THE HUMAN RIGHT TO REMAIN SILENT

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The right to remain silent is closely related to the principle that in criminal proceedings and proceedings that are equivalent to them a person shall not be compelled to incriminate himself or herself.

The prohibition of self-incrimination has a long tradition and was expressed very early on in the Latin maxim *nemo tenetur se ipsum accusare*. This maxim was used to protest against proceedings in absolute monarchies where subjects were forced to appear before courts and inquisition panels and take an oath that they would answer truthfully to any question put to them without at all being aware of the true reason for the questioning. In other words, they were in total darkness regarding the consequences of their answers: would they be only providing necessary information for the conduct of public affairs or would their statements under oath be used as evidence to prove that they had committed a criminal offence. However, the principle of non self-incrimination did not rest on a secure legal basis until it was set down in written form for the first time in the Fifth Amendment to the United States Constitution of 1791. This guarantees *inter alia* that “no person . . . shall be compelled in any criminal case to be a witness against himself; nor shall be deprived of life, liberty, or property, without due process of law.”

After the adoption of this Amendment to the US Constitution, the principle has gained strong support in common law systems. This has been expressed in many judgements of United States, English, Australian and Canadian courts, as well as courts in other countries. It has been gradually extended to apply not only to actual criminal trials before courts but to pre-trial questioning by the police and other administrative agencies. The most famous case in this respect has remained that of *Miranda v. Arizona* in 1966.1

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1 384 U.S. 436 (1966). The US Supreme Court found, *inter alia*, that the prosecution “may not use statements, whether exculpatory or inculpatory, stemming from questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way, unless it demonstrates the use of procedural safeguards effective to secure the Fifth Amendment's privilege against self-incrimination”. The Court also held that “the prosecution may not use statements […] stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination. By custodial interrogation, we mean questioning initiated by

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The prohibition of self-incrimination has gradually spread to civil law countries, such as France (Code of Criminal Procedure) and Germany (Code of Criminal Procedure).

With sudden progress in the internationalisation of human rights, the prohibition of self-incrimination was enshrined in the International Covenant on Civil and Political Rights (ICCPR), adopted by the UN General Assembly on 16 December 1966. The Covenant entered into force on 23 March 1976 and has now been ratified by 161 states.\(^2\)

Article 14 of the Covenant, dealing with due process, provides that

\[\ldots\text{ in determination of any criminal charge against him, every one shall be entitled to the following minimal guarantees in full equality:}\]

\[g. \text{Not to be compelled to testify against himself or confess guilt (para. 3).}\]

It is interesting that a regional human rights instrument of great value and importance, the European Convention for the Protection of Human Rights and Fundamental Freedoms (the European Convention on Human Rights) of 4 November 1950 does not expressly provide for this right, although it was drafted in approximately the same period. In addition, both instruments were inspired by the Universal Declaration on Human Rights, adopted by the UN General Assembly on 10 December 1948. In Article 10, the Declaration proclaims that everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in determination of his rights and obligations and of any criminal charge against him.

The European Convention on Human Rights has exerted an important influence on the modern understanding of human rights because of the jurisprudence of the European Court of Human Rights, which has been active for almost half a century. In comparison, the work of the UN Human Rights Committee, which was established to monitor the implementation of the ICCPR has had less influence, mostly due to the fact that deciding on individual communications where the authors complain of violations of the ICCPR has not been its main activity: communications can be submitted only against States which have ratified the (first) Optional Protocol to the ICCPR whereby signatories—

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\(^2\) As at 18 April 2008, the List of Ratifications and Reservations is available at [http://www.ohchr.org/English/countries/ratification/4.htm](http://www.ohchr.org/English/countries/ratification/4.htm).