

Criminalization of error under the various ICAO and EU regulations

Prof. Irene Nadal
Prof. Anthony Smoker
Marc Baumgartner

University of the Balearic Islands
University of Lund
IFATCA

Bucharest

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de les Illes Balears

Safety Information in the context of law

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ASRS - 1975



Reporting

UK MOR Scheme
1976BASIS
(BA incident reporting Scheme)Open
Reporting

CHIRP

No-Blame Culture

Anonymity versus confidentiality

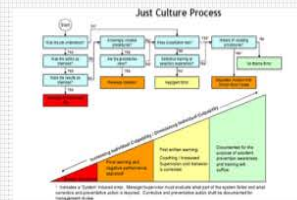
Anonymous reporting systems

Just Culture

GAIN

SASI

More than three quarters of ATCOs surveyed hide incidents for fear of reprisal
Eurocontrol, 2006



Flight Data Monitoring



SAFREP

Accountability

Eurocontrol ES2



EU 376/2014

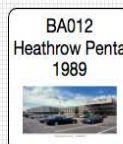
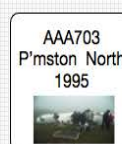
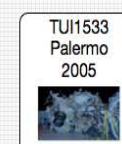
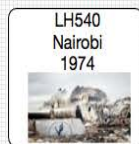
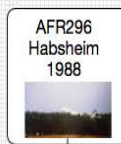
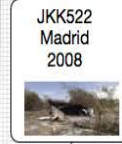
Just Culture Model Policy

EU JC Charter

Just Culture Prosecutors Course

ASMT

JC RP1 SKPI

BE476/JP550
Zagreb
1976ATI460
Mt Crezzoin
1987BA012
Heathrow Penta
1989AAA703
P'mston North
1995JAL907 & JAL958
Yaizu
2001CRX3597
Zurich
2001TUI1533
Palermo
2005GLO1907 & N600XL
Matt Grosso
2006LH540
Nairobi
1974SWR316
Athens
1979AFR296
Habsheim
1988ITF148
Strasbourg
1992DAL39
Schiphol
1998SAS686 & DIEVX
Linate
2001DHX611 & BTC2397
Uberlingen
2003HCY522
Athens
2005JKK522
Madrid
2008ATCO (Tasic)
Found guilty of
ManslaughterCrew charged with murder
Co-pilot Acquitted
Manufacturer convicted of homicideCaptain convicted of
negligently endangering
aircraft and
passengersCaptain acquitted
Status of CVR challengedJAL Captain & 2 ATCOs
prosecuted
ATCOs found guiltyBFU Conclude pilot error.
Six Crossair managers
prosecuted
All acquittedNine people charged with
multiple manslaughter charges
Crew sentenced to 10 years
imprisonment
Two engineers acquittedPilots & 4 ATCOs
charged.Engineers & supervisors
charged with manslaughterFlight Engineer
Negligent Homicide
AcquittedPIC & CoPilot
Negligent Manslaughter
Negligent bodily injury +
disrupting air services
Co-Pilot acquitted
PIC 5 years 2 months sentence
converted to a finePIC & Copilot +
2 AFR officials +
Flying club chairman
Manslaughter
Captain, 6 months
prison sentenceSix defendants cleared
of all charges
Airbus and Air France
held liableThree ATCOs prosecuted
2 found guilty & finedTwo separate prosecutions,
11 defendants
A number of convictions madeEight Skyguide employees
prosecuted.
Four found guiltyThe first case where
criminal trails in two
jurisdictions subsequent
to an aviation accident

Source: Michaelides-Mateou & Mateou (2010)

Three views of the
actuality of Just Culture



Has safety battled with the legal beast.
J.Woodlock E2 Rome WS 2017

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Just Culture – have we opened the Pandora's box?

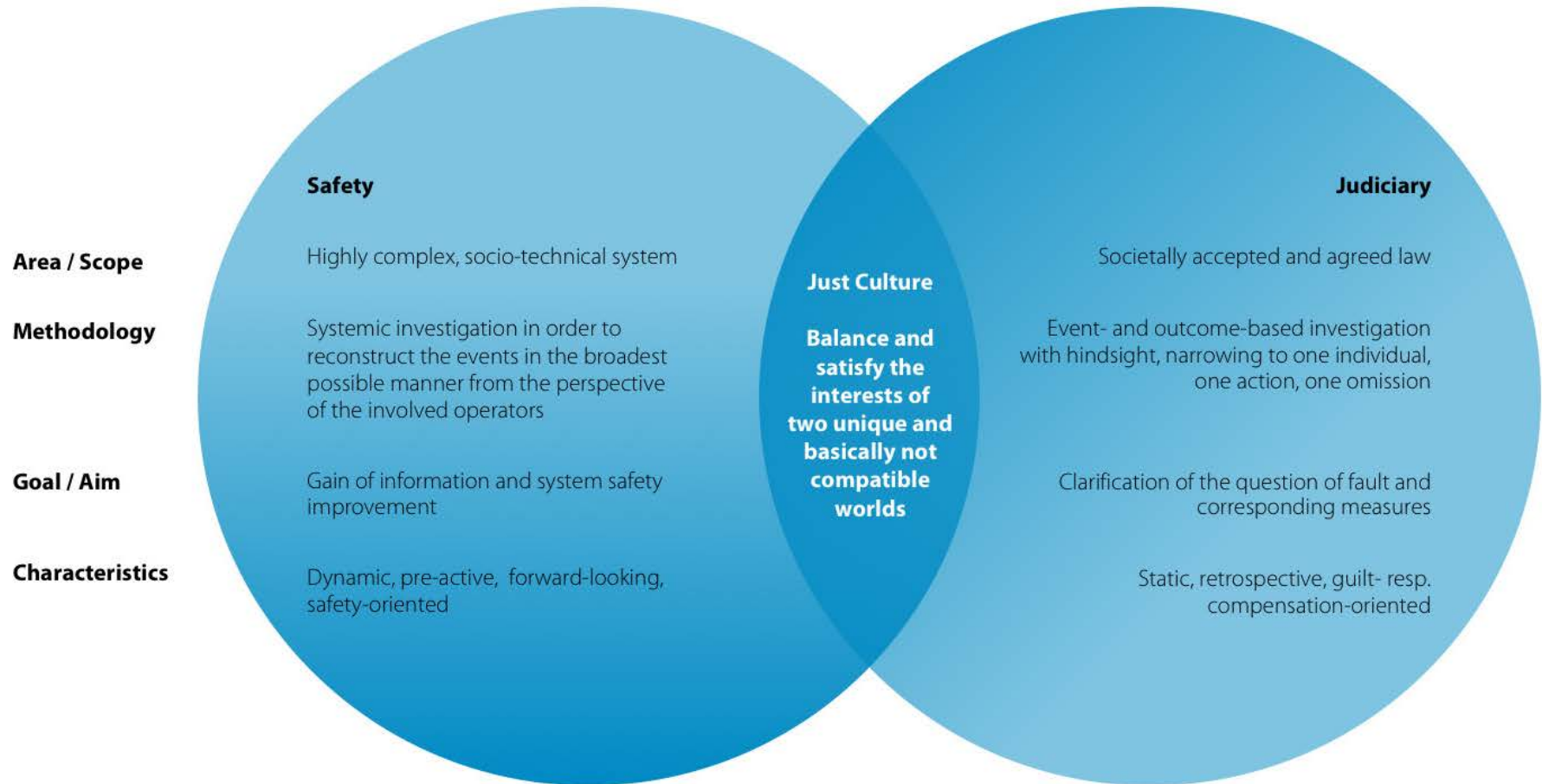


“the crisis in civil aviation
accountability”

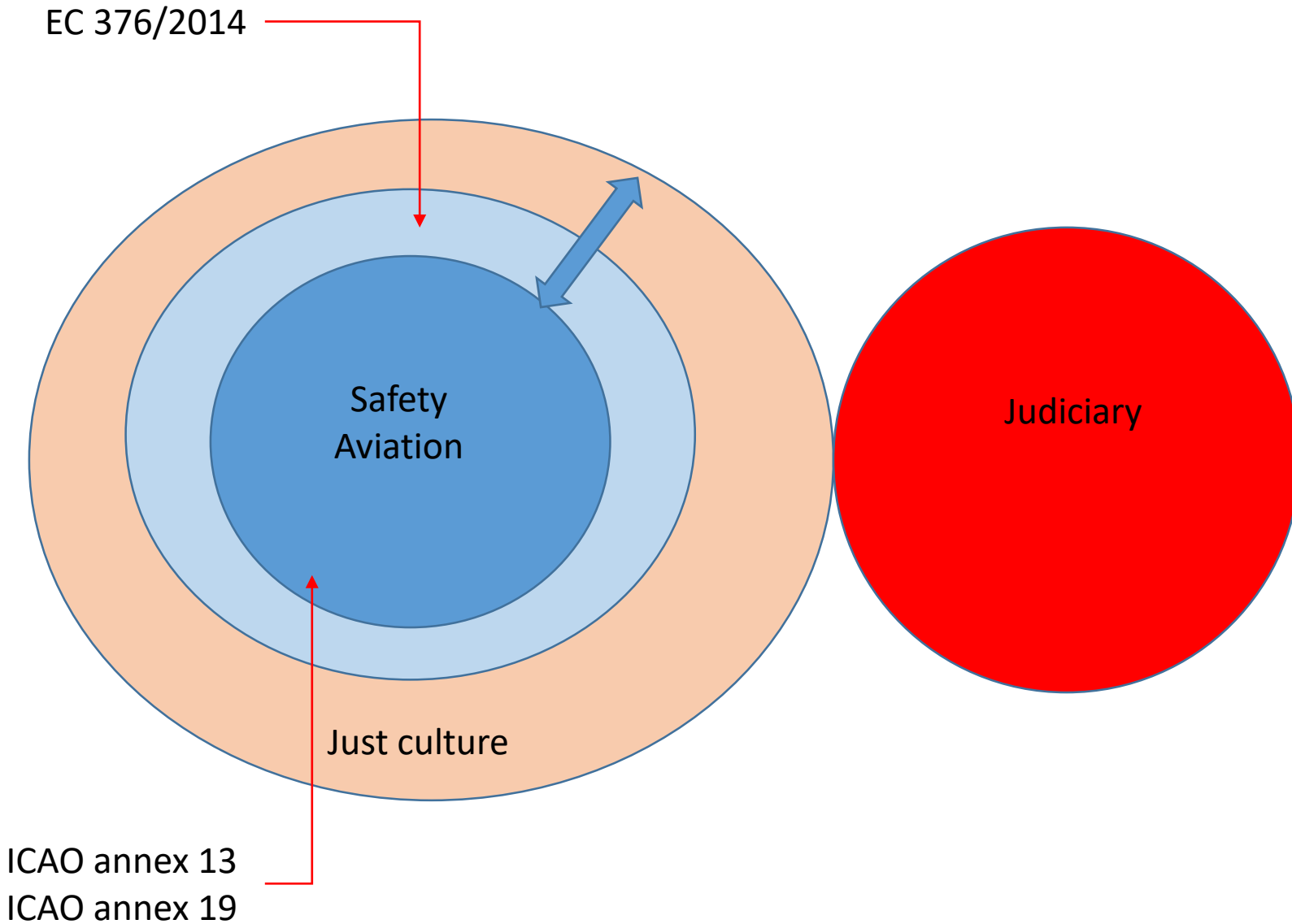
Daniels, 2017

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

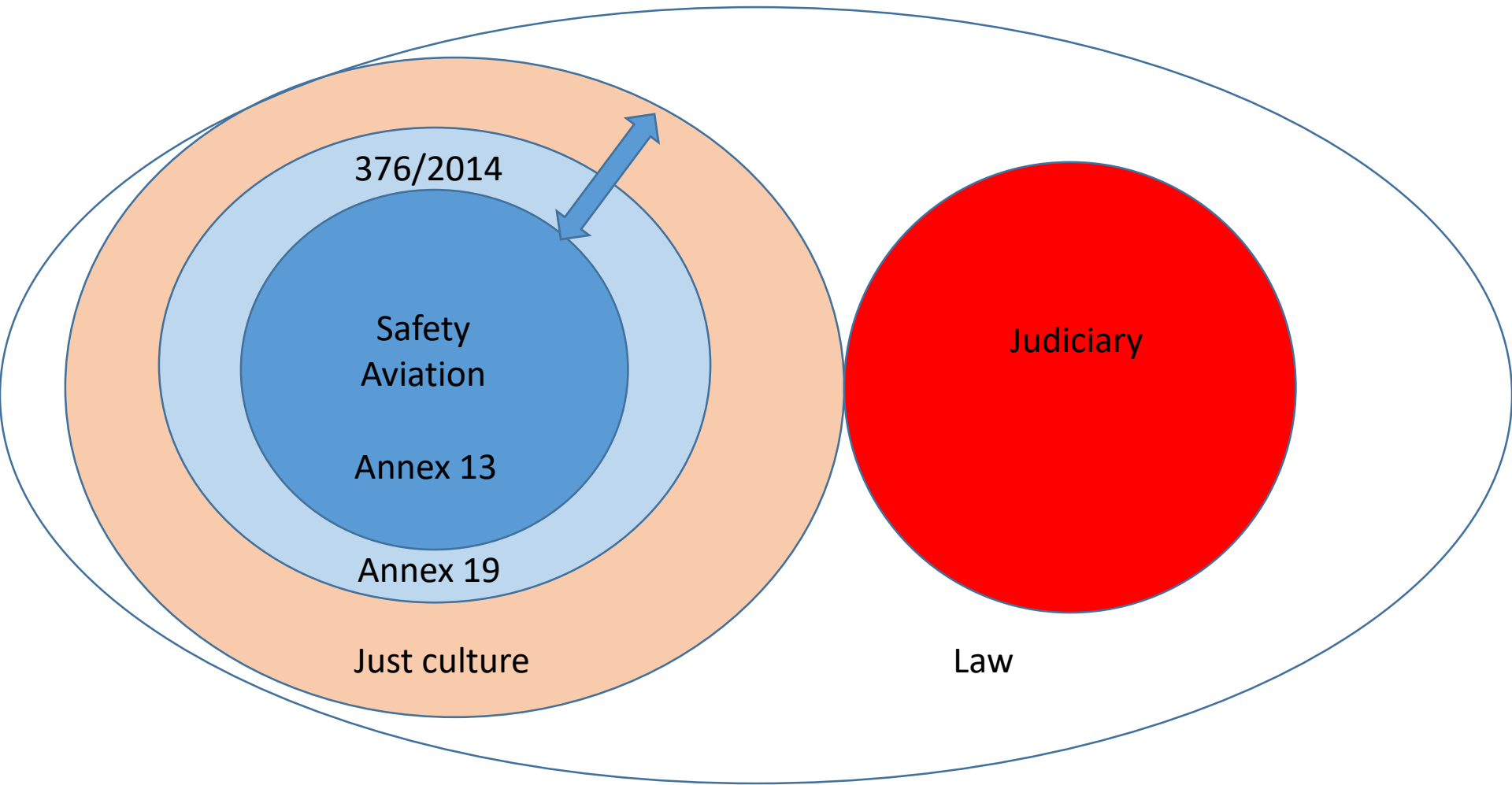
The need for 376/2014

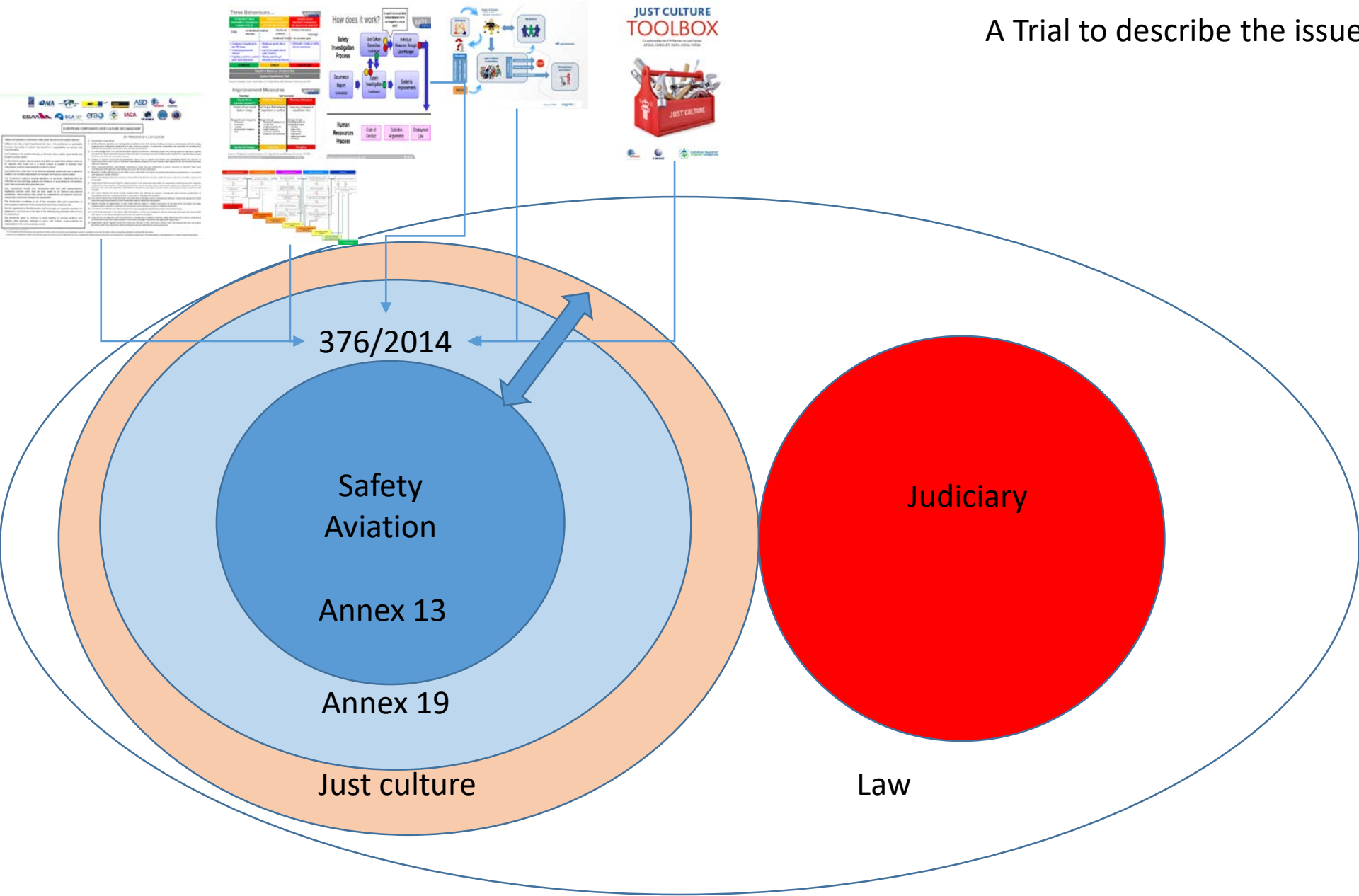


A Trial to describe the issue

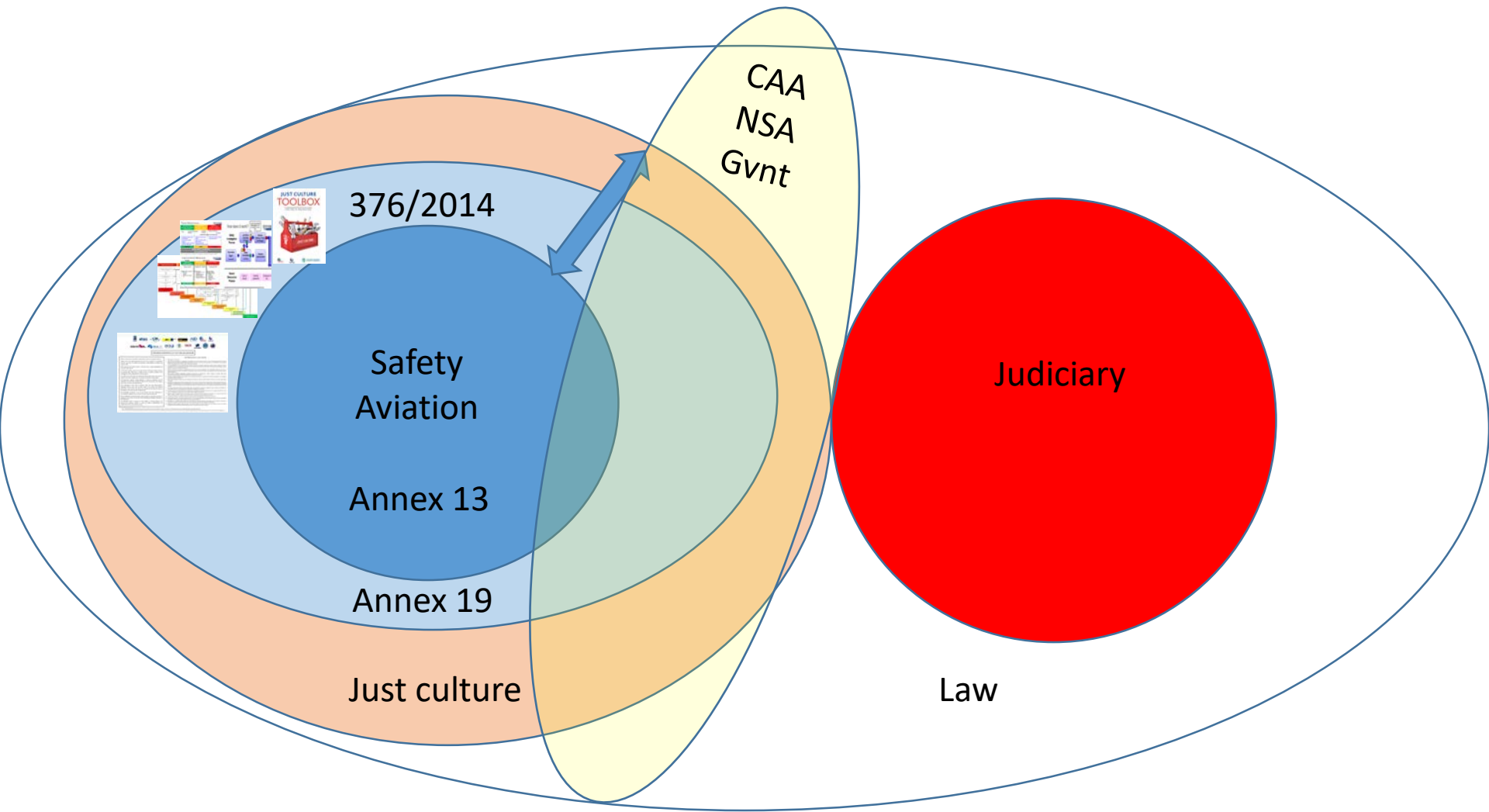


A Trial to describe the issue

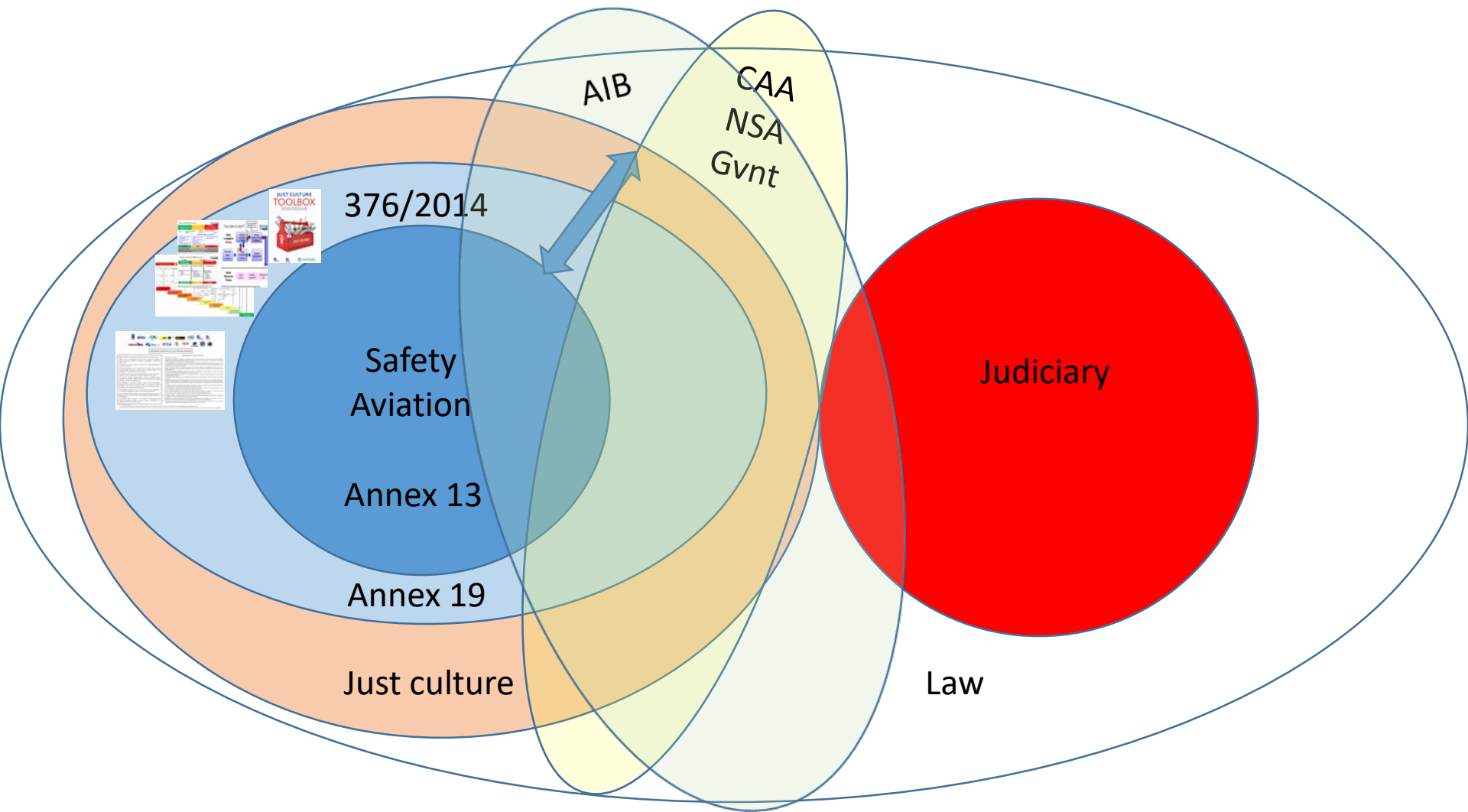




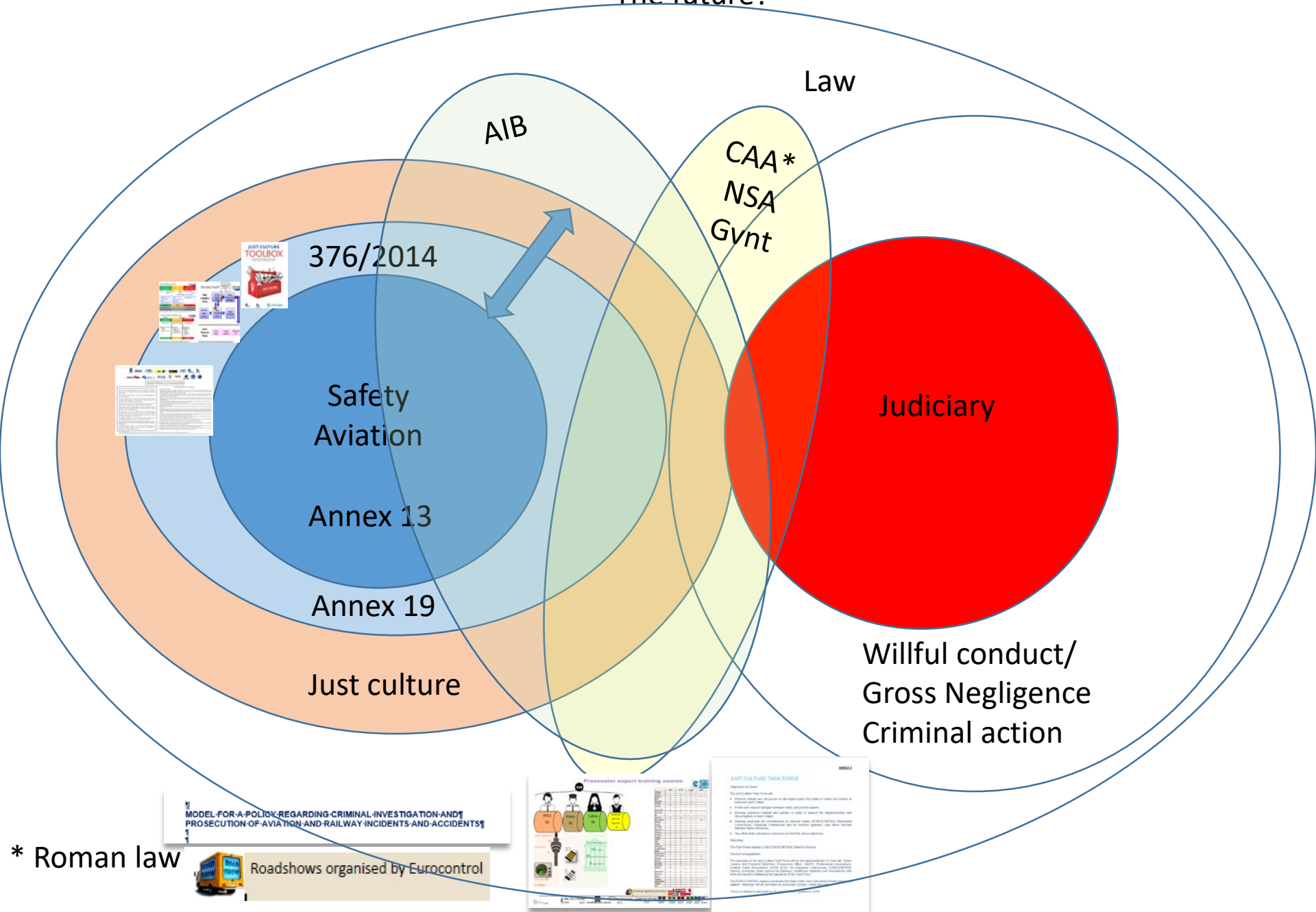
A Trial to describe the issue



A Trial to describe the issue



A Trial to describe the issue The future?



Aviation meets judiciary

prosecutors network





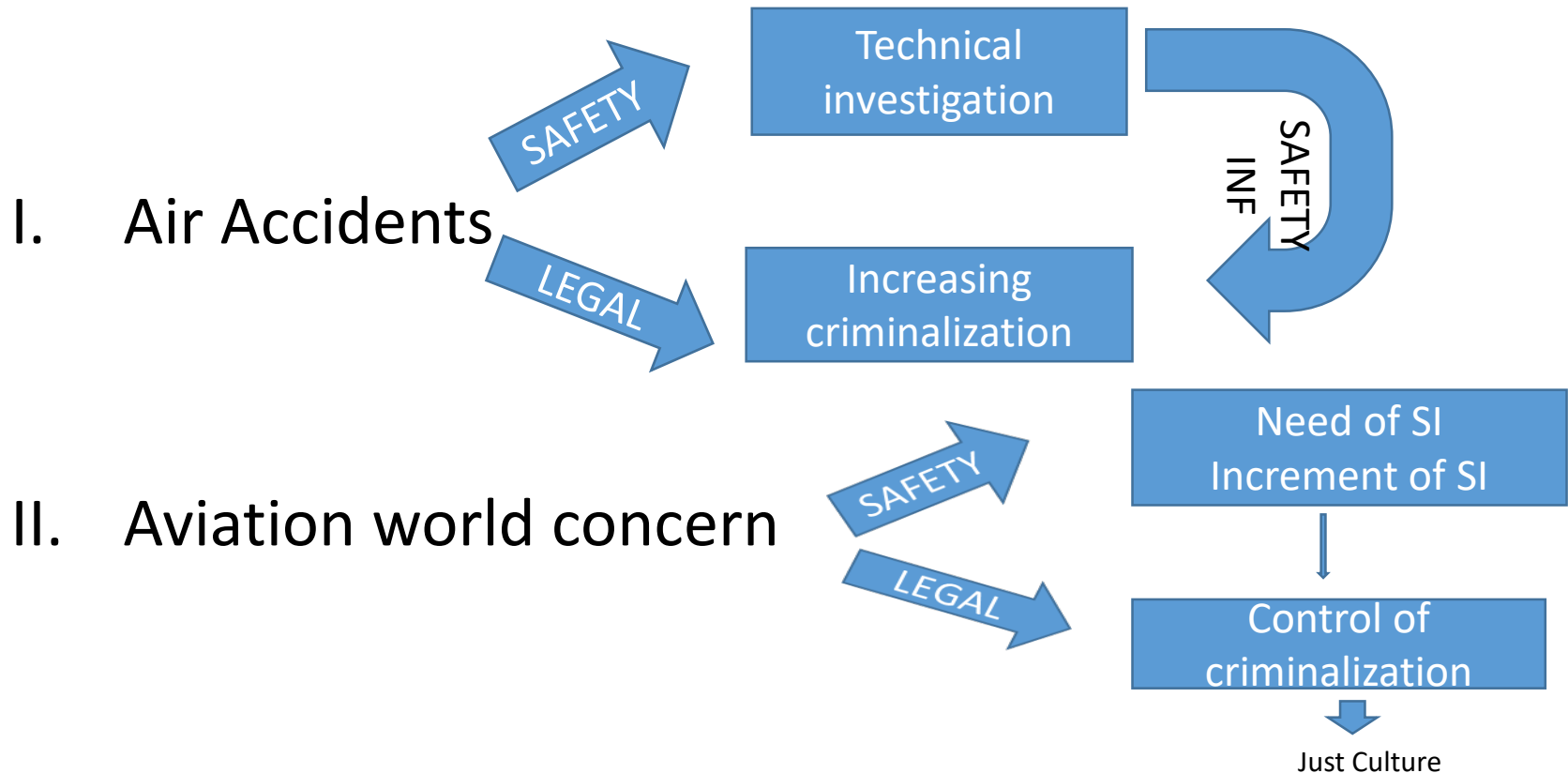
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JUST CULTURE FROM THE LEGAL PERSPECTIVE

A journey trough the History



CONTROL OF CRIMINALIZATION IN ORDER TO GET SAFETY INFORMATION THAT MANTAIN AND IMPROVE SAFETY IN AVIATION

Accidents investigation (2010)

INTERNATIONAL: Annex 13: 9^a y 10^a
(2010) Edition:

- 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)

INTERNATIONAL: Annex 19
(2013): Safety Management

- 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)

Mon 15 Oct

Annex-19-2edEdition_eng PDF



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 safety 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 omissions 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 records Annex 13 is contained in Appendix 3, 1.2.

7/11/19

5-2

New ICAO ANNEXES JULY 2016

- 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 and 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)

Positive	Negative
States shall accord protection to safety data, safety information and related sources by ensuring that	States shall ensure that safety data or safety information is not used for
<p>a) the protection is specified based on the nature of safety data and safety information;</p> <p>b) a formal procedure to provide protection to safety data, safety information and related sources is established;</p> <p>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</p> <p>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</p>	<p>a) disciplinary, civil, administrative and criminal proceedings against employees, operational personnel or organizations;</p> <p>b) disclosure to the public; or</p> <p>c) any purposes other than maintaining or improving safety; unless a principle of exception applies.</p>

PRINCIPLES OF EXCEPTION

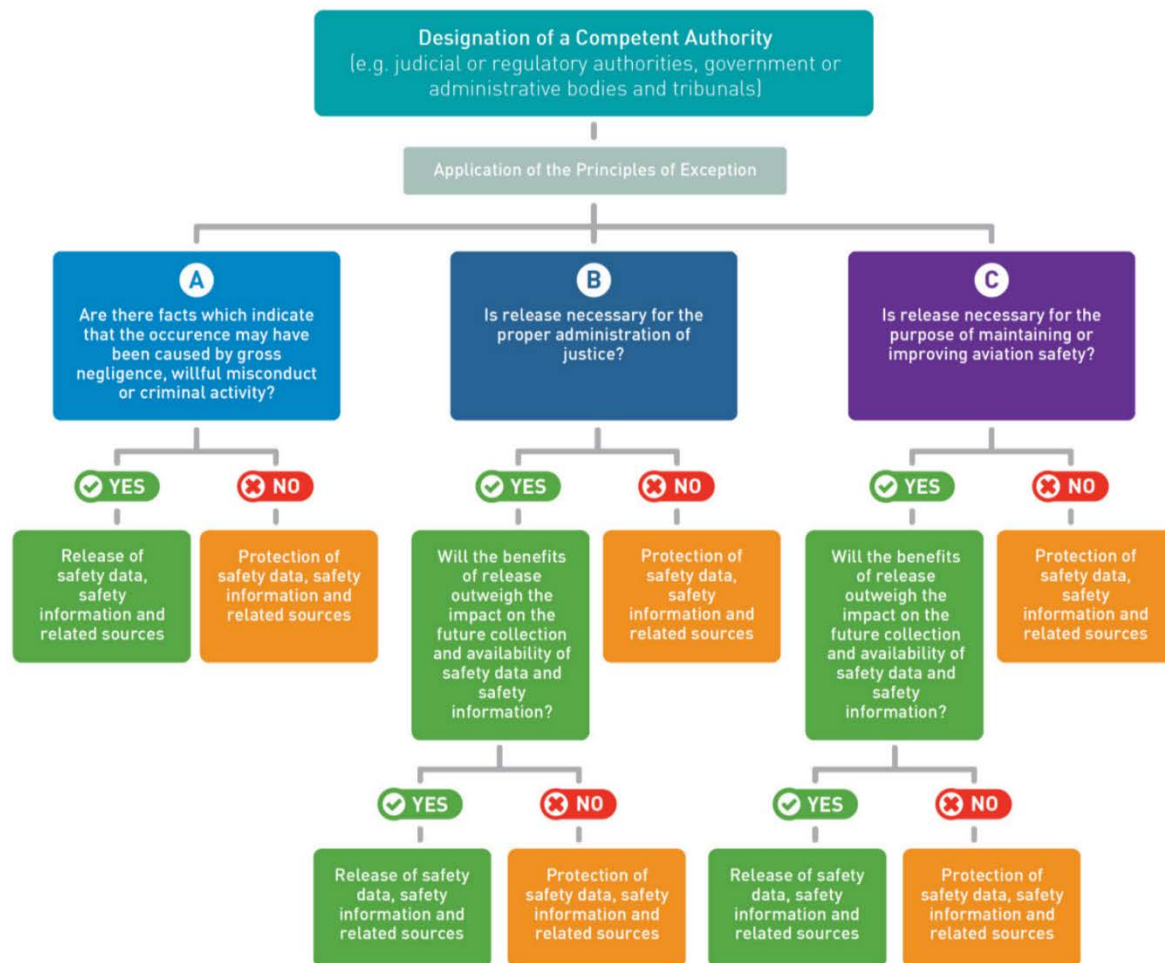
Exceptions to the protection of safety data, safety information and related sources shall only be granted when the competent authority

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**

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, determines that its release is necessary for **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

7.6.4.3 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 19.⁶



It does not require a Principle of
Exception actions for maintaining or
improving aviation safety

Preventive
actions

Corrective
actions

Remedial
actions

Protection according to Annex 13 and

Records has
to be
protected
always

**(There's no
principles of
exception)**

To release
any record:
Balancing
test

Recordings
(CVR, AIR...)
Special
treatment
privacy rights

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 ppl of exception applies
- Evidence Law

European Regulations

(Good ideas, but legal regulation should be improved)

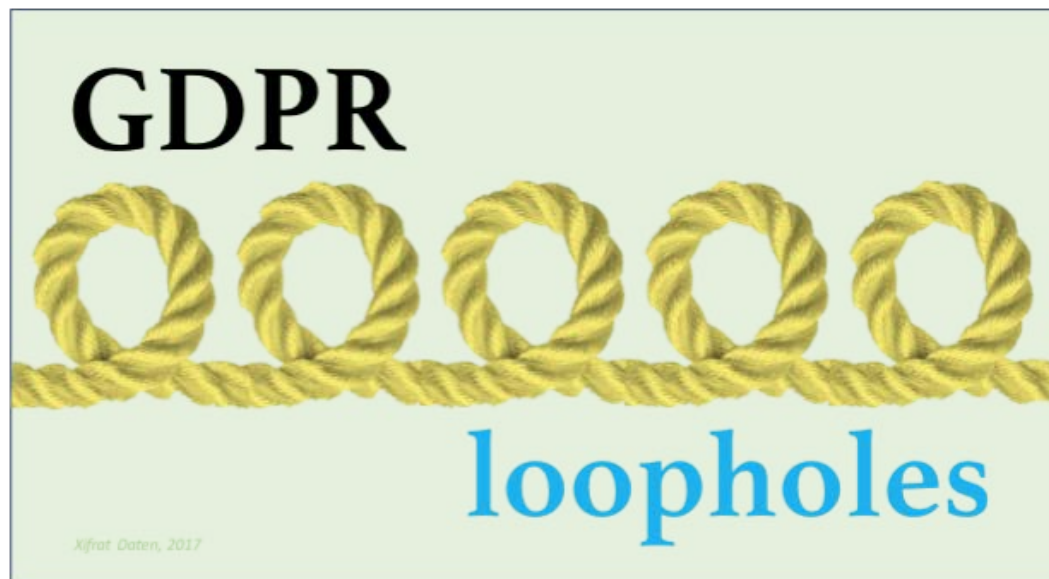
Reg. 996/2010

- 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

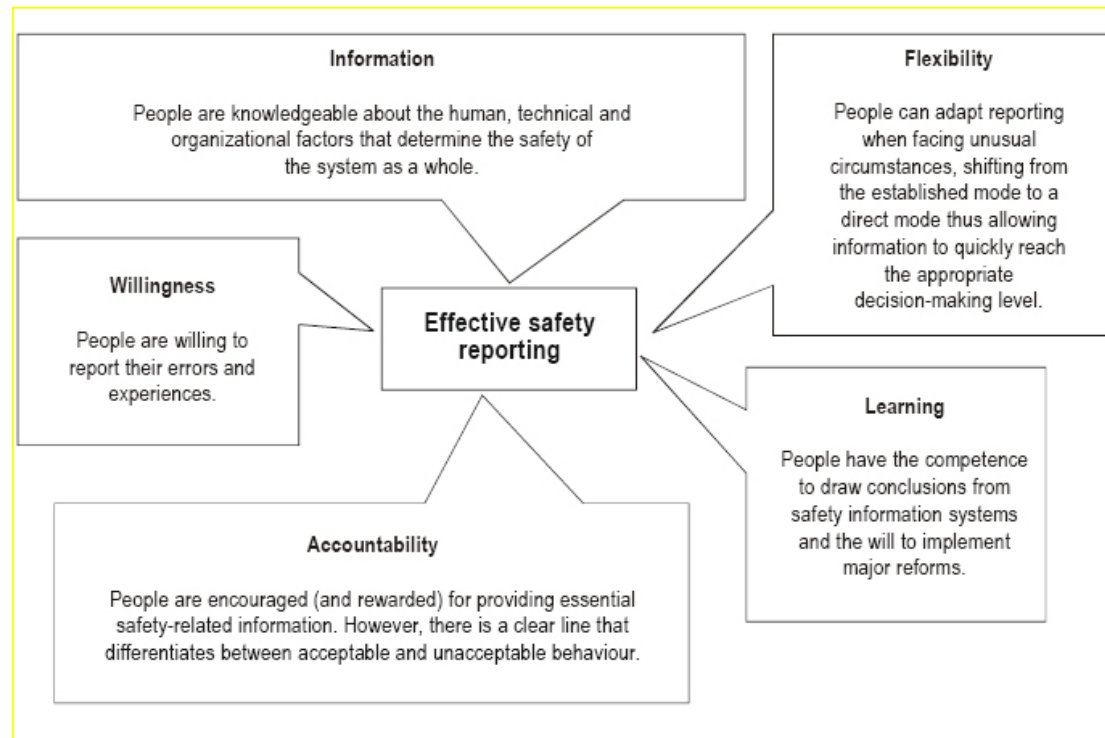
- It's chaotic in the way that protects information and chaos
- Two of the three principles of exception are not included
- There's no balancing test.
- No special treatment for recordings

Loopholes in EU law?



Are there 'loopholes' in Just culture and the legal effect of EU376/2014?

Reporting creates a safer operation



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...

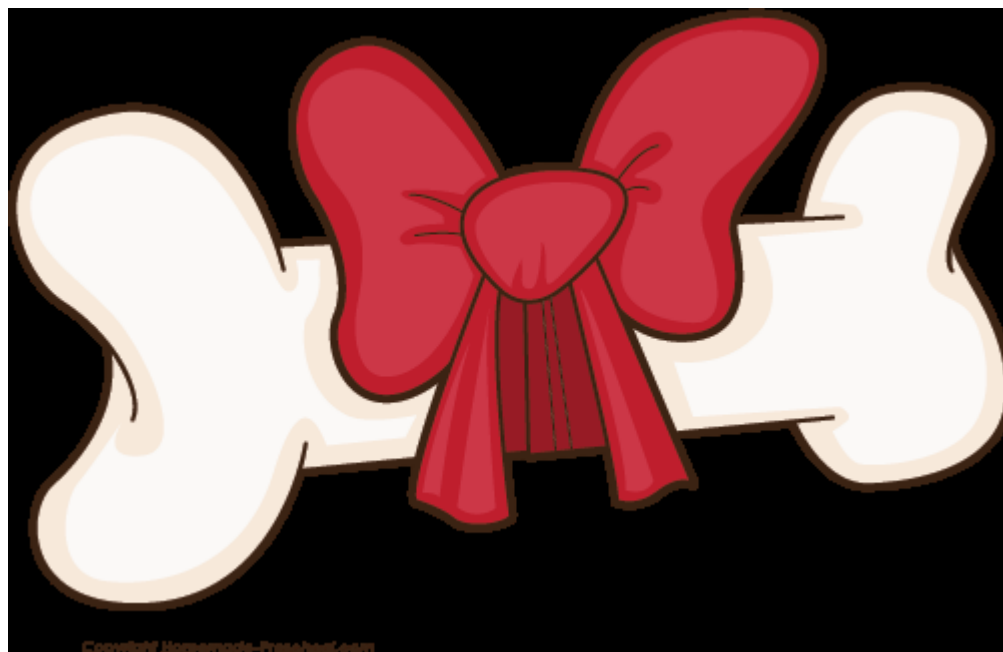
- Professionalism is a criminal offence?
- Because EU376/2014 Art 16 (10) (b) states:
*‘where there has been a manifest disregard of an obvious risk and profound failure of professional responsibility’ **shall be exempt from the protections afforded to those providing information to an employer***

A new failure of professional responsibility?

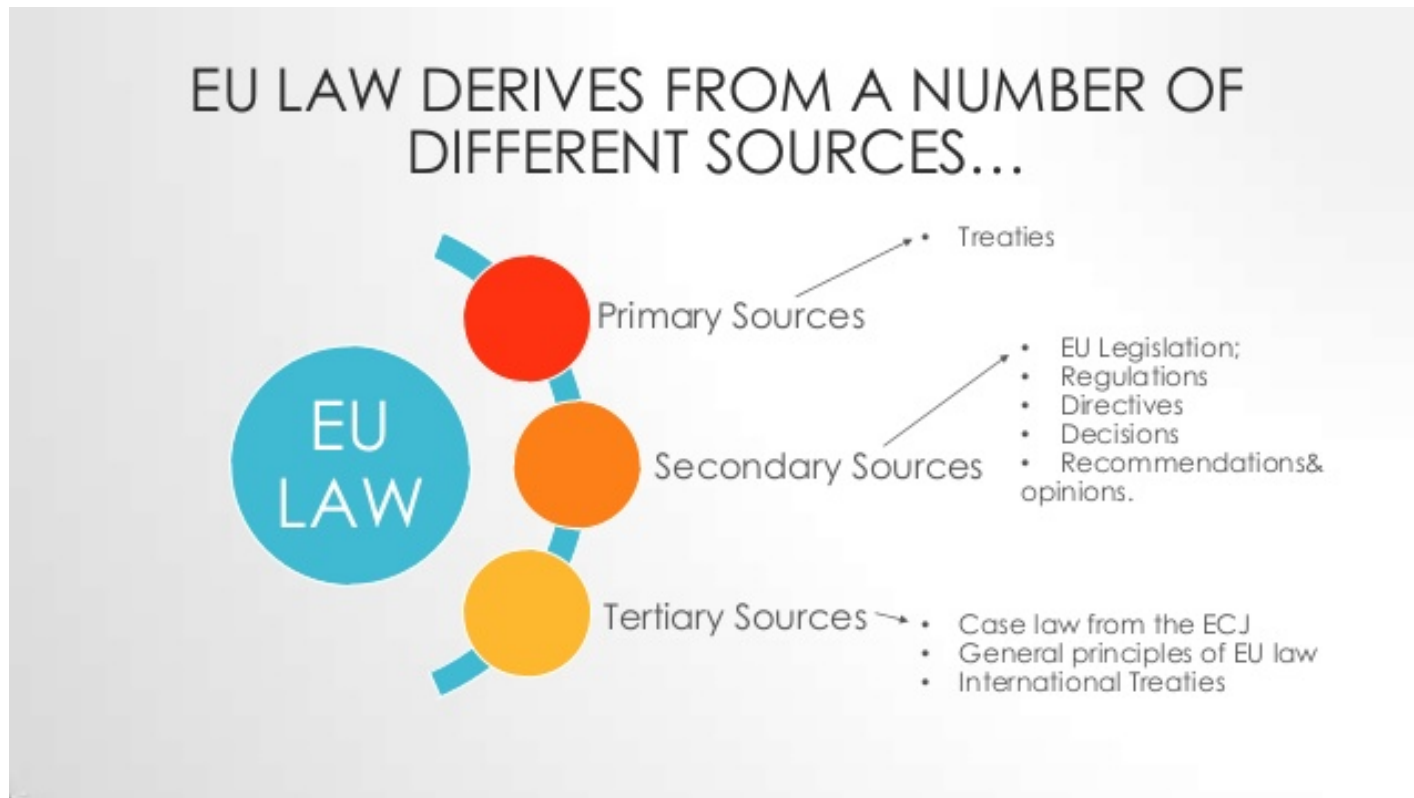
Prior to EU376/2014, in some jurisdictions open reporting existed or even mandatory reporting e.g. UK MOR scheme (Sweden)

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?
 - Stablish an adequate authority to decide about the application of a Principle of exception
 - Stablish 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

National States

- Through national legislation should:
 - Decide what should be criminalized, because where a crime could have been committed a principle 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.