SPECIAL ISSUE: CONSTITUTIONAL CRIMINAL LAW

GUEST EDITOR: JAVIER WILENMANN

# FORCED PRIVATIZATION OF THE ECONOMIC CRIMINAL LAW. QUESTIONS OF LEGITIMACY*

HÉCTOR HERNÁNDEZ BASUALTO**

**Abstract**
The article revolves around the criminal policy trend observed on an international level, which consists in the more or less coactive transfer to private entities -specially to companies and their officers- of crime prevention and investigation functions that are within the purview of the State criminal justice system, as well as the doubts regarding the legitimacy (and eventually the constitutionality) of some manifestations of this "forced privatization" of the economic criminal law. Specifically, the imposition of duties of action in the areas of criminal product liability, money laundering, criminal liability for the acts of employees, as well as the unprecedented challenge presented by the development of corporate "internal investigations", carried out under State pressure, to the traditional guarantees of the criminal process.

**Keywords:** *Forced privatization – compliance – criminal responsibility of corporate officers – corporate criminal liability– internal investigations*

## I. INTRODUCTION

The beginning of the establishment of the criminal law as a (official or public) state task, even though at that point a state in the modern sense did not yet exist, is situated at some point in the late Middle Ages.[1] Since then, the punishment for what it is defined as crime is justified by the defense of public interests and is exercised

* A preliminary version of this article was presented at the International Seminar on Comparative International Criminal Law, carried out on the 27th and 28th of June 2019 in Santiago de Chile at the Universities Adolfo Ibáñez and Diego Portales. Article received on January 21, 2020, and accepted for publication on February 12, 2020. Translated by Mauricio Reyes.

** Universidad Diego Portales, Chile (hector.hernandez@udp.cl).

1 In this way, concerning Castilian law, showing advances and setbacks across the centuries, TOMÁS Y VALIENTE (1992), pp. 24 ff.

by the state apparatus. Even though the identification of the criminal law with the national state has been increasingly affected by the *internationalization* of the former since the second world postwar, this is still understood as an essentially state remit, notwithstanding the growing tendency, present at least in some regional contexts (Central and South America, for example), to assign a problematic key role to crime victims in the basis and functioning of the criminal justice system.

Something different is, however, what can be attested in the last years, with the growing transfer of tasks belonging to the criminal justice system to private agents, particularly to companies, which can be denominated as a "privatization" process of the criminal law. Although this is not a privatization in the sense of a transfer of tasks that are somehow wanted or coveted by these agents, but quite the contrary, of the *imposition* of public burdens to them, in the context (and as a central component of) a criminal policy based on the belief in the relative incapacity of state powers regarding the prevention, detection, persecution and prosecution of criminal activity taking place within corporations or in the areas in which they act, criminal activity that is hardly detectable (at least in a timely fashion) from outside the business world. It is assumed that those who are in a better position to detect and control possible criminal developments inside companies and in their field of activity are the companies themselves or the officers in charge of them. This assumption is based on the fact that it is in or within the company itself where more and better information about what happens inside it or in the context of its interactions exist, since it is there where experience and expert knowledge of its relevant processes and business environment is accumulated (and, as a general rule, jealously treasured). If we add to this that, in some cases, concerning companies of large dimensions and volume of activity, they have at their disposal all sorts of resources that emulate and even surpass the capacities of the state, also regarding the potential of controlling possible criminal conducts, then the rationality of this sort of "forced privatization" of tasks in this area seems indubitable.

It is however obvious that the rationality of a criminal policy is not everything for evaluating its legitimacy. And it is clear that the strategy of "forced privatization" of tasks belonging to the criminal justice system arises a series of doubts regarding it, some of which can even present constitutional relevancy, since the sphere of rights of diverse individuals is more or less intensely affected.

The following pages address such doubts, using the description of the diverse manifestations of the aforementioned privatization process as a connecting thread. In each case it can be noted, however, that both the concerned rights and the affected individuals can vary, which is a result of the multifaceted character of the consequences of the process. Thus, it may be noted that, even though this is the first and main area of possible tensions (*infra* 1 to 3), not only different rights of those upon which the burdens are imposed (the company and the officers in charge of it) can be affected, but also the rights of other individuals, as paradigmatically occurs with the employees of the company in the context of "internal investigations" (*infra* 4), or its clients, in the context of the strategy against money laundering (*infra* 2).

From a different perspective, an evaluation of the legitimacy of the process cannot overlook the diverse nature of the individuals upon which the burdens are imposed (natural as well as legal persons), particularly regarding the rights to which they are entitled, as well as the specific scopes of said rights. Both this general matter and the more specific question revolving the liability of legal entities are, certainly, independent of the above described process of forced privatization of the criminal law, but, as it will be seen, it is in the context of this process that they have acquired a practically universal relevance, for the privatization strategy is what undoubtedly underlies the recent universalization of corporate criminal liability, and seems to dominate the current practice of prosecuting those entities in the Anglo-Saxon world, where that form of liability originated (further *infra* 3).

The current work is not intended as a detailed exposition of the latest manifestations of the forced privatization process of the economic criminal law, and it does not pretends to solve the different questions of legitimacy that they present, but merely to attract attention with regard to a process that can also be observed in Chilean law, that has not been object of academic attention in our midst. Through the presentation of multiple problematic issues raised by the process regarding the rights of different persons at diverse levels, this article mainly intends to contribute to the identification of questions that require detailed attention, without prejudice to bringing forward points of view that can be useful in this endeavor.

## II. LIABILITY FOR *PRIMA FACIE* "CORRECT" PRODUCTS ALREADY COMMERCIALIZED

A first manifestation of privatization, although so subtle that it does not seem to involve questions of legitimacy, is the relatively early imposition of duties reinforced by the criminal law of control of potentially dangerous *products*, even after having being commercialized (that is "beyond factory walls"), control for which technical knowledge and follow-up possibilities on the part of the manufacturing companies through their marketing and customer service channels are generally considered indispensable.[2]

We are certainly not referring to the liability for *defectively* manufactured products, regarding which, strictly speaking, the duties of the manufacturer do not require any special justification, since they are nothing more than the corollary of the liability for harmful consequences of an unlawful conduct. Neither do we refer to the liability for damages produced by things that are under the control of the company, responsibility that has long being considered the obvious counterpart of said power of control, exclusion and enjoyment (for instance, the company is naturally responsible that its facilities and processes do not injure its workers or unlawfully contaminate the

2 An up to date overview of the German discussion, emblematic in the continental European law, can be read in Kuhlen (2019). For Chile, Contreras (2015) and Hernández (2017).

environment).[3] The peculiarity of these cases is that, on one side, these are *correctly* manufactured products, that is, made according to the safety standards in force at the time of manufacture, which only reveal themselves to be harmful at a later time, so that, on the other side, they are no longer under the company's scope of control and often not even under the control of distributors and retailers, but in a corner of the homes of thousands or millions of anonymous consumers. In consequence, these are cases in which, according with traditional criteria, the manufacturer had no duty reinforced by the criminal law requiring it to act, which is what has changed.

If this peculiarity could have generated doubts about the appropriateness and justification of a "guarantor status" of the companies, according to which they have the duty of undertaking all demandable efforts in order to avoid that those products already distributed cause harm, currently such doubts no longer exist and it is understood that, due to their better position for detecting and forestalling the risk, as well as the benefit that the manufacture and distribution of their products generates for them, they are who should be burdened with that responsibility, also from the perspective of the criminal law.[4] Apart from the intense discussion about the correct dogmatic articulation of the solution, this is so convincing, that, as far as can be seen, it has not led to questions of legitimacy.

## III. LIABILITY FOR THE POSSIBLE INSTRUMENTALIZATION (BY A THIRD PARTY) OF ONE'S DOING

Even if the former can be understood as a natural consequence of the practically unique control possibilities on part of the company regarding the risk entailed by its products that end up being defective, the matter is no longer as clear if we consider the duties imposed on different entities belonging to the financial sector in the context of the strategy, international in its scope, for combating *money laundering*. These are goods proceeding from criminal activities of different sorts, mainly developed by third parties outside the sector that, so long as their criminal origin remains hidden due to their integration into the financial flows of the legal economy, can be exploited by those who develop the underlying criminal activities, as well as reutilized with other criminal purposes. This is obviously not a risk that can be attributed to the financial sector, but a risk regarding which the agents of said sector can be considered *victims*, since they are instrumentalized by individuals interested in concealing the origin of the goods at issue.

Nevertheless, instead of employing its apparatus of criminal prosecution or its administrative agencies for supervising the financial sector in order to early identify and seize those goods, from the 1990's onwards it is a universal fact that the State coactively recruits the agents of said sector to that ends, forcing them to carry out a series of activities at their expense, which are strange or even contrary to their line

3 On this matter Roxin (2003), pp. 747 ff. (marginal number 108 ff.); in the Chilean literature, brief references in Hernández (2013), pp. 558, 562 ff.

4 In this vein, for Chile, Contreras (2015), pp. 274 ff., 278 ff.

of business (for example, because of the affectation of the trust relationship with the clients), such as enforcing certain internal organizational duties, duties of operations log, duties to investigate background information of their clients and their operations, as well as duties to report operations regarded as suspicious, among others[5], which truly constitutes a form of fiscal levy, a sort of "war-time exaction" in the context of the war against organized crime. By way of example, according to figures from the 1990's (a time when duties were less extensive and intensive than they are nowadays), the fulfillment of these duties on part of German credit institutions represented at least DEM 1,500 million (about EUR 760 million).[6]

When we refer to the coactive imposition of such duties is because their infringement leads to the imposition of administrative sanctions, if not criminal liability. Whereas concerning product criminal liability what is punished is not the breach of a control duty as such, but the harm caused by dangerous products, in the area of money laundering, the punishment is directly based on the lack of cooperation with the state (*rectius*: not assuming tasks that fall within its purview), not only in preventing money laundering, but also, by means of report, in its detection, prosecution and punishment by the criminal justice system.

The justification of this mechanism is not obvious. A kind way of seeing it is to present it as a "lesser evil" for the company, as a burden much less disruptive than what the theoretical alternative would entail, namely the submission to a system of previous administrative authorizations or counting with the permanent presence of a state commissioner inside its premises, in charge of supervising the inner workings of the company.[7] It is however still true that this is not about prevention and repression of damages attributable to companies, but to third parties, their clients among others. Nevertheless, as far as can be seen, the possible constitutionality doubts regarding this imposition, at least on the part of the financial sector, did not go very far.[8]

Finally, it is necessary to underscore that this strategy could eventually lead to an affectation of the sphere of rights of the clients of the financial system, since they

5 An up to date presentation of these duties in the Chilean law in Albertz (2019), pp. 83 ff.

6 Werner (1996), p. 104

7 This was the view, for example, of Tiedemann (1976), p. 79, in his famous review of the principle of *ultima ratio*.

8 In the German case, as stated by Werner (1996), pp. 105 ff., the matter has been raised, but without having been submitted to the Federal Constitutional Tribunal for decision, from the perspective of the freedom to exercise a profession (*Berufsausübungsfreiheit*), guaranteed by Art. 12 of the German Fundamental Law, ruling out the objection by drawing a comparison between the involved amounts and those imposed by other public burdens, such as the payment of taxes or pension and health insurance contributions, without noticing a difference between those burdens common to any employer or merchant, that are the counterpart of the benefit obtained from the freedom of enterprise, and a specific burden aimed at preventing criminal activity carried out by others. In the United States the specific model of money laundering prevention does not seem to have been subject of debate from the perspective of the protection afforded by the Fifth Amendment to the Constitution against takings of property without just compensation, in particular against the so-called *regulatory takings*. An approach from the perspective of the criminal law can be found in Strader (1996).

have to deliver more or less sensitive information about their economic activity to the entities that provide services for them, but have been recruited by the State to gather said information, analyze it and, on that basis, eventually report them as suspects of a crime. Traditional protection for information of this sort, paradigmatically via *bank secrecy*, has certainly always yielded to the needs of criminal justice, but whereas this normally happened only based on suspicions of criminal activity, a system has been created in this area, according to which all information is analyzed beforehand in search of possible suspicions. Be that as it may, it does not seem that this has had enough weight to substantiate a constitutional objection,[9] also not in Chile, despite the extreme protection that, in comparative perspective, the Constitutional Court (*Tribunal Constitucional*) lavishes on bank secrecy among us.[10]

## IV. LIABILITY FOR ACTS OF EMPLOYEES

Beyond the specific regulations of certain crimes, the general trend that can be attested is to make both the company and those who are in charge of it criminally responsible for offences arising from its operation, not only with regard to damages produced by *things*, as it was traditional (*supra* 1), but also concerning *persons* working in the company, even if they are fully responsible, thus implying the imposition of a duty reinforced by the criminal law of monitoring the dependents of the company in order to prevent crimes, what amounts to the coactive transfer of a classical state function.

The strategy shows an overwhelming advance in comparative law. With regard to natural persons in charge of the company, doctrines such as the *delegation doctrine* as the basis of *vicarious liability*[11] or the doctrine of the *responsible corporate officer*[12] in the Anglo-Saxon world, as well as similar doctrines in continental European legal systems, such as the case of French law and its *responsabilité pénale du fait d'autri*,[13] have provided for a long time a basis for holding the corporate officer responsible for the criminal acts of subordinates, to which can be added the advancement in the last three decades towards similar results in legal systems influenced by the German dogmatic

9 On the German discussion in the 1990's, under the concept of informative self-determination, pp. 94 ff.

10 On the opinion according to which the requirement of prior judicial authorization is insufficient, demanding bilateral hearing, see STC Rol Nº 349 (2002); Rol Nº 389 (2003); Rol Nº 417 (2004); or, recently, Rol N° 5540 (2018). Whereas the previous judgments revolved around the powers of administrative bodies, STC Rol Nº 433, of January 7th, 2005 ruled on the powers of the Public Ministry for investigating drug trafficking cases. Fortunately, the requests of the Public Ministry were based on different normative grounds whose constitutionality was not denied, wherewith the judgment did not have significant practical effects. Afterwards the court has asserted that, at least concerning requests of the Public Ministry, only judicial authorization is necessary, see STC Rol N° 2764 (2015).

11 On this Simester et al (2013), pp. 271 ff.

12 On this Strader (2011), pp. 28 ff.

13 On this Varinard (2012), pp. 484 ff.

of criminal law via attributing *guarantor's duties of care* regarding subordinates.[14] On the other hand, whereas corporate criminal liability was for a long time a peculiarity of Anglo-Saxon law and of legal systems influenced by it, the last three decades are also characterized by the advance of said liability system in practically all legal systems.[15]

The point on which the Anglo-Saxon tradition and the recent development of the European law tend to converge, and that also allows us to properly speak of a "strategy" of criminal policy consisting in the transfer of crime prevention functions to the private sector, is in the acknowledgement of the efforts deployed by the company and its responsible officers aimed at preventing criminal activity within the organization, that is, in the importance attributed to that truly magical and omnipresent concept that is *compliance*. In fact, it is not simply about the punishment of a corporate officer or a legal person on their own merit, but about their recruitment in order to undertake a joint crime prevention effort based on a system that provides incentives and rewards serious efforts with exemption of liability, even if the perpetration of a certain crime could not have been avoided.

This is clear regarding the most recent legislations on corporate criminal liability in the continental European sphere of influence, in which the consideration of the preventive effort is such a widely extended feature,[16] that it would not be risky to assert that the establishment of a system of corporate criminal liability is precisely justified as a mechanism that, in this way, commits the business world to crime prevention. And it is also obviously justified with regard to the attribution of responsibility to the individuals in charge if, according to the same legal tradition, this is founded on the infringement of enforceable duties of care.

The former could not seem acceptable in the Anglo-Saxon tradition, whose roots are predicated on quite different reasons and whose regulations and case-law practice are still fundamentally based on the fact itself and the status of the individual inside the company, but it is unquestionable that the preventive effort has been playing an essential role in both the decision to prosecute and in the legal consequences imposed on legal persons, and is beginning to emerge as a decisive factor for establishing if the company incurred in said liability in some specific regulations concerning this matter.[17] It must be acknowledged nonetheless, that the

14 An overview of the evolution of the matter in some continental European legal systems can be found in Hernández (2013), pp. 550 ff.; a relatively up to date overview of the situation in Germany, where the relevant literature has become unmanageable, can be found in Bülte (2015), pp. 127 ff.; for Chile, Piña (2005), Hernández (2008), Novoa (2008).

15 An international overview in Pieth & Ivory (2011). For Chile, among others, Hernández (2010), Piña (2012), Artaza (2013).

16 Like this, clearly in Italy, now followed by Spain, or in Chile. Also, and since before the former legal systems, in the German administrative sanctioning law, since the infringement of duties of care is essential for the application of § 30 OWiG in virtue of the reference contained in § 130 OWiG, which regulates the most important case of corporate responsibility in that country.

17 This is expressed, besides the American prosecutors' practice of the so called DPA (Deferred Prosecution Agreements) and NPA (Non-Prosecution Agreements), in the consequences of a proper

same cannot be said about the attribution to individuals in charge of the company, since, despite the discussion on the precise scope of jurisprudential doctrines, it is clear that the possibility of liability exemption in the areas to which they apply is marginal, what from a continental perspective *per se* gives rise to a serious objection of constitutional legitimacy.

Nevertheless, the possible legitimacy objections against this trend have not revolved around the transfer of said duties of care itself (despite the huge expenses that the design, implementation and permanent security of a suitable compliance model can involve),[18] but around certain scopes of the criminal liability based on their infringement. In this regard we must differentiate between the criminal liability of the natural persons occupying directive positions in the company and the one that concerns companies as such, because their distinct nature affects the terms of the discussion about the legitimacy of the control strategy.

Concerning the possible criminal liability of corporate officials for acts of their subordinates, the major concern should be that this is to be effectively based on a culpable infraction of their duties of care[19] and not a mere "position based" liability, barely distinguishable from strict liability (*responsabilidad objetiva*). So, for example, in the Anglo-Saxon scope it is unequivocally recognized that the applied doctrines are related to the system of *strict liability*[20], whereas the German jurisprudence that implements *respondeat superior* (*Geschäftsherrenhaftung*) is not free from suspicion for infringing the principles of fact-based responsibility and culpability.[21] This should be a concern of the highest importance, particularly because a tendency can be foreseen, according to which guarantees are relativized in view of the entirely accurate realization, that in this area the defendants do not fit the classical profile of a vulnerable subject vis-à-vis an all-embracing state, but stand out for their economic and social power. However powerful the defendants may be, it cannot be noted how

compliance model contemplated by the Sentencing Guidelines for Organizations of 1991 of the same country, as well as in the explicit reference to the infraction of duties of care contained in modern statutes in the United Kingdom, such as the Corporate Manslaughter and Corporate Homicide Act or the Bribery Act.

18 In Chile, the legislative concern in this regard was reflected on the discussion on whether the crime prevention model described in Art. 4° of Ley N° 20.393 was mandatory or not, precisely considering what the answer would mean for middle and small-sized companies.

19 Whether they are punished for this infringement as such, or, as it is usual in the comparative law, for the non-avoidance of a legally described result to whose avoidance they were obliged as guarantors, in which case the imposed penalty is the one corresponding to the crime that was not avoided, the infraction of a duty of care being just one of the forms adopted by the infringement of a guarantors duty.

20 Cfr. Strader (2011), pp. 28 ff.; Simester et al (2013), pp. 270 ff. If strict liability is, strictly speaking, one form of objective responsibility, which is what its presentations suggest at least at first sight, is something that here may remain unanswered. Out is discussion is that, even if it were a form conceptually compatible with the principle of culpability (and characterized rather by a reversal of the burden of proof and a very demanding standard of diligence), it would be very distant from the standards of legitimacy prevailing in the continental European tradition.

21 Regarding this, the already classic critique from Heine (1995), pp. 161 ff.

come this power of theirs could legitimize models of position-based criminal liability or other alterations to the basic rules establishing the legitimation conditions of the criminal punishment.

Regarding *legal entities* and their criminal liability, if we consider that the debate as to whether that liability system could be considered unconstitutional *as such*[22] has been overcome, constitutionality doubts refer to the *differential* application of the guarantees of the criminal law, substantive as well as procedural, to legal entities. Even though in the continental European legal tradition there is a certain reluctance to accept differences concerning the guarantees of the criminal law, inasmuch as in the context of the constitutional law is obvious that the entities are not entitled to the same rights, and in so far as they are, they do not necessarily exercise them in the same way or with the same scope, it seems clear that the differential application is imposed by the very nature of things.[23] Instead of a debate about what the criminal law should be, which naturally revolves around human dignity, what is required in this specific area is an authentic constitutional debate on which rights legal entities have when they are charged with a criminal offence.

The possibility of this debate emerges, as previously stated, from the different nature and the different legal *status* that is recognized (and can be recognized) to legal persons, thus allowing the arising of public policy considerations that could hardly be admissible regarding the criminal liability of natural persons. From both a substantive point of view (responsibility requisites necessarily anchored to the act of third parties, continuity of liability if the legal person ceases to exist,[24] etc.) and a procedural one (disregard or minimization of the right not to incriminate oneself of the legal person as such,[25] denial or restriction of professional secrecy concerning

22 For the traditional reasons, which are that legal persons would not be capable either of action or of culpability, so that imposing criminal penalties on them would imply abandoning the basic principles of legitimacy of the criminal law. This is reflected, for example, on the minority opinion of Justice Zaffaroni in the judgement of the Argentinian Supreme Court on the "F.M.S.R.L" case (2006), grounds 5° to 8° and 11° (the majority vote, that coincides with the dissident one regarding the rejection of the petitioner's claim, does not, however, analyzes the substance of the matter). Bringing these objections to the level of analysis concerning the constitutional compatibility of a legal provision, these implies overlooking that it is not the criminal law as such, but the persons to which it applies, who have certain guarantees, and that there are unquestionable differences between the guarantees belonging to natural persons (among them, the right not to be punished if one is not capable of action or culpability) and those of legal persons, to whom is absurd to accord guarantees that are incompatible with their own nature. This, which is the true constitutional dimension of the issue, will be further examined in what follows.

23 In Chile, see Aldunate (2008), pp. 157 ff.; from the perspective of the criminal law, Hernández (2010), p. 213; Hernández (2015), pp. 238 ff.

24 A defense of this continuity, which has been questioned on its legitimacy, in Hernández (2019), pp. 912 ff., with references. The critique of an exclusively jurisprudential solution, of highly dubious constitutionality due to the principle of legal reserve in criminal matters, may deserve a different judgment.

25 An overview of the comparative discussion and a minimalist stance for Chile, Hernández (2015).

in-house lawyers,[26] etc.) we witness a redefinition (or simply a founding definition) of the rights of legal persons in the area of criminal law which, although from a certain perspective can be understood as a genuine reduction of guarantees, from another point of view can be regarded as the simple and necessary adaptations of those guarantees to the nature of the subject, in several cases with the aim of avoiding undue privileges vis-à-vis the regulation regarding natural persons.

Additionally, there is no doubt that this space of greater indeterminacy and increased sensitivity to public policy considerations allows us to address the unquestionable mutation suffered by the context in which the conflict regulated by the criminal law takes place when corporations are involved, above all large corporations. The (unacceptable) potential effect of the realization of the power of certain concerned persons for the understanding of this context, which is exacerbated when it comes to large corporations. Whereas in the original context (and still largely prevailing in the area of common criminality) the conflict regulated by the criminal law was between a powerful state and a vulnerable defendant who had nothing but his (or her) guarantees, the tension between the punitive power of the state and the concerned corporation usually is, assuming the rule of law exists, a tension between more or less equal powers, if we are not to forthrightly acknowledge the impotence of a state confronted with a more powerful contender. Be that as it may, this last consideration, even though probably underlying the discussion on the scope of the rights of legal persons, does not seem to be decisive on this regard. As previously stated, the differential application of the guarantees obeys objective differences among the several kinds of concerned subjects, rather than a reconsideration of the sense of the guarantees in the conflict regulated by the criminal law.

## IV. THE PRIVATIZATION OF THE CRIMINAL INVESTIGATION: CORPORATE INTERNAL INVESTIGATIONS

The most novel phenomenon taking place in recent times concerns a different aspect, that seems to have mayor constitutional implications regarding the relation with the *status*, no longer of the subjects upon which duties of care and control have been imposed, but of the monitored and controlled individuals. We are referring to the development, as a practical consequence of the imposition of compliance duties, of the so-called *internal investigations* inside companies and its connections with the state criminal process.[27]

Note that this is not aimed at preventing crimes, but at clarifying crimes that have already been committed. Certainly, there cannot be doubt that the clarification of a criminal activity inside a company can serve to avoid the repetition of said activity, since it makes possible to remove those responsible, as well as identify

26 For example, in judgments of the Court of Justice of the European Union *AM & S/Comisión* (1982), and *Akzo Nobel Chemicals y Akcros Chemicals/Comisión* (2010).

27 That this is an internationally widespread practice is shown by, for example, the territorial area covered by the collective work edited by Lomas & Kramer (2013). In our midst, see Montiel (2013).

the weak spots of the management and adopt improvement measures. From that perspective, a good system of internal investigations should be a relevant component of any compliance or crime prevention program.

However, it is another matter that internal investigations fundamentally serve the ends of the criminal justice system, that they operate as a previous activity essential for the success of the subsequent state criminal prosecution, being that the case at least in the country where this development seems to have advanced the furthest, namely in the United States, as a relevant consequence of the Enron case and the ensuing focus on the prosecution of individuals on the basis of the cooperation of companies.[28] This is a development that relies upon the pressure exerted by criminal prosecution agencies through incentives consisting in offers not to prosecute or in reduced sanctions to corporations liable to criminal prosecution (and risking devastating sanctions in case of conviction), in exchange for their full cooperation in establishing individual responsibilities. The mechanism has been tuned to the point where companies hire law firms that have the confidence of the corresponding state agency (Justice Department, CEC or other specialized agencies), counting with the approval of said agency, so that they carry out an extensive and full internal investigation, whose results are to be the base for the charges raised by the state against the responsible individuals.[29]

If we dispense with the discussion on the legitimacy of the pressure exerted through the mechanism over corporations (a sophisticated variant of the debate about the legitimacy of the practice of *plea bargaining* in the United States), what proves specially problematic is that, being the internal investigations of a company by definition a *private endeavor*, in principle lacking coactive powers comparable to those of criminal prosecution bodies, it is not subjected to the restrictions imposed by the *procedural guarantees* of the criminal process.

For the purposes of the Chilean discussion, it is relevant to make a clarification before continuing. There is an important difference between the situation in the United States (but also in some continental European systems) and the one in Chile as to the procedural consequences of the violation of fundamental rights by private parties. In the United States and in other legal systems fundamental rights are understood basically as rights against the state, not against other private parties, which means that, at least in principle, the main procedural consequence of the violation of said rights by private parties, namely the exclusion of evidence, has no place in said system (the same can be asserted in principle regarding the German case, notwithstanding the recognition of diverse forms of *Drittwirkung* of fundamental rights).[30] By contrast, in Chile, despite the absence of a sustained dogmatic development in this area, it seems

28 An overview of the evolution of the federal prosecution policy in this sense can be found in Nanda (2011), pp. 71 ff.

29 A general overview, from a critical perspective, in Green & Podgor (2013).

30 For the United States, for all, Dressler & Michaels (2013), pp. 57 ff.; for Germany, Roxin & Schünemann (2012), pp. 186 ff.

clear, at least in principle, that fundamental rights can be enforced against private parties as well (as it is attested by the doubtless admissibility of the claim or writ of constitutional protection against them, among other manifestations) and, most important of all, that the exclusion of evidence obtained in violation of fundamental guarantees is unambiguously admissible concerning evidence obtained by private individuals.[31]

But where there is no difference is in the fact that certain strictly *procedural* rights can only be enforced (at least until now) against the state (further still, only against the state as entity of criminal prosecution or jurisdiction), among them in particular the right not to incriminate oneself or, in its strongest form, the right to remain silent. The same can be said, naturally and with all the more reason, regarding the right to be warned about those rights, right which is merely an expression of the aforementioned ones. In general, citizens certainly have no duties of information with regard to other private parties, although it is perfectly possible, and in principle legitimate, that obligations of this kind could be object of a contractual relation, as paradigmatically occurs in labor relations, area in which a right to remain silent comparable to the one that can be asserted against state bodies endowed with prosecutorial or jurisdictional powers has not been recognized so far.

The former accounts for situations in the context of internal investigations in which Chilean law accords a high level of protection to the concerned employee, as it is the case, for example, of unlawful intrusions into the recognized sphere of intimacy at the workplace, in which case it should not be difficult to exclude evidence thus obtained. In contrast, it would be highly problematic, in the Chilean case as well, to do the same regarding evidence containing information obtained from the employee, for instance, under threat of dismissal.

Having made this precision, we can return to the characterization of the problem represented by corporate internal investigations. As such, they are neither strange nor novel. It is of course to be expected that a corporation would endeavor to clarify the facts concerning crimes of which the company itself is the victim (theft, fraud, espionage, sabotage, etc.), in order to adopt measures concerning its labor relations (dismissal), as well as to take civil or criminal legal action. The same can be said regarding crimes that affect third parties, either because of an ethical imperative of corporate responsibility or in order to avoid reputational damages, but also increasingly, due to the above described context (*supra* 3), with the aim of avoiding or at least reducing its own legal responsibility, be that civil, administrative or criminal. In all these contexts, the tension between the interests and rights of the company and those of the employees subject to the investigation is already clear, but until now

31 So, it has been asserted that, in principle, the exclusion of evidence illicitly obtained by private parties is admissible, although it may be rescued for other reasons in the specific case, among others, SCS Rol N° 1.836-2007 (evidence obtained by the mother of the alleged victim), and SCS Rol N° 2.576-2°11 (evidence obtained by the alleged victim). This is also the prevailing opinion in the literature, in this sense, among others, Hernández (2002), pp. 65 ff.; Horvitz & López (2004), pp. 226 ff.; Echeverría (2010), pp. 88 ff.

it was factually circumscribed, since it depended on more or less sporadic events or, even in the context of a systematic policy, exclusively corresponded to a specific strategy of the respective company. The novelty, that increases the magnitude of the tension, is the recent addition of the decisive boost from the criminal prosecution apparatus, which consequently presents coactive features.

As far as we can see, the phenomenon of internal investigations boosted by State coercion does not yet exist in Chile, and that is due to several reasons. Firstly, the scope of corporate criminal liability is still very narrow, since the relevant crimes are still very few.[32] Moreover, a general system of administrative infractions does not exist in Chile, or more precisely, there is no general system of state *enforcement* that could exert pressure in this respect, which can only be found in highly important regulated markets and with unequal degrees of development and potency: in the areas of internal and external taxes, free competition, financial markets, environmental regulation, as well as some others, whereas for all other areas there is only "local police" jurisdiction.[33] Another reason, linked to the previous one, is that the potency that can reach the aforementioned system of corporate criminal liability is yet unknown, since it has been applied very limitedly, to which it can be added that the administrative sanctions and compensation practices are relatively mild, meaning that so far we do not know of cases in which the established fine or compensation could even remotely jeopardize the subsistence of a company. Furthermore, in cases in which significant fines have been imposed, their constitutionality has been successfully contested.[34] Finally, yet another reason is that, at least in strictly criminal matters, the powers of the Public Ministry (*Ministerio Público*) to exert influence over the sentence in case of conviction, at least in the area of economic crime, in which the penalties are lower and there is ample access to substitute penalties, are quite limited, which means that so it is its bargaining power vis-à-vis the defendant.

32 Although there are projects aiming at widening its scope, currently it is restricted to the offences of bribery, domestic as well as foreign (arts. 250 y 251 bis CP), money laundering and handling stolen goods (arts. 27 of the Act N° 19.913 [*Ley N° 19.913*] and 456 bis A CP), financing of terrorism (art. 8 of Ley N° 18.314), incompatible negotiation (art. 240 CP), corruption among private individuals (arts. 287 bis and 287 ter CP), embezzlement, unlawful distraction and fraudulent administration (art. 470 N° 1 and N° 11 CP) and those contemplated by arts. 136, 139, 139 bis and 139 ter of Ley General de Pesca y Acuicultura.

33 This was one of the reasons why, in Chile, when aiming to satisfy the requirements for joining the OECD, a system of criminal corporate liability was chosen, in charge of which there would be a Public Ministry and a nation-wide judicial system without territorial restrictions, and not a system of administrative responsibility.

34 STC Rol N° 2.922 (2016), declaring the first subparagraph of art. 29 del DL N° 3.538 inapplicable for unconstitutionality, which gave to the Superintendence of Securities and Insurance (*Superintendencia de Valores y Seguros*) the power to impose either a nominally contemplated fine or one of up to 30% of the value of the irregular emission or operation. The majority opinion explicitly resorts to reasons of *proportionality*, even though, strictly speaking, decides only based on the supposed lack of *determination* of the applicable sanctions, since it is remarkable that it never affirms that the imposed fine was excessive, but only that there were no objective parameters for fixing its amount (cons. 37° ss., in particular cons. 49°), which also reveals the conceptual confusion of the tribunal.

But notwithstanding the fact that these factors could be modified, and even if that were not the case, Chilean law is not completely immune to this sort of developments, insofar as facts that have taken place in Chile can result in criminal or civil liability abroad due to statutes that include very extensive extraterritoriality clauses, as is the case, paradigmatically, with the American *Foreign Corrupt Practices Act* of 1977 (FCPA) or the *UK Bribery Act* of 2010, obviously regarding crimes committed in or by multinational corporations, but also in other cases. In this respect, the most graphic example of the scarce possibilities of forestalling this sort of practices in Chile if a prosecution interest of foreign agencies exists, is clearly offered by the German experience in view of proceedings conducted in the United States against multinational corporations of German origin such as Siemens or Volkswagen. So far as can be seen, in Germany the conditions for developing a criminal prosecution policy based on the imposition of unqualified duties of cooperating with the prosecution under the threat of devastating sanctions are not especially favorable. However, since those conditions do exist in the United States, these companies have tamely accepted said imposition, thus also leading to consequences in Germany regardless of the will of the German criminal prosecution bodies. In this way, the concerned companies hired the services of law firms trusted by (criminal or administrative) American agencies and entrusted them, not only to provide advice and representation before those agencies, but to carry out exhaustive worldwide internal investigations employing the same customary methods used in the United States, what has lead to a huge legal debate in Germany, certainly stung by the sense of uncontrolled foreign intrusion in matters that essentially concern the state.[35]

Now, from a constitutional point of view, apart from the possibilities of arguing in terms of "organization" or "public powers" about the legitimacy of a private criminal investigation as such, what, it must be said, does not seem specially promising in comparative perspective (one thing is the state having the monopoly of the criminal investigation regarded as one endowed with coercive and intrusive powers, a very different one is the existence of a constitutional reason for preventing private parties to investigate without resorting to such powers),[36] the most delicate specific issue is the question of whether is possible to keep asserting the thesis holding that the *nemo tenetur* principle does not protect against private parties, specifically against the employer company.[37]

35 A good presentation regarding the Siemens case, in Jahn (2009). See also, among many, Knauer & Buhlmann (2010).

36 The thesis however has been argued in Germany, so far without success. In this sense, in general terms, Hassemer & Matussek (1996), pp. 75 ff., 82; and specifically for the area of systematic private investigations, Zerbes (2013), pp. 568 ff. To the same results arrives Montiel (2013), p. 272, asserting that what is validly obtained in the labor area cannot be validly used in criminal matters.

37 In the United States, more than the widening of the non-self-incrimination privilege, what has been specially discussed is the way of preventing confessions to the lawyers hired by the company in order to carry out the internal investigation, under the false belief on the part of the employee that she or he is talking to her or his own lawyer, who is subjected to attorney-client confidentiality. The matter was treated by the Supreme Court in *Upjohn Co. v. United States*, 449 U.S. 383 (1981), also

The underlying assumption to the understanding of the right not to incriminate oneself as one that can only be asserted against state bodies is the essentially correct realization that only the state possesses a power capable of breaking the will of a defendant to the point of forcing him or her to sacrifice his or her freedom by admitting to criminal acts, so that, if the communicative interaction between the state and the defendant during the process is not prevented or at least restricted, abuses are bound to ensue. It is possible that, torture having been banned -at least formally- as a means of inquiry, the power of the state does not appear to be so fearsome, although coactive means are still conceivable, such as pressures to cooperate, in the form of economic burdens or deprivation of liberty[38]. None of that currently exists, but if instead of fixing attention on the possibilities of the state we consider the (non-criminal) coactive possibilities of certain private parties, specifically of big corporations, the existence of an essential factual difference between state and private power seems questionable in this matter. A corporate threat[39] can be more serious in fact than many that the state could make if it were empowered to threat the reluctant defendant. If we add to this the additional consequences that can accompany the corporation's threat (professional and social disrepute, followed by the resulting difficulty in gaining similar employment) or the possibilities of manipulation through offering to cover the expenses of the legal advice and defense of the employee, then the situation appears to be specially serious.

At the same time it is necessary to mention the circumstance that the above referred legal systems do recognize a right to remain silent about facts that could lead to criminal liability vis-à-vis the employer, but concerning *public employees*, as it is the case in Germany in the context of disciplinary proceedings (§ 20 I of the Federal Disciplinary Act, *Bundesdisziplinargesetz*, BDG) and in the United States since *Garrity v. New Jersey,*[40] this latter judgment being specially important since it asserts that the sole threat of dismissal, that is, the same that a private employee risks, is an undue pressure which violates the Fifth Amendment of the United States Constitution. If what is at stake in the cases considered by these legal systems is nothing but a labor consequence, regardless of whatever assessment of the peculiarities of public employment, then the unequal treatment remains unexplained.

known as "corporate Miranda", giving way to the so-called "Upjohn warnings", according to which the lawyer of the company must clarify to the employee that her or his duties of confidentiality are to the company and not to him. On this, Waldman (1987).

38 For many years, preventive detention played this role in the practice of the old Chilean criminal justice system, when the provisional release of the defendant was denied due to "pending proceedings" which ultimately consisted in the still pending cooperation of the defendant.

39 Which is legitimate in principle, since the company (as it is understood at least in the comparative law) is entitled to demand cooperation from its employees regarding the investigation of criminal activities carried out within the company, while the dismissal or report with which the employees are threatened are adequate means for obtaining corporate goals, so that said threat cannot be considered illegitimate (art. 296 CP).

40 385 U.S. 493 (1967). In this case, the police officers suspected of having committed a crime were warned of their right to remain silent and the use that could be given to their statement if they chose to issue it, but at the same time they were threatened with dismissal if they failed to cooperate, which the Court considered unconstitutional.

Relatedly, if the relative seriousness of the factual situation were not enough to base a *right* of the employee not to be subjected to the quandary of self-incrimination in the private sphere, an element should be considered that even resorting to traditional criteria suggests the possibility of extending the application of the *nemo tenetur* principle to these cases, such as, even though we are dealing with strictly private activity, this could be *attributed to the state* if it corresponds to a criminal prosecution policy which, to some extent, forces the company to obtain information by exerting pressure over its employees[41]. However, it must be noted that here the attribution of the private conduct to the state is useless for giving exceptional relevance to the private violation of guarantees for the purposes of the exclusion of evidence[42], which, as formerly stated, is not necessary in Chile, but for enforcing against private parties a guarantee that the individual has vis-à-vis the state.

There seem to be good reasons therefore to consider extending the application of the *nemo tenetur* principle (and the procedural consequences of its infringement) to cases of corporate internal investigations, at least if they are carried out in the context of explicit or implicit agreements[43] between the company and state agencies of criminal or administrative prosecution. A special justification of this surpasses the possibilities of the present article. What can be done here is to underscore the peculiar kind of relationship among agents to which the "forced privatization" of the economic criminal law leads, as well as the possible consequences of this new scenario from the point of view of the constitutional law.

As was noted above, the conflict regulated by the criminal law has always been defined as one between the state and the defendant. The latter can be a legal entity, thus failing to correspond to the classic image of the vulnerable individual confronted to the almighty state. A different nature of the defendant can justify a differential application of the guarantees of the criminal law, substantive as well as procedural. A different correlation of forces can reinforce the differentiation, and, regarding defendants that are individual persons, may lead to the temptation of restricting guarantees that cannot be restricted without bringing about a fatal loss of legitimacy. Be that as it may, none of these variables affect the morphology of the conflict, which remains as one bipolar in nature: a tension between the defendant and the state.

The real novelty that corporate internal investigations bring along is that, even though the conflict between the state and the defendant -in this case the concerned company- remain, both parties can nevertheless unite behind a common strategy (without prejudice to the fact that the initiative comes predominantly, but not always, from the state, whereas the company merely follows it, albeit not necessarily

41 In this vein, in Germany Anders (2014), p. 333; Greco & Caracas (2015), p. 14; rather skeptical Jahn (2009), p. 41 (45) and Kruse (2014), pp. 180 ff.

42 For the United States, Dressler & Michaels (2013), pp. 57 ff.; for Germany, Roxin & Schünemann (2012), pp. 186 ff.

43 A known and consolidated practice of such agencies should suffice, according to which companies rush to initiate their internal investigations in order to have concrete results before contacting them.

reluctantly) against individuals, paradigmatically against employees of the company. Consequently, in the light of a scheme integrated by two contrasting poles we draw a triangular or three-pole framework composed of two powerful agents joint against a weaker one, so that the procedural guarantees of the latter, even the most traditional and basic ones, can be circumvented by the circumstantial alliance of the two permanent antagonists. This new scenario obviously cannot be legitimized either by invoking the huge power developed by corporations or the peculiarities that their nature imposes or should impose to their regulation, for what is at stake is not the *status* of corporations, but that of individuals regarding whom said invocation is completely meaningless.

If coherence and continuity in constitutional valuations is to be achieved, understanding that what changes are the application contexts and not the constitutional values, the sole existence of this new scenario should lead to a redefinition of the protective aim and the scope of the guarantees of the criminal law to which the natural persons that are at the mercy of this "public-private alliance" are entitled, regardless of the power that those individuals in particular hold.[44]

44 Of course, it can be dubious to assert this regarding individuals that control the corporation, but in that case there is no separation between the individual and the company in a strict sense, so that the former can hardly be "at the mercy" of the latter. The preceding analysis supposes realities; it is not aimed to be a tool to artificially create impunity.

# BIBLIOGRAPHY CITED

Albertz, Pablo (2019). *Delito de lavado de activos y deberes positivos* (DER).

Aldunate, Eduardo (2008). *Derechos fundamentales* (LegalPublishing).

Anders, Ralf Peter (2014). "Internal Investigations. Arbeitsvertragliche Auskunftspflicht und nemo-tenetur-Grundsatz", *Zeitschrift für Wirtschafts- und Steuerstrafrecht*, pp. 329-334.

Artaza, Osvaldo (2013). "Sistemas de prevención de delitos o programas de cumplimiento. Breve descripción de las reglas técnicas de gestión del riesgo empresarial y su utilidad en sede jurídico penal", *Política Criminal*, Vol. 8, N° 16, pp. 544-573.

Bülte, Jens (2015). *Vorgesetztenverantwortlichkeit im Strafrecht* (Nomos).

Contreras, Lautaro (2015). "La responsabilidad penal del fabricante por la infracción de sus deberes de vigilancia, advertencia y retirada", *Política Criminal*, Vol. 10, N° 19, pp. 266-296.

Dressler, Joshua & Michaels, Alan C. (2013). *Understanding Criminal Procedure. Vol. 1: Investigation* (LexisNexis, 6th ed.).

Echeverría, Isabel (2010). *Los derechos fundamentales y la prueba ilícita* (Ediciones Jurídicas de Santiago).

Greco, Luís & Caracas, Christian (2015). "Internal Investigations und Selbstbelastungsfreiheit", *Neue Zeitschrift für Strafrecht*, pp. 7-15.

Green, Bruce A. & Podgor, Ellen S. (2013). "Unregulated Internal Investigations: Achieving Fairness for Corporate Constituents", *Boston College Law Review*, Vol. 54, pp. 73-126.

Hassemer, Winfried & Matussek, Karin (1996). *Das Opfer als Verfolger. Ermittlungen des Verletzten im Strafverfahren* (Peter Lang).

Heine, Günter (1995). *Die strafrechtliche Verantwortlichkeit von Unternehmen* (Nomos).

Hernández, Héctor (2002). *La exclusión de la prueba ilícita en el nuevo proceso penal chileno, Cuadernos de Análisis Jurídico N° 2* (Universidad Alberto Hurtado).

Hernández, Héctor (2008). "Apuntes sobre la responsabilidad penal (imprudente) de los directivos de empresa", *Revista de Estudios de la Justicia*, N° 10, pp. 175-198.

Hernández, Héctor (2010). "La introducción de la responsabilidad penal de las personas jurídicas en Chile", *Política Criminal*, Vol. 5, N° 9, pp. 207-236.

Hernández, Héctor (2013). "El fundamento de la posición de garante de los directivos de empresa respecto de delitos cometidos por terceros en la misma", in van Weezel, Alex (ed.), *Humanizar y renovar el Derecho penal. Estudios en memoria de Enrique Cury* (Thomson Reuters Chile), pp. 547-582.

Hernández, Héctor (2015). "¿Derecho de las personas jurídicas a no auto-incriminarse?", *Revista de Derecho de la Pontificia Universidad Católica de Valparaíso*, Vol. XLIV, pp. 217-263.

Hernández, Héctor (2017). "El Caso 'Global Engines': consecuencias mortales de la omisión del retiro de un producto defectuoso a la luz del Derecho penal chileno", in Couso, Jaime & Werle, Gerhard (eds.), *Intervención delictiva en contextos organizados. Humboldt Kolleg Santiago 2015* (Tirant lo Blanch), pp. 249-272.

Hernández, Héctor (2019). "Verbandsstrafe bei Auflösung, Umwandlung und asset deal. Rechtsvergleichende Überlegungen", in Böse, Martin, Schumann, Kay & Toepel, Friedrich (eds.), *Festschrift für Urs Kindhäuser* (Nomos), pp. 911-922.

Horvitz, María Inés & López, Julián (2004). *Derecho procesal penal chileno. T. II* (Editorial Jurídica de Chile).

Jahn, Matthias (2009). "Ermittlungen in Sachen Siemens/SEC", *Strafverteidiger*, pp. 41-46.

Knauer, Christoph & Buhlmann, Erik (2010). "Unternehmensinterne (Vor-) Ermittlungen – was bleibt von nemo-tenetur und fair-trial?", *Anwaltsblatt*, pp. 387-393.

Kruse, Björn (2014). *Compliance und Rechtsstaat. Zur Freiheit von Selbstbelastung bei Internal Investigations* (Peter Lang).

Kuhlen, Lothar (2019). "Strafrechtliche Produktverantwortung", in Achenbach, Hans, Ransiek, Andreas & Rönnau, Thomas (eds.), *Handbuch Wirtschaftsstrafrecht* (C.F. Müller, 5th ed.), pp. 113-153.

Lomas, Paul & Kramer, Daniel J. (2013). *Corporate Internal Investigations. An International Guide* (Oxford University Press, 2nd ed.).

Montiel, Juan Pablo (2013). "Sentido y alcance de las investigaciones internas en la empresa", *Revista de Derecho de la Pontificia Universidad Católica de Valparaíso*, Vol. XL, pp. 251-277.

Nanda, Ved P. (2011). "Corporate Criminal Liability in the United States: Is a New Approach Warranted?", in Pieth, Mark & Ivory, Radha (eds.), *Corporate Criminal Liability. Emergence, Convergence, and Risk* (Springer), pp. 63-89.

Novoa, Juan Pablo (2008). "Responsabilidad penal de los órganos directivos de la empresa", *Actualidad Jurídica*, N° 18, pp. 431-472.

Pieth, Mark & Ivory, Radha (2011). "Emergence and Convergence: Corporate Criminal Liability Principles in Overview", in Pieth, Mark & Ivory, Radha

(editores), *Corporate Criminal Liability. Emergence, Convergence, and Risk* (Springer), pp. 3-60.

Piña, Juan Ignacio (2005). "La imputación de responsabilidad penal en los órganos de la empresa y sus efectos en sede civil", in Baraona, Jorge & Zelaya, Pedro (eds.), *La responsabilidad por accidentes del trabajo. Cuadernos de Extensión Jurídica Universidad de los Andes*, N° 10, pp. 45-72.

Piña, Juan Ignacio (2012). *Modelos de prevención de delitos en la empresa* (Thomson Reuters).

Roxin, Claus (2003). *Strafrecht. Allgemeiner Teil II* (Beck).

Roxin, Claus & Schünemann, Bernd (2012). *Strafverfahrensrecht* (Beck, 27th ed.).

Simester, A.P., Spencer, J.R., Sullivan, G.R. & Virgo, G.J. (2013). *Simester and Sullivan's Criminal Law* (Hart, 5th ed.).

Strader, J. Kelly (1996). "Taking the Wind out of the Government's Sails? Forfeitures and Just Compensation", *Pepperdine Law Review*, Vol. 23, pp. 449-494.

Strader, J. Kelly (2011). *Understanding White Collar Crime* (LexisNexis, 3° edición).

Tiedemann, Klaus (1976). *Wirtschaftskriminalität und Wirtschaftsstrafrecht. Allgemeiner Teil* (Rowohlt).

Tomás y Valiente, Francisco (1992). *El Derecho penal de la monarquía absoluta* (Tecnos, 2nd ed. [reprint of 1st ed. of 1969]).

Varinard, André (2012). "Responsabilité pénale dite du fait d'autri. Chef d'entreprise. Délégation de pouvoirs", en Pradel, Jean & Varinard, André, *Les grands arrêts du droit pénale générale* (Dalloz, 8th ed.), pp. 482-503.

Waldman, Michael L. (1987). "Beyond Upjohn: The Attorney-Client Privilege in the Corporate Context", *William & Mary Law Review*, Vol. 28, pp. 473-511.

Werner, Gerhard (1996). *Bekämpfung der Geldwäsche in der Kreditwirtschaft* (edition iuscrim).

Zerbes, Ingeborg (2013). "Unternehmensinterne Untersuchungen", Zeitschrift für die gesamte Strafrechtswissenschaft, Vol. 125, pp. 551–572.

# CASES CITED

**Argentina:**

Corte Suprema, causa *F.M.S.R.L.*, May 30 2006.

**Chile**

Tribunal Constitucional, Rol Nº 349, March 22, 2002.

Tribunal Constitucional, Rol Nº 389, September 9, 2003.

Tribunal Constitucional, Rol Nº 417, August 6, 2004.

Tribunal Constitucional, Rol Nº 433, January 7, 2005.

Corte Suprema, Rol N° 1.836-2007, June11, 2007.

Corte Suprema, Rol N° 2.576-2011, May 11, 2011.

Tribunal Constitucional, Rol N° 2764, January 7, 2015.

Tribunal Constitucional, Rol N° 2.922, September 29, 2016.

Tribunal Constitucional, Rol N° 5540, October 26, 2018.

**European Union Court of Justice:**

*AM & S/Comisión*, May 18, 1982 (C-155/79).

*Akzo Nobel Chemicals y Akcros Chemicals/Comisión*, September 14, 2010 (C-550/07 P).

**United States:**

Supreme Court, *Garrity v. New Jersey,* 385 U.S. 493 (1967).

Supreme Court, *Upjohn Co. v. United States*, 449 U.S. 383 (1981).