Birt 7. september 2026

ÚLFLJÓTUR

VEFRIT

De Legé and the Right Against Self-Incrimination in Administrative Cases*

By Gerður Guðmundsdóttir, Committee Member of the Internal Revenue Board and Part-time Lecturer at the University of Iceland and Reykjavik University, and Dr. Hafsteinn Dan Kristjánsson, Law Professor at Reykjavik University.

Efnisyfirlit

Summary

De Legé v. the Netherlands is an important case on the right against self-incrimination in administrative cases according to Article 6 of the European Convention on Human Rights. We argue that while *De Legé* is a welcomed step in the development of the Court's jurisprudence, there is still room for an improvement, namely, to rethink the protective scope. We argue that evidence, which has an existence independent of the accused's will, should not be treated as falling outside the protective scope of the right, at least not to such a great extent, as the Court does, since it may still raise some issues of forced self-incrimination, but instead should be a consideration in the overall assessment of whether the very essence of the right has been extinguished. However, the consideration should usually lead to the result that essence of the right has not been extinguished unless countervailing considerations outweigh it, such as Article 3 violations. Moreover, we point out that a focus on the authority's awareness of document's existence is an important factor in interpreting the earlier case law. Nonetheless, the focus of the interpretation should not be on the protective scope but, instead, on whether an information request forced the accused to actively and positively gather and submit documents, where he may be compelled to use his knowledge of his own affairs and exercise his judgment in assessing the relevance of documents and from where or how to obtain them, even from a third party. An information request may place the accused in a position where it can be likened to be forced to 'investigate' the case against himself for the authorities. An information request may go too far in that respect. Lastly, we suggest that *De Legé* may give the Icelandic legislature a cause to review legal provisions that grant greater protection against self-incrimination than Article 6 does.

1. Introduction[1]

The right to remain silent and against self-incrimination applies to administrative cases that fall under the criminal limb of Article 6 of the European Convention on Human Rights. The right forms a part of the right to a fair trial. Administrative cases of that kind also fall within the ambit of Article 70 of the Icelandic Constitution, which is interpreted in light of Article 6.[2] An administrative case, where an authority imposes an administrative sanction, such as an administrative fine, which satisfies the so-called *Engel*-criteria,[3] counts as a criminal case for the purpose of Article 6. Where an administrative case satisfies the requirements for the applicability of the criminal limb of Article 6, authorities must respect the right against self-incrimination. That matters for how they obtain and use evidence.[4]

De Legé v. the Netherlands is an important judgment of the European Court of Human Rights on the right against self-incrimination in administrative cases. Essentially, the Court held that authorities may obtain *specific pre-existing documents* under the threat of penalties. Such documents are not created as a result of the compulsion. The authorities must be aware of the documents; 'fishing expeditions' are excluded. A procedure concerning an information request, which satisfies these requirements, falls outside the protective scope of the right against self-incrimination.

The judgment is important because it clarifies the Court's case law on the matter. One possible interpretation of the earlier cases, chief among them *Funke*[5] and *J.B.*,[6] was that authorities may not obtain documents under the threat of penalties except in rather limited circumstances. Previously, we argued that such an interpretation of the Court's case law suffers from both legal and normative problems and is, ultimately, unconvincing when the cases are considered as a whole in light of the right's rationale. The interpretation can make the

---

[1] Many thanks to the peer-reviewers for their excellent comments and valuable insights.

[2] The Constitution of the Republic of Iceland, Act No. 33/1944.

[3] ECtHR, *Engel and Others v. The Netherlands*, 8. June 1976, § 81, ECtHR, *Öztürk v. Germany*, 23 October 1984, § 50, and ECtHR, *Ezeh and Connors v. The United Kingdom* [GC], 9 October 2003, § 82.

[4] On the right to remain silent, especially in administrative cases, see e.g., Björg Thorarensen: „Réttur aðila að stjórnsýslumáli til að fella ekki á sig sök" (2006), Björg Thorarensen and Ásgerður Ragnarsdóttir: *Álitsgerð um rétt til að fella ekki á sig sök á stjórnsýslustigi. Skýrsla nefndar við viðurlög við efnahagsbrotum* (2006), Jens Møller: „Forbud mod selvinkriminering in forvaltningsretten" (2003), Gerður Guðmundsdóttir: „Rétturinn til að fella ekki á sig sök í stjórnsýslunni. Almenni hlutinn: 70. gr. stjórnarskrárinnar og 6. gr. Mannréttindasáttmála Evrópu" (2019), Gerður Guðmundsdóttir: „Rétturinn til að fella ekki á sig sök í stjórnsýslunni. Sérstaki hlutinn: Gagna- og upplýsingaöflun stjórnvalda, Lagaákvæði. Réttaráhrif brota" and Gerður Guðmundsdóttir and Hafsteinn Dan Kristjánsson: „The Right Against Self-Incrimination in Administrative Cases", p. 261-265. We refer to these sources and the materials cited there for more details on the right and academic sources and cases.

[5] ECtHR, *Funke v. France*, 25 February 1993.

[6] ECtHR, *J.B. v. Switzerland*, 3 May 2001, § 44.

authorities' investigation excessively difficult.[7] *De Legé* is, therefore, a welcomed step in the development of the Court's jurisprudence.

The focus here will be on arguing that, in our humble view, there is still room to fine-tune and develop the Court's jurisprudence, namely, to rethink the protective scope of the right as well as to lay down the methodological steps differently.

We begin, however, with some background on the right against self-incrimination in administrative cases and introduce *De Legé*.

2. The Right Against Self-Incrimination in Administrative Cases

2.1 A critique of a possible interpretation of the earlier case law – The 'Funke/J.B.'-interpretation

Many authorities, including tax and financial authorities, investigate cases by, among other things, requesting documents from the party to the case (the accused). Sometimes there is a legal duty to submit the documents under a threat of penalties. The legal duty amounts to a coercion or a compulsion. It follows from these legal provisions that the accused can be coerced to submit documents that incriminate him. The question becomes: when does that constitute a violation of the right against self-incrimination according to Article 6?

One possible interpretation of the Court's earlier case law took the *outcome* of *Funke* and *J.B.* as a *general rule*. According to that interpretation, authorities may not require an individual, who is accused of a criminal offence in the sense of Article 6, to submit documents or give information according to a legal duty under the threat of penalties except in rather limited circumstances.

Previously, we argued that this interpretation of the earlier cases faces two kinds of problems. The first kind of problems are *legal*. The interpretation does not account for the entirety of the case law and the right's rationale, including evidence with an existence independent of the accused's will. Overall, it is not a good interpretation of the earlier cases since it is over-inclusive. The second kind of problems are *normative*. The interpretation can make it excessively difficult for authorities to investigate cases, it leads to an arbitrary

[7] Gerður Guðmundsdóttir and Hafsteinn Dan Kristjánsson: „The Right Against Self-Incrimination in Administrative Cases", p. 261-265, and Gerður Guðmundsdóttir: „Rétturinn til að fella ekki á sig sök í stjórnsýslunni. Sérstaki hlutinn: Gagna- og upplýsingaöflun stjórnvalda, Lagaákvæði. Réttaráhrif brota", p. 348-355.

distinction, and it creates a discrepancy between information requests and searches and seizures at the suspect's home.[8]

2.2 An alternative interpretation – the 'excessive burden'-interpretation

Aside from criticising the abovementioned possible interpretation of the earlier case law, we offered an alternative. According to our alternative interpretation, authorities may obtain documents, which were not created as a result of the compulsion, under a threat of penalties unless the obtaining or use of the evidence makes the proceedings excessively burdensome in light of considerations relevant for assessing its overall fairness.

What followed from our alternative interpretation of the earlier cases was that information requests should be assessed in their context in light of considerations relevant for evaluating whether the very essence of the right has been extinguished. We stressed that the existence of many documents is independent of the accused's will since they are not created as a result of the compulsion. In some instances, the accused is even legally required to keep them, the documents are meant to be publicly accessible or a matter of public record, such as many accounting documents, receipts, and bank statements. Some documents can even be obtained, at least in principle, from third parties. Their use is not suspect from the point of view of the right's rationale, which is to respect the accused's will to remain silent. We said that *Funke* and *J.B.* should not be read literally, and their *outcome* should not be taken as a *general rule*. Instead, the cases should be interpreted in light of the Court's overall methodology and other case law. The 'excessive burden' interpretation would not face the same legal and normative problems as the *Funke*/*J.B.*-interpretation, or so we maintained.[9]

2.3 To not be forced to 'investigate' the case against oneself

For a lack of a better term, we used the words 'excessive burden' to refer to situations where, on the balance of considerations, which matter for assessing the overall fairness of the proceedings in these types of cases, the authorities went too far; they asked too much of the accused in light of the right's rationale.

An excessive burden may be imposed in situations where the accused is compelled to *actively and positively (even strenuously) gather and/or submit documents and give information*

[8] Gerður Guðmundsdóttir and Hafsteinn Dan Kristjánsson: „The Right Against Self-Incrimination in Administrative Cases", p. 261-265.

[9] Gerður Guðmundsdóttir and Hafsteinn Dan Kristjánsson: „The Right Against Self-Incrimination in Administrative Cases", p. 268-273. See also Gerður Guðmundsdóttir: „Rétturinn til að fella ekki á sig sök í stjórnsýslunni. Sérstaki hlutinn: Gagna- og upplýsingaöflun stjórnvalda, Lagaákvæði. Réttaráhrif brota", p. 348-354.

that may incriminate him, even from a third party. The key is not that the accused is bothered or troubled by the authorities, or forced to make an effort, but, rather, that the accused is *compelled to use his own knowledge of and insight* to his affairs as well as *to exercise his judgment* of what is relevant for the information request, including whether potentially incriminating documents, which have a bearing on the information request, should be submitted. The accused may be placed in a situation where he may need to decide: 'Should I submit this incriminating document, which the authorities may not know that exists, but I do?' Or: 'Should I ask a third party for this document, which the authorities may not know about or know where is kept?' The accused is forced to what can be likened to partly 'investigating' the case against himself *for* the authorities.

To be essentially forced to 'investigate' the case against oneself for the authorities is a different situation from being *merely* (or more passively) compelled to submit a specific document, which may be in the accused's possession. Although the accused must hand over the document, he is not required to exercise his judgment as to whether to include it or actively seek it from a third party in the same way or to the same extent.[10] That situation is closer to but still different from having the document taken away by the authorities in a search and seizure, but there the accused's role is largely or virtually entirely passive.

Assessing whether the authorities went too far with their information request requires evaluating the position in which the accused is placed by the authorities to act against himself, including whether the role is essentially passive or active, in what way and to which degree. Where the role is essentially and to a large degree active and positive, in the sense described above, an excessive burden may be imposed on the accused but that depends on an assessment of each case.

In *Funke*, the accused was compelled to submit statements from the last three years from several foreign banks, which the authorities where not certain that existed, and could or would not obtain themselves. Since the applicant refused to hand them over, he was fined. In other words, he was fined for not submitting documents, which were not in his possession, but he needed to obtain from a third party, and it was not certain that they even existed. In other words, he was not only compelled to gather potentially incriminating documents from a third party but fined for not handing the over even though their very existence was uncertain.

[10] To be clear, in our view, it still matters for whether the procedure raises an issue of self-incrimination that he is forced to partake in incriminating himself.

The focus of *J.B.* was 'whether or not the imposition of a fine on the applicant for having failed to provide certain information complied with the requirements of the Convention'.[11] The Court stated that the accused is provided with protection against 'improper compulsion' by the authorities the purpose of which is to avoid miscarriages of justice and securing the aims of Article 6.[12] The applicant was requested to submit 'all documents' concerning his investments in his financial manager's companies. In addition to the apparent open-ended nature of the first information request, it was relentlessly pursued by the authorities. The Court found it unconvincing that the authorities were already aware of the information in question, stating:

'[…] in view of the persistence with which the domestic tax authorities attempted to achieve their aim. Thus, between 1987 and 1990 the authorities found it necessary to request the applicant on eight separate occasions to submit the information concerned and, when he refused to do so, they successively imposed altogether four disciplinary fines on him.'[13]

One way to understand the judgments is that the information requests went too far. They placed the accused in a position where they were compelled to submit documents or give information, which the authorities were not even sure that existed, even to gather them from a third party (again not being certain whether they even exist), and, in the latter case, to answer apparently an open-ended information request, which was relentlessly pursued.

2.4 A note on evidence with an existence independent of the accused's will

Moreover, we argued that documents, which have an existence independent of the accused's will, should not be treated as falling outside the scope of the right as *Shannon*[14] and *Marttinen*[15] suggested. Rather, evidence with an independent existence of the accused's will should be a feature to be considerate in the overall assessment of whether the very essence of the right has been extinguished.[16]

2.5 Added consideration to the overall assessment

Accordingly, we suggested that the consideration of *the nature and content of the evidence* should be added to the overall assessment of whether the very essence of the right has been extinguished. Independent existence is very significant. We argued that the consideration would

[11] ECtHR, *J.B. v. Switzerland*, § 63.
[12] ibid § 64.
[13] ibid § 69.
[14] ECtHR, *Shannon v. The United Kingdom*, 4 October 2005, § 26.
[15] ECtHR, *Marttinen v. Finland*, 21 April 2009, p. 69.
[16] Gerður Guðmundsdóttir and Hafsteinn Dan Kristjánsson: „The Right Against Self-Incrimination in Administrative Cases", p. 265-268.

usually lead to the outcome that obtaining such documents under the threat of penalties would not extinguish the very essence of the right unless other considerations outweigh it in the context of the case at hand.[17]

So, how does *De Legé* fit into all of this?

3. De Legé v. the Netherlands

The Court clarified its case law in *De Legé* on the privilege against self-incrimination and coercion to supply documents in the context of financial-law matters. The Court rightly notes that, in principle, the right can apply in these kinds of cases.[18] Then, the Court lays down its methodology. First, certain prerequisites must be satisfied for the right to apply. Secondly, the use of evidence must fall within the protective scope of the right. Thirdly, the use of evidence must not extinguish the very essence of the right. The Court elaborated on the three steps in the following manner.

First, two prerequisites must be satisfied for the right to apply to the case at hand. (a) The *case must fall under the criminal limb of Article 6*. The person must be facing existing or anticipated criminal proceedings (a criminal charge in the sense of Article 6) or incriminating information obtained with compulsion in the context of a criminal case must be used in a subsequent criminal proceeding. Moreover, (b) some form of *compulsion or coercion* must be exerted on the person concerned.[19] This is clearly satisfied in the types of cases discussed here.

Secondly, it must be determined whether the use of evidence, nevertheless, falls *outside the protective scope* of the right against self-incrimination. The scope is demarcated in light of the right's rationale to respect the accused's will to remain silent. When the accused is forced to answer questions or make statements, whether orally or in writing, the will is clearly not respected. The privilege does not, though, apply to obtaining materials which have an *existence independent of the accused's will*.[20]

The Court clarified in *De Legé* that documentary evidence obtained under a threat of penalties in the context of financial-law matters fall *outside the protective scope* of the right where the authorities are able to show that 'the compulsion is aimed at obtaining specific pre-existing documents'.[21] These are the kinds of documents that have not been created as a result of the very compulsion. These documents must be relevant for the investigation and 'whose

[17] Gerður Guðmundsdóttir and Hafsteinn Dan Kristjánsson: „The Right Against Self-Incrimination in Administrative Cases", p. 265-268.
[18] ECtHR, *De Legé v. the Netherlands*, § 69.
[19] ibid § 74.
[20] ibid § 75.
[21] ibid § 76.

existence the authorities are aware'.[22] This excludes a so-called *fishing expedition*. The Court distinguished this from situations where the authorities believe a document must exist, but they are not certain as was the case in *Funke* and *J.B*. The Court drew a parallel with the situation where a person makes an incriminating statement as a result of compulsion of which the authorities are not already aware.[23]

However, if the documents are obtained by using methods, which breach Article 3, its use will always fall within the protective scope irrespective of whether the authorities are aware of documentary or other real evidence.[24]

Thirdly, if the prerequisites are met and the use of evidence falls within the protective scope, then 'it is necessary to examine whether the procedure did not *extinguish the 'very essence' of the privilege'*.[25] That requires an overall assessment of the fairness of the procedures. The Court looks at the following considerations in its assessment: (a) the nature and degree of compulsion used to obtain evidence, (b) the existence of any relevant safeguards, and (c) the use to which any materials so obtained is put.[26]-[27]

As to the facts of the case, the Court found that the documents requested by the tax authorities were pre-existing and the authorities had been aware of them since they had already established that the applicant had a bank account in Luxembourg at the relevant time. Therefore, it could not be said it was a fishing expedition. The information request, hence, fell outside the protective scope of the right.[28] Accordingly, there had been no violation of Article 6.[29]

Consequently, the Court did not take the *outcome* of *Funke* and *J.B.* as a *general rule* for these types of information requests but distinguished the cases. A possible interpretation of the earlier case law (see 2.1 above), where authorities are essentially precluded from requesting incriminating documents or information from the accused except in some limited situations,

[22] ibid § 76.
[23] ibid § 76.
[24] ibid § 77.
[25] Our italics.
[26] ECtHR, *De Legé v. the Netherlands*, § 78.
[27] It should be noted that sometimes the Court has referred to an additional consideration, namely the public interests pursued.[27] See e.g., ECtHR, *Jalloh v. Germany*, [GC], 11 July 2006, § 101 and 117, and ECtHR, *O'Halloran and Francis v. the United Kingdom*, 29 June 2007. See also e.g., D.J. Harris et al (eds): *Harris, O'Boyle and Warbrik. Law of the European Convention on Human Rights* (2018), p. 427. For a discussion on the general significance of public interests, see ECtHR, *Ibrahim and others v. The United Kingdom*, 13 September 2016, § 252. Public interests cannot, though, justify extinguishing the very essence of the right and are limited in other ways as well. See in this regard ECtHR, *Jalloh v. Germany*, § 97, ECtHR, *Heaney and McGuinness v. Ireland*, 21 December 2006, § 58, ECtHR, *Quinn v. Ireland*, 21 December 2000, § 59, and ECtHR, *Marttinen v. Finland*, 21 April 2009, § 75. For a further discussion of the consideration, see Gerður Guðmundsdóttir: „Rétturinn til að fella ekki á sig sök í stjórnsýslunni. Almenni hlutinn: 70. gr. stjórnarskrárinnar og 6. gr. MSE", p. 302.
[28] ECtHR, *De Legé v. the Netherlands*, § 85.
[29] ECtHR, *De Legé v. the Netherlands*, § 88.

has, therefore, been rejected by the Court as a general rule or, at the very least, narrowed to situations where the authorities are not aware of the documents or the information request is not specific enough.[30]

De Legé is a welcomed step in the Court's development of its jurisprudence. Nevertheless, there is, in our humble opinion, still room for further development and improvement. Among them is to expand the approach beyond 'financial law matters' to other administrative cases with similar features. It is hard to see a principled reason for why the limitation of the protective scope should be confined to only these types of administrative cases.[31] No doubt the Court is being careful when it refers to 'financial law matters'.

Setting that aside, the focus here will be, firstly, on the desirability of rethinking the protective scope of the right and, secondly, laying out the methodological steps differently. We will now discuss these issues in turn.

4. Rethinking the Protective Scope

4.1 Specific pre-existing documents fall outside the protective scope of the right

In *De Legé*, the Court considered information requests for specific pre-existing documents, i.e., evidence having existence independent of the accused's will, as being procedures, which fall outside the protective scope of the right. This is in line with *Shannon*[32] and *Marttinen*,[33] as previously noted. The consideration of evidence with an existence independent of the accused's will originates in *Saunders*.[34]

There are, essentially, two different ways to deal with the issue of whether requesting specific pre-existing documents under the threat of penalties breaches the right against self-incrimination. The former is the Court's way of treating such procedures as not being protected by the right at all; they fall outside the scope. The very nature of the documents means that obtaining them under a threat of penalties does not even raise an issue of self-incrimination that must be further assessed. Nevertheless, a procedure falls within the protected scope if the information request does not satisfy the requirement of specificity and the authorities being aware of its existence. Likewise, a procedure falls within the scope if the document is obtained by methods, which violate Article 3.

[30] Also, keeping in mind the reference to 'financial-law matters'.
[31] We are aware that the kinds of documents in cases concerning financial-law matters, which are the subject matters of information requests, are of certain kind. However, other administrative cases can share their features.
[32] ECtHR, *Shannon v. The United Kingdom*, 4 October 2005, § 26.
[33] ECtHR, *Marttinen v. Finland*, § 69.
[34] ECtHR, *Saunders v. The United Kingdom* [GC], 17 December 1996, § 69. See also ECtHR, *Jalloh v. Germany* § 113.

The latter way is to treat information requests concerning such documents as falling within the protective scope but, instead, to assess them further in light of the considerations relevant for evaluating whether the very essence of the right has been extinguished. This entails that being forced to submit incriminating documents is, in principle, subject to the right's protective scope but the right has not been violated unless that is the outcome of the overall assessment. The nature and content of the documents is a (very) weighty consideration, which often leads to the outcome that the very essence of the right has not been extinguished. The outcome would be different, however, if countervailing considerations outweigh it.

In what follows, several arguments will be given for rethinking the protective scope of the right and in favour of the latter approach.

4.2 Why bring the evidence within the protective scope?

The Court's approach is founded on the right's rationale. Hence, the question arises: why should being compelled to submit specific pre-existing documents, which incriminate the accused, fall within the protective scope and, consequently, be subjected to an overall assessment of the relevant considerations?

The main reason is the following. It *raises an issue of forced self-incrimination* even if the evidence has an existence independent of the accused's will. While the evidence was not created as a result of the compulsion, the accused is forced to partake in incriminating himself against his will to a large enough degree.[35] To be fair, not all such issues are very serious, and some are (very) unlikely to lead to a violation of the right. Let us, therefore, bring into the daylight a situation where, in our view, there should, at the very least, be a concern. The situation is meant to be an argument against the demarcation of the protective scope in *De Legé*, concerning evidence with existence independent of the accused's will, but not a complete argument for our suggestion of the wider demarcation of the scope, i.e., where an issue of forced self-incrimination arises.

The situation is the following. Even though a pre-existing document was not created as a result of the compulsion (hence being pre-existing), it may, nonetheless, *force the accused to actively and positively work against himself* in a manner or to a degree which is questionable in light of the right's rationale. An information request, backed by a threat of compulsion, may force the accused to *actively and positively use his knowledge of and insights to his own affairs,*

[35] Issues concerning what counts as creating will be set aside. For example, whether it counts as creating a document as a result of the compulsion if the accused is requested to seek information from his bank concerning his business with the bank and the bank must create a document to describe or summarize the business based on its available information.

as well as to exercise his judgment, *against himself* in gathering, even from a third-party, and submitting incriminating documents to the authorities. An information request may actively and positively require the accused to exercise his will against his will to not incriminate himself. That is the situation when an information request places the accused in a position that can be likened to being forced to partly 'investigate' the case against himself *for* the authorities. The accused may, for instance, be forced to *assess the relevance* of documents for the information request as well as to *assess from where or how to obtain* them from a third party, also in situations where the authorities do not know where the documents are kept.

In principle, this situation is not that far removed from one where the accused is coerced into giving written or oral statements to identify relevant documents for the criminal case or disclose where or how the authorities can locate or obtain them. In both situations, the accused is compelled to use information, i.e., the identity/relevance or location of documents, which may incriminate him. The information used *contributes* to the incrimination by identifying it and its location even though the incriminating evidence itself has an existence independent of the accused's will. An information request may force the accused to *use that very same information* in action as opposed to giving written or oral statements on them.

It might be thought that compelling such an active and positive participation by the accused, forcing him to use his knowledge and judgment against himself, is ruled out by the condition that the request identifies specific documents and the authorities are aware of their existence. However, there are reasons to doubt why that condition should fully address the concern. The condition should be understood in light of what the Court stated on 'fishing expeditions'. Information requests can be more-or-less specific, and the authorities may be more-or-less aware of a document's existence in detail without a request for them amounting to a 'fishing expedition' in a true sense. A corollary is that the accused may be compelled to a *more-or-less* degree to use his knowledge of his own affairs and to exercise his judgment to incriminate himself. *Even when documents have an existence independent of the accused's will, an information request may force the accused to identify and located them in defiance of his will.* That may raise issues concerning self-incrimination even though the information request does not amount to a 'fishing expedition', at least not to large enough degree.

Now, it might be further thought that there is no reason to be concerned because whenever the accused is required to assess the relevance of documents and from where or how to obtain them, the condition of specificity and awareness is not satisfied. That would mean the condition is very strict. However, there are good reasons to not be overly strict on specificity and awareness. Requiring authorities to list every document or information by name or detailed characteristics might unduly limit their legitimate investigative abilities without raising significant concerns in light of the right's rationale and without it being a proper 'fishing expedition'. It is important to remember that the active and positive participation of the accused is a matter of degree (more-or-less) but not either-or. Hence, it should, in our view, be assessed in type of situation in its context and that is best done alongside the other considerations relevant for evaluating whether the very essence of the right has been extinguished.

4.3 The Court's earlier interpretation of Funke

The reasoning in *Funke* and *J.B.* is terse. Therefore, it is difficult to interpret them. We previously pointed out that the Court had stated, on an earlier occasion, that:

'The Court [in *Funke*] elaborated no further on the nature of the right to remain silent and not contribute to incriminating oneself.'[36]

However, we also pointed out that the Court had interpreted *Funke* in its later judgments highlighting that the 'impugned measure' where used to obtain evidence in defiance of the will of the accused[37] and, importantly, in several judgments noted:

'[s]uch a degree of compulsion in that case [*Funke*] was found by the Court to be incompatible with Article 6 […] since, in effect, *it destroyed the very essence of the privilege against self-incrimination*.'[38] [Our italics.]

In other words, the Court itself appears to have interpreted *Funke* as assessing how far the authorities went in the case as *a part of the overall assessment of whether the very essence of the right was extinguished* but *not* as part of the *protective scope* and distinguished cases on that ground. This is a different approach from the one in *De Legé* and in line with what we suggest.

4.4 The Court has previously considered the nature and content of the evidence in the overall assessment

The Court's methodological approach in *De Lége*, regarding the protective scope, is in line with *Shannon* and *Marttinen*. However, in *Bajic*,[39] the Court appears to have taken into account the nature and content of the evidence as *a part* of the overall assessment of whether the very essence of the right has been extinguished. In the Court's own words:

[36] ECtHR *O'Halloran and Francis v. the United Kingdom*, § 45.
[37] ECtHR, *Jalloh v. Germany*, § 113.
[38] ECtHR *John Murray v. the United Kingdom*, § 49. See also ECtHR *Heaney and McGuinness v Ireland*, § 48, and *O'Halloran and Francis v the United Kingdom*, § 46, referring to *John Murray*. See also D.J. Harris et al: *Harris, O'Boyle and Warbrick. Law of the European Convention on Human Rights*, p. 425.
[39] ECtHR, *Bajic v. North Macedonia*, 10 June 2021.

'The disputed reports, drafted by the applicant only after the accident, referred to the boat inspections he had performed in 2008 and 2009. That being so, the Court can only assume that *those reports should have been produced at the time when the technical inspection of the boat had been conducted, together with the certificates for its ability to navigate, and should therefore have been part of the boat's files*. Those two reports contained a warning by the applicant directed at the captain of the boat that passengers should only be carried in the saloons below the upper deck, even though no such warning had ever been included in the certificates which the applicant issued in 2008 and 2009. It is furthermore important to note, as maintained by the Government, that the two reports, *as documents regulating an important issue of public safety, could have been obtained by the competent authorities from sources other than the applicant,* even if by means of a compulsory court order.'[40] [Our italics and underlining.]

The Court highlights, for a lack of better term, the 'official' aspect of the documents (they could have been obtained from a third party and were connected to the technical inspection of the boat and should have been a part of the boat's files) as well as their content (the reports regulated an important issue of public safety). It was evidence with an existence independent of the accused's will. Still, the Court did not stop there and state that the documents fell outside the protective scope of the right. Instead, it assessed these features of the documents alongside the other relevant considerations for the overall assessment of whether the very essence of the right had been extinguished. For that purpose, the Court went on to state that the applicant's conviction had been based on the two reports, i.e., they had been taken into consideration, but that they had been of little relevance for his conviction in light of other available evidence.[41] In other words, the Court assessed how the evidence was used as well as its nature and content.

4.5 No further assessment of the nature and content of the evidence or the information request

According to the methodology in *De Legé*, the nature and content of the evidence and the nature of the information request, namely, specific preexisting documents (evidence with an existence independent of the accused's will) matter for demarcating the protective scope of the right in step two. At least the nature and content of the evidence does *not* appear to play *a further role in the overall assessment* of whether very essence of the right has been extinguished in step three. It is not among the three considerations identified by the Court. The same *might* be said

[40] ibid § 72.
[41] ibid § 73.

about the nature of the information request but much depends, though, on what can be squeezed under the rubric of the nature and degree of the compulsion used to obtain the evidence.

What is the outcome? If the document is specific and preexisting (evidence with an existence independent of the accused's will), then, according to *De Legé*, *no further issue* arises according to the right since it falls outside the protective scope as long as the method of obtaining it does not constitute an Article 3 violation. However, if it falls within the protective scope, then *no further account* is taken of the evidence's nature and content (possibly even the nature of the information request). The very features that matter for demarcating the protective scope do not matter for assessing whether the very essence of the right has been extinguished. There is a *disconnect* between the demarcation of the protective scope and the considerations in the overall assessment, at least according to how the methodological steps are laid out in *De Legé*.

Even according to the approach in *De Lége*, and other cases like *Jalloh*, evidence with an existence independent of the accused's will is *sometimes* included in the protective scope. That means in those situations that the nature of the evidence is not taken into account. It ceases to matter. According to our approach, *more* evidence with such a nature is included in the protective scope. Consequently, there is a stronger reason to take it into account in the overall assessment. Nevertheless, the point applies even according to the approach in *De Lége*.

Here it should *also* be stressed that the nature and content of the evidence is not limited to the evidence having an existence independent of the accused's will. Such evidence can have other characteristics, which do not appear to be wholly irrelevant for the overall assessment. For instance, some documents or evidence have a 'public' or 'official' dimension, such as public records, tax returns, accounting documents, etc. Other documents are a part of business dealings between parties, such as contracts, invoices, etc. Yet others appear to be more 'private' or 'personal', such as private communication via email, texts, social media, etc. It strikes us as there is a relevant distinction in these types of documents, which should not be wholly irrelevant for the overall assessment of the procedure. Consider, for instance, an information request for contracts, invoices, and accounting documents, on the one hand, and private email communication between co-conspirators in a tax evasion case. While none of the document are created as a result of the compulsion,[42] the emails are less 'official' and have a closer tie to the accused's will to remain silent (in the traditional sense).[43]

4.6 The expansion of the protective scope

Previously, we pointed out that there are limits to treating evidence, which have an existence independent of the accused's will, as falling outside the protective scope, but we stated:

'It would be mean that material, such as documents acquired pursuant to a warrant or drugs (see for example *Jalloh* [where Article 3 was violated]), would fall outside the scope of the right and no issue of whether it has been violated can arise.'[44]

Our point was this: not every obtainment of evidence, which has existence independent of the accused's will, should fall outside the protective scope of the right. An example of that would be obtaining evidence with methods that violate Article 3, as *Jalloh* had found in a different context.

The Court is clear in *De Legé* that there is an 'exception' to the limitation of the protective scope for specific pre-existing materials, where the methods used to obtain evidence violates Article 3. This means that a procedure concerning one and the same document can sometimes be within the protective scope and sometimes outside it. This suggests that the nature and content of the document does not raise concerns from the point of view of the right against self-incrimination but the *method* of obtaining it does. A method, which violates Article 3, does exactly that; it constitutes a violation of Article 3. The question arises: why does the method of obtaining a specific pre-existing document with such a method *also* potentially violate the right against self-incrimination?

To be sure, there is a historical connection between torture in interrogations and self-incrimination. The connection to confessions and oral statements obtained in such a manner is obvious. However, a specific pre-existing document has an existence independent of the accused's will unlike written or oral statements. The nature of a bank statement or receipt does not change even though a degrading treatment was used to obtain it or located it. The expansion of the protective scope appears to be an *ad hoc* fix to the limitation of the protective scope.

---

[42] Contrast with ECtHR, *J.B. v. Switzerland*, § 68, where the documents and information was not considered to have existence independent of the accused's will in the same way as in *Saunders*. To our mind, this underscores that evidence can have different characteristics, even though they are not created as a result of the compulsion.

[43] Importantly, such limitation of the right to respect for private and family life may be protected in other ways, though.

[44] Gerður Guðmundsdóttir and Hafsteinn Dan Kristjánsson: „The Right Against Self-Incrimination in Administrative Cases", p. 267.

Jalloh offers three reasons for including Article 3 violations in the scope of the right against self-incrimination but in a different context.[45] They are focused on how far the authorities went in obtaining real evidence in defiance of the accused's will with a focus on the appalling nature of the method. Aside from that, the reasoning is not crystal clear on how it ties to the right's rationale given the fact that the evidence has an existence independent of the accused's will, which may be determinative in other contexts.

It is also not obvious why the protective scope should only include Article 3 violations even though those methods constitute the most appalling violations of human dignity. Why *only* the most appalling ones? Evidence can be obtained in a highly questionable manner, such as by subterfuge, without reaching the threshold of Article 3, but still raise concerns from the point of view of the right's rationale. In case of subterfuge, the accused is not merely passively compelled to submit specific pre-exiting documents but tricked into acting against his will. That goes beyond being more-or-less 'passively' subjected to investigative measures.

To be clear, the problem is not, in our opinion, that these situations are included in the protective scope. Far from it. The problem is the limitation of the scope to begin with, which leads to a need to expand it to include these situations. It also means that assessing whether the procedure amounts to an Article 3 violation has a double role: first it brings the procedure within the protective scope in step two and, then, it matters for the overall assessment in step three.

4.7 A note on specific documents and awareness of their existence

De Legé requires that an information request is specific and that the authorities are aware of the document's existence; an information request may not be a 'fishing expedition'.

To be clear, a document has an existence independent of the accused's will *even when* authorities are not already aware of its (specific) existence and irrespective of how general or specific an information request is. The condition of specific documents and awareness of their existence leads to the result that the accused enjoys the protection of the right against self-incrimination when the authorities are not aware of the document's existence, but they are 'fishing', but not when they are aware of it and specific enough in their requests. This chimes with what was stated above about the accused being compelled to actively and positively work against himself, including assessing the relevance of evidence and from where or how to obtain them. Still, it should not be forgotten that information requests can be more-or-less specific, and authorities may be aware of a document's existence in greater or lesser detail and with

[45] ECtHR, *Jalloh v. Germany*, § 112-116.

greater or lesser certainty. Assuming the condition is not overly strict, which we caution against, there is a conceptual space where an accused may be forced to actively and positively participate in incriminating himself, without it amounting to a 'fishing expedition' in a true sense, resulting in him enjoying no protection since it falls outside the protective scope.

A condition of specificity and awareness, as a part of demarcating the protective scope, was not the only interpretation of the earlier case law, which was available to the Court. Instead of focusing on demarcating the protective scope of the right, the Court could have treated these features as parts of the overall assessment of whether the very essence of the right has been extinguished. *Funke* and *J.B.* should, in our view, have been seen as examples where an 'excessive burden' was imposed on the accused, namely, to actively and positively gather and submit documents that could incriminate them, it being relevant in the latter case that the information request was apparently open-ended and relentlessly pursued. The information requests went too far in light of these features.

5. Clearer Methodological Lines

5.1 Points on De Lége's methodological steps

Considering what has been stated above, concerning the protective scope, we suggest that the methodological steps in *De Legé* can be adapted and clearer lines drawn.

Recall that according to *De Lége*, there are three overarching steps: (1) Two prerequisites must be satisfied; (2) The use of evidence must fall within the protective scope of the right; and (3) the very essence of the right must not be extinguished. The former prerequisite is that the case falls under the criminal limb of Article 6. The latter is that some form of compulsion or coercion must be exerted on the person concerned. The former is truly a prerequisite since it is not specific to the right against self-incrimination. Contrariwise, the latter is specific to the right and should, hence, be a part of the specific methodological steps for that right but not a prerequisite.

Moreover, the latter prerequisite is an incomplete step when viewed as a part of the protective scope. It is not enough that a compulsion has been exerted on the person concerned, it must be exerted *to* (potentially) obtain incriminating evidence. Therefore, it is submitted that the latter 'prerequisite' should be a part of demarcating the protective scope alongside obtaining incriminating evidence. Moreover, it has been argued above that the protective scope (step 2 in *De Lége*) is too limited and complicated with 'fishing expedition' and Article 3 violations.

5.2 Alternative methodological steps

While the overarching steps are fine (prerequisite, protective scope, and overall assessment), we submit that the *details* should be the following. The first step is to ascertain whether the case falls under the criminal limb of Article 6, which is a prerequisite. The other two steps are specific to the right against self-incrimination.

The second step is to determine whether the case falls within the protective scope of the right. The focus of the protective scope should, in our view, be on *whether an issue of forced self-incrimination arises*. After all, the right grants a protection to persons against being compelled to contribute to incriminating themselves and it is based on that rationale. According to this, there must be some compulsion or coercion exerted and a risk of self-incrimination as a result. For example, general information, such as about the accused's name and address, does not usually raise an issue of self-incrimination.[46] The same applies usually to evidence procured from a third party.

The nature of evidence having an existence independent of the accused's will matters for demarcating the protective scope since it lessens the likelihood and sometimes even eliminates the possibility that the accused incriminates himself due to the coercion. Either he is not incriminating himself or it is not due to the coercion. As we have highlighted, the nature of the evidence is not the only relevant feature of the procedure in this regard. If there is no other feature that raises an issue of forced self-incrimination, the evidence's nature may be crucial in finding that the procedure falls outside the protective scope. However, if the accused is forced to partake in the procedure in a manner which raises such an issue, then the procedure should, in our view, fall within the protective scope even though the evidence has an existence independent of the accused's will. We have sought to identify some features like that here. We have also cautioned against ruling out that an issue may arise at the stage of the protective scope.

The third step should still be *whether the very essence of the right has been extinguished*, which depends on an overall assessment of the relevant considerations. As *De Lége* reiterates, they include the following: (a) the nature and degree of the compulsion, (b) any relevant safeguards, and (c) the use to which the evidence is put. Even though methodological steps in general tend to come in 'threes' for pedagogical reasons, we suggest that there are more considerations. Two will be stressed in this context. The first is the nature and content of the

[46] See e.g., ECtHR, *Vasileva v. Denmark*, 25 September 2003.

evidence. The second is the nature of the information request. Whether these are treated as independent considerations or a part of a contextual assessment of the nature and degree of the compulsion is not crucial. What matters the most is that these factors should form a part of the overall assessment. There should be a connection between the considerations in the overall assessment with the protective scope as it should be demarcated in light of the right's rationale. Hence, it matters *in what way* the accused is forced to (potentially) incriminate himself. The nature and content of the evidence and the nature of the information request are significant factors in that regard.

According to our view, when the accused is compelled in a criminal case, in the sense of Article 6, to submit documents that may incriminate him, the case should fall within the protective scope of the right since it raises an issue of forced self-incrimination, at least when it cannot be ruled out. An especially problematic situation is where the accused is forced to actively and positively gather and submit evidence that may incriminate him. However, requesting specific pre-existing documents should usually not lead to the very essence of the right to be extinguished given the evidence's existence independent of the accused's will. Notwithstanding, it could lead to a violation where the other considerations outweigh it, which includes, but is not limited to, Article 3 violations and true 'fishing expeditions'.

5.3 Upsides of the alternative methodology

We submit that these details of the methodological steps are less complicated than the ones in *De Lége*. Even though it entails that authorities need to make an overall assessment in step three more often, there are clear 'general lines' or tendencies, which should make their job manageable. Among them is that requesting specific pre-existing documents does not extinguish the very essence of the right unless there are special circumstances (countervailing considerations which outweigh those features in the context of the case at hand).

Furthermore, this methodology has an upside: it keeps authorities alert to potential violations; they need to keep an eye out for special circumstances. Finally, while the result will most often be the same according to the approach in *De Lége* and our suggestion, our approach should, at least in principle, offer a greater protection, since more procedures are subjected to the overall assessment and there is less conceptual space for cases to 'slip through the cracks' than according to the complicated or fixed demarcation of the protective scope in these kinds of cases in *De Lége*.

6. Concluding Remarks

De Legé is an important case in the Court's jurisprudence on the right against self-incrimination in administrative cases. It makes clear that authorities can obtain specific preexisting documents under the threat of penalties. The authorities must be aware of their existence but not engage in a fishing expedition. This part of the judgment is in line with our previous criticisms of a different possible interpretation of the Court's earlier jurisprudence as it pertains to administrative cases.

While *De Legé* is a welcomed step in the Court's jurisprudence, there is still room for an improvement, namely, to rethink the protective scope. The Court treats specific preexisting documents as falling outside the protective scope of the right unless they are obtained by methods which violate Article 3. A better approach, in our humble view, would be treat the procedures, where such documents are requested, as falling within the protective scope of the right, since it raises an issue of forced self-incrimination, but instead assess the nature and content of the document (evidence with an existence independent of the accused's will) and the nature of the information request (for instance how open-ended it is) as a part of the overall assessment of whether the very essence of the right has been extinguished. According to that approach, obtaining specific pre-existing documents does not usually lead to the outcome that the very essence of the right has been extinguished but that can be the case where other considerations outweigh these features.

Accordingly, we suggest that clearer lines can be drawn for the details of the methodological steps, which are: (1) Does the case fall within the criminal limb of Article 6? (2) Does the procedure fall within the protective scope of the right, i.e., does it raise an issue of forced self-incrimination? And (3) has the very essence of the right been extinguished, which requires an overall assessment of the relevant considerations, where that includes, in some form, the nature and content of the evidence and the nature of the information request.

De Legé may also give the Icelandic legislature a cause to review legal provisions that give greater protection against self-incrimination than Article 6. Numerous legal provisions in Icelandic law state that individuals are not required to submit documents or give information unless it can be ruled out that they matter for determining their guilt. No distinction is made for specific pre-existing documents (evidence with an existence independent of the accused's will).[47] The Icelandic provisions offer protection for situations, which fall outside the scope of

[47] To give just one typical example from Act No. 55/2013 on Animal Welfare, Article 42(4) states in Icelandic: „Í máli sem beinist að einstaklingi og lokið getur með álagningu stjórnvaldssekta eða kæru til lögreglu hefur maður, sem rökstuddur grunur leikur á að hafi gerst sekur um lögbrot, rétt til að neita að svara spurningum eða afhenda

the right according to Article 6. Arguably, the legal provisions are based on what we dubbed as the '*Funke/J.B.*'-interpretation of the earlier case law. At the least, they are consistent with it.

gögn eða muni nema hægt sé að útiloka að það geti haft þýðingu fyrir ákvörðun um brot hans. […]" For a more detailed discussion of these types of provisions, see Gerður Guðmundsdóttir: „Rétturinn til að fella ekki á sig sök í stjórnsýslunni. Sérstaki hlutinn: Gagna- og upplýsingaöflun stjórnvalda, Lagaákvæði. Réttaráhrif brota" e.g., p. 360-366. See also e.g., Hafsteinn Dan Kristjánsson: „Brottfall stjórnsýsluviðurlaga", e.g., p. 535.

Sources

Björg Thorarensen and Ásgerður Ragnarsdóttir: *Álitsgerð um rétt til að fella ekki á sig sök á stjórnsýslustigi. Skýrsla nefndar við viðurlög við efnahagsbrotum*. Reykjavík 12. október 2006.

Björg Thorarensen: „Réttur aðila að stjórnsýslumáli til að fella ekki á sig sök.“ *Rannsóknir í félagsvísindum VI: lagadeild*. Róbert R. Spanó (ed). Reykjavík 2005.

D.J. Harris, M. O‘Boyle, E.P. Bates and C.M. Buckley: *Harris, O‘Boyle and Warbrick Law of the European Convention on Human Rights*. 4. útg. Oxford 2018.

Gerður Guðmundsdóttir and Hafsteinn Dan Kristjánsson: „The Right Against Self-Incrimination in Administrative Cases.“ *Liber Amicorum Robert Spano* (Jon Fridk Kjolbrø, Síofra O‘Leary and Marialena Tsirli eds) 2022.

Gerður Guðmundsdóttir: „Rétturinn til að fella ekki á sig sök í stjórnsýslunni. Almenni hlutinn: 70. gr. stjórnarskrárinnar og 6. gr. MSE.“ *Stjórnsýslulög 25 ára*. Hafsteinn Dan Kristjánsson (ed). Reykjavík 2019.

Gerður Guðmundsdóttir: „Rétturinn til að fella ekki á sig sök í stjórnsýslunni. Sérstaki hlutinn: Gagna- og upplýsingaöflun. Lagaákvæði. Réttaráhrif brota.“ *Stjórnsýslulög 25 ára*. Hafsteinn Dan Kristjánsson (ed). Reykjavík 2019.

Hafsteinn Dan Kristjánsson: „Brottfall stjórnsýsluviðurlaga.“ *Stjórnsýslulögin 25 ára*. Hafsteinn Dan Kristjánsson (ed). Reykjavík 2019.

Jens Møller: „Forbud mod selvinkriminering i forvaltningsretten.“ *Forvaltningsretlige perspektiver*. Carsten Henrichsen o.fl. (ed). Kaupmannahöfn 2006.

Cases

ECtHR, *Bajic v. North Macedonia*, 10 June 2021 (2833/13).

ECtHR, *De Legé v. the Netherlands*, 4 October 2022 (68342/15).

ECtHR, *Engel and others v. the Netherlands*, 8 June 1976 (5100/71, 5101/71, 5102/71, 5354/72 and 5370/72). Series A no. 22.

ECtHR, *Ezeh and Connors v. The United Kingdom* [GC], 9 October 2003.

ECtHR, *Funke v. France*, 25 February 1993 (10828/84). Series A nr. 256- A.

ECtHR, *Heaney and McGuinness v. Ireland*, 21 December 2000 (34720/97). Reports of Judgments and Decisions 2000-XII.

ECtHR, *Ibrahim and others v. The United Kingdom*, 13 September 2016 (50541/08 50571/08, 50573/08 and 40354/09). Reports of Judgments and Decisions 2016.

ECtHR, *Jalloh v. Germany*, 11 July 2006 (54810/00). Reports of Judgments and Decisions 2006-IX.

ECtHR, *J.B. v. Switzerland*, 3 May 2001 (31827/96). Reports of Judgments and Decisions 2001-III.

ECtHR, *Marttinen v. Finland*, 21 April 2009 (19235/03).

ECtHR, *Murray v. the United Kingdom*, 8 February 1996 (18731/91).

ECtHR, *O'Halloran and Francis v. the United Kingdom*, 29. June 2007 (15809/02 and 25624/02). Reports of Judgments and Decisions 2007-III.

ECtHR, *Quinn v. Ireland*, 21 December 2000 (36887/97).

ECtHR, *Saunders v. the United Kingdom*, 17 December 1996 (19187/91). Reports 1996-VI.

ECtHR, *Shannon v. the United Kingdom*, 4 October 2005 (6563/03).

ECtHR, *Vasileva v. Denmark*, 25 September 2003 (52792/99).

ECtHR, *Öztürk v. Germany*, 21 February 1984 (8544/79). Series A nr. 73.

---

* *Grein þessi hefur verið ritrýnd og staðist þær fræðilegu kröfur sem gerðar eru samkvæmt reglum Vefrits Úlfljóts. / This article has been peer-reviewed and meets the academic requirements set out in the rules of the Úlfljót Web Journal.*