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A Comparative Analysis of the Case Law of the European Court of Human Rights on the Right against Self-Incrimination

Un análisis comparado de la jurisprudencia del Tribunal Europeo de Derechos Humanos sobre el derecho a no autoincriminarse

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ABSTRACT: The right against self-incrimination can be understood as the right of all persons to remain silent and not to be forced to collaborate with an investigation against them. Despite of its fundamental importance, the right against self-incrimination raises several theoretical and practical discussions. Can defendants refuse to produce documentary evidence? Does this right apply to administrative and civil proceedings? What degree of coercion is necessary to trigger the application of this right? This article aims to analyse the evolution and current state of the case law of the European Court of Human Rights in order to elucidate how the European court has resolved the questions posed above.

KEYWORDS: Right against self-incrimination; right to remain silent; incriminatory evidence.

RESUMEN: *El derecho a no autoincriminarse puede ser entendido como el derecho de todas las personas a permanecer en silencio y a no ser forzadas a colaborar con una investigación dirigida en su contra. A pesar de su fundamental importancia, el derecho a no autoincriminarse continúa planteando diversas discusiones, tanto a nivel teórico como práctico. ¿Pueden las personas imputadas rehusarse a entregar*

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evidencia documental? ¿Puede este derecho aplicarse en procedimientos administrativos y civiles? ¿Cuál es el grado exigido de coacción para entender que este derecho ha sido infringido? Este artículo tiene por objeto analizar la evolución y el estado actual de la jurisprudencia del Tribunal Europeo de Derechos Humanos, a fin de dilucidar cómo este tribunal ha resuelto las interrogantes planteadas anteriormente.

PALABRAS-CLAVE: *Derecho a no autoincriminarse; derecho a permanecer en silencio; evidencia incriminatoria.*

INTRODUCTION

In a broad sense, the right against self-incrimination can be understood as the right to remain silent and not to contribute to incriminating oneself.²

The importance of the right against self-incrimination has been universally recognised. For instance, the European Court of Human Rights (hereinafter ECtHR) has ruled that the right against self-incrimination is a generally accepted international standard which lies at the heart of the notion of a fair proceeding.³ Similarly, the United States Supreme Court has stated that the right against self-incrimination “registers an important advance in the development of our liberty—one of the great landmarks in man’s struggle to make himself civilized”.⁴

It has also been stated that the right against self-incrimination is one of the most well-known constitutional rights in criminal proceedings,

² ECtHR, *O’Halloran and Francis v. United Kingdom*, nos. 15809/02 and 25624/02, § 45 (2007).

³ ECtHR, *John Murray v. United Kingdom*, no. 18731/91, § 45 (1996).

⁴ United States Supreme Court, *Ullmann v. United States*, 350 US 422, 426 (1956). The recognition of the right against self-incrimination has been characterised as a landmark event in the history of Anglo-American criminal procedure. LANGBEIN, John H. The Historical Origins of the Privilege Against Self-Incrimination at Common Law, *Michigan Law Review*, v. 92, n. 5, p. 1047-1085, 1994, p. 1047.

to the point that the phrase “plead the Fifth” has entered common usage and can be heard regularly in conversations in the United States.⁵

Despite its fundamental relevance and the apparent simplicity of its definition, the right against self-incrimination raises several theoretical and practical discussions. The right against self-incrimination has been characterised as one of the most complex guarantees in the entire body of fundamental rights applicable in the context of criminal proceedings⁶. Some authors have affirmed that the self-incrimination clause of the Fifth Amendment to the United States Constitution “is an unsolved riddle of vast proportions, a Gordian knot in the middle of our Bill of Rights”.⁷

What is the rationale of the right against self-incrimination? What degree of coercion is needed to trigger the application of this right? Does the right against self-incrimination apply to administrative and civil proceedings? Can defendants refuse to produce documentary evidence? The relevance of all these questions has increased notably in recent decades, due to the growing number of authorities with the power to subpoena people to answer questions and compel them to produce documentary evidence. Moreover, those who do not comply with such requests may be sanctioned by either the same authority or a court.

The significance of the above problems can be exemplified with the following case: The tax authority has instituted a tax evasion proceeding against the owner of a company for having repeatedly failed to report income. In this context, the tax authority requests the defendant to submit all the documents which she had concerning her company. The owner of the company refuses to submit the requested documents, and the tax authority fines her €5.000. Has the imposition of such a fine violated the defendant’s right against self-incrimination? Would the

⁵ TRACZ, Eliot T. Doctrinal Evolution and the Right against Self-Incrimination, *University of New Hampshire Law Review*, v. 18, n. 1, p. 109-142, 2019, p. 110.

⁶ TRECHSEL, Stefan. *Human Rights in Criminal Proceedings*, Oxford University Press, 2005, p. 341. Similarly, HIGGINS, Georganne R. Business Records and the Fifth Amendment Right against Self-Incrimination, *Ohio State Law Journal*, v. 38, n. 2, p. 351-378, 1977, p. 351.

⁷ AMAR, Akhil Reed and LETTOW, Renee B. Fifth Amendment, First Principles: The Self-Incrimination Clause, *Michigan Law Review*, v. 93, n. 5, p. 857-928, 1995, p. 857.

situation change if, in parallel to the administrative proceeding, the public prosecutor initiated a criminal investigation based on the same facts?

This article aims to analyse the evolution and current state of the case law of the ECtHR on the right against self-incrimination in order to elucidate how the European court has resolved the questions posed above and to identify the main aspects of its case law. Specifically, the article will review the recognition of the right against self-incrimination, the rationale and scope of application of this right, and the problem of compelled production of documentary evidence, four subjects that the ECtHR has addressed in its case law.

The case law of the ECtHR will be analysed from a comparative perspective, since it will be compared with the case law of the Court of Justice of the European Union (hereinafter, CJEU) and the United States Supreme Court. The American case law is especially relevant for the purposes of reviewing the last of the four subjects that will be addressed, which is the problem of compelled production of documentary evidence.

The hypothesis of the article is that the ECtHR has been able to develop a convincing case law regarding the right against self-incrimination, which has prevented authorities from using evidence obtained by coercion in criminal proceedings, thereby protecting both defendants and witnesses. Moreover, by comparing the case law of the ECtHR with that of the United States Supreme Court and the CJEU, it will be proved, firstly, that the ECtHR has developed a more protective approach of the right against self-incrimination than the American Supreme Court, and secondly, that the ECtHR has influenced EU Law, since the CJEU has almost completely adopted the Strasbourg approach.

1. RECOGNISING THE RIGHT AGAINST SELF-INCRIMINATION.

Currently, the right against self-incrimination enjoys explicit recognition in Article 7 of EU Directive 2016/343, which obliges EU Member States to ensure the right to remain silent and not to self-incriminate. However, this was not always the case.

Unlike other international instruments, which expressly recognise the right against self-incrimination, such as the International Covenant

on Civil and Political Rights⁸ and the American Convention on Human Rights,⁹ the European Convention on Human Rights does not explicitly recognise the right against self-incrimination.¹⁰

The right against self-incrimination was not incorporated in any of the protocols to the European Convention either. However, it has been argued that the omission of a corresponding provision in the Protocols, particularly in number 7, cannot be characterised as an oversight, since there was a general understanding that the right against self-incrimination formed part of the general notion of a fair proceeding under Article 6 of the European Convention.¹¹

The ECtHR recognised the existence of the right against self-incrimination in *Funke v. France*, decided in 1993.¹² The ECtHR did not address in *Funke* the rationale of the right against self-incrimination, its scope of application, or its origins, a circumstance that has led some authors to characterise the decision as “brief and Delphic”¹³.

Three years later, in *John Murray v. United Kingdom*, the ECtHR attempted to give a fuller explanation of its reasons for including the right against self-incrimination into the right to a fair trial.¹⁴ In this case, the ECtHR characterised the right against self-incrimination

⁸ Article 14.3 (g).

⁹ Article 8.2 (g).

¹⁰ BALSAMO, Antonio. The Content of Fundamental Rights. In: KOSTORIS, Roberto E. (ed), *Handbook of European Criminal Procedure*, Springer, p. 99-170, 2018, p. 117; RODRIGUES, Paulo. The Development of the Guarantee Against Self-Incrimination in the Brazilian Constitutional System: Different Views on a Common Legal and Political Institute. *Comparative Law Review*, v. 23, pp. 187-205, 2017, p. 189.

¹¹ TRECHSEL, Stefan. *Human Rights in Criminal Proceedings*, Oxford University Press, 2005, p. 340.

¹² BERGER, Mark. Self-Incrimination and the European Court of Human Rights: Procedural Issues in the Enforcement of the Right to Silence, *European Human Rights Law Review*, v. 5, p. 514-533, 2007, p. 516.

¹³ ASHWORTH, Andrew. Self-Incrimination in European Human Rights Law. A Pregnant Pragmatism, *Cardozo Law Review*, v. 30, n. 3, p. 751-774, 2008, p. 753.

¹⁴ BERGER, Mark. Self-Incrimination and the European Court of Human Rights: Procedural Issues in the Enforcement of the Right to Silence, *European Human Rights Law Review*, v. 5, p. 514-533, 2007, p. 516.

as a recognised international standard which lies at the heart of the notion of a fair procedure. Therefore, it must be understood that the right against self-incrimination is part of the general right to a fair trial provided for in Article 6 of the European Convention.¹⁵ This is the current standpoint of the ECtHR.¹⁶

The CJEU has ruled in the same sense. The right against self-incrimination first made an appearance in EU competition law in *Orkem v Commission*, decided in 1989. In this case, the defendant challenged a Commission decision requesting information, arguing that it infringed upon her right against self-incrimination. The CJEU noted that such a right was not included in the European Convention on Human Rights. However, the CJEU held that the Community law prevented the Commission from undermining the right of defence of the defendant.¹⁷ Therefore, the CJEU ruled that the Commission “may not compel an undertaking to provide it with answers which might involve an admission on its part of the existence of an infringement which it is incumbent on the Commission to prove”.¹⁸

Over the years, the CJEU’s standpoint became more and more similar to that of the ECtHR. In *DB v Commissione Nazionale per le Società e la Borsa (Consob)*, the CJEU deliberately aligned its interpretation of Articles 47 and 48 of the European Union Charter of Fundamental Rights with the case law of the ECtHR on Article 6.¹⁹ Firstly, the CJEU restated that Articles 47 and 48 of the Charter, which recognise the right to a

¹⁵ ECtHR, *John Murray v. United Kingdom*, no. 18731/91, § 45 (1996).

¹⁶ ECtHR, *Bajić v. North Macedonia*, no. 2833/13, § 64 (2021); *Chambaz v. Switzerland*, no. 11663/04, § 52 (2012); *Gäfgen v. Germany*, no. 22978/0, § 168 (2010); *Brusco v. France*, no. 1466/07, § 44 (2010); *Bykov v. Russia*, no. 4378/02, § 92 (2009); *Weh v. Austria*, no. 38544/97, § 39 (2004); *Allan v. United Kingdom*, no. 48539/99, § 50 (2002); *Heaney and McGuinness v. Ireland*, no. 34720/97, § 40 (2000).

¹⁷ CJEU, *Orkem v Commission of the European Communities*, 374/87, § 34 (1989).

¹⁸ CJEU, *Orkem v Commission of the European Communities*, 374/87, § 35 (1989); BALSAMO, Antonio. The Content of Fundamental Rights. In: KOSTORIS, Roberto E. (ed), *Handbook of European Criminal Procedure*, Springer, p. 99-170, 2018, p. 117-118.

¹⁹ HANCOX, Emily. The Right to Remain Silent in EU Law, *Cambridge Law Journal*, v. 80, n. 2, p. 228-231, 2021, p. 231.

fair trial and other procedural guarantees, are equivalent to Article 6 of the European Convention on Human Rights providing for a right to a fair trial. Secondly, the CJEU noted that while Article 6 of the European Convention does not refer to the right against self-incrimination, it is “a generally recognised international standard which lies at the heart of the notion of a fair trial” and has long been recognized under the case law of the ECtHR. Given that, according to Article 52 of the European Union Charter, the rights set forth therein shall have the same meaning as the rights set forth in the European Convention on Human Rights, the CJEU found that Article 47 and 48 of the Charter must be construed as including the right against self-incrimination.²⁰

The thesis of the ECtHR that the right against self-incrimination is part of the right to a fair trial finds support in the case law of the United States Supreme Court. In *Boyd v. United States*, decided in 1886, the Supreme Court stated that “any compulsory discovery by extorting the party’s oath, or compelling the production of his private books and papers, to convict him of crime, or to forfeit his property, is contrary to the principles of a free government. It is abhorrent to the instincts of an Englishman; it is abhorrent to the instincts of an American. It may suit the purposes of despotic power; but it cannot abide the pure atmosphere of political liberty and personal freedom”.²¹ Subsequently, in *Malloy v. Hogan*, decided in 1964, the Supreme Court ruled that the right against self-incrimination was directly applicable to the States through the Fourteenth Amendment because this right is part of the due process clause.²²

Recognising the right against self-incrimination as an element of the right to a fair trial is a reasonable interpretation. Indeed, a proceeding where the authority forces the defendant to incriminate herself could not be seriously considered to be fair from the human rights perspective. Consequently, States cannot deny the existence of the right against self-incrimination under the pretext that it has not been explicitly recognised by

²⁰ CJEU, *DB v Commissione Nazionale per le Società e la Borsa (Consob)*, 481/19, § 37-38 (2021).

²¹ United States Supreme Court, *Boyd v. United States*, 116 US 616, 631-632 (1886).

²² United States Supreme Court, *Malloy v. Hogan*, 378 US 1, 3-6 (1964).

national legislation. In the same vein, States cannot restrict the application of the right in question arguing that national legislation has not recognised the right in question as a part of the right to a fair trial, but with a more limited scope of application.

2. RATIONALE OF THE RIGHT AGAINST SELF-INCRIMINATION.

The basis of the right against self-incrimination has been the source of considerable debate. This is demonstrated by the many different approaches that have been developed in this regard.

Firstly, it has been argued that the right against self-incrimination aims to protect innocent people. Given the asymmetry of power between the prosecution and the people charged in criminal proceedings, the system must prevent the authority from abusing its superiority. One of the possible abuses would be the exercise of coercion against the defendant, so that he or she confesses or cooperates with the investigation. From this point of view, the right against self-incrimination stands as a limit to the power of the state, prohibiting any use of coercion against the accused, thus avoiding possible coerced confessions.²³ Indeed, when coercion is employed to obtain a confession from a suspect, “there can be no assurance that the suspect is testifying truthfully on the basis of his knowledge, and not falsely, out of fear of his accuser”.²⁴

A second approach holds that purpose of the right against self-incrimination does not exclusively relate to protecting the innocent from conviction, but rather to preserving the integrity of a judicial system since even guilty people have the right not to be forced to incriminate themselves.²⁵ According to this second approach, a judicial system that allows authorities to force people to incriminate themselves would not be acceptable from a moral point of view.

²³ GRISWOLD, Erwin N. *The Fifth Amendment Today*, Harvard University Press, 1995, p. 10-19.

²⁴ GEYH, Charles Gardner. The testimonial component of the right against self-incrimination, *Catholic University Law Review*, v. 36, n. 3, p. 611-642, 1987, p. 616.

²⁵ United States Supreme Court, *Tehan v. Shott*, 382 U.S. 406, 415 (1966).

Finally, a third approach has stated that the rationale of the right under study is to be found in the concern for the extreme situation of conflict in which the person forced to incriminate herself is placed. The right against self-incrimination aims to prevent the authority from placing the accused in the cruel trilemma of choosing between contributing to his or her own conviction, lying (which in some systems means committing perjury), or remaining silent (and incurring liability for contempt).²⁶

What has been the position of the ECtHR on this matter? According to the ECtHR, the right against self-incrimination aims to protect people against improper compulsion by the authorities, thereby contributing to the avoidance of miscarriages of justice and to the fulfilment of the aims of the right to a fair trial.²⁷ Since the right against self-incrimination prevents the authority from using evidence obtained by coercion, the ECtHR has further added that the right in question is closely linked to the presumption of innocence.²⁸

By underlying that the right in question contributes to avoid miscarriages of justice, as well as linking it to the presumption of innocence, the ECtHR seems to support the first approach described above as the rationale of the right against self-incrimination. The European approach differs on this point from the standpoint adopted by the American courts, including the Supreme Court,²⁹ which have generally supported the “cruel trilemma” interpretation.³⁰

²⁶ United States Supreme Court, *Murphy v. Waterfront Comm'n*, 378 U.S. 52, 55 (1964).

²⁷ ECtHR, *Bajić v. North Macedonia*, no. 2833/13, § 64 (2021); *Aleksandr Zaichenko v. Russia*, no. 39660/02, § 38 (2010); *Bykov v. Russia*, no. 4378/02, § 92 (2009); *Saunders v. United Kingdom*, no. 19187/91, § 68-69 (1996); *John Murray v. United Kingdom*, no. 18731/91, § 45 (1996).

²⁸ ECtHR, *Aleksandr Zaichenko v. Russia*, no. 39660/02, § 38 (2010); *Saunders v. United Kingdom*, no. 19187/91, § 68 (1996); *Weh v. Austria*, no. 38544/97, § 39 (2004); BALSAMO, Antonio. *The Content of Fundamental Rights*. In: KOSTORIS, Roberto (ed), *Handbook of European Criminal Procedure*, Springer, p. 99-170, 2018, p. 118 (2018).

²⁹ United States Supreme Court, *Murphy v. Waterfront Comm'n*, 378 U.S. 52, 55 (1964).

³⁰ GREEN, Michael S. *The Privilege's Last Stand: The Privilege Against Self-Incrimination and the Right to Rebel Against the State*, *Brooklyn Law Review*, v. 65, n. 3, p. 627-716, 1999, p. 630-631; DOLINKO, David. *Is There a Rationale*

3. SCOPE OF APPLICATION OF THE RIGHT AGAINST SELF-INCRIMINATION.

The right against self-incrimination applies to all criminal proceedings, no matter the seriousness of the criminal offence the defendant is charged with.³¹

However, it is important to note that self-incrimination may adopt different forms. For example, there are voluntary and knowledgeable self-incrimination (for example, a defendant may want to confess to have committed a criminal offence), inadvertent self-incrimination (for example, by answering a question posed by the authority, a person may incriminate herself without noticing it), and self-incrimination compelled by the authority (the most brutal case is that of a confession obtained by torture).³²

In this regard, it must be highlighted that the right against self-incrimination does not protect people against incriminating themselves per se. Rather, it only protects people against the obtaining of evidence by coercion.³³ Therefore, what is contrary to the right against self-incrimination is the use of coercion. This is evident, since people may freely waive their right to remain silent.³⁴

The ECtHR has identified three situations that represent a clear risk from the point of view of the right against self-incrimination. Firstly, where a defendant is compelled to testify under threat of sanctions.

for the Privilege against Self-Incrimination?, *UCLA Law Review*, v. 33, n. 4, p. 1063-1148, 1985, p. 1090-1091.

³¹ ECtHR, *Saunders v. United Kingdom*, no. 19187/91, § 74 (1996).

³² MOYLAND JR., Charles E. and SONSTENG, John. Privilege against Compelled Self-Incrimination, *William Mitchell Law Review*, v. 16, n. 1, p. 249-308, 1990, p. 267.

³³ ECtHR, *Ibrahim and Others v. United Kingdom*, nos. 50541/08, 50571/08, 50573/08 and 40351/09, § 267 (2016); MOYLAND JR., Charles E. and SONSTENG, John. Privilege against Compelled Self-Incrimination, *William Mitchell Law Review*, v. 16, n. 1, p. 249-308, 1990, p. 267; AMAR, Akhil Reed and LETTOW, Renee B. Fifth Amendment, First Principles: The Self-Incrimination Clause, *Michigan Law Review*, v. 93, n. 5, p. 857-928, 1995, p. 865.

³⁴ ECtHR *Ibrahim and Others v. United Kingdom*, nos. 50541/08, 50571/08, 50573/08 and 40351/09, § 267 (2016).

Secondly, where the authority applies physical or psychological pressure against the defendant to obtain evidence. Finally, where the authorities use subterfuge to obtain information.³⁵

To what type of proceedings does the right against self-incrimination apply? According to the ECtHR, the right against self-incrimination is not limited to directly incriminating statements produced in criminal proceedings since evidence obtained in other proceedings may later be deployed in criminal proceedings in support of the prosecution case. Therefore, “what is of the essence in this context is the use to which evidence obtained under compulsion is put in the course of the criminal trial”.³⁶

In similar terms, the United States Supreme Court has ruled that the right against self-incrimination is not confined to confessions made by the accused in criminal proceedings. On the contrary, the right in question aims to ensure that a defendant, regardless of her status and the proceedings involved, is not compelled to criminally incriminate herself.³⁷

Therefore, the relevant issue is not the specific type of proceeding in which the evidence was obtained through coercion, but its criminal relevance. This is the question that courts should address in order to determine whether there has been a violation of the right against self-incrimination. Consequently, a person summoned to testify in a civil, labour, or administrative proceeding may refuse to answer a question asked in such a proceeding if the answer to it could criminally incriminate her.

The above interpretation is more than reasonable since, otherwise, the authority could circumvent the right against self-incrimination by simply compelling individuals to testify in a civil or administrative

³⁵ ECtHR, *Ibrahim and Others v. United Kingdom*, nos. 50541/08, 50571/08, 50573/08 and 40351/09, § 267 (2016).

³⁶ ECtHR, *Saunders v. United Kingdom*, no. 19187/91, § 71 (1996). See also *Ibrahim and Others v. United Kingdom*, nos. 50541/08, 50571/08, 50573/08 and 40351/09, § 268 (2016).

³⁷ United States Supreme Court, *Counselman v. Hitchcock*, 142 U.S. 547, 562 (1891); MOYLAND JR., Charles E. and SONSTENG, John. Privilege against Compelled Self-Incrimination, *William Mitchell Law Review*, v. 16, n. 1, p. 249-308, 1990, p. 279-280.

proceeding and then using the information thus obtained in a subsequent criminal proceeding against them.³⁸

This was exactly the case in *Saunders v. United Kingdom*. The applicant, who was a director of Guinness, was suspected of acting unlawfully during a takeover bid. The administrative authority initiated an investigation against the applicant, who was summoned to testify under a legal obligation to answer the questions. A refusal by the applicant to answer the questions could have led to the imposition of a fine or imprisonment for up to two years. In parallel to the administrative proceedings, a criminal investigation against the applicant was initiated. The transcripts of the applicant's answers and other documents obtained by the administrative authority were used by the prosecution and read to the jury during the criminal trial. The transcripts were used to prove the applicant's knowledge and to refute evidence given by him to the jury.³⁹

Considering the way in which the prosecution had used the transcripts of the applicant's answers, the ECtHR concluded that they were used in the criminal proceeding in a manner which incriminated the applicant. Moreover, the ECtHR noted that the defendant had answered the questions put to him by the administrative authority because of the threat of sanctions. Therefore, the ECtHR found a violation of Article 6.⁴⁰ The ECtHR adopted the same reasoning in *I.J.L. v. United Kingdom*.⁴¹

In conclusion, it is not the procedure in which the evidence was obtained that is relevant. So long as the evidence was obtained

³⁸ ESCOBAR, Javier. Aplicación del derecho a no autoincriminarse en procedimientos administrativos sancionatorios: Análisis comparado de la jurisprudencia del Tribunal Europeo de Derechos Humanos y del Tribunal Constitucional chileno, *Revista de Derecho Administrativo Económico*, n. 34, p. 39-68, 2021, p. 49.

³⁹ ECtHR, *Saunders v. United Kingdom*, no. 19187/91, § 70-72 (1996); ASHWORTH, Andrew. Self-Incrimination in European Human Rights Law. A Pregnant Pragmatism, *Cardozo Law Review*, v. 30, n. 3, p. 751-774, 2008, p. 755.

⁴⁰ ECtHR, *Saunders v. United Kingdom*, no. 19187/91, § 72-76 (1996).

⁴¹ ECtHR, *I.J.L. and Others v. United Kingdom*, nos. 29522/95, 30056/96 and 30574/96, § 79-83 (2000).

under compulsion, it should not be used against the defendant in a criminal proceeding.⁴²

3.1. AUTONOMOUS CONCEPT OF CRIMINAL OFFENCE

The approach of the ECtHR regarding the scope of application of the right against self-incrimination cannot be fully understood without having into consideration its case law regarding the autonomous concept of criminal offence.

The ECtHR has repeatedly held that the label of the offence under national law cannot be the only criterion to determine its nature.⁴³ Otherwise, the application of the criminal guarantees would be left to the discretion of the legislature.⁴⁴

Therefore, the concept of criminal proceeding must be interpreted in the light of the autonomous concept of criminal offence developed by the ECtHR in relation to Articles 6 and 7 of the European Convention.⁴⁵

To ascertain the actual nature of the offence, the ECtHR applies three criteria set out in *Engel v. Netherlands*, decided 1976. The three criteria, commonly referred to as the “Engel criteria”, are (i) the legal classification of the offence under national law; (ii) the very nature of the offence; and (iii) the severity of the penalty that the person concerned risks incurring.⁴⁶

⁴² ASHWORTH, Andrew. Self-Incrimination in European Human Rights Law. A Pregnant Pragmatism, *Cardozo Law Review*, v. 30, n. 3, p. 751-774, 2008, p. 755.

⁴³ ECtHR, *Mihalache v. Romania*, no. 54012/10, § 53 (2019); *Serazin v. Croatia*, no. 19120/15, § 64 (2018); *Šimkus v. Lithuania*, no. 41788/11, § 41 (2017); *Palmén v. Sweden*, no. 38292/15, § 20 (2016).

⁴⁴ ECtHR, *Serazin v. Croatia*, no. 19120/15, § 64 (2018); *Kadusic v. Switzerland*, no. 43977/13, § 82 (2018); *Glantz v. Finland*, no. 37394/11, § 48 (2014).

⁴⁵ ECtHR, *Timofeyev and Postupkin v. Russia*, no. 45431/14 and 22769/15, § 86 (2021); *Korneyeva v. Russia*, no. 72051/17, § 48 (2019).

⁴⁶ ECtHR, *Engel and Others v. Netherlands*, no. 5100/71; 5101/71; 5102/71; 5354/72; 5370/72, § 81-83 (1976). See also *Velkov v. Bulgaria*, no. 34503/10, § 45 (2020); *Orlen Lietuva Ltd. v. Lithuania*, no. 45849/13, § 60 (2019); *A and B v. Norway*, nos. 24130/11 and 29758/11, § 105-107 (2016); *Žaja v. Croatia*, no. 37462/09, § 86 (2016).

By applying the Engel criteria, the ECtHR has developed a broad concept of criminal offence, that covers not only criminal sanctions *stricto sensu*, but also all other civil sanctions with a punitive effect.⁴⁷ For instance, the ECtHR has considered as criminal in nature the following administrative sanctions: the withdrawal of the driving license for eighteen months,⁴⁸ a 10% tax surcharge,⁴⁹ a fine of 720 Finnish marks⁵⁰ and a fine of 60 Deutsche marks,⁵¹ among others.⁵²

The decision in *J.B. v. Switzerland* shows clearly how the reasoning of the ECtHR works. In this case, the tax authority instituted tax-evasion proceeding against the applicant. He was requested to submit all the documents which he had concerning these companies, but he refused to produce the documents. Based on his refusal, the tax authority fined the applicant, who argued that such a sanction violated his right against self-incrimination.⁵³ The government argued that the right against self-incrimination was not applicable to the present case because the relevant proceeding was not criminal in nature.⁵⁴ In this regard, the ECtHR reiterated that the concept of “criminal charge” is an autonomous one, which must be determined on the basis of the three Engel criteria. By applying these criteria, the ECtHR characterized the tax proceeding as criminal in nature, since one of its purposes was to sanction the defendant

⁴⁷ BÖSE, Martin. The Consecutive Application of Different Types of Sanctions and the Principle of Ne Bis in Idem: The EU and the US on Different Tracks? In: LIGETI, Katalin and FRANSEN, Vanessa (eds.), *Challenges in the Field of Economic and Financial Crime in Europe and the US.*, Hart Publishing, p. 211-222, 2017, p. 216; LASAGNI, Giulia. Prendendo sul serio il diritto al silenzio: commento a Corte cost., ord. 10 maggio 2019, n. 117, *Diritto Penale Contemporaneo*, n. 2, pp. 135-162, 2020, p. 136.

⁴⁸ ECtHR, Nilsson v. Sweden, no. 73661/01 (2005).

⁴⁹ ECtHR, Jussila v. Finland, no. 73053/01, § 37-38 (2006).

⁵⁰ ECtHR, Ruotsalainen v. Finland, no. 13079/03, § 47 (2009).

⁵¹ ECtHR, Öztürk v. Germany, no. 8544/79, § 50-54 (1984).

⁵² ESCOBAR VEAS, Javier. Ne bis in idem y sistemas sancionatorios de vía múltiple: análisis crítico de la jurisprudencia del Tribunal Europeo de Derechos Humanos. In: CÁRDENAS, Claudia, GUZMÁN, José Luis, and VARGAS, Tatiana (eds.), *XVI Jornadas chilenas de Derecho Penal y Ciencias Penales. En homenaje a sus fundadores*, Tirant lo Blanch, p. 201-218, 2021, p. 208-210.

⁵³ ECtHR, J.B. v. Switzerland, no. 31827/96, § 52 (2001).

⁵⁴ ECtHR, J.B. v. Switzerland, no. 31827/96, § 43 (2001).

and impose a fine on him. Therefore, the defendant was entitled to the right against self-incrimination.⁵⁵

Although the autonomous concept of criminal offence developed by the ECtHR has been criticised,⁵⁶ what is relevant here is to show that this autonomous concept has allowed the application of criminal guarantees to be extended beyond the confines of the criminal justice system. Indeed, even though, according to the ECtHR, the right against self-incrimination only protects people charged in criminal proceedings, or who may be charged in such proceedings, the application of the Engel criteria has resulted in a substantive extension of the scope of application of criminal safeguards, including the right against self-incrimination. Consequently, this right is not confined to the criminal justice system, but also applies to administrative proceedings of a punitive nature.

The approach developed by the ECtHR has been followed by the CJEU in *DB v Commissione Nazionale per le Società e la Borsa (Consob)*. In this case, the administrative authority sanctioned the defendant for an administrative offence of insider trading. It also imposed on him a fine of €50,000 for violating his duty to cooperate with the authority by systematically postponing the hearing and refusing to answer the questions posed.⁵⁷

⁵⁵ ECtHR, *J.B. v. Switzerland*, no. 31827/96, § 44-50 (2001); BERGER, Mark. Europeanizing Self-Incrimination: The Right to Remain Silent in the European Court of Human Rights, *Columbia Journal of European Law*, v. 12, n. 2, p. 339-382, 2006, p. 349.

⁵⁶ ESCOBAR VEAS, Javier. Ne bis in idem y sistemas sancionatorios de vía múltiple: análisis crítico de la jurisprudencia del Tribunal Europeo de Derechos Humanos. In: CÁRDENAS, Claudia, GUZMÁN, José Luis, and VARGAS, Tatiana (eds.), *XVI Jornadas chilenas de Derecho Penal y Ciencias Penales. En homenaje a sus fundadores*, Tirant lo Blanch, p. 201-218, 2021, p. 208-210; BACHMAIER, Lorena. New Crime Control Scenarios and the Guarantees in Non-Criminal Sanctions: Presumption of Innocence, Fair Trial Rights, and the Protection of Property. In: SIEBER, Ulrich (ed.), *Prevention, Investigation, and Sanctioning of Economic Crime. Alternative Control Regimes and Human Rights Limitations*, Maklu, p. 299-334, 2019, p. 307; LASAGNI, Giulia. Prendendo sul serio il diritto al silenzio: commento a Corte cost., ord. 10 maggio 2019, n. 117, *Diritto Penale Contemporaneo*, n. 2, pp. 135-162, 2020, p. 136-137.

⁵⁷ CJEU, *DB v Commissione Nazionale per le Società e la Borsa (Consob)*, C-481/19, § 14-15 (2021).

Firstly, the CJEU held that the safeguards afforded by Articles 47 and 48 of the European Union Charter include, inter alia, the right to silence of natural persons charged with a “criminal offence”, a concept to be determined on the basis of the three Engel criteria. Secondly, the CJEU stated that the right against self-incrimination precludes, inter alia, “penalties being imposed on such persons for refusing to provide the competent authority under Directive 2003/6 or Regulation No 596/2014 with answers which might establish their liability for an offence that is punishable by administrative sanctions of a criminal nature, or their criminal liability.”⁵⁸

3.2. *IS THE RIGHT AGAINST SELF-INCRIMINATION ABSOLUTE OR RELATIVE?*

The ECtHR has stated that the right against self-incrimination is not absolute.⁵⁹ Rather, the right in question will be violated only when the degree of compulsion destroys its very essence.⁶⁰

In determining whether a proceeding has extinguished the very essence of the right against self-incrimination, the ECtHR analyses, in particular, the nature and degree of the compulsion employed, the existence of any relevant safeguards in the proceedings, and the use made by the authority of the coercively obtained evidence.⁶¹

In *John Murray v. United Kingdom*, the defendant was found by the police in a house where a person kidnapped by the IRA was held prisoner. The applicant neither answered the questions of the authority nor gave

⁵⁸ CJEU, *DB v Commissione Nazionale per le Società e la Borsa (Consob)*, C-481/19, § 42-45 (2021).

⁵⁹ BALSAMO, Antonio. The Content of Fundamental Rights. In: KOSTORIS, Roberto (ed), *Handbook of European Criminal Procedure*, Springer, p. 99-170, 2018, p. 118.

⁶⁰ ECtHR, *Ibrahim and Others v. United Kingdom*, nos. 50541/08, 50571/08, 50573/08 and 40351/09, § 269 (2016); LASAGNI, Giulia. *Prendendo sul serio il diritto al silenzio: commento a Corte cost., ord. 10 maggio 2019, n. 117, Diritto Penale Contemporaneo*, n. 2, pp. 135-162, 2020, p. 141.

⁶¹ ECtHR, *Bykov v. Russia*, no. 4378/02, § 104 (2009); *O'Halloran and Francis v. United Kingdom*, nos. 15809/02 and 25624/02, § 55 (2007); *Jalloh v. Germany*, no. 54810/00, § 101 (2006); *Allan v. United Kingdom*, no. 48539/99, § 44 (2002).

evidence in support of his defence. The trial judge drew strong inferences against the applicant by reason of his failure to give an account of his presence in the house and his refusal to give evidence in his own defence.⁶²

Regarding the question of whether drawing adverse inferences from an accused's silence is contrary to the right against self-incrimination, the ECtHR stated that the right against self-incrimination cannot prevent the court from considering the defendant's silence in assessing the evidence adduced by the prosecution.⁶³ However, it is incompatible with the right in question to base a conviction mainly on the defendant's silence. Therefore, the lawfulness of drawing adverse inferences from an accused's silence is a matter that must be determined in the light of all the circumstances of the case.⁶⁴

As can be seen, to affirm that the right against self-incrimination is not absolute does not mean that in certain cases the right does not apply at all. Rather, to state that the right against self-incrimination is relative means that "it is impossible to draw sharp borders. How much pressure on a suspect is acceptable? It is hardly possible to dictate that the accused be put under no pressure at all".⁶⁵

4. RIGHT AGAINST SELF-INCRIMINATION AND COMPELLED PRODUCTION OF DOCUMENTARY EVIDENCE.

Does the right against self-incrimination prohibit the compelled production of documentary evidence? Can the authority request a person, under threat of sanctions, to hand over incriminatory documentary evidence?

⁶² ECtHR, *John Murray v. United Kingdom*, no. 18731/91, § 25 (1996).

⁶³ RODRIGUES, Heloisa. Fundamento central do direito à não autoincriminação, *Revista Brasileira de Direito Processual Penal*, v. 4, n. 2, pp. 731-765, 2018, p. 737.

⁶⁴ ECtHR, *John Murray v. United Kingdom*, no. 18731/91, § 47 (1996); SUMMERS, Sarah. *Fair Trials*, Hart Publishing, 2007, p. 158.

⁶⁵ TRECHSEL, Stefan. *Human Rights in Criminal Proceedings*, Oxford University Press, 2005, p. 346.

The practical relevance of this problem is evident, due to the importance and significance of documentary evidence for the justice system, as well as the fact that there are currently authorities with broad powers to seize documentary evidence, such as the tax authority or the competition authority. Unfortunately, the case law of the ECtHR on this issue has not been perspicuous.

4.1. *FUNKE V. FRANCE.*

The ECtHR addressed this matter in *Funke v. France*. In this case, the customs authority issued an order requiring the defendant to produce bank statements from his foreign accounts. The defendant refused to produce such documents, and he was then sanctioned for failing to produce the documents. The sentence was a fine that increased for each day that he continued to refuse to supply the evidence. The ECtHR noted that the customs authority had sanctioned the defendant with the intention of obtaining certain documents that it believed existed, although it was not sure of this. These documents allegedly contained information about possible crimes committed by the defendant. Therefore, unable to obtain them by other means, the authority attempted to force the defendant to hand over the documents. The ECtHR held that such a use of coercion was contrary to the right against self-incrimination.⁶⁶

From the decision in *Funke*, it may be concluded that the right against self-incrimination applies to cases of compelled production of documentary evidence. Indeed, if the right in question were confined to purely testimonial evidence, the ECtHR would not have found a violation of Article 6.⁶⁷

⁶⁶ ECtHR, *Funke v. France*, § 44 (1993); BALSAMO, Antonio. The Content of Fundamental Rights. In: KOSTORIS, Roberto (ed), *Handbook of European Criminal Procedure*, Springer, p. 99-170, 2018, p. 118; LOCK, Tobias. Article 48 CFR. In: KELLERBAUER, Manuel, KLAMERT, Marcus and TOMKIN, Jonathan (eds.), *The EU Treaties and the Charter of Fundamental Rights. A Commentary*, Oxford University Press, p. 2227-2230, 2019, p. 2229.

⁶⁷ ASHWORTH, Andrew. Self-Incrimination in European Human Rights Law. A Pregnant Pragmatism, *Cardozo Law Review*, v. 30, n. 3, p. 751-774, 2008, p. 753.

4.2. SAUNDERS V. UNITED KINGDOM. DID SAUNDERS OVERRULE FUNKE?

In *Saunders v. United Kingdom*, the ECtHR partially modified its standpoint, drawing a distinction between the compelled provision of “real evidence” and the provision of “testimonial evidence”.⁶⁸ The ECtHR held that the right against self-incrimination is primarily concerned with respecting the will of an accused person to remain silent. Therefore, it does not extend to evidence “which may be obtained from the accused through the use of compulsory powers but which has an existence independent of the will of the suspect such as, inter alia, documents acquired pursuant to a warrant, breath, blood and urine samples and bodily tissue for the purpose of DNA testing”.⁶⁹

The distinction drawn in *Saunders* might seem clear. In fact, it was literally transposed into Article 7(3) of Directive EU 2016/343,⁷⁰ according to which the exercise of the right against self-incrimination shall not prevent the authorities from gathering evidence that can be lawfully obtained through coercive methods and that has an existence independently of the will of the persons charged.⁷¹

Notwithstanding, the concrete implications of the decision in *Saunders* regarding compelled production of evidence are not straightforward. Indeed, the reference to evidence that exists independently of the will of the suspect might suggest that the ECtHR

⁶⁸ ASHWORTH, Andrew. Self-Incrimination in European Human Rights Law. A Pregnant Pragmatism, *Cardozo Law Review*, v. 30, n. 3, p. 751-774, 2008, p. 758.

⁶⁹ ECtHR, *Saunders v. United Kingdom*, no. 19187/91, § 69 (1996); BALSAMO, Antonio. The Content of Fundamental Rights. In: KOSTORIS, Roberto (ed), *Handbook of European Criminal Procedure*, Springer, p. 99-170, 2018, p. 118.

⁷⁰ LASAGNI, Giulia. *Banking Supervision and Criminal Investigation. Comparing the EU and US Experiences*, Springer, 2019, p. 251.

⁷¹ KLIP, André. Fair Trial Rights in the European Union: Reconciling Accused and Victims’ Rights. In: RAFARACI, Tommaso and BELFIORE, Rosanna (eds.), *EU Criminal Justice Fundamental Rights, Transnational Proceedings and the European Public Prosecutor’s Office*, Springer, p. 3-25, 2019, p. 14; LAMBERIGTS, Stijn. The Privilege against Self-Incrimination: A Chameleon of Criminal Procedure, *New Journal of European Criminal Law*, v. 7, n. 4, p. 418-438, 2016, p. 429.

was overruling its decision in *Funke*.⁷² However, *Funke* and *Saunders* can be read compatibly, in the sense that the decisive question to determine is whether the government is compelling a person to actively cooperate with an investigation against herself, either ongoing or eventual.⁷³ Trechsel has proposed a similar interpretation, suggesting that the right against self-incrimination “only covers assistance from the suspect which could not be substituted by employing direct force”.⁷⁴

On this view, since bodily samples can be obtained without the active cooperation of the defendant (for example, by using force to take them), this would not violate the right against self-incrimination.⁷⁵ The same is true when the government, by means of an entry and search warrant, seizes documents or evidence from the home of the defendant, from whom active cooperation is not required. On the contrary, when the government requests a person to hand over documentary evidence in his possession, threatening her with the imposition of sanctions if she refuses to comply with the request, then the government is demanding of her an active cooperation with the investigation, which is contrary to the right against self-incrimination. This was exactly what happened in *Funke*, which would explain why the ECtHR found a violation of the right under consideration on that occasion.

The alternative reading of *Funke* and *Saunders* expounded here was confirmed by the ECtHR in *J.B. v. Switzerland*, decided in 2001, and *Chambaz v. Switzerland*, decided in 2012.

In *J.B. v. Switzerland*, the tax authority sanctioned the defendant in an administrative procedure for refusing to hand over documents and information relating to his income. The applicant contended that

⁷² ASHWORTH, Andrew. Self-Incrimination in European Human Rights Law. A Pregnant Pragmatism, *Cardozo Law Review*, v. 30, n. 3, p. 751-774, 2008, p. 759.

⁷³ REDMAYNE, Mike. Rethinking the privilege against self-incrimination, *Oxford Journal of Legal Studies*, v. 27, n. 2, 209-232, 2007, p. 214-215.

⁷⁴ TRECHSEL, Stefan. *Human Rights in Criminal Proceedings*, Oxford University Press, 2005, p. 341.

⁷⁵ ASHWORTH, Andrew. Self-Incrimination in European Human Rights Law. A Pregnant Pragmatism, *Cardozo Law Review*, v. 30, n. 3, p. 751-774, 2008, p. 759.

the imposition of such sanctions was contrary to his right against self-incrimination.⁷⁶ Regarding the defendant's argument, the ECtHR observed that the authorities were attempting to compel him to produce evidence against himself.⁷⁷ The ECtHR concluded that the authorities had indeed compelled the defendant to incriminate himself, therefore finding a violation of the right against self-incrimination.⁷⁸ It must be underlined that the ECtHR explicitly affirmed that the present case did not involve evidence whose existence was independent of the will of the suspect.⁷⁹

A decade after, the ECtHR handed down its decision in *Chambaz v. Switzerland*. In this case, the tax authority assessed the applicant's taxable income for the 1989-1990 tax year, finding that he had not declared all of his income because the growth of his assets was disproportionate to his stated income. During the proceeding, the applicant was asked to produce evidence, but he refused. Because of this, the tax authority sanctioned him. The ECtHR observed that by fining the applicant for refusing to produce all the items requested, the authorities had compelled him to submit documents which would have provided information on his income and assets for tax assessment purposes, thereby forcing him to incriminate himself. Once again, the ECtHR found a violation of the right against self-incrimination in a case of compelled production of documentary evidence.⁸⁰

4.3. COMPARISON BETWEEN THE EUROPEAN AND THE AMERICAN APPROACH.

The approach of the ECtHR on compelled production of documentary evidence is decisively more protective of the right

⁷⁶ ECtHR, *J.B. v. Switzerland*, no. 31827/96, § 52 (2001).

⁷⁷ ECtHR, *J.B. v. Switzerland*, no. 31827/96, § 66 (2001).

⁷⁸ ECtHR, *J.B. v. Switzerland*, no. 31827/96, § 71 (2001); RODRIGUES, Heloisa. Fundamento central do direito à não autoincriminação, *Revista Brasileira de Direito Processual Penal*, v. 4, n. 2, pp. 731-765, 2018, p. 737.

⁷⁹ ECtHR, *J.B. v. Switzerland*, no. 31827/96, § 68 (2001).

⁸⁰ ECtHR, *Chambaz v. Switzerland*, no. 11663/04, § 53-58 (2012); LAMBERIGTS, Stijn. The Privilege against Self-Incrimination: A Chameleon of Criminal Procedure, *New Journal of European Criminal Law*, v. 7, n. 4, p. 418-438, 2016, p. 431.

against self-incrimination than the one developed by the United States Supreme Court.

The Fifth Amendment to the United States Constitution declares: “No person (...) shall be compelled in any criminal case to be a witness against himself (...)”.

According to the United States Supreme Court, the word “witness” in the wording of the Fifth Amendment limits the protection to testimonial evidence.⁸¹ This element has been the source of most of the theoretical problems.⁸²

In *Holt v. United States*, decided in 1910, the Supreme Court held that “the prohibition of compelling a man in a criminal court to be witness against himself is a prohibition of the use of physical or moral compulsion to extort communications from him, not an exclusion of his body as evidence when it may be material”.⁸³

In *Schmerber v. California*, decided in 1964, the Supreme Court tried to define the parameters of “testimony”, distinguishing between testimonial and real evidence. In this case, the defendant appealed his conviction for driving under the influence of alcohol arguing that his right against self-incrimination was violated when a blood sample was extracted from him at the hospital despite his refusal to consent.

The Supreme Court affirmed the conviction, holding that “the privilege protects an accused only from being compelled to testify against himself, or otherwise provide the State with evidence of a testimonial or communicative nature, and that the withdrawal of blood and use of the analysis in question in this case did not involve compulsion to these ends”.⁸⁴ The Supreme Court acknowledged that courts have usually found no violation of the right against self-incrimination when the defendant is compelled “to submit to fingerprinting, photographing, or measurements, to write or speak for identification, to appear in court, to stand, to assume a

⁸¹ United States Supreme Court, *United States v. Hubbell*, 530 U.S. 27, 34 (2000).

⁸² ALLEN, Ronald J. and MACE, M. Kristin. The Self-Incrimination Clause Explained and Its Future Predicted, *Journal of Criminal Law and Criminology*, v. 94, n. 2, p. 243-293, 2004, p. 259.

⁸³ United States Supreme Court, *Holt v. United States*, 218 U.S. 245, 252-253 (1910).

⁸⁴ United States Supreme Court, *Schmerber v. California*, 384 U.S. 757, 761 (1966).

stance, to walk, or to make a particular gesture”. In conclusion, the privilege is a bar against compelling “communications”, but compulsion which makes a suspect or accused the source of “real evidence” does not violate it.⁸⁵

After *Schmerber*, the Supreme Court decided a series of cases allowing a defendant to be compelled to stand in a line-up,⁸⁶ to give handwriting exemplars,⁸⁷ to give voiceprints,⁸⁸ and to take sobriety tests measuring mental acuity and physical coordination.⁸⁹

Regarding the specific case of compelled production of documents, the current approach of the Supreme Court was set out in *Fisher v. United States*, decided in 1976. In *Fisher*, the Supreme Court shifted the focus of the analysis from the content of requested documents to the testimonial component of the act of producing those records.⁹⁰

According to *Fisher*, the content of documentary evidence voluntarily created no longer enjoy any protection under the privilege against self-incrimination.⁹¹ Nevertheless, the Court recognised that the act of producing evidence in response to a subpoena has communicative aspects of its own. Indeed, compliance with the subpoena tacitly concedes the existence of the papers demanded and their possession or control by the person involved, as well as the person’s belief that the documents are those described in the subpoena.⁹² However, compulsion of these implied admissions alone does not warrant Fifth Amendment protection with respect to the act of production,⁹³ since the right against self-incrimination

⁸⁵ United States Supreme Court, *Schmerber v. California*, 384 U.S. 757, 764 (1966).

⁸⁶ United States Supreme Court, *United States v. Wade*, 388 U.S. 218, 221-223 (1967).

⁸⁷ United States Supreme Court, *Gilbert v. California*, 388 U.S. 263, 266-267 (1967).

⁸⁸ United States Supreme Court, *United States v. Dionisio*, 410 U.S. 1, 7 (1973).

⁸⁹ United States Supreme Court, *Pennsylvania v. Muniz*, 496 U.S. 582, 592 (1990).

⁹⁰ ANDRITSAKIS, Katherine K. Corporate Record-Keepers and the Right against Self-Incrimination: An Equitable Approach to Fifth Amendment Analysis, *Santa Clara Law Review*, v. 27, n. 2, p. 411-442, 1987, p. 426.

⁹¹ ALITO JR., Samuel A. Documents and the Privilege against Self-Incrimination, *University of Pittsburgh Law Review*, v. 48, n. 1, p. 27-82, 1986, p. 64-65.

⁹² United States Supreme Court, *Fisher v. United States*, 425 U.S. 391, 410 (1976).

⁹³ ANDRITSAKIS, Katherine K. Corporate Record-Keepers and the Right against Self-Incrimination: An Equitable Approach to Fifth Amendment Analysis, *Santa Clara Law Review*, v. 27, n. 2, p. 411-442, 1987, p. 426.

“only applies when the accused is compelled to make a testimonial communication that is incriminating”.⁹⁴

Therefore, the Fisher test consists of three elements: (i) compulsion; (ii) a testimonial communication which may take the form of either oral testimony, authentication of the contents of documents, or an assertive act; and (iii) incrimination, which results when the documents produced are an important evidentiary link in the government’s case.⁹⁵ If any one of the three elements is lacking, the right is unavailable.⁹⁶

One could think that the approaches of the ECtHR and the United States Supreme Court offer similar protection against compelled production of documentary evidence and that the Fisher test has the same extent as the interpretation set out in *Saunders* by the ECtHR. However, this is not the case. Rather, the American approach offers less protection against compelled production of documentary evidence than the European one. For example, under the Fisher test the government can compel a defendant to hand over documents when the existence and location of the evidence are a foregone conclusion, and the defendant adds little or nothing to the government’s information by conceding that she in fact has the documents.

This was exactly the case in *Fisher*. On that occasion, the Supreme Court held that however incriminating the documents were, the act of producing them did not amount to testimonial self-incrimination because the existence and location of the papers were a foregone conclusion, finding therefore no violation of the right against self-incrimination⁹⁷

⁹⁴ United States Supreme Court, *Fisher v. United States*, 425 U.S. 391, 408 (1976); ALLEN, Ronald J. and MACE, M. Kristin. The Self-Incrimination Clause Explained and Its Future Predicted, *Journal of Criminal Law and Criminology*, v. 94, n. 2, p. 243-293, 2004, p. 246.

⁹⁵ ANDRITSAKIS, Katherine K. Corporate Record-Keepers and the Right against Self-Incrimination: An Equitable Approach to Fifth Amendment Analysis, *Santa Clara Law Review*, v. 27, n. 2, p. 411-442, 1987, p. 426.

⁹⁶ HIGGINS, Georganne R. Business Records and the Fifth Amendment Right against Self-Incrimination, *Ohio State Law Journal*, v. 38, n. 2, p. 351-378, 1977, p. 361.

⁹⁷ United States Supreme Court, *Fisher v. United States*, 425 U.S. 391, 411 (1976); GEYH, Charles Gardner. The testimonial component of the right

Another example of the limits of the American approach is *Doe v. United States*, decided in 1988. In this case, the defendant was asked to produce records of transactions in accounts at three foreign banks. The defendant produced some bank records and testified that no additional records were in his possession. When asked about the existence of additional records, the defendant refused to answer, invoking the right against self-incrimination. The government asked the court for an order directing the petitioner to sign a consent directive, without acknowledging the existence of any account, authorizing the banks to disclose records of all his accounts.

The Supreme Court reaffirmed that the right against self-incrimination protects a person only against “being incriminated by his own compelled testimonial communications”.⁹⁸ Regarding the present case, the Supreme Court noted that the consent directive neither acknowledged the existence of an account in a foreign bank nor identified any relevant bank. Moreover, given the consent directive’s phraseology, the Court held that petitioner’s compelled act of executing the form has no testimonial significance either. Moreover, by filling out the form the defendant was not admitting the authenticity of any eventual record produced by foreign financial institutions.⁹⁹ The Supreme Court concluded that there was no violation of the defendant’s right against self-incrimination.¹⁰⁰

The decisions of the United States Supreme Court in *Fisher* and *Doe* show how the current American approach works, as well as confirm that the approach developed by the ECtHR offers more protection against compelled production of documentary evidence. Indeed, considering the decisions adopted by the ECtHR in *J.B.* and *Chambaz*, it is reasonable to imagine that if the European court had addressed the cases *Fisher* and *Doe*, it would have probably found a violation of the right against self-incrimination.

against self-incrimination, *Catholic University Law Review*, v. 36, n. 3, p. 611-642, 1987, p. 634.

⁹⁸ United States Supreme Court, *Doe v. United States*, 487 U.S. 201, 207 (1988).

⁹⁹ United States Supreme Court, *Doe v. United States*, 487 U.S. 201, 216-217 (1988).

¹⁰⁰ United States Supreme Court, *Doe v. United States*, 487 U.S. 201, 219 (1988).

CONCLUSIONS

Even though the European Convention on Human Rights does not expressly provide for the right against self-incrimination, the ECtHR has been able to develop a convincing case law regarding the right against self-incrimination, which has prevented authorities from using evidence obtained by coercion in criminal proceedings, thereby protecting both defendants and witnesses.

The development of the case law on self-incrimination has been marked by the ECtHR's recognition that the task requires the balancing of different interests involved. Indeed, the ECtHR has recognised that the right against self-incrimination prevents the state from compelling a person to incriminate herself, but, at the same time, has accepted the possibility of the state to obtain real evidence.

Over this article, the case law of the ECtHR was compared with that of the United States Supreme Court and the CJEU, comparison that proved, firstly, that the ECtHR has developed a more protective approach of the right against self-incrimination than the American Supreme Court, and secondly, that the ECtHR has influenced EU Law, since the CJEU has almost completely adopted the Strasbourg approach.

With respect to the scope of application of the right against self-incrimination, the ECtHR has affirmed that it is not reasonable to limit the right against self-incrimination to statements of admission of wrongdoing or to directly incriminating remarks produced in criminal proceedings, since evidence obtained under compulsion which appears on its face to be of a non-incriminating nature may later be deployed in criminal proceedings in support of the prosecution's case. Therefore, what is of the essence in this context is the use to which evidence obtained under compulsion is put in the course of the criminal trial.

There is no doubt that the most complex issue regarding the application of the right against self-incrimination is related to cases of compelled production of documentary evidence. The ECtHR addressed this matter in *Saunders v. United Kingdom*, drawing a distinction between testimonial and real evidence.

According to what has been stated here, *Saunders* must be read in the sense that the decisive question to determine is whether the government

is compelling a person to actively cooperate with an investigation against herself, either ongoing or eventual. If the authority does this, there will be a violation of the right against self-incrimination. This interpretation was confirmed in *J.B. v. Switzerland* and *Chambaz v. Switzerland*, two cases in which the ECtHR found a violation because the authority had sanctioned the defendant for refusing to submit incriminating evidence.

As stated above, the approach of the ECtHR on compelled production of documentary evidence is decisively more protective of the right against self-incrimination than the one developed by the United States Supreme Court.

According to the Supreme Court, the right against self-incrimination only applies when the defendant is forced to make an incriminating testimonial communication. Therefore, in order to find a violation of the right against self-incrimination three elements must be met: (i) compulsion; (ii) a testimonial communication; and (iii) incrimination. If any one of the three elements is lacking, the right is unavailable. Consequently, where the production of incriminating evidence is not testimonial, compelled production of such evidence will not be contrary to the right against self-incrimination.

BIBLIOGRAPHY

ALITO JR., Samuel A. Documents and the Privilege against Self-Incrimination, *University of Pittsburgh Law Review*, v. 48, n. 1, p. 27-82, 1986.

AMAR, Akhil Reed and LETTOW, Renee B. Fifth Amendment, First Principles: The Self-Incrimination Clause, *Michigan Law Review*, v. 93, n. 5, p. 857-928, 1995. <https://doi.org/10.2307/1289986>

ANDRITSAKIS, Katherine K. Corporate Record-Keepers and the Right against Self-Incrimination: An Equitable Approach to Fifth Amendment Analysis, *Santa Clara Law Review*, v. 27, n. 2, p. 411-442, 1987, p. 426.

ASHWORTH, Andrew. Self-Incrimination in European Human Rights Law. A Pregnant Pragmatism, *Cardozo Law Review*, v. 30, n. 3, p. 751-774, 2008.

BACHMAIER, Lorena. New Crime Control Scenarios and the Guarantees in Non-Criminal Sanctions: Presumption of Innocence, Fair Trial Rights, and the Protection of Property. In: SIEBER, Ulrich (ed.), *Prevention, Investigation, and*

Sanctioning of Economic Crime. Alternative Control Regimes and Human Rights Limitations, Maklu, p. 299-334, 2019, p. 307.

BALSAMO, Antonio. The Content of Fundamental Rights. In: KOSTORIS, Roberto (ed), *Handbook of European Criminal Procedure*, Springer, p. 99-170, 2018. https://doi.org/10.1007/978-3-319-72462-1_3

BERGER, Mark. Europeanizing Self-Incrimination: The Right to Remain Silent in the European Court of Human Rights, *Columbia Journal of European Law*, v. 12, n. 2, p. 339-382, 2006.

BERGER, Mark. Self-Incrimination and the European Court of Human Rights: Procedural Issues in the Enforcement of the Right to Silence, *European Human Rights Law Review*, v. 5, p. 514-533, 2007.

BÖSE, Martin. The Consecutive Application of Different Types of Sanctions and the Principle of Ne Bis in Idem: The EU and the US on Different Tracks? In: LIGETI, Katalin and FRANSSSEN, Vanessa (eds.), *Challenges in the Field of Economic and Financial Crime in Europe and the US.*, Hart Publishing, p. 211-222, 2017. <https://doi.org/10.5040/9781509908066.ch-010>

DOLINKO, David. Is There a Rationale for the Privilege against Self-Incrimination?, *UCLA Law Review*, v. 33, n. 4, p. 1063-1148, 1985.

ESCOBAR VEAS, Javier. Ne bis in idem y sistemas sancionatorios de vía múltiple: análisis crítico de la jurisprudencia del Tribunal Europeo de Derechos Humanos. In: CÁRDENAS, Claudia, GUZMÁN, José Luis, and VARGAS, Tatiana (eds.), *XVI Jornadas chilenas de Derecho Penal y Ciencias Penales. En homenaje a sus fundadores*, Tirant lo Blanch, p. 201-218, 2021.

ESCOBAR, Javier. Aplicación del derecho a no autoincriminarse en procedimientos administrativos sancionatorios: Análisis comparado de la jurisprudencia del Tribunal Europeo de Derechos Humanos y del Tribunal Constitucional chileno, *Revista de Derecho Administrativo Económico*, n. 34, p. 39-68, 2021. <https://doi.org/10.7764/redae.34.2>

GEYH, Charles Gardner. The testimonial component of the right against self-incrimination, *Catholic University Law Review*, v. 36, n. 3, p. 611-642, 1987.

GREEN, Michael S. The Privilege's Last Stand: The Privilege Against Self-Incrimination and the Right to Rebel Against the State, *Brooklyn Law Review*, v. 65, n. 3, p. 627-716, 1999.

GRISWOLD, Erwin N. *The Fifth Amendment Today*, Harvard University Press, 1995.

HANCOX, Emily. The Right to Remain Silent in EU Law, *Cambridge Law Journal*, v. 80, n. 2, p. 228-231, 2021. <https://doi.org/10.1017/s0008197321000362>

HIGGINS, Georganne R. Business Records and the Fifth Amendment Right against Self-Incrimination, *Ohio State Law Journal*, v. 38, n. 2, p. 351-378, 1977.

KLIP, André. Fair Trial Rights in the European Union: Reconciling Accused and Victims' Rights. In: RAFARACI, Tommaso and BELFIORE, Rosanna (eds.), *EU Criminal Justice Fundamental Rights, Transnational Proceedings and the European Public Prosecutor's Office*, Springer, p. 3-25, 2019. https://doi.org/10.1007/978-3-319-97319-7_1

LAMBERIGTS, Stijn. The Privilege against Self-Incrimination: A Chameleon of Criminal Procedure, *New Journal of European Criminal Law*, v. 7, n. 4, p. 418-438, 2016, p. 429. <https://doi.org/10.1177/203228441600700404>

LANGBEIN, John H. The Historical Origins of the Privilege Against Self-Incrimination at Common Law, *Michigan Law Review*, v. 92, n. 5, p. 1047-1085, 1994. <https://doi.org/10.2307/1289628>

LASAGNI, Giulia. *Banking Supervision and Criminal Investigation. Comparing the EU and US Experiences*, Springer, 2019.

LASAGNI, Giulia. Prendendo sul serio il diritto al silenzio: commento a Corte cost., ord. 10 maggio 2019, n. 117, *Diritto Penale Contemporaneo*, n. 2, pp. 135-162, 2020.

LOCK, Tobias. Article 48 CFR. In: KELLERBAUER, Manuel, KLAMERT, Marcus and TOMKIN, Jonathan (eds.), *The EU Treaties and the Charter of Fundamental Rights. A Commentary*, Oxford University Press, p. 2227-2230, 2019.

MOYLAND JR., Charles E. and SONSTENG, John. Privilege against Compelled Self-Incrimination, *William Mitchell Law Review*, v. 16, n. 1, p. 249-308, 1990.

REDMAYNE, Mike. Rethinking the privilege against self-incrimination, *Oxford Journal of Legal Studies*, v. 27, n. 2, 209-232, 2007. <https://doi.org/10.1093/ojls/gql001>

RODRIGUES, Heloisa. Fundamento central do direito à não autoincriminação, *Revista Brasileira de Direito Processual Penal*, v. 4, n. 2, pp. 731-765, 2018. <https://doi.org/10.22197/rbdpp.v4i2.134>

RODRIGUES, Paulo. The Development of the Guarantee Against Self-Incrimination in the Brazilian Constitutional System: Different Views on a Common Legal and Political Institute. *Comparative Law Review*, v. 23, pp. 187-205, 2017. <http://dx.doi.org/10.12775/CLR.2017.008>

SUMMERS, Sarah. *Fair Trials*, Hart Publishing, 2007.

TRACZ, Eliot T. Doctrinal Evolution and the Right against Self-Incrimination, *University of New Hampshire Law Review*, v. 18, n. 1, p. 109-142, 2019.

TRECHSEL, Stefan. *Human Rights in Criminal Proceedings*, Oxford University Press, 2005.

TABLE OF CASES EUROPEAN COURT OF HUMAN RIGHTS

Engel and Others v. Netherlands, no. 5100/71; 5101/71; 5102/71; 5354/72; 5370/72 (1976).

Öztürk v. Germany, no. 8544/79 (1984).

John Murray v. United Kingdom, no. 18731/91 (1996).

Saunders v. United Kingdom, no. 19187/91 (1996).

Heaney and McGuinness v. Ireland, no. 34720/97, § 40 (2000).

I.J.L. and Others v. United Kingdom, nos. 29522/95, 30056/96 and 30574/96 (2000).

J.B. v. Switzerland, no. 31827/96 (2001).

Allan v. United Kingdom, no. 48539/99 (2002).

Weh v. Austria, no. 38544/97 (2004).

Nilsson v. Sweden, no. 73661/01 (2005).

Jussila v. Finland, no. 73053/01 (2006).

Jalloh v. Germany, no. 54810/00 (2006).

O'Halloran and Francis v. United Kingdom, nos. 15809/02 and 25624/02 (2007).

Bykov v. Russia, no. 4378/02 (2009).

ECtHR, Ruotsalainen v. Finland, no. 13079/03 (2009).

Gäfgen v. Germany, no. 22978/0 (2010).

Brusco v. France, no. 1466/07 (2010).

Aleksandr Zaichenko v. Russia, no. 39660/02 (2010).

Chambaz v. Switzerland, no. 11663/04 (2012).

Glantz v. Finland, no. 37394/11 (2014).

Ibrahim and Others v. United Kingdom, nos. 50541/08, 50571/08, 50573/08 and 40351/09 (2016).

Palmén v. Sweden, no. 38292/15 (2016).

A and B v. Norway, nos. 24130/11 and 29758/11 (2016).

Žaja v. Croatia, no. 37462/09 (2016).

Šimkus v. Lithuania, no. 41788/11 (2017).

Serazin v. Croatia, no. 19120/15 (2018).

Kadusic v. Switzerland, no. 43977/13 (2018).
Orlen Lietuva Ltd. v. Lithuania, no. 45849/13 (2019).
Mihalache v. Romania, no. 54012/10 (2019).
Korneyeva v. Russia, no. 72051/17 (2019).
Velkov v. Bulgaria, no. 34503/10 (2020).
Bajić v. North Macedonia, no. 2833/13 (2021).
Timofeyev and Postupkin v. Russia, no. 45431/14 and 22769/15 (2021).

UNITED STATES SUPREME COURT

Boyd v. United States, 116 US 616 (1886).
Counselman v. Hitchcock, 142 U.S. 547 (1892).
Holt v. United States, 218 U.S. 245 (1910).
Ullmann v. United States, 350 US 422 (1956).
Malloy v. Hogan, 378 US 1 (1964).
Murphy v. Waterfront Comm'n, 378 U.S. 52 (1964).
Tehan v. Shott, 382 U.S. 406 (1966).
Schmerber v. California, 384 U.S. 757 (1966).
United States v. Wade, 388 U.S. 218 (1967).
Gilbert v. California, 388 U.S. 263 (1967).
United States v. Dionisio, 410 U.S. 1 (1973).
Fisher v. United States, 425 U.S. 391 (1976).
Doe v. United States, 487 U.S. 201 (1988).
Pennsylvania v. Muniz, 496 U.S. 582 (1990).
United States v. Hubbell, 530 U.S. 27 (2000).

EUROPEAN UNION COURT OF JUSTICE

Orkem v Commission of the European Communities, 374/87 (1989).
DB v Commissione Nazionale per le Società e la Borsa (Consob), 481/19 (2021).

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