviolable entitlement. This right is absolute as it guarantees that every court renders its judgment solely based on merit.<sup>156</sup> In contrast, the right against self-incrimination is not an inviolable right, as it constitutes a component of an arrested individual's rights. The right to a fair trial necessitates the highest regard for the fundamental rights of the accused.<sup>157</sup>

A taxpayer's right not to testify against themselves does not protect them from tax crimes. This right can't be used to get rid of records that are required by law to be kept. When collecting taxes, the information a person gives is only used to figure out how much tax they owe. Information from tax forms that points to illegal behaviour but isn't needed to figure out tax debt shouldn't be used in criminal cases that aren't related to taxes. A person who is being held can also give up this right by admitting. The Evidence Act says in Section 25A that a statement can be made in front of a court, a magistrate, or a police officer with at least the rank of sergeant.<sup>158</sup>

A person cannot refuse to file tax reports because they think that some of the information they include could be used against them. If certain questions in the tax return could lead to the voter being charged with a crime, he can use the right against self-incrimination to refuse to answer those questions. Since making an income tax return is required, the voter has three good choices when asked questions that could be used against them: they can refuse to answer, use the right against self-incrimination, or not answer at all. If these choices add up to show that the person is involved in illegal behaviour, the requirement to file a return may raise constitutional issues.

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<sup>153</sup> Redmayne M, 'Rethinking the privilege against self-incrimination' 27(1) Oxford Journal of Legal Studies, 2007, 210.

<sup>154</sup> Redmayne M, 'Rethinking the privilege against self-incrimination' 27(1) Oxford Journal of Legal Studies, 2007, 210.

<sup>155</sup> Redmayne M, 'Rethinking the privilege against self-incrimination' 27(1) Oxford Journal of Legal Studies, 2007, 210.

<sup>156</sup> Article 25, Constitution of Kenya (2010).

<sup>157</sup> Article 25, Constitution of Kenya (2010).

<sup>158</sup> Section 25A, Evidence Act (Cap. 80).

The taxpayer possesses additional rights beyond the right against self-incrimination related to tax returns. These encompass the right to privacy<sup>159</sup>, the right to access information<sup>160</sup>, and the right to fair administrative action.<sup>161</sup> To protect individuals' privacy, the tax authority must keep all data and information supplied by individuals confidential unless absolutely required. Regarding the right to know, people should know why the government needs them to provide details beyond what's already on their yearly tax returns, and they should also know that the government's mission is to collect taxes.

Limitations on rights are permissible under Article 24, but only in cases where they are fair and warranted.<sup>162</sup> It lays out the rules for when restrictions can be imposed, and those rules include things like how the restriction relates to fundamental freedom, how relevant the purpose of the limitation is, how big the limitation is, how important it is to protect other people's rights, and whether or not there are less restrictive ways to accomplish the same goals.<sup>163</sup> No one has the authority to limit or eliminate the right to a fair trial, which includes the right to refuse to testify against oneself if doing so would incriminate oneself.<sup>164</sup> Conversely, the Tax Procedures Act, Income Tax Act, Value-Added Tax Act, and Customs and Excise Act would impose limitations on the right to self-incrimination as permitted by Article 49.<sup>165</sup>

### **3.2 Deduction Formula in Kenya**

The taxable income is the result of deducting expenses from total revenue. Sections 15–28 of the Income Tax Act outline the regulating conditions.<sup>166</sup> The taxation authorities determine the total tax due by using the provision to compute taxable income formulae.<sup>167</sup> Taxes are imposed by the authorities on all income and deductions are allowed as long as they meet the requirements of the Act.<sup>168</sup>

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<sup>159</sup> Article 31, Constitution of Kenya (2010).

<sup>160</sup> Article 35, Constitution of Kenya (2010).

<sup>161</sup> Article 47, Constitution of Kenya (2010).

<sup>162</sup> Article 24, Constitution of Kenya (2010).

<sup>163</sup> Article 24, Constitution of Kenya (2010).

<sup>164</sup> Article 25, Constitution of Kenya (2010).

<sup>165</sup> Article 49, Constitution of Kenya (2010).

<sup>166</sup> Section 15-28, Income Tax Act (Cap. 470).

<sup>167</sup> Section 15-28, Income Tax Act (Cap. 470).

<sup>168</sup> Section 15-28, Income Tax Act (Cap. 470).

The court in *Hancock vs. General Reversionary and Investment* said that for deductions to be valid, they must be incurred to meet the needs of the organization.<sup>169</sup> In order for a cost to be deductible, it must have had a direct impact on the creation of profits, as determined in the case of *Income Tax vs. T Ltd.*<sup>170</sup>. Lawrence J reached the same conclusion in the case *Southier versus Borax Consolidated Ltd.*<sup>171</sup> The Income Tax Act lays forth the principles in question in Section 15(1). It lays forth the main idea for finding valid deductions.<sup>172</sup>

Each expenditure must comply with at least one requirement outlined in Part IV of the act to qualify for deduction in determining taxable income. In instances of doubt about deductions, the laws must be construed in a manner that benefits the taxpayer. The court in *Commissioner of Income Tax vs. Westmont Power (K) Ltd* determined that where a provision in tax law is ambiguous, it should be construed in a manner that benefits the taxpayer. The case of *Ramsay Ltd versus Inland Revenue Commissioner* established that tax is assessed only where there is certainty. According to Section 15, the item must be solely designated for revenue creation to qualify as an acceptable deduction. Section 16 excludes any expenditure that is not entirely directed towards creating profits for the firm. All fees stated in this section pertain to legal costs. However, the issue is whether the illegality of a firm renders all associated costs illegitimate as well. In *Heininger v. Commissioner*, the court ruled that an item is not disallowed for deduction solely due to its association with an unlawful enterprise.<sup>173</sup> It is essential to examine Kenya's legal structure to see whether it has the same provision.

### 3.3 Permissible Expenses

In Section 15(1), the general idea is laid forth. The only purpose of incurring a cost is to generate income for the business. The kind of business determines the allowable deductions.<sup>174</sup> The type of the company is crucial in ascertaining the spending. The court in *CIR vs. Gen & Co (Pty) Ltd* held that the cost must be linked to company success. If the intention behind purchasing an item is not to generate profit, it is not considered an expenditure for taxes purposes.<sup>175</sup>

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<sup>169</sup> *Hancock v General Reversionary and Investment Company (1919)*, *The United Kingdom Court of King's Bench as quoted in Commissioner of Domestic Taxes v Kenya Maltings Limited (2013) eKLR at paragraph 34*

<sup>170</sup> *Income Tax v T Ltd (No. 2) (1971) EA.*

<sup>171</sup> *Commercial & Industrial Credit Ltd v Commissioner of Income Tax (1986) eKLR referred to Lauren J's opinion in Southern v Borax Consolidated Ltd (year), 23 TC 597.*

<sup>172</sup> Section 15, Income Tax Act (Cap. 470).

<sup>173</sup> *Heininger v Commissioner (1952)*, *The United States Court of Appeals for the Seventh Circuit.*

<sup>174</sup> Section 15, Income Tax Act (Cap. 470).

<sup>175</sup> *Commissioner for Inland Revenue v Genn & Co (Pty) Ltd (1955)*

Section 15(2) enumerates the expenditures permissible for deductions. The list is not comprehensive, since more clauses exist that allow for deductions. Permissible deductions include bad debts incurred from revenue generation.<sup>176</sup> However, the Commissioner must be convinced that the debts have become irrecoverable. Additional expenditures include such costs.

The second schedule of the legislation stipulates permissible deductions from capital expenditure. A category of such expenditure pertains to costs spent in the development of an industrial structure. It also includes deductions for wear and tear, mining operations, capital expenditures on agricultural property, and investment deductions such as equipment purchases. The petroleum business has specific deductions outlined in the ninth schedule.

Research and development, legal expenses, commercial property leasing, donations to registered charities, interest on borrowings for investment income generation, and charges related to the issuance of shares or debentures are additional expenditures.<sup>177</sup> Among other things required by the Act, the primary goal of this expenditure is to generate profits.<sup>178</sup>

### **3.4 Prohibited Expenses**

The Act delineates a list of costs that are non-deductible in the determination of taxable income revenue. Expenditures not entirely directed towards income generation are not eligible for deduction.<sup>179</sup> Additional expenses include personal entertainment, lodging costs unrelated to business travel and training courses, premiums paid on annuity contracts, and expenditures recoverable via insurance.<sup>180</sup>

### **3.5 Taxation of Losses**

The losses of a corporation affect the evaluation of its tax liabilities, especially in calculating taxable income for the current year and the next four years, often exposing inconsistencies in permissible deductions.<sup>181</sup> According to the Eighth Schedule and Section 15(3)(f) of the Income Tax Act, capital losses are neither deductible nor may they be used as credits against company income.<sup>182</sup> It is crucial to differentiate between the notions of spending and loss. In *Joffe & Co (Pty) Ltd v. CIR*, Watermeyer CJ highlighted this contrast, stating that a loss is an involuntary

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<sup>176</sup> Section 15(2), Income Tax Act (Cap. 470)

<sup>177</sup> Section 15(2), Income Tax Act (Cap. 470)

<sup>178</sup> Section 15(2), Income Tax Act (Cap. 470)

<sup>179</sup> Section 16, Income Tax Act (Cap. 470)

<sup>180</sup> Section 16, Income Tax Act (Cap. 470)

<sup>181</sup> Section 15(4), Income Tax Act (Cap. 470)

<sup>182</sup> Section 15(3) (f), Income Tax Act (Cap. 470)

deprivation, while spending represents a choice and intentional transaction.<sup>183</sup> In *Allen v. Farquharson Brothers*, Findlay J elucidated that loss results from misfortune and is involuntary, whereas expenditure is deliberate and methodical.<sup>184</sup>

### **3.6 Deductibility of Additional Expenditures**

Those engaged in unlawful endeavours, including but not limited to prostitution, fraud, or theft, may face a range of additional costs associated with their illicit activities that are not permissible for deduction under the stipulations of the act.

### **3.7 Penalties Imposition**

Fines and penalties are not permissible deductions.<sup>185</sup> Fining people for breaking the law could be a reduction, and there would be no public policy reason not to let it happen. The taxpayer faces criminal charges not as a businessperson but as a way of getting back at them personally. The House of Lords said in *McKnight v. Sheppard*, “However, the reason for the prohibition of fines, in my view, is much more specific and pertains to the distinct nature of a fine or penalty.”<sup>186</sup> The aim is to impose a penalty on the taxpayer, and a court could easily conclude that allowing the individual to share the burden with the community through a tax deduction would compromise the legislative intent.<sup>187</sup> By this logic, I believe the Special Commissioner and the court were entirely justified in disallowing the deduction of penalties.

A fine constitutes a personal penalty rather than an expense associated with doing company activities.<sup>188</sup> The deduction of penalties incurred is prohibited since the relevant clause permits deductions only for business losses, and a loss arising from a legal violation does not qualify as a commercial loss.<sup>189</sup> Individuals engaged in unlawful acts may incur fines or penalties, which are obviously non-deductible costs.<sup>190</sup>

### **3.8 Deduction of Legal Expenses**

Legal costs may be considered permissible expenditures based on their purpose. Legal expenditures qualify as acceptable expenses only if they relate to the execution of business activities, as stipulated under section 15. This could be about things like the legal fees needed for

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<sup>183</sup> *Commissioner for Inland Revenue v Genn & Co (Pty) Ltd* (1955)

<sup>184</sup> *Allen v Farquharson Bros & Co* (1932), 17 TC 59.

<sup>185</sup> Section 16, Income Tax Act (Cap. 470)

<sup>186</sup> *McKnight v Sheppard* (1999), 71 TC 419.

<sup>187</sup> *McKnight v Sheppard* (1999), 71 TC 419.

<sup>188</sup> Colliton, ‘*The tax treatment of criminal and disapproved payments*’ 9(1) Virginia Tax Review, 1989.

<sup>189</sup> Colliton, ‘*The tax treatment of criminal and disapproved payments*’ 9(1) Virginia Tax Review, 1989.

<sup>190</sup> Colliton, ‘*The tax treatment of criminal and disapproved payments*’ 9(1) Virginia Tax Review, 1989.

registering and following the rules. It could also mean protecting the business in court cases or claims. You won't be able to claim legal fees that are needed to defend against crimes, tax cases, other tax issues, or breaches of trade agreements.

### **3.9 Expenses associated with contesting a tax assessment**

It has been concluded that legal and accounting costs incurred during an appeal against a tax assessment are not allowable, as they cannot be demonstrated to have been incurred entirely and exclusively for the purpose of generating revenue.<sup>191</sup> The corporation requested permission to deduct legal expenditures related to an appeal against an assessment.<sup>192</sup> The High Court determined that it could not be classified as an admissible cost just due to its association with the company. The expenditure must be for the purpose of generating profit. Justice Finlay concluded that this pertained to profits generated rather than an expenditure incurred to generate those profits.<sup>193</sup>

#### **3.9.1 Shortcomings of the Kenyan Legal Framework**

**Lack of Explicit Guidance on Taxing Illegal Income:** While the legal framework discusses the requirement for income to be disclosed and the potential for self-incrimination, it lacks a clear and explicit framework for how illegal income is specifically treated for tax purposes.<sup>194</sup> The focus is more on the *disclosure* of such income and the safeguards against self-incrimination during that process, rather than the principles guiding its taxation.<sup>195</sup>

**Silence on the Legitimacy Paradox:** The legal framework does not delve into the inherent contradiction of the government simultaneously aiming to suppress illegal activities while potentially taxing the proceeds derived from them.<sup>196</sup> This silence suggests a lack of a cohesive legal philosophy on this issue within the current framework.<sup>197</sup>

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<sup>191</sup> *Allen v Farquharson Bros & Co (1932)*, 17 TC 59.

<sup>192</sup> *Allen v Farquharson Bros & Co (1932)*, 17 TC 59.

<sup>193</sup> *Allen v Farquharson Bros & Co (1932)*, 17 TC 59.

<sup>194</sup> Maina E and Paranta E, 'Taxing income from illegal activity: The Kenyan perspective' 2(1) Strathmore Law Review, January 2017, 12.

<sup>195</sup> Maina E and Paranta E, 'Taxing income from illegal activity: The Kenyan perspective' 2(1) Strathmore Law Review, January 2017, 12.

<sup>196</sup> Maina E and Paranta E, 'Taxing income from illegal activity: The Kenyan perspective' 2(1) Strathmore Law Review, January 2017, 15.

<sup>197</sup> Maina E and Paranta E, 'Taxing income from illegal activity: The Kenyan perspective' 2(1) Strathmore Law Review, January 2017, 15.

**Focus on Deduction Rules, Not Income Source Legitimacy:** The detailed discussion on permissible and prohibited deductions under the Income Tax Act primarily revolves around the *purpose* of the expenditure (revenue generation) rather than the legality of the underlying business activity generating the income.<sup>198</sup> This ambiguity contributes to the contradiction, as it implies that expenses related to illegal activities could potentially be deductible if they meet the "revenue generation" test, further blurring the lines between suppressing and indirectly acknowledging illegal activities.<sup>199</sup>

**Emphasis on Self-Incrimination over Taxing Modalities:** The overwhelming emphasis dedicated to constitutional safeguards against self-incrimination in the disclosure of illicit income underscores the tension between tax collection and criminal prosecution.<sup>200</sup> While these safeguards are crucial for individual rights, the legal framework does not adequately explain how tax authorities can enforce tax laws on illegal income without appearing to legitimize those activities.<sup>201</sup>

**Lack of Clarity on Information Sharing:** While the current framework mentions that information provided for tax purposes should only be used to determine tax liability and not for non-tax criminal cases (unless directly related to tax crimes), the practical mechanisms and legal boundaries of this separation are not thoroughly explored. This lack of clarity leaves room for concern that the very act of taxing illegal income, based on disclosed information, could inadvertently lend a degree of official recognition to such activities.<sup>202</sup>

**Judicial Interpretation Gap:** The current legal framework has failed to clarify the intersection between tax law and illicit activities.<sup>203</sup> The current legal framework is insufficient in providing

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<sup>198</sup> Journal of Legal Studies and Research, 'Is It Legal to Levy Tax on the Proceeds of Illegal Activities in Kenya?' (The Law Brigade Publishers, 24 May 2017) <https://thelawbrigade.com/tax-laws/is-it-legal-to-levy-tax-on-the-proceeds-of-illegal-activities-in-kenya> accessed 29 March 2025.

<sup>199</sup> Journal of Legal Studies and Research, 'Is It Legal to Levy Tax on the Proceeds of Illegal Activities in Kenya?' (The Law Brigade Publishers, 24 May 2017) <https://thelawbrigade.com/tax-laws/is-it-legal-to-levy-tax-on-the-proceeds-of-illegal-activities-in-kenya> accessed 29 March 2025.

<sup>200</sup> Journal of Legal Studies and Research, 'Is It Legal to Levy Tax on the Proceeds of Illegal Activities in Kenya?' (The Law Brigade Publishers, 24 May 2017) <https://thelawbrigade.com/tax-laws/is-it-legal-to-levy-tax-on-the-proceeds-of-illegal-activities-in-kenya> accessed 29 March 2025.

<sup>201</sup> Journal of Legal Studies and Research, 'Is It Legal to Levy Tax on the Proceeds of Illegal Activities in Kenya?' (The Law Brigade Publishers, 24 May 2017) <https://thelawbrigade.com/tax-laws/is-it-legal-to-levy-tax-on-the-proceeds-of-illegal-activities-in-kenya> accessed 29 March 2025.

<sup>202</sup> Journal of Legal Studies and Research, 'Is It Legal to Levy Tax on the Proceeds of Illegal Activities in Kenya?' (The Law Brigade Publishers, 24 May 2017) <https://thelawbrigade.com/tax-laws/is-it-legal-to-levy-tax-on-the-proceeds-of-illegal-activities-in-kenya> accessed 29 March 2025.

<sup>203</sup> Maina E and Paranta E, 'Taxing income from illegal activity: The Kenyan perspective' 2(1) Strathmore Law Review, January 2017, 15.

clear guidance on how courts and tax authorities should navigate this complex terrain.<sup>204</sup> The absence of clear precedents and statutory provisions leaves the balancing act to ad-hoc interpretations, potentially leading to inconsistencies and a failure to effectively prevent the legitimization of illegal income through taxation.<sup>205</sup>

**Deduction Rules Potentially Undermining Non-Legitimization:** the focus on the purpose of expenditure for deductibility, without a clear stance on the illegality of the income source, could lead to a situation where expenses directly facilitating illegal activities are deemed deductible if they are seen as contributing to revenue generation.<sup>206</sup> This would further undermine the principle of not legitimizing illegal activities.

### **Conclusion:**

The analysis presented in Chapter Three reveals that Kenya's legal framework, as it pertains to the taxation of illegal income, is characterized by significant ambiguities and a lack of explicit provisions addressing the inherent contradictions and the crucial need to balance tax enforcement with the non-legitimization of illegal activities. The heavy emphasis on self-incrimination safeguards, the unclear treatment of expenses related to illegal income, and the acknowledged need for further judicial interpretation all point towards a framework that has not yet achieved a coherent and effective approach to this complex area of law. Therefore, based on this chapter, the argument that the legal framework has not adequately addressed the issues of contradictory objectives and the balance between enforcement and non-legitimization is well-supported.

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<sup>204</sup> Maina E and Paranta E, 'Taxing income from illegal activity: The Kenyan perspective' 2(1) Strathmore Law Review, January 2017, 15.

<sup>205</sup> Maina E and Paranta E, 'Taxing income from illegal activity: The Kenyan perspective' 2(1) Strathmore Law Review, January 2017, 15.

<sup>206</sup> Journal of Legal Studies and Research, 'Is It Legal to Levy Tax on the Proceeds of Illegal Activities in Kenya?' (The Law Brigade Publishers, 24 May 2017) <https://thelawbrigade.com/tax-laws/is-it-legal-to-levy-tax-on-the-proceeds-of-illegal-activities-in-kenya> accessed 29 March 2025.

## **Chapter Four: Benchmarking Best Practices from The United States Jurisdiction in Mitigating Self-Incrimination Risks in Mandatory Income Disclosure and the Taxation of Illegal Income.**

### **4.0 Introduction.**

The primary objective of this chapter is to benchmark best practices from the United States in mitigating self-incrimination risks associated with mandatory income disclosure and the taxation of illegal income. Given that the U.S. operates under a written constitution that explicitly guarantees the right against self-incrimination, its legal framework provides valuable insights that can inform potential reforms in Kenya's tax regime. The chapter explores the relationship between tax compliance in the US and constitutional protection against self-incrimination, offering insights for potential reforms in Kenya. It focuses on the Fifth Amendment's safeguards against self-incrimination, particularly in the Internal Revenue Code of 1986. The chapter also explores the deductibility of expenses associated with illegal income, highlighting the judicial approach to balancing revenue collection with ethical considerations. The chapter concludes by suggesting Kenya implement more organized legal protections and defined tax policies to enhance fairness and compliance.

### **4.1 The Right against Self-incrimination in the United States of America Jurisdiction.**

The Bill of Rights prohibits compelling individuals to provide self-incriminating statements.<sup>207</sup> The American tax system effectively establishes tax obligations on illegal income while upholding the right against self-incrimination, making it a relevant case study for this thesis. The right to a fair hearing, as outlined in Article 8 of the 1978 American Convention on Human Rights, encompasses multiple protections, including the right to remain silent, the right against providing false information, and the right to legal representation. They are presumed innocent until proven guilty.<sup>208</sup>

The Internal Revenue Code of 1986 establishes the legislative framework for the tax system in the United States. The code requires a detailed report of income, encompassing both legal and illicit

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<sup>207</sup> John Francis Hanzel, "Self-Incrimination and the Use of Income Tax Returns in Non-Tax Criminal Prosecutions" (1973) 30(1) *Washington and Lee Law Review* 182.

<sup>208</sup> Article 8, *American Convention on Human Rights*, 22 November 1969, OAS Treaty Series No. 36

sources. Failing to file a tax return, neglecting to pay taxes, or not maintaining income records is considered a criminal offense.<sup>209</sup> Violations of this nature could result in penalties such as fines, imprisonment, or a combination of both.<sup>210</sup>

The Fifth Amendment prohibits individuals from being compelled to testify against themselves.<sup>211</sup> This principle extends beyond criminal proceedings and is applicable in civil cases as well. Numerous exceptions exist.<sup>212</sup> A notable exception exists wherein a defendant is precluded from invoking the right after accepting immunity from prosecution in return for self-incriminating evidence.<sup>213</sup> A person seeking immunity to testify cannot invoke the Fifth Amendment. Immunity guarantees that any self-incriminating evidence provided will not result in criminal charges. The Fifth Amendment does not serve as a justification for evading a legal duty, such as the requirement to submit a tax return.<sup>214</sup>

The tension between the obligation to disclose all sources of income, regardless of their legality, and the safeguard against self-incrimination frequently arises in US judicial proceedings. One instance is *Garner v. United States*. The appellant raised an objection regarding the utilization of his tax return in relation to a gambling offence.<sup>215</sup> He contended that the trial courts erred in accepting his tax returns as evidence, asserting that this action infringed upon his right to self-incrimination.<sup>216</sup> The appeals court agreed with him and said that it violated his right not to be questioned about his actions. The decision shows that a worker could be properly protected from self-incrimination, even if they had to give information that could be harmful. It was decided by the court that the government had to prove its case without using the defendant's tax records as proof.<sup>217</sup>

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<sup>209</sup> Cornell Law School, Legal Information Institute, “26 U.S. Code § 7203 - Willful failure to file return, supply information, or pay tax” <https://www.law.cornell.edu/uscode/text/26/7203>

<sup>210</sup> Tax Foundation, “IRS Guidance for Thieves, Drug Dealers, and Corrupt Officials” <https://taxfoundation.org/blog/irs-guidance-thieves-drug-dealers-and-corrupt-officials/>

<sup>211</sup> Justia, “Self-Incrimination - Fifth Amendment” <https://law.justia.com/constitution/us/amendment-05/07-self-incrimination.html>

<sup>212</sup> Akhil Reed Amar and Renée B Lettow, ‘Fifth Amendment First Principles: The Self-Incrimination Clause’ (1995) 93(5) *Michigan Law Review*

<sup>213</sup> Akhil Reed Amar and Renée B Lettow, ‘Fifth Amendment First Principles: The Self-Incrimination Clause’ (1995) 93(5) *Michigan Law Review*

<sup>214</sup> Akhil Reed Amar and Renée B Lettow, ‘Fifth Amendment First Principles: The Self-Incrimination Clause’ (1995) 93(5) *Michigan Law Review*

<sup>215</sup> *Garner v United States* (1976) 424 US 648 (*The Supreme Court of the United States*).

<sup>216</sup> *Garner v United States* (1976) 424 US 648 (*The Supreme Court of the United States*).

<sup>217</sup> *Garner v United States* (1976) 424 US 648 (*The Supreme Court of the United States*).

The language of the Fifth Amendment does not provide clear criteria for identifying the specific rights it safeguards. The court assesses the essential criteria for invoking this right through the analysis of two primary factors. Initially, it evaluates the historical context and the intended purpose of the right. Secondly, it examines the importance and characteristics of conflicting public interests. Based on the factors listed, it seems that at some point, the rules about the right against self-incrimination are overshadowed by the duties law enforcement officers must keep society safe.<sup>218</sup>

The scope of the privilege is limited, and the US Supreme Court has consequently restricted its application. The privilege has been restricted to natural people, thus excluding corporations, labour unions, and partnerships from its availability. This limit comes from the idea that the Fifth Amendment right is a personal defense to make sure that the accused person's human humanity is respected during the legal process.<sup>219</sup> The privilege applies solely when the compelled disclosure involves testimonial or communicative elements. So, self-incriminating information given by an accused person while being forced may not violate the Fifth Amendment if it is not shown through the accused person's statement or any proof related to a communication act of the accused.<sup>220</sup> Ultimately, when the tax authority seeks testimonial information regarding an individual, the privilege applies solely to data acquired under coercion from the accused party. This indicates that the Fifth Amendment safeguards individuals from self-incrimination as opposed to general incrimination.<sup>221</sup>

All individuals required to pay income tax, irrespective of their source of income, must submit a tax return. For an individual aiming to conceal the origins of funds derived from illegal activities, opting not to file is therefore an unwise decision.<sup>222</sup> The idea put forward in the Supreme Court's ruling in *Shapiro v. United States* shows how far privilege can be taken away. When it comes to taxes, courts have started to understand the idea of "required records."<sup>223</sup> Shapiro's required records hypothesis posits that privacy concerns are absent in documents maintained in accordance with

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<sup>218</sup> Akhil Reed Amar and Renée B Lettow, 'Fifth Amendment First Principles: The Self-Incrimination Clause' (1995) 93(5) *Michigan Law Review*

<sup>219</sup> Akhil Reed Amar and Renée B Lettow, 'Fifth Amendment First Principles: The Self-Incrimination Clause' (1995) 93(5) *Michigan Law Review*

<sup>220</sup> Akhil Reed Amar and Renée B Lettow, 'Fifth Amendment First Principles: The Self-Incrimination Clause' (1995) 93(5) *Michigan Law Review*

<sup>221</sup> Akhil Reed Amar and Renée B Lettow, 'Fifth Amendment First Principles: The Self-Incrimination Clause' (1995) 93(5) *Michigan Law Review*

<sup>222</sup> *Shapiro v United States* (1948), US Supreme Court.

<sup>223</sup> *Shapiro v United States* (1948), US Supreme Court.

government standards. This strategy suggests that all financial records pertaining to tax obligations will be disclosed to the public. Taxpayers would consequently lose the opportunity to exercise their right to remain silent in court.<sup>224</sup> The concept arose to elucidate the mechanisms behind maximum price regulations.<sup>225</sup> Nonetheless, it occasionally pertains to the income tax documentation that individuals are required to keep. The concept may also hold significance for submissions that require completion, such as income tax returns. Since the beginning of this idea, most people have thought that the government could get rid of the defence against self-incrimination by making reports required. The Supreme Court has not yet made it clear that it will use the necessary evidence of the Shapiro theory to decide tax cases. Despite this, some lower federal courts have used this method in tax cases. Experts in the law and lower federal courts agree that the idea of needed evidence doesn't apply in this case.<sup>226</sup>

The Shapiro notion lacks relevance in tax matters for several compelling reasons. Shapiro initially implemented an emergency measure; due to national security concerns, stringent enforcement was deemed essential. Secondly, Shapiro's vote resulted in a five-to-four decision, even in light of the emergency circumstances. Third, of the twenty-six regulatory laws to which the necessary documents concept may be relevant in Shapiro, the Supreme Court excluded the Internal Revenue Code. The tax regulations impose comprehensive and detailed record-keeping obligations. Each entry generated taxable income; it is possible that some were influenced by tax regulations.<sup>227</sup>

According to the Shapiro approach, taxpayers may be required to disclose all aspects of their financial activities, irrespective of the severity of the item in question. A significant number of individual citizen taxpayers could experience considerable impact from this, as the majority of adults are potential subjects for IRS investigations, in contrast to agencies that possess less extensive authority. Recognising this strategy within the tax framework would significantly undermine the Fifth Amendment rights and the expectation of privacy that every taxpayer holds during IRS investigations. The plan remains intact despite significant opposition.<sup>228</sup>

In situations of income declaration, the "required records" idea and its denial of the right to self-incrimination may not seem to have anything to do with each other. However, the right to self-

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<sup>224</sup> *Shapiro v United States* (1948), US Supreme Court.

<sup>225</sup> *Shapiro v United States* (1948), US Supreme Court.

<sup>226</sup> *Shapiro v United States* (1948), US Supreme Court.

<sup>227</sup> *Shapiro v United States* (1948), US Supreme Court.

<sup>228</sup> *Shapiro v United States* (1948), US Supreme Court.

incrimination could still not be enough. It's easy to see how flawed he is by looking at the United States. Sullivan investigated what the Fifth Amendment has to do with the rules for filing income taxes. It was Sullivan's job to sell homemade whisky, so he decided not to file an income tax return to avoid possible consequences. The Court decided that a person cannot refuse to file returns because they think that certain statements and returns could make them look guilty. In situations where the taxpayer's answers to certain questions on the return could be used against him, he can use the right against self-incrimination and refuse to give those answers. Even so, the Court didn't say which searches might lead to damning information.

Historically, most courts did not recognize Fifth Amendment protection in cases involving income disclosure, referencing a range of justifications. Certain courts addressed the matter of protection by asserting that the disclosures were, indeed, considerably damaging. Individuals who have encountered this issue have concluded that the requirements of the government take precedence over those of the individual, or that by submitting an income tax return, the taxpayer has relinquished his right to self-incrimination. The likelihood of prosecution for an n-tax-related offence appears to be significant. To assess the right, it is essential to identify an element of coercion to assert that the right to self-incrimination has been infringed. An individual must actively assert the right to be free from self-incrimination.<sup>229</sup>

#### **4.2 Deductibility of Expenses in the United States of America Jurisdiction.**

All money received, regardless of where it came from, is considered part of a person's total income for US tax purposes. The Commissioner of Taxes is authorized by law to collect taxes from any source of income that a person may have. Tax responsibilities persist even when income is earned via illegal means. The imposition of taxes on illicit revenue ensures that wrongdoers cannot fully profit from their actions until they fulfil their financial responsibilities.<sup>230</sup>

The United States Constitution permits taxation on all forms of income; however, it does not contain any clauses that allow for deductions. The court subsequently determined the allowable deductions, with this decision being influenced by public policy considerations for many years. Deductions were permitted only insofar as they aligned with public policy. In this framework, expenses incurred to produce illicit income are not allowable deductions, as they contradict

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<sup>229</sup> Eric N Feldman, 'Tax and Non-Tax Crimes in Fifth Amendment Protection Cases: *United States v Troescher*' (1996) 49(4) *The Tax Lawyer* 961—<http://www.jstor.org/stable/20771818> on 20 February 2025.

<sup>230</sup> Deductibility of Illegal Expenses under Section 162 of the Internal Revenue Code: A Justification for Vagueness' (1957) 66(4) *The Yale Law Journal* 602—<https://doi.org/10.2307/794051>.

national policy. Congress incorporated a deduction provision to mitigate reliance solely on public policy, as such dependence has historically resulted in inconsistencies and uncertainties within the legal framework.<sup>231</sup>

IRS Section 162(a) stipulates that expenses related to income production are deductible, including all ordinary and necessary costs linked to business operations, regardless of their legality.<sup>232</sup> This encompasses components like salaries and equipment, regardless of their association with unlawful activities. Nonetheless, the law clearly delineates exclusions for specific unlawful expenditures, including kickbacks, bribes, political campaign contributions, lobbying activities, and attempts to sway legislation or public opinion.<sup>233</sup> Revenue laws typically allow for the deduction of expenses associated with income generation; however, these allowances are constrained by public policy considerations.<sup>234</sup> Therefore, deductible expenditures should not only reflect genuine financial investments aimed at generating revenue but also adhere to the legal and ethical standards established by public policy.<sup>235</sup>

Sam Mesi determined that the compensation provided to employees by a company involved in unlawful activities could not be considered legitimate business expenses. The refusal to grant deductions to a delinquent taxpayer stem from the notion of taxes serving as a moral guide. Permitting these deductions implies viewing taxes merely as a revenue generation mechanism, relying on precise calculation methods. The court permitted a deduction for rent and labour expenses incurred by an unlawful bookmaking operation in the case of *Commissioner v. Sullivan*.<sup>236</sup>

The courts ruled in the case of *Tank Truck Rentals, Inc. v. Commissioner* that spending money that goes against government policy cannot be justified as an essential expense. G.A. Comeaux upheld a salary deduction since the taxpayer had already deducted these costs from their

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<sup>231</sup> Deductibility of Illegal Expenses under Section 162 of the Internal Revenue Code: A Justification for Vagueness' (1957) 66(4) *The Yale Law Journal* 602—<https://doi.org/10.2307/794051>.

<sup>232</sup> Deductibility of Illegal Expenses under Section 162 of the Internal Revenue Code: A Justification for Vagueness' (1957) 66(4) *The Yale Law Journal* 602—<https://doi.org/10.2307/794051>.

<sup>233</sup> Deductibility of Illegal Expenses under Section 162 of the Internal Revenue Code: A Justification for Vagueness' (1957) 66(4) *The Yale Law Journal* 602—<https://doi.org/10.2307/794051>.

<sup>234</sup> Deductibility of Illegal Expenses under Section 162 of the Internal Revenue Code: A Justification for Vagueness' (1957) 66(4) *The Yale Law Journal* 602—<https://doi.org/10.2307/794051>.

<sup>235</sup> Deductibility of Illegal Expenses under Section 162 of the Internal Revenue Code: A Justification for Vagueness' (1957) 66(4) *The Yale Law Journal* 602—<https://doi.org/10.2307/794051>.

<sup>236</sup> Deductibility of Illegal Expenses under Section 162 of the Internal Revenue Code: A Justification for Vagueness' (1957) 66(4) *The Yale Law Journal* 602—<https://doi.org/10.2307/794051>.

income. The legislation permits a taxpayer to deduct a valid expense incurred while operating an unlawful business. The Sullivan<sup>237</sup> and Sam Mesi cases established that expenses incurred in the generation of illegal income can be deducted, whereas the Tank Truck Rentals ruling clarified that fines do not qualify for deduction. This suggests a potential involvement of taxpayers in unlawful activities. One taxpayer's expense will be permitted as a deduction, while another taxpayer's expenditure will be denied.<sup>238</sup>

On the other hand, fines and penalties remain non-deductible, regardless of their role in facilitating profit generation. The taxpayer in Tank Truck Rentals Inc. v Commissioner intentionally breached the weight restrictions set for trucking services, resulting in the payment of fines. The court denied the deduction of the fine, reasoning that allowing such penalties as a deduction would promote ongoing violations of state law and was not necessary for the operation of the trucking firm. The IRS Code allows for disallowance. Regardless of whether the offence took place during the course of business or trade, fines paid by a taxpayer for a law violation are not deductible.<sup>239</sup>

U.S. tax law gives the Commissioner the authority to tax any income, even that acquired via unlawful means. It is possible to deduct all ordinary and necessary costs spent on engaging in illegal trade or company during a given tax year, with the exception of those that are specifically forbidden by legislation pertaining to public policy. You can't subtract fines and penalties. When it comes to deducting costs associated with an illicit enterprise, the United States takes a firm stance.<sup>240</sup>

### **4.3 Comparison of the Two Models**

This entails a comparison of the right against self-incrimination and the deductibility of expenses related to illicit income in the United States and Kenya, highlighting their similarities, differences, and potential lessons for Kenya from the USA

#### **4.3.1 Similarities**

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<sup>237</sup> *Sullivan v United States (1927), The Supreme Court of the United States*

<sup>238</sup> Deductibility of Illegal Expenses under Section 162 of the Internal Revenue Code: A Justification for Vagueness' (1957) 66(4) *The Yale Law Journal* 602—<https://doi.org/10.2307/794051>.

<sup>239</sup> Deductibility of Illegal Expenses under Section 162 of the Internal Revenue Code: A Justification for Vagueness' (1957) 66(4) *The Yale Law Journal* 602—<https://doi.org/10.2307/794051>.

<sup>240</sup> Deductibility of Illegal Expenses under Section 162 of the Internal Revenue Code: A Justification for Vagueness' (1957) 66(4) *The Yale Law Journal* 602—<https://doi.org/10.2307/794051>.

In the United States, the Fifth Amendment of the Constitution explicitly provides individuals with the right against self-incrimination, stating that no person "shall be compelled in any criminal case to be a witness against himself."<sup>241</sup> Similarly, Kenya's 2010 Constitution incorporates this right within its Bill of Rights. Article 49(1)(d) specifies that an arrested person has the right "not to be compelled to make any confession or admission that could be used in evidence against the person."<sup>242</sup>

### 4.3.2 Differences

The scope and exceptions to the right against self-incrimination exhibit notable differences between the two countries. In the United States, extensive jurisprudence has refined the application of the Fifth Amendment. One significant limitation is that the privilege is generally confined to natural persons; corporations, labor unions, and partnerships cannot invoke this right.<sup>243</sup> Furthermore, the privilege applies solely to testimonial or communicative evidence, not to physical evidence such as fingerprints or DNA samples. The U.S. has also developed the "required records" doctrine, which holds that documents mandated by law to be maintained may not be protected by the privilege against self-incrimination.<sup>244</sup> Additionally, U.S. law explicitly allows for immunity from prosecution in exchange for self-incriminating testimony, effectively nullifying the privilege in such instances.<sup>245</sup>

### 4.3.3 Lessons Kenya Can Draw from the United States Tax Model

**Doctrinal Innovations-**The United States of America legal system has introduced doctrines such as the "required records" exception, which limits the applicability of the Fifth Amendment in

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<sup>241</sup> U.S. Constitution, Amendment V, interpreted in *Shapiro v. United States*, 335 U.S. 1 (1948), as discussed in "Required Records Doctrine", Legal Information Institute, Cornell Law School, available at <https://www.law.cornell.edu/constitution-conan/amendment-5/required-records-doctrine> (accessed 7 April 2025)

<sup>242</sup> Article 49 (1) (d), Constitution of Kenya (2010).

<sup>243</sup> J. Reinert, *Protecting the Common Good: The Required Records Doctrine and the Fifth Amendment*, The Urban Lawyer, Vol. 51(3), 2019.

<sup>244</sup> U.S. Constitution, Amendment V, interpreted in *Shapiro v. United States*, 335 U.S. 1 (1948), as discussed in "Required Records Doctrine", Legal Information Institute, Cornell Law School, available at <https://www.law.cornell.edu/constitution-conan/amendment-5/required-records-doctrine> (accessed 7 April 2025)

<sup>245</sup> U.S. Constitution, Amendment V, interpreted in *Shapiro v. United States*, 335 U.S. 1 (1948), as discussed in "Required Records Doctrine", Legal Information Institute, Cornell Law School, available at <https://www.law.cornell.edu/constitution-conan/amendment-5/required-records-doctrine> (accessed 7 April 2025)

specific regulatory contexts.<sup>246</sup> While this doctrine may not be directly transposable to Kenya, a deeper understanding of its rationale, as well as doctrines related to immunity for compelled disclosures, could enrich Kenya’s legal discourse. These frameworks offer valuable perspectives on how to navigate complex cases involving potential self-incrimination while still upholding constitutional guarantees.

**Refining the “Business Purpose” Test**-Kenya’s relies on the “wholly and exclusively” standard for deductibility test. The application of this test to atypical or borderline-illegal business activities often presents challenges.<sup>247</sup> U.S. jurisprudence offers instructive examples on how to navigate such complexities by emphasizing the intent and function of claimed expenses. By engaging with this body of law, Kenya can develop more tailored interpretive standards that uphold fiscal integrity while recognizing the diverse realities of business operations.

**Benchmarking United States of America precedence on Deductibility and Public Policy**-In the United States, courts have developed nuanced jurisprudence balancing the deductibility of business expenses with overriding public policy concerns, particularly in cases involving illegal enterprises.<sup>248</sup> These decisions are often guided by the principle that the tax system should not appear to condone or subsidize illegal activity.<sup>249</sup> Kenya could benefit from a similar evaluative approach by analysing U.S. case law to refine the interpretation of its own “wholly and exclusively” requirement, doing so would assist in distinguishing between legitimate business expenditures and those that offend public morality or legal norms, thereby enhancing administrative guidance and statutory clarity.

#### 4.4 Conclusion

This chapter aimed to conduct a comparative analysis of the United States tax system to assess whether it offers key insights for Kenya’s taxation regime, particularly in balancing tax compliance with protections against self-incrimination. The U.S. model mandates that the privilege against

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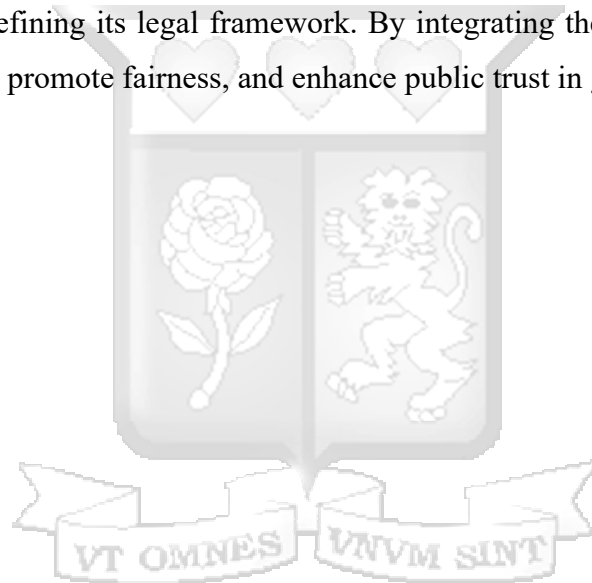
<sup>246</sup> Akhil Reed Amar and Renée B Lettow, ‘Fifth Amendment First Principles: The Self-Incrimination Clause’ (1995) 93(5) *Michigan Law Review*

<sup>247</sup> *Elgon Tea and Coffee Limited v Commissioner of Domestic Taxes* (Appeal 1264 of 2022) [2024] KETAT 10 (KLR).

<sup>248</sup> Deductibility of Illegal Expenses under Section 162 of the Internal Revenue Code: A Justification for Vagueness’ (1957) 66(4) *The Yale Law Journal* 602—<https://doi.org/10.2307/794051>.

<sup>249</sup> Deductibility of Illegal Expenses under Section 162 of the Internal Revenue Code: A Justification for Vagueness’ (1957) 66(4) *The Yale Law Journal* 602—<https://doi.org/10.2307/794051>.

self-incrimination is generally limited to natural persons, excluding corporations, labor unions, and partnerships. It applies only when the compelled disclosure involves testimonial or communicative elements. Additionally, the United States has developed the "required records" doctrine, which, although debated in tax cases, suggests that records mandated by law to be maintained may not be protected under this privilege. Furthermore, U.S. law allows for immunity from prosecution in exchange for self-incriminating testimony, effectively negating the right in such cases. Kenya could adopt similar protections by establishing clear guidelines that balance income disclosure obligations with constitutional rights, enhancing both compliance and enforcement. Additionally, structuring tax deductions as seen in U.S. law could reduce ambiguity and prevent misuse. Examining U.S. judicial precedents on self-incrimination in tax matters may further guide Kenya in refining its legal framework. By integrating these principles, Kenya can strengthen its tax system, promote fairness, and enhance public trust in governance.



## **Chapter Five: Conclusion and Recommendations**

### **5.1 Introduction**

This study sought to explore the ramifications of imposing taxes on illicit income in Kenya concerning the right to protection against self-incrimination. The research was guided by research questions and research objectives, to examine the ramifications of the taxation of illicit money on the right against self-incrimination, to investigate the extent to which Kenya's taxation regime protects taxpayers' right against self-incrimination within mandatory disclosure and taxation of illegal income and to benchmark best practices of the United States Jurisdiction on addressing risk of self-incrimination in mandatory income disclosure and the taxation of illegal income. Additionally, it assessed whether the income tax legislation in Kenya requires amendments to allow for the deduction of expenses associated with the generation of illicit revenue. The hypothesis being proven; the taxation of income derived from illegal activities compels individuals to disclose incriminating financial information, thereby violating the right against self-incrimination. The study employed a doctrinal approach, analysing legal sources such as legislation, case law, and academic commentaries to determine the legal framework in Kenya and in comparative jurisdictions.

### **5.2 Summary of Findings**

Chapter 2 highlighted the constitutional issues related to the taxation of illicit income in Kenya, indicating that the current legal frameworks do not adequately protect individuals from the potential for compelled self-incrimination. The Kenyan tax statutes, particularly the Tax Procedures Act and the Value Added Tax Act, establish significant disclosure requirements for taxpayers; however, they lack provisions for statutory immunity. The chapter contended that this omission establishes a significant conflict between the demands of tax enforcement and the constitutional protection against self-incrimination. The observation indicates that the legal framework is ambiguous in differentiating between the administrative and criminal repercussions of non-compliance, a shortcoming that exacerbates the tension arising from the competing requirements of disclosure and safeguarding against self-incrimination. As a result, the chapter put forward the necessity for legislative reform, suggesting the inclusion of statutory immunity provisions and clearer procedural distinctions to ensure that tax compliance measures are consistent with constitutional guarantees and effectively safeguard individual rights.

This chapter examined whether Kenya's taxation regime provides adequate safeguards to protect taxpayers from self-incrimination. The analysis presented in Chapter Three reveals that Kenya's legal framework, as it pertains to the taxation of illegal income, is characterized by significant ambiguities and a lack of explicit provisions addressing the inherent contradictions and the crucial need to balance tax enforcement with the non-legitimization of illegal activities. The heavy emphasis on self-incrimination safeguards, the unclear treatment of expenses related to illegal income, and the acknowledged need for further judicial interpretation all point towards a framework that has not yet achieved a coherent and effective approach to this complex area of law. Therefore, based on this chapter, the argument that the legal framework has not adequately addressed the issues of contradictory objectives and the balance between enforcement and non-legitimization is well-supported.

Chapter 4 presented a comparative examination of the tax legislation in Kenya and the United States. The research indicates that although Kenya imposes taxes on illegal income, it lacks legal clarity regarding the deductibility of associated expenses. In contrast, the tax legislation in the United States recognizes the taxation of illicit income while offering more explicit criteria regarding deductible expenditures. The research indicated that the legal framework in the United States provides more robust protections against self-incrimination, especially through immunity provisions that ensure tax disclosures are not utilized in criminal prosecutions.

### **5.3 Recommendations**

Based on the preceding findings, the study makes the following recommendations:

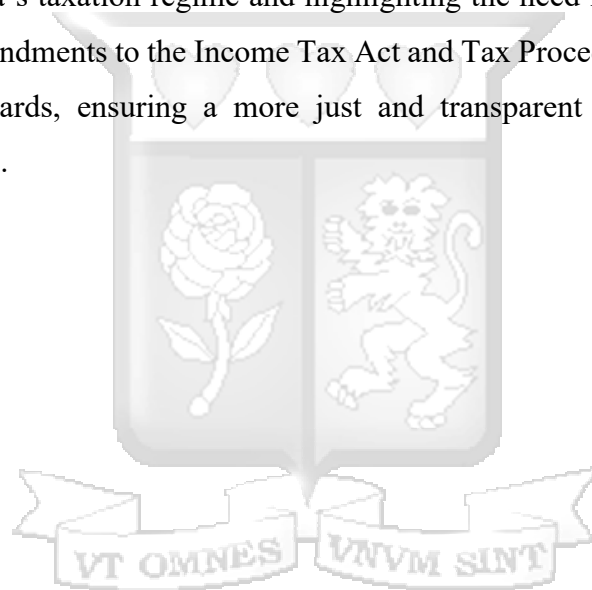
1. It is advisable to review and amend Sections 15 and 16 of the Income Tax Act to establish clear definitions regarding permissible and impermissible deductions related to income generated from illicit activities. The existing provisions are insufficiently detailed, resulting in legal uncertainty regarding the deductibility of expenses associated with illegal income. A revised statutory framework must clearly define allowable and disallowable expenses, making a distinction between ordinary business costs and those expenditures that are prohibited due to public policy considerations, such as bribes and kickbacks. This approach will provide clear legal guidelines for taxpayers and promote uniformity in administration for tax authorities.

2. Revise the Tax Procedures Act to introduce use and derivative use immunity for self-disclosed information. To safeguard constitutional rights, particularly the privilege against self-incrimination, the Tax Procedures Act should be amended to include provisions for both "use immunity" and "derivative use immunity" when taxpayers disclose information that may implicate them in criminal activity. The proposed safeguards would ensure that disclosed information remains insulated from direct or indirect use in criminal proceedings, while simultaneously enabling the Kenya Revenue Authority (KRA) to continue its efforts in tax assessments and revenue recovery. This equilibrium guarantees adherence to constitutional safeguards while preserving the integrity of the tax system.
3. Establish a distinct legislative separation between tax compliance measures and criminal prosecution within the Tax Procedures Act. A statutory boundary must be established to differentiate between tax compliance mechanisms and the criminal prosecution of underlying illegal activities. The existing framework's ambiguity may hinder voluntary disclosures and cooperation from taxpayers engaged in potentially unlawful activities. A legislative provision that delineates the boundaries between administrative tax enforcement and criminal prosecution—except in instances of fraud or intentional tax evasion—will bolster taxpayer confidence, promote compliance, and guarantee equitable treatment in accordance with due process standards.
4. Establish and execute a uniform framework for assessing the taxation of illicit income and associated expense deductions. To maintain consistency and adhere to regulatory standards, it is essential for the Kenya Revenue Authority, alongside the National Treasury and legal professionals, to develop and execute a standardised framework for taxing income generated from illegal activities. This framework must delineate the criteria for assessing taxable illicit income, the handling of related expenses, and the interaction with criminal liability. A model of this nature would enhance understanding for taxpayers and enforcement agencies, minimise administrative discretion, and foster consistent tax results.
5. Kenya should consider integrating internationally recognised best practices in the taxation of illicit income, particularly those found in jurisdictions such as the United States, to enhance tax compliance and enforcement. The U.S. model allows for the taxation of illegal income while prohibiting deductions that contravene public policy, presenting a practical framework. Implementing similar measures tailored to the Kenyan context has the potential

to enhance tax compliance, improve revenue collection, and promote fair enforcement. This would align Kenya's tax administration with international standards, thereby improving its credibility and effectiveness in managing intricate financial behaviours.

#### **5.4 Conclusion**

The research findings confirm that while Kenya imposes taxes on illegal income, the existing legal framework fails to provide adequate protections against self-incrimination, creating a significant legal gap. The study's hypothesis was proved because of the absence of immunity provisions and the ambiguous distinction between administrative and criminal liability heighten the risk of prosecution. Additionally, the research successfully answered its key questions by demonstrating the deficiencies in Kenya's taxation regime and highlighting the need for reform. To bridge this legal gap, legislative amendments to the Income Tax Act and Tax Procedures Act are necessary to introduce clearer safeguards, ensuring a more just and transparent tax system that upholds constitutional protections.



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