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SALLY RAMAGE ®

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TEL 01785 - 244725
FAX 01785 - 228281

The right to silence in France, Germany, US and the UK

by Sally Ramage

The right to silence: UK, France, Germany and the US

The privilege can be traced to the 12th century and became more developed in the following centuries. The Latin term *'nemo tenetur prodere seipsum*' remains in use. It was applied on the Continent before the age of Codification. It was applied in English ecclesiastical courts also. It served as a guarantee that men and women would not be required to become the source of their own public prosecution and it was also a check on over-zealous officials.

In late medieval England anyone whose beliefs or practices deviated noticeably from the norm was liable to be described as a "lollard" or "lollar" and the word "lollard" became known as a general term of abuse in those times when the Church was seen as a well ordered body , staffed at its highest levels by decent and competent clergymen who saw that the ecclesiastical machinery ticked over in broad accordance with canon law. As feudal anarchy raged and as jurisdictional rivalries between ecclesiastical and royal courts provided contention, laws were passed including the Lollardy Act when lawyers were second only to clergymen as figures of hate. The legal privileges of sanctuary and benefit of clergy which were contingent upon the sacred status of the Church's property and personnel were a perpetual source of friction. Both canon and common lawyers were equally hostile to anything which threatened to subvert the established order of the Church and State. The Magna Carta[1] was as dear to the lawyers as to the clergy and the clergy once a year reminded their congregations of the charter's contents, which were binding under pain of excommunication.

Professional rivalries among lawyers were matched by similar rivalries between different branches of the clergy through problems arising out of attempts at reform. Since at least the 12th century, medieval reformers has scented corruption in the Church's vast landed wealth, which, in itself, and in its effect upon clerical lifestyles, struck them as starkly contrasted with the poverty and simplicity of Christ and his apostles recorded in the gospels. From this seedbed of dissent developed Lollardy. Fourteenth century England was devoid of the inquisitors' manuals and the special inquisitors commissioned to combat heresy. So was Germany and southern France.

Much of the historical importance of Lollardy consists of the fact that it was the first time that the English ecclesiastical authorities had to grapple with the problem of heresy as anything other than that it was the inconsequential aberration of an eccentric academic

[1] The text of the Magna Carta mostly deal with specific grievances rather than with general principles of law. Some of these grievances are self-explanatory and others can be understood in the context of the feudal society in which the King's barons held lands 'in fee' from the King, for an oath of loyalty and obedience. Feudal custom allowed the king to make certain other extractions from his barons. There was much scope for extortion and abuse in this system, aggravated by the inability to obtain redress . The Magna Carta provided the means of obtaining a fair hearing of complaints, not only against the King but against lesser feudal lords. The first clause concedes the freedom of the Church and confirm its right to elect its own dignitaries without royal interference. Clause 38 states "no official shall place a man on trial on his own unsupported statement, without
producing credible witnesses to the truth of it."

,Wyclif. . Wyclif was at Oxford University where he aired his radical views on property and ownership in a course of lectures which were almost immediately circulated in manuscript as *'De civili domino'*. These lectures were notable chiefly for their bold contention that clergymen should not own property and it was not possible to question something as fundamental as ecclesiastical property without inviting instant and bitter hostility at the highest level. The Benedictines were the wealthiest of the religious orders. They lobbied for papal sanctions against Wyclif and produced a massive defence of the status quo in the form of the '*Defensio ecclesiasticae potestatis'*.

After accession of Richard II, Wyclif produced a memorandum against papal taxation of the Church of England. He spoke out against the papacy and the mendicant friars and after the Peasants' Revolt his position a Oxford became untenable and the commonplace connection between heresy and sedition was invoked.

When Richard II was deposed and replaced by Henry IV, Henry IV gave the royal assent to a statute '*De haeretico comburendo'* ('*On the burning of heretics'*) , which regularised the customary medieval penalty (recommended by canon law) of death by burning for relapsed or unrepentant heretics. Parliament passed the statute in response to a petition from Convocation. The first victim of the law was William Sawtry, a priest from Norfolk, who was executed under customary procedures. The real importance of the Act was its demonstration that the Crown stood squarely behind the Church in defence of the faith.

In the 16th and early 17th century, the English judges used the maxim of '*nemo tenetur prodere seipsium*' to prevent the ecclesiastical courts from acting beyond the scope of their jurisdiction. In the late 16th century, opposition to the religious policies of the church clashed with the expansive view of the supervising powers of the common law judges. This produced arguments that writs should issue to keep the ecclesiastical courts from requiring defendants answering incriminating questions. Therefore they sought to establish an effective privilege against self-incrimination. In 1640, the practice of interrogating defendants under oath came to an end.

By the 18th century, English Criminal Procedure made it virtually impossible for a privilege against self-incrimination to be asserted effectively by persons charged with a crime. This was the indirect result of the common law's refusal to allow criminal defendants to be represented by a lawyer. Without professional assistance, persons accused of a crime had little choice but to speak for themselves. Criminal defendants conducted their own defence. Defendants could not be sworn but they were allowed to speak on their own behalf and almost all did so. But if they did not speak, no-one spoke for them. In such a case, assertion of a right not to answer incriminating questions amounted to a right to forego real defence. This was supported by Wigmore's writings which state that he found little evidence that privilege was being exercised during the 17th Century and early 18th Century.

Without the active participation of a defence lawyer in criminal cases, "*nemo tenetur prodere seipsum"* remained a maxim but with severely limited practical consequences. Wigmore's account of the maxim of privilege focussed on the evidence found in political trials and political tracts and not on manuscript records and pamphlet literature.

In the 18th Century, lawyers were crucial in the development of privilege. Today, it is axiomatic that defendants should be represented by a lawyer. English law virtually guarantees representation by a lawyer through a system of legal aid. With the arrival of lawyers since the 18th century came the possibility of effective implementation of the

privilege against self-incrimination. By the 19th century, the privilege became the subject of heated controversy as it began to be fully implemented.

Privilege in the USA

The privilege against self-incrimination is included in the 5th Amendment to the US Constitution. Also in the American Convention on Human Rights 1978, Article 8 (2) (g) Right to a Fair Trial, states: "*Every person accused of a criminal offence has the right to be presumed innocent so long as his guilt has not been proven according to law. During the proceedings, every person is entitled, with full equality, to the following minimum guarantees :....(g) the right not to be compelled to be a witness against himself or to plead guilty*."
The privilege is also established in the 1976 International Covenant on Civil and Political Rights in which Article 14 (3)(g) states that "*In the determination of any criminal charge against him, everyone shall be entitled to the minimum guarantee , in full equality, not to be compelled to testify against himself or to confess guilt*".

The privilege followed the English pattern, making its way into several state constitutions and ultimately the Federal Constitution, couched in terms of preservation of traditional procedures and coming relatively late to effectively implement the privilege.

The essence of the common law criminal procedure transported to the American Colonies was its use of a hierarchy graded to a hierarchy of offences, allowing lay judges to dispose of all but the most serious offences. Serious crimes were disposed of by itinerant or centrally located judges of high standing accompanied by professional lawyers responsible for the preparation of the State's case.

The demographic density of British North America was low, compared to England's and caused differences in expenses. Also, there were a very small number of men capable of serving as judges and lawyers. In light of such pressures, summary jurisdiction was popular. For example, in New York, in 1732, two statutes were passed providing that anyone in custody charged with offences below the degree of grand larceny (goods to the value of 12 shillings) who could not be bailed within 48 hours, might be tried by a Justice of the Peace, without a jury, and sentenced to corporal punishment. The 1732 Acts specifically defined the evidentiary standards of such convictions, allowing conviction "by confession or by the oath of one or more credible witnesses"". So, in effect, these statutes limited trial to those with substance and standing in the community. In New York, there are records of 75 cases between 1733 and 1743 but there are no records of any of the summary cases. There were many slave conspiracy cases with the threat of immediate execution unless testimony was given. By 1776, there were riots in New York that were the most frequent source of presentation and summary jurisdiction expanded even more.

After independence, America adopted the English common law tradition of protecting subjects by adopting the jury system which included traditional English common law privileges of indictment, venue, representation, confrontation and a general verdict. In 1788 New York ratified a Convention that a Federal Bill of Rights including the provision that in all criminal prosecutions, the accused should not be compelled to give evidence against himself.

The constitutionalisation of the self-incrimination privilege was part of the larger process by which a diverse collection of criminal procedure doctrines became fundamental law in the

USA. Those rules were components of the common law's structure for protecting subjects' rights under the 18th century British Constitution.

The interpretation of the 5th Amendment asserts that government officials have no legitimate claim to testimonial evidence tending to incriminate the person who possesses it. Yet the Supreme Court has required defendants to shoulder much of the load by producing immunity records, giving pre-trial notice of defences and of the evidence to be used to support them, providing copies of defence investigative reports and supplying all forms of non-testimonial evidence, for example, blood samples and voice samples. The reality today is that over 90% of all felony convictions are by guilty plea.[2]. Behind this figure lies the practice of plea-bargaining. Prosecutors and other officials exert much pressure on defendants, not only to obtain an answer, but to secure an unqualified admission of guilt. The Federal Sentencing Guidelines currently promise a substantially discounted sentence to a defendant who supplies "complete information to the government concerning his own involvement in the offence"[3]. Few other nations are as dependent as the USA on proving guilt from a defendant's own mouth. This is a contrary position to the revered principle of American constitutional law.[4] The privilege as embodied in the US Constitution may be simply to prohibit methods of interrogation and not to afford criminal defendants a right to refuse to respond to incriminating questions.

Self-incrimination in France and Germany

Germany had the *ius commune* since the 16th century. The English development of the privilege followed the lead of practice on the Continent. But by the 17th century, France was practising compulsory self-incrimination. As early as 1820, the French government was amazed by the English use of lawyers to speak on behalf of defendants.[5] The idea that affirmative "full proof" precludes defensive disproof has a long history in Continental procedure.[6] The French still today have a confession rule and an inquisitorial practice.

Self-incrimination in the present UK legal system

It can be argued that the specific protections embodied in the UK's Police and Criminal Evidence Act 1984 give advantage to the suspect. The UK's PACE is similar to the criminal procedure of the USA with its landmark judgement in *Miranda v Arizona*[7] . The balance of power between prosecution and defendant has shifted in favour of the defendant even though the right to silence during a police interview can be brought to the attention of the jury if a case were to be brought against the suspect. The Police And Criminal Evidence Act has attached to it Codes of Practice for the police to adhere to. These Codes were issued under section 66 pf the Police and Criminal Evidence act 1984. The Codes cover the detention, treatment and questioning of suspects by police officers and include access to legal advice, time limits for detention and conditions in which suspects may be questioned. Special provision is made for vulnerable groups such as people with learning difficulties and

[2] Bureau of Justice Statistics, Sourcebook of Criminal Justice, statistics 1994.
[3] US Sentencing Commission, Sentencing Guidelines Manual , 1995..
[4] Schaefer.S, McCormack.C.T,, "Law and Future: Evidence", North Western University Law Review, 218, 222, (1956).
[5] Macnair. M.R.T, "The early development of the privilege against self-incrimination", Oxford Journal of Legal Studies, 1990.
[6] Esmeen. A, "Histoire de la procedere criminelle en France", 1931, Sweet & Maxwell.
[7]

juveniles. [8] Under the Judges Rules insufficient consideration was given to these suspects,[9]but PACE has improved the position of juveniles and suspects with learning disabilities.[10] Breaches of the Codes may be taken into account if the court thinks that they are relevant to any question arising in the proceedings.[11] Evidence obtained where breaches of the Codes of Practice have occurred may be excluded under the court's exclusionary discretion under s 78(1) of PACE, which states that "In any proceedings the court may refuse to allow evidence on which the prosecution proposes to rely to be given if it appears to the court that , having regard to all the circumstances, including the circumstances in which the evidence was obtained, the admission of the evidence would have such an adverse effect on the fairness of the proceedings that the court ought not to admit it."

This could be seen as broader than the common law discretion to exclude and it encompasses a wider range of behaviour than that envisaged by section 76 PACE. Section 78 PACE has been used often by the Court.[12] Provisions relating to the exclusion and admissibility of confessions obtained in circumstances of oppressive, inhuman or degrading treatment, o in circumstances which are likely to render them unreliable, may be found in section 76 of PACE. The Court's common law discretion to exclude evidence is preserved in section 82(3) of PACE. Section 82(3) states: "Nothing in this Part of the Act shall prejudice any power of a court to exclude evidence (whether by preventing questions from being put or otherwise) at its discretion."

This section 82 is designed to exclude confessions obtained by unfair or improper methods which would otherwise be admissible.

A further step in causing the police to behave fairly during interrogation was provided by the tape recording of interviews. A Code of Practice issued under the duty placed on the Home Secretary under section 60(1)(b) PACE sets out the procedure for tape recording interviews with suspects. There must be a master tape which must be sealed in the presence of the suspect.[13]. Tape recording has to be used when police interview a person cautioned of an indictable offence, including an offence triable either way, or where further questioning takes place following charging a suspect or informing him that he may be prosecuted, or where in such circumstances, the suspect is confronted with a written statement made by another person or the contents of an interview with another person.[14]. If the machine is switched off, , then he should be cautioned again before resuming the interview.[15]

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[8] PACE 1984, s 77; Code C 11.14, 11.16.

[9] Report of the Royal Commission on Criminal Procedure, 1981, HMSO.

[10] PACE 1984 s 77, Code C, Annex E.

[11] PACE, s 67(11).

[12] *R v Keenan*[1989] Crim LR 720, R v Canale [1990] 2 All ER 187, R v Weekes [1993] Crim LR 211, In an important case, R v Hertfordshire County Council, ex parte Green Environmental Industries and another [2000] 1 All ER 773,the case, which concerned a waste regulation authority requiring a person to furnish information on pain of fine or imprisonment (Environmental Protection Act 1990), it was held that it was up to the trial judge to exercise his discretion under section 78 of Police and Criminal Evidence Act 1984. The case went to the House of Lords where Lord Hoffman concluded that Parliament was more likely to have intended that the question of whether coercive power to provide information which was self-incriminating was a matter for the court to consider in the context of s 78 PACE and that the applicants were NOT entitled to refuse to provide information on the grounds that it would incriminate them.

[13] Code E 2(b)

[14] Code E 4.11.

[15] This did not occur in the case of *R v Bryce* [1992] 95 Cr App Rep 320

As to tape recordings and their successful use in the police station, a study was carried out by Willis in a Home Office Research Study, Number 97, in 1988, and he found only one challenge by the defence to the police evidence during the two year period of the study which examined six districts in the United Kingdom and involving twenty thousand suspects and forty five thousand police tapes. The use of tape recording led to more charges, more information about other offences and more confessions. If adverse inferences are to be drawn from a defendant's silence during interrogation, then the tape recording is again useful as a reliable account of what occurred. The tape recordings prevent the fabrication of confessions and this is reinforced by the exclusionary rules to exclude confessions which are improperly obtained. It must be stated that tape recordings are not compulsory in interviews of people arrested under the Prevention of Terrorism Act or those suspected of offences under the Official Secrets Act.[16] The Royal Commission on Criminal Justice thought that the safeguards in PACE against false confessions were basically sound.[17] It can be argued that PACE has removed the need for the right to silence because suspects are now sufficiently well protected and have improved access to legal advice and legal aid. But it can also be argued that the Police and Criminal Evidence Act rests on the right to silence and that without the right to silence, the Police and Criminal Evidence Act 1984 will be less effective. The safeguards in PACE and its attached Codes can be argued to be insufficient to protect the suspect. It can be argued that the police can use strategies prior to recording, which are not televised, breaches of human rights such as lack of water, meals, blanket, subtle torture , before they proceed to the tape recorded interview and these are not always revealed to allow the exclusionary rules to take effect. Furthermore, transcripts can be used in court and transcripts, rather than the original tape recordings, may well distort the questions and responses, by obliterating variations in the tone or speed of the interview and transcripts may also be edited.

While tape recording may contribute to a reduction of abuse and of allegations of abuse, it may only displace the problems of pressure outside the police interview. In Maguire[18] it was held that the PACE Codes did not prohibit the police from asking questions at the scene of the crime and that the resulting admissions were admissible even though they were made by a juvenile without an appropriate adult being present. Furthermore one of the other defendants in the case was injected with a Class A sedative Pethedine just before the police interview was conducted and this tape was also used as evidence. The pethedine injection was only disclosed at appeal. So formal rights and protections can be evaded by informal rules and practices. The many cases revealed on miscarriages of justice prove this point.

It can be said that the enactment of PACE was intended to strengthen public confidence in the police and offer substantial protection to the suspect. The Law Society has said that there are still situations in which advising silence would be appropriate.. But given the risk of adverse inferences, lawyers will be less likely to advise silence. If the accused does confess in the absence of a solicitor he may well argue that his solicitor would have advised silence if he had been present. If there is insufficient evidence to convict the solicitor present should advise the suspect to stay silence but this rarely occurs. Circumstances in which silence would be recommended include the case of the solicitor's client is distressed or confused at the time of the interview, or is suggestible, or under pressure from the police. At trial the defence can argue that silence was exercised on the basis of legal advice and that the jury should not draw an adverse inference, as the defendant was just following his solicitor's

[16] Code E 3.2
[17] Report of the Royal Commission on Criminal Justice, 1993, HMSO,London.
[18] R v Maguire [1990] Cr App Rep 115

advice. Because the silence was chosen on legal advice adverse inference should not be drawn from it.

Considering the vulnerability of the suspect during questioning, the importance of access to legal advice and of the right to silence is clear. If the defendant is in alien surroundings and is subject to interrogation by experienced interrogators, then there is tremendous pressure on him to speak.[19]

Derogation of the Right to some authorities

The practical reality of modern UK law is that the right to silence is severely restricted by statutory and common law exceptions as in Section 2 of the 1987 Criminal Justice Act. Statistics show that even where the right to silence does apply, it is rarely invoked.[20]

The right to silence during Miranda v Arizona police questioning is encapsulated by the well-known caution: "You do not have to say anything unless you wish to do so but what you say may be given in evidence".[21]

The right to silence at trial is provided by statute.
"The failure of any person charged with an offence … to give evidence shall not be made the subject of any comment by the prosecution"[22]

In 1992, in the case Smith [1992] 95 Cr App R 191, Lord Mustill said :

"This expression (the right to silence) arouses strong but unfocused feelings. In truth, it does not denote any single right, but rather refers to a disparate group of immunities, which differ in nature, origin, incidence and importance, and also to the extent to which they have been encroached upon by statute."

Under various modern statutes, there is a duty to disclose information to the Inland Revenue, HM Customs and Excise and to a variety of inspectors who can compel answers on pain of contempt of court. In a Serious Fraud Office inquiry, the duty to answer questions may continue even when criminal proceedings have been commenced and until verdict.[23]

The ordinary requirement for a caution is over-ruled by the Criminal Justice Act 1987. Advance disclosure by the defence must be given in a Serious Fraud Office case.[24]
One aspect of the duty to disclose information in Serious Fraud Office cases, is the psychological vulnerability of suspects. People, even highly successful, intelligent professionals, can suffer from an abnormal mental state whilst in police custody, without having had a history of mental disorder. A study for the Royal Commission on Criminal Justice found that 20% of suspects studied had an abnormally high level of anxiety, yet only 7% were suffering from mental illness such as depression. In addition to high generalised anxiety, and sometimes independent of it, suspects may suffer from specific phobic anxiety,

[19] "Interrogations in New Haven: The impact of Miranda", by M. Wald et al,Yale Law Journal, 1976
[20] Professor McConville's research for the Royal Commission found that 2.5% of suspects remained silent in police interrogation.
[21] Police and Criminal Evidence Act 1984, Code of Practice for the Detention, Treatment and Questioning of Persons by Police Officers.
[22] Section 51, Criminal Evidence Act 1898.
[23] *Smith* [1992] 95 Cr. App.R.191).
[24] Criminal Justice Act 1987.

such as claustrophobia (eg. exaggerated fear of being locked up in a confined space like a prison cell, or panic attacks).[25]

Some medical conditions (eg. cardiovascular problems, diabetes, epilepsy) may result in a disturbed or abnormal mental state whilst the person is at the police station.

Highly successful businessmen usually have a good sense of compliance and this very personality characteristic may be important in evaluating the reliability of self-incriminating admissions. (Gudjonsson 1992).
The concept of compliance is associated with eagerness to please and the tendency to avoid conflict and confrontation. It is difficult to measure by behavioural observation and it is typically measured by a self-report questionnaire. There have been recent suicides during four different Serious Fraud Office Investigations[26], illustrating that suspects, even intelligent, advised, wealthy suspects, can be vulnerable to the strains of such investigations. In the SFO case *R v Peter Young [2003]*, Peter Young became extremely mentally ill due to the strain of the investigation. In The SFO case *R v Saunders [1986]* Ernest Saunders suffered two nervous breakdowns as a consequence of the case.
The case of *R v Seelig, R v Spens* was associated with the Saunders case and one in which admissions were made to a Department of Trade inspector conducting an investigation of a company's affairs pursuant to section 432 of the Companies Act 1985.. These admissions ere admissible as evidence in criminal proceedings against the person making the admissions even though they were self-incriminating and even though the inspector did not caution the confessors before requiring them to give evidence and produce documents because the inspector did not have to comply with section 67(3) of the Police and Criminal Evidence Act 1984. Seelig and Spens were convicted at trial and the case was taken to the European Court of Human Rights by Spens and Seelig in 2002 where it was ruled that their confessions were in breach of their human rights to a fair trial.

In support of the right against self-incrimination is the case of *Funke v France* [27]
in which the European Court of Human Rights held that the applicant's right to a fair trial under Article 6(1) of the Human Right Convention had been infringed by a requirement to disclose documents concerning his tax affairs that would incriminate him. He had been asked to supply documents regarding assets abroad to custom officers. When he refused, criminal proceedings were commenced for a fine and a daily penalty of 50 francs until such time as he produced the documents. Funke argued that the criminal proceedings had been brought to compel him to co-operate in a prosecution brought against him. The French government argued that the customs authorities had not required Funke to confess to a crime or to provide evidence of one himself.. They had merely asked him to give particulars of evidence found by their officers during a search of his home. The courts for their part had merely assessed whether the customs' application was justified.

The European Court of Human Rights had found in favour of the French Government. It considered that neither the obligation to produce bank statements nor the imposition of pecuniary penalties offended the principle of a fair trial. The former was reasonable. Responsibility for the detriment caused by the latter lay entirely with the person affected when he refused to co-operate with the authorities. But in spite of these powerful considerations, the European Court of Human Rights upheld the claim. The judgement said

25 Morgan D, Stephenson. G.M, "Suspicion and Silence", 1994, Blackstone Press.
26 eg. Mr. Hardy in *R v Steen and others* [2003] ; R v Pound, Green and others [2004]
27 [1993] 16 EHRR 297

that the criminal conviction was in order to obtain documents which the customs officials believed must exist. It said : "Being unable or unwilling to procure them by some other means, they attempted to compel the applicant himself to provide the evidence of offences he had allegedly committed. The special features of customs laws…. cannot justify such an infringement of the right of anyone 'charged with a criminal offence' within the autonomous meaning of this expression in Article 6, to remain silent and not to contribute to incriminating himself." There had been a breach of Article 6(1). So it seems that the ECHR is prepared to protect the right to silence.

Again, in *Kansal v UK* [2004] [28], The ECHR found that the use at a subsequent trial of answers given under compulsion of the Official Receiver breached the fair trial provisions of the European Convention on Human Rights even though the trial took place before that Convention was incorporated into English law by the Human Rights Act 1998. Yash Pal Kansal ran a company which operated a chain of chemist shops. He went into receivership in 1988. He was subsequently charged with two offences of obtaining property by deception and at this trial, two transcripts were placed before the jury, transcripts of compulsory interviews with the Official Receiver. The House of Lords ruled that this was not against his human rights as the Human Rights Act 1998 could not be applied retrospectively and the case went to the ECHR where it was judged that there was an alleged violation of article 6 because there had been an infringement of the right not to incriminate oneself and that the applicant had been deprived of a fair hearing.

Self-incrimination in the present German system

Roman law was of decisive influence on German criminal procedure. But German law moved away from Roman law when in the 17th century it favoured a systematisation of the law, through a process of codification. During the first phase of the existence of the German Democratic Republic, the old German Penal Code of 1871, amended, had been in force. It was replaced by the new Penal Code on 11 December 1957, a drastically changed version, resting on socialist principles. This was replaced by the Penal Code of 1968 which was adopted after extensive debates and discussions by citizen groups. This Code states "Its norms emphasize , bindingly, for everybody, the uniform political will of the working class and of working people allied with it, and define which acts, within the jurisdiction of the socialist state, have been subjected to criminal liability because of their anti-social nature or social danger, either as felonies or as misdemeanours, which must be combated by the organised face of workers, which must be prevented, and which, if committed, must be vindicated with the sanctions provided by them". The principle *nullum crimen, nulla poena sine lege* is applicable, ie. All prohibitions and sanctions are legislated. Criminal procedure is governed by the Code of Criminal Procedure. Article 2 states "*Criminal procedure is intended to educate towards respect for socialist law, socialist property, work discipline and democratic watchfulness".* Generally, the approach of the Code of Criminal Procedure follows continental European practice and incorporates most of the typical procedural guarantees. The code recognises the prohibition of double jeopardy, except that prosecutions may be instituted on felony charges after conviction for a misdemeanour in the same matter, and that trial may be instituted after imposition of a violations punishment; however, previously imposed and served punishments are deducted from subsequently imposed punishments.

[28] *Kansal v UK* [2003] Application No. 21413/02

Germany is a Federal Republic consisting of sixteen Lander – territorial units endowed with wide powers and their own decision –making bodies. There are various sources of law; at the top is the German Constitution, the Grundgestz, then there are federal laws and regulations and finally the constitutions, the laws and regulations of the Lander

The German Constitution, das Grundgesetz, established a State where the rule of law prevailed. It sets out fundamental guarantees and join the traditional human rights in the field of criminal procedure. These are binding to the legislator, administration (public prosecutors) and judge4s in the form of directly applicable law (article 1 GG)
There is a Federal Constitutional Court, the Bundesverfassungsgericht, which is in Karlsruhe. The court rules on the conflicting opinions and doubts concerning the compatibility of systems of public law of the Federation and of the Lander and on constitutional appeals, Verfassungsbeschwerde) made by anyone who believes a fundamental right of his has been violated by the public authorities. The Federation administers the federal courts and tribunals, while all other courts come under the jurisdiction of the Lander. Germany has 7117 local courts, Amtsgerichte, 116 district courts, Landgerichte, 24 high courts, Oberlandesgerichte, and one Federal Court of Justice, Bundesgerichthof.

In criminal cases, there is the public prosecutor, the defence counsel, the police, the state officials, the victim, and the defendant. German terminology to indicate the defendant varies according to the legal situation in which he finds himself in the course of the procedure. He is called the Beschuldigte during the inquiry, der Angeschuldigte after the institution of proceedings and der Angeklagte after the start of the trial phase. German criminal law does not accept the criminal liability of legal persons. So offences of serious fraud are brought against directors of companies under the criminal code and they can also be tried for tort offences under the civil code.

Criminal Responsibility

The existence of an offence presupposes that the wrong be attributable to its author. So the German criminal code does NOT deal with corporate responsibility, *societas delinquere non potest*. So for acts committed in the name of a corporate body, responsibility lies with the individuals who act in the capacity of its legal representatives or its board of directors. Their personal responsibility has to be proved for the court to convict them. Also, an adult who is deemed to be mentally unstable cannot be held responsible, but if it can be proved that his mental illness only diminished his judgement, he can be given a reduced sentence. (21 StGB.)[29].

The Police

The people's police has a reputation not only for efficiency and effectiveness in clearing crimes , but also in their preventive activity. "Every member of the People's Police must be in a position to explain law to ordinary people and to see that socialist law is observed in everyday life. In public relations, emphasis is laid on making observance of socialist law a customary habit of all."[30]. Accordingly they have succeeded in keeping the crime rate low

[29] 21 StGB – Diminished capacity to be adjudged guilty.
"If the capacity of the perpetrator to appreciate the wrongfulness of the act or to act in accordance with such appreciation is substantially diminished upon commission of the act due to one of the reasons indicated ,in section 20, then the punishment may be mitigated pursuant to section 49 subsection (1)".
[30] 'The Democratic Republic which are Aimed at Preventing and Combating Crime'. Material submitted

and reducing it further over the years. Minor transgressions and irregularities are not overlooked but, inasmuch as they may be symptomatic of impending major problems, are followed up and where necessary, prosecuted.

The Defence

It is obligatory for a lawyer, Verteidiger, to be present when the accused is questioned in the preparatory phase of an interrogation. The interrogation is conducted by a judge. If the interrogation is conducted by the public prosecutor, a lawyer 's presence is optional. *If the police conduct the interrogation, the lawyer is not present* (163a IV St PO)

Where the offence is serious and the trial takes place at the district court, Landgericht, the presence of a lawyer is obligatory.. A lawyer must be present also, if:

- the accused's previous counsel has been excluded from the procedure;
- if the accused has been remanded in custody for an extended period of time;
- if the court is considering whether the accused should be interned in a psychiatric clinic to assess his condition;
- if the accused has mental problems and runs the risk of being detained in a psychiatric institution;
- whenever the proceedings could result in the accused being prevented from exercising a particular profession (*140 1, StPO*);
- when the public prosecutor intends to request that an offence be dealt with by the accelerated procedure in a case where the accused risks a prison sentence of over six months. (418 IV,St PO).

The presiding judge also appoints a counsel for the defence on his own initiative or on request when, due to factual and legal difficulties raised by the case, assistance becomes essential or when he decides that the accused is unable to defend himself alone (140 StPO). In all cases counsel must be appointed at the latest before the accused is asked to answer the indictment during the intermediate proceedings (141, St PO).

German law is based on an adversarial system and the principle of the immediacy of evidence does not normally allow trials in the defendant's absence (Abwesenheitsverfahren) but only when the offence carries a minor sentence. A practising lawyer or a professor of law may be nominated as counsel for the defence at public expense.

As far as evidence is concerned, German procedure is guided by the principle of investigation or the principle of factual truth, which obliges a judge to seek out the truth in a case and to form an inner conviction without being bound by the statements recorded at the hearing. The result of this is that the accused gets the benefit of any doubt. Germany has anti-terror law of December 1986 (Gesetz zur Bekampfung des Terrorismus) which make exception to the normal rules of criminal procedure.
In German criminal cases the interrogation of the suspect must start by reading him his rights (Belehrungspflicht) or it will be void. These are the right to answer questions, or to refuse; to make or refuse to make a statement; and to request the assistance of a lawyer. The suspect must then be told of the charges against him. Finally the interrogation *stricto sensu* allows information concerning his personal situation to be obtained, and then gives the suspect the chance to explain the accusations and to produce arguments and evidence

by the Delegation of the German Democratic Republic to the Fifth United Nations Congress on the Prevention of Crime and the Treatment of Offenders. Geneva 1975.

as to why he ought to be discharged. Telephone tapping is allowed in serious cases but must be ordered by a judge by way of a warrant.

The German criminal procedure is not a procedure that puts the parties in opposition, the public prosecutor has the duty to investigate evidence favourably to the accused. So admissions by the accused do not exempt the judge from hearing witnesses to corroborate his confession.

The participants in the proceedings can, at the first interrogation of the accused, request the interrogation of any evidence which they consider to be useful to secure his acquittal. The request to obtain supplementary evidence at a later date is subject to the discretion of the public prosecutor, who can allow or refuse the request. But when the accused is interrogated by the judge, the judge must investigate the evidence which the accused requests if it appears to be of use, if loss of this evidence is feared, or if it could lead to his release. (166 St PO)

Inadmissible evidence includes

- certain subject matter (Beweiserhebungsverbote) such as the revelation by a State Official of a State secret without first obtaining permission;
- certain methods of obtaining evidence such as the statement of a witness who has NOT been informed of his right to silence (52 to 55 St PO);
- certain methods of investigating evidence, for example, - the use of physical ill-treatment, exhaustion,
- bodily interference, drugs, torture, deception or hypnosis. Constraints may only be used in so far as the law expressly permits it, and the suspect must not be threatened with acts that the law forbids or offered benefits to which he is not lawfully entitled;
- evidence adduced without permission of the competent authority, such as telephone tapping carried out by the police without judicial authorisation.

Self-incrimination in the present French System

In France, the rights of the accused were traditionally very limited during the criminal investigation. The most important rights only arose at the point when the person suspected was formally officially 'accused'. Nowadays, the suspect has rights from the time at which he arrives involuntarily at the police station. He may refuse to allow searches within the context of an *equate preliminaire*; he may also notify the *procureur de la Republique* and a person of his choice if he is subject to an identity check (article 78-3, para 1 CPP).

While in custody, he may request a medical examination, inform a relative by telephone, and speak to a lawyer (art 63-2 CPP).But the extent of his rights remain limited; first, a violation of his rights will only lead to nullity if it threatens the interests of the defence (article 802 CPP). Only since 2000 were the French police legally obliged to inform the person in custody about the reasons for his arrest and his right of silence (article 63-1 CPP)**.** At the end of a police enquiry into a *delit*, a person referred to the *procureur de la Republique* in order for an instruction to be opened, or for appearance in court, then has the right to the assistance of a lawyer.

Once a prosecution has been formally instituted, the victim plays a role in the prosecution; the victim plays no role in the investigation stage. He will then be informed by the public prosecutor if the case is dropped (article 40 CPP); reparation for damage to him may be a condition for the case being dropped; and he plays a major role in the mediation procedure.

Also, if he has at his disposal all the necessary elements required to bring an action, he can bring a private prosecution, *partie civile*, before the judge.

From the time an investigation is opened, any person who can provide information on an offence may be questioned by an officer of the police *judicaire* (article 62 CPP). If this person is being held on police premises, the police officer must state the length of questioning of the accused and the intervals between questioning sessions. This must be recorded on the written account of the interrogation and on a special register over which the public prosecutor has control (articles 64 and 65 CPP).

In the past, the French police had power to detain compulsorily not only suspects but even certain witnesses by *guarde a vue*. This power was abolished in 2000. Since 200 only suspects may be placed in *guarde a vue* and witnesses may only be detained for the time necessary to take their statements. (Articles 62, 63, 153 and 154 CPP).
Any person suspected of having taken part in a crime which is flagrant may be brought before the *procureur de la Republique* who questions him there and then. (article 70 CPP).
As far as time constraints are concerned after four months have passed in an investigation since the suspect was last interviewed, the person under examination may formally request to be heard by the *juge d'instruction* (article 82 CPP).

The interrogation may only take place in the presence of the lawyer of the person under investigation, unless he expressly waives his rights (article 114 CPP). Statements made by the person being questioned are not recorded, but transcribed in a written account by a police officer (during the investigation stage) or by a clerk on the order of the juge d'instruction. A person suspected of having committed an offence may refuse to respond and his statements are never made under oath. As part of the 2000 reforms, the police must now inform suspects they are free either top talk or to remain silent. The written account of the interview is read and signed by the person being questioned: if he refuses to sign, a note is made of his refusal (articles 62, 106, 121 CPP).The state can video monitor public places to gather information except press offices, doctors, bailiffs, lawyers homes and offices.

Evidence may only be admitted if it has been obtained legally and without interfering with the rights of the defence. For example, confessions made by a person under hypnosis, or reports of offences following unfair police provocation, are not accepted. Irregular written statements and reports are similarly treated. However the law limiting admission of evidence is confined to the public authorities. The *Cour de Cassation* considered that criminal judges should not be allowed to discount evidence produced by the private parties for the sole reason that it may have been obtained illegally and unfairly; their task is merely to assess its probative value. (Cass 6 April 1994, Bull; no. 136; Cass Crim; 30 March 1999, Bull no.59). The justification for this exception is based on the fact that actions carried out by the *partie civile* or the accused are not part of the instruction, and consequently they are exempt from the rules of nullities. In addition, the court may only act on evidence that has been debated adversarially (article 427 CPP).

Self-incrimination in modern US

The United States Constitution provides minimal rights and guarantees and no law may be in conflict with it. The Constitution provides for two separate systems of law, that of the states and that of the national government. So two separate and distinct sets of courts., state and federal, exist side by side in the United States. The Constitution,1789,outlines the duties and

powers of various elements of government. It also guarantees basic rights to citizens. There are 26 amendments to the Federal Constitution. The first 10 are the Bill of Rights,1791, which protect citizens from the central government.
The following Bill of Rights are applicable here:

iv No unreasonable search or seizure;
v Due process; rule against double jeopardy; to not testify against self;
vi Right to a speedy trial in criminal cases, by jury, and to confront accusers and witnesses;
viii No excessive bail, cruel and unusual punishment banned.

The Supreme Court of the United States is the highest court in the federal judicial system and the country. There are circuit courts of appeal and New York is the 2nd Circuit and Illinois the 7th Circuit. The basics of a criminal prosecution are that police officers, detectives and investigators investigate the alleged crime, interview witnesses and suspects and make an arrest based upon probable cause. Prosecutors are responsible for the ultimate decision to prosecute based upon the evidence; they are responsible for deciding the charge and also decide what sentence the state will seek. Defence attorneys may be public defenders, hired counsel, volunteer counsel. The grand jury are a panel of 24 citizens who investigate and evaluate evidence and determine whether there is probable cause to issue a formal charge. Then there is a pre-trial hearing where the accused is formally advised of the indictment and is asked to enter his or her plea and bail may be set.

When a crime is brought to the attention of the police, it triggers the enforcement process. Police may learn about possible crimes from reports of citizens, discovery in the field or from investigative and intelligence work. There are several types of police procedure, police procedures that are aimed at solving specific past crimes known to the police, (reactive procedures), police procedures that are aimed at anticipated ongoing and future criminal activity (proactive procedures) and prosecutorial and other non-police investigations conducted primarily through the use of subpoena authority.

On – scene arrests

A substantial percentage of arrests for much crime are of the on-scene variety. These are arrests made during the course of the crime or its immediate vicinity. Most on-scene arrests are based on the officer's own observations, although sometimes they will be based on the direction of a witness

Reactive arrests

When the police learn of the previous commission of a crime, such a fraud, but are not in the position to make an on-scene arrest, they have a responsibility to solve the crime. This involves determining whether there actually was a crime committed, if so, determining who committed it, collecting evidence of that person's guilt and locating the offender so that they can be taken into custody. Investigations directed at performing these crime-solving functions are described as reactive or retrospective in nature because they focus on past criminal activity.

A wide variety of investigative activities may be used in the course of a reactive investigation. These include interviewing the victims, interviewing the witnesses at the crime scene, canvassing the neighbourhood for other witnesses, interviewing the suspects, collecting physical evidence, checking computer records and computer files, seeking information from

informants, surveillance of the suspect and using undercover operatives to gain information from the suspect.

Proactive investigations are undertaken by full time police staff

They are aimed at uncovering criminal activity that is not specifically known to the police. The investigation is aimed at placing the police in a position where they can observe ongoing criminal activity that otherwise would be hidden from public view and not reported. It may be aimed at inducing persons who have committed crime of a certain type, including many unknown to the police, to reveal themselves. Proactive investigations are often aimed at anticipating future criminality and placing police in a position to intercept when a crime is committed. Here, the investigative technique may be designed simply to gain information that will permit the police to predict when and where a crime is likely to be committed, or it may be designed to instigate or induce the criminal attempt at a particular time and place by creating a setting likely to spur into action those prone to criminality.

Cases for grand jury investigation are cases such as serious fraud, crimes involving public corruption eg bribery), misuse of economic power (eg price fixing) and widespread distribution of illegal services or goods (eg organised crime operations). The grand jury investigations are used in a fraction of 1% of all criminal investigations.

The first step in a grand jury investigation is arrest. Once a police officer has obtained sufficient information to justify arresting a suspect, the arrest ordinarily becomes the next step in the criminal justice process. A constitutional right is involved in the right to remain silent. The Fifth Amendment provides protection against inferences from silence as to guilt. But silence during interrogation does not necessarily come within the ambit of the Fifth Amendment. The US Supreme Court has brought it under the shield of due process as set forth in the Fourth Amendment.[31]
Silence after Miranda warnings have been given cannot be taken into account. So to properly protect use of the privilege, it is prohibited to cross-examine the defendant on the subject of earlier silence and it is prohibited for prosecutors or judges to comment to the jury on inferences which may be drawn from a defendant's failure to testify.
The Americans discuss the right to silence around the Fifth Amendment which states that "no person… shall be compelled in any criminal case to be a witness against himself". The right to silence is here grounded in the constitutional framework and is protected by entrenched constitutional limitations and this constrains the Supreme Court. So the arguments usually centre around the interpretation of the Amendment. Problems of interpretation have arisen over the underlying rationale of the privilege, whether its prime rationale is privacy, in protecting an area in which the state cannot intrude, or autonomy, embodying the recognition of human dignity, which is balanced against the state's interest in crime control and law enforcement. Disputes have arisen over the scope of the privilege, for example, whether it embraces the refusal to supply incriminating evidence.

Amar and Lettow[32] were critical of the Court's failure to define the scope of the privilege in a logical and sensible way. They argue that focussing on reliability provides the best rationale for making sense of the self-incrimination clause and defining its scope. Another critic,

[31] US Supreme Court Doyle v Ohio 426 US 610 [1976]

[32] A. Amar and R. Lettow (March 1995) "Fifth Amendment First Principles : The Self-Incrimination Clause", Michigan Law Review, Vol 93, No.5

Stuntz[33] has argued that the privilege is best understood in terms of solving the problem of excusable self-protective perjury; that if pressured to confess, the accused will be tempted to perjure himself and that while telling lies would be wrong, it would be understandable in those circumstances.

A critical point in the history of the privilege with regard to pre-trial procedures was the case of Miranda v Arizona[34]. In Miranda the police had failed to inform Ernesto Miranda of his right to see a lawyer. The Supreme Court, in Miranda, therefore laid down new guidelines for the police, to provide a procedural protection against improper police practices of federal and state law enforcers. So now, prior to questioning in custody, the suspect has to be warned by the police of his right to silence, his right to a lawyer at the police station as well as at trial. The police now have to tell the suspect that he can stop the interrogation at any point and have access to a lawyer on demand. Since the Miranda case, it is ruled that confessions are not admitted unless the prosecution could show that these procedural safeguards have been observed and that the defendant has waived these rights in full knowledge and voluntarily. These Miranda guidelines aim to prevent the mental and physical abuse of suspects at the police station and to prevent the accused from being tricked into making admissions. The Miranda case judgement is a reaffirmation of the importance of right to silence and it expresses the Supreme Court's recognition of the importance of judicial integrity and impartiality . The court said that "The privilege against self-incrimination , which has had a long and expansive historical development, is the essential mainstay of our adversary system and guarantees to the individual '*the right to remain silent unless he chooses to speak in the unfettered exercise of his own free will', during a period of custodial interrogation as well as in the courts or during the course of other official investigations*"

Chief Justice Warren stressed that 'procedural safeguards must be employed to protect the privilege' and said this:

"*He must be warned prior to any questioning that he has the right to remain silent , that anything he says can be used against him in a court of law, that he has the right to the presence of an attorney, and that if he cannot afford an attorney one will be appointed for him prior to any questioning if he so desires. Opportunity to exercise these rights must be afforded to him throughout the interrogation. After such warnings have been given, and such opportunity afforded him, the individual may knowingly and intelligently waive these rights and agree to answer questions or make a statement. But unless and until such warnings and waiver are demonstrated by the prosecution at trial, no evidence obtained as a result of interrogation can be used against him.*"

Even this has been misinterpreted or been open to various interpretations. In Orozco v *Texax*[35], it was held that the Miranda requirements applied when the questioning had taken place outside the police station. A murder suspect was questioned in the early hours of the morning in his boarding house bedroom, regarding a murder in a restaurant the previous evening. He admitted going to the restaurant and owning a gun, which he said was in a washing machine at the back of the house. The gun was found and it was proved that it was the gun which fired the shot which killed the victim. Ozorco was convicted but because the questioning had not been preceded by a Miranda warning , notwithstanding the fact that it took place at the lodging house rather than in the isolation of the police station, his conviction was reversed.

[33] Stuntz. W., "Self-incrimination and excuse", 1988,Columbia Law Review

[34] *Miranda v Arizona* , 384 U.S. 436 [1966]

[35] *Orozco v Texas* , 324 U.S. [1969]

In *Harris v New York*[36] it was held that where a confession had been obtained without a Miranda warning, the accused could be cross-examined on it in order to undermine his testimony and credibility at trial. The case concerned the sale of drugs on two occasions to an undercover policeman. Harris denied that he had made the first sale and while acknowledging the second sale, denied that the substance sold was heroin. Incriminating statements had been made to the police, before he had received his Miranda warning. These conflicted with his testimony in court, and when they were put to him, the court held that he could be cross-examined on them. The trial judge had stressed that Miranda should not be used as a licence to commit perjury, safe in the knowledge that one would not be embarrassed by being faced with one's previous inconsistent statements at trial. His decision was upheld by the Supreme Court.

In *Moran v Burbine*[37] when Burbine was being held by the police a lawyer obtained for him by his sister, telephoned the police station, explaining who he was and asking if his client would be further questioned that day. The lawyer was informed that Burbine would not be questioned, yet later that night Burbine was interrogated without being informed that he now had a lawyer, or even that the lawyer had rung the police station. After receiving his *Miranda* warnings, he confessed and the court held that the police were under no obligation to disclose that information, even though it might have affected his decision to talk. Provided that he understood his right to silence, his waiver of that right was valid.

What these decisions show, is that the tactics in *Moran v Burbine* were precisely those which *Miranda* was designed to protect against. *Miranda* can be said to fail to establish standards of propriety in the police station. *Miranda* does not require that lawyers, magistrates, tape recorders or video recorders be present in interrogation rooms. Such cases as these show that in the absence of these monitors, detectives and police have engaged in ingenious but troubling forms of interrogations.

A critical analysis of the right to silence

In the legal systems of France, Germany, the UK and the USA, a defendant has the right to silence in that throughout the entirety of the criminal proceedings he or she has the right to refuse to answer questions, and may not be exposed to criminal sanctions for exercising this right. The only exception is in the United Kingdom in cases of serious fraud and bankruptcy. The European Court of Human Rights decided[38] that the right of silence was implicit in the general right to a fair trial. Only the United Kingdom has derogated this right in cases of serious fraud.

The use in evidence of statements obtained from the defendant in breach of his right to silence is an important aspect of the problem of improperly obtained evidence. The question most frequently discussed in this connection is whether a suspect's statement may be used in evidence where he made it without first being warned that he has a right not to talk. This question potentially raises once again the issue of evidence illegally obtained. In each country studied the solution depends on whether there was a legal duty to warn the suspect of his right to silence in the case in question, the terms of this duty if it exists, and the attitude of the court to breach of this obligation. France, the country where the inquisitorial tradition is strongest, is the least sympathetic to the defendant in this respect.

[36] *Harris v New York*, 401 U.S. 222 [1971]
[37] *Moran v Burbine*, 475 U.S. 412 [1986]
[38] *Funke v France* [1993] 16 EHRR 297

In the UK the police are under a duty to caution a suspect before questioning him[39] And if they fail to do so, this is likely to result in the court excluding his statement under section 78 of Police and Criminal Evidence Act 1984.

The code of criminal procedure in Germany also imposes a duty to caution..[40] In Germany, where the duty to caution was introduced in 1964, the courts, after initial hesitation, eventually came down in favour of excluding statements made where the duty had been disregarded. German procedural law outlaws inferences from silence in general. But it discriminates between total silence and partial silence. Total silence does not necessarily mean refraining from any utterance. It is silence in the legal sense if the defendant merely protests his innocence or contests his involvement with the alleged offence or if he invokes statutory limitations or procedural obstacles. Similarly statements made by defence counsel concerning factual events cannot be taken into consideration, if the defendant does not explicitly corroborate them.[41]

If, however, the defendant testifies in part on the allegations, his silence on other points, on which he refuses to comment or make incomplete statements, can be taken into account. But inferences from silence are conditional on a hypothetical test; only if an innocent man would have defended himself where the defendant resorted to silence may this silence be held against him. Furthermore, it cannot work to the disadvantage of the defendant if he chooses to remain silent when questioned by the police but makes a statement at the main hearing before the court. The opposite situation would certainly be the case of partial silence and could be considered by the trial judge. Whether extra-trial statements could be taken into account when the defendant chooses to remain silent before the authorities would be a separate issue. In a situation like this, there would be no state compulsion involved. Statements made outside police questioning or court examination may therefore be taken into consideration.

Until recently, in France, there was no duty at all to caution the suspect and hence no question of excluding evidence of a statement they made without one, but that has changed in France since 1993. France has since 2000comprehensive duty to warn. But this new duty is not expressly stated in the law-books as existing to give such a warning and so undermines the rights of the defence as to give rise to a *nullite substantielle*.

Two questions are posed with regard o the right to silence. Is it permissible to use a compulsorily made statement against a person? In the UK, for example, the law of bankruptcy obliges the bankrupt on pain of penalty to reply to the questions put to him by the receiver. Are these replies capable of being used against him as evidence in a later prosecution? In English law this is a difficulty question. In principle three results are possible :

1 The possibility of a prosecution displaces the obligation to reply; in other words, there is a privilege against self-incrimination;

2 The person is obliged to answer, but because his answer is made under compulsion, his reply may not be used as evidence in a criminal case;

3 The person is obliged to reply, and his replies, although he was obliged to make them, are capable of being used against him as evidence in a later prosecution.[42]

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39 Police and Criminal Evidence Act 1984, Code of Practice C.

40 136, 163a (3)-(4), 243(40, St PO

41 BGH Judgement 24 August 1993 in BGHSt 39, 305.

42 *R v Director of the Serious Fraud Office, ex parte Smith* [1993] AC1

A situation in which the English courts applied the third solution cost the United Kingdom a condemnation by the European Court of Human Rights in the Saunders case[43]. In response to this Parliament in 1999 passed a law[44] which amended a series of earlier statutes that had made it compulsory for suspects to give information to official investigations, so that any information so given can no longer be used in evidence in a criminal case.

The second question concerns the accused who has chosen to exercise his right of silence. The fact of not giving explanations in a situation where there is reason to suppose an innocent person would have been glad to explain himself is certainly suspicious. But may such an exercise of the right to silence amount in itself to a piece of circumstantial evidence?

In American law the answer has long been negative. In the United States the right to silence exists in the double sense – a person may not be punished for his refusal to talk, nor may he be judged guilty of the offence of which he is accused in consequence of his refusal to talk. There is one distinction between the American law of the right to silence and the UK law. The right to silence, even with inferences applies in the UK from interrogation of a suspect to trial, where the USA seems to treat the Miranda rights as distinct to the Fifth Amendment rights to silence as in the case Chavez v Martinez[45] where it was held that a suspect, although not given his Miranda warning under persistent questioning did not have his Fifth Amendment right not to be "compelled in any criminal case to be a witness against himself" because the Court reasoned (per Thomas J.) that the phrase "criminal case" in the Fifth Amendment at least required that legal proceedings should have been started, and did not encompass the entire criminal Investigatory process, including police interrogations. Other justices noted that since Martinez's statements were never admitted as evidence against him in criminal proceedings he could not be said to have been a "witness" against himself. The majority of the justices' view would let he police officers that behaved in that manner off the hook as long as they did not charge the interviewee with a crime. Moreover it would seem to allow the police to get around the exclusionary rule. Assume that Martinez had implicated another in wrongdoing, then, if Martinez had been charged and then a court excluded his evidence because he was not given a Miranda warning, then everything that was a consequence of that confession would also have to be excluded under the "fruit of the poisonous doctrine". However, if he was not charged but another whom he had implicated was, then the doctrine would not seem to apply.

English law took up the same position in the twentieth century and so did German law. But in French law the position is different. If a defendant stays silent then the judge and jury can draw inferences from that. In England this question has given rise to a great deal of controversy. One section of legal and public opinion argue that the official ban on drawing

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43 *Saunders v UK* [1997] 23 EHRR 313

44 The Youth Justice and Criminal Evidence Act 1999, Schedule 111

45 *Chavez v Martinez* U.S. 123 [2003]. The facts of this case were that Martinez was subject to a police stop search in connection with drugs. He was shot several times by a police officer, instantly blinding and paralysing hi8m. Sergeant Chavez, the patrol supervisor, arrived at the scene and accompanied Martinez to hospital. Chavez questioned Martinez while he was receiving medical treatment in the hospital, despite his protests and those of medical staff. Chavez never gave any Miranda warning and persisted in questioning Martinez. Martinez eventually made some admissions about the incident and his prior drug use. He was not charged with a crime, and his answers were not used against him in any criminal prosecution. He later brought a 1983 action for damages against Chavez. Section 1983 is a federal provision making it a tort to deprive a person of their civil rights. The claim was that Chavez's actions violated Martinez's Fifth Amendment right.

unfavourable deductions from a suspicious refusal to answer is unsatisfactory. They argue that an innocent person would explain himself and the person who refuses to do so is generally someone who has no credible explanation to offer. In 1993 the UK Parliament introduced a Bill to permit the court to draw "any conclusion which it considers proper" from a suspicious refusal to reply to certain questions put by the police, the use at trial of some piece of evidence of which he earlier failed to inform the police, or a suspicious exercise by an accused of his right to silence at the trial. This law was enacted as sections 34 to 39 of the Criminal Justice and Public Order Act 1994. On the whole, in the UK, a crucial protection for the accused, the right to silence, has been lost.

For France, UK and Germany who have ratified the European Convention on Human Rights, the ECHR point of view must also be considered. Several conditions must be fulfilled in order to allow inferences from silence to be drawn. First, a conviction must not be based solely on inferences from silence; so if there is no other evidence and the accused refuses to comment, then he cannot be convicted. Secondly, it seems that the evidence must be strong enough top carry the conviction on its own. Inferences from silence may only be added as a corroboration of the prosecution's case. It must not be the other way round, so the main basis for the conviction is inference. Article 67 of the Rome Convention says that the silence of the accused cannot be a consideration in the determination of guilt or innocence.

Further, the European Convention on Human Rights contains no express guarantee of a privilege against self-incrimination. While such a right has to be implied, there is no treaty provision which expressly governs the effect and extent of what is to be implied. The jurisprudence of the European Court of Human Rights very clearly establishes that while the overall fairness of a criminal trial could not be compromised, the constituent rights comprised within Article 6 of the ECHR are not themselves absolute.
The immunities of the ECHR are as follows:

- a general immunity , possessed by all, from being compelled on pain of punishment to answer questions posed by others;
- a general immunity , possessed by all, from being compelled to provide answers to questions which may incriminate them.
- a specific immunity, possessed by all criminal suspects being interviewed by police and others in authority, from being compelled to answer any questions;
- a specific immunity, possessed by accused persons at trial, from being compelled to give evidence or answer questions, and
- a specific immunity, possessed by all accused persons at trial, from having adverse comment made on any failure to answer questions before trial or to give evidence at trial

The United Kingdom has derogated the first two of these immunities with the Criminal Justice Act 1987[46], The Insolvency Act 1985[47] and the Environmental Protection Act 1990 and the United Kingdom has indirectly derogated the three specific immunities. As to UK trials,

[46] In R v Director of SFO, ex parte Smith, it was held that although there was a strong presumption against interpreting a statute as taking away the right to silence of an accused person it was the plain intention of the Criminal Justice Act 1987 that the powers of the Director of the Serious Fraud Office should not come to an end when the person under investigation had been charged; and that she was entitled to compel Smith to answer questions on pain of commission of a criminal offence under section 2(13) of the 1987 Act if he did not do so and no caution was appropriate.

[47] In Re Pantmaenog Timber Co Ltd. [2003] HL, the Official Receiver required documents from any person
having information relating to officers of a company in liquidation, thus further derogating a person's right to silence.

although a person has the right not to say anything at his trial from start to finish, in theory, the jury are usually exhorted to apply their common sense to a case. Furthermore, although the silence of an accused at trial cannot be commented upon by the prosecution, this silence can be commented upon by a co-accused. Also , the co-accused can incriminate the accused even though the accused may have chosen to exercise his right to silence and this mixed statement is allowed in the UK to be put in evidence in its entirety, thus prejudicing the defendant.

By and large, The European Court of Human Rights has tried not to interfere with the application of domestic laws of evidence.[48] The European Court has concerned itself more with procedural fairness, including the manner in which the evidence was taken so as to decide whether the proceedings as a whole were fair.

The right to silence is not guaranteed in any part of the International Convention on Civil and Political Rights, although Article 14.3(g) of the ICCPR states that :
"In the determination of any criminal charge against him, everyone shall be entitled…
(g) not to be compelled to testify against himself or to confess guilt…"

In the United States of America, The right to silence is upheld in the Fifth Amendment of the Constitution. The American prosecutors abide by this Amendment by obtaining confessions instead. There is a new Department in Justice, created in 2002, since when there have been 290 separate white collar criminal cases brought of which 250 confessed and pleaded guilty.[49] Before 2002, the average white collar crime case number was 50. America has the Clayton Act which allows the right to bring private anti-trust actions. Private actions can be brought against corporations, individuals, partnerships or any other organisation with the exception of those specifically excluded by statute, such as labour unions. This is similar to the situation in Germany where private actions can be brought for restitution after the criminal case of deception or deceit has been brought. The difference is that in Germany such an action cannot be brought against a corporation or partnership. It must be brought against individual officers of a corporation as the courts in Germany do not recognise a legal personality for this purpose.

In America, there is the problem of false testimony which in effect is a way of establishing the defendant's right against self-incrimination. The way that they have addressed the problem is by putting the onus on the defence lawyer through a Rule 3.3 of the Restatement of the Law Governing Lawyers 1983. This can be argued to be violating the defendant's sixth Amendment right to effective assistance of his lawyer.
There is a revised Rule 3.3 since 2002. This revised rule states that:
(a) A lawyer shall not knowingly:
(1) make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer;
(2) fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel; or
(3) offer evidence that the lawyer knows to be false. If a lawyer, the lawyer's client, or a witness called by the lawyer, has offered material evidence and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures, including, if

[48] See for example, *Schenk v Switzerland* [1991] 13 EHRR 242 and Khan v UK[2000] 31 EHRR 45.
[49] The Economist, Feb 28th 2004.

necessary, disclosure to the tribunal. A lawyer may refuse to offer evidence, other than the testimony of a defendant in a criminal matter, that the lawyer reasonably believes o be false.
(b) A lawyer who represents a client in an adjudicative proceeding and who knows that a person intends to engage, is engaging or has engaged in criminal or fraudulent conduct related to the proceeding shall take reasonable remedial measures, including if necessary, disclosure to the tribunal.
(c) The duties continue to the conclusion of the proceeding.
(d) In an ex parte proceeding, a lawyer shall inform the tribunal of all material facts known to the lawyer that will enable the tribunal to make an informed decision, whether or not the facts are adverse.

This new rule is a safeguard against perjury by the defendant in his effort against self-incrimination and goes as far as to force the defence counsel to make the defendant silent by refusing to call him to testify but the lawyer must know that his client will make false testimony, not just believe that he might. The defendant on the other hand has the constitutional right to testify on his own behalf. For the lawyer to disclose confidential information to the court is to break the privilege of the client-counsel relationship and to establish a sixth amendment violation of the defendant's right. This privilege against self-incrimination is derogated in respect also of documentary evidence.[50]

The new Restatement of the Law Governing Lawyers 2003 makes an exception to the client-attorney privilege as regards fraud. Section 83 of the Restatement states:
"The attorney-client privilege does not apply to a communication occurring when a client:
(a) consults a lawyer for the purpose, later accomplished, of obtaining assistance to engage in a crime or fraud or aiding a third person to do so, or
(b) regardless of the client's purpose at the time of the consultation, uses the lawyer's advice or other services to engage in or assist a crime or fraud".
Here the USA has made an exception to the legal privilege. In the United Kingdom, legal privilege can only be waived by the client and not by the solicitor in theory, although case-law decisions show a similar slant to the USA's position , not by statute but by the facts of the case. The case of *Walsh Automation (Europe) Ltd v Bridgman* and others [51] is one in which legal advice obtained in furtherance of crime or fraud lost its privilege. This is in fact a "fraud exception" which has been termed as such by Lord Denning in a previous case when he suggested that the test should be whether there was an obvious fraud that the relevant party should not be allowed to shelter behind the cloak of privilege. In the Butte case that Lord Denning decided , his decision was that the facts of that case did not warrant the privilege to be waived, but in this case, Justice Eady gave an order for disclosure of all the categories of documents identified including any relating to legal advice.

[50] In Fisher v United States, the Supreme Court established Fifth Amendment principles applicable to this case. Fisher involved an investigation of possible civil and criminal violations of the federal income Tax laws. The taxpayers obtained their accountants' work papers relating to the preparation of their tax returns and turned the documents over to their attorneys for assistance in the investigation. The Internal Revenue Service subsequently issued subpoenas to the attorneys seeking production of these documents. When the attorneys refused to comply, the government brought enforcement actions against them. As to the issue of privilege against self-incrimination relating to documents, the court held that the privilege protects a criminal defendant from being compelled to give incriminating testimony against himself, but it does not bar the use of incriminating evidence against a person and because the accountants' work papers did not involve any testimony by the tax payers, they were not subject to the privilege against self-incrimination.
[51] Walsh Automation (Europe) Ltd v Bridgeman and others [2002] EWHC 1344 (QB)

As America has moved away from legal privilege , the United Kingdom appear to be reinforcing legal privilege at least as far as citizens income tax affairs are concerned. In 2002 the United Kingdom Inland Revenue was unsuccessful in forcing companies and individuals to disclose confidential legal advice that they had received from their legal advisors, a House of Lords ruling. The privilege is held by the client and only the client can waive the privilege.

As to documents that are privileged, all correspondence between client and solicitor are privileged in the United Kingdom as are all documents that have been obtained without a search warrant except those required under the Criminal Justice Act 1987, the Insolvency Act 1985, the Environmental Protection Act 1990 and the Anti-Terrorism Act 2003. In New York, documents obtained without a search warrant are admissible whilst they are excludable in Illinois.[52]

Conclusion

The right to silence is not the same as the right to be presumed innocent but both fall within the concept of the right to a fair trial. The principle of the presumption of innocence is that a person must not be convicted where there is reasonable doubt that he may not be guilty and tries to eliminate the risk of conviction based on factual error. The principle underlying the right to remain silent is of historical origin. In the UK, both the principles of the presumption of innocence and the right to remain silent are rooted in common law and statute; The 1984 Police and Criminal evidence Act provides that everyone who is arrested has the right to remain silent and to be informed of that right and of the consequences of not remaining silent. The 1998 Human Rights Act provides that every accused person has the right to a fair trial, which includes the right to be presumed innocent, to remain silent, not to testify during the proceedings and not to be compelled to give self-incriminating evidence. Evidence obtained in a manner that violates these rights must be excluded if the admission thereof would render the trial unfair or otherwise be detrimental to the administration of justice. The UK has exceptions to these rights in the form of the 1985 Insolvency Act and the 1987 Criminal Justice Act and the 2002 Enterprise Act and the 2003 Terrorism Act which compels persons to provide incriminating documentary evidence and compels them to give interviews to the authorities on pain of punishment of imprisonment in contravention of the European Convention on Human Rights which the UK has ratified.

In the UK the right to silence has many facets. It consists of immunities which differ in nature, origin, incidence and importance with certain exceptions. They are –

- A general immunity possessed by all, from being compelled on pain of punishment to answer questions posed by other persons or bodies, except if posed by the Department of Trade, the Office of Fair Trading and the Serious Fraud Office.
- A general immunity , possessed by all, from being compelled on pain of punishment to answer questions the answer to which may incriminate them, except questions by the Serious Fraud Office.
- A specific immunity, possessed by all persons under suspicion of criminal responsibility whilst being interviewed by police officers or others in similar positions of authority, from being compelled on pain of punishment to answer questions of any kind, except when the police are investigation terrorism when they can hold a person in breach of

[52] Atkins.R.A, Rubin.P.H, "Effects of criminal procedure on crime rates", 1998, Emory University article, Atlanta.

the Police and Criminal Evidence Act , without a solicitor being present and more longer than the rules of PACE stipulate.

- A specific immunity , possessed by accused persons undergoing trial, from being compelled to give evidence, and from being compelled to answer questions put to them in court.
- A specific immunity, possessed by persons who have been charged with a criminal offence, from having questions material to the offence addressed to them by the police officers or persons in a similar position of authority.
- A specific immunity, possessed by accused persons undergoing trial, from having adverse comment made on failure to give evidence at trial.

In the UK, the examination of all witnesses, including the accused, if he offers himself as a witness, is conducted principally by the advocates for the parties. In this adversarial model of criminal procedure, the judge does not himself examine witnesses, except that he can put supplementary questions. This relative inactivity of the judge in the UK goes back to the medieval trial, this being a primitive combat. England adopted an inquisitorial system in the thirteenth century, following the twelfth century continental way and this was evident in England's ecclesiastical courts and later by its Star Chamber. These courts claimed the power to summon a defendant without warning of the charge to be made against him and to examine him under oath. The powers were abused as the authorities probed into the private affairs of the defendant fishing for something with which to accuse him of. The Star Chamber used the rack and other torture instruments to obtain confessions. The Star Chamber and the Court of High Commission for Ecclesiastical Cases were abolished in 1641 after the 1637 case of John Lilburn who was charged with printing or importing seditious and heretical books who refused to answer questions designed to ensnare him in order to find other charges against him. He was whipped and pilloried for this refusal but petitioned parliament who subsequently abolished the Star Chamber. It was this case that gave rise to the privilege against self-incrimination.

Bentham called the privilege '*one of the most pernicious and most irrational notions that ever found its way into the human mind'*. This tone of criticism was also adopted by Professor Glanville Williams in his 1963 book "The proof of Guilt". Bentley also criticised this rule and he said of it: "*If all criminals of every class had assembled, and framed a system after their own wishes, is not this rule the very first they would have established for their security? Innocence never takes advantage of it; innocence claims the right of speaking, as guilt invokes the privilege of silence"*.
In 1961 Professor Wigmore in his book "Wigmore on Evidence" stated : "*To forbid this (thorough questioning of the suspect) is to tie the hands of the police. The attitude of some judges towards these necessary police methods is lamentable; one would think that the police , not the criminals, were the enemies of society. To disable the detective police from the very function they were set to fulfil is no less than absurd"*.

The Criminal Justice and Public Order Act 1994, amended in 1996, made the first ever changes to this 1641 rule by introducing a permissive adverse inference from the accused silence . Since 1996 in the UK , an inference of guilt may be drawn from four facts – with-holding facts from the police during interrogation if those facts are subsequently relied on in court during the trial; failure to respond to police questions about suspicious things found in his possession or at the place of his arrest or about remarks made at such time; failure to explain to the police his presence at the scene of the crime at the relevant time and failure to testify where it would have been appropriate for an innocent person to do so.

The presumption of innocence as embodied in the human right to a fair trial, is found in the United States Fifth Amendment of its Constitution, in the European Convention on Human Rights, in Article 14 of the International Covenant on Civil and Political Rights, in Article 18 of the American Declaration of the Rights and Duties of Man, in the Article 8 of the American Convention on Human Rights and in Articles 4 and 5 of the Inter American Commission Application.

The American doctrine regarding the presumption of innocence embodies that the prosecution must prove all the essential elements of the crime. The accused may remain silent and offer no defence, relying wholly on the presumption of innocence for acquittal. No adverse inference of guilt may be drawn from his failure to testify and neither the judge not the prosecutor may comment on such failure.[53]
In France, all evidence, including the demeanour and attitude of the accused, is subject to the free and unrestricted evaluation and whatever inferences may be so drawn. The French and other continentals, have an inquisitorial model of criminal procedure but these new systems are vastly different from their former inquisitorial systems of centuries ago when judicial torture was abolished in the middle of the eighteenth century. In the nineteenth century, compulsory interrogations, secret trials based on an investigating magistrate's written summary and the presumption of guilt were abolished.

French criminal procedure starts with an examining magistrate whose role is to collect the facts, determine whether formal charges should be filed and to decide which persons should be charged. All his findings are recorded in detail and kept in a dossier which is available to the suspect. After this the investigating magistrate turns the matter over to the prosecutor's office if he is convinced of the guilt of the accused. Then three judges sit to decide whether to indict the accused.

In France , there is the presumption of innocence, a right to counsel and the right to silence. At an early stage of the proceedings the accused has an absolute right to inspect all the evidence collected by the police, the prosecution and the investigating magistrate. A distinguishing feature of the trial itself is that the *viva voce* witness is the accused. Although there is the right to silence, it is rarely exercised. The trial is a one stop trial . After the closing arguments one judgement on both conviction and sentence is delivered. Mitigating factors have therefore to be placed before the court *ab initio*. The trial focuses on the accused and emphasises his side of the case. He is called to speak first and to speak last also and throughout the trial he is invited to respond to witnesses' testimony. He is not sworn as a witness and is not subject to prosecution for perjury. Therefore remaining silence penalises him.
Adverse inferences from silence are not prohibited and silence in response to specific questions is more damning than refusal to testify at all. There is no jury in these cases. The judge conducts the inquiry and acts as a safeguard to the distortion of truth. These inquisitorial proceedings are non-continuous and issue-separated and proof taking is episodic with the presiding judge deciding what evidence to hear at particular sessions.

The French have a Penal Code and rules of procedure. Most of the arguments are in writing and judges almost always conduct the examination of witnesses through counsel. The burden of proof is on the judge. There are no rules of evidence. and the judges may admit

[53] Griffin v California 380 US 609 [1965].

all evidence they deem fit and are free to question the accused. If expert witnesses are used they are chosen from a government list . Such experts write long written reports rather than give oral testimony.
So essentially , in France, the trial is a public review of the dossier and of the findings of the examining magistrate.

In Germany, a criminal prosecution begins with an official investigation of the alleged crime by the police. When the preliminary investigation is complete the prosecutor then takes control of the case and it is he who decides whether there is enough evidence to prove that the suspect committed the crime. The examination of witnesses is non-adversarial and free from most non exclusionary rules of evidence and conducted by the judge. The defence has access to the dossier. The German criminal trial is mostly a concentrated trial which is started and concluded in one sitting. The first person to be examined is the accused who is informed that he may remain silent.

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Conclusion

In conclusion, the analysis can be summarised as follows:

The privilege against self-incrimination-comparison between France, Germany, UK and USA

	France	**Germany**	**UK**	**USA**
Implied right Overriding rights	Ius Commune	Ius Commune	Magna Carta 1215	Federal Bill of Rights 1788
Conventions	ECHR	ECHR	ECHR	International Convention of Civil and Political rights Article 13(3)(g)
Legislation	Code d'Instruction Criminelle 1808	Criminal Code 1871	PACE 1984	3rd & 5th Amendment
Protective Code	Code de Procedure Pénale 1958	Criminal Code 1975	PACE 1984	Miranda Rights
Derogations	Full	None	CJA 1987 s2	None
Legal reasons for silence	None	Universal	Mental incapacity, and distress	Universal
legal aid	Limited	yes	yes	yes

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