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# Criminal compliance and the risk of criminal procedure privatization

THE PROBLEM CONCERNING “BORROWED EVIDENCE”  
AND THE VIOLATION OF THE PRIVILEGE AGAINST SELF-  
INCRIMINATION

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## 1. Introduction

Compliance programs arose as a reaction phenomenon to several famous procedures concerning economic crime in America and Europe, such as the cases of Enron and WorldCom in the US, Parmalat in Italy, Flowtex and Siemens in Germany. The debate about the needs of prevention and control of corporate criminality became the issue of the day. Therefore, the private sector (companies) as well as the public one (legal and judiciary state systems) have refocused themselves to guarantee the existence of effective organization systems within companies to the fulfillment of ethical and legal goals and not just the traditional purpose of obtaining profit. The objective was to avoid the commission of offences, throughout prevention programs<sup>1</sup>. Sieber states that these programs, by encouraging the respect for law as a way to support a minimum standard of ethical and lawful behaviour in a certain company, ensure larger protection to those values than criminal law does, as they try to avoid not only the crimes against the company, but also the crimes in its favor<sup>2</sup>.

The unquestionable need of these programs doesn't erase the dangers associated to its establishment, namely the challenges to the legal system, in particular, as far as corporate criminal law is concerned. Thus criminal compliance deals with all the contents that must be introduced in the compliance system so that it prevents criminal risks<sup>3</sup>.

The study will seek to investigate the phenomenon presently known as *criminal compliance* and its implications as far as criminal procedure is concerned. The aim is to understand and control the impact that the investigations developed within a private company will have in the following criminal procedure.

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<sup>1</sup> There are several innovative concepts related to this subject and its precise meaning and differentiation are very difficult to sustain as they all define the same idea, despite the different goals, procedures or characteristics: *compliance programs, risk management, value management and corporate governance, business ethics, integrity codes, codes of conduct, corporate social responsibility, ...* Cf. Sieber, Ulrich, "Programas de compliance en el derecho penal de la empresa. Una nueva concepción para controlar la criminalidade económica", in *El Derecho Penal Económico en la Era Compliance*, Zapatero, Luis Arroyo/ Martín, Adán Nieto (dir.), Tirant lo Blanch, València, 2013, p. 63 – 109, specially, p. 64-66.

<sup>2</sup> Sieber, Ulrich, *cit.*, p. 70.

<sup>3</sup> Martín, Adán Nieto, "Problemas fundamentales del cumplimiento normativo en el Derecho Penal", in Kuhlén/Montiel/Ortiz de Urbina (eds.), *Compliance y teoría del Derecho Penal*, Marcial Pons, 2013, p. 21.

## 2. Criminal compliance programs

### 2.1 Internal system of criminal prevention

As a natural trait, man brings inside himself the germen of disobedience. There is a natural human failure to uphold the requirements of law. As Faria Costa says, crime is connatural to our way of being<sup>4</sup>.

The prohibition is breachable. Law is created to be breached. It's the nature of life. It's the nature of men. But as we have law and its inevitable transgression, we also have the sanction. In fact, punishment arises as the necessary consequence to the infraction which presumes breaching the legal command.

We must acknowledge that this human trend towards criminal behaviour is enlarged in certain environments or contexts. That is what happens within a company<sup>5</sup>, specially if we consider economic and financial criminality<sup>6</sup>. Consequently it makes sense to introduce internal programs to monitor and control the workers' performance, in other words, what we may call an internal system of criminal prevention. This system should involve the settlement of rules of action to define adequate behaviour (legal system), the foundation of surveillance mechanisms (control system) and finally the establishment of repression measures to face possible offences (sanctioning system)<sup>7</sup>.

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<sup>4</sup> Costa, José de Faria, *Noções Fundamentais de Direito Penal, Fragmenta Iuris Poenalis*, Coimbra Editora, 2012, p. 5.

<sup>5</sup> There are several reasons pointed out to underline why this criminal tendency is more effective and more notorious within the scope of a legal person: the complexity of procedures; the hierarchy; the natural tendency to failure enhanced by the companies' profit maximizing logic, the ferocious market competition and the shortage of working offers.

About the criminogenous factors present in the corporate organizations, *vide* Bermejo, Mateo G./Palermo, Omar, "La intervención delictiva del compliance officer", in *Compliance y Teoría del Derecho Penal*, eds. Lothar Kuhlén, Juan Pablo Montiel e Íñigo Ortiz de Urbina Gimeno, Marcial Pons, 2013, p. 174 – 176.

<sup>6</sup> We don't mean to focus only on the private sector, but it is important to emphasize that a corporate structure, whether it is public or private, and according to its dimension, is permeable to crime practise and favours impunity. In this sense, there is an important study about compliance programs in the public sector, specially considering the prevention of corruption in the public administration and political parties, in Martín, Adán Nieto/Calatayud, Manuel Maroto (dir.), *Public Compliance, Prevención de la corrupción en administraciones públicas y partidos políticos*, Colección de Estudios Penales Marino Barbero Santos, Ed. De la Universidad de Castilla-La Mancha, 2014.

<sup>7</sup> Sánchez, Juan A. Lascuraín, "Compliance, debido control y unos refrescos", in *El Derecho Penal Económico en la Era Compliance*, Zapatero, Luís Arroyo/ Martín, Adán Nieto (dir.), Tirant lo Blanch, València, 2013, p. 127 e ss.

*Compliance* comes from the verb "to comply" which means "do as one is requested or commanded; obey"<sup>8</sup>. Compliance programs are intended to identify possible unlawful behaviours undertaken within, in favour of or throughout the company and therefore they aim at the prevention and/or repression of those actions. In other words, if according to an *ex ante* perspective, criminal compliance suits as a method of crime prevention, if we follow an *ex post* approach, it may also be seen as a way of sanctioning the offences. In any case, those programs are always real crime prevention systems<sup>9</sup>, not only because they are created with that specific aim, but also because the repression of infractions shows the preventive intention of reaffirming the value of the legal system.

## 2.2 Internal corporate investigations

Internal corporate investigations are an internal procedure sustained by the company within the scope of a concrete compliance program. They are intended to identify and discover any transgression to the rules of law which support the legal system.

It is clear that these investigations aren't used only to discover the practice of crimes. Indeed, the investigation is supposed to focus in any fact which claims for accountability, of the company or of an individual person, concerning offences committed against the company or against other workers, even if those offences aren't crimes.

There are authors who point out the existence of different types of internal investigations<sup>10</sup>, considering their object or target: internal investigations regarding

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<sup>8</sup>Oxford Advanced Learner's Dictionary, 7th Edition, Oxford University Press.

<sup>9</sup> About the suitability of compliance programs to the prevention of crime, based on a criminological perspective, see Sieber, Ulrich, *cit.*, p. 96 e ss.

<sup>10</sup>Cuadras, Albert Estrada i/Anglí, Mariona Llobet, "Derechos de los Trabajadores y Deberes del Empresario: Conflicto en las Investigaciones Empresariales Internas", in *Criminalidad de Empresa y Compliance. Prevención y Reacciones Corporativas*, Sánchez, Jesus-María Silva (dir.)/Fernández, Raquel Montaner (coord.) et al., Atelier, Barcelona, 2013, p. 201e 202. These authors establish the typology of internal investigations based on several criteria: 1 – According to the object; 2 – According to the step of execution of the infractions under investigation; 3 – According to the level of suspicion over the investigated person; 4 – According to the passive subject; According to the nature of the consequences; 6 - According to the kind of intrusion in the individual freedom of the investigated person.

crimes, internal investigations regarding other kinds of offences (for instance in labour matters, data protection, intellectual and industrial property, etc) and internal investigations regarding contract breach.

Anyway, the internal investigation is defined as a mechanism of the sanctioning system, which is enforced as a consequence of the surveillance effectiveness. As *trigger mechanism* of an internal investigation, within the company, there is the so called whistleblowing channel. But suspicion sometimes comes from other events, even external ones, such as consumers 'or clients 'complaints, media news, etc.

It's mainly about this issue of internal investigations and its limits that emerges a recurrent problem, profoundly discussed by the doctrine, concerning the risk of criminal procedure privatization. This problem is now being risen due to the increasing emergency in the business world of compliance programs.

### **3. Criminal compliance and corporate criminal liability**

#### **3.1 Models of corporate criminal liability**

Overpast the principle *societas deliquere non potest*, most of the legal systems admit and regulate the possibility of charging legal persons for their criminal liability. The current trend of the majority of legislations in modern legal systems is to acknowledge concurrent accountability for legal and natural persons involved in the commission of a certain criminal offence<sup>11</sup>.

That is why it is important to point out under which conditions a certain crime can be ascribed to a legal person, by describing the model of corporate criminal liability adopted. There are two theoretical models of liability: the traditional model defining corporate responsibility based on representation and the more recent model of self-responsibility of the legal person.

The traditional model of responsibility by representation entails a definition of the links between the criminal act and the management decisions as they represent the

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<sup>11</sup> This kind of solution can be found in article 11.º, no. 7, of the Portuguese Penal Code.

corporate entity. This model attempts to link corporate personality to the actions of individual persons. The company is accountable for the crime practised by someone acting on its behalf and interest, because the entity allowed somehow the individuals to commit the fact, whether they are legal representatives (the social entities of the company) or natural/voluntary representatives - according to the *identification theory* - or, in a wider perspective - the *vicarious solution* - even other agents, such as employees or service providers or contractors. This way a corporation may be criminally liable for the acts of its officers, agents or servants who are acting within the scope of their employment and for the benefit of the corporation. Vicarious liability, therefore, is another method of imputing the illegal acts of employees to the corporation itself.

On the other hand, there is the model of self-responsibility of the legal person or direct responsibility, which stands upon the idea of direct criminal guilt of the company<sup>12</sup>. In this sense, the legal person is accountable for its own offence, not some fact committed by an individual. The company is to be punished for its own organizational fault. Nevertheless, the wrongfulness of the company's conduct can't be assumed as from the individual crime. The concrete lack of control of the company that enabled the offence committed by an individual person has to be assessed and proven *in casu*.

This text doesn't aim at reasoning substantive matters, however, criminal responsibility of legal persons and the exact imputation model of corporate criminal liability bring up into discussion very relevant procedural questions, like the importance of corporate cooperation with public investigation and the means of defence used by the company in case of being charged for criminal acts.

Compliance programs, and internal investigations in particular, represent fundamental weapons for the legal person to resort as a way to achieve unaccountability.

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<sup>12</sup> This idea of direct guilt of the legal person is related to several theories, among which we highlight the theory of deviated corporate culture (present in the Australian Penal Code and defended by Gómez-Jara), the theory of the organizational defect (Heine, Gómez-Jara) or the theory of guilt for the company's leading (Heine) – cf. Martín, Adán Nieto, *La responsabilidad penal de las personas jurídicas*, Madrid, 2008, p. 146.

In the first place, this might happen when internal investigations are used to demonstrate the crime didn't occur or to plead the prosecutions' prescription, for instance, so that every suspect, being a legal person or an individual, may be declared unaccountable.

Second, and on the contrary, internal investigations can be used by the company to demonstrate the crime commission. In this case, besides aiming at charging the employee within a disciplinary internal proceeding, the company may also follow a specific interest as far as criminal procedure is concerned, for two reasons:

1 - to benefit from a substantive or procedural advantage provided by criminal law, related to the possibility of excluding corporate criminal liability;

2 - to allow the legal person the chance of proving that there was no lack of control or organizational failure and therefore there is no reason to raise a criminal procedure against the company because the legal standard of incrimination was not fulfilled.

### **3. 2 Legal benefits associated to criminal compliance programs**

"The possibility of collaborating doesn't mean there is a duty to collaborate"<sup>13</sup>. The possibility of making the legal person criminally accountable also assures its privilege against self-incrimination, and consequently it is a legitimate choice not to collaborate<sup>14</sup>.

However, it seems the advantages the company may achieve by collaborating with public investigation are superior to the corresponding drawbacks.

As far as criminal law policy is concerned, compliance programs prove to be a very effective mechanism to public power because they allow the promotion of the companies' cooperation with criminal investigation.

Without this cooperation, most of the times, nothing would be discovered, considering the specificity and complexity associated to the kind of offences committed

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<sup>13</sup>Martín, Adán Nieto, "Problemas fundamentales del cumplimiento normativo en el Derecho penal", *cit.*, p. 47.

<sup>14</sup> About the *nemo tenetur* as a procedural guarantee of the legal person and its relativization due to the legal obligations of criminal compliance in Brazil (*compliance duties*), see Gloeckner, Ricardo Jacobsen/Silva, David Leal da, "*Criminal Compliance*, Control and Actuarial Logic: The Relativization of the *Nemo Tenetur Se Detegere*", in *Direito.UnB*, Jan – June/2014, vol. 01, i.01, p. 140-163.

and the organizational net, involved or accessory to criminal execution, which easily hides the signs left over by criminal action.

Compliance practises can be favoured through different kinds of measures, such as:

- through the imposition of special legal obligations of compliance in certain areas, being very common in the range of the credit system, the stock market monitoring, with the purpose of preventing money laundering, for instance<sup>15</sup>;

- through the creation of stimulus structures to collaboration, namely in the scope of corporate criminal law<sup>16</sup>. Well, in this field, the incentives might be substantive or procedural, but what really matters to the legal person is to guarantee unpunishment as consequence of its unaccountability.

There are, in fact, situations in which, depending on what is stated on the applicable criminal legislation, the legal person can benefit from the exclusion of its criminal accountability: whether it is by the substantive way, because the existence and enforcement of a concrete compliance program contributes to prove there was an effective fulfilment of the legal person's control duties towards its subordinates and therefore the legal requirement to declare criminal liability won't be verified and the company's conduct will be considered atypical<sup>17</sup>; or by the procedural way, because cooperating with public investigation agencies may offer in return not opening the penal proceeding against the legal person or at least not charging the company when its cooperation already took place after starting the investigation.

Following the substantive perspective, the suspect's collaboration can be legally qualified as a mitigating circumstance, acting to reduce the penalty or even, in certain circumstances, as a ground to grant judicial forgiveness<sup>18</sup>. There are even some systems that expressly regulate the mechanism of collaboration with regard to financial and

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<sup>15</sup> Sieber, Ulrich, *cit.*, p. 103 – 105.

<sup>16</sup> About the benefits concerning criminal matters to the legal person and to its leaders, concerning the spanish legal system, see Cuadras, Albert Estrada i/Anglí, Mariona Llobet, *cit.*, p. 203 e 204.

<sup>17</sup> In respect of criminal unaccountability of the legal person based on the existence of a compliance program, in a critical sense and concerning the recent modification introduced in the spanish penal code (article 31), see Soler, José-Ignacio Gallego, "Criminal compliance y proceso penal: reflexiones iniciales", in *Responsabilidad de la Empresa y Compliance, Programas de prevención, detección y reacción penal*, Puig, Santiago Mir/ Bidasolo, Mirentxu Corcoy/ Martín, Víctor Gómez (dir.), Edisofer S. L., 2014, p. 197 and ff., specially footnotes no. 4 and 5, p. 197.

<sup>18</sup> That is precisely what happens, for example, in the USA (*plea bargaining*), Germany (*Kronzeugenregelung*), Italy (*patteggiamento*), or Brazil (*delação premiada*).



economic criminality. That is precisely what happens in Brazil where there is a general regime for plea bargaining, and a specific parallel figure called “leniency agreements”<sup>19</sup>.

From a procedural point of view, the biggest incentive is the fact that the public agency of prosecution may not initiate the investigation against the collaborative person. The principle of legality concerning criminal procedure promotion forces the opening of the procedure once there is a report received by public authorities, which is seen as a trigger mechanism to start an investigation. By the end of the investigation, if there are evidences of the crime commission and its authors, the authority is legally bound to present the charges. Because of that, only the procedural systems based on opportunity would be capable of granting the advantage of not investigating or charging the suspect who collaborated. However, this isn't exact: in a system of legality, there are also easing mechanisms, such as diversion or probation measures<sup>20</sup>, similar to the *Deferred Prosecution Agreements* used in the USA<sup>21</sup>, under which the procedure is suspended until the duties or rules of action enforced are fulfilled by the legal person. These rules can consist of implementing a compliance program in the company.

We consider the legal incentives offered by procedural solutions of diversion are more effective and less problematic<sup>22</sup>. More effective because the simple existence of a proceeding against a company brings about negative costs to its reputation and commercial performance, damaging the internal running of the activity. Less

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<sup>19</sup> In the year 2000 was created the Leniency Program which allows an agent, who participated in a criminal cartel or a collective antitrust practise, to denounce those actions to the authorities and cooperate with the investigations, receiving in return administrative or criminal immunity or at least the reduction in the applicable sanctions. Cf. <http://www.cade.gov.br/Default.aspx?2d0d0f111ffd3e1c28293e>.

About the brazilian legislation as far as criminal compliance is concerned, see Rios, Rodrigo Sánchez/Antonietto, Caio, “Criminal Compliance. Prevenção e Minimização de Riscos na Gestão da Atividade Empresarial”(“Criminal Compliance. Preventing and Minimizing risks in the Management of Corporate Activities”), in RBCCrim ano 23, vol. 114, maio-jun. 2015, p. 341 and ff., specially p. 363-369.

<sup>20</sup> As it is granted by Adán Nieto Martín about the Spanish legal system where it is recognized the principle of legality concerning procedural promotion. *Vide* Martín, Adán Nieto, “Introducción”, in *El Derecho Penal Económico en la Era Compliance*, Zapatero, Luís Arroyo/ Martín, Adán Nieto (dir.), Tirant lo Blanch, Valencia, 2013, p. 21.

<sup>21</sup> In the USA, a system of opportunity, the Department of Justice, following the scandals of Enron and WorldCom, issued guidelines directed to the promotion of the suspects collaboration as a decisive criterion not to pursue criminal procedure. This way is favoured the celebration of agreements and in exchange is granted the immediate and definitive abandonment of the procedure against the legal person (*Non Prosecution Agreement*) or agreements sustained under a probation regime (*Deferred Prosecution Agreements*).

<sup>22</sup> There are authors who defend diversion measures, such as the procedure's suspension or the celebration of procedural agreements with legal persons (and in exchange these persons commit to improve their internal organization), as a natural way to incorporate compliance in criminal law. See Martín, Adán Nieto, “Problemas fundamentales del cumplimiento normativo en el Derecho penal”, *cit.*, p. 49.

problematic as those solutions don't require commitment to defending an objective condition to punish, the sanction forgiveness or even a mitigating circumstance.

#### **4. The risk of criminal procedure privatization**

##### **4.1 The problem**

Increasing the companies' cooperation with criminal procedure brings forward obvious advantages to the company itself, but also remarkable benefits to the public investigation. Nevertheless, it implicates huge risks, mainly in the field of self-defence rights of the accused as far as criminal procedure is concerned.

The risk of using probative elements gathered during internal investigations lies precisely in the fact that those evidences were obtained under unknown and uncontrolled circumstances, by non judiciary entities.

In fact, the use of this "borrowed evidence" will always be questionable, whether it is the only source of evidence for tracing the crime, or even when it is only complementary evidence. In the first case, though, there is a bigger danger as it may turn criminal procedure into a conventional public intervention *a posteriori*, deprived from its specific content. Criminal procedure would only aim to enforce the criminal sanctions without assuring, but only confirming, the expected requirements of criminal liability.

In any case, the relevant issue is that "the power of investigation of the company is bigger than the State's"<sup>23</sup>. Na verdade, o poder do empregador é enorme, desde logo pela evidência prática de que o empregador detém um ascendente sobre o seu subordinado que, receoso das consequências nefastas que podem advir para o seu futuro laboral, tende a colaborar acriticamente com todas as diligências.

On the other hand, internal investigations aren't tied to the limits imposed to criminal investigation<sup>24</sup>. Therefore they may be carried out without respecting the

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<sup>23</sup> Martín, Adán Nieto, "Problemas fundamentales del cumplimiento normativo en el Derecho penal", *cit.*, p. 47.

<sup>24</sup> Despite the fact that courts, in labour law cases, have been using some of the criminal law rules.

fundamental rights of the accused, which are central to criminal investigation, as well as the basic principles of criminal procedure, as, for instance, the principle *nemo tenetur se ipsum accusare*.

We don't mean to say these internal investigations are illegal or against the law. The challenge here derives from the fact that we are in an intersection scope, between private labour law and public criminal law<sup>25</sup>. Thus, we must acknowledge that those internal investigations are carried out under labour law rules, which are directed to the protection of individual rights of work-people and, because of that, don't mean to regulate such an intrusive and inquisitorial process as criminal procedure is. Labour law<sup>26</sup> worries about the observance of the rules contained in the contract or in the law by contractual parties and for this reason disrespecting those rules can only imply for the worker the consequence of dismissal. On the contrary, in a criminal proceeding, the goal of public authorities is to discover the real facts that occurred which violated the values protected by the incrimination, as a way to reaffirm those legal-axiological grounds. In order to fulfill this objective, the accused has to be subordinated to coercive measures, highly restrictive to individual rights, sometimes in early stages of the procedure, and, in case of conviction, criminal law implies the enforcement of the most severe sanctions within the legal system because they might deprive citizens from their freedom.

## 4.2 Evidence collection in internal corporate investigations

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On the other hand, however the evidences collected in the internal investigations may justify disciplinary measures, they must be proven in case the worker claims in court against the enforcement of the disciplinary sanction. Therefore, it is very relevant the character of the *compliance officer*, who, being a criminal lawyer, may grant credibility to the internal procedure, in order to "validate the effectiveness of compliance programs before the judges". *Vide* Franco, J. A. González/ Shemmel, A./ Blumenber, A., "La función del penalista en la confección, implementación y evaluación de los programas de cumplimiento", in *El Derecho Penal Económico en la Era Compliance*, Zapatero, Luis Arroyo/ Martín, Adán Nieto (dir.), Tirant lo Blanch, Valencia, 2013, p. 158.

<sup>25</sup> Montiel, Juan Pablo, "Sentido y alcance de las investigaciones internas en la empresa", in *Responsabilidad de la Empresa y Compliance, Programas de prevención, detección y reacción penal*, Puig, Santiago Mir/ Bidasolo, Mirentxu Corcoy/ Martín, Víctor Gómez (dir.), Edisofer S. L., 2014, p. 512.

<sup>26</sup> We don't disregard the fact that labour law can't be only considered as being a branch of private law, due to the public interest associated to it and the constitutional protection given to working people.

In the internal investigations pursued within a criminal compliance program, the applicable rules are the labour set of laws. In this field, we face a kind of *sui generis* private relation because there isn't a total balance of contractual positions, given the ascendancy of the employer. The employer holds the direction power and also the ability to adopt surveillance and control measures to verify the employee's accomplishment of his work tasks<sup>27</sup>.

Considering these internal investigations, we can recognize different ways to obtain evidence: evidence obtained against the worker's will and evidence obtained with the worker's contribution.

In the first case, the employer orders a certain demarche and the employee must subject to it, in case it doesn't harm his fundamental rights. We can think of the apprehension of working instruments, for instance, such as a computer, a mobile phone, etc. In this kind of operations, the important issue is to verify if the investigation respected the fundamental rights of the suspect and if it was carried out with a justified purpose.

In the second case, the evidentiary elements were willingly provided by the worker during the course of an internal investigation: making statements, revealing passwords to access emails or other data bases, cell phones' pins, etc. In fact, there is a duty of obedience that forces the worker to render information when requested by the employer and there is no privilege similar to the *nemo tenetur* principle, but there are also limitations to the employer's power<sup>28</sup>.

In any of those cases, a proportionality judgement must be made, because there are conflicting interests: on one side, the direction power of the employer and, on the other side, the workers' fundamental rights, as, for instance, the right to privacy. The employer's actions that affect privacy aren't always illegal. That is why the compression of individual rights and freedoms demands that specific reflexion of proportionality in a large sense (meaning a judgement of necessity, adequacy and proportionality in a strict sense) so that it becomes possible to check the admissibility of the individual right's restriction upon constitutional standards. Anyway, our starting

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<sup>27</sup> However those measures are in general subject to legal limitations, namely by the labour codes.

<sup>28</sup> About the limits to the employer's control concerning the execution of the compliance program, specially considering the respect for privacy and confidentiality, *vide* Sein, José Luis Goñi, in *Responsabilidad de la Empresa y Compliance, Programas de prevención, detección y reacción penal*, Puig, Santiago Mir/ Bidasolo, Mirentxu Corcoy/ Martín, Víctor Gómez (dir.), Edisofer S. L., 2014, p. 387-393.

point should be the premise of the superiority of the individual fundamental rights when compared to the control powers of the enterprise's owner<sup>29</sup>.

### 4.3 The conveyance/transmission of evidence

The question that arises is to know if it is legitimate to use in the criminal procedure the elements gathered against the suspect during the previous internal investigation. This question puts us before two problems: first, the problem of the evidence transmission<sup>30</sup>; secondly, the risk of promiscuity between the two types of procedure<sup>31</sup>.

It is relevant to start from understanding which kinds of evidence might be incorporated in the criminal procedure. It will mainly consist of documentary evidence, as the internal investigation must be registered in written reports composed by documents collected during the investigations. Yet there is also the expert evidence, as a way to clarify about the special technical knowledge about the issue under investigation, or even the witnesses, who might be important to show and prove the way the compliance program was put into practice by the company suspected<sup>32</sup>.

The experts and the witnesses will have to be interrogated again during the criminal proceedings and it won't be considered what they have declared in a previous stage concerning the company's internal affair. This is why there isn't great problem about these kinds of evidence. But the same can't be stated as far as documentary evidence is concerned. Let's think, for instance, of email correspondence or digital documents collected from the employee's computer, written interviews directed by the

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<sup>29</sup> Whenever the disrespect for fundamental rights of the worker is a crime, because it fulfills criminal law formal requirements, the action might be considered not typical or illicit. This position is stated by Martín, Víctor Gómez, "Compliance y derechos de los trabajadores", in *Responsabilidad de la Empresa y Compliance, Programas de prevención, detección y reacción penal*, Puig, Santiago Mir/ Bidasolo, Mirentxu Corcoy/ Martín, Víctor Gómez (dir.), Edisofer S. L., 2014, p. 421 and ff., specially p. 438 and ff.

<sup>30</sup> Adán Nieto Martín speaks about the problem of incorporation. *Vide* Martín, Adán Nieto, "Investigaciones internas", in Adán Nieto Martín (dir.) et al., *Manual de cumplimiento penal en la empresa*, Tirant lo Blanch, Valencia, 2015, p. 269.

<sup>31</sup> Concerning a similar issue, namely the contamination between processes of inspection and enquiry and the risk of "self-blaming", *vide* Dias, Augusto Silva/Ramos, Vânia Costa, *O direito à não auto-inculpação (nemo tenetur se ipsum accusare) no processo penal e contra-ordenacional português*, Coimbra Editora, 2009, p. 71 e ss.

<sup>32</sup> Soler, José-Ignacio Gallego, "Criminal compliance y processo penal: reflexiones iniciales", *cit.*, p. 223 e 224.

*compliance officer*, the passwords to access mobile phones or other electronic devices revealed by the worker which allowed the access to secret or encrypted data.

If these elements gathered in internal investigations are available to the public investigation agency, can they be used in the criminal investigation? It is, in fact, a problematic question: the relation between the worker and the employer there are cooperation obligations that don't exist from the suspected or accused person towards the public investigator or prosecutor.

Labour law professes the direction and disciplinary power of the employer and the corresponding employee's duty of obedience. In the penal field, the accused person doesn't have the duty to collaborate and, moreover, holds a privilege against self-incrimination.

Indeed it is important to clarify if the worker collaborated willingly and was informed about the possible consequences of his collaboration, including the chance of being charged for criminal offences. If so, there is no reason to prevent the data from being used in the criminal procedure as far as the investigation is concerned, but only to sustain the opening of that stage and to decide whether there are enough suspicion to justify the charges. In other words, those elements can't be used as evidence, but they can serve to sustain a complaint aiming at initiating a new procedure.

## **5. Borrowed evidence and procedural rights**

### **5.1 The principle *nemo tenetur se ipsum accusare* (the privilege against self-incrimination)**

As far as criminal procedure is concerned, the privilege against self-incrimination confronts with the duty to collaborate.

Collaborating may involve a duty to bear or a duty to provide. Well, there is a difference between an obligation of giving something (*dare*) and an obligation of bearing a certain measure or behaviour (*pati*).

One thing is to subject someone to investigations in order to obtain evidences. The suspect will be forced to tolerate those actions whenever the law says so expressly<sup>33</sup> and according to the conditions legally determined.

Some other thing is to collaborate in an active manner with the investigation agency, providing verbal or physical elements that may constitute evidences. This cannot be seen as an obligation and it mustn't be legally required as no one should be forced to contribute to self-incrimination – the latin brocard *nemo tenetur se ipsum accusare*.

This privilege against self-incrimination, being a right not to produce self-incriminating evidence, has a wider scope than the right to silence, as it integrates also the right not to deliver any physical or digital elements, documents or others<sup>34</sup>. Using the words of Costa Andrade, “*nemo tenetur* protects against every form of active collaboration to self conviction, if coercively imposed”<sup>35</sup>.

This principle is materialized in the Constitution through the mention to the right of self-incrimination which is a defence right of the defendant towards the state's punitive power.

The defendant doesn't bear the burden to prove his innocence – presumption of innocence –, in other words, the burden of proof is thus on the prosecution. This is also a way to justify the idea according to which the accused person has the right to refuse to collaborate with criminal investigation and adverse inferences can't be drawn from this refusal.

## 5.2 Other rights of the accused

Besides the *nemo tenetur* principle, there are other safeguards guaranteed in criminal procedure that aren't observed when an internal investigation is carried out.

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<sup>33</sup> That is precisely what happens in article 60.º of the Portuguese Criminal Code.

<sup>34</sup> In this sense, Dias, Jorge de Figueiredo e Andrade, Manuel da Costa, "Poderes de supervisão, direito ao silêncio e provas proibidas", in *Supervisão, Direito ao Silêncio e Legalidade da Prova*, Almedina, 2009, p. 43 e ss.

<sup>35</sup> Our translation from Andrade, Manuel da Costa, “*Nemo tenetur se ipsum accusare* e direito tributário ou a insustentável indolência de um Acórdão (n.º 340/2013) do Tribunal Constitucional”, in RLJ, ano 144, n.º 3989, nov-dez. 2014, p.

For example, penal procedure implies that every investigation act that involves restrictions to fundamental rights and freedoms has to be authorized or practised by a judge, while "an internal investigation allows the inspectors to dodge the judge's control"<sup>36</sup>.

If documents or other elements were obtained through apprehensions or searches, etc, made by the employer within his legal or contractual power, can that information be valued in criminal proceedings?

Answering affirmatively to this question would imply perverting the essence of procedural guarantees of criminal law, by deviating from the legal bind according to which the judge must be involved in the process of evidence acquisition. If the investigation agency, being the prosecutor or the police, shouldn't embody certain actions without the judge's scrutiny, so, a fortiori, mustn't be an individual (the employer) to do so, even because that person can also be accused in the same criminal proceeding.

### **5.3 Self-defence rights of legal persons**

The new substantive and criminological reality associated to legal persons claims for a specific treatment as far as procedural law is concerned, as it may alter the traditional pattern of procedure centred in the defendant being a natural person.

In fact, every procedural instrument must be reorganized according to this new model where criminal responsibility of natural and legal persons live side by side.

In criminal procedure there isn't only one self-defence right. There are several defence rights if we think of the several guarantees that compose it. These guarantees will be broader or less broad according to the structure of the procedure in analysis and the principles that inspire it. Anyway, in modern criminal procedure, it is generally granted the principle of contradiction and the defendant is allowed to benefit from a position of active participation, acknowledging all the measures undertaken, using his defence weapons and carrying to the process his own story, ultimately, practising every

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<sup>36</sup> Our translation from Martín, Adán Nieto, "Problemas fundamentales del cumplimiento normativo en el Derecho penal", *cit.*, p. 47.



action considered relevant to secure his interests as the principal target of the investigation and prosecution.

The natural person, in the exercise of proper defence rights, can present his own version of the facts, the one that best conveys his position and allows the best protection to personal interests. However, the legal person faces several obstacles, such as the existence of different versions of the facts, the uncertainty of which is the best position to defend its interests, ...

In this context, criminal compliance programs can assume great importance to the definition of corporate criminal liability, namely because the internal investigations appear to be a necessary tool to the exercise of the legal person's defence right<sup>37</sup>. Whatever legal benefit we consider, it will always be crucial to the legal person knowing the details of the fact under investigation to better model an effective strategy of defence. It might even be decisive for the company to prove that formally there is an internal compliance program and that it worked effectively in that concrete case: the company adopted control mechanisms aiming at preventing infractions, the required vigilance was assured, the infraction was identified and therefore it triggered an internal investigation willing to discover the circumstances of the fact, and the company is able to prove that the infraction was committed in disobedience to the orders and recommendations which rule its activity<sup>38</sup>.

Well, it should be important to define which exact elements can be presented by the enterprise in order to exercise its self-defence right. Does the company need to carry evidences that were gathered in the internal investigation and that incriminate a worker? In most situations, legal persons can defend themselves effectively without unveiling incriminatory data about natural persons. Let's see:

If we follow the model of hetero-responsibility, the legal person will only have to prove that the actions of its representative agent weren't developed in its name, with its authorization or in its interest and therefore the action can't be foreseen as a true act of representation. In the other cases, even if the infraction was committed in its interest, it must be demonstrated that it was carried out against orders, instructions or

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<sup>37</sup> Martín, Adán Nieto, "Investigaciones internas", in Adán Nieto Martín (dir.) et al., *Manual de cumplimiento penal en la empresa*, Tirant lo Blanch, Valencia, 2015, p. 261, 264 e 265.

<sup>38</sup> As an example, the portuguese penal code, in its article 11.º, n.º 6, excludes responsibility whenever the agent acts against orders or express instructions of superiors ("*A responsabilidade das pessoas colectivas e entidades equiparadas é excluída quando o agente tiver actuado contra ordens ou instruções expressas de quem de direito*").

recommendations. In this case, it will be crucial to put together probative elements necessary to certify that the organization and the internal policy of the company were patently breached by the individual agent of the crime, who acted according to its own will and not representing the company at any title.

If we follow the model of self-responsibility, the company will have to underline the occurrence of an organizational defect, which doesn't contradict the existence of a working philosophy and an internal structure guided to the fulfilment of rules and not to its violation<sup>39</sup>.

In any of this two hypothesis, demonstrating the legal person wasn't involved in the criminal fact can be more easily achieved if there is a compliance program within the company. It shouldn't be enough, though, to prove its abstract existence, otherwise it must be clear that, in the concrete circumstances under investigation, it functioned effectively.

This way we reach the same conclusion as before: legal persons can defend themselves effectively without unveiling incriminatory evidences against individuals and this is a risk that must be fought.

The issue becomes even more imperious when we consider that the cooperation of the private company with the public prosecution aims at obtaining a certain gain, its own unaccountability. In fact, considering the trouble that public authorities face in the investigation of economic and financial crimes, it is common to offer the company's unaccountability as a way to pay back its cooperation. The problem is that the evidence brought from the internal investigation can be part of a personal defence strategy of the company, who steps into the criminal procedure as an interested part, aiming at the conviction of the individual person accused as a way to decline its own responsibility. In this sense, the legal person can reveal some data but hide other relevant elements, according to its own interests, in order to benefit herself by jeopardizing the worker.

In conclusion, there must always be uncertainty when considering the probative elements brought to the proceedings by the legal person, as the company may also assume simultaneously the position of accused in the same process. Therefore, all those

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<sup>39</sup> About the concept used by Spanish law, in art. 31 bis of the Penal Code, "duty of vigilance/control", *vide* Martín, Adán Nieto, "Investigaciones internas", *cit.*, p. 79 and ff.

evidences should be analysed as any other defence instrument and the declarations should be valued according to the legal rules applicable to co-accused persons.

As a matter of fact, not allowing the judge to value the evidences obtained in pre-existent internal investigations can also be a way to assure the impartiality of a final criminal decision.

## **6. The future: private/public cooperation with rights?**

### **6.1 Internal investigations with safeguards**

Although it is not admissible the communication of evidences collected in previous internal investigations, the reflexions above will always fulfil an important objective. The future will bring an evolution in the design and implementation of compliance programs, in order to make private investigation more credible: “internal investigations should be just, efficient and professional”<sup>40</sup>.

According to Adán Nieto Martín<sup>41</sup>, the solution is to surround the cooperation between private and public investigation with a series of guarantees that are able to compensate the dangers associated to it, such as:

1 – a system of compliance based in values, by integrating in internal investigations the basic and unremitting guarantees of criminal procedure, such as the ethic principles that compose any just process<sup>42</sup>;

2 – criminal law can only admit probative material coming from internal investigations when it was obtained respecting fundamental rights;

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<sup>40</sup> Moosmayer, Klaus, “Investigaciones internas: una introducción a sus problemas esenciales”, in *El Derecho Penal Económico en la Era Compliance*, Zapatero, Luís Arroyo/ Martín, Adán Nieto (dir.), Tirant lo Blanch, València, 2013, p. 138.

<sup>41</sup> Martín, Adán Nieto, “Investigaciones internas”, *cit.*, p. 261.

<sup>42</sup> Adán Nieto Martín defends that “if the internal investigation is an antechamber of criminal procedure, it must offer similar guarantees” and, for instance, the author states that the people who are interrogated should be informed of the right to remain silent and also about what is the goal of the investigation. *Vide* Martín, Adán Nieto, “Problemas fundamentales del cumplimiento normativo en el Derecho penal”, *cit.*, p. 48.

3 – preserving the information obtained by the company from public investigation, in the sense that public agencies won't be allowed to use that information against the company's will, in order to respect the legal person's defence right.

The author's way of thinking can lead us to admitting that internal investigations with respect for the principles and guarantees of criminal procedure can be a previous private stage that anticipates and prepares the public process, being an *antechamber* of criminal procedure<sup>43</sup>.

Although we recognize and praise the intention of this thinking, we can't agree with it. First, because it goes against a basic conception: criminal procedure is a matter of the community, it causes serious restraints to the citizens' fundamental rights and therefore should remain as a public prerogative, being held by who detains the State's *potestas* and used within the limits imposed by law in a democratic State. Secondly, for practical reasons, as the enterprises don't have neither the human or logistic means, nor the knowledge and the technical preparation to guarantee the fulfillment of internal procedures with the required level of respect for the main principles. Besides, it doesn't seem right to address that kind of demand to private companies; we should only demand them to communicate the judiciary entities whenever there is suspicion of a crime in spite of sustaining a form of subrogation in criminal investigation.

We tend to agree more with Montiel who stands for an "intermediate system of guarantees"<sup>44</sup> because an internal process similar to criminal procedure can bring serious problems to the labour relationship that binds the employer and the subordinate, which follows private law rules, completely different to those that guide the criminal law universe.

Internal investigations, despite the fact that they can also focus on criminal infractions, are always non state procedures, carried out by who doesn't detain public powers and because of that they are a phenomenon of private law with respect for the rights and principles granted in labour law<sup>45</sup>.

## 6.2 Reflection on the interests in conflict – searching the road to a solution

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<sup>43</sup> *Idem, ibidem.*

<sup>44</sup> Montiel, Juan Pablo, *cit.*, p. 506 e 507.

<sup>45</sup> Montiel, Juan Pablo, *cit.*, p. 512 e 513.

The principle *nemo tenetur*, as well as other defence guarantees, aren't granted within internal investigations, even when they focus on crime commission<sup>46</sup>. Being a non public procedure, these investigations must only obey the rules of labour law and therefore there is no juridical obstacle to use the information obtained, based on the worker's collaboration duty towards the employer, within a disciplinary procedure, for instance, if the main content of the employee's fundamental rights is respected.

Calling the judgement of BGH, there is only a situation of conflict caused by *nemo tenetur* when the declarant is exposed to state pressure, as it never exists when the disclosure of information can only cause material damage, as far as civil law is concerned<sup>47</sup>.

Our answer will be different if the information obtained is to be used as evidence in criminal procedure: the incriminating evidences collected in internal investigations without respecting the privilege against self-incrimination can't be considered and public authorities should develop their own investigation in order to gather other probative elements able to sustain a prosecution and subsequent conviction.

In criminal procedure, the evidences obtained with disrespect for the *nemo tenetur* principle are null and void and cannot be valued under any circumstance. That nullity may also influence secondary evidence, according to the fruit of the poisonous tree doctrine<sup>48</sup>.

Thus the evidences borrowed from internal investigations can't be valued in criminal procedure as they are subjected to a prohibition of valuation due to the

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<sup>46</sup> Sustaining an opposed position, in the sense the *nemo tenetur* can't be completely withdrawn as a right of the workers, vide Maschmann, Frank, "Compliance y derechos del trabajador", in *Compliance y Teoría del Derecho Penal*, eds. Lothar Kuhlen, Juan Pablo Montiel e Íñigo Ortiz de Urbina Gimeno, Marcial Pons, 2013, p. 156 e ss.. The author thinks it is necessary to distinguish two situations according to the objective of the questioning made by the employer within a compliance program: if the questioning aims at preventing facts, in other words, has the objective of avoiding inconvenient situations and allow the company to work in the future without troubles, the *nemo tenetur* principle isn't valid; if the questioning has a repressive aim, to discover crimes or serious infractions to duties, the *nemo tenetur* should be recognized in a limited sense.

<sup>47</sup> *Apud* Maschmann, Frank, "Compliance y derechos del trabajador", in *Compliance y Teoría del Derecho Penal*, eds. Lothar Kuhlen, Juan Pablo Montiel e Íñigo Ortiz de Urbina Gimeno, Marcial Pons, 2013, p.157.

<sup>48</sup> *Vide*, for all, in Portugal, Andrade, Manuel da Costa, *Sobre as Proibições de Prova em Processo Penal*, Coimbra Editora, 2006, p. 312 e ss.

forbidden evidence theory, in other words, the elements brought from the private investigation couldn't be considered nor those which were obtained after them<sup>49</sup>.

We don't have any doubts about the enforcement of this theory to the situations where the company committed some irregularity to obtain the information (for example, because there was improper access to the emails, or the company hid from the interviewed worker that the information could be self-incriminating, etc), disrespecting fundamental rights.

However, whenever there aren't any irregularities, the problem remains. If the employer carries out an internal investigation with respect for the principles and rule of labour law, without any intolerable violation of the employee's rights and privileges, can those elements be incorporated in criminal proceedings?

Costa Andrade<sup>50</sup> states, for similar cases, a solution based on the prohibition of valuation of every self-incriminating data that the defendant was somehow legally obliged to reveal to the tax administration within a tax procedure, due to the duties of cooperation with public tax agencies. We agree entirely with the main idea of the author: "the collaboration duties that exist in other areas of law exterior to the criminal law universe can't project themselves over criminal procedure by imposing self-incriminating evidences"<sup>51</sup>. But there is an important difference that breaks the possible analogy with the tax procedure situation: in the case in analysis the investigation agency that asks for the incriminating evidence might simultaneously be accused or at least suspect and investigated in the following criminal procedure and the information given by the author of the crime can even exclude the company's criminal liability.

There are three legitimate values in conflict: the defence right of the individual worker (where we include the privilege against self-incrimination among other defence guarantees), the defence right of the legal person and the public interest in the administration of justice and the discovery of truth. The challenge we face, using the

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<sup>49</sup> Adán Nieto Martín speaks about a problem of incorporation. In this cases, the author questions the possibility of enforcing the theory of forbidden evidence, because it was developed thinking of the relationship between the state and the individual, in order to discourage public investigators from obtaining evidences that violated fundamental rights. Cf. Martín, Adán Nieto, "Investigaciones internas", *cit.*, p. 269 e 270.

<sup>50</sup> Andrade, Manuel da Costa, "*Nemo tenetur se ipsum accusare* e direito tributário ou a insustentável indolência de um Acórdão (n.º 340/2013) do Tribunal Constitucional", in RLJ, ano 144, n.º 3989, nov-dez. 2014, p. 129-158.

<sup>51</sup> Andrade, Manuel da Costa, "*Nemo tenetur se ipsum accusare* e direito tributário ..."

words of Adán Nieto Martín, is to create a three range criminal procedure<sup>52</sup> – enterprise, individual person, investigator/judge - which subverts the traditional bilateral relationship state/individual which characterizes the exercise of the State's *ius puniendi*.

Schuhr<sup>53</sup> defends a solution based on an *hypothetical clean path doctrine*, according to which there should be accepted the evidences that could have been obtained with very high probability without the declaration of the accused.

This solution, despite being tempting, is also criticisable. It is the task of public power to find the alternative means to prove the facts that compose the prosecution and an eventual conviction. It can't be admitted in criminal procedure the use of presumptions or probable evidences. Because of the consequences associated to it, a criminal conviction implies certainty about the facts, sustained by valid and legitimately obtained evidences.

The answer to the question "to admit or not borrowed evidence in criminal proceedings" must be negative considering an adequate task of practical harmony of the interests in conflict. The individual couldn't find a way to benefit from all the guarantees associated to its procedural status if it wasn't so. Yet the legal person can defend herself validly without using those incriminating evidences against the individual. And also public power is able to carry out an effective investigation, using its own methods and means, either than those "borrowed" ones.

It is obvious that we overvalue in this reflexion the individual's self-defence rights because its content must be faced differently than the defence rights of legal persons. There isn't as much protection in the legal system to this right when compared to the rights of individuals. In the spirit of the constitutional and ordinary legislator, the prevision of a criminal procedure with guarantees and a specific procedural status to the defendant are due to the fact that this kind of procedure can end by enforcing severe penalties as prison which are the bigger restrictions to the rights and freedoms of citizens in a democratic state. Putting the values on the scale, the most heavy is undoubtedly the pan that carries the rights of the individuals. In our opinion, this is argument enough to refuse the acceptance of evidences gathered in internal

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<sup>52</sup>Martín, Adán Nieto, "Investigaciones internas", *cit.*, p. 258.

<sup>53</sup> Schuhr, "Vorbemerkung zu den §§ 133 ff", in Knauer/Kudlich/Schneider (ed.), *Münchener Kommentar StPO*, nm. 116, *apud* Montiel, Juan Pablo, *cit.*, p. 515, footnote no. 102.

investigations in criminal procedures, even if the legal person is also accused and has the legal right to defend herself.

### **6.3 Conclusions**

Considering:

- the thoroughness and extent of the private person's defence rights when compared to the defence rights of legal persons;

- the possibility of the legal person exercising its defence right by proving the existence and effectiveness of the compliance program, without needing to join evidences collected by non judiciary entities that incriminate natural persons;

- the doubt about the reliability of those evidences collected in the internal investigations due to the lack of technical preparation of the investigators, the lack of concern for personal defence rights and the interest of the legal person in reaching unaccountability;

- the possibility open for public investigators to develop new attempts of searching and seizing evidence or to repeat the ones carried out in internal investigations;

- the need to shield the balance between the purposes of criminal procedure;

- the concern to avoid the transformation of companies in private investigation agencies, surrounding the safeguards provided by modern criminal procedure.

We must conclude that:

The evidence collected in internal corporate investigations in violation of the fundamental rights and guarantees of criminal procedure can't be used in a subsequent criminal process. Therefore, the judgement of this "borrowed evidence" must be forbidden, being disregarded to the evaluation of culpability for two main reasons: not perverting the protective nature of defence guarantees in criminal procedure; preserving the investigation's impartiality which influences the righteousness of the final decision.