Criminalization of error under the various ICAO and EU regulations

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24.10.2018
Safety Information in the context of law

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Three views of the actuality of Just Culture
Has safety battled with the legal beast.
J.Woodlock E2 Rome WS 2017
Just Culture – have we opened the Pandora's box?
“the crisis in civil aviation accountability”

Daniels, 2017

Have developments in law outpaced Just Culture policy - despite EU376/2014 - or because of it...
The need for 376/2014

**Area / Scope**
- Safety: Highly complex, socio-technical system
- Judiciary: Societally accepted and agreed law

**Methodology**
- Safety: Systemic investigation in order to reconstruct the events in the broadest possible manner from the perspective of the involved operators
- Judiciary: Event- and outcome-based investigation with hindsight, narrowing to one individual, one action, one omission

**Goal / Aim**
- Safety: Gain of information and system safety improvement
- Judiciary: Clarification of the question of fault and corresponding measures

**Characteristics**
- Safety: Dynamic, pre-active, forward-looking, safety-oriented
- Judiciary: Static, retrospective, guilt- resp. compensation-oriented

**Just Culture**
Balance and satisfy the interests of two unique and basically not compatible worlds
A Trial to describe the issue

- EC 376/2014
- ICAO annex 13
- ICAO annex 19
- Safety Aviation
- Just culture
- Judiciary
A Trial to describe the issue

376/2014

Safety Aviation

Annex 13

Annex 19

Just culture

Judiciary

Law
A Trial to describe the issue
A Trial to describe the issue

376/2014

Safety Aviation
Annex 13
Annex 19
Just culture

CAA NSA Gvnt

Judiciary
Law
A Trial to describe the issue

- 376/2014
- Safety Aviation
- Annex 13
- Annex 19
- Just culture
- AIB
- CAA NSA Gvnt
- Judiciary
- Law
A Trial to describe the issue
The future?

Safety
Aviation

Law

AIB

CAA
NSA
Gynt

Willful conduct/
Gross Negligence
Criminal action

376/2014

Annex 13

Annex 19

Just culture

* Roman law

Roadshows organised by Eurocontrol
Aviation meets judiciary

prosecutors network

Nationwide prosecutor for aviation

- Civil aviation occurrences analysis bureau
- Ministry of infrastructure
- Main Dutch airline carriers
- Dutch ATC
- Aviation Police
- Dutch Safety Board
JUST CULTURE FROM THE LEGAL PERSPECTIVE
A journey through the History

I. Air Accidents

II. Aviation world concern
## CONTROL OF CRIMINALIZATION IN ORDER TO GET SAFETY INFORMATION THAT MAINTAIN AND IMPROVE SAFETY IN AVIATION

### Accidents investigation (2010)

- Evolution Chapter 5: inv. records
- Protection of Information from acc
- Independence between two invest
- NEW ATTACHMENT E: SIP

**EUROPEAN**: Reg. 996/2010 Accidents investigation (FOLLOWING Spanair Accident). Art.12, 13 and 14

### Safety information (2013/14)

- Standar 5.3 about safety data protection
- New attachment B= Attachment E (A 13)

**EUROPEAN**: Reg. 376/2014 Reporting System
- Protection of information 15
- Protection of sources of information 16
CURRENT SITUATION AT INTERNATIONAL LEVEL: A HUGE STEP FORWARD

What have we achieved in new Annexes 13 and 19?

• SI legal PROTECTION is incorporated as SARPS
• DEFINE WHAT SAFETY INFORMATION IS
• CLARIFY BETWEEN: SAFETY DATA AND SAFETY INFORMATION
• ACKNOWLEDGEMENT: WHY SAFETY INFORMATION SHOULD BE PROTECTED
• HOW SAFETY INFORMATION SHOULD BE PROTECTED
• PRINCIPLES OF PROTECTION AND PRINCIPLES OF EXCEPTION: JUST CULTURE IN ACTION
New ICAO ANNEXES (July 2016)

- **The main reference** in SIP is *Annex 19* 2nd Edition

- **WHAT:** In Definitions:
  - Safety Data: a set of Facts or Values from aviation sources
  - Safety Information: Safety data analyzed, organized
  - Special treatment for recorded data

- **HOW:**
  - In Chapter 5: *Note* 1 to 5.3.2
  - JUST CULTURE
  - In new Appendix 3 (former Attachment B)
  - In new SMM (9859)

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5.3 Safety data and safety information protection

5.3.1 States shall accord protection to safety data captured by, and safety information derived from, voluntary or reporting systems and related sources in accordance with Appendix 3.

*Note.*—Sources include individuals and organizations.

5.3.2 Recommendation.—States should extend the protection referred to in 5.3.1 to safety data captured by, safety information derived from, mandatory safety reporting system and related sources.

*Note 1.*—A reporting environment where employees and operational personnel may trust that their actions or omits that are commensurate with their training and experience will not be punished is fundamental to safety reporting.

*Note 2.*—Guidance related to both mandatory and voluntary safety reporting systems is contained in the Safety Management Manual (SMM) (Doc 9859).

5.3.3 Subject to 5.3.1 and 5.3.2, States shall not make available or use safety data or safety information collected or analysed in accordance with 5.1 or 5.2 for purposes other than maintaining or improving safety, unless competent authority determines, in accordance with Appendix 3, that a principle of exception applies.

5.3.4 Notwithstanding 5.3.3, States shall not be prevented from using safety data or safety information to take preventive, corrective or remedial action that is necessary to maintain or improve aviation safety.

*Note.*—Specific provision aimed at ensuring that there is no overlap with the protection of investigation record. Annex 13 is contained in Appendix 3, 1.2.
• ANNEX 13: Only Records from the Accidents investigation (Part of the Saf data and Saf information)

- WHAT and HOW
  - Standard 5.12 provides a list of records and specific measures to protect these records
  - Appendix 2: protection of accident and incident investigation records
  - Doc 10053 MPSI Part I Specific about protection for Accidents e Incidents Investigation records
Safety Information protection scheme (Annex 19)

1. Determine if the Data or Information should be protected under:
   a. Annex 13 (special procedure of protection)
   b. Annex 19 (inside organization SSM or Authority SP)
   c. FDM (annex 6 forwards to annex 19)

2. Determine if a principle of exception applies. The competent Authority determines that:
   1. the conduct is considered as gross negligence, willful misconduct or criminal activity: SI or relates sources release
   2. SI is necessary for the proper Administration of Justice or maintaining/improving safety + Balancing test

3. If PE does not apply, then SI should be protected according to the principles of protection
### Principles of Protection (Annex 19)

<table>
<thead>
<tr>
<th>Positive</th>
<th>Negative</th>
</tr>
</thead>
<tbody>
<tr>
<td>States shall accord protection to safety data, safety information and related sources by <em>ensuring</em> that</td>
<td>States shall ensure that safety data or safety information is <em>not used</em> for</td>
</tr>
<tr>
<td>a) the protection is specified based on the nature of safety data and safety information;</td>
<td>a) disciplinary, civil, administrative and criminal proceedings against employees, operational personnel or organizations;</td>
</tr>
<tr>
<td>b) a formal procedure to provide protection to safety data, safety information and related sources is established;</td>
<td>b) disclosure to the public; or</td>
</tr>
<tr>
<td>c) safety data and safety information will not be used in a way different from the purposes for which they were collected, unless a principle of exception applies; and</td>
<td>c) any purposes other than maintaining or improving safety;</td>
</tr>
<tr>
<td>d) to the extent that a principle of exception applies, the use of safety data and safety information in disciplinary, civil, administrative and criminal proceedings will be carried out only under authoritative safeguards</td>
<td>unless a principle of exception applies.</td>
</tr>
</tbody>
</table>
**PRINCIPLES OF EXCEPTION**

Exceptions to the protection of safety data, safety information and related sources shall only be granted when the competent authority determines that there are facts and circumstances reasonably indicating that the occurrence may have been caused by an act or omission considered, in accordance with national laws, to be conduct constituting **gross negligence, wilful misconduct or criminal activity**

| Determines that its release is necessary for the proper administration of justice, and that the benefits of its release outweigh the adverse domestic and international impact such release is likely to have on the future collection and availability of safety data and safety information. |
| --- | --- | --- |
| after reviewing the safety data or safety information, | determines that its release is necessary for | after reviewing the safety data or safety information, | Maintaining or improving safety, and that the benefits of its release outweigh the adverse domestic and international impact such release is likely to have on the future collection and availability of safety data and safety information. |
| and | determines that its release is necessary for | determines that its release is necessary for | |
| that the occurrence may have been caused by an act or omission considered, in accordance with national laws, to be conduct constituting **gross negligence, wilful misconduct or criminal activity** | after reviewing the safety data or safety information, | after reviewing the safety data or safety information, | |
| determines that its release is necessary for the proper administration of justice, and that the benefits of its release outweigh the adverse domestic and international impact such release is likely to have on the future collection and availability of safety data and safety information. | after reviewing the safety data or safety information, | after reviewing the safety data or safety information, | Maintaining or improving safety, and that the benefits of its release outweigh the adverse domestic and international impact such release is likely to have on the future collection and availability of safety data and safety information. |
The following diagram provides general guidelines regarding the application of the principles of exception by the competent authority consistent with the provisions of the Annex 19.

**Designation of a Competent Authority**
(e.g. judicial or regulatory authorities, government or administrative bodies and tribunals)

**Application of the Principles of Exception**

- **A** Are there facts which indicate that the occurrence may have been caused by gross negligence, willful misconduct or criminal activity?
  - **YES** Release of safety data, safety information and related sources
  - **NO** Protection of safety data, safety information and related sources

- **B** Is release necessary for the proper administration of justice?
  - **YES** Protection of safety data, safety information and related sources
  - **NO** Will the benefits of release outweigh the impact on the future collection and availability of safety data and safety information?

- **C** Is release necessary for the purpose of maintaining or improving aviation safety?
  - **YES** Protection of safety data, safety information and related sources
  - **NO** Release of safety data, safety information and related sources

Figure 18 - Guidelines for the application of the principles of exception
It does not require a Principle of Exception actions for maintaining or improving aviation safety

<table>
<thead>
<tr>
<th>Preventive actions</th>
<th>Corrective actions</th>
<th>Remedial actions</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Protection according to Annex 13 and</td>
<td></td>
<td></td>
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<tr>
<td>------------------------------------</td>
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</tr>
<tr>
<td>Records has to be protected always (There’s no principles of exception)</td>
<td>To release any record: Balancing test</td>
<td>Recordings (CVR, AIR...) Special treatment privacy rights</td>
</tr>
</tbody>
</table>
Conclusions about Annexes

States should provide formal procedures to ensure the protection of safety information (data, information and sources):

- Establish which information should be protected
- Set the means to guarantee the protection:
  - Confidentiality of the information
  - De-identification
  - Definition of conducts that should be criminalized, penalized
- Determine when and how a principle of exception is going to be applied
- Safeguards to be taken when a ppl of exception applies

States should determine the authority, or provide legal guide to determine the authority who has to decide about the application of principles of exception

The application of the balancing test should be supported by criteria defined by regulations
How to protect within national law

Establish which information should be protected

- At national level: SSP
- At Internal level: each organization should make clear what information is going to be protected

Set the means to guarantee the protection:

- Confidentiality of the information
- De-identification
- Definition of conducts that should be criminalized, penalized
- Determine when and how a principle of exception is going to be applied
- Safeguards to be taken when a principle of exception applies
- Evidence Law
European Regulations
(Good ideas, but legal regulation should be improved)

- **Reg. 996/2010**
  - Art. 14: determine records that should be protected, not totally according to the new Annex 13
  - There’s a balancing test (14.3): No criteria nor authority

- **Reg. 376/2014**
  - It’s chaotic in the way that protects information and chaos
  - Two of the three principles of exception are not included
  - There’s no balancing test.
  - No special treatment for recordings
Loopholes in EU law?

Are there ‘loopholes’ in Just culture and the legal effect of EU376/2014?
Reporting creates a safer operation

**Information**
People are knowledgeable about the human, technical and organizational factors that determine the safety of the system as a whole.

**Willingness**
People are willing to report their errors and experiences.

**Accountability**
People are encouraged (and rewarded) for providing essential safety-related information. However, there is a clear line that differentiates between acceptable and unacceptable behaviour.

**Flexibility**
People can adapt reporting when facing unusual circumstances, shifting from the established mode to a direct mode thus allowing information to quickly reach the appropriate decision-making level.

**Learning**
People have the competence to draw conclusions from safety information systems and the will to implement major reforms.

Or will it?

*Source: Skybray*
Disclosure of occurrence reporting

• EU376/2014 Art. 15(2): limits the disclosure of occurrence reporting:
  • Not for the purpose of attributing blame or liability
  • Only for the maintenance or improvement of safety

• EU376/2014: Art. 6 (10) (a) & (B): provides an exemption for the above:

Thereby affirming that a member state’s criminal law ‘shall remain inalienable within its sovereign jurisdiction’

Daniels, 2017
Does this mean then that...

• Professionalism is a criminal offence?

• Because EU376/2014 Art 16 (10) (b) states:
  ‘where there has been a manifest disregard of an obvious risk and profound failure of professional responsibility’ shall be exempt from the protections afforded to those providing information to an employer
A new failure of professional responsibility?

Prior to EU376/2014, in some jurisdictions open reporting existed or even mandatory reporting e.g. UK MOR scheme (Sweden)

If an ATCO/AFISO/ATSEP does not submit an Occurrence report for a reportable occurrence, is this a failure of professional responsibility?

Is it so when the resources are not available to allow them to submit an occurrence report?
Consistency

Is there consistency in the judgements made in decisions derived from Secondary sources?
Consistency of Decisions and judgements

• National jurisdictions have the opportunity to extend some of EU376/2014 (protection) into national legislation

• How does this influence the consistency of interpretations and judgements made in relation to the provisions of EU376/2014 e.g. Art. 16

• What about the consistency of judgements made within organisations dealing with events that lead to, for example, a profound failure of professional responsibility?
Thanks
What is it “Just Culture” now?

• The definition is still valid but there has been important hits:
  • Annex 19 Note 1 to Recommendation 5.3.2 accept or embody one definition of Just Culture (non binding)
  • There has been a separation between Accident information and Safety Management Information
  • How should sources (atc, operator personnel, organizations) be protected by Just Culture from now?
    • Protection is given to the information and related sources
    • Mandatory: voluntary report system data and the information that came from these data.
    • Recommended: mandatory report system data and information that came from these data
• A positive protection system should be establish in which:
  • S data and S information should be use only for the purpose that it was collected: **non** punitive use, **yes** Remedial, preventive, corrective
  • Confidentiality
  • Definition of conducts that can be punish according to the Just Culture criteria ¿only gross negligence or willful misconduct (civil) or criminal activity?
  • Establish an adequate authority to decide about the application of a Principle of exception
  • Establish and inform personnel about the procedure for applying a principle of exception
  • Define through MoU or Protocols how SI is going to be protected when it is release in a judicial proceeding
Where to be done

• **Inside the organization:**
  a. Name an internal authority for internal application of PE
  b. Design a procedure for applying the principles of exception and the release of information to others authorities (These other authorities should decide what to do with SI (maybe we are in PE 2 or 3)
  c. Inform the personnel or employees about PE and procedures

• **The Aviation Authority**
  a. Name an internal authority (same as organization)
  b. Same as latter b. But decide to release or to use it in a punitive way o PE 3
  c. Inform organizations or individuals that provide data or information about procedure
Through national legislation should:

- Decide what should be criminalized, because where a crime could have been committed a principal of exception is applied
  - How the society want to criminalize risk. A political decision.
  - It has remarkable importance in Civil law systems because of the rule of law and because the prosecutor has no option not to accuse
- Define an authority to apply the principle of exception based on the proper administration of justice and on the aviation safety improvement
- Should provide criteria for the balancing test?
- Legislate in evidence law about how and when these data and information can be used.