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BETTER TO EXPLAIN OR TO TESTIFY? THE POSITION OF THE ACCUSED AS A SOURCE OF ORAL EVIDENCE IN A CRIMINAL TRIAL IN A COMPARATIVE PERSPECTIVE

Abstract

In this article the position of the accused as a source of personal evidence in three different European legal systems: Poland, Germany, and England, will be presented. This analysis will be oriented to understand the way of functioning of the two different models of giving statements of fact by the accused at a criminal trial. The main difference is that in the common law model of criminal trial the accused may only present evidence by testifying as a witness speaking about what happened, whereas in the continental model the accused gives a specific personal type of evidence (that in the Anglo-Saxon literature is rather described as "oral evidence") that is known as explanations. From this differentiation several consequences arise: among others, the possibility of presenting untruthful explanations and presenting many versions of events in the continental model which have to be assessed by the judges. At the same time, the same right of the accused to silence and not to give incriminating evidence applies in both models of criminal trial – however, in two different shapes and with different types of limitations.[1]

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Keywords

criminal procedure – the accused – comparative law – the right to lie – criminal evidence

Introduction

The role of the accused is one of the basic elements when deciding to which model of criminal trial a particular system belongs. Not only does the trial position of the defendant markedly differ in these models, but also the role and functions of the statements of fact s/he presents at trial. In the most general terms, the fundamental difference is that whereas in the common law model the accused if s/he wants to present a statement of fact must act as a witness (testify), in the continental model the accused can explain, i.e. present explanations as a separate type of oral evidence (*Erklärungsrecht*). In the latter case s/he is not bound by the truthfulness principle. This article focuses on the role played by the accused in the trial as an oral source of evidence and its procedural consequences; that is, the form of deposition and the importance given to his/her statements. Three elements of the accused's position will be presented: first of all, the essence and the scope of the right to remain silent and its limitations in the adversarial (English) and continental model (mostly Polish). Secondly, the question of the form in which the accused presents statements in a trial will be analysed, that can be either a testimony or an explanation these statements of fact; they can be either truthful or false (which leads to another issue – the so called "right to lie"); they can also be used to contradict the indictment or to plead guilty. Another important question will relate not only to in what procedural form the accused speaks in a courtroom, but when – at what stage of criminal trial – it is possible for him/her to break silence and become a personal source of evidence. It will be also shown how the form of presenting statements of fact at a trial influences the procedural position of the defendant at the trial – and how in each of the models of criminal trial this position is in a state of equilibrium although two different concepts of defence apply. Whereas in continental states the defendant is active as a source of information for the court and as a *sui generis* party to the trial while the defence overall must be assessed as passive, in the common law model, although the defendant is passive (most often) as a source of

information and as an independent from his/her counsel party to the trial, the defence as a party to an adversary trial remains active.

The different procedural position of the accused in the legal systems in Poland, Germany, and England will be analysed – and this choice was dictated by two reasons. The first was theoretical: Germany and England have been traditionally treated in comparative literature as two examples of the distinct models of criminal procedure belonging to the continental and common law models, and in result comparing their legal systems always leads to interesting conclusions. The choice of Poland with a system similar to the German one was dictated by the fact that as regards some elements of the Polish system of criminal procedure it is even more inquisitorial than the German system.[2] The second reason these legal systems were chosen is pragmatic: these three Council of Europe Member States (the UK formerly also of the European Union) are bound by the mutual recognition principle that forms the foundation of the cooperation in criminal matters. From the Polish or German perspective the position of the accused in an English court is quite unknown. The representatives of both legal systems are often at a loss as to pointing to the most decisive factors that may influence the accused's decision to give explanations or to remain silent. This article will offer a comparative picture of the legal situation in which the accused finds himself/herself in both legal models of criminal trial wanting to participate in a trial as an oral source of evidence.

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[2] The normative model in Poland and Germany is similar and can be treated for the purposes of comparative analysis as belonging to the theoretical model of a continental trial. As to the inquisitorial traits of the German model of criminal trial, see: S. Sebastian, *Die Strafprozessordnung im Lichte verfahrensbeendender Verständigung Eine Gegenüberstellung von inquisitorischem Grundmodell und adversatorischen Elementen*,, Hallesche Qualifikationsschriften: Universitätsverlag Halle-Wittenberg, 2015, p. 49. The inquisitorial elements of the Polish criminal trial are described by: A. Ryan, "Comparative procedural traditions: Poland's journey from socialist to 'adversarial' system", *The International Journal of Evidence & Proof*, 2016, Issue 4, pp. 305–325.

I. The Limitations to the Right to Remain Silent

1. The Essence of the Right to Silence

The key element of the position of every defendant – in both criminal trial models – is that s/he has a right, but not an obligation, to become a personal source of evidence and to either explain (in the continental model) or testify (in the common law model), or to remain silent throughout the trial. In the jurisprudence of the European Court of Human Rights (ECtHR, or the Court), the right to silence is considered to emanate from the most basic rights of every accused: the right of defence, the presumption of innocence, and the principle of a fair trial – which are also related to the privilege against self-incrimination.[3] Human rights standards, as defined by the Court, have linked the privilege against self-incrimination with the right to silence – as they both result from the need for states to respect individual dignity and the autonomy of an individual.[4] An accused (or suspect) in both legal traditions is under the protection of the *nemo se ipsum accusare tenetur* (*nemo tenetur prodere se ipsum*[5] or *nemo debet se prodere ipsum*[6]) principle, which provides that no one can be compelled to testify against himself, also known as the privilege against self-incrimination. This means that a defendant cannot be forced to cooperate with prosecuting organs in prosecuting himself/herself. In European Union law the right to remain silent and the right not to incriminate oneself is even more strictly regulated: Directive (EU) 2016/343 of the European Parliament and of the Council of 9 March 2016 on the strengthening of certain as-

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[3] See: *Murray v. UK*, Application no. 18731/91, Judgment of 8.2.1996, para 45; *Saunders v. UK*, Application no. 19187/91, Judgment of 17.12.1996, paras 68–69; *Funke v. France*, Application no. 10828/84, Judgment of 25.2.1993, para 44.

[4] J. D. Jackson, S. J. Summers, *The Internationalisation of Criminal Evidence. Beyond the Common Law and Civil law Traditions*, Cambridge: Cambridge University Press, 2012, p. 283.

[5] G. Horowitz, "The Privilege against Self-Incrimination – How Did It Originate", *Temple Law Quarterly*, 1957–1958, Issue 40, p. 121; J. H. Langbein, *The Origins of Adversary Criminal Trial*, Oxford: Oxford University Press, 2003, pp. 277–284.

[6] J. McEwan, *Evidence and the Adversarial Process*, Oxford: Blackwell Publishers, 1998, p. 168.

pects of the presumption of innocence and of the right to be present at the trial in criminal proceedings in Article 7 states that Member States shall ensure that suspects and accused persons have the right to remain silent in relation to the criminal offence that they are suspected or accused of having committed and that they have the right not to incriminate themselves. Moreover, the exercise of this right shall not be used against them and shall not be considered to be evidence that they have committed the criminal offence concerned.[7] According to the preamble, in order to determine whether the right to remain silent or the right not to incriminate oneself has been violated, the interpretation of the right to a fair trial under the ECHR should be taken into account. Also, according to Directive 2013/48/EU of the European Parliament and of the Council of 22 October 2013 on the right of access to a lawyer in criminal proceedings,[8] where a person other than a suspect or accused person, such as a witness, becomes a suspect or accused person, that person should be protected against self-incrimination and has the right to remain silent, as confirmed by the case-law of the ECtHR. As an important element of this right, an obligation was introduced to restrict the admissibility of evidence gathered not in compliance with this right: "Without prejudice to national rules and systems on the admissibility of evidence, Member States shall ensure that, in the assessment of statements made by suspects or accused persons or of evidence obtained in breach of the right to remain silent or the right not to incriminate oneself, the rights of the defence and the fairness of the proceedings are respected" (Article 12(2) of Directive 2013/48/EU).

On the Continent this right is provided in Article 175 of the Code of Criminal Procedure (CCP)[9] in Poland and § 136 StPO[10] in Germany, both

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[7] OJ L 65, 11.3.2016, p. 1–11.

[8] Directive 2013/48/EU of the European Parliament and of the Council of 22 October 2013 on the right of access to a lawyer in criminal proceedings and in European arrest warrant proceedings, and on the right to have a third party informed upon deprivation of liberty and to communicate with third persons and with consular authorities while deprived of liberty, OJ L 294, 6.11.2013, pp. 1–12.

[9] Law of 6 June 1997, Kodeks postępowania karnego, Journal of Laws 1997, No 89, item 555 (hereinafter: CCP).

[10] The German Code of Criminal Procedure: Strafprozeßordnung in der Fassung der Bekanntmachung vom 7. April 1987 (BGBl. I S. 1074, 1319), zuletzt geändert durch Gesetz vom 10.07.2020 (BGBl. I S. 1648) m.W.v. 17.07.2020 (hereinafter: StPO). See on this sub-

of which give the accused the right to refuse – without giving reasons – either to give an explanation or to answer specific questions. A suspect should also be instructed that under the law s/he is free to either comment on the accusation or not, and the accused may even present explanations in writing. The accused may refuse to provide explanations in totality or to answer any question at whatever stage of the hearing for whatever reason. In the jurisprudence of continental courts it is assumed that a refusal to provide explanations does not require any justification, and also cannot be considered as an implicit admission of guilt or reinforcement of suspicion of commission of a crime, nor can it be considered as an aggravating circumstance in the course of sentencing. Since a refusal to provide explanations or answer specific questions is the right of the accused, neither a court nor the prosecuting authorities can draw any negative inferences from the silence of the accused. In this sense it can be concluded that this is an absolute principle. This solution is doubtlessly in compliance with the standard demanded by Directive 2016/343 according to which exercise of the right to remain silent shall not be used against defendants and shall not be considered to be evidence that they have committed the criminal offence concerned. However, the practice does not always reach this high standard.

Also in the adversarial model the accused has an indisputable constitutional right to remain silent: the choice between maintaining total silence and offering testimony at the trial as a witness belongs to him/her. S/he enjoys this right both during the investigation and the trial. It may happen that the accused will choose to speak in the presence of the police and remain silent at the trial; or remain silent at the police station and speak only as a witness in court. The right of the suspect/accused not to answer questions and to not provide evidence to his/her disadvantage in this model is not, however, an unlimited right, although in two models of criminal trial the limitations to this right are of a completely different nature.[11]

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ject: U. Eisenberg, *Beweisrecht der StPO. Spezialkommentar. 10 Auflage*, C.H.Beck: Munchen, 2017, pp. 242–243.

[11] See also observations made in: H. Kuczyńska, „Pozycja procesowa oskarżonego jako osobowego źródła dowodowego w Polsce i Anglii – rozważania prawno-porównawcze", *Studia Prawnicze,* 2019, Issue 2, p. 100.

2. The Right to Draw Negative Inferences from the Silence of the Accused in England

The first limitation of this right in the English model is the obligation to present a line of defence as part of the disclosure of evidence procedure before the hearing, under the condition however that such evidence cannot be used in court proceedings.[12] However, the second limitation to the right to remain silent in England is the most problematic: the right to draw negative inferences from the silence of the accused. *Criminal Justice and Public Order Act 1994* (*CJPOA*), in ss. 34–37, regulates the effect of an accused's failure to mention facts when questioned or charged. It provides that where, in any proceedings against a person for an offence, evidence is given that the accused – at any time before he was charged with the offence – on being questioned under caution by a constable trying to discover whether or by whom the offence had been committed – failed to mention any fact relied on in his defence in those proceedings relating to circumstances existing at the time and which the accused could reasonably have been expected to mention, a judge or jury, "in determining whether the accused is guilty of the offence charged, may draw such inferences from the failure as appear proper." The accused must be instructed about the possibility of drawing such inferences. However, where the accused was at an authorised place of detention at the time of the failure to offer such evidence, the above rules do not apply if he had not been allowed an opportunity to consult a solicitor prior to being questioned, charged, or informed about these rules. Also at trial, at the conclusion of the prosecution's case, the court shall satisfy itself that the accused is aware that the stage has been reached at which evidence should be given for his defence; that he can, if s/he wishes, give evidence; and that if s/he chooses not to give evidence or, having been sworn, refuses to answer a question without good cause, it will be permissible for the court or jury to draw such inferences as appear proper from his/her failure to give evidence or a refusal to answer a given question. The accused should also be instructed that such a be-

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[12] Described as such by: A. Ashworth, M. Redmayne, *The Criminal Process*, Oxford: Oxford University Press, 2010, p. 82.

haviour "may harm your defence"[13] – but only if the accused refuses to speak "without a good cause" – "a good cause" meaning for instance the case when s/he awaits his counsel's advice. Such a statement made by the court should be accompanied by a notice to the jury that the burden of proof rests with the prosecution and that there is a case to answer.[14] In the English legal literature these provisions are by some authors assessed as restrictions on the right to remain silent (even as "an erosion of the right of silence").[15] Although the Act does not completely remove the right to remain silent, it undoubtedly introduces some pressure to offer testimony. The accused does not have a free choice between speaking and maintaining silence – in some ways the accused is forced to speak. Certainly, silence is neither an incriminating nor an exculpatory proof – it must always be assessed in the light of all the evidence. Remaining silent does not prove anything in and of itself. However, it is difficult to imagine a jury which would not interpret the silence of the defendant as significant in particular instances if – and when – allowed.[16] Therefore, in some cases remaining silent in the face of a strong case of the accusation may be virtually tantamount to an admission of guilt.[17] Certainly, in cases in which the only persons with knowledge about the incident would be the victim and the accused (e.g. as in cases of rape), the indicated tactic of defence would be to testify.[18]

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[13] PACE Code of Practice C, p. 10.5.

[14] Court of Appeal in: *R v Cowan, Gayle and Riccardi* [1995] 3 W.L.R. 818: Thomson Reuters Westlaw. See also discussion in the Polish literature: A. Sakowicz, *Prawo do milczenia w polskim procesie karnym*, Białystok: Temida 2, 2019, p. 110–122; H. Kuczyńska, *supra* note 11, p. 103; A. Światłowski, „Prawo do milczenia we współczesnym angielskim procesie karnym", *Palestra,* 2002, Issue 1–2, p. 15.

[15] A. Duff, L. Farmer, S. Marshall, V. Tadros, *The Trial on Trial. Vol. III. Towards a Normative Theory of the Criminal Trial*, Oxford and Portland: Hart, 2007, p. 206; J. R. Spencer, "Evidence" in M. Delmas-Marty, J. Spencer (eds.), *European Criminal Procedures*, Cambridge: Cambridge University Press, 2004, p. 614; A. Ashworth, M. Redmayne, *supra* note 12, p. 97.

[16] P. Mirfield, *Silence, Confessions and Improperly Obtained Evidence*, Oxford: Oxford University Press, 1997, p. 269. "Significant silences" – as they have come to be known: P. Roberts and A. Zuckerman, *Criminal Evidence*, Oxford: Oxford University Press, 2012, p. 574.

[17] McEwan, *supra* note 6, p. 172.

[18] M. Hannibal, L. Mountford, *Criminal Litigation Handbook 2014–2015*, Oxford: Oxford University Press, 2015, p. 314.

In the continental literature, the possibility of drawing negative consequences from the silence of the accused is analysed from a different perspective. As a starting point, it is claimed that such a provision is a consequence of attaching an excessive importance to the use of the accused as a source of evidence in general in English procedural law. It is indicated that the "procedural regulation, placing the accused in such a situation, cannot claim to be fair".[19] On the Continent the assurance that there will be no criminal responsibility for false explanations is aimed both as a precaution against placing too much importance on the accused as a source of evidence, as well as against drawing negative conclusions from his/her silence.[20] The continental doctrine indicates the role of the right to remain silent as a means of strengthening the procedural position of the accused and "levelling" his/her chances against the accuser. It cannot be rationally argued that in each and every case the right to maintain silence is used as a deliberate measure to hinder law enforcement agencies from reaching the truth and/or as a means to protect the true criminal. In the continental law it is claimed that this rule is not designed to protect guilty persons.[21] Silence may be the best defence strategy for an innocent person as well. However, the English law and the English courts act according to the assumption that in normal circumstances an innocent person would speak in his defence in every case where there is evidence pointing to his guilt. For a continental lawyer this assumption is clearly not in compliance with the presumption of innocence nor with placing the burden of proof on the prosecutor.

Notwithstanding the criticism of this solution, the ECtHR did not find that the possibility of drawing negative consequences from the silence of the accused under English law violated Article 6 of the Convention. In *Murray* it stated that it is a matter to be determined in the light of

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[19] M. Rusinek, '"O „prawie do kłamstwa" (artykuł polemiczny)", *Prokuratura i Prawo*, 2008, Issue 4, pp. 90–91

[20] In the Polish literature, see also: W. Nestorowicz, *Oskarżony i jego przysięga w rozwoju historycznym procesu karnego*, Warszawa: Zakłady wyd.-druk. Praca, 1933, p. 5; P. K. Sowiński, „Prawo oskarżonego do milczenia oraz reguła nemo se ipsum accusare tenetur na tle dążenia organów procesowych do poznania prawdy materialnej w procesie karnym", in Z. Sobolewski, G. Artymiak (eds.), *Zasada prawdy materialnej*, Warszawa: Wolters Kluwer, 2006, p. 169.

[21] See: Roberts, Zuckerman, *supra* note 16, p. 559.

all the circumstances of the case, having regard to the situations where inferences may be drawn, the weight attached to them by the national courts in their assessment of the evidence, and the degree of compulsion inherent in the situation. It observed that it would be incompatible with the right to maintain silence to base a conviction solely or mainly on the accused's silence or on a refusal to answer questions or to give evidence himself. Nevertheless, the Court found that it is obvious that the right cannot and should not prevent the accused's silence from being taken into account in situations which clearly call for an explanation from him when assessing the persuasiveness of the evidence offered by the prosecution. Thus, the Court has declared that the question of whether the right to silence is an absolute right must be answered in the negative.[22] In *Averill* the Court again observed that the regulation provided in English law was intended to "permit the drawing of proper inferences from the failure of suspects to mention to the police any fact later relied on in their defence, to prevent the hampering of police investigations by the accused who take advantage of their right to silence by waiting until the trial to spring exculpatory explanations, in circumstances in which the accused has no reasonable excuse for withholding an explanation."[23] The Court admitted that while it may be expected in most cases that innocent persons would be willing to cooperate with the police in explaining that they were not involved in the suspected crime, there may be reasons why in a specific case an innocent person would not be prepared to do so. In particular, an innocent person may not wish to make any statement before he has had the opportunity to consult a lawyer. Therefore, a warning must be given against attaching weight to the silence when a person arrested in connection with a serious crime was denied access to a lawyer during the interrogation. In such cases, the suspect cannot be expected to provide detailed responses when confronted with incriminating evidence against him – and it has been shown that English law takes this condition into consideration. Moreover, the fact, that the accused may have been advised by his lawyer to maintain his silence, must also be given appropriate weight by the domestic court. However, in the *Condron* judgment, the Court stressed that there is no

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[22] *Murray v. UK*, Application no. 18731/91, Judgment of 8.2.1996, para 47.

[23] *Averill v. UK*, Application no. 36408/97, Judgment of 6.6.2000, para 49.

"automatic effect" of the violation of the right to silence[24]. Whether the drawing of inferences from an accused's silence during a police interview infringed Article 6 should be determined in the light of all the circumstances of the case. The Court decided, that the mere fact, that the question of an accused's silence was left to the jury could not, of itself, be considered incompatible with Article 6. In this case the Court also underlined that the formula employed by the trial judge should reflect the balance between the right to silence and the circumstances in which an adverse inference may be drawn from silence, including by a jury.

At the same time Directive 2016/343 provides that the exercise of this right shall not be used against defendants as well as it introduces the prohibition to use "silence" as "evidence that they have committed the criminal offence concerned". Does it introduce a prohibition of drawing negative consequences from the silence of the accused? From the literature it can be concluded that English courts do not treat this institution as "using the silence against the defendant". From the jurisprudence of the English Court of Appeal it is clear that silence itself has no "probative value". Drawing inferences therefrom is more of a permission to exercise a psychologically reasonable interpretation: "to give common sense freer rein in criminal adjudication."[25] It should not be understood that the standard of proof is being lowered. According to the adopted model, the inferences are legitimate only when the police have a sufficiently strong case against the suspect to necessitate a response – and more importantly that the suspect has been informed of the evidence in the possession of the police and despite the irrefutable meaning of the evidence (e.g. his/her prints in the murder weapon or his presence at the crime scene) s/he still chooses to remain silent. The English court must be aware of and take appropriate steps to ensure that such a reasoning does not become an instrument in the hands of the police to force people to speak whenever the police suspects them of having committed an offence[26]. In this regard, it is possible to claim that the English model is in compliance with the standard of guarantees required by the Directive.

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[24] *Condron v. UK*, Application no. 35718/97, Judgment of 2.5.2000, paras 60–61.

[25] P. Roberts, A. Zuckerman, *Criminal Evidence*, Oxford: Oxford University Press, 2012, p. 572.

[26] Roberts, Zuckerman, *supra* note 16, p. 579.

Analysis of the Anglo-Saxon literature leads to the postulate that the privilege against self-incrimination should not be strictly equated with the right to remain silent[27]. While the privilege is absolute, the right to remain silent is not. It may be assumed that the minimum content of the privilege is reduced to the idea that no person can be compelled to cause his own conviction by testifying[28] – the accused is only 'compelled' to speak in his/her defence, to explain his/her innocence; for example why s/he was seen near the place of the crime. This concept is in accordance with a theory that the right of silence is "a composite right that is made up of a number of more specific rights,"[29] such as the privilege against self-incrimination, whether orally or in writing; the right to information about this right itself; and the right to have a lawyer to offer professional advice on the best ways to exercise this right – although it may seem that the right to silence and the privilege against self-incrimination rather overlap than create one entity (as the privilege relates to broader types and sources of information, such as e.g. professional privilege, the production of incriminating evidence coming from body samples, etc.).[30] Certainly, for the right to silence to be real and correctly applied, there must be adequate procedural guarantees for the accused, in particular the right to have a lawyer (free of charge if suspects and accused persons lack sufficient resources to pay for the assistance of a lawyer, have the right to legal aid, and when the interests of justice so require, according to article 4(1) of the Directive (EU) 2016/1919[31]) from the very first meeting with the prosecutorial authorities (or rather to be able to consult a lawyer before a hearing), and the right to reliable and understandable information about the procedural rights (in particular the right to

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[27] P. Roberts and A. Zuckerman state that they can be defined and disaggregated in different ways, citing the *R v Director of Serious Fraud Office, ex p Smith* [1993] AC 1, 30-1, HL. See: Roberts, Zuckerman, *supra* note 16, p. 540.

[28] M. Damaška, "Evidentiary Barriers and Two Models of Criminal Procedure: A Comparative Study", *University of Pennsylvania Law Review* 1973, Issue 121, p. 527.

[29] F. M.W. Billing, *The Right to Silence in Transnational Criminal Proceedings: Comparative Law Perspectives*, Springer 2016, p. 6 although Jackson and Summers (*supra* note 4, p. 249) seem to identify the scope of these rights basing on the ECtHR jurisprudence.

[30] Billing, *supra* note 29, pp. 8–9.

[31] Directive (EU) 2016/1919 of the European Parliament and od the Council of 26 October 2016 on legal aid for suspects and accused persons in criminal proceedings and for requested persons in European arrest warrant proceedings (OJ 2016 L 297, p. 1).

remain silent and to a lawyer) – and those should be guaranteed as the Directives 2013/48/EU and 2012/13/EU of 22 May 2012 on the right to information in criminal proceedings, are supposed to have been implemented in all the EU Member States.

3. Manipulating with Time – the Moment of Presenting Charges as a Limitation to the Right to Remain Silent

In continental states, where the stage of investigation (preparatory proceeding) is a separate and formalised stage of a criminal trial, only a "suspect" or an "accused" enjoys the right to remain silent. Thus, it is the moment of procedurally becoming "a suspect" that changes the type of evidence from testimony (of a witness) to explanations (of a suspect). As it is not always possible to decide whether a witness should become a procedural "suspect" the division into "accused *sensu largo*" and "*sensu stricto*" has been made typical of the continental trial model. The former also includes a suspected person or witness who provides evidence to his disadvantage before being charged. There is an important difference in the set of concepts used to describe a defendant: a suspected person (*Verdächtiger, osoba podejrzana*) becomes a suspect (*der Beschuldigte*[32]*, podejrzany*) when charges are presented by a prosecutorial authority (police or a prosecutor), and a suspect becomes an accused (*der Angeklagte, oskarżony*) when an indictment is sent to a court.[33] Additionally, after indictment, but before admission of the indictment, such a person is called in German procedural law the *Angeschuldigte*. If an indictment cannot be issued (for example in the case of a person mentally incapacitated, "substitutes" for an indictment are used), the suspect remains "a suspect" until the end of the proceedings. In every one of these "statuses" this person can be interviewed, and each time s/he makes the decision whether to explain or to remain silent. Each time s/he 'explains', his/her statements are included in the case file and can become grounds for a finding of the court – in Poland, whereas in Ger-

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[32] §157, § 170 StPO.

[33] As regards Poland, see: Ryan, *supra* note 2., p. 315; and Germany: M. Bohlander, *Principles of German Criminal Law*, Bloomsbury: Hart Publishing, 2008, p. 16.

many only the files of interviews made by a judge can be included into a trial case file.

However, the line dividing these two legal statuses can be drawn differently. In Poland, the element that distinguishes a suspected person (deprived of the defendant's rights in a criminal trial) from a suspect (who is a party to the trial and a subject to a set of procedural rights) is a formal element of the filing of official charges, taking the form of a decision on presentation of charges. Before it happens, any witness is subject to provisions of Article 233 § 1a CC, which provides for the criminal responsibility of a suspected person (that is, also a person still appearing formally as a witness, although already informally suspected by the investigating authorities to be the perpetrator) who testifies falsely or conceals the truth for fear of possible criminal liability. Such a person is punished by imprisonment from 3 months up to 5 years. As it results the right to remain silent cannot be read separately from the division into "accused *sensu largo*" and "*sensu stricto*", which is typical of the continental trial model. It would seem that a suspected person enjoys no right to remain silent in a Polish criminal trial. However, there is also another provision that provides for a quite contradictory regulation – Article 183 of the Code of Criminal Procedure provides that "A witness may refrain from answering the question, if the answer could expose him or the person closest to him to criminal responsibility for a crime or tax offence". It is clear that these two provisions stay in contradiction (a state quite common nowadays in Polish law). Which one of them does a court choose when it comes to a trial for such a witness? Should it decide on the criminal responsibility of such a witness on the basis of Article 233 § 1a CC, and rule that Article 183 CCP relates only to an exclusionary evidentiary rule? It is not clear whether before the formal moment of presenting the charges a witness has no right to silence. For the time being, the authorities often postpone the moment of presenting charges to the "suspected person", wishing to use the fact that in such a status she/he is deprived of the right to refuse to explain.[34] Seen against the background of the first

[34] This often happens in practice; see: P. Nowak, „Definicja podejrzanego i oskarżonego a konstytucyjne prawo do obrony", *Czasopismo Prawa Karnego i Nauk Penalnych*, 2016, Issue 4, p. 81; Sakowicz, *supra* note 14, p. 235.

section of this article, this provision may be perceived as a serious limitation on the right to silence[35], subordinating the use of this right to the decision of the prosecuting authority. It is the prosecuting authority who decides whether a given person has the right to silence during the interrogation, "shifting" the moment of presenting charges until a person admits guilt or gives incriminating "testimony". Postponing the presentation of charges is common in practice and is obviously beneficial for the "efficiency" of prosecution and "statistics" of the prosecuting authority. In the Polish literature there is a common opinion that one should depart from such formalistic notions of a suspect/suspected person by introducing a solution based on the factual status of the suspect, as is functioning in Germany.[36]

In Germany a different model was adopted – the concept of a "factual suspect". The principle of *nemo se ipsum accusare tenetur* applies from the moment that the investigating authorities suspect a person of possibly having committed a crime. According to the *opinio iuris*, the way in which the interrogation is conducted reflects a manifestation of the will to prosecute – and accordingly, once such a will is evident, the suspect should be instructed about his/her right – as a suspect – to speak or remain silent. The essence of becoming a suspect is created – subjectively – by the prosecution's will to prosecute, which manifests itself – objectively – in a purposeful act, i.e. in the way the interrogation is conducted (e.g. questions related to the incriminated act such as:

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[35] See observations made in 2010 but still actual: E. Cape, Z. Namoradze, R. Smith, T. Spronken, *Effective Criminal Defence in Europe. Executive Summary and Recommendations,* Antwerp – Oxford – Portland: Intersentia, 2010, pp. 10–11 who also point to the fact that: „Despite the fact that accused persons are entitled to a lawyer at all stages of criminal proceedings, in practice legal aid is generally not available at the investigative stage or at early hearings such as those at which a decision is made regarding pre-trial detention".

[36] See the opinion of the Ombudsmen: https://www.rpo.gov.pl/pl/content/realne-prawo-do-obrony-gwarantuje-dyrektywa-ue-ktorej-nie-wprowadzono-do-polskiego-prawa-rpo-pisze-do-premiera. The response of the Minister of Justice of 17 February 2017, DL-III-072-29/16 (accessed 2.05.2019); S. Steinborn, "*Status osoby podejrzanej w procesie karnym z perspektywy Konstytucji RP (uwagi de lege lata i de lege ferenda*)", in P. Kardas, T. Sroka, W. Wróbel (eds.), *Państwo prawa i prawo karne. Księga Jubileuszowa Profesora Andrzeja Zolla. Tom II*,, Warszawa: Wolters Kluwer, 2012, p. 1787; P. C. Kłak, „"Osoba podejrzana" oraz „potencjalnie podejrzana" w polskim procesie karnym a zasada *nemo se ipsum accusare tenetur*", *Ius Novum* 2012, Issue 4, pp. 60–61; Sakowicz, *supra* note 14, p. 236.

"Where is the body?" or "Your conscience does not plague you?").[37] In this way the interrogated person turns into a suspect – based on the real meaning of the procedural activity of the interrogator (which is implied). In Germany it was considered that giving the procedural authorities the power to decide from what moment the accused enjoys his rights "undermined" the constitutional rights of the accused.[38] The right to remain silent of the accused is thus independent of issuing of certain procedural decisions.

This small – as it would seem – difference between the method and timing of presenting charges to a suspected person is crucial for the effective and real right to remain silent and not to incriminate oneself. The possibility of manipulating the timing of the presentation of charges leads to the conclusion that the solution adopted in Polish Article 233 § 1 CC (however contradicted by Article 183 CCP) is not only a major violation of Directive 2014/41/UE, but also a violation of Article 6 ECHR. According to the provisions of Directive 2014/41/UE, the right of access to a lawyer should be available from the earliest moment: already a suspected person should enjoy this right if interviewed in connection with the suspicion of committing a crime. It should therefore apply to a person who has the status of a suspected person within the meaning of Polish law. It follows from the Directive that the status of a suspect and the related right to a lawyer are also vested in a witness who during the interrogation begins to provide information incriminating himself.[39] Such a person should be considered a "suspect" from the moment in which in fact: both subjectively and objectively, the prosecuting authority recognizes that s/he may be the perpetrator, asking, for example, questions

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[37] Judgment of BGH, Urt. v. 3.7.2007, printed in NJW 2007, 2706 – 1 StR 3/07, and a commentary by: S. Mikolajczyk, „Urteilsanmerkung: Zur Begründung der Beschuldigteneigenschaft durch die Art und Weise einer Vernehmung", *Zeitschrift für Internationale Strafrechtsdogmatik*, 2007, Issue 14, p. 566. See also the jurisprudence cited.

[38] W. Beulke, *Strafprozessrecht*, Heidelberg: C.F. Müller, 2005, p. 66; K. Volk, *Grundkurs.Strafprozessordnung*, München: Nomos, 2006, pp. 36–37.

[39] As for the standard resulting from the directive and the implementation thereof in Member States see: E. Cape, J. Hodgson, "The Right To Access To A Lawyer At Police Stations. Making the European Union Directive Work in Practice", *New Journal of European Criminal Law*", 2014, Vol. 5, Issue 4, p. 462; M. Wąsek-Wiaderek, Dostęp do adwokata na wczesnym etapie postępowania karnego w prawie Unii Europejskiej", *Europejski Przegląd Sądowy*, 2019, Issue 1, pp. 17–23.

aimed at confirming the participation of a given person in committing a crime. In order to properly guarantee the level of protection resulting from the Directive, in the moment where such a suspicion arises, the hearing should be suspended immediately in order to allow the interviewed person to receive a lawyer's advice. The same standard has been established in the ECtHR jurisprudence: if a suspected person is interrogated without the participation of a lawyer, i.e. his request for counsel is rejected – this is an "irreversible" violation of his article 6 rights – that is, the trial becomes unfair and only elimination of such evidence can ensure its reliability. The Court underlined the importance of the investigation stage for the preparation of the criminal trial, as the evidence obtained during this stage determines – especially during the first interrogation of a suspected person – the framework in which the offence charged will be considered at the trial (in *Salduz v. Turkey*[40] and in *Płonka v. Poland*[41]). At the same time, in *Ibrahim* the Court decided that acquiring evidence in breach of this principle does not automatically lead to a violation of Article 6 if the trial in general can be assessed as fair.[42]

II. Two Types of Offering Evidence Compared

1. Offering Evidence in the Form of Explanation in the Continental Model

As it was shown above, if the accused does not wish to exercise his/her right of silence, s/he can take an active part in the criminal trial. The right of the accused to remain silent has a common consequence for both legal traditions: in the criminal trial, the accused either appears as a source of evidence, or does not. The decision is solely his/hers. No procedural authority has the power to influence this decision. However, not only is the scope of the right to silence different in both systems (as was

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[40] *Salduz v. Turkey*, Application no. 36391/02, Judgment of 27.11.2008, para 54.

[41] *Płonka v. Poland*, Application no. 20310/02, Judgment of 31.3.2009, para 33.

[42] *Ibrahim v. United Kingdom*, Application no. 50541/08, Judgment of 13.9.2016, para 274. See also: W. Jasiński, „Dostęp osoby oskarżonej o popełnienie czynu zagrożonego karą do adwokata na wstępnym etapie ścigania karnego – standard strasburski", *Europejski Przegląd Sądowy*, 2019, Issue 1, pp. 24–30.

shown in the previous section), but so too is the way of testifying in the trial (which is discussed below).

In the continental model several characteristic features should be pointed out: first of all, the characteristic trait of this model is that the explanations constitute a procedural form of making statements of knowledge (as opposed to statements of will, such as, e.g. the accused's formally pleading guilty in the framework of a plea bargaining agreement in the common law states). The accused cannot give testimony – the prohibition to act as a witness in his own case is without exception (even against his co-defendant). The suspect, who later becomes the accused, "explains". Even the "tone" of this word gives the notion that s/he "explains" how s/he ended up being suspected, then accused, by giving clarifications as to his/her possible part in the crime (or lack thereof). The accused has the right to tell his/her own story – not by means of presentation of evidence by his/her legal representative. Thus, in the continental model the basic division of such statements is, firstly, between "explanations" presenting the accused's role in the crime and those denying that s/he took part. The second division could be between truthful explanations and untruthful ones – which leads to the commonly misunderstood concept of a so-called "right to lie".[43] Thirdly, explanations can play a dual role: the exercise of the right to defence (when the accused denies the case, presenting for example an alibi or alternative course of events); or a means of accusation – when the accused pleads guilty within the framework of the initial statement.[44] In the procedural meaning confessions are treated as statements of knowledge (constituting a type of explanations) and not statements of will (leading to a plea bargain) as in England. In continental trials all types of explanations are given the same evidentiary weight in terms of being an oral source of evidence.

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[43] This 'right' is usually proffered by common law lawyers. See: Bohlander, *supra* note 33, p. 7.

[44] See: P. Wiliński, *Zasada prawa do obrony w polskim procesie karnym*, Kraków 2006, p. 345; M. Cieślak, *Polska procedura karna: podstawowe założenia teoretyczne*, Warszawa: PWN, 1984, p. 427; T. Grzegorczyk, *Kodeks postępowania karnego. Komentarz*, Warszawa: Wolters Kluwer, 2011, p. 599; Z. Muras, *Wyjaśnienia oskarżonego w procesie karnym i prawie karnym materialnym*, Warszawa: C.H.Beck, 2014, p. 73; M. Klejnowska, *Oskarżony jako osobowe źródło informacji o przestępstwie*, Kraków: Zakamycze, 2004, p. 22.

Secondly, the right to be heard exists throughout the entire proceedings: after the testimony of every witness, expert, and co-defendant (if any); and after the reading of every document (Article 175 § 2 CCP and § 257 StPO) – although the defendant may remain silent if s/he prefers.[45] The accused may also address questions to every witness and expert (Article 370 § 1 CCP and § 240 StPO). After the presentation of each piece of evidence, the defendant is asked if s/he has anything to explain.[46] Assessment of the role of the accused as a source of evidence should thus take into consideration the fact that the right to present explanations should also be understood as the right of the accused to comment on the evidence presented at trial on an ongoing basis, and that these statements constitute statements of knowledge of the accused, being given the same weight and meaning as the "basic" explanations (relating to all the issues that s/he wishes to discuss and hardly ever restricted by the court).

Thirdly, it should be taken into account that in the continental trial the concept of the right to defence in the material aspect (the formal aspect being the right to counsel) and the right to submit "explanations" result in a lack of criminal responsibility for one's testimony. The provisions constituting the basis for explanations of an accused (Art. 175 § 1 CCP and § 136(2) StPO) are usually considered to constitute at the same time the basis for the right to submit both true and untrue explanations.[47] In Anglo-Saxon literature this "continental right" is presented as something extraordinary: "The accused does not take an oath and therefore can lie without fearing a subsequent prosecution for perjury."[48] In common language it is the so-called "right to lie" although it is not a right in the procedural sense of a "subjective" right, but solely the right not to be held criminally responsible for giving false explana-

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[45] H. H. Meyer, "German Criminal Procedure: The Position of the Defendant in Court", *American Bar Association Journal*, 1955, Vol. 41(7), p. 666.

[46] As to the same rights of the prosecutor in Poland, see: A. Bojańczyk, "Obsolete Procedural Actors? Polish Prosecutors and their Evidence-Gathering Duty Before and during Trial in an Inquisitorial Environment" in E. Luna, M. Wade (eds.), *The Prosecutor in Transnational Perspective*, Oxford: Oxford University Press, 2012, p. 276.

[47] See: Ł. Pohl, „Składanie nieprawdziwych wyjaśnień przez oskarżonego w polskim postępowaniu karnym –szkic teoretyczno prawny", *Prokuratura i Prawo,* 2006, Vol. 6, p. 38.

[48] Jackson, Summers, *supra* note 4, p. 245.

tions. It is also a simplified approach in the sense that the real limits of criminal responsibility are set by the provisions of substantive not procedural criminal law (in Poland Article 233 CC, and in Germany § 153 StPO). It should be agreed that the accused has no "procedural right to lie", although at the same time s/he is not at risk of being held responsible according to criminal law for making false statements. In the German literature it is commonly stressed that "continental people are realistic"[49] and they acknowledge that every person facing criminal responsibility might lie. Therefore, the law should not punish him/her for what is a reasonable behaviour. At the same time, this privilege should not lead to the conclusion that the accused's explanations should be always treated with distrust and assessed as incredible; the right to present untruthful explanations should not be automatically presumed to signify that all the explanations are incredible; it is the role of a judge to assess their credibility at the stage of holistic evaluation of evidence[50]. As a matter of principle, it is assumed in both the German and Polish doctrine that "the obvious fact of the accused's interest in the outcome of the proceedings cannot be the basis for a general consideration of the accused's explanation as less credible."[51] It should be remembered that this "right" is bonded with the procedural status of the suspect and thus in Poland it can be introduced only after the formal moment of presenting the charges.

However, as to the scheme of interrogation – the accused is interrogated according to the same scheme as a witness. Although the same principle applies in the common law model, on the Continent it includes the accused's right to make a spontaneous statement before s/he is questioned by the parties and the court. Also, although the accused may be (but not always is) questioned by other parties (the prosecutor and the subsidiary accuser and his counsel) during "a sort of" cross-examination and re-examination, this procedure is not conducted according to such a rigid scenario as in the common law model, and the accused can say whatever s/he thinks is suitable and many times throughout the trial.

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[49] There is also no "ethical" obligation to tell the truth that could be placed on the accused, according to the German literature, see e.g. Meyer, *supra* note 45, p. 666.

[50] Eisenberg, *supra* note 10, pp. 243–244.

[51] For more regarding the German criminal trial, see: Bohlander, *supra* note 33, p. 36; Meyer, *supra* note 45, p. 666 and the Polish criminal trial: Cieślak, *supra* note 44, p. 426.

2. Offering Evidence in the Form of Testimony In The Common Law Model

In the common law model, the accused cannot make statements of knowledge in the form of explanations. This does not mean that the accused does not play a role as an oral source of evidence at all. The accused, as a source of evidence, can provide oral evidence in a different capacity from that in the Continental trial – in the form of testimony, i.e. deciding to become a witness. Also the accused's other statements, such as informal confessions and even specific behaviour, can become oral evidence.

In an English trial a defendant who chooses to testify does so as a witness in his/her own case. However, the accused is exempted from the compulsory process of testifying which binds all other witnesses.[52] According to s. 53(1) *Youth Justice and Criminal Evidence Act 1999*, an accused can appear in trial as witness competent to give evidence. Nevertheless, if s/he decides to testify s/he does so under oath and it is no longer possible to refuse to answer any questions. If the accused testifies at his/her trial, s/he is interrogated according to the same pattern as all other witnesses. S/he is then subject to all the rights and obligations of a witness, and is not treated in any particular way: s/he testifies under the threat of perjury, i.e. penal responsibility for giving untruthful testimony. Therefore, "unfortunately" for the accused, if s/he decides to take the stand as a witness, his/her decision can lead to serious consequences. Once s/he begins to talk – s/he has to talk. S/he waives his privileges and has to answer all the relevant and proper questions put to him/her and tell the whole truth. S/he may not "pick and choose" which questions s/he will answer solely on the grounds that to do so would not serve the interests of her/his case.[53] Even (or especially) during cross-examination the privilege against self-incrimination cannot be invoked: according to s. 1(2) *Criminal Evidence Act 1898* "a person charged in criminal proceedings who is called as a witness in the proceedings may be asked any question in cross-examination notwithstanding that it would tend to criminate him as to any offence with which he is charged in the

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[52] Roberts, Zuckerman, *supra* note 16, p. 541.

[53] McEwan, *supra* note 6, p. 168.

proceedings." Consequently, the accused cannot take the witness stand in order to present his version of events and deny his guilt; once s/he is there s/he must submit to the procedure of cross-examination conducted by the prosecution. Also the right to free expression of a witness is unknown to the Anglo-Saxon trial system. It can be noted that pleading guilty is not a statement of fact – the accused can make this statement of will and bear no responsibility for its untruthfulness.

Therefore, in an English criminal trial the decision of an accused to testify should be very carefully considered: if an accused decides to become a witness, a number of practical factors should be taken into account, starting with the simplest question: will the defendant make a good impression? (or "How will my client come across in the witness box?"[54]). Will the accused, as a witness, look credible and testify in a competent and convincing manner? Will s/he be able to show and maintain his/her credibility under cross-examination? Another factor relevant to making such a choice is also the accuracy and efficiency of conducting the investigation – in the face of irrefutable evidence of guilt, the accused may not really have a choice. At the same time however, the right to draw adverse interferences from the accused's silence can be another decisive factor: a fear of adverse inferences being drawn may force even an unwilling and unconvincing defendant into the witness-box.[55]

In continental Europe almost all defendants choose to explain – both during police interrogation and at trial.[56] Why should a defendant be silent if there is in no danger of criminal charges for perjury, and there is always a chance that the court would consider his explanation credible? S/he loses nothing and can only gain: s/he can lie creating mitigating versions of events and will not bear any consequences of lying. Lies are not subject to consequences, and this may encourage the accused to produce a "good story".[57] A defendant who refuses to speak

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[54] Hannibal, Mountford, *supra* note 18, p. 314.

[55] McEwan, *supra* note 6, p. 180.

[56] E. Cape, J. Hodgson, "The Right To Access To A Lawyer At Police Stations. Making the European Union Directive Work in Practice", *New Journal of European Criminal Law*, 2014, Issue 4, 2014, p. 455–458; J. Hodgson, *The role of lawyers during police detention and questioning: a comparative study*, Warwick Law School, 2015, p. 3.

[57] Roberts, Zuckerman, *supra* note 16, p. 562, commenting on D. J. Seidmann, A. Stein, "The Right to Silence Helps the Innocent: A Game-Theoretic Analysis of the Fifth Amendment Privilege", *Harvard Law Review*, 2000, Issue 114, p. 431.

forfeits the opportunity to offer a mitigating account of his actions. The position of the accused is however different during the investigation and at trial; inasmuch as taking the stand at trial is obligatory. As seen from the English perspective: "the defendant in a criminal trial cannot be compelled to give evidence (…) in continental trials, the accused cannot decline to be questioned, but he can decline to answer (…) If he does elect to explain himself, he does this unsworn."[58] It is not however seen as a "certain psychological pressure to speak" as the accused can still without any consequences refuse to speak. But even if defendants stay silent, most judges will still ask questions – the questions may of course remain without an answer. The usual way to deal with a defendant who refuses to speak at trial is to read aloud the protocol of the hearing by the police. When at trial the accused uses his/her right to silence or refutes the charges, the protocols of his earlier interviews in the role of a suspect may be read out, according to both § 254 StPO and 396 CCP[59]. Then the judge asks the accused if s/he confirms his/her former statements, although the accused still does not have to answer such a question. If s/he spoke during earlier interrogations, whether s/he speaks at trial or not his statements may be used as evidentiary material. From the practical dimension, the refusal to speak at trial could even be the result of fatigue from speaking on the same topic on so many previous occasions in front of the prosecuting authorities – and such an answer is often given by the defendants in court.

3. When to Break the Silence? The Timing of Presenting a Statement by the Accused

The privilege against self-incrimination can be asserted in two different phases of the criminal trial: during the police investigation (preparatory proceedings in the continental model) and at trial.[60] Therefore, one more factor should be taken into consideration, namely the moment of "coming forward" by the accused. In every case it should be

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[58] McEwan, *supra* note 6, p. 177.

[59] J. Seier, „Der strafprozessuale Vergleich im Lichte des § 136a stopp", *Juristen Zeitung*, 1988, Issue 14, p. 685.

[60] Roberts, Zuckerman, *supra* note 16, p. 547.

borne in mind that there is a continuity between the investigative phase and the trial procedures: the suspect's choice as to whether to speak to the police or to remain silent in the pre-trial phase, as well as all the things s/he says, have consequences "for the way in which the evidence unfolds at trial."[61] These consequences may be different in every legal model of a criminal trial.

In the English system, having in mind that various rules apply to different stages of a criminal trial, it is sometimes claimed that, "Silence is rarely the best policy at the police station." However, from the point of view of defence tactics it may be worthwhile to keep silent, as at trial, before the accused is given the chance to submit to questioning s/he has already heard the witnesses for the prosecution. The accused speaks only after the prosecution has established a *prima facie* case, and can react to all the evidence presented by the prosecution.[62] At the police station the suspect is in a situation where it is not known what incriminating evidence the police have. Thus silence at the police station can be used as a weapon – a bargaining chip to get the police to explain what evidence they have.[63] It would seem that the accused should keep silent at the police station in England, as at trial they cannot speak untruthfully, and yet if they remain silent nonetheless their previous statements or confessions can be read out. However, taking into consideration the previous reflections it should be noted that the possibility of drawing negative consequences from the maintenance of silence on the part of the accused has been a major change. Most research studies indicate that after the introduction of such regulations, a larger number of defendants decided to testify and now rarely remain silent.[64] Recently, empirical research has shown that suspects are both less likely to remain silent at the police station as well as more likely to testify at trial than was the case before the introduction of s. 35 PACE.[65] Most of the accused testify

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[61] Billing, *supra* note 29, p. 13.

[62] Damaška, *supra* note 28, p. 549.

[63] McEwan, *supra* note 6, p. 171.

[64] *Ibid*., p. 170; Roberts, Zuckerman, *supra* note 16, p. 557. For Northern Ireland see:. J. Jackson, M. Wolfe, K. Quinn, *Legislating against Silence: The Northern Ireland Experience*, Belfast: Northern Ireland Office, 2000.

[65] J. D. Jackson, "Silence and Proof; Extending the Boundaries of Criminal Proceedings in the United Kingdom", *The International Journal of Evidence and Proof*, 2001, Issue 5, p. 145.

in their own defence. Even with the advice of legal counsel, in 78% of cases the legal advisers recommend co-operation with the police[66] (of course in a case of cooperation when a plea bargain is concluded there will be no trial).

The above-described tactics may have a common denominator with a decision taken by the accused in the continental process. In both models of criminal trial the adequate choice of words during the police interrogation is crucial, because this part of the investigation "is not simply preliminary, but may have a determining evidential effect at the trial of the accused"). The police interview and the trial are to be seen as part of a continuous process in which the suspect is engaged from the beginning.[67] Both in England, Poland, and Germany a defence counsel, when deciding whether to propose to the accused the tactic of taking the stand or remaining silent, should take into account the evidence collected in the case in support of the accusation. The more numerous and more categorical is the evidence, the more it would be advisable to provide explanations (even if false), or even to plead guilty and cooperate with the law enforcement authorities or the judiciary.[68] On the other hand, a tactic commonly chosen by defence counsel is to instruct the accused to refrain from testifying when the evidence presented by the prosecution is so unconvincing that there is no case to answer. Marginally it is worth mentioning that no legal advice before the first hearing (which is a common practice in Poland) most often results in "convincing" (somehow) the suspect that s/he should speak and confess.

The issue of when the accused should break his silence leads to the issue connected with the sequence of presentation of evidence at trial. In England if the accused decides to take the witness stand and testify in his/her own defence, s/he should be called before the other wit-

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[66] A. Zuckerman, "Trial by Unfair Means: The Report of the Working Group on the Right of Silence", *Criminal Law Review*, 1989, p. 855.

[67] J. Hodgson, "The Future of Adversarial Criminal Justice in 21st Century Britain", 35 *North Carolina Journal of International Law and Commercial Regulation*, 2009, Issue 35, p. 332 citing Lord Justice Laws described it in *Regina v. Howell*.

[68] In the Polish criminal trial: P. Girdwoyń, *Zarys kryminalistycznej taktyki obrony*, Kraków: Zakamycze, 2004, p. 72; regarding the German criminal trial: F. Gillmeister, "Die Verteidigererklärung als Einlassung des Angeklagten", in S. Hiebl, N. Kassebohm, H. Lilie (eds.), *Festschrift für Volkmar Mehle zum 65. Geburtstag*, Baden-Baden: Nomos, 2009, p. 233.

nesses, unless the court in its discretion directs otherwise (s. 79 PACE 1984). This is an obvious solution, as otherwise s/he could adjust his testimony to the version presented by the other witnesses.[69] However, the accused can testify after a witness whose testimony is not in dispute. The interrogation of the accused takes the same course as that of any other witness: examination-in-chief, cross-examination, and re-examination.

On the Continent, the proof-taking stage of the trial is commenced by questioning the accused (§ 243(5) StPO), although the "evidentiary proceedings" as a phase of trial commence after the explanations are presented). The defendant is "presented" as an evidentiary source before any other evidence has been examined at trial. Although it may logically seem that at this moment the prosecution has not yet established a *prima facie* case – in fact this is far from truth. A strong case has to have been established before the trial even begins – in the course of the investigation a case file has been assembled and read by the adjudicating judge. Also Anglo-Saxon commentators point to the fact that the accused has to argue before knowing how the prosecution's case will develop.[70] However, the accused knows exactly what the case of the prosecution is, as s/he has read the dossier and the indictment, which usually comes with a justification which presents the prosecution's position in connection with the evidence taken during the investigation, which will be only repeated at trial. So the accused answers questions under the "veil of the dossier",[71] i.e. in response to the materials contained in the case file, which also are known to the accused. In this model the explanation of the accused is an answer to the indictment that has just been read aloud in the courtroom. On one hand the prosecution can expect that an untruthful story of the accused will crumble in the light of the subsequent witnesses' testimonies – as in the continental model the prosecutor must present the evidence supporting the accusation and come forward with a convincing proof of guilt using items of evidence other than the defendant's statements in court. On the other hand, the accused has the right to comment on every piece of evidence and take

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[69] R. Ward, A. Wragg, *English Legal System*, Oxford 2005, p. 611.

[70] Damaška, *supra* note 28, p. 550.

[71] *Ibid*.

part in the questioning of every witness heard after the accused's statement. This mitigates the conclusion that giving his statement before the prosecutor's case is presented places him in an unfavourable position. Quite to the contrary: his/her statements can be adjusted throughout the whole trial. S/he may refrain from giving explanations after reading the indictment and choose to speak later, after the evidence has been presented. The judge is always obliged to give floor to the defendant. Frequent and uncontrolled interventions by the accused may be assessed by the common law lawyers as chaotic and even as amounting to a contempt of court.

In the continental trial the accused not only can present explanations many times: several times during preparatory proceeding and several times during trial, but s/he can also "revoke" or change explanations. In the common law model such a "change" could lead to criminal responsibility for perjury. Meanwhile, in the continental trial it is a fundamental right of the accused and the use of it cannot be considered even as an aggravating circumstance. The accused vests the court with the responsibility to assess which of the different explanations were consistent with the real course of events – which in every case leads to the problem of evaluating the credibility of the defendant's statements. The continental judge is tasked with the assessment of the whole body of evidence after the close of the proof-taking proceedings. S/he has great discretion in the evaluation of the evidence (in Germany according to § 261 StPO, and in Poland on the basis of Article 7 CCP) – the judge decides the findings based, not only on the evidence presented at trial, but also gathered during an investigation in the case file and "considered to be revealed at trial" that is included in the evidentiary material, according to his or her own convictions, drawn from the essence of the procedure (so called *freie Überzeugung*). It is clear that the first explanations made by the suspect at the police station are usually considered to be most credible. At the same time in Poland they are most often made without the possibility of consulting a lawyer. Such a trait does not function in Germany, where only protocols of the interview conducted by a judge can be read aloud at trial and made a basis for fact-finding (§ 254 StPO).

Conclusions

The position of the accused as an oral source of evidence influences other elements of a criminal trial. It is connected to the meaning and scope of the privilege against self-incrimination, to the consequences of untruthful statements, and the amount and variety of information the accused can offer to the court. In this article it has been shown how the principle not to incriminate oneself is exercised in both continental and common law states. In both models the right to remain silent can be limited in certain ways: in England it is the right to draw negative inferences from the silence of the accused and in Poland it is the shifting of the moment of presenting formal charges. It has been shown how within one legal model of the continental criminal trial a different shape of one element – the moment of becoming a formal suspect – can change the position of the accused and the consequences of lying during the first interview at the police station. In result in the continental states the most important for the position of the accused in trial is the moment of becoming a formal suspect when the right to silence and the right to present explanations are followed by the "right to lie" – when a witness turns into a passive party to a criminal trial. Also the timing of breaking the silence has been analysed and it has been shown that in both models of criminal trial it can be done both in investigation and at trial – however, in the continental model the accused can speak at trial many times and explain as to all the other presented evidence at any given moment of evidentiary proceeding. In the English trial the decisive factor "activating" the accused into presenting statements of knowledge became the introduction of s. 35 PACE.

It is also important to notice that the main difference between explanations and testimony (voluntary in both model of criminal trial) of the accused is the consequence of presenting untruthful statements – in the continental model there is none, whereas in England the accused is considered to bear the same consequences as an untruthful witness, as s/he is the procedural witness. Another difference is that the accused in the continental trial can offer various (and often contradictory) information to the court and can do it numerous times, whereas in England s/he can do it only once during trial – as a witness called by the defence. On the

Continent presentation of explanations can become also a mechanism of exercising the material form of defence; in England the truth limits the accused's possibilities of presenting his/her own account of events. Finally, in England the accused cannot, as a matter of fact, present oral evidence – s/he can do it only as a witness. Therefore, from the formal point of view, the accused cannot become a personal source of evidence at a trial at all. Moreover, his/her explanations in England are the only means of personal activity – whereas on the Continent the accused can be active as a trial party.

The defendant's trial position should be also considered in relation to other aspects of criminal trial. The accused is not only a personal source of evidence, but above all is a party to the proceedings – and while his/her appearance in the former role depends entirely on his/her decision, s/he is entitled by law to the status of a procedural party in any case. The status of the accused gives him/her the right to be involved in the trial, regardless of whether giving explanations or not; the accused can issue motions to call witnesses, present documents, and can also question the judge's (and the prosecutor's) impartiality throughout the trial. Analysing this position it is clear that the accused's role in a criminal trial cannot be assessed merely from his position of as a "procedural source of evidence", but must always be considered in conjunction with a specific "package of rights" at the trial.

The accused in the continental model has a broad "package of rights" – s/he can be active in many ways during the trial. The accused is not only present in the criminal trial as a source of evidence, equivalent (in principle) to other evidence, but also has other powers. S/he may not only present explanations, but also make a statement on each piece of evidence. S/he may also put questions to witnesses – on a par with his/her defence counsel (Article 370 CCP, § 257 and 240 StPO). The accused's rights in the continental trial also include the possibility of submitting evidence, as well as explanations, in relation to pieces of evidence presented in his/her absence – and these rights are valid at every stage of the process. In other words, the accused is an active participant in all phases of the trial process. A defence counsel may interrogate a witness on behalf of the accused, but this does not mean that the accused loses his/her right to ask that witness questions on his/her own

behalf.[72] Indeed exercising this right to be active in trial is intertwined with presenting explanations to the point where even in the literature it is hard to distinguish where explanations end and strictly procedural activity begins. There are accused who are active during the whole course of trial even in the final phases demanding to be heard as to the explanations they may present.

In contrast to this wide range of personal procedural rights, the accused in the common law system has more limited possibilities. As a personal source of evidence s/he can only appear as a witness – and his/her testimony is the only personal activity at trial. S/he cannot make statements because the only form of doing so is from the witness box, where s/he gives evidence under the risk of perjury for false or incomplete testimony. The accused cannot speak on his/her own behalf during the entire course of the trial – s/he can only communicate with the court through a lawyer.[73] In other words, the accused participates in the trial only through his/her representative (unless s/he waives his right to counsel, which is rare and considered highly disadvantageous). Seen from the continental perspective, in the common law model a defendant has very limited "personal" rights vis-à-vis his/her "material" defence, i.e. the activities that s/he can undertake personally during a trial are limited. The lawyer (who represents his/her formal right to defence) consumes most of these privileges and is in charge of presenting the case of the defence.[74] The defendant's right to defence in material terms is associated mainly with his right to silence.

On the other hand, there is another element that should be taken into consideration. In the common law model the accused remains a "master" of the defence case: s/he enjoys a wide autonomy of actions in a criminal trial: s/he does not have to submit "motions" to present evidence, but calls the evidence on his/her own (or rather through his lawyer).[75] So s/he – through his lawyer – is responsible for the entire defence case and is in charge of it: it is under his/her full control, which

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[72] Ryan, *supra* note 2, p. 21.

[73] See observations of J. H. Langbein about "lawyerization of criminal trial" – *Idem*, *The Origins of Adversary Criminal Trial*, Oxford: Oxford University Press, 2010, p. 267, 284.

[74] Duff, Farmer, Marshall, Tadros, *supra* note 15, p. 206.

[75] See also: G. Trüg, *op.cit.*, p. 27; W. L. Twinings, "Evidence of Proof in Anglo-American Litigation", in *Anglo-Polish Legal Essays*, Warszawa 1989, p. 85.

makes it possible to present not only specific pieces of evidence, but also in a specific order, at a specific time, and with a specific narrative. From the moment of entering the courtroom, the defence (although not the accused himself) may present opinions of experts appointed by him/her; s/he may decide about the way of selecting and manner of presenting evidence – while in the continental trial it may happen that not a single defence motion to present evidence is considered by a court "worth carrying out", or the evidence is admitted and conducted by the judge in a way that is not necessarily consistent with the wishes of the accused (Article 167 and 366 CCP, § 238(1) and § 214(1) StPO). It seems that the "personal activity" of the accused acting as a source of evidence in the continental model becomes the only activity in trial (as the accused's explanations is the only piece of evidence that has to be heard as evidence of defence), whereas in the common law trial the only activity may be restricted to presenting only other evidence. As seen from the perspective of the procedural rights of the accused, it may be observed that the procedural position of the defendant at the trial in each of the models of criminal trial is in a state of equilibrium – despite the adoption of different guarantees for the performance of the defence function – and at the same time two possible concepts of defence emerge: of an active defendant and passive defence in the continental model, and of a passive defendant and active defence in the common law model.