IS PRIVILEGE AGAINST SELF-INCRIMINATION APPLICABLE TO BRAZILIAN INTERNAL INVESTIGATIONS?

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By Gabriela Costa Carvalho Forsman

Brazilian practitioners face a dilemma regarding conflicting labor and criminal provisions arguably applicable to employees under internal investigations regarding, on one hand, employee cooperation obligations and, on the other hand, privilege against self-incrimination. Applicability is indeed arguable since there are no specific statutory provisions or robust case law regarding internal investigations in Brazil. This paper sheds light on the Brazilian experience regarding internal investigations into misconduct and the interplay between resolution applicants and public authorities; and analyzes theories regarding the enforceability of privilege against self-incrimination within internal investigations considering the Brazilian practice and statutory regime. This article concludes that privilege against self-incrimination applies to internal investigations when private and state action are present and entwined, provides examples of Brazilian public authorities' active influence over internal investigations and points to practical recommendations to local practitioners.

I. INTRODUCTION

Brazilian practitioners face a dilemma regarding conflicting labor and criminal provisions *arguably* applicable to employees under internal investigations. Applicability is indeed *arguable* since there are no specific statutory provisions or robust case law regarding internal investigations in Brazil. Local practitioners must therefore abide by general rules, principles, and international best practices.

On one hand, labor and civil law provide that employees must cooperate with internal investigations[2] (e.g. due to the good faith principle[3] which applies to employment contracts[4] and employee information duties)[5] and that employers have the right and duty to request employees for relevant information on activities related to the company, including information regarding alleged misconduct.[6]

One the other hand, constitutional[7] and criminal[8] provisions set forth the privilege against self-incrimination pursuant to which individuals are entitled to remain in silence when compelled to self-incrimination by the state.

Against this backdrop, are employees obliged to provide self-incriminatory statements or evidence to their employers when targeted by internal investigations?

Those who are not truly aware of Brazilian internal investigations' dynamics could argue that internal investigations are organized and conducted by companies and individuals, related attorney communications and work-product are privileged, and companies are not obliged to reveal or discuss findings with state agents. In such case, considering internal investigations' private nature, the privilege against self-incrimination should not apply.

When taking a closer look to internal investigations involving alleged violations carried out in Brazil and the interplay between resolution applicants and authorities, law practitioners hit a grey area. Could private investigative measures be attributed to public authorities? In such case, should the privilege against self-incrimination apply?

II. THE BRAZILIAN EXPERIENCE

Many internal investigations carried out in Brazil alter investigations' private nature when they take place concurrently with resolutions with authorities and their investigative measures are affected or influenced by the state; or are initiated due to cooperation obligations entered with authorities.[9]

2 Lack of cooperation could entail labor disciplinary measures, including termination for cause. Article 484 of the Labor Code.

3 Article 422, Civil Code.

4 ARNALDO SUSSEKIND, DÉLIO MARANHÃO, SEGADAS VIANNA, LIMA TEIXEIRA, *INSTITUIÇÕES DE DIREITO DO TRABALHO* (2 ed. São Paulo: LTr, 2005, pg. 257-258).

5 JUDITH MARTINS-COSTA, op. cit. (2018, pg. 308).

6 See, for instance, Brazil. Superior Court of Justice. *Recurso Especial No. 1.410.246/PR* (2013/0343503-6). Judge: Minister Paulo de Tarso Severino. Adjudication date: 05/12/2015; Brazil. Superior Court of Justice. *Agravo em Recurso Especial No. 284.518* (2013/0010128-7). Judge: Minister Raul Araújo. Adjudication date: 08/19/2013; Brazil. Regional Labor Court of the 3rd Region. *Recurso Ordinário No. 590607.01079.2006.037.03.00.0*. Judge: Maria Cecília Alves Pinto. Adjudication date: 05/12/2007; Brazil. Superior Labor Court. *Agravo de Instrumento em Recurso de Revista No. 405-23.2012.5.06.0002*. Judge: Minister Maria Helena Mallmann. Adjudication date: 06/24/2016; and Brazil. Regional Labor Court of the 2nd Region. *Ação Trabalhista Rito Ordinário No. 1001930-27.2017.5.02.0465*. Judge: Gabriel Callado de Andrade Gomes. Adjudication date: 11/22/2021. Also, ALICE MONTEIRO DE BARROS. CURSO DE DIREITO DO TRABALHO (5 ed. São Paulo: LTr, 2009, pg. 582).

7 Article 5, LXIII, of the Brazilian Federal Constitution.

8 Articles 186, 198, 478, II of the Code of Criminal Procedure.

9 Information regarding Brazilian practice is based on field research (i.e. interviews with expert attorneys and members of the Federal Prosecutors' Office, Comptroller General's Office, and Brazilian Antitrust authority), Brazilian legislation, doctrine, and case law. Ana Gabriela da Costa Carvalho Forsman. *A prática das investigações internas no Brasil e a aplicabilidade do direito à não autoincriminação*. Fundação Getulio Vargas, Escola de Direito de São Paulo (October 10, 2022). Available at https://bibliotecadigital.fgv.br/dspace;commle/handle/10438/32786.

For instance, leniency agreements entered with the Federal Prosecutors' Office ("MPF"),[10] Comptroller General's Office ("CGU")[11] and Brazilian antitrust authority ("CADE")[12] typically encompass obligations regarding internal investigations such as: (i) general cooperation pursuant to which settling parties must provide data on relevant facts and/or individuals (e.g. evidence gathered under internal investigations); and (ii) specific provisions to deepen ongoing internal investigations or alter their scope.

Also, under resolutions, law practitioners conducting internal investigations are typically expected to provide internal investigations' reports (e.g. oral reports, presentations, or written reports) to such public authorities during the negotiation process and/or after the signing of resolutions.

In addition, public authorities most frequently request applicants for evidence gathered in internal investigations. For instance, CGU usually requests internal investigations' plans, reports with findings and interview memoranda to settling parties; CADE typically requests an executive summary on the reports produced in such investigations and findings; and MPF usually requests all documents classified as hot (i.e. the most relevant documents gathered in document reviews) and internal investigations' final reports.

Also, even though many authorities have expressed concern with the lawfulness of evidence submitted by settling parties as such evidence must be admissible under criminal and administrative proceedings, in practice, only few examine internal investigation's interview methodology. Examination methods include asking settling parties how they conducted individuals' interviews which interview memoranda were provided to the authority matter, such as if interviewees were provided with UpJohn warnings[13] and cooperated voluntarily.

Finally, criminal and administrative proceedings encompassing evidence obtained during internal investigations rarely address employee interview's methodology in the case files, hindering potential challenges to such methodology in court or before administrative authorities.

10 See, for instance, excerpt of the MPF's Chamber of Corruption Prosecution's leniency agreement template: "Item 5. THE APPLICANT and related individual applicants or future individuals that adhere to this agreement agree to provide the Federal Prosecutor's Office with facts and evidence gathered in internal investigations and that may assist in the investigation of the violations provided under item 3 above with the objective of obtaining the benefits set forth in this Leniency Agreement" (free translation). Available at http://www.mpf.mp.br/atuacao-tematica/ccr5/publicacoes/guia-pratico-acordo-leniencia/arquivos/Modelo-Leniencia-MPF.pdf.

11 See, for instance, excerpts of the leniency agreement executed between CGU, the Attorney General's Office ("AGU"), Camargo Corrêa Construções e Participações S.A and MOVER Participações S.A.: "4.2. The RESPONSIBLE APPLICANTS acknowledge, as they acknowledged hereby, the duty of full and permanent cooperation with the investigations of the violations under this Leniency Agreement"; and "6.1. The FIRST RESPONSIBLE APPLICANTS represent that they have adopted the following measures to remediate the misconduct hereunder described and prevent their continuity […] Investigated misconducts referred to in ANNEXES I and II under internal investigations with the objective of gathering information on the total value of illicit payments directly or indirectly offered or paid to authorities" (free translation). Available at https://www.gov.br/cgu/pt-br/assuntos/combate-a-corrupcao/acordo-leniencia/acordos-firmados/camargo-correa.pdf.

12 See, for instance, excerpt of CADE's leniency agreement template: "Item 20. Given that the Reported Violation was targeted by an internal investigation conducted by the Applicants, they may identify current or former employees whose involvement was unknown on the signing date and who may wish to adhere to the Leniency Agreement. Such individuals may adhere to the Leniency Agreement when admitted as applicants by CADE according to convenience and opportunity criteria and such adhesion shall have the same effect as a joint execution provided that the thresholds set forth under Law No. 12,529/2011 and Article 198 of CADE's Internal Rules are met." (free translation). Available at https://cdn.cade.gov.br/Portal/assuntos/programa-de-leniencia/modelo-de-acordo-e-documentos-relacionados/MODELO_Acordo-de-Leniencia.pdf.

13 *United States Court of Appeals for the Sixth Circuit. Upjohn Co. et. al. v. United States et. al.*, 1981.

III. THE PRIVILEGE AGAINST SELF-INCRIMINATION'S SCOPE OF APPLICATION

The privilege against self-incrimination is set forth under the Brazilian Federal Constitution (Article 5, LXIII) and Code of Criminal Procedure (Articles 186, 198, 478, II) and its origin has been largely debated. For instance, it has been associated with the right to due process,[14] principle of human dignity,[15] informative self-determination, and rule of law.[16]

Such privilege protects individuals from being compelled by the state to self-incriminate and its main legal consequences are the right: (i) to remain silent during coercion, which right may not be used against such individual; and (ii) to not produce self-incriminatory evidence. Its scope of application is therefore related to state coercion, which may take place by legal means (e.g. depositions and warrants) and physical means (e.g. mistreatment).

The Brazilian Superior Court of Justice ("STJ") has found that the privilege in question applies to all criminal actions, its *core sphere of protectio*n, and adopted an extensive view as to its reach, having understood that administrative actions also entail such protection should they be related to administrative offenses that also constitute criminal offenses.[17] For instance, investigative measures adopted by CADE when investigating cartel practice and by CGU when investigating bribery and bid rigging, both of which are part of the Federal Government and have administrative powers, should comply with individuals' privilege against self-incrimination since such wrongdoings are also a crime in Brazil.[18]

Anyhow, the privilege against self-incrimination has only been enforced against state coercion. Since internal investigations are conducted by individuals on behalf of legal entities rather than the state, the privilege against self-incrimination would only be enforceable within internal investigations should: (i) the privilege against self-incrimination be deemed applicable to private actions; or (ii) actions occurred within internal investigations be attributable to the state.[19]

IV. EXTENSION OF THE PRIVILEGE AGAINST SELF-INCRIMINATION TO PRIVATE COERCION

Foreign scholars argue that privilege against self-incrimination applies to internal investigations even though investigations are not public in nature since they place employees in a position equivalent to defendants investigated by the state ("extension theory").[20] Hence, the extension theory is based on the similarity between internal investigations and public investigations regarding inequality of arms and the vertical relationship among parties (i.e. employee and employer).

Pursuant to such scholars, the extension of the privilege against self-incrimination is in accordance with employee's right to dignity and should only take place in specific circumstances: (i) when employees are subject to legal coercion in internal investigations (i.e. by being invited

14 See, for instance, LUIS GRECO, *Internal investigations e o princípio da não auto-incriminação* in JOSÉ DANILO TAVARES LOBATO, JOÃO PAULO ORSINI MARTINELLI, HUMBERTO SOUZA SANTOS (Orgs.), *COMENTÁRIOS AO DIREITO PENAL ECONÔMICO BRASILEIRO*. Belo Horizonte: D'Plácido, 2017, pg. 817), PAULO PINTO DE ALBUQUERQUE, *COMENTÁRIO DO CÓDIGO DE PROCESSO PENAL: À LUZ DA CONSTITUIÇÃO DA REPÚBLICA E DA CONVENÇÃO EUROPEIA DOS DIREITOS DO HOMEN* (4 ed. Lisboa: Universidade Católica Editora, 2011, pg. 982).

15 See, for instance, ASENCIO GALLEGO, *EL DERECHO AL SILENCIO COMO MANIFESTACIÓN DEL DERECHO DE DEFENSA* (2017, pg. 258); MORENO CATENA, *Los elementos probatorios obtenidos con la afectación de derechos fundamentales durante la investigación* in GÓMEZ COLOMER (Coord.), *PRUEBA Y PROCESO PENAL (2008, pg. 81); ROGALL, DER BESCHULDIGTE ALS BEWEISMITTEL GEGEN SICH SELBST* (1977); BEATRIZ GOENA VIVES, *Responsabilidad penal de las personas jurídicas y nemo tenetur: análisis desde el fundamento material de la sanción corporativa* in *REVISTA ELECTRÓNICA DE CIENCIA PENAL Y CRIMINOLOGÍA* (2021, No. 23-22, pg. 6-7). Available at http://criminet.ugr.es/recpc/23/recpc23-22.pdf.

16 See, for instance, *Allan v. The United Kingdom*; Brazil. Superior Court of Justice. *Recurso Especial No. 1.677.380/RS*. Judge: Minister Herman Benjamin. Adjudication date: 10/16/2017. Brazil. Superior Court of Justice. *Agravo Interno no Recurso Especial No. 1.719.584-RJ*. Judge: Minister Herman Benjamin. Adjudication date: 11/29/2018. Spain. Constitutional Court. Romeo Edgardo Vargas Romero 197/1995. Adjudication date: 12/21/1995. Ruiz Vadillo, FJ 6º. JAMES D. WING, Corporate Internal Investigations and the Fifth Amendment. BUSINESS LAW TODAY, 2014, pg. 3. CHRISTOPH DANNECKER, *Der nemo tenetur-Grundsatz: prozessuale Fundierung und Geltung für juristische Personen*, ZStW 2015, (127), pg. 370-409. Available at https://d-nb.info/1217598944/34; PETER KASISKE, *Mitarbeiterbefragungen im Rahmen interner Ermittlungen: Auskunftspflichten und Verwertbarkeit im Strafverfahren*, NZWiSt, n. 7, 2014, pg. 15; MARTIN BÖSE, *Die verfassungsrechtlichen Grundlagen des Satzes "Nemo tenetur se ipsum accusare."* Berlin: Geburtstag, 2003, pg. 98.

17 Brazil. Superior Court of Justice. *Recurso Especial No. 1.677.380-RS*. Judge: Minister Herman Benjamin. Adjudication date: 10/10/2017. Brazil. Superior Tribunal de Justiça. *Agravo Interno no Recurso Especial No. 1.719.584-RJ*. Judge: Minister Herman Benjamin. Adjudication date: 11/29/2018.

18 Articles 337-L and 333 of the Criminal Code and 4 of Law No. 8,137/1990.

19 There are other theories regarding the matter such as the *labor law response and the criminal finality* theories. Further information available at Ana Gabriela da Costa Carvalho Forsman. *A prática das investigações internas no Brasil e a aplicabilidade do direito à não autoincriminação*. op. cit., (2022).

20 HANS THEILE, StV, 2011, 381, 385. ZERBES, ZStW 125, 2013, pg. 551 and 567. PETER KASISKE, NZWiSt 2014, pg. 262.

to take part in interviews and being bound to "talk of walk" rules); and (ii) when internal investigations potentially concern criminal misconduct, are organized in a "systematic" manner[21] and make use of human and financial resources "equivalent to those employed in criminal proceedings by the state."[22,23]

From a Brazilian standpoint, the enforceability of the privilege against self-incrimination against private coercion is a bold solution to the problem at hand as it challenges the established legal paradigm's[24] fundamental premises[25] – i.e. the scope of protection of the privilege matter. Such innovative approach should only be adopted to solve a legal problem should there be no other adequate legal solution.

Also, the extension theory's rationale is not compatible with the Brazilian labor framework since it is based on the premise that internal investigations are responsible for altering the equilibrium among employees and employers. Conversely, in Brazil the vertical nature and lack of equilibrium among employees and employers are inherent to employment relationship.

In addition, inequality of arms among employees and employers in internal investigations could be addressed by alternative methods allowed for in the Brazilian statutory regime. For instance, employees could request access to documents related to them held by the employer directly or before judicial courts in light of the right to a complete defense[26].

Finally, regarding the second circumstance under which the privilege against self-incrimination allegedly applies to internal investigations (e.g. those organized in a "systematic" manner and that make use human and financial resources "equivalent to those employed in criminal proceedings by the state"), theorists assume that such privilege would only apply to well-organized and robust internal investigations into criminal misconduct. Such assumption leads to the wrong impression that the extension of the scope of applicability of the privilege against self-incrimination is related to the size or the way internal investigations are conducted rather than nature of the misconduct under investigation and of the coercion involved.

V. ATTIBUTION OF PRIVATE COERCION TO THE STATE

The *attribution theory*[27] warrants the enforceability of the privilege against self-incrimination within internal investigations whenever the legal and/or factual coercion matter is attributable to the state.

There are some intermediate positions among scholars regarding the reasoning behind the attribution of actions to the state,[28,29] all of which seem to point to one direction: whenever there is an *active influence* of authorities over actions conducted within internal investigations, such actions are attributable to the state. Therefore, the individuals targeted by such actions are entitled to the privilege against self-incrimination.

Active influence should be deemed as state actions that give rise to the commencement of internal investigations or interfere in measures that shall be adopted under such investigations (e.g. under resolution with authorities or related to notification duties before authorities). Such concept must not be interpreted *lato sensu* as comprising all actions that may give rise to the opening of an internal

21 For instance, such as an internal investigation comprised of various stages and encompassing a work plan.

22 For instance, when an internal investigation is conducted by individuals specialized in compliance who are fully dedicated to the investigation. ALBERT ESTRADA I. CUADRAS, *CONFESIÓN O FINIQUITO: EL PAPEL DEL DERECHO A NO AUTOINCRIMINARSE EM LAS INVESTIGACIONES INTERNAS* (Barcelona: InDret, 2020, pg. 257 and 266).

23 See, for instance, Spain. Supreme Court. *Sentencia* No. 489/2018. *Sala Penal*. Adjudication date: 10/23/2018.

24 THOMAS S. KUHN, THE STRUCTURE OF SCIENTIFIC REVOLUTIONS (3 ed. Chicago: University of Chicago Press, 1996, pg. 23).

25 LUIS GRECO, op. cit., pg. 816.

26 Article 5, LV, of the Brazilian Federal Constitution.

27 See, for instance, LUIS GRECO, op. cit., pg. 792. PETER KASISKE, op. cit. 2014, pg. 262. ZERBES, ZStW, n. 125, 2013, p. 563. KASPAR, *Strafprozessuale Verwertbarkeit nach rechtswidriger privater Beweisbeschaffung*, GA, n. 160-4, 2013, pg. 213.

28 For instance, such conclusion is based on the criminal offense intervention theory [*teoria da intervenção do delito*]; strict liability attribution theory [*teoria da imputação objetiva*]; and the theory that deems the state as individuals' or companies' co-principal whenever there is a joint decision to initiate the internal investigation matter and a relevant contribution by each party [*coautoria*]. Respectively, WOLTER, *Staatlich gesteuerte Selbstbelastungsprovokation mit Umgehung des* Schweigerechts: Zur objektiven Zurechnung im Strafprozess, ZIS, n. 5, 2012, pg. 240-244; and KOTTEK, *Die Kooperation von deutschen Unternehmen mit der US-amerikanischen Börsenaufsicht* SEC, 2012, pg. 161.

29 Some foreign theorists also argue that the right against self-incrimination applies when authorities postpone the opening if investigations to wait for information and evidence gathered in internal investigations that shall be submitted by applicants under resolutions. Nonetheless, such postponement would be deemed illegal in Brazil since the state does not have prosecutorial discretion (Articles 5, 6 and 257, II, of the Code of Criminal Procedure). See, for instance, LUIS GRECO, op. cit., pg. 814.

investigation (e.g. becoming aware of the opening of an investigation by authorities into misconducts related to the company matter by the press).

The *attribution theory* is a more reasonable solution to address the problem at hand since it does not significantly alter the privilege against self-incrimination's traditional scope of application (i.e. state coercion), and is based on attribution theories already put in practice by local practitioners (e.g. criminal offense intervention theory [*teoria da intervenção do delito*], strict liability attribution theory [*teoria da imputação objetiva*] and theory pursuant to which the state acts as individuals' and/or companies' co-principal [*teoria da coautoria*]).

It also seems to suit the Brazilian experience since many internal investigations into administrative and/or criminal misconduct are directly influenced by authorities under settlement agreements and therefore challenge internal investigations' private nature.

Examples of *active influence* that most frequently takes place in internal investigations carried out in Brazil regarding alleged criminal or administrative misconduct disclosed under resolutions to authorities[30],[31] include: (i) requests from authorities to the settling parties to deepen the investigation generally or into specific topics; (ii) decisions by authorities as to which independent third party shall be hired by companies to conduct internal investigations; (iii) definition of the internal investigation's scope (e.g. by including provisions in the resolution regarding the facts that must be investigated by the settling party); (iv) requests by authorities to the settling parties to conduct certain employee interviews; (v) requests by authorities to run specific key word lists against companies' data; and (vi) monitoring internal investigation's activities (e.g. by means of periodic meetings with settling parties to obtain information and assess internal investigation's development).

Finally, the state's *active influence* over internal investigations within resolutions does not transform settling parties into authorities' investigative tools, since such resolutions must be reached voluntarily among parties.

VI. CONCLUDING REMARKS

Brazilian internal investigations encompass legal coercion from a labor and civil law standpoint and many of such investigations into criminal and administrative misconduct are initiated or affected by authorities under resolutions. Pursuant to the *attribution theory*, which best suits the Brazilian experience and statutory regime and does not significantly alter the privilege against self-incriminations' traditional scope of application, the privilege matter should apply to employees targeted by internal investigations into criminal misconduct whenever private and state action are present and entwined.

Thus, law practitioners should err on the side of caution and inform interviewees that they are entitled to the privilege against self-incrimination and/or to remain silent. Although there are no provisions setting forth warning duties within internal investigations such as those provided for the state[32] during hearings (Article 186 of the Criminal Code of Procedure) and arrests (Article 5, LXIII, of the Federal Constitution), the adoption of such measure could prevent the annulment by courts[33] of evidence gathered based on employee cooperation. However, the privilege against self-incrimination's protection should only apply to evidence gathered concurrently to or after coercion attributable to the state takes place.

30 Further information available at: Ana Gabriela da Costa Carvalho Forsman. *A prática das investigações internas no Brasil e a aplicabilidade do direito à não autoincriminação.* op. cit., (2022).

31 "A close nexus of state action exists between a private entity and the state when a governmental actor (i) exercises coercive power; (ii) is entwined in the management or control of the private actor; (iii) provides the private action with significant encouragement, either over or covert; (iv) engages in a joint activity in which the private actor is a willful participant; (v) delegates a public function to the private actor; or (vi) entwines the private actor in governmental policies." *Flagg v. Yonkers Sav. & Loan Ass'n*, 396 F. 3d 178, 187, 2d Cir., 2005. Also, see, *United States v. Matthew Connoly and Gavin Campbell Black*, 2022; *Stein II*, 541 F. 3d at 147; *Brentwood Academy v. Tennessee Secondary School Athletic Association*, 531 U.S. 288, 2001; *San Francisco Arts & Athletics, Inc. v. United States Olympic Committee and International Olympic Committee, 1987, 483 U.S.* 522, 547, 107, S.Ct. 2971, 97 L.Ed.2d 427; *Jackson v. Metropolitan Edison Co.*, 419 U.S. at 350 n. 7, 95 S.Ct. 449.

32 See for instance, Brazil. Federal Supreme Court. *Habeas Corpus No. 80.949/RJ*. Judge: Minister Sepúlveda Pertence. First panel. Adjudication date: 12/14/2001.

33 EUGÊNIO PACELLI, *CURSO DE PROCESSO PENAL* (24 ed. São Paulo: Atlas, 2020, pg. 437). Also, Brazil. Federal Supreme Court. *Habeas Corpus No. 80.949/RJ*. Judge: Minister Sepúlveda Pertence. First panel. Adjudication date: 12/14/2001.

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