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COMPLIANCE DIALOGUES



Instituto
Ibero-americano
de Compliance



EDITION 1

Dados Internacionais de Catalogação na Publicação (CIP)

C737	Compliance dialogues / Andreia Nicole Pereira Carvalho, Fabiana Guerra Machado Vecchio, Fabrizio Bon Vecchio, Sancha de Carvalho e Campanella, (coordinators). – 1 st edition. – Funchal : Instituto Superior de Administração e Línguas, ©2022.
	1 recurso online.
	ISBN
	1. Compliance. 2. Corruption – Law and legislation. 3. Corporate governance. 4. Public administration. I. Carvalho, Andreia Nicole Pereira. II. Vecchio, Fabiana Guerra Machado. III. Vecchio, Fabrizio Bon. IV. Campanella, Sancha de Carvalho e.
	CDD 345.02323
	CDU 343.46

Elaborada pelo bibliotecário Flávio Nunes CRB 10/1298

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(Coordinators)

Funchal 2022

Title**COMPLIANCE DIALOGUES****Organisation**

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Edition

Instituto Superior de Administração e Linguas - ISAL

Pagination and Graphic Design

André Rieger

Date: © 1st Edition | Funchal, December 2022

Format: e-book

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ISBNs: 978-989-33-4180-3

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PREFACE

On 29 and 30 November 2021, Instituto Ibero-americano de Compliance (Ibero-American Institute of Compliance) – IIAC –, based in Brazil, and Instituto Superior de Administração e Línguas (Higher Institute of Administration and Languages) – ISAL –, on the island of Madeira, joined forces to celebrate via telepresence the 2nd Ibero-American Congress on Compliance, Governance and Anti-Corruption. It was the second event organised by the union of the two entities, whose fraternal ties have only grown closer since then.

In this edition of the event, the debate of normative compliance was promoted in its most diverse aspects. The rise of the compliance debate has long since transcended the idea of the merely preventive-criminal sphere. In this sense, as PORTO (2020, p. 16) accurately stated, "besides an immediate end (fight against corruption), compliance must act as a true lighthouse, control tower (in aviation language), indicating to the agents the expected behaviours that will bring greater well-being for everyone"¹.

This was precisely the main thread that guided the event. Over the two days, with the participation of scholars from more than ten nationalities, there was debate from alpha to omega of this interdisciplinary, organic and changeable branch that is ethical, responsible and social management. As a member of the event's organising committee, I would like to state on behalf of the committee that we were honoured by the richness of the research carried out, as well as by the cross-border expansion of our event: conceived between Portugal and Brazil but built on the collaboration of the Iberian Peninsula and Latin America as a whole.

Over the two days – together with the presentations by guest speakers – more than fifty unique research works were debated in working groups, in nineteen different themes, whose abstracts can be checked by the reader in the annals of the event, already published in January 2022. The present work corresponds to the research that, once brought to debate at the event, was converted into a paper format in order to present to the academy the results obtained in the light of the proposal presented.

The reader will find in this work twelve research works developed by eighteen scholars in Brazil, Portugal, Spain, Argentina and the United States of America. The comprehensiveness of the themes has always been a cornerstone of the partnership between IIAC and ISAL, and when dealing with compliance, it could not be different. In this edition, the researchers approached the most varied aspects: welfare, labour, digital, corporate, criminal, banking, tourism and social compliance, as well as risk management analysis.

The organisers are proud that the reader can access research on the contemporary challenges of artificial intelligence in the field of warfare and on the accessibility of tourism from the perspective of regulatory compliance and ethical management in this publication. On behalf of IIAC and ISAL, I would like to congratulate all the participants of this work. The event was enriched with this academic wealth, and the research field with the relevant advances and innovations brought by the authors. We thank everyone who contributed to this transdisciplinary and cross-border debate.

¹ Porto, Éderson Garin. (2020) *Compliance & Governança Corporativa: uma abordagem prática e objetiva*. Porto Alegre: Lawboratory.

Finally, I dedicate this preface to the reader with certainty that the following pages will contribute to their research in the field and invite them to participate in the next editions of CIACGA. Enjoy your reading.

Cássio Chechi de Assis

Member of the organising committee of the 2nd CIACGA. Vice-President of Instituto Ibero-americano de Compliance. PhD candidate, Master and Specialist in Compliance from the University of Coimbra. Lawyer.

PRESENTATION

This book, titled *COMPLIANCE DIALOGUES*, comprises the papers produced in the 2nd Ibero-American Congress on Compliance, Governance and Anti-Corruption (CIACGA 2021), as the result of the abstracts presented and approved at the event held in November 2021, in a blended format, in the capital of the island of Madeira, at the headquarters of ISAL. It is composed of twelve chapters, each of them produced by authors who, in addition to being researchers, scientists and observers of the current reality, offer the readers their accurate and critical perspective on issues that currently assume the utmost importance for the construction of a fairer, more fraternal and ethical society.

The first paper "THE IMPLEMENTATION OF CRIMINAL COMPLIANCE AS A CRIMINAL POLICY TO COMBAT CORRUPTION" by Juliano Astor Corneau, presents us a study on the possibility of criminal compliance being adopted as a novel form of criminal policy in order to combat the endemic problem of corruption, emphasizing, finally, the need to adopt an ethical culture to combat non-compliance.

In turn, the paper titled "THE IMPORTANCE OF COMPLIANCE AS AN INSTRUMENT TO COMBAT CYBERCRIME", written by Luís Augusto Antunes Rodrigues, faces the problem of cybercrime and how the creation of specific rules of compliance may help in the prevention of criminal attacks in order to mitigate the growing threat linked to criminality in cyberspace.

Subsequently, the article "THE SUBSIDIARY RESPONSIBILITY OF THE COMPANY REQUESTING SERVICES CONCERNING THE CORRECT APPLICATION OF LABOUR COMPLIANCE IN COMPANIES PROVIDING SERVICES. CASE STUDY: RIACHUELO STORES", authored by Daniel das Neves Gomes and Luís Augusto Antunes Rodrigues, discusses labour compliance and the need to extend these rules also to service companies, bearing in mind the possibility of objective liability of the legal person for harmful acts of corruption, brought by Law no. 12.846/2013. The case of Lojas Riachuelo, which was fined by the Labour Court because Guararapes Confecções, which provided outsourced clothing manufacturing services, exploited its employees, is an example considered.

In chapter four, the reader is presented with the article "HOW CAN THE FUNDAMENTAL PRINCIPLES OF LABOUR LAW BE MADE COMPATIBLE WITH MODERN WORK? It discusses Labour Law in Portugal, analysing the new changes in the labour world that have occurred due to the expansion of globalisation and the intensification of the use of new technologies, which has made the fragility of labour in these new times even more evident. It highlights the importance of labour compliance as a relevant tool for the mitigation of labour conflicts, also acting as a protector of companies, to the extent that it avoids unnecessary risks generated by new and still unregulated situations.

Subsequently, the text "COMPLIANCE AND MENTAL HEALTH IN THE WORKPLACE: THE NEED FOR AN ETHICAL COMMITMENT FROM LEADERS TO PREVENT ABSENTEEISMO BY PSYCHOLOGICAL ILLNESS IN PUBLIC ORGANISATIONS" authored by Davi Valdetaro Gomes Cavalieri, presents compliance as an instrument of protection of psychological integrity in the work environment, in such a way as to diminish the levels of absenteeism by psychic illnesses in public organisational environments. It conducts an exquisite empirical research that takes place through quantitative and qualitative techniques, with data collection and interviews.

The sixth paper, titled "DUE DILIGENCE - AN APPROACH AIMED AT MITIGATING RISK IN RELATIONSHIPS WITH THIRD PARTIES", written by Renata de Oliveira Ferreira and Fernando Augusto Macedo de Melo, discusses the use of DUE DILIGENCE in the relationship with stakeholders and how this practice is effective, particularly in relation to mitigating the risks arising from this relationship in terms of potential financial damage and organisational image. It seeks to propose a classification of the integrity risk with these third parties in order to adopt monitoring policies appropriate to the situation.

The article "CONFLICT MANAGEMENT AS A PILLAR OF PRIVACY COMPLIANCE PROGRAMMES", by Guilherme Hernandes Sicuto, deals with privacy and data protection – such a controversial theme nowadays - as well as the need for adaptation of the institutions for the implementation of a compliance practice that takes into account the interest of the holders of personal data and also the possible conflicts related to this problem.

In the eighth chapter, "COMPLIANCE AS AN ALTERNATIVE INSTRUMENT FOR THE PROTECTION OF HUMAN RIGHTS AND THE INEFFECTIVENESS OF DECREE No. 9.571/2018", the authors Bianka Adamatti and Eduardo Adolfo Ferreira focus on compliance from the perspective of Human Rights, through Decree No. 9.571/2018, which determined the guidelines for implementation of Compliance programmes in Human Rights and how these measures can positively impact the results and the image of companies in the market.

The paper "THE INSS GOVERNANCE SYSTEM AND THE LIABILITY OF THE MANAGING SERVANT FOR DELAYS IN THE GRANTING OF BENEFITS", written by Claudine Costa Smolenaars, dissects the integrity and governance programme introduced by Instituto Nacional do Seguro Social (National Institute of Social Security) (INSS), especially regarding the non-compliance generated by the excessive time that the municipality takes to implement the benefits provided by Law 8.213/91, generating accusations of prevarication and disobedience of servants, characterising a threat of liability, which can be mitigated through data transparency and by permanent collaborative governance.

Chapter 10, titled "OVERINDEBTEDNESS AND RESPONSIBLE CREDIT: THE BREACH OF BANKING COMPLIANCE DUTIES AND THE ENACTMENT OF LAW No. 14.181/2021", authored by Renata de Alcântara e Silva Terra and Eduardo Adolfo Ferreira, addresses the banking theme with respect to responsible credit policies in opposition to the current overindebtedness of individuals in Brazil. It discusses the effectiveness intended by the enactment of Law no. 14.181/2021, which establishes rules for the protection of overindebted consumers.

"THE ROBOTS OF WAR: SOCIO-LEGAL CHALLENGES FACING THE ADVANCEMENT OF ARTIFICIAL INTELLIGENCE IN THE FIELD OF WARFARE", written by Gabriella Miraíra Abreu Bettio, brings the analysis of the advances of artificial intelligence in applications of a warlike nature, leading to the question related to the necessary regulation of these new technologies, especially regarding the ethical and humanitarian issues of these new devices.

Finally, the paper "ACCESSIBLE TOURISM AND COMPLIANCE", by Leonilde Rodrigues Dias Olim, Andreia Nicole Pereira Carvalho and Sancha de Carvalho e Campanella, invites us to discuss the theme of accessible and democratic tourism, in addition to highlighting the gains for local populations, beneficiaries of the improvements in accessibility, a fundamental condition enshrined in the Portuguese Constitution. It notes that even with increased awareness to improvements in accessibility, we still see a reality far from desired and necessary for the mitigation of this problem. It analyses the good practices implemented in the Autonomous Region of Madeira which, however, still need to advance in order to face the

demands of people with special needs and, consequently, to make Madeira a fully accessible and inclusive destination.

We hope that this reading represents an opportunity to share research experiences and to increasingly contribute to the progress of science.

Fabrizio Bon Vecchio
President of Instituto Ibero-americano de Compliance (IIAC)

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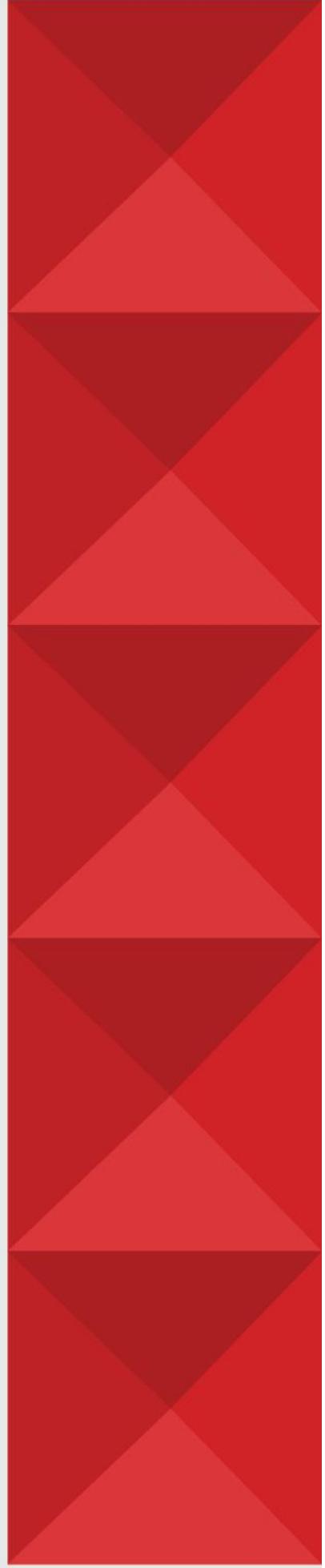
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CHAPTER



COMPLIANCE
DIALOGUES



THE IMPLEMENTATION OF CRIMINAL COMPLIANCE AS A CRIMINAL POLICY TO COMBAT CORRUPTION

Juliano Astor Corneau²

Abstract

The systemic corruption that exists in Brazil, in the public and private spheres, is one of the biggest challenges of the criminal justice system of the last decade in the country. The way to combat economic crimes is a major challenge for the criminal sciences, where, in the last decade, the legislator began to adopt alternative methods, such as the use of *compliance* programmes to prevent these crimes. Thus, it is the objective of this work to analyse whether criminal *compliance* could be adopted as a new form of criminal policy in the fight against corruption. It is concluded that there is a need to establish a culture of ethics and integrity in public and private institutions in Brazil, changing the course of the criminal policy of repression and prevention of corruption.

Keywords: criminal compliance; criminal law; criminal policy; corruption.

² Law undergraduate student at FSG - Centro Universitário da Serra Gaúcha. Email: juliano_corneau@hotmail.com.

1 INTRODUCTION

The criminal issue is, and always has been, one of the most debated topics in politics, in electoral campaigns and in the daily life of the Brazilian people, especially when faced with various allegations of corruption of politicians and businessmen, announced by the media. Corruption develops through a wide network, and is disseminated by broad sectors of society, making itself perceived in the public and private sphere (GONÇALVES & MARTINI, 2019, p. 121), distancing itself from the conception that the locus of corruption is in the centre of the State, as if the economic market were an area where the values of good faith and ethics reign.

The "fight" against corruption, a term constantly used by the media and by actors in the criminal justice system, traditionally occurs through the repressive channel of the State, that is, through criminal proceedings. In the last decade, Brazil has improved its legislation, introducing innovations with respect to the instruments of repression of economic crimes, recognising the inefficiency of the state repressive model in the face of crimes that are highly complex to elucidate, such as economic crimes. Still, in doing so, it also recognizes the need of participation of the private sector in the combat of corruption, establishing a series of duties of implementation of compliance programmes.

Initiating this process of change of paradigms of the fight against corruption, Law 12.846/2013 (called the Anticorruption Law) was enacted, followed by Law 13.303/2016 (Law of State Companies) and, finally, Law 14.133 (Law of Bidding and Contracts), only to mention the most relevant and that will impact the deductive logic brought in this work. In this process, which aims to ensure sustainability and confidence in the economic market, the State exercises its role as "Security State" or "Welfare State", which is attributed to it in the 21st century.

Thus, the objective of this study is to analyse whether the institution of criminal compliance can be adopted as a criminal policy to combat corruption. The hypothetical-deductive research method will be used, for presenting the most adequate result for the purposes of this research, of an eminently theoretical character and based on a logical construction of arguments.

Initially, the fight against corruption will be addressed, outlining briefly the phenomenon, as well as the manner in which it is currently seen and treated in Brazil, making comments on the repressive form traditionally used in economic criminal repression. In a second moment, one enters the area of compliance, making some explanatory comments about it, as well as the requirements and its eminently preventive characteristics, in order to, in a final moment, analyse the necessary characteristics that must be present in an integrity program in

order for it to be effective in the fight against economic criminality and, in particular, corruption, outlining by means of doctrine and the aforementioned legislations to form a critical judgment on the theme.

Finally, in a brief synthesis, the final considerations are made concerning what was presented throughout the study, correlating the topics explored on the combat of corruption and the implementation of criminal compliance in the structure of public and private organisations to combat corruption.

2 OVERVIEW OF THE CRIMINAL POLICY TO COMBAT CORRUPTION IN BRAZIL

In the last decade, corruption has become one of the most commented and debated subjects in Brazil, with different opinions about its roots, from the apparent natural dishonesty of the Brazilian, the famous “a little help”, to opinions such as corruption is present in the political agent, who is corrupt by nature (FILGUEIRAS, 2009, p. 387). Especially after the *Mensalão*, and, more recently, the outbreak of Lava Jato Operation, the Brazilian society sees constant allegations of corruptive acts by political agents and businessmen.

Although Lava Jato was not the first or the only Brazilian task force dedicated to fighting crime, it was innovative in terms of the use of a surprise element: the support of the mainstream media, which certainly helped to popularize the information and the practices of the Federal Prosecutor's Office and the criminal justice system as a whole (CALLEGARI, DIAS and ZAGHLOUT, 2020, p. 266-267). Taking advantage of this support of the media and part of the population, it used, as an instrument of enforcement of the so-called "fight against corruption", coercive conduits, leaking of information and other illegalities, performing for the criminal process a real show, sometimes creating the stigma of convicted corrupt in political agents who were only investigated in a police investigation, measures supported by some criminologists, who believe in a differentiated performance of criminal law to ensure its effectiveness (CACICEDO, 2017, p. 416).

Seeking to support popular desires, the State, represented by its agents of the criminal justice system, has availed itself of the repression of the Criminal Law as the first ratio for the solution of the conflict, as well as the accomplished to seek to solve various problems and ills of society (CACICEDO, 2017, p. 410; CALLEGARI, DIAS & ZAGHLOUT, 2020, p. 277). This form of repressive action through Criminal Law forms the classic conception, unfortunately rooted in the popular imagination, that corruption resides solely in the State and in the political agent, being the place and persona par excellence of the practice of corruptive

offenses (CACICEDO, 2017, p. 417; FILGUEIRAS, 2009, p. 403), criminalizing politics and the agent himself (INNERARITY, 2017).

Moreover, this criminalization reveals a contradiction, to the extent that, by adopting the criminal system as the first mechanism for conflict resolution, it disregards the influence and political power exercised by the agents accused of white-collar crimes (MENDES, 2020, p. 1185). The repressive discourse of combating corruption also has political-economic purposes, when sustaining in favour of (neo)liberalism that, from the conception that the locus of corruption resides in the core of the State, it should have its area of action reduced to a minimum, leaving all subsisting demands to the private sphere (GLOECKNER & SILVEIRA, 2020, p. 1148). As a result of the acceptance of this "fight" against the corrupt, represented in the political agent, the State should institute a series of transnational laws about limitations to the public agent, reducing its field of action, in true economic political action on account of the excusable endemic corruption (GLOECKNER & SILVEIRA, 2020, p. 1155).

In a study published about the emergence of economic crime, Sutherland (2015, p. 340) verifies that the business person, even if he/she practices crime, does not see himself/herself as a criminal, since he/she does not have the stereotype of criminal. Still, the author states that business people consider that, the smaller the government is, the better it is, highlighting their true contempt for the law (SUTHERLAND, 2015, p. 336).

In another way, in relation to the public agent and the business person, the legal rule of economic crimes aims to protect and safeguard the economic development and its sustainability (RUIVO, 2011, p. 32), being unlikely the existence of the financial market completely divorced from the legal order, to the extent that one must recognize the artificiality of the market and the possibility of correcting distortions (RUIVO, 2011, p. 20-21). Still, Ruivo (2011, p. 22) points out that it is essential to have preventive state intervention, with the proper conformation of the Administrative Sanctioning Law, using the Criminal Law in its minimal form, i.e., as the last ratio, making use of this instrument constantly used as a preferred tool in combating social ills (BOLDT, 2020, p. 1213).

In this area, it is noted that the fight against economic macro-criminality by the repressive way has proven ineffective for two reasons: its ineffectiveness for agents who commit this kind of crime and, the attempt to repress these crimes, the transgression of basic criminal norms of the rule of law aiming at the condemnation of the individual.

At first point, it is verified that there is evident difficulty in personal and individual attribution of criminal responsibility of the delinquent individual, not always being possible to verify this activity, given that the concealment of assets, money laundering and other practices

occur through various operations, third parties or even performed through legal entities (MENDES & SOUZA, 2020, p. 1185). From its ineffectiveness in the common forensic practice, identifying the agents who commit crimes, the Criminal Law does not even reach its general preventive character, since the certainty of its ineffectiveness generates the annulment of the dissuasive effects aimed at with the creation of the criminal type and the respective penalty (MENDES & SOUZA, 2020, p. 1186). Thus, crimes are more effectively prevented by the certainty of penalties than by their severity, because the certainty of a small punishment causes a more serious impression than a possible more severe punishment (BECCARIA, 2015, p. 76).

As for the second reason, sometimes the argument of "not tolerating impunity" is used to perpetrate illegalities against the accused or investigated, treating procedural guarantees as obstacles to the goal of criminal prosecution (CALLEGARI, DIAS & ZAGHLOUT, 2020, p. 282). The way in which the illegalities are diverse, such as restrictions on the right of defence, preventive arrests as a first measure, admission of extraordinary evidence and long periods of pre-trial detention aiming to constrain the accused to sign a plea bargain agreement, everything becomes legitimate if the goal is to fight corruption (BOLDT, 2020, p. 1219).

The damage to the fundamental rights injures the public interest itself, being impossible to restrict them on behalf of the "supremacy of the public interest", given that the defence of fundamental rights interests both the citizen with the offended legal good, as the community itself, weighed against the fact that the protection of fundamental rights is an intrinsic characteristic of the Constitutional State, constituting these unavailable rights and of negative provision before the Public Power (ABBOUD, 2011, p. 12-15). According to Zaffaroni (2007, p. 119), when extreme measures of illegality perpetrated against individuals are tolerated, regardless of the reason, it becomes impossible to avoid that the same actions are used against other agents at the time that is convenient for them, generating a huge precedent and extremely dangerous for guaranteeing.

Considering that in the 21st century we live in the "Security State", there is no way the State can escape from seeking to ensure stability and trust in institutions and economic relations, since crimes against the economic, tax and financial order, even if they do not cause immediate damage to third parties, produce effects on public policies, falling on legal goods of supra-individual nature (BURKE, 2020, p. 209-210), besides this being a state activity provided for in the Federal Constitution, in its Article 173, § 5.

However, it is necessary to perform a combination between extra-penal elements through the Administrative Sanctioning Law, using the Criminal Law as the last ratio

(MENDES & SOUZA, 2020, p. 1201). It is justified, for practical purposes, considering the insufficiency of the Criminal Law to fight economic macro-criminality in Brazil, with the repressive model proving to be inefficient in preventing frauds, in view of the expansion of the state scope in the criminalization of such conducts, resulting in the frustration of the expectations of the criminal prosecution model for abstract economic criminal problems (MENDES & SOUZA, 2020, p. 1177-1184).

Thus, it is necessary to seek new political-criminal strategies that can contribute in a preventive way, i.e., before the fact occurs, which are developed within the social and corporate sphere, collaborating to the criminal field (FURTADO, 2012, p. 23), and providing solutions in a timely manner, not simply being classic criminal procedural formulas (MENDES & SOUZA, 2020, p. 1202), as well as the verification of the possibility of participation of public and private agents in this movement, the institution of compliance programmes arises (NIETO MARTÍN, 2013, p. 134). This is essentially characterized by its *ex ante* performance in crimes, that is, by means of an analysis of internal controls and implementing measures that may prevent offenses, as a consequence, preventing the criminal prosecution (SAAVEDRA, 2011, p. 11) and administrative and civil sanctions resulting from conflicts with regulatory acts, as well as injuries to the image of the organisation (BOTTINI, 2019, rb-4.1).

With the obligation of implementation of compliance programmes in certain circumstances, the conception of the diffuse collective focus is reinforced, where, by means of stipulations and determinations, the State becomes increasingly present, forming a kind of "surveillance State" (SILVEIRA & SAAD-DINIZ, 2012), or, in other terms, a "privatization of the fight against corruption" (NIETO MARTÍN, 2013). Furthermore, modern regulation, like compliance, acts mainly focused on fighting risks, which may not even be produced, in comparison with criminal law, which fights damages (SOUZA & PINTO, 2021, RB-1.1).

Given this manner in which integrity programmes operate in the prevention of criminal offenses, it is essential to observe and analyse where it fits into the criminal policy to combat corruption, as well as verify its effectiveness for such, considering the cultural and legal environment currently in force in the country. A few considerations on these points will follow.

3 CRIMINAL COMPLIANCE IN THE INTERNAL STRUCTURE OF BRAZILIAN INSTITUTIONS

The implementation of integrity programmes in public and private institutions, also known as compliance programmes, the former being the term currently used by the country's legislation, are programmes that establish risk management strategies in the internal structure

of organisations and, under the criminal aspect, named criminal compliance, aim at the prevention of offenses (SOUZA & PINTO, 2021, RB-1.2). It represents beyond the mere legal compliance, being seen as the normative compliance, encompassing non-legal norms, such as technical rules, principles of business ethics and stakeholders' expectations (SOUZA & PINTO, 2021, RB-1.2; CUEVA, 2018, p. 54). However, unlike internal audits, such as ISO 19600, among others, which exercise a sporadic and punctual control, directed to analyse samples, compliance is a permanent and always preventive programme (BOTTINI, 2019, RB-4.3).

For its successful implementation, it must have some basic mechanisms, such as: continuous assessment of risks of the scope of action of the company/institution, preparation of the Code of Ethics and Conduct, commitment of top management, autonomy and independence of the team responsible, periodic trainings, safe channels for reporting violations and the protection of these informants, investigation of conducts reported by whistle-blowers, and the creation of an ethical culture of respect for the laws (FRAZÃO & MEDEIROS, 2018, p. 95). Some of these aforementioned requirements remain established in Decree no. 8,420/2015 of the Federal Government, which regulated Law 12.846/2013, listing minimum requirements for the evaluation of a good compliance programme.

However, there is not a programme applicable to each and every company/institution, but the analysis of the corporate culture in each institution is necessary for the formulation of the ideal integrity programme, which, despite the existence of numerous requirements, must not have bureaucracy as a principle, but the independent and collaborative performance towards all sectors of the company (SIMONSEN, 2018, p. 111). It is important to observe that its implementation aims at reflecting on points of risk and recommending practices that minimize the possibility of the practice of crimes, in a performance prior to the occurrence of the fact, aiming to provide legal safety to the managers and to the legal entity (BOTTINI, RIZZO & ROCHA, 2018, p. 383-385).

In summary, the criminal compliance programme may be defined as a series of internal and continuous efforts of self-organisation, which will aim at the detection and prevention of any criminal activity that may occur in the internal structure of the legal entity, using internal controls and the development of an ethical corporate environment (SOUZA & PINTO, 2021, RB-1.2).

From the preventive perspective of compliance, it inaugurates a new reality in Criminal Law, in view of the repressive performance that it classically exerts, seeking to establish a removal of the typical incidence, with softening of the delinquent risk (SILVEIRA & SAAD-DINIZ, 2015, p. 214). This movement is justified in view of the scandals led by financial entities

in acts of money laundering, interest manipulation and fraud and corruption practices, seeking a greater state intervention in the market, curtailing the autonomy previously enjoyed by large companies (ANTONIETTO & RIOS, 2015). Thus, through the "privatization of the fight against corruption", as Nieto Martín (2013) calls it, the state has granted corporations the duty to act together with public institutions in the development and implementation of regulatory policies (SOUZA & PINTO, 2021, RB-1.1), with the aim of avoiding legally relevant risks, giving way to preventive criminal types (SOUZA & PINTO, 2021, RB-1.2-RB-2.2).

In this context, several legislative innovations promoted in Brazil are introduced, which has aligned with international anti-money laundering and anti-corruption measures, being signatory of conventions and also signing a wide network of multilateral agreements of assistance between States (GONÇALVES & MARTINI, 2019, p. 116).

Among the legislative innovations, of the most recent and relevant are the Anti-Corruption Law (Law 12.846/2013), State Law (Law 13.303/2016) and the New Bidding Law (Law 14.133/2021), which follow the agreement signed by Brazil United Nations Convention against Corruption, called the Mérida Convention, signed by Brazil on December 9, 2003. The Anticorruption Law (Law 12.846/2013), the first national norm that delimited the compliance programmes, in addition to defining as objective the civil and administrative responsibilities for corruptive acts committed by private companies in detriment of the Public Administration, established, in its Article 7, item VIII, the integrity programmes as a mitigating circumstance in the application of sanctions to legal entities. Although it is not formally a criminal law, it has as a fundamental characteristic the restriction of rights, affecting the sphere of application of criminal conviction (SILVEIRA & SAAD-DINIZ, 2015, p. 308), configuring itself at the limit of the Sanctioning Administrative Law and the search for greater rationality and effectiveness to the criminal justice system (MENDES & SOUZA, 2020, 1194).

In turn, Law 13.303/2016, called the Law of State-Owned Enterprises, innovates in its Article 9, providing about the obligation of public companies and mixed economy companies, with gross operating revenues exceeding R\$90 million, to implement rules of structures and practices of risk management and internal control. In this regard, they must prepare and disclose a Code of Conduct and Integrity, containing a series of requirements aimed at implementing a culture of business ethics, as mentioned above. One should not forget to mention the Laundering Law (Law no. 9.613/1998), which, already in the 90's, instituted the duty of compliance for sensitive sectors of the financial market, varying according to the activity and the degree of complexity of the operations, with the norms to be stipulated by the supervisory agency of the branch of activity of the company, and in its absence, by COAF (BOTTINI, 2019, RB-4.4).

Also within the scope of Public Administration, the New Bidding Law makes it mandatory for legal entities to adopt integrity programmes in large contracts executed with the Public Administration (contracts worth over R\$200 million) and, within 6 months of the execution of the contract, must establish a compliance programme within the internal structure of the organisation (Law 14.133/2021, art. 25, §4). It also establishes the implementation of the integrity programme as a tie-breaker criterion between two or more bidders, as well as determines it as a mandatory requirement for rehabilitation in the administrative sphere.

As may be observed, the implementation of compliance in the internal structures of public companies and in the direct and indirect Public Administration is recent, which will still undergo improvements and internalization in the institutions. Likewise, it is not possible to make the need of implementing compliance only in private organisations, but this practice must be extended to the Public Administration and the governmental entities (NIETO MARTÍN, 2022, p. 37), with the same rigor or even greater for large companies (VIOL, 2021, p. 70), given that public integrity aims to sustain and prioritize public interests over private interests (VIOL, 2021, p. 57-58), and the fight against corruption cannot be completely outsourced to private companies and the State cannot exempt itself from implementing these programmes in its structures (NIETO MARTÍN, 2022, p. 38). It is weighed against the fact that its implementation within public organisations may contribute to one of the failures observed by Mairal (2018, p. 195-199), who warns about the contribution of Public Law to corruptive practices, such as the absence and defects of state oversight about the execution of contracts between private parties and the state.

It is of utmost importance its implementation in state agencies, given that many economic crimes occur between a legal entity of private law and another government entity, participant of the Public Administration, being this statement added to the fact of the absolute difficulty of unravelling certain criminal conducts in the economic criminal field, due to specific internal procedures within each organisation (SILVEIRA and SAAD-DINIZ, 2015, p. 72).

Thus, public integrity programmes should encompass the obligations inherent to public organisations, in addition to the legal duties stipulated for each sector, as well as internal control, adequate service provision with risk management and other instruments designed to combat corruption (VIOL, 2021, p. 71). According to Nieto Martín (2022, p. 39), for this self-regulation in the public organisation to be effective, it is necessary to establish sanctions that oblige leaders to seek continuous improvement in the internal organisation, in addition to numerous other essential requirements so that this internal structure in the legal entity, whether public or private, produces real positive effects in the fight against economic crimes, and seeks

to break with the cycle of corruption present, sometimes very well structured, without invalidating the traditional forms of combating corruption (GONÇALVES & MARTINI, 2019, p. 118). In order to break the cycle, the integrity programme cannot be solely formal, since the mere existence of rules and penalties is not capable of preventing certain criminal conduct, and should therefore be created based on the characteristics of each organisation, for example, senior management, all members should understand the programme, periodic review of the programme, availability of direct lines for whistleblowing, and, in the event of complaints, investigations should be conducted (VIOL, 2021, p. 72-78), creating an organisational culture of integrity (VIOL, 2021, p. 78).

Thus, it is fundamental to visualize the idea of building an organisational culture of integrity, which requires deep insertion and exercised with ethics by all members of the organisation, from the trainee to the CEO (VIOL, 2021, p. 78; SOUZA & PINTO, 2021, RB-3.3), from suppliers to customers, propagating the culture and the expected behaviours of non-tolerance of violations of internal rules and legal standards (SOUZA & PINTO, 2021, RB-3.2). The Code of Conduct or Ethics should be solid and establish the bases and guidelines to be adopted on a daily basis, with the values being directly associated with each institution in a unique way (SOUZA & PINTO, 2021, RB-3.3).

Once the bases of the Code of Conduct are defined, the management of leaders in the organisation's environment will have the role of seeking to disseminate the ethical culture set forth in the Code, being, at the macro level, the role of the tone-from-the-top, that is, the company's management, the example in a broad sense, with the company's decisions reaffirming ethical attitudes, as well as tone-in-the-middle, the managers and leaders in the day-to-day execution of work activities, who should be trained and aligned with the ethical purpose of the integrity programme, aiming to propagate it to other sectors of the organisation (VIOL, 2021, p. 180). The influence of leaders is explained to the extent that, in organisations where individuals perceive a culture of integrity is ingrained and procedures are viewed as fair, members are more likely to be motivated to comply with rules and regulations (VIOL, 2021, p. 80).

The next collaboration act of all members of the organisation is the provision of whistleblowing channels, or direct lines, which are effective means of obtaining information that would hardly be discovered otherwise, which must be treated with secrecy and care, so that information of the names of the whistle-blowers does not leak (SOUZA & PINTO, 2021, RB-3.5). The information arrives to the reporting channel, and sometimes it may be inaccurate or incomplete, and the team responsible for compliance must perform a valuation of the

information received, and, if pertinent, perform an internal investigation to verify what was discovered (SOUZA & PINTO, 2021, RB-3.5).

Thus, before the verification of the commission of a crime, the team responsible for compliance has the duty to report them to COAF (Financial Activities Control Council), an administrative entity, which may promote precautionary measures, breach of secrecy and even require the initiation of criminal proceedings (article 14 of Law 9.613/98), being responsible for receiving, storing and systematizing information, and contribute to the fight against money laundering by means of strategic planning (BOTTINI, 2019, RB-3.6).

Moreover, one should not forget to raise the use of information technology as a means of investigation of criminal acts in the internal structure of the organisation (NIETO MARTÍN, 2022, p. 37). It is emphasized, with the digitalization and universalization of information systems, with the compacting of data, that this can and must be used during the investigations performed by the team responsible for compliance when there is the suspicion of illegal acts in the internal environment, given the advancement of new control technologies during the last decades (SAAD-DINIZ, 2018, p. 26).

In other words, having observed these fundamental aspects for a successful integrity programme, that is, one that prevents corruption, it is emphasized that of great value would be the creation of connections between the private and state control systems, making available a field of information of possible front programmes, which circumvent the legal system of the implementation of a real compliance programme (SIEBER, 2001, p. 25), which would use the capacity of the private and state control systems to prevent corruption. 25), which would use the capacity of compliance to monitor information, systematize data and generate reports on money laundering practices and laundering acts (BOTTINI, 2019, RB-3.6). This dialogue between the private and public sectors would aim at an approximation between compliance and antitrust, exercising and protecting constitutional values of isonomy, publicity, and accountability, considering that compliance is one of the structuring elements of accountability (ABBOUD, 2019, p. 8).

Having weighed the parameters and requirements described above, it is verified that an integrity programme that truly combats corruption goes through three stages: the assembly of the integrity plan, the instruments and mechanisms of integrity and the effective formation and construction of a culture of integrity (VIOL, 2021, p. 83). There is an infinity of "cons" within each one of these topics described above, all equally impacted by the independence of the compliance policies structured within the company by the top management, its freedom of action among the most diverse sectors and the ability to suggest changes in the internal work

process to avoid certain breaches for offenses, with the compliance area being a prominent area of the corporate structure (SOUZA & PINTO, 2021, RB-3.1). Within this context, and in view of the above, the final considerations about this paper will be made.

4 FINAL CONSIDERATIONS

Finally, after a brief analysis of corruption and criminal compliance, it is necessary to make some conclusive comments, but which by no means close the debate on the theme. The debate on corruption has countless interfaces and lines of research, among them the political, sociological and legal, which, in this work, is opted to perform an analysis among these three, given the understanding that it is impossible to dissociate the political from the legal, and vice-versa, guided by the principle *ubi societas, ubi jus*.

The phenomenon of corruption, "fought" by the criminal justice system in recent decades, especially through the repressive route, which is outlined in a critical manner in this work, considering the various transgressions of fundamental rights, justified by the supposed "public interest", which, as exposed, does not even have legal-argumentative validity within a Constitutional State of Law. Furthermore, the inefficiency of state repression in the fight against corruption, considering the offender agent in economic crimes, generally possessing economic and political power, as well as the use of sophisticated and internal mechanisms for money laundering and other crimes in this area.

Thus, after the legislator acknowledged the inefficiency of the repressive measures and the need to ensure the sustainability and confidence in the economic market, integrity programmes were introduced in accordance with the U.S. model, aimed at combating economic crime through private enterprise. Inaugurated with Law 12.846/2013, a movement began for the creation and implementation of compliance programmes in private organisations in Brazil, extending to public companies with Law 13.303/2016, as well as becoming a mandatory requirement for the execution of large contracts with the Public Administration, with the advent of Law 14.133/2021.

Differently from the repressive conception of economic crimes, which are constantly treated as a "fight" or a "combat", compliance deals with a change of perspective and of criminal policy, with an essentially rationalizing focus. In the last decade, the Brazilian legislator began to strongly bet on the formation of a culture of integrity within private organisations, which, in our view, should be extended to public institutions, which, by the way, have an accentuated duty of public ethics and of providing an example to be followed in the private order,

constituting a new form of criminal policy through the increased use of the administrative sanctioning law.

As for the challenges of implementation of a compliance programme, for certain there are many, with issues that reside at the core of the institutions, added to the fact that there is not a standard integrity programme for all organisations, but, with respect to the speed with which business and financial updates currently occur, criminal compliance reveals itself as the most effective means of prevention of economic crimes and subsequent aggregator of security to the market. It is justified because the classic alternative, the repressive means, proves to be extremely slow, flawed and at times exceeds legality, contrary to integrity programmes, which, although it is not denied that at times organisations merely seek to meet the expectations of the regulator to avoid punishment, would be the creation of a culture of business and institutional ethics within organisations, currently non-existent in Brazil.

It is certain that no culture is created with the mere promulgation of a law, and it must be improved by countless instruments, with the collaboration of the business society and public institutions in its effectiveness, since from the moment in which society has engaged itself to fight corruption, it is incumbent upon it to collaborate with the State to decrease corruption, also by means of compliance.

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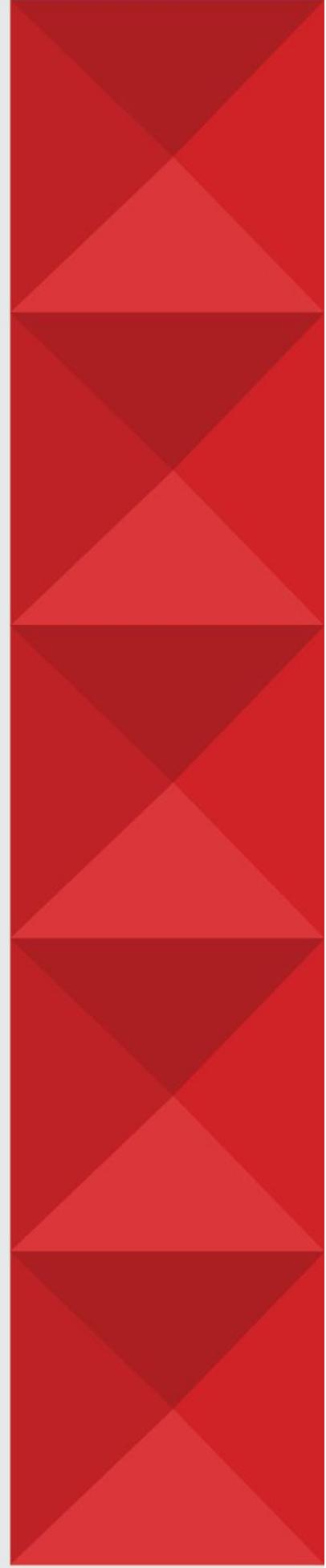
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CHAPTER

II

COMPLIANCE
DIALOGUES



THE IMPORTANCE OF COMPLIANCE AS A TOOL TO COMBAT CYBERCRIME

Luís Augusto Antunes Rodrigues³

Abstract

Law 13.709/2018 - General Data Protection Law - is in force in Brazil, aiming to protect fundamental rights of freedom and personality. In this view, this proposal is closely linked to the analysis of the implementation of compliance rules in the business technology sectors in order to avoid cybercrime, identifying in practice what must be done aiming to eliminate the leakage of clients' data. This article will inform about the importance of compliance in cybercrime, how companies should provide conditions so that criminals do not have access to customer data. Business owners need to keep their technological security level very high, including several precautions explained throughout this paper. Companies must help in the fight against cyberattacks aiming to comply with specific laws. The need for the creation of specific rules will be demonstrated, thus avoiding Internet hacking. One cannot deny the advance of technology, but one must be aware that today we depend on it and that illegal acts will increasingly become a reality. What is sought is to identify specific means of combating cybercrime through the correct use of compliance in the technology sector of companies.

Keywords: Compliance; Cybercrime; Internet; Technology.

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1 INTRODUCTION

According to the definition in Wikipedia, probably the most popular general reference on the Internet itself, the definition of "Internet" is as follows:

The Internet is a world-scale conglomeration of millions of computers interconnected by TCP/IP that allows access to information and all kinds of data transfer. It carries a wide variety of resources and services, including the documents interconnected through World Wide Web – (www) interconnections, and the infrastructure to support electronic mail and services such as instant communication and file sharing (MARQUES, 2012).

Given that the Internet is an information paradise and that these are true sources of wealth, it has attracted criminals because "where there is wealth, there is crime" (CORRÊA, 2000).

This can be seen when digital signals, which may represent huge amounts of money, can be intercepted and "stolen". Digital criminals no longer need to use their revolvers, pistols or rifles to rob a bank and exchange shots with police officers, often exposing their own lives. They now use the Internet and sophisticated software to commit the same crimes. They withdraw money from bank account holders without firing any shots and avoiding putting their lives at risk. But this is only one of the crimes that can be committed on the Internet. Throughout this article we will look at others, mainly in the business sphere, and how companies should beware of these scams. It is precisely in this prevention that the implementation of Compliance is very important.

2 DIGITAL CRIMES

According to Neil Barret, "digital crimes" would be: (...) the use of computers to help in illegal activities, subverting the security of systems, or using the Internet or banking networks in an illicit way" (BARRET, 2015).

We know that every society depends on information and therefore ends up being victim of simple threats to terrorism exercised in the largest world computer network.

As Neil Barret used to say: "(...) the information age affects not only our companies or electronic mail, but also the entire national infrastructure as the economy. If hackers can access existing computer systems in universities and companies, why not in banking, air traffic, railways, television and radio systems?" (BARRET, 2015).

We need to understand this new reality presented with the advent of the Internet, based on cutting-edge technology. How can this evolution be reconciled with the evolution of human relations? There is no alternative but to tirelessly seek to prevent the future implications resulting from this relationship between mankind and machines, where the structure and capacity offered by machines and new technologies will also be used by criminals and cyber-terrorists. These will use these new technologies to launder money, to hide files on illegal material, or even in an extreme situation, to organise a conspiracy against a certain order, of a Head of State for instance, which would even lead to a world war.

The Internet is certainly a place prone to fraud, mainly due to the impossibility of identifying its users and the imperfection of the computer programmes used to access and develop it. And in the wake of those who seek to curb these frauds and crimes, difficulties also arise, inherent to the new forms used for the current practice of crimes, the difficulty in punishing the perpetrators of these crimes and enforcing the right of the victim of such crimes, because such effectiveness collides with the right of secrecy of the data of those who are on the Internet.

Even the protection granted by the providers gives criminals a false sense of anonymity and, with this difficulty to identify them, even a sense of impunity because the legal system still lacks legal rules that cover the entire framework of crimes committed over the Internet.

And in the business field, how have companies been suffering with these new fraud options regarding their financial and/or accounting controls? What security can they offer to their employees and clients so that they do not have their data stolen by *crackers* or even the values taken from their current accounts?

3 CYBER SECURITY

Nowadays, information is an essential organisational asset and, consequently, it must be protected in the best possible way. Cyber security has as its primary objective to protect the integrity, availability and confidentiality of all and any information, being developed in companies to reduce the occurrence of cybercrimes. With the implementation of an effective compliance programme, companies will achieve these goals by following some basic procedures, such as: (a) Set up an adequate action plan; (b) Create a code of conduct; (c) Establish communication channels, internal and external; (d) Train all employees; (e) Monitor

the functioning of the entire programme and (f) Evaluate and correct problems during programme implementation.

The objectives of cybersecurity in companies will be achieved through the implementation of a set of rules and control, such as internal policies, effective management processes, internal procedures well adapted to the real needs of the company, lean organisational structures, software and hardware capable of identifying any anomalies in its operational, management, accounting and financial systems. These control mechanisms must be continuously monitored and updated to ensure perfect alignment with the objectives of the business in question.

We know that these cybercriminals have already hacked traditional organisations into the security area, such as Interpol, CIA, NASA, Pentagon, NATO, and many others, including also the main world banks and credit card operators. Cybercriminals operate worldwide and in an organised manner, defying all security measures, however strong and effective, and the main investigative bodies worldwide. Their primary purpose is to breach the confidentiality, integrity and availability of data and information. They indirectly tamper with the legality, ownership and traceability of content produced and stored on the Internet.

In certain situations, internal aspects in companies may stimulate the breaking of established rules. Frustration, indignation, forced work, internal pressure from managers, anger or a simple discontentment involving psychological, financial and/or social elements may motivate people to take the path of crime, both in the physical and digital environment. In the latter, they use skills and knowledge to the detriment of others. It is a reality in companies, especially large ones, that individuals who had trusted status have been involved in security breaches. Due to personal and professional factors, taking advantage of specific opportunities, flaws in the companies' control and the knowledge acquired internally, these people commit digital crime.

4 INTERNAL COMPLIANCE WITHIN ORGANISATIONS

And in practice, how can a Compliance Programme implemented in an organisation contribute to reduce the risks of occurrence of these crimes in its staff? As previously identified, some actions can and must be performed by the organisations with this purpose, such as:

- a) Make a risk analysis - In this first stage it is necessary to evaluate all the conduct problems that the company may be subjected to according to the area in which it operates. It is important to highlight that the decree that regulates the Anticorruption Law provides for the

differentiation between companies regarding their relations with the international market and/or with the public administration.

b) Set up an adequate action plan - In this second stage it is necessary to plan an internal strategy with the purpose of implementing the compliance program. In this plan, in order to achieve the desired result, each step must be described, how these steps will be performed, in addition to key points, such as the disclosure, the training of employees and the monitoring of actions.

c) Create a code of conduct - In this third stage it is necessary that the document (planning developed in the previous stage) is clear, objective and pertinent to the company's reality. It is not important the aesthetics of the document, but its real meaning aligned with the values and needs of the organisation.

d) Establish internal and external communication channels - In the fourth stage, the code created has to be put into practice. To do so, reporting channels (ombudsman) and analysis of situations must be created and disclosed. These channels must be open both to the internal public (the company's employees) and to the external public (customers and suppliers), with the sole purpose of identifying fraudulent actions, erroneous and suspicious procedures, as well as to propose internal solutions in order to avoid future losses, consequent indemnification and/or lawsuits.

e) Train all employees - In this new stage it is necessary that all employees are aware of their responsibilities and their actions. However, even more important than this awareness is the fact that they adhere to the compliance program. In order to provide a greater engagement on their part, periodic trainings must be done together with awareness and internal communication campaigns.

f) Monitor the operation of the entire programme - In the sixth step it is essential to monitor the operation of each of the compliance program's actions. It is not enough to put them into practice, it is necessary to follow up the development and test each one of the programme components, incessantly, to be sure about its effectiveness.

g) Evaluate and correct the problems during the implementation of the programme - Last but not least, the solutions must not only consider isolated cases, but the entire environment that provided such occurrences. In other words, a compliance programme is not a simple postponement of solutions (when the management identifies the problems and keeps them in a "drawer" to be solved later). The main objective of the programme is to propose permanent changes in the conduct of the members of the company, thus avoiding countless problems in the future (maybe very soon!).

5 LAWS TO COMBAT CYBERCRIME

And what legal forms (laws) are some countries using to combat these cybercrimes?

In the United States of America, the laws related to this topic are divided into two categories, namely, state laws, which are responsible for curbing the relevant cases in each state, and federal laws that cover crimes with a higher impact, such as the movement of illicit funds and materials between states. Currently, almost all US states have laws regulating illicit access to computer systems (software) and data manipulation. The most interesting fact is that these regulations classify actions as the simple possession of information protected by computers, such as passwords.

The *Wire Fraud Act*, even before the advent of the Internet, a federal statute that regulates the matter, was concerned with registering illegal acts involving communication via telephone, telegraph, television, and other means, among states. Nowadays we can include the Internet in this modality, since the information exchanged in its virtual environment (data traffic) is directly related to communication between the States, shifting the competence to the Federal Justice.

Undoubtedly, the most important law related to cybercrime in the United States was enacted in 1986, called the Computer Fraud and Abuse Act. This law typified activities divided into several categories, with the purpose of clarifying to the violator of a certain system that his activity was illegal, and, therefore, would be susceptible to penalty, which are:

- (a) accessing systems without authorisation, with the aim of obtaining restricted government information;
- b) accessing systems without authorization, with the purpose of obtaining restricted financial information;
- c) having the intention to access, without authorisation, any government computer, or any computer used by the government;
- d) transmitting data through a computer for illicit purposes;

In this context, it is easy to understand the greater interest of the State over the private individual, as these categories mention, almost exclusively, government computers.

Unlike the United States, in the United Kingdom there is no difference between state and federal law. They are all equally applicable over the whole territory. The Computer Misuse Act was based on the model of the US laws. However, it went beyond the level of authorisation given to it. There are three types of crimes in the Act in general terms, the second and third being susceptible to deprivation of liberty, namely:

Section 1 - offence involving unauthorised gain of access to a computer not in authority. This is the most general of the specifications, ranging from "hacking" to attempts to locate specific information within a system.

Section 2 - offence involving unauthorised access to any computers for the purpose of violating the law, such as publishing information obtained, using information obtained, or for use of data for the purpose of breaching the security of other systems.

Section 3 - offence involving unauthorised access to computers, for the purpose of altering their data, thereby preventing authorised user operation or access.

In this context, in the United Kingdom, it is noted that the three sections of the Act manage to prohibit a wider range of cybercrimes, such as the publication of private, confidential and copyrighted material, as well as the creation and dissemination of viruses and other attacks, thus achieving its main goal, which is to typify the acts harmful to the technological development.

In Brazil the main laws dealing with this topic are: a) The Cybercrime Law (Law 12.737/2012); b) The law regulating E-commerce (Law 7.962/2013); c) the Civil Framework for the Internet (Law 12.965/2014); d) Citizen's Base Register (Law 10.046/2019) and the most important of them, the e) General Data Protection Law (Law 13.709/2018).

Until 2012, Brazil did not have any sanction for crimes of violation or invasion of systems or other digital devices (mobile phones, tablets and others), existing only some vague determinations in the Interception Law or hypotheses of some crimes committed by public officials against the public administration (specific laws).

However, due to facts involving the leak of intimate photos of a very well-known global actress, Brazil, through its legislators, realizing the existing gap on the subject, created Law no. 12.737/2012, adding articles 154-A and 154-B of the Brazilian Penal Code, not making changes until May 2021.

Art. 154-A. Hacking into another's computing device, whether or not connected to the computer network, in order to obtain, alter or destroy data or information without the express or tacit authorisation of the user of the device or to install vulnerabilities in order to obtain an illicit advantage: (Amendment introduced by Law No. 14.155 of 2021)

Penalty – confinement, from 1 (one) to 4 (four) years, and fine. (Drafted by Law No. 14.155, of 2021)

§ 1st The same penalty is incurred by anyone who produces, offers, distributes, sells or disseminates a device or computer programme with the intention of enabling the practice of the conduct defined in the preamble. (Included by Law No. 12.737, of 2012)

§ 2nd The penalty is increased by one-third (1/3) to two-thirds (2/3) if the hacking results in economic loss. (Drafted by Law No. 14.155, of 2021)

§ 3rd If the hacking results in obtaining the content of private electronic communications, commercial or industrial secrets, confidential information as defined by law, or unauthorised remote control of the invaded device: (Included by Law No. 12.737 of 2012)

Penalty – confinement, from 2 (two) to 5 (five) years, and fine. (Drafted by Law No. 14.155, of 2021)

§ 4th In the case under Paragraph 3, the penalty shall be increased by one to two-thirds if the data or information obtained is disclosed, commercialised or transmitted to third parties for any purpose. (Included by Law No. 12.737, of 2012)

§ 5th The penalty shall be increased by one-third to one-half if the crime is committed against: (Included by Law No. 12.737, of 2012)

I - President of the Republic, governors and mayors; (Included by Law No. 12.737, of 2012)

II - President of the Federal Supreme Court; (Included by Law No. 12.737, of 2012)

III - President of the House of Representatives, Federal Senate, State Legislative Assembly, Federal District Legislative Chamber or City Council; or (Included by Law No. 12.737, of 2012)

IV - Top manager of the direct and indirect federal, state, municipal or Federal District administration. (Included by Law No. 12.737, of 2012)

Criminal Action (Included by Law 12.737, of 2012)

Article 154-B. In the crimes defined in Article 154-A, proceedings shall only be initiated upon representation, except when the crime is committed against the direct or indirect public administration of any of the Powers of the Union, States, Federal District or Municipalities or against public utility concessionaires. (Included by Law 12.737, of 2012)

The recent creation of Law No. 14.155/21 increases the penalties provided in the Criminal Code for crimes known as cybercrime. According to the text of the law, the crimes of computer device violation, theft and swindling committed electronically or over the Internet are now even more serious. With the new legislation, the punishment that used to be detention for three months to one year and a fine is now one to four years of confinement and a fine, aiming to inhibit the actions of these cybercriminals.

The sanctioned law foresees that the penalty of confinement will be applied in more severe convictions and that the regime of compliance may be closed. Detention is applied to lighter convictions and does not allow the beginning of the sentence to be in a closed regime.

6 GENERAL DATA PROTECTION LAW (LAW 13.709/2018)

Law 13.109/18 came into force in August 2020, with the main objective to regulate the protection of personal data, as well as the privacy of data. It is a way to impose that companies and organisations deal more responsibly with people's information.

With this, the fundamental rights are ensured, which are freedom, privacy and also the development of the personality of the natural person.

With the General Data Protection Law in force, companies and organisations had to change their behaviour quickly. They have the obligation to develop a system that ensures full protection of the data of everyone who are born, live and/or are in the national territory, or of data that has been collected in the country.

Through this law both consumers and businesses themselves began to observe the importance of this protection, which applies to the digital world as well as to physical businesses. The law also deals with consent and permission to share data, since the data of a holder requires express authorisation to be shared, as well as the consumer has the right to request the cancellation or deletion of their information from any system where it is inserted.

The General Data Protection Law is a very important milestone in Brazil. With the advancement of the internet, the significant increase of e-commerce, as well as digital banking, the access and dissemination of important and private data has increased exponentially. As a result, data leakage has also increased.

Therefore, a law that regulates and supervises companies so that there are standards and software within them to protect their customers' data is undoubtedly an essential decision.

The strictness of law 13.709/18 guarantees a severe inspection to companies, to verify if in fact they are following the standards stipulated by the General Data Protection Law. The

body responsible for inspecting and presenting penalties for those who do not comply with the law is the National Authority for Personal Data Protection; the maximum authority to determine the fines to be applied for non-compliance with the law, as well as to guide these companies on the importance of protecting the data of their employees, consumers, suppliers and customers.

The Law comes to authorise punishment in case there is a cyberattack on some system, avoiding the use of this data for something illicit, especially sensitive data. After all, no personal data can be transferred without prior consent. The freedom to choose between giving or not giving must be exclusively of the individual.

In conclusion, we understand that companies in their work environment must provide conditions so that cybercriminals do not have access to their data. To succeed in this demand, the business person needs to keep his or her business security level very high, including some fundamental precautions, such as:

a) Continuous monitoring of the network to detect threats - it is necessary to constantly check, through specific and reliable software, the behaviour and possible changes of data on the network;

b) Always keeping the IT infrastructure up to date - this way the company avoids risks of invasion to their data;

c) Implant, whenever possible, a virtual private network - this way, the business person will provide a safer connection to his or her company's network and to the Internet;

d) Developing alternative plans in cases of data loss recovery - this way, the company will be able to create options in cases of emergency in the eventual loss of data.

7 CONCLUSION

Finally, one cannot deny the advancement of technology in our daily life. However, we must also be aware that nowadays there is an almost absolute dependence on the Internet and that illicit acts will increasingly become a reality. What we must seek all the time is to identify specific means to fight cybercrime through the correct use of compliance in the technology sector of companies.

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CHAPTER



COMPLIANCE
DIALOGUES



THE SUBSIDIARY RESPONSIBILITY OF THE COMPANY REQUESTING SERVICES REGARDING THE CORRECT APPLICATION OF LABOUR COMPLIANCE IN COMPANIES PROVIDING SERVICES. CASE STUDY: RIACHUELO SHOPS

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Abstract

Law 12.846/2013 holds companies objectively liable for harmful acts and acts of corruption, thus expanding the labour compliance programmes, applying the issue of subsidiary liability in the companies that request services as to the correct application in the companies that provide these services. The rules of compliance will be analysed, identifying the responsibility of the companies, seeking the adoption of programmes and aiming at the correct adaptation and respect for the labour laws, seeking to avoid social dumping. The social benefits to the workers, to the economic activity by the adoption of an effective compliance system will be verified internally. It is essential that the entrepreneur launches the internal compliance programme in order to achieve full success in his/her actions. Due Diligence is also indispensable from the pre-employment phase up to the dismissal of the employee. Likewise, for service providers, avoiding situations such as Lojas Riachuelo that was fined by the Labour Court, because one of its service providers, Guararapes Confecções, made clothes by exploiting its employees. One must always be open to new things and always seek empathy. Labour Compliance is about regulating relations between third parties - in this case, between the company and its employees, continuously seeking ethics and the well-being of all.

Keywords: Labour Compliance; Due Diligence; Companies; Production Chain.

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1. INTRODUCTION

Labour Compliance refers to the adoption of programmes that aim at the adequacy and respect for the labour laws, collective agreements and conventions, the internal regulations of the organisations, as well as the international guidelines for worker protection, in addition to the constant search for ethics in the work environment. Along these lines, we will analyse the set of principles in worker's health, detail the rules that regulate and supervise the compliance with the programme, as well as the (im)possibility of condemnation in moral damages for non-compliance with the regulatory rules.

2. GENERAL ASPECTS OF COMPLIANCE IN THE LEGAL SCIENCES AND IN THE BRAZILIAN LEGAL SYSTEM

Positive law has evolved over the years in the West so that, in addition to punishment, it carries other modes of enforcement. The historical evolution with the ethical concern of compliance with the rules - although its legislative evolution occurs in a more modern way - is old in the jurists' treatment. In the 18th century, the illustrious representative of *L'Accademia dei Pugni*, Cesare Beccaria (1764) already stated that "it is preferable to prevent crimes than to have to punish them (...)".

Based on this categorical imperative of giving effectiveness to the law, the idea of compliance arises, which only begins in fact to be developed in the Western legislations of the 20th century. The expression *compliance* comes from the English verb 'to comply,' which means to act in accordance with a rule, an internal norm or regulation according to the activity developed by the company (LIRA, 2014).

However, the legislative *positivisation* on the theme occurs only as of the 20th century. There is no doubt that the United States was the country that developed the most in the compliance legislation. Thus, it is not surprising that the very etymology of the term comes from the English language. In the 1930s, the Securities and Exchange Commission (SEC) was created, a US regulatory agency with the purpose of avoiding the abuse of privileged information. In the United States, compliance advanced more in the competition sector, especially until the 1980s (CARVALHO, 2019).

In the 1990s, several legislations supporting compliance emerged in the European and Latin American legislation. On this theme, one may mention the Convention on the Combat against Corruption of member countries of the Organisation for Economic Cooperation and Development (OECD); in addition to Brazil, Argentina, Bulgaria, Chile, and Slovakia, which

in 1999 executed the Convention on the Combat against Corruption of Foreign Public Officials in Commercial Transactions, obliging the adaptation of their legislations to the measures necessary for the prevention and combat of corruption of foreign public officials within the international scope (MORAIS, 2019).

In Brazil the federal Decree 8.420/15 is in force, which regulates Law 12.846/2013, and which defines compliance in its article 41, *in verbis*:

Art. 41. For the purposes of the provisions of this Decree, an integrity programme consists, within the scope of a legal entity, of a set of internal mechanisms and procedures for integrity, auditing and encouraging whistleblowing and the effective application of codes of ethics and conduct, policies and guidelines with the objective of detecting and correcting deviations, fraud, irregularities and illicit acts committed against the domestic or foreign public administration.

Sole Paragraph. The integrity programme shall be structured, applied and updated in accordance with the current characteristics and risks of the activities of each legal entity, which, in turn, shall ensure constant improvement and adaptation of the programme to ensure its effectiveness.

It was through Law no. 12.846/2013 that Brazil expanded the compliance programmes implemented. Likewise, it was with this law, which holds companies objectively liable for harmful acts and acts of corruption, that labour compliance arose. In this view, the proposal is linked to the issue of subsidiary liability in companies that request services as to the correct application with labour compliance in companies that provide these services.

Compliance is an instrument of corporate management, whose particularities of monitoring and stimulation are deeply connected to the integrity programme. Within the corporate environment, the relationship of integration of the compliance sector with all other sectors of the organisation is fundamental to a successful programme (KNOER, MARCHI, BALDÍSSERA, 2019). In this context, the relationship of compliance with labour law gains strength with the purpose of preserving the integrity of conduct of legal entities.

3. COMPLIANCE AND LABOUR LAW

When analysing the system of labour law, it is important to read the compliance systems within the context in which they are inserted. The understanding purely from the perspective of economic law and risk calculation is insufficient to the analysis of the theme of compliance

systems in the system of social rights of labour, this because, when we deal with law and its relationship with misery as a social manifestation, we deal with the utopian perspective of dignity (NASCIMENTO, 2008).

From the historical understanding of the relationship between labour and capital in history, it is observed that, in Western legislation, there was a search for the worker's dignity, also through the protection of the work environment in general. In this path, it is imperative to consider the multiple attractions that (in)form the law, considering its social, physical, historical, economic aspects. We follow here the premise of Tainã Gois (2018) when the author analyses the jurist's perspective regarding the legal fact, especially in labour relations:

(...) many times, jurists understand themselves outside history, like blind trustees of the scales, neutrally measuring the weight of each side, without the sensitivity to pay attention to the fact that this neutrality is a perverse falsehood that greatly helps one of the sides. This is because our justice system is too young to be blind - when it arrived here, together with democracy, relations had already long ago been extremely unequal. Thus, it is not materially possible to promote justice from a neutral technique, one must first balance how these forces will tip the scales.

Henceforth, before entering the application of the compliance systems in labour law, a brief exposition is necessary on the values that (in)form the labour law, giving constitutive elements of its existence and its guidelines. The principles in the legal and social sciences have differentiated functions, acting in the interpretation of the law in its most relevant performance and even in the legislative creation, political phase of the law, therefore, fundamental to its understanding (DELGADO, 2013):

In conclusion, for the Law Science, the principles are conceived as fundamental propositions that inform the understanding of the legal phenomenon. They are central guidelines that are inferred from a legal system and, after being inferred, report to it, informing it.

In short, principles are "fundamental and informative ideas of the legal organisation" (RODRIGUEZ, 2000). Thus, we recall the primary function of social rights that confirm the labour law, based on the postulate of protection, also known as the principle of protection of the hypo-sufficient worker in his/her relationship with the capital (COUTINHO, 2016):

The main function of Labour Law consists in "creating limits to capital, through the recognition of workers' rights, fixing guidelines of conduct so that

exploitation is controlled, minimal and restricted to labour as a force; and, furthermore, not spoiling and not violating human dignity, through the incorporation of fundamental social rights in the relationships interpreted as obligations, rejecting the exercise of arbitrary power exercised over a person.

It can be assumed that the protection principle is in the ontological roots of the Labour Law corroborates with the affirmation of the tutelary character of labour laws, aimed at protecting the worker (ALMEIDA, 2009). It is concluded, therefore, that any reading of the rules of occupational safety and health should be read under the aspect of the social justification of its existence, namely, the protection of the worker (DELGADO, 2013):

The principle of protection influences all segments of Individual Labour Law, also influencing the very perspective of that branch as it is built, develops and acts as law. In fact, there is a wide predominance in this specialized legal branch of rules essentially protective, tutelary of the workers' will and interests; its principles are fundamentally favourable to the worker; its presumptions are elaborated in view of reaching the same legal will rectifying the practical social differentiation. In fact, it can be affirmed that without the rectifying protective idea, Labour Law would not be historically and scientifically justified.

In labour law, the principle of the worker protection is part of the basic core. In the work of Maurício Godinho Delgado (2013), the principles of "the most favourable rule; the imperativeness of labour standards; the unavailability of labour rights; the most beneficial condition; the inalterability of the harmful contract; the primacy of reality; and the continuity of the employment relationship".

Based on this premise, the teleological objective is to ensure better working conditions with the evolution of rights over time. Considering that most of the active population of Western society, including Brazilian society, lives only from their work, the continuity of the employment relationship is of extreme relevance in Brazilian society and in Law (DELGADO, 2013).

In this perspective, when we approach the dogmatic interpretation of this study, we must keep in mind the factor of protection, in an imperative right of work that limits the autonomy of will evidently harmed in relation to economic dependence on labour power. Likewise, we consider that the historical formation of our legal system recognizes labour rights as non-waivable guarantees, prioritizing the factual reality of labour relations.

This humanistic and social concept of the right to work is supported by values elected by the Brazilian Constitution. Therefore, the CRFB/1988 limits the state power through fundamental rights and guarantees, guiding the legal system of the Brazilian state (MORAES, 2007).

In addition to labour law's own principles, we must consider in contemporary Western law the historical challenge of reconciling freedom and equality. In the words of the late jurist Ricardo Aronne (2010):

There is no Social and Democratic State of Law without the guarantee of the dignity of the human person. Beyond the singular or selfish protection of the individual, this principle calls for an inter-subjective understanding of the subject and its social insertion and contextualisation, for the realisation.

In the Brazilian Constitution, the social function has as its essential assumption the property, being an affirmation of this, although the principle is the result of a collectivist evolution of the philosophy. In this path, the ownership of production assets as a principle of the economic order subordinates the exercise of this property to the ethical commandments of social justice, instilling in its purposes to ensure a dignified existence (GRAU, 2005).

It is imperative to remember that, although the social function has a proprietary connotation, and despite its exegetical imprecision, it has a binding character. It is essential that it be applied and interpreted in accordance with the objectives set out in the Constitution of Brazil (art. 3 CFRB), encompassing the vision of constitutional civil law, electing as its scope the solidarity and dignity of the human being embodied by fundamental rights. (FRANCO and SZTAJN, 2008).

In the case of the Social Function of the company, the semantic and epistemological imprecision is crystal clear, so that it is necessary to observe the economic option of each State, as well as, obviously, the guarantees of no arbitrariness. Thus, in general, in Western law the Social Function cannot escape the precepts of free enterprise, nor bring damage to the economy (FRANCO and SZTAJN, 2008).

In the path of the evolution of a social concept, one can observe today conducts that are imposed on the entrepreneur, such as the care in the choice of products and services provided to the community, avoiding unnecessary ones; the option of installing nuclei in poorer places, in order to promote development; the care with advertising, in order to avoid offending against ethical values; the care with the quality of the product or service used; the duty to ensure the

continuity of the company, therefore, its contribution to the economy and society (FRANCO and SZTAJN, 2008).

With the identified principles, compliance in the labour sphere proves the responsibility of companies, whether providers of services or requesting these services, aiming at the adoption of programmes, the correct adaptation and respect to the labour laws, along with the internal regulations of the companies, continuously seeking ethics in the work environment. The best compliance programmes allied to the best internal corporate alternatives will be identified, mitigating risks, preserving values and sustaining the continuity of the business, throughout the productive chain, with the firm purpose of maintaining respect for the laws and internal regulations of the companies, aiming at the implementation of ethics throughout the productive chain. The businessman, with these measures, will only have benefits, such as: a) the employees will feel safer; b) there will be an increase in productivity; c) labour lawsuits will decrease; d) the company will be well seen in the eyes of the judiciary; e) preserve the company's image in the market.

There are several themes that approach labour compliance in the reduction of risks, such as: moral and sexual harassment; risks of the company that requests services; recruiting and selection; contracting modalities; labour health and safety, among others. It is essential that the entrepreneur launches the internal compliance programme, respecting all the individual rights of the employees, but necessarily this programme will need to go through all levels of the company in order to have full success in its actions. One must always be open to novelties and always seek empathy. Labour compliance deals with regulating relations between third parties - in this case, between the company and employees, continuously seeking ethics and the well-being of all.

A labour compliance programme implemented effectively and with due seriousness provides countless benefits to companies in general. The employees feel safer and consequently there is an increase in productivity, reducing the number of labour suits, besides presenting the company with good eyes before the judiciary. The effectiveness of the programme brings with it the preservation of the company's honour and image, as well as the continuity of its operations.

The implementation, disclosure and effectiveness of the labour compliance programme depends exclusively on the management of the company, and it must participate directly and actively in the stipulated rules and objectives.

After the disclosure of the creation of the programme by the company's management, the sector responsible for labour compliance must be very well structured. This work will be aimed at the compliance officer (denomination given by the market to the professionals that master the tools necessary for the implementation of this program. The structuring of the sector responsible for labour compliance occurs through the creation of a specific committee for this purpose, in which representatives of the legal department in the labour scope, human resources, internal audit, ombudsman, among other professionals that may add ideas to the programme due to their professional knowledge in the area, must necessarily participate. The area responsible for labour compliance must have total independence in relation to the other areas, reporting only to the management, who will have independence to inspect their performance.

Ethics and the compliance programme vary according to the characteristics of each company, such as the size of the company, the resources available and the critical awareness of its managers. There are, however, some elements that are common to most of the programmes, among which are highlighted: the values of the company; the code of ethics/conduct; the education and training offered to its employees; the complaint and clarification channels, such as the ombudsman; the investigatory process; the disciplinary committees; the relationship mechanisms with third parties, such as suppliers, service providers, partners, among others; the internal and independent audits of ethics and compliance; the internal and external policies of the companies.

The integration of the compliance sector with the other sectors of the company is essential for the success of the programme, since through it the companies will enable a more pleasant work environment, able to deal with the regulatory and legal issues with the purpose of promoting ethical values counting on the participation of everyone, including partners, managers, employees, partners, and others and in a continuous manner.

Nowadays, one believes that all companies need to be attentive to the assimilation of work practices based on ethics, in compliance with the labour legislation, allied to practices directed towards the improvement of people management processes, since many disputes arise due to relationship issues between colleagues, mainly between subordinates and employers, and end up in the labour courts. Therefore, the importance of ethical policies in labour relations, focused and based on the compliance with the legislation, can be managed by the compliance area, as well as a code of conduct centralized in the ombudsman channel, providing for sanctions. Discipline, transparency in the management and control of labour relations is imperative, whether preventing or identifying risks. The compliance programme rushed in

consonance with the best practices of people management, without any doubt, increases the satisfaction and esteem of the employees in the company, impacting directly on the organisational climate.

In this scenario, a very important question arises: how can labour compliance be established and implemented in the triangular employment relationship? In view of the high turnover of outsourced employees, how can and should the companies served manage properly and ensure the effectiveness of ethics in their organisations by means of compliance programmes?

With the introduction of Law 13.467/2017, the number of companies specializing in labour outsourcing increased, concomitantly with the restructuring of the segment entering a new phase. Because, today, although the concept of compliance in Brazil is very new in relation to the United States, for example, companies increasingly feel the need to implement these programmes, not only based on the compliance with legal obligations, but also on market requirements.

The market feels the need to relate to companies that are attentive to these compliance programmes, with the firm purpose that the company specialized in the outsourcing of services is duly aligned with the ethical objectives sought by the company requesting the service. Thus, the service taker companies must also structure themselves through compliance programmes, aiming at the institution of ethical norms and internal policies, so that they may remain firm in the labour market.

It is highlighted that, for the expected effectiveness and efficiency of the compliance programme to occur, in theory, the formal existence of an ethical code is not enough if, in practice, this does not occur within the companies. The employees need to identify in practice the consistency between the acts practiced by the very company that presents the compliance programme to them, such as: a) tax evasion; b) payments made outside the employment agreement; c) disrespectful conducts to the worker's rights; d) lack of correct equality in the treatment between the employee hired directly and the outsourced employee; e) mistreatment with employees, colleagues and others. Still, for greater effectiveness of the labour compliance programme, it is necessary the existence of an active ombudsman with the purpose of offering to the employee a right channel so that he/she may present complaints or suggestions without running the risk of retaliation. Therefore, the organisations that use this tool create reporting channels observing means to keep the employee anonymous, preserving the identity of the one

who has decided to share his/her anguish or even expose a weakness of controls within the company, or a particular fact.

4. CASE STUDY: RIACHUELO SHOPS

In a case that began in 2011 and ended in 2015, the Superior Labour Court ruled that the company Guararapes should pay the equivalent of 40% of a seamstress's last salary for as long as she was incapacitated, in addition to R\$10,000 as compensation.

Guararapes Confecções is a clothing industry from the Riachuelo group, a service provider of the latter. In this company, the former employee (a seamstress) developed carpal tunnel syndrome, which causes pain and swelling in the arms. The worker had her work capacity diminished because of the exhausting work rhythm demanded by the factory where the clothes to be sold by the shops of the Riachuelo Group are made.

The conviction, arising from lawsuit no. 000235-41.2016.5.21.0019 reinforces a series of verifications on labour violations within the Riachuelo group's factory by the Labour Public Ministry (MPT). In 2012, the body filed a lawsuit against Guararapes, charging a fine of R\$37 million for non-compliance with health and safety standards at the factory: public civil action no. ACP 0000694-45.2017.5.21.0007, due to non-compliance with worker safety and health standards.

At the time, inspections by the Labour Prosecutor's Office and the former Ministry of Labour and Employment - now the Secretariat of Labour of the Ministry of the Economy - found non-compliance with previous agreements.

Still, in case no. 000235-41.2016.5.21.0019, the testimonies collected by labour inspectors confirmed the complaint made by the seamstress, leading to her victory in her individual action against the company. The reports describe limitations on going to the bathroom, not receiving valid medical certificates and lack of periodic medical examinations and other precarious salary conditions, in a clear case of social dumping.

This specific case proves that the companies providing services need to be even more attentive to the discussions in relation to compliance. One cannot put the frenetic search for excessive profit of the company in detriment of the human element. This must be the most important aspect when analysing what is being traded. Thus, considering that compliance essentially involves the human factor, the companies providing services, more than those that sell the products manufactured by them, are subject to the occurrence of situations that may affect the internal policies and procedures, also affecting the regulatory rules of the sector and

internal and external legislation when applicable. In this area, the employee must have full knowledge of the internal policies and procedures of the company for which he/she works, that is, he/she must be specifically acquainted with the compliance programme of his/her employer, and this, in turn, must also be familiar with the rules that regulate the companies for which the services will be rendered.

In the case of the Riachuelo shops, it was very clear that there was not an adequate programme of internal policies and procedures on the part of Guararapes Confecções and that the company requesting the service itself did not give due attention to these failures. Likewise, the Labour Judiciary has adopted a stance of punishing companies in all consumption chains, holding them responsible for non-compliance with social rights and for social dumping.

This makes it clear that the outsourced employee must know not only the compliance programme of the company providing services for which he/she works, but also understand that the sector that regulates it may not be the same as that of his/her employer, and will have, as a consequence, an even wider range of rules that he/she must know and understand. This happens through courses and lectures from their own employer.

It is essential that the entrepreneur launches the internal compliance programme, respecting all the individual rights of the employees, but, necessarily, this programme will need to go through all levels of the company in order to have full success in its actions. It is also essential that there is due diligence from the pre-employment phase up to the dismissal of the employee. It is also very important to perform due diligence for service providers, also applying the labour compliance programme to them, thus aiming to avoid situations such as the one reported above.

5. CONCLUSION

The object of the present study was a synthetic analysis of labour compliance and the importance of its application by companies. We addresses principles, going through the dimension of the constitutional system that must guide the system of labour compliance. One verified general principles that (in)form labour law and the legal system, such as the principle of labour protection, as well as the principle of social function. We also drew conclusions on the application of the referred principle to the means of production.

We exemplified, in a synthetic manner, general and historical aspects of the compliance systems, concluding by their full applicability in Labour Law. We also addressed the specific case of the Guararapes Group from the Riachuelo clothing industries, which demonstrates the

broad accountability of the consumption chain in the relationship between capital and labour, as well as the importance of an effective system of compliance.

The companies that sell the final product to the consumer at the shops must seek companies specialized in the outsourcing activity that also promote compliance programmes, implementing ethical policies and rules focused on the business segment in which they operate. Outsourced companies and companies requesting services must necessarily have their compliance programmes in tune. Likewise, the contracts shall be well formulated, binding the conduct of the service provider companies to the code of ethics of the companies requesting services, under the penalty of termination of the employment agreement and future indemnities. Besides this, it will be up to the companies that take on the services to diligently provide periodical training for their service providers, with the purpose of showing how a certain job is done correctly and how it should be carried out. Concomitantly to this, they must point out which ethical standards are expected from their collaborators and the best way to achieve them.

Finally, in order to be effective in its compliance programmes, the company requesting a service has the obligation to expand its internal structure, observing the specificities that the outsourcing of services causes in this relationship, and then, reach the desired corporate ethical standard.

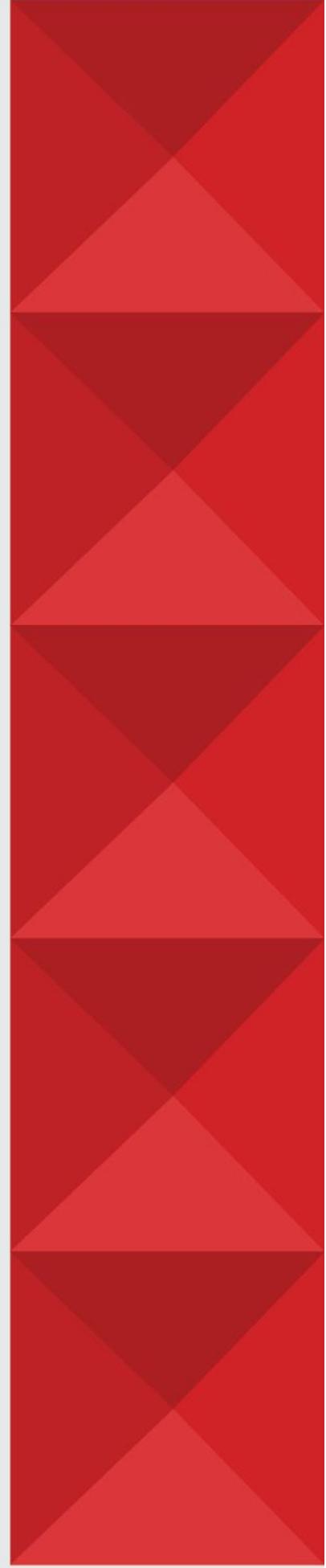
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CHAPTER IV

COMPLIANCE
DIALOGUES



HOW TO MAKE THE FUNDAMENTAL PRINCIPLES OF THE LABOUR LAW BE COMPATIBLE WITH THE MODERN WORK?

Eduardo Alves⁶

Abstract

Based on the current legal regulatory framework in Portugal, it is relevant to reflect on the importance of the scope inclusion of the fundamental principles, applicable to Labour Law, in the text of the Constitution of the Portuguese Republic. The current problem is to know to what extent, with all the recent changes in the labour world, which have been seen largely as a result of globalisation and new technologies, the existing balance between capital and labour does not compromise those principles, with emphasis on the principle of “worker protection”. The challenge is, therefore, posed to the State, but also to the interpreter of Labour Law, to permanently ensure a possible balance. The importance of labour compliance, as a tool for mitigating conflicts in labour relations, with principles, ethics, integrity, as a reference, can make it, today, a positive reality in the globalised labour world and can help to minimize risks to which a particular company is exposed. It is therefore instructive to assess the constitutional impact that ends up being given to Labour Law in the laws of an infra-constitutional nature. The case of teleworking appears to be paradigmatic as an instrument for flexibilization of work, which allows companies to attract, motivate and retain professionals. Having followed this path – which seems irreversible – it will now be important to provide this institute with a legal framework that gives it legal certainty without, however, compromising the fundamental principles. The methodology used to carry out this article followed a qualitative analysis, through deductive approach methods and of an analytical and descriptive character, with a monographic procedure.

Keywords: Labour Law, Fundamental rights, Labour compliance, Globalisation.

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1 INTRODUCTION

The advent of the so-called Welfare State, which began to take shape following the industrial revolution and began its decline in the penultimate quarter of the 20th century, is based on a very close relationship between Capital versus Labour with the "protection" of the State. In this equation, the balance is based on two essential features: full employment and social security, elements relevant for inclusion and social justice.

The truth, however, is that this model, which worked, especially in times of post-World War II reconstruction, until almost the end of the last century, is now exhausted. Various factors, including globalisation, economic tensions and the exhaustion of the role of the State, knowing the finite nature of its action, have contributed to the so-called "crisis of the Welfare State".

Streeck states, in fact, that: "[...] the lack of economic growth threatened the continuity of the mode of pacification of social relations that had put an end to post-war conflicts." (STREECK, 2015, p. 20).

In the world of work the reflexes end up being felt and what was a wage society where, with the possible adjustments of the market, almost all the workers were welcomed, we are now witnessing high rates of unemployment and enormous difficulties to include everyone, even huge contingents of those who are outside the "wage-earning" (ALVES, 2021).

According to Sanson, three clear aspects can be identified which mark this change. First, the increasing annulment of the role of the state as arbiter in the dispute between Capital versus Labour. Secondly, the evolution of the productive forces, which substantially altered the mode of production, making it possible to produce more while employing less. Third, the transfer to finance of the real economy, a process in which there is a displacement of investment from productive capital to financial capital (SANSON, 2020, p.153).

Work is a determining factor in the life of man as a social being. Beyond other more philosophical dimensions, only it contributes to be materially productive and transform nature into what he/she needs to live and evolve.

Weber (2010) provides an expressive demonstration, in the sense of explaining how the transition from patriarchal organisation to capitalist organisation is the result of the passage from tradition to modernity.

Today, however, labour in the traditional form in which it was conceived is at a crossroads. The old social structure of labour has been strongly influenced by economic forces, especially international competition on markets and globalisation.

Moreover, the increase in labour productivity has been achieved by means of formulas that have turned against workers - machines. And these, machinery as a whole, together with the forces of production, do not possess the desired neutrality. As a result, the counterpart of the advance in production has been the "fragmentation" of man himself, who no longer holds the leading role in the production process.

Marx is attributed one of the strongest critiques of this competition and as a consequence the dehumanisation to which workers are subjected. Therefore, he emphasises some points concerning work and workers. He states that the worker externalises himself through the product of his work and that these are transformed into the complement of what he and his peers have produced. These fruits dominate the consciousness of workers, capitalists and also agents of production. The human existence needs work to feel productive in the relationship with others and with the world (SPURK, 2005).

Complementarily, for Smith, the work will constitute the productive activity of people congregating, simultaneously, a dimension that represents an abstract notion of what would be their objectification as value. In fact, in Smith's work, this emerges as a neuralgic point of reflection and of life in society. To this extent, labour is at the origin of wealth and becomes the merchandise within the circuit concerning production and exchange (MERCURE, 2005).

The capitalist crisis, which has been highlighted, is thus faced with the problems of overproduction, mass unemployment, the limited consumer market and the discontent of workers.

As Harvey points out, the exhaustion of the mode of production, whether Fordist or Taylorist as a pattern of accumulation is just another problem arising from this process (Harvey, 2010).

2 THE RIGHT TO WORK AS A FUNDAMENTAL RIGHT - THE PORTUGUESE CASE

At the same time, the right to work, as well as the right to leisure, are basic and fundamental premises for every human being, and therefore a means to their full realization.

Therefore, its ontological dimension ends up constituting a relevant heritage of protection and emerges as one of the Fundamental Rights, today even with wide inscription in the Constitutions of modern States.

In Portugal, work and leisure are fundamental principles that are protected constitutionally, and the Labour Law acquis provided for in the Constitution of the Portuguese Republic (CPR) is embodied in several of its domains (BACELAR GOUVEIA, 2001; REBELO DE SOUSA, MELO ALEXANDRINO, 2000).

As a matter of fact, right at the beginning of the Portuguese *magna carta*, in what the CPR reserves to the "Fundamental Principles" it alludes to this theme, even if indirectly, as an element of the realisation of the economic, social and cultural rights, a consequence of the Social State and as an incumbency of the latter.

It even does so in the sense of:

"promoting the well-being and quality of life of the people and real equality among the Portuguese, as well as the realisation of economic, social, cultural and environmental rights, through the transformation and modernisation of economic and social structures" (article 9, paragraph d) of the CPR).

However, it is in Part I of the CPR that we find the essentials.

Under the Title of "Fundamental Rights and Duties" one finds, here, not only a peculiar category of rights, freedoms and guarantees: the "Rights, Freedoms and Guarantees of Workers" (MIRANDA, 1988); but also, although in a more tenuous way - but equally significant in its protection, some references to the rights of workers, in this case under the category of "Economic Rights and Duties" (MIRANDA, 2000).

Specifically, we can point out in the first of those categories, the rights of "freedom of choice of profession" (article 47, no. 1 of the CPR); "right to job security" (article 53 of the CPR); "rights of workers committees" (article 54 of the CPR); "trade union freedom" (article 55 of the CPR); "rights of trade union associations" (article 56 of the CPR) and the "right to strike and the prohibition of lock-out" (article 57 of the CPR). Regarding the second of these categories, we can point out the following economic rights: "right to work" (article 58 of the CPR) and "workers' rights" (article 59 of the CPR).

The CPR also inscribes in its Part II, some principles, in what is called "Economic Organisation". Here are described with constitutional force all aspects relating to the functioning of the economy and state intervention in this sector, notwithstanding that, in what concerns us here, there are relevant references to Labour. So much so in the case of public sector production units in which the "effective participation of workers in the respective management must be safeguarded (Article 89 of the CRP).

One may also refer to Part III of the CPR. This part essentially deals with the regulation of political power in Portugal, which is entitled "Organisation of Political Power" and where the field concerning Labour Law ends up appearing in a lateral manner, in a morphological perspective of the mere distribution of legislative power among the "actors" with legislative constitutional powers in Portugal, namely: the Assembly of the Republic and the Government within the framework of the Republic; and, between these bodies, and the regional Legislative Assemblies, in the relations between the State and the Autonomous Regions (REBELO DE SOUSA , MELO ALEXANDRINO, 2000).

What deserves to be highlighted, still, around the Labour Law, in this Part III of the CPR is the care in the delimitation that is presented - Article 165, paragraph 1, subparagraph b) of the CPR - in the considered domain of "relative reserve of legislative competence" of the Assembly of the Republic around the subject of "rights, freedoms and guarantees", which surely ends up including the treatment of several rights in the individual and collective labour plan (BACELAR GOUVEIA, 2003, p.30).

Particularly relevant, if we take into account the competency nature that the matters may also have at regional level, knowing that Portugal is a unitary regional or politically decentralized State, constituting a partial regional State, since it only comprises two Autonomous Regions of Madeira and the Azores (articles 6 and 224 of the CPR).

In this case, one considers the provisions of the Political-Administrative Statutes of the Autonomous Regions of Madeira and the Azores.

In these statutes, labour law matters, with the scope that was pointed out above, are, here, regionally convened as a matter of regional interest and the Regional Assemblies also have "room" to legislate.

Finally, it is enlightening and symptomatic of the constitutional impact that is given to Labour Law and the importance that this ends up deserving, consequently, in terms of relevance, also the fact that in the matters for which the CPR considers that there is irreversibility and, consequently, to be a limit to the very revision of the Constitution, it includes precisely the "rights of workers, workers' committees and trade union associations" (article 288, paragraph e)) which attests to its importance in the constitutional design of the CPR.

3 AT THE CORE OF LABOUR LAW - THE WORKER

The Constitutions of modern states, of which Portugal is no stranger, mark the passage from liberal constitutionalism, concerned only with guaranteeing the personal autonomy of the

individual against the power of the State, to social constitutionalism, characterised by state interventionism with a view to solidarity and social justice.

It is noteworthy, in what is its essential core, that the principles of Labour Law undeniably constitute a form of protection of the worker, since in this branch of Law, unlike the parity of the parties existing as a rule in common (Civil) Law, there is a flagrant inequality. One may thus say, in line with Monteiro Fernandes, that the basic constituent principle of Labour Law is the principle of "protection of the worker" (MONTEIRO FERNANDES, 2006, p.15).

In this regard it is also eloquent what Leal Amado writes on the subject:

“As labour force is a quality which is inseparable from the person of the worker, which presupposes a profound involvement of the worker in its execution in a heterogeneous manner, this implies that the law, although it focuses on the labour relationship as a patrimonial relationship of exchange of work and salary, must take this personal involvement into account. The employment relationship is a profoundly asymmetrical relationship, that is, manifestly unequal, marked by economic dependence and legal subordination. For the worker to comply is, first of all, to obey, not only to commit his/her will in the contract, but also to submit to that same contract”. (LEAL AMADO, 2009, p.13).

The Fundamental Right to Work has, therefore, not only a defence dimension, in which its holder is guaranteed to demand that the State refrain from and protect the full enjoyment of the right protected, but also a positive action dimension, in the sense that the State must protect the enjoyment of freedom of work, against what it may be affected by third parties (NOVAIS, 2010).

Therefore, all subjectivity, which is inherent to this duty of protection, should be ensured within the framework of the principles of fundamental rights confronted at each moment, and in each situation, in view of the factual and legal context. This means, therefore, that in each concrete situation, where the two constitutional principles are in confrontation: that of the employer's free economic initiative, on the one hand, and that of the Right to Work, on the other, this principle should prevail whenever a manifestation of the dignity of the human person is at stake, which is the fundamental value ordering the entire legal system, thus making the worker the core of Labour Law.

For all these reasons, it is clear that the Right to Work, as a Fundamental Right, should assume a sufficient dimension to ensure the dignity of the human person and require the State

to act positively in promoting public employment policies, unemployment assistance and vocational training.

At another level, what is the economic role of social intervention by employers is not an integral element of fundamental rights, it is not part of their essential core, nor does it fit and integrate within the immanent limits of fundamental rights. The reservation of the financially possible should only act as a factual and legal limit of fundamental rights.

4 "TELEWORK" IN PORTUGAL - A RECENT PARADIGMATIC CASE FOR THE AFFIRMATION OF A FUNDAMENTAL RIGHT

One of the most immediate answers to the Covid-19 pandemic was presented to the labour world by telework. We are facing here a simplified expression of a specific regime which includes the provision of work with legal subordination typically carried out outside the company and using recent technological means of information and communication. This legal-labour "figure" exists in many of the international legal systems under the designations of *teletravail*, *teletrabajo*, *telelaboro*, *telearbeit*, etc., and has even originated in the USA in the 70s of the 20th century. It is not, therefore, a recent innovation.

This type of work (as it is considered in Portugal) is recognised in Portugal in the Labour Code - approved by Law no. 7/2009, of 12.02 and subsequent amendments - in articles 165 and following.

The truth is that this reality has motivated, due to its global impact on the labour space in Portugal (right from the beginning of the effects of the pandemic, due to the inevitable confinement and its consequences and that imposed, even, the telework as compulsory by governmental means, being this legally, in the Labour Code, This is legally a voluntary option between the worker and the employer), fierce debate between all political-party forces, with seat in the Parliament, about the limits and scope that the regime of telework in Portugal had and the necessary evolution that it should contain, for the protection of the real rights of workers⁷.

In fact, all this ended up leading, through Law no. 83/2021, of 06/12 (which marked the last amendment to the Code), to relevant legislative changes in the current regime of the Labour Code, vis-à-vis what was enshrined in 2009. Basically, the following changes were made

⁷ The opinion article by the leader of the Portuguese Socialist Party, Ana Catarina Mendes, published in *The Guardian*, in <https://www.theguardian.com/commentisfree/2021/nov/18/portugal-bosses-work-hours-right-to-disconnect>, is enlightening.

Fundamentally, the following additions were made: the extension of telework to parents with children up to eight years old (against the previous three years), without the need of an agreement with the employer, provided that it is done by both parents, a reality also extended to workers with the status of informal carer (here, for the maximum period of four consecutive or interpolated years). The new rules also dictate that companies are obliged to pay workers the additional expenses related to "teleworking", such as energy and internet costs - article 168, no. 2.

However, where relevant progress (innovation) in this legal-labour area actually stands out, corresponds to the fact that employers must now promote face-to-face contact between teleworkers and their superiors, at intervals not exceeding two months - Article 169, no. 1, paragraph c); besides the fact that employers have the duty to refrain, also, from contacting the worker during the rest period (except in situations of force majeure), the violation of this rule constituting a serious administrative offence - Article 199-A.

In an analytical manner, the dimension that converges in the sense of trying to understand this modality of labour provision, nowadays, is to note that we are facing an inevitable organisational change in companies. For these, this means broadening the horizons of the model of their operation, including labour relations and the way they take place (without the legal subordination ceasing to exist and, consequently, leaving the perimeter of the employment contract) and giving them a more malleable and plastic connotation by virtue of the virtual dimension that their execution implies (Alves, 2021).

Moreover, the pandemic contributed decisively to the acceleration of the digital transition process of companies and the development of new models of work provision, seeing in telework a possible answer. In fact, nowadays, many workers and employers already recognise its advantages and are even in favour of its adoption after the pandemic. Telework allows geographic flexibility, facilitating workers' mobility and the hiring of professionals anywhere in the world, which contrasts with the traditional paradigm of face-to-face work, restricted to a limited geographic space. It is therefore predictable that, in certain sectors of activity, recruitment processes will become increasingly global, raising with greater frequency complex legal issues arising from the constitution of multi-location employment relationships (such as issues related to the law applicable to the employment contract, determination of the applicable social security regime, etc.).

As a result, this whole context of technological evolution still has its innovative path and the traditional forms of control and supervision in person of the work activity are beginning to be replaced by other forms and methodologies of remote control. The risks of these, due to their intrusive impact, being considered as damaging the privacy and the fundamental rights of workers, raising problems of delimitation of the contours and limits of the employer's power of direction constitute, in due time and manner, challenges to legislators (besides the interpreter of the Law), as in Portugal we end up witnessing with the recent legislative change.

Therefore, where this type of work is currently particularly paradigmatic, of what should be today the affirmation of a fundamental right, in Labour Law, is precisely in the so-called "right to disconnection".

As stated above, the growing importance of "telework" is leading to relevant changes in the morphology of work and labour relations, which pose new challenges to the legislator and the enforcer of the Law. In fact, in the case considered, telework makes the boundary between working time and rest time less clear, sometimes being associated with an idea of flexibility of the time of work provision, which does not always seem to be compatible with the existing labour law "design".

However, the risks of excessive flexibility, or at the limit, even the disrespect for the most basic leisure and personal life rights of workers, impose the need to ensure, in fact and in practice, the effective rest of workers, thus justifying the express provision of a "right to disconnection". This, thus, became part of the Portuguese labour legal system, through the insertion of article 199-A in the Labour Code and which appears, here, in our view, as a clear evolution in the sense of (re)express affirmation of infra-constitutional connection, via the Labour Code, to a Fundamental Right already duly constitutionally protected in article 59 of the Constitution of the Portuguese Republic, particularly, in no. 1, paragraphs b) and d):

Article 59

(Rights of Workers)

1. All workers, without distinction of age, sex, race, citizenship, territory of origin, religion, political or ideological convictions, have the right

(...)

b) To organise work in socially dignifying conditions so as to enable personal fulfilment and to reconcile work and family life;

(...)

d) Rest and leisure (...);

As the name suggests, the so-called "right to disconnection" from the work environment, in a case of telework, ends up consisting in a "disconnection" in the connection, not so much physical (this ends for real reasons of the labour modality adopted to exist), but, above all, mental of the worker. The "right to disconnection" ends up being, therefore, an element of full realisation of Man, which in the era of full-time connection is increasingly compromised and which gains ground by the indiscriminate use in the work environment of telematic tools.

As such, being a factor of the realisation of human nature, protected as a constitutionally inscribed Fundamental Right for workers, as seen before, rest, "leisure", the conciliation of professional activity with family life, to which is added the right to "disconnect from work" (disconnection), present themselves in an essential manner, as a physical and mental well-being of the worker, improving even his quality of life and health, eventually even reflecting on his/her productivity.

In addition, it should also be seen, due to its growing relevance, as the affirmation of a labour Fundamental Right related to other Fundamental Rights, with constitutional protection, through article 17 of the CPR, such as the "right to health" - article 64 of the CPR, and the "right to rest and to a healthy environment" - article 66 of the CPR, which attests to its importance.

5 THE ROLE OF THE WORKER IN A GLOBALISED WORKPLACE

Globalisation, as demonstrated, has taken world trade to a level of enormous competitiveness, but also of interdependence. As a result, companies have started to adjust and to look for countless alternatives and to create adaptation to this global competition. The role of this globalisation was presented to the world in the sense that companies could break barriers, interacting in front of a system, no longer of a local, regional or national nature, but rather worldwide.

Admittedly, the actors in the world of work, particularly employers, especially companies, as Ianni (2006) states, both produce and reproduce their own dynamics and differentially assimilate the dynamics arising from global society as a more comprehensive whole. However, as Granato (2015) rightly points out, it is in the "space" where development appears unequal, combined and contradictory, that diversities, localisms, singularities, particularisms or identities are expressed.

It ends up becoming inherent to capitalism, therefore, that the social/technical organisations of work and production end up transformed in an equal structural manner, since they develop all the time and everywhere. It is a very rapid process, which inevitably has been

making even some of the productive forces dispensable, technically and socially obsolete. Social forms and techniques of organisation of production and work are modernized to mitigate the uneven development on a national, regional or global scale (IANNI, 2006).

Consequently, the traditional format that was conceived, has been undergoing significant transformations, in many cases creating a gap between different types of workers. Urges, therefore, that the State, but also the society, be attentive and follow the changes correcting if necessary and applying the reduction of differences (ALVES, 2014).

Therefore, today, for all that has been demonstrated before the production of developed capitalism points to the change of the Work, the universal flexibility of the worker and the fluidity of its function⁸. The durable, stable and solid condition of capital is contrasted with the fragility and uncertainty of workers.

The core of the labour process, by its nature, has such precarious foundations that it justifies the existence of workers and their partial functions. That is, in reality, they can become useless and surplus cash without at least having control of this process (SPURK, 2005).

6 CONCLUSION

In the light of the framework just outlined, contemporary Labour Law, while maintaining its initial characteristic, centred on the idea of protecting the worker, must try not to be an obstacle to the advance of technology and the imperatives of economic development.

The inevitability, it seems today, of moving towards the flexibility of some legal institutes and not preventing that, mainly in face of the growth of collective bargaining, the social partners may, in each concrete situation, through collective bargaining, compose their interests directly, without the interference of the State and in the form they judge to be most appropriate at the time; the so-called compliance of labour nature may also play a relevant role in the mitigation of conflicts in labour relations and even help to minimise the risks to which a certain company is exposed, boosting its competitiveness through compliance and ethical-legal example.

It will continue to be increasingly important to maintain quality work and rights (NASCIMENTO, 2011, p. 70).

⁸ In Europe and in line with the Framework Agreement of the European Social Partners, companies using new and emerging technologies have a responsibility to provide adequate opportunities for requalification and up-skilling for all employees, so that they can learn to use the most technologically advanced tools, adapt to the changing needs of the labour market and stay in it. Vide in this respect <https://ec.europa.eu/social/main.jsp?catId=1223>

It is fundamental that all potential consequences and negative effects of the current conjuncture of change in the labour world are not reflected in the guarantees that Labour Law and, above all, the State, should continue to ensure in order to guarantee the common good and sustainable development, the valorisation and dignity of the worker.

In fact, at its level, Labour Law has also felt the reflexes of the competitiveness between companies in different countries. In fact, this ended up happening from the moment when economic agents, as we have seen, took advantage of the facilities provided by the agility of trade in the global economic context, seeking to find their "space" in the capitalist competitive market. It is then understandable, as a consequence, that companies have adjusted their strategy by focusing on all issues of reducing production costs.

Therefore, Labour Law will be required to maintain a balance, without prejudice to an adjustment to contemporary labour. And this must maintain valid, as pillars, solidarity in the performance of work and participation in its results. As Ferrari et al state, the globalisation of social rights can only be equated with economic globalisation, when the dignity of the worker is safeguarded (FERRARI et al, 2002, p. 76).

Here again, the international dimension converges before that which is a global dimension. And the necessary action of international organisations, such as the United Nations (UN) and the International Labour Organisation (ILO), so that there is an alignment of related impulses and a political will is aimed, which goes far beyond the strict limits of firm decisions in the internal local and national conjuncture and, if possible, can even guide it in a concerted manner (ALVES, 2021).

One cannot forget that the present times are symptomatically marked by the dangers created with a global dynamic, coupled with fierce, and sometimes unregulated, international business competition, which can generate a decrease in the level of working conditions and disrespect for fundamental rights. Moreover, between countries, there are markedly different and asymmetric levels of protection and recognition of rights. Moreover, the entire context currently underway, associated with the process of internationalization of production, occurs in an environment in which institutions, legislation and market regulation are still essentially based on national dynamics defined by each country or limited economic space.

This question leads to reflection, in the sense of knowing how to shape a capitalist social formation consistent with the relative suppression and possible changes in the needs of workers, as social beings, without ever conditioning or harming those, which are the fundamental rights

enshrined by the Labour Law and whose inscription is rooted in the Constitutions of modern States.

This is, therefore, clearly the challenge that is permanently faced by legal systems today, recognising, moreover, that the role of the Fundamental Right to Work is vital in promoting human dignity, as a suitable means to produce autonomy, self-determination of the individual and to make him subject of subjective rights (NOVAIS, 2010).

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CHAPTER V

COMPLIANCE
DIALOGUES



COMPLIANCE AND MENTAL HEALTH IN THE WORKPLACE: THE NEED FOR AN ETHICAL COMMITMENT OF LEADERSHIP TO PREVENT ABSENTEEISM DUE TO PSYCHIC ILLNESS IN PUBLIC ORGANISATIONS

Davi Valdetaro Gomes Cavaliere⁹

Abstract

This paper aims to study Compliance as an instrument to protect psychological integrity in the work environment, with the potential to reduce absenteeism rates due to mental illness in Public Organisations. The problem in relation to which the present research intends to investigate is summarized through the following question: why can Compliance Programmes be instruments capable of promoting psychological integrity in the work environment and reducing absenteeism rates due to illness psychic? To answer the research question, the work will be divided into two parts: a first theoretical part, to deepen knowledge about Compliance applied to the protection of human life in the work environment; and another empirical part, to identify absenteeism rates and the main factors that lead to absence from work due to mental health in the Federal Attorney General's Office, a body linked to the Attorney General's Office. Empirical research will be developed through the use of quantitative and qualitative techniques, with data collection and a structured interview with Federal Prosecutors. To analyse the data obtained in the interview, the technique of content analysis will be used.

Keywords: compliance; mental health; absenteeism; work environment.

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1.1 ABSENTEEISM DUE TO PSYCHOLOGICAL ILLNESS: A PERSONNEL MANAGEMENT PROBLEM

Although the definitions of absenteeism have varied over time, for the purposes of this article, it is important to divide it into five categories, as defined by Thelmo Quick and João Lapertosa (1982): 1) Sickness absence: absence justified by sick leave (the classification used in this article); 2) Absenteeism due to professional pathology: caused by a work accident and/or professional illness; 3) Legal absenteeism: supported by law; 4) Compulsory absenteeism: due to suspension imposed by the employer, prison or other impediment to coming to work; and 5) Voluntary absenteeism: for private, unjustified reasons.

For this paper, the concept of absenteeism is adopted as the uninterrupted period of absence from work, due to the individual's temporary incapacity to perform the task assigned to him or her - definition given by the International Labour Organisation - ILO (1989). Based on this concept, the line of approach in this article adheres to the idea brought by Daphnis Souto (1980), for whom absenteeism-disease is essentially a management problem, and any well-structured plan to control absenteeism should develop a climate of interest in the subject throughout the organisation.

When related to psychological illnesses, absenteeism is often caused by factors linked to the institution itself, given the psychological impacts of a deficient management which does not advocate a preventive and humanistic policy, as stated by Silva and Marziale (2000).

The psychiatrist and psychoanalyst Christophe Dejours (1992) treats absenteeism as a manifestation of exhaustion of the worker, that is, a search for balance when one reaches the limit of dissatisfaction with the "sickening work". Although work is an indispensable activity for the individual and collective development of people (Murcho, Jesus, 2014), it can become sickening to the extent that it contains risk factors for the mental health of professionals.

Therefore, absenteeism due to psychological illness is an indicator of both the professionals' mental health and the institution's personnel management policy. It is an indicator of a problem that, if well evaluated, can be the basis for the construction of effective measures of prevention, which will bear fruit for the health of the workers and the quality of the service provided.

Based on all the theoretical aspects exposed, one sought to map absenteeism in the Federal Attorney General's Office and investigate its causes, in order to promote greater reflection and interest in the theme, besides being able to subsidise the preparation of policies and strategies of people management in the institution, especially in the scope of the Compliance Programmes.

2.1 EMPIRICAL RESEARCH

Methodology

From the theoretical knowledge brought in the previous chapters, this moment of the research is dedicated to the analysis of the panorama of protection and promotion of mental health in the Federal Attorney General's Office, a body linked to the Attorney General's Office (AGU). The quantitative technique was used with the objective of collecting the following data: 1) the number of leaves of absence due to mental health among the members of the Federal Attorney General's Office in the years 2016 to 2018; 2) the number of days of absence due to mental health in each year surveyed; 3) the percentage of leaves of absence due to mental illness in relation to the total absenteeism-sickness in the period evaluated.

In turn, the qualitative technique chosen was the completion of a structured interview, in the online survey mode, which is widely used when the proposal is to address sensitive topics (Feferbaum, Queiroz, 2019). Data analysis was performed using the content analysis technique of the thematic categorical type, with the aim of critically understanding the meaning of communications, their manifest or latent content and the explicit or hidden meanings (Chizzotti, 2006).

Fourteen (14) Federal Prosecutors were chosen to answer the open questions of the structured questionnaire, seeking an equal proportion as to gender, age, length of career and occupation of management position. The participation of the interviewees was voluntary and was conditional upon their signature of the Free and Informed Consent Form.

Results and discussions

Quantitative research

The data obtained from the Medical-Social Assistance Service of the AGU indicate that mental and behavioural disorders related to the CIDs listed below, between the years 2016 and 2018, totalled 13,392 days of absence in that period, as shown in the tables below:

<u>Total leave for treatment of one's own health - Federal Attorney General's Office</u>
Year 2016: 608 members with leave for treatment of their own health - total of 22,506 days of absence in the year;
Year 2017: 650 members with leave of absence for treatment of their own health - total of 22,915 days of absence in the year;

Year 2018: 654 members on leave for treatment of their own health - total of 21,190 days of absence in the year.

Absences due to depression by year (CID 10 - F33, F33.0, F33.1, F33.2, F33.3, F33.4, F33.8 e F33.9) – Federal Attorney General's Office

Year 2016: 27 members with leave for treatment of their own health due to depression - total of 1,712 days of absence in the year;

Year 2017: 36 members with leave for treatment of their own health due to depression - total 1,724 days of absence in the year;

Year 2018: 33 members with leave for treatment of their own health due to depression - total 1,932 of days of absence in the year.

Absences due to neurotic disorders, stress-related disorders and psychosomatic disorders per year (CID 10 - F40.0, F40.1, F40.2, F40.8, F40.9, F41, F41.0, F41.1, F41.2, F41.3, F41.8, F41.9, F42, F42.0, F42.1, F42.2, F42.8, F42.9, F43, F43.0, F43.1, F43.2, F43.8, F43.9, F44, F44.0, F44.1, F44.2, F44.3, F44.4, F44.5, F44.6, F44.7, F44.8, F44.9, F45, F45.0, F45.1, F45.2, F45.3, F45.4, F45.8, F45.9, F48, F48.0, F48.8, F48.9) – Federal Attorney General's Office

Year 2016: 44 members with leave for treatment of their own health due to neurotic disorders, stress-related disorders and psychosomatic disorders - total of 1,900 days of absence in the year;

Year 2017: 62 members with leave for treatment of their own health due to neurotic disorders, stress-related disorder and psychosomatic disorders - total of 2,886 days of absence in the year;

Year 2018: 62 members with leave for treatment of their own health due to neurotic disorders, stress-related disorders and psychosomatic disorders - total of 3,238 days of absence in the year.

Given the data obtained, the following table shows the percentage of absenteeism due to psychological illness in relation to the total number of days of absence for any health reason:

Year	Total members absent due to health reasons	Percentage of members absent due to mental health reasons
2016	608	71 (11.67%)
2017	650	98 (15.07%)

2018	654	95 (14,52%)
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Year	Total days of absence due to health reasons	Percentage of days absent due to mental health reasons
2016	22,506	3,612 (16.04%)
2017	22,915	4,610 (20.11%)
2018	21,190	6,894 (24.39%)

Thus, the quantitative research points to a growth of about 4% per year in absenteeism due to psychological illness in relation to the total absenteeism due to illness, making mental and behavioural disorders the main cause of absenteeism due to illness in the Federal Attorney General's Office between the years 2016 and 2018.

This is alarming data that deserves special attention from public managers, since depressive conditions have a significant impact on the servant's health and also on absenteeism, as they generate prolonged periods of sick leave and a high cost to the treasury. This is what a study conducted in 2019 by the World Health Organisation reveals, for example, when it states that 264 million people suffer depression and anxiety at work, which causes a loss of US \$1 trillion/year due to reduced productivity in the world economy (WHO, 2019).

In addition to the cost mentioned above, the high rate of absenteeism undeniably brings various losses to any organisation, such as staff deficit, service disorganisation, dissatisfaction and overload among the professionals present, drop in quality and amount of work provided, decreased efficiency, increased operating costs, among other consequences.

The panorama of absenteeism tends to become more serious after the advent of COVID-19, in view of the potential impact of the pandemic on the mental health of people around the planet. According to the World Health Organisation (WHO), mental health plays a key role in the crisis response plan, given that the psychological integrity and well-being of populations are dramatically affected by the pandemic (United Nations, 2020).

Regarding the consequences of the pandemic in working conditions, it is worth mentioning the growth of telecommuting in home office mode, which has reached a significant portion of the working class worldwide. Although initially driven as an exceptional measure of protection against the new coronavirus by reducing social contact, telework tends to consolidate itself as a rule in many public and private organisations.

It happens that the institution of telework, by itself, does not guarantee the recognition of people and the promotion of quality of life. This is because the professional activities performed remotely, which a priori could be considered as a privilege, can bring deleterious effects to the mental health of professionals, since the work began to occupy and share space with other activities, mixing and invading spaces that before had clearer limitations.

These considerations make it necessary to continue the research on absenteeism, obtaining data from the COVID-19 pandemic and the implementation of the remote work regime, considering the probability of a substantial increase in the rates of absence due to psychological illness in this "new reality".

Qualitative research: absenteeism due to psychological illness in the Federal Attorney

General's Office from the perspective of its members

The qualitative analysis of the data obtained through the structured interview sent to the Federal Attorneys brought more clarity about the factors present in the work environment that are directly related to the psychological illness of the members of the institution.

When asked about what makes them most uncomfortable in relation to the working conditions, the excessive volume and lack of support careers (technicians and analysts, for example) are factors significantly highlighted by the Federal Attorneys, as can be confirmed in the answers below:

Participant 01: The volume of work, which makes a more detailed and specific performance in the phase of defence/procedural instruction unfeasible.

Participant 08: I think that the point of greater emotional instability is the excess of work, either constantly or in "turns".

Participant 14: Excessive workload, inequitable division of the workload, stress generated to be able to meet all the procedural and administrative deadlines, little visibility, support and difficulty of release to exercise other functions.

Participant 10: I have never had any provider directly linked to me, and only three trainees in my seven years of career, still divided with other Attorneys. Therefore, bureaucratic and administrative activities are a constant at work. This also occurs in relation to the prosecutors themselves, who are understaffed. With holidays and leaves of absence, it is quite common for the workload of the Prosecutor to be multiplied by two or even three times, all without aid or financial compensation. This year, just to give an example, for about three months out of six, I did double work and have not taken any holidays so far.

Participant 12: Overwork.

Participant 06: The working conditions are not ideal and cause discomfort insofar as the PGF does not have a support career to assist the Federal Prosecutors, who must cumulatively perform judicial and administrative tasks.

Participant 11: Excessive workload, inequitable division of the workload, stress generated in order to meet all procedural and administrative deadlines.

Feeling overwhelmed by work overload and its precarious conditions causes, most of the time, the physical and mental exhaustion of the servant, influencing productivity, performance, absenteeism, turnover, organisational citizenship, health and well-being, life satisfaction and user satisfaction (Marco et al, 2008). The problem of overwork tends to worsen in the new reality of home office, as addressed earlier. The South Korean philosopher Byung-Chul Ham (2021) states that remote work causes even greater exhaustion than in the office, due to the lack of rituals and fixed temporary structures, in addition to the lack of social contacts. The work began to accompany the individual in moments and spaces that would be dedicated to leisure, family interaction, rest and physical and mental rehabilitation. As stated by Losekann and Mourão (2020), the individual in telework remains online and responsive, recording the achievement of goals and deadlines and avoiding any impression of idleness about their hours. This context is clearly portrayed in the speech of the following participant:

Participant 14: I suffer from anxiety and stress caused by the need to meet deadlines and tasks with a high workload, which generates the fear of making mistakes. The excess of work takes away part of the time to accomplish other important things in life.

The above passage needs reflection. Even before the COVID-19 pandemic, our society was already suffering from fatigue caused by an exaggerated need for performance, an internal and external imperative to have to produce more and more, something that is propagated *en masse* on social networks. The subject is exploited by others, but also by the author. Without consistent attention to mental health, this logic of the "entrepreneurs of oneself" tends to further increase the rates of psychological illness in society, because, in addition to leading to physical and mental exhaustion, it greatly reduces the individual's time for leisure, for leisure and for the "accomplishment of other important things in life", as said by the participant.

The excessive workload reported by the prosecutors becomes an even more complex problem due to the absence of public competitions for the position - the last one took place in 2013. With the occurrence of retirements over the past few years, the staff deficit and the increase in the workload are inevitable. This is a context that requires the adoption of strategic solutions by management in order to make working conditions more satisfactory and less prone to illness.

Another relevant issue highlighted by the Federal Prosecutors is directly related to problems in people management. A feeling of injustice was noted whether due to pressure from superiors, the existence of a work environment in which there is no recognition of the professionals, or even the distribution of positions and functions that does not have merit or the profile of the Prosecutors as determining criteria:

Participant 13: What bothers me about the work environment is the lack of objectivity in the analysis of the professional performance of the Prosecutor for job offers or even to change the area of activity within the body. The impression is that it is not enough to be professional and technical, constitutional criteria for the exercise of the position, it is necessary personal links that are aligned - not with the public interest of the institution - but with the private interest of the manager. And in relation to working conditions, the annoyance is the lack of interest of the managers who pass through the institution to take care, observe, effectively ensure the health of the work environment - based on objective criteria - that assess the quality of work coupled with the quality of health of the member and thus base the movement of prosecutors within the career.

Participant 03: Absence of management measures that take into consideration the reality of those who work with the cases. There is a management of numbers and not of people [...] Valuing subservience. Lack of objective rules for choosing coordinators.

Participant 04: Personally, the biggest inconveniences I've had in relation to the work environment and conditions were related to the misconduct of certain situations by managers [...] in any case, what bothered me most, without a doubt, was the pressure exerted by managers - DAS occupants - for certain work to be done this way or that way. Although I never gave in to pressure, this resistance almost cost me a leave of absence for psychiatric reasons and made me need controlled medication for a certain period.

Participant 05: I feel most uncomfortable with the managerial distancing and the position of superiority adopted by members of the same career who assume management and command positions [...] A veiled pressure (arising from the separation of "castes") that drives vanities and does not always turn to the best interest of the Autarchies. As an example, I remember inopportune messages from a coordinator (sent in a WhatsApp group) requiring greater effort in the search for favourable judicial decisions. Obviously, after 21 years serving the Union and seven years as federal prosecutor, I am not shaken by the power game of the Prosecutor's Office, but I intuitively imagine that unreachable goals and contempt for the efforts of others generate 'psychological suffering', especially among the younger ones. Because we exercise an activity of means (not of result), dependent on the appreciation of third parties, the Magistrates, it does not seem right to me the creation of a trophy gallery, on the one hand, with subliminal criticism to those who face difficulties.

Participant 06: Add this to the fact that we have a naturally hierarchical career based on functions often assigned arbitrarily and we have an environment conducive to emotional destabilisation. First, because the Prosecutor does not perform quantitatively and qualitatively the work he or she understands as ideal. Second, because when he tries to do a good job, despite all this, he ends up being penalized with more work and little recognition. The environment does not stimulate growth, but rather stagnation. In the end, the discouragement opens the doors to illness.

The above reports point to a need for greater cooperation in work relationships, especially between hierarchical levels. The experience of cooperation favours the construction of meaning of work, strengthens the empowerment, as well as provides the acquisition of technical and behavioural skills, which tends to reduce the sense of injustice in the work environment.

In order to evaluate the satisfaction with work on the part of the participating Federal Prosecutors, they were asked to comment on moments in which they feel more tired or discouraged with their work and career, and on situations in which they feel pleasure and fulfilment with the work they perform. Once again, we observed a significant incidence of management problems as the factors that most generate dissatisfaction among the professionals, as reported below:

Participant 12: I feel discouraged when changes occur in the way of working as a result of new administrative organisation.

Participant 13: The times I feel most tired are when I am charged for high productivity in a few hours of work. As if it were a trophy race to accomplish more distributions and procedural dispatches in less time. It is a feeling that the "boss" wants the prosecutor to be available for 24 hours. An example that I see with great care and even a certain fear is the "wave" of robots within the institution - mechanical work and with algorithms that we do not know the criteria elected for the analysis of lives that are behind these processes. The moment that I feel discouraged with the work occurs in situations in which I verify the total absence of professionalism for change of area of performance, of the prosecutor, within the institution or to assume high positions; the lack of stimulus, praise for work performance are factors that cause discouragement. We know that we are a career with many members, but it is necessary to create "eyes" for these lives that perform, with dedication, this essential function of justice.

Participant 07: I feel tired and discouraged at times when I need support from the career management. Lack of prerogatives for better performance of the function. Lack of career support for "middle" jobs. Much worse structure in comparison with other legal careers.

Participant 14: Discouragement is present due to the excessive amount of work, which makes the provider afraid of "missing something" or making some mistake, since he/she has to rush to accomplish his/her tasks. The beginning of each week always generates a lot of discouragement due to the demand that arrives. It is also discouraging because some prosecutors can more easily assume more interesting functions, which characterizes a certain privilege when compared to the others.

Participant 03: When I see friendship/contacts being more important than efficiency. When we know that some decisions could be taken to improve the quality of life, but that, although evident, are ignored.

Participant 02: Lack of concern for the emotional well-being of colleagues. Deficit of empathy from higher bodies. Gap between colleagues from higher bodies of the AGU with the other colleagues from the base.

Participant 05: When precious time is wasted on ineffective debates, unfounded impositions, dispensable meetings and untimely rule-setting. The climate of dispute and the attempt to gain ground by power generate two categories of federal prosecutors who should never be distanced.

In general, the Federal Attorney General's Office has highly motivated members who are satisfied with their remuneration, aware of the importance of their functions, and eager to do quality work. Satisfaction and motivation, however, are hindered by obstacles directly related to personnel management, as the following answers make clear:

Participant 06: The moments I feel most fulfilled are those when I perform a good job, which I can be proud of having done. If this is accompanied by procedural victories and institutional recognition, the satisfaction is even greater. Unfortunately, as said, recognition is a rarity, and there is no proportionality between recognition/responsibility, which would be quite salutary for the institution.

Participant 03: I think that the career is focused on numbers, on how to extract more productivity, but prosecutors are people, not numbers. Prosecutors are not human resources, who exhaust their capacities and then are discarded. I think it is the AGU's duty to focus efforts on people management, to periodically assess the physical and emotional well-being of its employees.

Once situations and factors that truly act as motivators of human behaviour at work in a certain circumstance have been identified, it is up to management to act to provide the full development of people based on the diagnosis made.

3.1 COMPLIANCE AND THE PROTECTION OF MENTAL HEALTH IN THE WORK ENVIRONMENT

In current times, the debates on ethics have brought the Compliance Programmes very much to the fore. Such programmes were conceived to increase organisational management, with the purpose of preventing infractions and controlling moral risks, by means of a new model of compliance of management rules that offers new perspectives on the place of ethical behaviour in the organisations. It so happens that most discussions and academic work on this topic, especially in Brazil, are limited to studying it strictly as a mechanism for combating corruption, that is, as an instrument of compliance with the anti-corruption legislation in force in the country.

The fight against corruption constitutes a fundamental agenda, but not the only one when it comes to Compliance, because, as pointed out by the American David Hess (2017), the respective Programmes need to fundamentally seek the protection of human rights, in a positive motivation that can influence the organisational behaviour. Being an instrument of protection of human rights, the Compliance should also focus on mental health, a theme that is increasingly closer to the daily life of the Brazilian and world population, and that has a significantly humanistic content. The protection of mental health in the work environment should be part of the Compliance commitment of every institution, in face of the need of the organisations themselves to implement a system of attention to the psychological integrity based on the compliance with the rules in effect, and within a standard of ethics, governance and respect to the human rights.

Having said this, how can Compliance improve the mental health management model in organisations and contribute to the psychological integrity of employees in the workplace?

Firstly, it is necessary to highlight that to monitor absenteeism periodically, assess its rates, causes and consequences, consists of an important personnel management instrument. The International Labour Organisation (ILO) itself, through Convention 161, recognizes that the records of absences from work contribute to the knowledge of the dimension of the problem, to the identification of possible causes, as well as to the formulation of measures to minimize the rates of absences and illnesses.

Caring for the psychological integrity of workers means protecting human rights in the work environment. Mental health is expressly provided for in the list of human rights, as can be inferred from Article 25 of the Universal Declaration and the repeated statements of representatives of the United Nations. There is no health without mental health, and

psychological illness is taking on ever greater proportions, as already mentioned. Protecting the mental health of employees is, then, an ethical responsibility on the part of managers.

Being an instrument of protection of human rights, as previously mentioned, the Compliance must also focus on mental health, a subject which is increasingly closer to the daily life of the Brazilian and world population, and which has a significantly humanistic content.

The protection of the mental health in the work environment must be part of the Compliance commitment of every institution, due to the need of the organisations themselves to implement a system of attention to the psychological integrity based on the compliance with the rules in force, and within a standard of ethics, governance and respect to the human rights.

The purposes of Compliance Programmes vary according to the activities performed by the organisation and the risks it faces. For a Programme to be considered effective, it must be integrated to the totality of risks to which an organisation is subject. There is, however, a type of risk present in all organisations, whether public or private: psychosocial risks, which constitute the factors that may contribute to or cause stress and mental illness among professionals within an organisation. Psychosocial risks at work, according to Luciana Baruki (2018), are related to the way work is conceived, organised or managed. They are harmful agents associated especially with the mental health of the worker, the emotional demands and the psychic energy needed to perform the work. They include the methods of charges and demands on the abilities and skills that may affect the psychological well-being of the worker, going through forms of management and work organisation.

It is necessary to point out that since January 1st, 2022, Burnout Syndrome is considered an occupational illness, according to the new classification of the World Health Organisation (WHO). If before, exhaustion, stress and reduced productivity were worrying factors for companies, now the Burnout Syndrome has become another factor of financial and legal risk. Also known as professional burnout syndrome, it is developed by exhausting work and manifests itself from mental exhaustion linked to stress, high demand, excessive responsibility and competitiveness in the work environment.

In view of the new classification, organisations must pay attention to take all measures to prevent the psychological exhaustion of their employees, avoiding, inclusive, being held responsible for the development of the syndrome by their employees.

Hence, the importance of using the Compliance Programmes as a legitimate mechanism for the protection of mental health in the workplace, which can contribute in two main ways:

- 1) by being a human rights protection instrument that advocates the compliance with the current regulations, Compliance can boost the increase of human and financial resources for the protection of mental health in the work environment, as well as the compliance of the organisations in relation to the current regulations. Mental health is an investment - according to WHO, for every US\$ 1 invested in employee wellbeing, US\$ 4 are obtained in ROI - Return on Investment (WHO, 2020).
- 2) in the case of the Federal Attorney General's Office, object of this qualitative and quantitative research, it became clear the existence of psychosocial risks in the work environment with strong potential to lead the professionals to psychological illness, highlighting the excessive volume of work, the pressure for productivity and results, and the feeling of injustice caused by the lack of recognition and minimum meritocratic criteria in the offer of career opportunities. In this context, Compliance can enable the implementation of a preventive legal regime, composed by a set of good practices in mental health, besides a management model of the referred psychosocial risks, which performs the prevention, detection and repair of such risks within the respective work environments.

In view of the true pandemic situation of psychic illness of the population, there are several contributions to be made by Compliance in favour of psychological integrity in the work environment. The focus on mental health is essential for organisations to truly understand their impact - positive and negative - on employees, communities and society at large, and Compliance provides a mechanism to track this impact over time.

4.1 FINAL CONSIDERATIONS

The analysis of absenteeism due to psychological illness in the Federal Attorney General's Office allowed us to better understand the panorama within the institution and to reinforce the thesis that it is a problem linked to people management, with a strong ethical content involved. The results obtained can collaborate to spread the importance of the theme, as well as to broaden the vision of managers about the need not only to provide better working conditions for their teams and greater recognition to professionals, but, above all, to evolve the concepts and the treatment given to mental health in the work environment. This is a problem which requires the implementation of a people management policy based on prevention and humanistic values.

Compliance appears as a protagonist in this context, as an instrument able to drive the increase of human and financial resources for the protection of the mental health of the

professionals, to promote the conformity of the organisations in relation to the rules in force, as well as to implement a model of management of psychosocial risks in the work environment. These measures have the potential to promote psychological integrity and reduce absenteeism due to psychological illness in organisations.

The relations suggested in this paper were produced with the purpose of subsidizing good people management practices, through the discovery of the factors that generate absenteeism due to psychological illness in the organisation, in addition to encouraging future research to advance in the proposed theme.

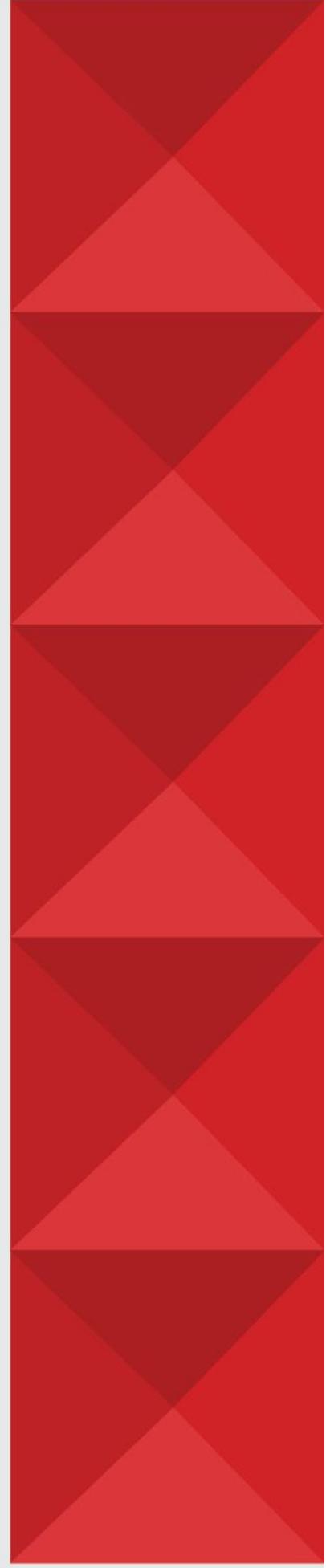
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CHAPTER VI

COMPLIANCE
DIALOGUES



DUE DILIGENCE - AN APPROACH TO MITIGATING RISK IN RELATIONSHIPS WITH THIRD PARTIES

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Fernando Augusto Macedo de Melo¹¹

Abstract

The due diligence process, adopted previously to the relationship with third parties, is an inherent activity to integrity programmes. However, its effectiveness can be questionable, especially to mitigate the risk in third parties relationships and in the potential to cause financial and reputational damage to an organisation. Therefore, this article aims to propose an integrity risk classification with third parties, in order to allow companies to adopt adequate monitoring actions for those most exposed to possible irregularities during this relationship. Firstly, a literature review will be presented, associated with the regulatory framework, in order to show that the adoption of due diligence has become a common practice in compliance programmes, not associated with the results. In the second section, the research proposes to explore third-party integrity assessments which, for the most of it, can be due diligence questionnaires application and performing public data mining (background checks) to classify the integrity risk. In the end, based on a case study, the third section will present a quantitative approach to risk classification, according to the exposure level integrity risk to the company, the capacity monitoring and does not represent an excessive monitoring cost. The article will adopt the deductive method, in order to suggest new hypotheses. It is expected, with the methodology adopted and the results obtained, to contribute to scientific research, the compliance environment, corporate governance and risk management, as corporate mechanisms for the prevention and detection of fraud with third parties.

Keywords: due diligence, third parties, compliance, anti-corruption

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• INTRODUCTION AND OBJECTIVES

The emergence of anti-corruption legislation and conventions on a global scale over the past 25 years has fostered the implementation of compliance programmes in the corporate environment, with a growing search for practices and mechanisms that not only prevent the occurrence of fraud and corruption, but also generate an environment of ethics and integrity in organisations.

In the Brazilian context, in addition to the creation of the anticorruption regulatory framework, the subsequent involvement of major Brazilian companies in corruption scandals unfolded in 79 operations conducted, between 2014 and 2021, by the Lava-Jato Operation (Federal Public Prosecutor's Office, 2021). According to a survey, the direct and indirect impacts of the investigations may have reached R\$ 142.6 billion, only in 2015 - something around 2.5% of Brazilian GDP, involving a set of companies whose investments reached almost 5% of Brazilian GDP in that year (Costas, 2015).

In Brazil, Law No. 12.846 (2013), also known as the Brazilian Anticorruption Law, provides for the administrative and civil liability of legal entities for the practice of acts against the public administration. The law, as well as its regulating decree, Decree No. 8.420 (2015), address the application of sanctions in view of harmful acts committed by companies operating in the Brazilian territory, the adoption of integrity programme and the leniency agreement. According to Macedo (2021) there is an innovative aspect in the Brazilian Law, regarding the possibility of objective liability of companies for violations provided by the legislature, regardless of malice or fault on the part of organisations. That is, an organisation can be penalized beyond acts committed by itself (intention), as well as for acts committed by other organisations with which it relates, provided that in acts that indirectly benefit it (guilt).

Similarly, in compliance with the U.S. Foreign Corrupt Practices Act - FCPA, the U.S. Department of Justice evaluates the effectiveness of the compliance programme when the corporation is alleged to have committed an irregularity as a measure to determine the appropriate process, the fine and the compliance obligations to be included in the judicial decision.

In both the Brazilian and U.S. legal frameworks, among the aspects evaluated with respect to the effectiveness of the integrity programme is the adoption of due diligence for the selection and, according to the case, supervision of third parties, such as suppliers, service providers, intermediate agents and associates (USA, 2019) in order to mitigate the risk of objective liability assumed in relations with third parties who violate anti-corruption laws and regulations.

In light of the relevance of third-party due diligence in the context of integrity programmes, the objective of this paper is to discuss its application so as not to "plaster" relationships and to provide effectiveness in the process of preventing the occurrence of illicit acts.

Following a bibliographical approach to the theme, a case study will be conducted using a methodology to classify the integrity risk of third parties so that other organisations may be aware of selection and monitoring actions appropriate to those most exposed to objective liability during their relationship with such third parties.

- **THEORETICAL FRAMEWORK**

According to Batisti and Kempfer (2016), the Brazilian Law aims to combat corruption and enable companies to be active agents in this mission. The law provides for punishment of enterprises, but provides that this punishment may be minimized if the enterprise adopts strategies to prevent corruption through integrity programmes - compliance. The preventive effectiveness of this law will depend on the adoption of integrity mechanisms that involve ethical, legal and administrative aspects, to point out objective paths in the face of the risk of corruption inherent to any organisation.

As pointed out by Macedo (2021), the Brazilian Law does not address how organisations should implement their integrity programmes. Decree 8.420 (2015), which regulates Law No. 12.846 (2013), provides in its Chapter IV on the "Integrity Programme" and presents in Article 42 the parameters that should be observed for purposes of evaluating the existence and application of that programme. One of the parameters set forth in Decree 8.420/2015 is the one dealing with periodic risk analysis: "V - periodic risk analysis to make necessary adjustments to the integrity programme". The legislature is consistent in demonstrating that risk analysis addressing integrity under Law 12.846/2013 is an indispensable factor for scaling up risk mitigation actions and constantly improving the integrity programme, in line with the legal provisions of other countries or organisations cited here.

According to the OECD (2013), enterprises should assess the risk of possible fraud and acts of corruption in the scope of their relationships with suppliers, as well as conduct regular monitoring of this type of third party. To this end, companies must make their anticorruption policies known and act in the development of compliance practices, minimally, to those suppliers with more relevant contracts.

The Office of the Comptroller General (2015) recommends that organisations adopt prior verifications (due diligence) when hiring third parties. The agency suggests the adoption

of measures to "gather information about the company that intends to be hired, as well as about its representatives, including partners and administrators, in order to make sure that there are no situations impeding hiring, as well as to determine the degree of risk of the contract, to perform the appropriate supervision."

Ferreira (2013) points out the existence of methodological differences during the corporate risk assessment process, with some corporations choosing to qualitatively prioritize certain risks prior to determining the level of exposure and vulnerability of each identified risk event. Similarly, prior to initiating the third-party risk assessment process, an internal definition of the scope to be submitted to the integrity risk assessment process in the relationship with such parties is required.

After this definition, in general, the data collection is the first step, which can occur by several techniques. Rosa and Castro (2019) state that the company that is performing the due diligence process must be sure about what information must be collected, as well as must inform the expectations of deadline and timeline. For example, instead of making redundant information requests, the target company should receive a listing of detailed information requests in advance to manage the process effectively and meet the reporting timeline.

Then, the veracity of such data is verified by conducting interviews or obtaining background check reports to identify any inconsistencies and allow for additional information to be obtained. The assessment itself consists of identifying red flags according to the nature of each organisation, which point to a qualitative metric of suggested risk (degree of integrity risk).

Finally, each assessment and its corresponding risk rating are taken to decision-making and, if approved, the organisation must initiate mitigation measures to address the potential integrity risk. The choice and quantity of actions to be taken will depend on the type and level of risk associated with the relationship. Suggested practices include the inclusion of different contractual clauses, ranging from confirmation of compliance with the Code of Conduct and other integrity guidelines of the contracting enterprise to the possibility of contract termination in the event of evidence of improper conduct by the third party; provision for review of the third party's integrity risk assessment; monitoring of payments and other expenditures with the third party; and training in integrity practices by the third party and professionals involved in contract management and monitoring (PACI, 2013).

The provision of rules for the hiring and contract enforcement with third parties and the existence of mechanisms for the interruption of irregularities or infractions detected are structural elements of a Compliance Programme, to be examined by an evaluator in light of Law no. 12.846/2013 (Veríssimo, 2017).

The concept of due diligence, however, is not limited to the third party filling out a questionnaire related to anti-corruption aspects. In the European Union (Smit, et al., 2020), the adoption of such practice is extended to the context of climate change, sustainability, child labour and agricultural issues, as well as the scope of due diligence is extended to the collection of public data of the analysed company, such as consulting sustainability reports, audits conducted through own employees or by hiring external companies.

Although due diligence forms are a good tool, they may not be capable, in isolation, of identifying integrity risk in relations with third parties. Faced with the possibility of a supplier misrepresenting the truth when filling out the data requested by due diligence forms, the risk identification/assessment process can be initiated with a detailed mapping of the supply chain and operations, as well as visits and even independent audits to the prospective supplier, which can lead to greater effectiveness in classifying the degree of risk and defining monitoring actions (Esoimeme, 2020).

In addition, the implementation of the due diligence tool should avoid simplistic results, based on a single score. Comparatively, anti-corruption criteria for decision making only regarding the choice of countries or markets for investment should be used with caution (Doig, 2011). Similarly, the quantitative approach suggested by third-party due diligence results should be contextualised, in-depth and evaluate trends.

Research conducted during third-party due diligence processes has proven insufficient to prevent movement of illicit money, especially when multiple countries are involved. This is because there is difficulty in reaching information on the actual beneficiaries of companies that use tax havens for suspicious transactions (Naheem, 2018). Similarly, it is difficult to identify Politically Exposed Persons (PEP) and map their financial transactions through due diligence (Johnson, 2008).

It can be noticed that the adoption of due diligence with third parties has become a desired practice in the corporate environment, but belongs to paths that are still unknown and limited. In a survey of executives conducted by KPMG (2020), third-party risk management was cited as a strategic priority by 77% of respondents. In addition, 74% of those pointed out that their organisations need more consistent actions in this sector, while 59% stated that their companies have already suffered sanctions for risks caused by third parties. In this survey, half of the companies do not have enough internal resources to manage all the third-party risks they face (KPMG, 2020).

As a means of limiting the scope of third-party integrity risk management adopted by companies, ISO 37001 (2016) recommends that in order to have an effective anti-bribery

management system, a company should implement due diligence procedures prior to the hiring of third parties and transfers and promotion of internal personnel that represent a bribery risk above a low threshold. The standard, the first internationally recognised anti-bribery standard, uses this same minimum risk threshold as a criterion for implementing the other procedures to prevent bribery from occurring (ISO, 2016).

The Global Pact (2016) also encourages cooperation among contracting companies, through collective actions, to provide the necessary conditions for more honest business. By adopting common standards and practices and monitoring compliance, companies improve leverage in the fight against corruption and contribute to market efficiency, as suppliers will not encounter conflicting requirements. Moreover, with collective actions during procurement processes, suppliers can minimise and contain companies tempted to act corruptly for short-term gain or quick profit.

The Corruption Risk Assessment Guide (UNGP, 2013) highlights the importance in having well-defined responsibilities and leadership in corruption risk assessments, which should include support from governance bodies such as senior executives on the board of directors and the audit committee. Without this high-level support, the implementation of the response plan may stall, as certain functions and individuals may not give the required importance and attention to the items in the response plan. In addition, it may be beneficial for the corruption risk assessor to liaise with various stakeholders, because implementing the steps in the response plan can benefit them individually and as a group.

• **METHODOLOGY**

The present research focuses on the assessment of integrity risk in the relationship with suppliers so as to identify weaknesses within organisations that might lead to the occurrence of fraud and acts of corruption based on an experience conducted by the authors at a utilities company listed on the Brazilian stock exchange.

To achieve the proposed objectives, the selected research design was the case study since this is a methodological research approach used when one seeks to understand, investigate or report on complex events and contexts (Yin, 2001).

According to Yin (2001), the choice of the case study method is intended to:

- Explain causal links in real-life interventions that are too complex for experimental strategies or those used in surveys;
- Describe an intervention and the real-life context in which it occurred;

- Illustrate certain topics within an evaluation, sometimes descriptively;
- Explore situations where the intervention being evaluated does not have a simple and clear set of outcomes.

Research has a pragmatic nature and is a formal and systematic process of development of the scientific method (GIL, 1999). According to Oliveira et al. (2006), both qualitative and quantitative research have advantages and disadvantages, the choice of which method to follow must be based on the objectives and research question proposed in the research.

One opted for the hypothetical-deductive perspective that emphasizes universal laws of cause and effect in an explanatory model in which reality consists of a world of objectively defined facts (ALI; BIRLEY, 1999).

According to Yin (2001), there are many useful and important techniques, and they should be used to arrange the evidence in some order before actually carrying out the analysis. Furthermore, preliminary manipulations of data such as these are a way to overcome the problem of research becoming stagnant, mentioned above. At the same time, manipulations should be carried out with extreme care to avoid biased results. The most important aspect is to have an overall analytical strategy first. The ultimate goal of this is to treat evidence in a fair way, produce irrefutable analytical conclusions and eliminate alternative interpretations.

According to Gil (1995), case studies do not accept a rigid script for their delimitation, but it is possible to define four phases that show their description: (a) delimitation of the case-unit; (b) data collection; (c) selection, analysis and interpretation of data; (d) preparation of the report.

The unit chosen for the present case study is the degree of integrity risk in supplier relationships. Data were collected by means of a quantitative data collection procedure. Data selection considered the objectives of the research, its limits and the set of references to assess which data would be useful or not for the chosen analysis plan. Analysis categories derived from the theoretical framework presented were used. For the preparation of the reports, it was specified how data was collected; which theory was the basis for their categorization and the demonstration of the validity and reliability of the data obtained.

It is understood that if the case studies presented are eminently quantitative in nature (use of quantitative methods for data collection), triangulation would not be part of the research protocol (CESAR; ANTUNES; VIDAL, 2010).

The data used for the research was obtained between November 2021 and March 2022, part of it extracted from the company's own website and another part obtained internally. In

addition to quantitative data, percentages and graphs were generated and presented in the following section.

- **ANALYSIS OF THE COLLECTED DATA**

The case study was conducted in a corporation with shares at B3 (Brazilian Stock Exchange), belonging to a group of companies that operate in the Brazilian energy sector and with a Compliance Programme recognised by institutions specialized in the theme.

Among the initiatives set forth in the Compliance Programme of the analysed company, there is the adoption of diligences prior to the promotion process of employees, as well as the appointment of representatives in governance bodies in the company itself, in affiliates, subsidiaries and other companies in which they hold equity interests. In addition, the due diligence process is also applied before signing legal instruments with suppliers and business partners, as well as for donations, agreements, sponsorships, social projects and partnership in research, development and innovation (R&D+I) projects.

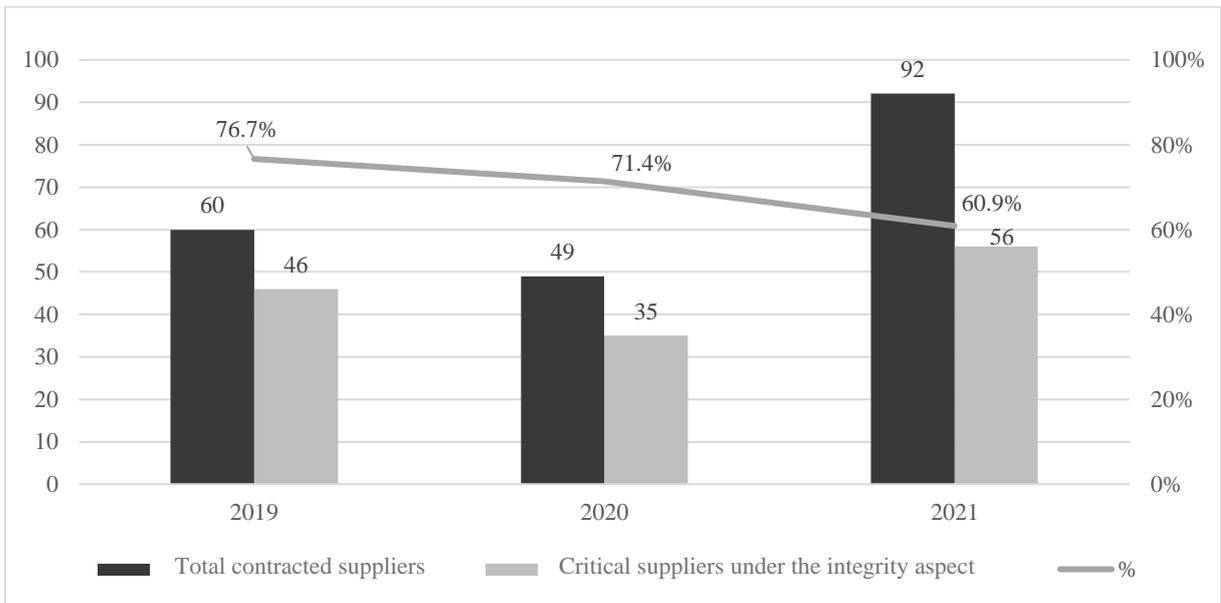
For the purposes of this article, the steps taken with the third-party supplier were observed, from the measures involved during negotiation to the monitoring actions planned during the contract enforcement, depending on the risk classification obtained for the third party. The set of such initiatives, called integrity assessment, was created in 2018 and aims to identify, analyse, classify the integrity risk and monitor the supplier.

Given the extensive supply chain of the company analysed, the integrity assessment process for suppliers is conducted only for those who, according to internal methodology, appear to be most exposed to integrity risks, whether due to illegal acts that may directly involve the contract in question or other relationships conducted in the marketplace that could cause damage to the contracting company's image.

The decision, therefore, to conduct an integrity evaluation with the supplier in the contracting process occurs when at least one of the following criteria is met: contract involving a financial amount for which the company's Board of Directors is responsible for approval, contracting a public official and contracting a service classified internally as having a high integrity risk.

To fit into the latter criterion, the contracting should provide for financial services, legal services, consulting services in general, information technology and software development services, outsourcing of continuous services with allocated labour, advertising, engineering works and services or the activities of people with the power to represent the contracting company (customs brokers, auctioneers and lawyers).

In analysing the data obtained in the case study, set out in the following graph, among the hirings conducted in the years 2019, 2020 and 2021, approximately 76.7%, 71.4% and 60.9% of the suppliers contracted respectively in the years analysed were subject to the integrity assessment for belonging to at least one of the criteria described. The results show that the company prefers to analyse its supply chain to learn about and monitor the integrity risk of only a group of suppliers that meet criteria reflecting greater exposure to the occurrence of illicit acts.



Graph 1: Evolution of critical contracting under the integrity aspect

Source: Authors

Companies in the contracting process that meet at least one of the criteria described above are then subjected to an integrity assessment. The process begins with the third party completing a due diligence form to ascertain the relationships of the legal entity and its administrators with public agencies and agents and with employees of the contracting company; the existence of any history of accusations or convictions of the third party in cases related to fraud and corruption; and the existence of a compliance programme with a channel for complaints, code of ethics and other measures aimed at preventing the occurrence of illicit acts by the third party.

Based on the responses obtained in the due diligence form, the integrity of the supplier is analysed and, if relevant alert points are identified, a complementary analysis is conducted

through research in a proprietary background check tool, where public data, such as certificates, legal and civil proceedings, family relationships and shareholdings are verified.

Based on the history obtained, among the companies that participated in the first stage of the integrity assessment process, i.e., those that completed the due diligence form, approximately 26% presented relevant alert points that justified the complementary analysis. Despite the possibility that the questionnaire may contain incorrect information, either due to omission or carelessness in its completion by suppliers in the contracting process, the method used, by subjecting only a group of suppliers to an in-depth analysis, directs the efforts to be adopted by the contracting company.

The result of these analyses generates a classification of the supplier's integrity risk based on a standardized dosimetry, ranging from low, medium, high or very high.

Finally, in accordance with the supplier's degree of risk, an action plan is defined with activities to prevent the occurrence of fraud and corruption in the relationship with the contracting enterprise, as well as to monitor its external performance so as not to cause damage to its image.

Among the planned actions, selected depending on the degree of risk obtained in the analysis of the supplier, are the obligation to undergo training in compliance by the contract managers and inspectors, the inclusion of the supplier in the awareness raising activities offered by the company and the auditing of contracts to verify conformity in payments and in the provision of services. In addition, the integrity clauses to be included in contracts are chosen depending on the risk classification. These include a commitment by the supplier to know and comply with the guidelines established in the company's Compliance Programme, the obligation to complete a due diligence form and any additional information that may be requested, the possibility of terminating the contract in the event of evidence of irregularities and even the possibility of auditing the supplier, with access to the books, records and accounting of assets.

• **RESULTS AND CONCLUSIONS**

The limitations of the methodologies presented for due diligence with third parties show that the prevention of fraud and corruption by the organisations cannot be summarized by simplistic and automatic processes. At the same time, as part of the corporate context that seeks the balance between the financial and the adoption of good market practices, the compliance teams must be structured so as not to bring excessive rigidity in the work processes and neither excessive monitoring costs.

Thus, greater effectiveness in relations with third parties is suggested when the company chooses to adopt criteria and strategies in a considered manner and focus on those third parties most exposed to integrity risk. By limiting the scope of third parties to be monitored, the company has a robust and appropriate capacity to monitor its relationships, as well as greater chances to react quickly and appropriately when third parties are suspected of wrongdoing.

This article is not intended to be exhaustive since case studies alone cannot be generalized and components of an integrity risk assessment vary according to the economic sector, size, scope, geographic reach and other factors inherent to each organisation.

As this is still a recent topic within the context of organisations, the adoption of due diligence and monitoring of third parties are fields of study with opportunities for development. It is expected that, with the research carried out in this article, the academia can advance in the discussions of the proposed theme, testing new data to confirm the propositions made here, as well as associating them to the occurrence of irregularities by the assessed third parties. Quantitative comparisons between the number of companies adopting due diligence on third parties and the occurrence of illicit acts could prove to be a way to advance in verifying the effectiveness of integrity assessments. Finally, new methodologies for conducting due diligence that overcome the limitations suggested here are also opportunities for research.

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CHAPTER VII

COMPLIANCE
DIALOGUES



CONFLICT MANAGEMENT AS A PILLAR OF COMPLIANCE PROGRAMMES IN PRIVACY

Guilherme Hernandes Sicuto¹²

Abstract

The origin of the regulations on privacy and data protection inaugurates a new form of legal relationship between public or private institutions that carry out processing activities and the citizens to whom the information refers. It must be considered, however, that the issue of privacy, although present in society's discussions, still requires efforts to be incorporated into the social fabric as a concrete value. In this scenario of cultural decantation of the subject, institutions invariably find themselves faced with the following need: understand the interests of the data subjects and third parties involved and, consequently, identify the use of resources, assertively, in order to protect their rights and maintain the relationship with other parties. In this way, the composition of a privacy programme must consider, in addition to regulatory compliance, the approach to conflicts with the aim of avoiding them and, alternatively, providing opportunities for their management. Thus, this research will identify the advantages of applying knowledge related to the field of conflict in compliance actions and, finally, the indication of strategies for the prevention and management of privacy conflicts.

Keywords: privacy and data protection; privacy and data protection compliance programme; legal data processing relationships; privacy conflicts; conflict prevention and management.

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1 INTRODUCTION

The practice of adapting institutions and maintaining actions for privacy compliance demonstrates the need, on the part of processing agents, for a greater understanding of the interests of data subjects and possible developments in the scenario of divergences, including for the measurement of risks and assertive application of resources.

Thus, the present research, of a descriptive nature and developed through the theoretical-empirical method, aims to present the intersection between *conflictology* and the management of a privacy compliance programme, the analysis of macro scenarios of relationship and potential conflicts, as well as the consideration of the application of prevention techniques and the possible benefits for personal data processing agents.

2 PRIVACY REGULATIONS AND NEW LEGAL RELATIONSHIPS

The quest to guarantee data protection has received significant social support, as it invites discussion of issues necessary for everyday life, such as the effects of the advances in innovation already experienced by society or to come and their interrelation with the privacy of citizens. According to a forecast prepared by the company Gartner (2021), it is estimated that in 2023, 75% of the world's population will be subject to some regulation in this area, a result observed by the recent formalisations of the European GDPR (General Data Protection Regulation), followed by the Brazilian LGPD (General Data Protection Law) and the CCPA (California Consumer Privacy Act).

While each regulation has its own aspects, which end up expressing the political context of its people at a given historical moment, these legal norms aim to guarantee minimum rights to data subjects regarding the processing of their personal data. It is important to note that the movement to regulate the subject has generated important developments: first, the reaffirmation of the protection of individual rights, pre-existing in legal systems, and the possibility of implementing control measures. Examples are the guarantees of image protection, the right to privacy and the right to honour, guaranteed, for example, by the Charter of Fundamental Rights of the European Union. The second development would be the motivation for the affirmation of new rights related to the subject, such as the inclusion of data protection as a fundamental guarantee in the Brazilian Constitution in 2022.

In the same sense, the existence of laws that aim to regulate the use of personal data results in the legitimisation of this act. In contrast to the context prior to the criteria governing the processing of data, the legislation in force ends up validating processing activities, which

come to constitute legal relationships between the data subjects and the data subjects to whom the information refers. In this context, the scenario of processing and, at the same time, the exposure of the data controller to events arising from such relationships is widened.

It is also necessary to consider that the relationships that are established through the processing of personal data present a transversal characteristic with respect to issues already decanted in the multiple legal systems. It is explained: the processing of data can be the initial factor of formalisation of a relationship and its respective rights and duties (for example, in situations in which information is collected legitimately for the purpose of prospecting for new clients) or it can be presented as a complementary attribute to those instituted between processing agents and data subjects, as in consumer or labour relations, or even in the provision of public services to society.

Thus, it is possible to identify a complex regulatory scenario that addresses not only rules of conduct and limitations to the activities carried out, but also motivates a context in which the monitoring and use of effective measures for the maintenance of legal relationships or the treatment of conflicts derived from them is an important differential to mitigate privacy risks.

3 PRIVACY CONFLICTS

Having made the initial considerations on the context of privacy and the consequent reaffirmation of interests in the protection of personal data, this scenario and its consequences will be addressed, from the point of view of conflicts, derived from this movement for the protection of rights.

The phenomenon of "conflict" has multiple meanings, considering the perspective of the different branches of human knowledge. Refraining from the pretension of exhaustively evaluating the possible concepts, we will establish, for the development of further reflections, the idea of conflict as "a social process that results among other variables from divergences in communication or differences of interests, which provoke behaviours and exchange decisions" (Maglianesi & Coppa, 2018).

According to this guideline, conflicts are consequences of social interactions that represent, as a main or subsidiary factor, the existence of conflicting interests in terms of values, needs or even resources. The context in which power differences between related parties are grounded can also be a vector of conflict identification (Xifra, 2009).

It is pertinent to consider that conflict, although it initially raises the idea of aversion, due to its divergent nature, can be understood as an opportunity for a better understanding of

the interests embedded in their own contexts and, consequently, a propellant of changes necessary for the maintenance and evolution of the relationships that compose them.

The transposition of conflict studies to the scenario of data protection discussions is in line with the initial idea that there is a close correlation between the institutes of recognition of rights and the possibility of their exercise. It should be noted that, regardless of the existence of a legal norm regulating the various legal relations, interests exist separately and prior to regulation, as they result directly from social dynamics. However, with the affirmation of the right to privacy, such interests receive, in addition to the status of a protected legal object, the formalisation of instruments of safeguarding, repair and control.

In this sense, *conflictology* finds fruitful scope under different perspectives, such as the relationship of processing agents with data subjects and the exercise of their rights, the dialogue with control and regulatory bodies, and the conduct of business with commercial partners in privacy matters. While the above-mentioned contexts are intended to be detailed when presenting the topic of privacy conflict management, such an approach is important so that, in the future, the strategy perspective in dealing with disputes can be pointed out.

4 CONFLICT MANAGEMENT METHODS

Considering the relevance of the intersection between the issues assessed, a brief explanation of the activity of *conflictology* practitioners is missing. Initially, it is important that there is a mapping of circumstances of divergence of interests, the identification of the impacts experienced by the parties and the escalation factors of disputes, the recognition of the procedures available for resolution and the methodologies and tools that can be used in each case.

Among the methods, the following are highlighted for dealing with conflicts of interest in general: jurisdiction, arbitration, negotiation, conciliation and mediation. The first two have a hetero-compositional character, as they propose a form of guardianship in which "the third party imposes the decision on those who come to it to achieve a solution, in which the subjects do not take an interested party, since it is the decision of the third party in the same conflict" (Barona, 2013, p.65). The third party who has the decision can be a judge (for jurisdiction) or an arbitrator (for arbitration).

The other methods have a self-compositional character, as the parties involved in the divergence are the ones in charge of reaching a resolution of the conflict. Negotiation is conceptualised as "a process of interaction between two or more parties for the purpose of

reaching an agreement on some exchange, or an agreement aimed at achieving common interests in a situation where there are conflicting interests" (Iklé, 1964).

In turn, conciliation has the idea of a mechanism of self-composition on available rights, with primacy of the autonomy of the will, so that the parties reach a consensus on a situation, before a judge or other judicial authority, with the aim of avoiding or ending a court case (Reales, 2013). Although it takes place before a public agent, conciliation departs from the concept of mediation because of the role of this third party.

In this method, "the mediator is a facilitator, who guides the parties through an open exploration of their interests and options, acting as a process manager. In other words, mediation is a process involving a third party, who is not interested in the issue, and who, without offering a solution, helps the parties in their concessions to reach a point of agreement" (Domenici & Littlejohn, 2001, p.33).

The appropriate methodology requires the analysis of the conflict, its causes, and the structuring of a mitigation plan and, when it arises, the necessary treatment to preserve the interests and eventual relationship between the parties, achieving not only legal compliance but also strengthening trust between them.

To this end, privacy compliance programmes should have as one of their thematic priorities the action in the context of conflict, so that the parameters of application of the laws are also sensitive to the perception of the rights established by them.

5 GOVERNANCE AND LEGAL ADEQUACY SYSTEM

In order for the regulatory needs and interests related to the issue of privacy to be met, it is necessary for processing agents to establish actions that pursue this end. Thus, corporate governance, understood by the Instituto Brasileiro de Governança Corporativa (2022) as a system through which organisations are directed, monitored and encouraged to achieve predetermined objectives, can be a relevant approach to building a privacy agenda.

The systemic idea attributed to the concept of governance, which influences the conduct of the activities of a privacy programme, conceives the existence of a composition by agents, linked through responsibilities and to whom objectives are intended, always seeking feedback of information between them, according to the situations experienced.

As an illustration of the identification of these responsibilities, the scenario in which some departments are involved in complying with the regulations is proposed as an example, considering the multidisciplinary nature inherent to the same: for the contracting of a new supplier, the purchasing area is responsible for the initial gathering of information on

compliance with the applicable regulations; the privacy team maps the processing activities and assesses the maturity level of the third party; the information security department is dedicated to the implementation of the necessary measures and controls; and the compliance department proceeds to the identification and monitoring of vulnerabilities that cannot be fully mitigated.

Although simplified for didactic purposes, the flow of activities described above represents the actions necessary to achieve some objectives of a privacy programme, linked to the exchange of data with third parties, such as their preliminary assessment, prevention of non-conformities, parameterisation of responsibilities and the measurement, monitoring and mitigation of regulatory risks. This systemic view is essential for controls to be implemented and for companies to effectively target compliance measures, complemented by the pursuit of internal process improvement and brand building opportunities through increased market and consumer confidence.

Given their notorious complexity, organisations end up implementing so-called privacy frameworks, which, in literal translation, mean working methodologies. In other words, a framework contemplates ways of organising a certain topic, in a didactic way, that allow for better visibility on obligations and the institution of controls for the demonstration of compliance (Blum, Vainzof & Moraes, 2020).

According to the survey conducted by the International Association of Privacy Professionals (IAPP), and EY (2022), in its Privacy Governance Annual Report 2021, 28% of the companies interviewed use the privacy framework provided by the National Institute of Standards and Technology (NIST), an agency of the US Department of Commerce.

This methodology addresses the following pillars: identification, which presupposes the mapping of activities and identification of the regulatory and risk context; governance, which is responsible for the construction and management of policies, processes and procedures and institutional training; control, which directs implementation and monitoring activities; communication, which translates into the need for openness and transparency; protection, which provides for the application of technical and administrative measures for the protection of personal data (NIST, 2020).

Different frameworks are equally recognised in the corporate context and may address, more broadly or specifically, general privacy issues (e.g., the ISO 27701 standard or the AICPA privacy management framework) or specifications on specific topics (such as the renowned privacy by design and the Canadian privacy maturity model).

However, while comprehensively addressing internal organisational needs and defining responsibilities for legal compliance, these frameworks do not directly address the *conflictology*

issues discussed above in their methodology. In what follows, we discuss the intersection of these two issues in order to seek clarification of their initial provocation: the relevance of conflict management in the methodological approach of a privacy programme.

6 CONFLICT MANAGEMENT AS A PILLAR OF A PRIVACY COMPLIANCE PROGRAMME

Initially, it is proposed to align with the premises of building a privacy compliance programme, especially with regard to the institutional objectives that are intended to be achieved as a result of its implementation. It is essential to identify the privacy standards applicable to the activities of a given company, as well as to understand the stakeholders involved, i.e., internal agents of the business organisation, external agents, customers, agencies and institutions related to the privacy issue that must be considered for the parameterisation of actions and responsibilities (Densmore, 2019).

In addition to the above premises, it is imperative to consider, from a final perspective, the objectives intended by the formalisation of privacy laws. In this sense, it seems that, to a large extent, current regulations institute legal systems of mixed protection (Puig, 2019), i.e., the regulatory content provides for both public and private protections at the same time.

In terms of public protection, measures for receiving complaints, investigating, conducting administrative proceedings and applying sanctions can be implemented by bodies that have the power to do so.

With regard to the private protection of the right to privacy, some nuances can be observed when it comes to its application and, consequently, with regard to the relevance of attention in the perspective of a privacy programme. The first is demonstrated by the implementation of the principle of informed self-determination, common to the different laws, through the formalisation of data subjects' rights (e.g., rights of access, rectification, limitation of processing, erasure of data, portability, objection and review of automated decisions).

The second point is the possibility for data subjects, having established the irregular processing of their personal data, to claim compensation for the damages suffered. This provision, generally entrusted to the judiciary and its respective procedural systems, is complex in the sense of harmonising the search for punitive claims, the applicable legal measures and the organisation around the reception of claims of different nature (civil, labour, consumer rights).

Finally, a system of accountability among processing agents is also possible, especially in the rules that delimit the prerogatives and burdens of controllers and operators of activities

involving personal data. In this sense, protection permeates the business relationship from its negotiation and preliminary risk assessment, and touches upon the liability regime and future divergences for the execution of the compliance activities determined therein.

It is therefore interesting that the design of a privacy programme's chain of responsibility supports not only the understanding of the regulatory and policy context, the data processing activities, the possible impacts of non-compliance and the ongoing building of a new corporate culture, but also can anticipate situations of conflict between the processing actor and the different data subjects and treat them appropriately, in order to address legal concerns and protect their own interests.

7 APPROACHING THE PRACTICE OF CONFLICTOLOGY

Having overcome the approximations regarding the context of the emergence of new legal relationships of data processing, the legitimisation of multiple interests derived from the regulations, as well as the relevance of considering the issue of conflict prevention and management as a topic of confrontation in the field of privacy compliance programmes, some reflections will be presented, based on experiences in the implementation and conduct of compliance actions, on the opportunities of applying *conflictology* techniques.

Furthermore, the focus of this article is limited to the context of the management of privacy issues under the responsibility and powers of a compliance programme and is not intended to assess the strict scenario of data remediation claims arising from processing activities. Notwithstanding this, it is clear that such indicators, especially those from legal metrics studies, can serve as a monitoring object and provide insight into the privacy manager's need to adjust parameters.

After considering the thematic approach, it is important to point out that the methodological application of conflict prevention has a cross-cutting nature in relation to the multiple themes of a privacy framework, so that the analysis of implementation will be carried out according to thematic axes.

Conflicts in relation to data subjects

A priori, the invitation to reflect on the impact of conflicts in privacy leads one to think about the divergences between data controllers and data subjects. Indeed, the recognition of data protection rights and the obligation of care, including the indication of deadlines and tools to do so, shows the importance of self-determination mechanisms in personal data and highlights such risks of litigation.

In the field of conflicts, these relationship dynamics are useful for the implementation of conflict prevention methods. The first moment when such intelligence can be applied coincides with the situation where the legal impact starts: the collection of personal data. Considering the premises and peculiarities of the laws in force, the data subject must be guaranteed sufficient information to understand the limits, purposes and impacts of the processing of his or her data. For example, the European General Regulation delimits the content of transparency in its articles 13 and 14, reserving minimum information in contexts in which data have been collected directly or indirectly in relation to the data subject.

From the point of view of *conflictology*, it is possible to provide insights into the way in which such information should be provided. This is because conflict management can be interpreted according to the way in which the parties communicate and therefore the form of expression can influence whether or not the conflict exists. The idea that all conflict, as a social process, originates, in addition to the conflict of interests, divergence in communication (Maglianesi & Coppa, 2018), indicates the equivalence of the relevance of both content and form being strategically aligned so that the legal object, the knowledge about the treatment, is produced in a way that harmonises interests.

After the start of the processing, and throughout the life cycle of the data in the controller's databases, there is the possibility for the data subject to express his or her interests related to the relationship, through the exercise of privacy rights. At this point, in addition to the implementation of means for effective communication and assistance (such as providing the controller and channel of communication, the time limits for assistance and the guarantee that the procedure will be free of charge), it is necessary that there is an objective that stands out: the understanding and satisfaction, where possible, of the real interests of the data subject.

Considering that the issue of privacy, although discussed and regulated for decades in some regions, it still lacks internalisation in the culture of many populations, it is clear that citizens are still unclear about their rights and, above all, about the consequences of exercising their rights.

For example, in situations in which the responsible carries out periodic communications to offer products to its customers and one of the data subjects, motivated by an interest in the cessation of such communications, requests the erasure of his or her personal data. In this regard, the consequences of the request made, i.e., the termination of the entire relationship with that company, appear to be much more burdensome than the one actually sought by the data subject (cessation of commercial activity), which could be achieved by exercising the right to object.

In this context, it is essential that the routines of attention to the licensees are built on the premise of discourse analysis, so that the real interest of the claimants is extracted and that, to some extent, the application of negotiation actions can take place. Such a stance not only allows educational measures to be taken to increase social awareness of the applicable regulations, but also demonstrates the good faith of the agent in understanding the objectives, reaffirming the bonds of probity in their relationship and, effectively, seeking the self-determination of citizens.

Conflicts in relation to third parties

Privacy rules establish, to a greater or lesser degree, aspects of co-responsibility between actors engaged in the shared processing of personal data, a situation that is binding in the context, but not sufficient to align the interests that each party can defend.

Prior compliance assessments and the design of partnerships carry out important negotiation actions prior to the processing of personal data. Such negotiations end up defining responsibilities according to the objectives and values provided by the contracting parties. They include, for example, essential issues such as characterisation of control and operation, limitation of processing activities and intended purposes, necessary security measures, issues related to international transfer, auditing and even accountability to third parties.

In addition to the examples given above, there are some developments in the execution of contract activities, such as the responsibility to make resources available for the enforcement of data subjects' rights and the effectiveness, by an operator, of decisions taken by the processor in confirming a right; commitment and accountability for the actions of subcontractors, especially in contexts of access, deletion and discontinuation of activities; providing assertive and timely information on security incidents so that the processor can make the necessary assessments and communicate, where appropriate, to the supervisory authority and data subjects within the legal deadlines; the ways of demonstrating evidence at the conclusion of the contract and the need for the operator to demonstrate the effective deletion or return of all personal data processed.

Therefore, the parameterisation of responsibilities and interests between processing agents is important as a way to identify points of risk in conflicts and, proactively, to adopt measures for their mitigation.

Conflict management and the relationship with regulatory authorities

While stressing the importance of conflict management in the scope of administrative procedures that fall under the competence of regulatory authorities in terms of imposing disciplinary measures, the development of safeguards in the conflict prevention bias may be the differential in the exercise of activities or in the severity with which fines or abstentions may be imposed.

Inspection activity can be initiated in a number of ways, such as proactive investigation, reporting by cooperating entities or even complaints to the authorities. In this last path, reflections on the application of conflict management methodologies will be presented. The first criterion is in the sense that some regulations, for example, the Brazilian one, determine that the authority will only accept complaints from data subjects when the admissibility requirement of the direct solution attempt is demonstrated (article 55-J, V of the LGPD).

In other words, the condition that the authority considers the complaint after demonstrating the attempt to resolve the conflict directly with the controller represents an important incentive for means of self-composition. The Spanish Law on the Protection of Personal Data and Guarantee of Digital Rights also provides for verification of the submission of the dispute prior to the initiation of the sanctioning procedure (Article 65(4)). It can be seen, therefore, that rules exist so that the search for proactive solutions to conflicts is considered and, to a certain extent, privileged.

In addition, advantages may be granted to companies that adopt, as a way of repairing damages resulting from breaches of privacy laws, measures for out-of-court settlement of disputes. According to the Spanish experience, some supporting criteria can be assessed for the application of administrative sanctions, among them, the submission of the situation, voluntarily, to alternative dispute resolution mechanisms (art. 76. 2, h).

Brazilian legislation, in addition to honouring the search for a peaceful solution to conflicts by instituting the parameter of minimisation of the penalty for those agents who demonstrate the adoption of internal mechanisms and procedures for the minimisation and reparation of damage (art. 52, §1 VIII), institutes the legal figure of exclusion of administrative liability (Sicuto, 2020). In the specific context of security incidents, when it is demonstrated that the national data protection authority reaches an agreement, in the framework of conciliation, between the operator and the affected subjects, it is impossible to apply administrative sanctions to the controller (Art. 52, § 7 of the GDPR).

Thus, it is possible to visualise the potential of conflict resolution strategies to be applied to the approach of a privacy compliance programme also in order to, in due course, make the

case to regulators to not only protect the interests of the parties, but also to seek the legal benefits conferred by the privacy rules.

8 CONCLUSION

Privacy and data protection are proving to be important issues for their recognition as fundamental rights and, increasingly, they serve as a basis for the legitimisation of legal relationships between data processing agents and data subjects and the claims of the parties to them. Thus, it is essential that, when designing a compliance programme that seeks to comply with regulatory requirements, companies also consider as a premise the pursuit of protected rights, especially that of informed self-determination.

Therefore, the composition of privacy frameworks should contemplate the application of *conflictology* techniques in order to identify points of conflict between their activities, as well as strategies that can be internalised in the procedures and interactions with data subjects, third parties and competent authorities, for the prevention or, if necessary, the effective management of disputes.

In addition to mitigating privacy risks, the integration of conflict management in the privacy work methodology allows the real interests of the parties involved to be addressed, thus generating an adjusted visibility of the reality in which the processing agent is inserted, in addition to the possibility of parameterising efforts and seeking better relations with the different stakeholders.

Finally, there are benefits guaranteed by privacy rules for actors who proactively seek to use self-composition methods to resolve disputes. This is a way to privilege a dialogue-based approach, legitimising the self-determination of data subjects for the resolution of specific circumstances, as well as seeking to bring the mindset in line with the procedural reality of our time and to make the improvement of the relationship a driver for the construction of a society that is aware of and committed to the protection of personal data and the guarantee of privacy.

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CHAPTER VIII

COMPLIANCE
DIALOGUES



COMPLIANCE AS AN ALTERNATIVE INSTRUMENT FOR THE PROTECTION OF HUMAN RIGHTS AND THE INEFFECTIVENESS OF DECREE NO. 9.571/2018

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Abstract

With the advancement of globalisation, economic and technological processes, and the disruption of obsolete social standards, it is no longer acceptable for corporations to seek their development and profits without observing the pertinent aspects of the human condition, which have their guiding principles established by the United Nations Human Rights Council. Thus, in order to encourage the adoption of good practices in Human Rights by national and multinational companies, the Decree No. 9.571/2018 established the guidelines for implementing Human Rights Compliance programmes in organisations. This study analyses Decree No. 9.571/2018 and demonstrates the importance of implementing Human Rights Compliance programmes, which, in addition to providing protection and encouragement to Human Rights in the corporate-business environment, may positively influence the results and reputation of businesses in the market. While some companies are adopting Human Rights policies, from a Corporate Social Responsibility perspective, the decree under analysis is optional and does not provide an incentive for companies to implement Human Rights Compliance programmes, resulting in a guideline without practical effectiveness.

Keywords: Compliance; Human rights; Corporate Social Responsibility; Decree No. 9.571

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1 INTRODUCTION: COMPANIES, HUMAN RIGHTS AND A HISTORICAL OVERVIEW OF VIOLATIONS

In the 21st century, companies play an important role in the globalised and economically competitive world, whose circumstances aim at the search for profits - in their own countries or in their foreign subsidiaries. In contrast, they exercise a precarious role in relation to labour and social issues, in such a way that implies the violation of Human Rights or criminal legal goods (SÁNCHEZ, 2020, p. 65-66).

This is because the transformations caused in society require a better contextualization of the protected legal goods, since they were not part of the political discussion agendas that began to be perceived from the development of technologies and the heating of industrial activity, i.e., legal protection no longer acts only in the context of essentially individual interests, but now requires the protection of supra-individual, diffuse legal goods, which deal with the preservation of the environment, the economy and public health (LOUREIRO, 2017, 37).

Beyond corporate crimes, the involvement of companies in human rights violations does not come as a novelty, since many organisations have had relations with questionable practices under this focus. Thus, even if they are oscillating, the studies on the criminalization of socially harmful corporate behaviour began to contemplate the violation of Human Rights in the corporate sphere (SAAD-DINIZ, 2019, 185).

One of the best-known cases of human rights violations committed by business organisations occurred during World War II, when several companies, from the most varied branches, assisted the Nazi administration in the process of spoliation of victims mostly from Jewish communities. In addition, the companies took advantage of slave labour, establishing factories and creating labour camps, such as Auschwitz III (also known as *Monowitz*), which supplied prisoners to work in a rubber industry. The historical-investigative process carried out by academics and the documentation drawn from the archives of the current Auschwitz-Birkenau Museum revealed that companies had no problem with using slave labour for profit.

In addition to direct involvement in crimes of genocide, there are also accusations against companies involved in ethnic cleansing, extrajudicial executions, torture, rape and the destruction of civilian homes. As is the case in Darfur, Sudan (COSTA; SILVA, 2018, p. 16) and also, the accusation against a financial institution of having financed arms to the government of Rwanda that, in 1994, promoted genocide against ethnic groups of that country (OLIVEIRA, 2019, p. 438).

Regarding the Brazilian reality, the National Truth Commission, created in 2011 through Law No. 12.528, investigated and reported the direct participation of several companies, including a state-owned company, in the military coup of 1964 and the subsequent dictatorship that lasted until 1985. In this way, the business organisations contributed to the repression imposed by the Military Government, through financing, supplying equipment and food to the armed forces. Moreover, inside the factories there was the physical presence of government agents, and the repression and denunciation of those workers considered subversive was highly encouraged. The consequence was persecution, torture and, in many cases, some were put to death (COSTA; SILVA, 2018, p. 22-26).

In this sense, the phenomenon of corporate delinquency and defective management brought (and brings) damage to democracy, the environment and human dignity, so that illegal conducts tend to affect security and Human Rights (SANCHEZ, 2020, p. 90).

Considering this, the historical synthesis shows that, even after the internationalization of human rights, concomitant to the creation and agreement of standards and instruments that strengthen the role of business organisations, it was glimpsed, in fact, the participation of many companies in emblematic cases of destabilisation of political institutions and human rights violations.

Besides the historical digression, presented in this chapter, this research will be divided into three main axes. In the first part, the evolution of International Human Rights Law will be highlighted, with regard to the inclusion of business organisations in the responsibility for the protection and promotion of human rights. Subsequently, there will be the contextualization of the Compliance instrument for the enforcement of human rights policies, specifically in the corporate environment. Finally, we will address the nature of decree no. 9.571/2018 and its ineffectiveness in guaranteeing human rights within the corporate environment.

2 BUSINESS ORGANISATIONS AS ACTORS IN THE PROTECTION AND PROMOTION OF HUMAN RIGHTS

Until the early twentieth century, it was understood that the duty to protect human rights was a state competence, while the responsibility of companies towards their employees and society was reduced to a philanthropic, religious and paternalistic perspective, headed by the leaders of corporations (MANCINI, 2019, 280).

The Universal Declaration of 1948 - ratified in the Vienna Declaration of Human Rights (1993) -, established the ownership of rights and directed efforts towards the reconstruction of a human rights perspective, based on an ethical reference to guide the international order, since

these rights were imploded during World Wars I and II. It is in this scenario that the conception that human rights are not a demand that should be reduced only to the role of States' actions was strengthened, but are universal and indivisible rights that require international protection and legitimacy (PIOVESAN, 2018, p. 236).

In a perspective of collective and generic perception, it is common to disassociate companies from human rights, understanding that their protection and promotion is a duty that falls solely and exclusively to the State. However, such understanding is not pertinent, since business organisms, besides exercising a private activity that is essential for the economic activity of a country, are also actors in the promotion of Human Rights due to the relationship they have with consumers, with commercial partners, employees and service providers, governments, among other members of their productive chain.

As an illustration of the expansion of corporate activities, Flávia Piovesan points out that of the 100 world economies, only 31 are States, the rest being multinationals that have revenues that exceed the Gross Domestic Product (GDP) of Countries, so that the accelerated expansion of the globalization process brings impacts on social, cultural and political contexts, reason why, it is necessary to understand the existence of new international actors, such as non-governmental organisations (NGOs), international organisations, individuals and transnational companies (PIOVESAN, 2018, p. 233-234).

Although international organisations, especially the International Labour Organisation (ILO), consider human labour as essential for the construction of their dignity as a guiding principle, from the Oil crisis (1973), corporations have become sources of political and economic decisions and there is a realization of the failure of the Welfare State, so that the regulatory and supervisory role of the State began to suffer from the influences of international financial institutions. In this perspective, the participation of countries and companies in the international market became regulated by a neo-liberal primer determined by organisations such as the World Bank, the International Monetary Fund, the World Trade Organisation and the Organisation for Economic Cooperation and Development. Thus, as globalization processes advanced, there was a reduction in social rights to the extent that neoliberal guidelines were defined by national states interested in private investments (PEREIRA; RODRIGUES, 2021, p. 75).

In this sense, this process of expansion of business organisations, often encouraged by the states themselves, increasingly reveals the influence that these organisations have on individuals, since the services and products provided by business entities help improve people's

quality of life, since they acquire a new degree of responsibility for the protection and development of human rights.

However, with corporate expansionism, especially in the 1990s, the representativeness of the States began to be questioned and pressured. Mainly because of the scenario of state dependence on economic power, which revealed its negligence in relation to the issue of norms for the protection and promotion of human rights. This became (wrongly) associated with partisan and ideological issues - thus fragmenting the social fabric and putting at risk the most vulnerable populations, such as women, black people, indigenous people and LGBTQIA+ (PEREIRA; RODRIGUES, 2021, p. 76).

Although the United Nations Organisation, since 1972, and other international organisations sought to establish an agenda that related companies and Human Rights, it was through the Global Compact, established in 1999 by the then Secretary-General of the United Nations Organisation, Kofi Annan, and launched in 2000, that a global agenda was established in which the compliance of business activity with the protection and promotion of Human Rights was aimed (DE ALMEIDA; MOREIRA, 2021, p. 5). Resulting from international standards already in force - the Universal Declaration of Human Rights; the Declaration of the International Labour Organisation on Fundamental Principles and Rights at Work; the Rio Declaration on Environment and Development; and the United Nations Convention against Corruption -, the aforementioned pact, which was signed by more than 160 countries, more than 14,000 companies and 70 local networks, sought to translate, a perspective of application of the principles and guarantees established through 10 universal principles that, despite the common interest of the human being, means the solution of the main socioeconomic problems borne by contemporary societies. The pact is disposed about the importance of the conformation of an ethical-corporate culture aimed at the development of corporate operations based on assessing the impacts on society, especially to the most vulnerable and marginalized groups in decision-making (PEREIRA; RODRIGUES, 2021, p. 101-102).

At the international level, there are also instruments from the International Labour Organisation, the Guidelines and the Tripartite Declaration of Principles on Transnational Corporations and Social Policy, from the Organisation for Economic Co-operation and Development, which determine guiding principles for the protection of human rights in the work and corporate-business environment. However, the norms in question have a voluntarism aspect, being soft law recommendations, without any kind of binding aspiration (DE ALMEIDA; MOREIRA, 2021, p. 5-6).

Following this logic, in 2008, appointed Special Representative of the Secretary-General, John Ruggie presented a report, which was approved by resolution A/HRC/RES/17/31 (2011), containing guiding principles on the protection of human rights in the corporate-business environment. The report is considered a conceptual framework on the subject and established as guiding principles "Protect, Respect and Remedy", which, in short, provide for the state duty against human rights abuse by third parties, including companies; of corporate responsibility regarding Human Rights, establishing a duty of care so that they do not infringe the rights of third parties and the duty to deal with the impacts of their conduct; and the need to guarantee access to resources-judicial and extrajudicial-by the victims of these abuses and violations (DE ALMEIDA; MOREIRA, 2021, p. 5-6).

Therefore, international bodies, especially the United Nations, declare that companies are actors in the protection and promotion of human rights, due to the degree of importance they have in societies, so that economic development and the obtaining of profits must, in theory, take place in compliance and observance of the basic principles of human dignity.

3 COMPLIANCE AS AN INSTRUMENT FOR THE PROTECTION OF HUMAN RIGHTS IN THE CORPORATE-BUSINESS ENVIRONMENT

In compliance with the principles proposed by John Ruggie, the concept of Corporate or Corporate Social Responsibility was launched, in which a series of values, guidelines and experiences transmitted to the market, to the employees and to the societies as a whole are established, whose purpose aims at re-signifying the role of private activities in the construction of fairer, more balanced, solidary, healthy, human societies, etc. (PEREIRA; RODRIGUES, 2021, p. 79).

Although it is held that the Corporate or Business Social Responsibility is equivalent to the Compliance programmes, it should be noted that the first is associated with the management of companies, application of ethical or compensatory actions, with the preservation of the interests of stakeholders (employees, consumers, government, suppliers, service providers, society, etc.); while the second is linked to the normative conception of prevention or mitigation of risks and violation of laws that arise from the business activity (MANCINI, 2019, 278).

In other words, the Compliance programmes are, in short, an instrument that integrates a complex and organised system that aims to establish a set of procedures for risk control and preservation of values, which must be consistent with the structure and strategies of the business company. Its adoption promotes an environment of legal certainty and reliability for decision making (CARVALHO; BERTOCELLI, 2021, p. 50).

The expression *compliance* derives from the verb to comply, which reflects the context of obedience, compliance, agreement and consent. Marcela Block adds that the expression should be understood as Compliance with/comply to, i.e., "to be in conformity", with the "duty to comply" and "enforce". Therefore, institutions must comply with internal and external regulations imposed on the activities they perform (BLOK, 2020, p. 19).

Emerged as a mechanism to control the operations of corporations in the financial market, the Compliance programmes have been, over the years, acquiring relevance to prevent or mitigate the practice of crimes - especially against the Financial Systems and Public Administration. Given its preventive character, it started to be used in other sectors of the business organisations, aiming to prevent, also, the occurrence of fiscal, labour and environmental illicit acts. More recently, we have seen the implementation of Digital and Data Compliance programmes.

The connection between good governance and Compliance programmes establishes a hybrid system, with state and private rules, imposing policies to companies in several concentration branches - anti-corruption, money laundering, environmental, competition, consumer, labour, tax, among others. Thus, by establishing a system in which the rules are doubly mixed - state and supra-state and public-private -, the State resumes, in a way, the control over the economic activity, given that the Compliance programmes encourage companies to exercise and adjust their activities to the ethical and legal precepts (MIRANDA, 2019, p. 56-57).

In Brazil, although it has acquired relevance since the enactment of Law no. 12.846/2013 (Anticorruption Law), regulated by Decree no. 8.420/2015, the duty of Compliance was already provided for in the Brazilian legal system through Resolution no. 2.554/1998 of the National Monetary Council, Complementary Law no. 105/2001 and Law no. 12.683/2012, which amended Law no. 9.613/1995 that provides on money laundering crimes. And, as exposed, since the Anticorruption Law - or integrity programme, as referred by the national legislator -, Compliance acquired another status in the private sector, since it served as a stimulus for companies to become concerned and to perform their activities and business with compliance with ethical and legal standards.

Even in the face of several international norms, declarations and pacts for the protection of Human Rights, which state the relevance of business organisations in their role as actors in the protection and promotion of Human Rights, the scenario of violations of these rights in the corporate-corporate environment and in the relationship with other stakeholders, shows the importance of establishing Compliance as an instrument for the protection of Human Rights.

From the perspective of violations practiced in Brazil, it is possible to highlight the case of structural racism followed by the homicide of João Alberto de Freitas in a shop of the supermarket chain "Carrefour"; situations of racism against consumers practiced by employees of the department stores' chain "Zara"; a case of homophobia among employees of one of the shops of the chain "Americanas"; discrimination in the selection process of the drugstore chain "São João", among many other cases published - frequently - in the Brazilian press.

Nevertheless, the advancement of technology and Artificial Intelligence perpetuate and amplify existing social prejudices, since the algorithmic routines of these technologies replicate the existing ethno-social perspectives - that is, when we consider that corporations are the mirror of an excluding and prejudiced society, Artificial Intelligence systems will reflect aspects of a prevailing social structure. In this sense, Filippo A. Raso et. al. points out that systems of personnel selection process have had a discriminatory conduct by offering unequal treatment to people with the same curriculum, but with distinct race, gender or sexual orientation (RASO et. al., 2018, p.18).

Therefore, the Human Rights Compliance programme consists of a set of norms, principles and guidelines, of public or private nature, whose purpose is to establish an effective scenario of compliance and development of ethical standards of governance, transparency and justice, so as to reflect on the individual and corporate posture. Likewise, it has as principle to pay attention to the fact that the standards and conducts are in harmony with the culture of each business organisation and with the current legal system in which the productive activities and the relationship with the society are executed, in order to reconcile entrepreneurship, the national and international standards of protection to Human Rights and the personal and corporate introjection of understanding the indispensability of establishing an inclusive and diverse corporate environment that provides a business environment with observance and appreciation of human dignity. From this perspective, the conception that Corporate or Business Social Responsibility is an instrument that tends to contribute to the healthy development of the business environment and of a democratic society model is consolidated (PEREIRA; RODRIGUES, 2021, p. 150).

The importance of using Compliance as a Corporate or Business Social Responsibility tool for the protection and promotion of Human Rights goes beyond the concept of merely "being in compliance" with international laws and national standards. The idea starts from the assumption that ethics and human dignity are principles that guide the Principle of the Social Function of the Company and the business activity.

4 DECREE NO. 9.571/2018 AND ITS INEFFECTIVENESS AS A HUMAN RIGHTS PROTECTION INSTRUMENT

The Federal Constitution of 1988 is recognised as a modern constitutional charter, as it presents an extensive list of individual, diffuse and collective rights. While the Brazilian constitutional order provides for economic development, free enterprise and valuing work, it also provides for human dignity and the right to work in fair conditions. However, it is known that the constitutional idealization is very far from reality.

Obviously, the impact of human rights violations in Brazil is axiomatic for society and for the most vulnerable groups, due to the systemic, chronic and structural framework, whose violating conduct is practiced both by the State and by business organisations. However, specifically with regard to the relationship between business and human rights, Flávio de Leão Bastos Pereira and Rodrigo Bordalo Rodrigues point out that such violations also generate relevant impacts for the business environment and for the reputation of companies that practice these violations or maintain strategic partnerships with corporations that ignore human rights norms and human dignity (PEREIRA; RODRIGUES, 2021, p. 184-185).

While the international level has debated and published several norms of soft law character about the conduct and positioning of business organisations in relation to Human Rights, Brazil issued Decree 9.571/2018 establishing the National Guidelines on Business and Human Rights, which have as guiding principles the obligation of the State with the protection of these rights in business activities; the business responsibility towards Human Rights; designate access to redress mechanisms; and the implementation, monitoring and evaluation of the guidelines instituted by intervention of that decree (PASSOS, 2021, p. 379).

Based on the principles described in Article 2, or guiding axes, as defined by the norm, the decree in question defined a series of guidelines for each of these axes, which may serve as guidance for the implementation of a Human Rights Compliance programme.

According to Flávio de Leão Bastos Pereira and Rodrigo Bordalo Rodrigues, Decree No. 9.571/2018 may represent an important reference for business organisations, given that the guidelines established in the national norm may serve as a scope of customized solutions for the situation of each company (PEREIRA; RODRIGUES, 2021, p. 184-185).

However, despite being an important national milestone on the subject of Human Rights and companies, the national norm establishes a voluntary character, just like the United Nations Guiding Principles on Business and Human Rights - "Ruggie Principles" (DE ALMEIDA; MOREIRA, 2021, p. 11).

And it is on this voluntary aspect that lies one of the problems about the adherence of companies to the guidelines proposed by the decree.

The debate about the model of legal obligation is broad, because even if there is an inclination to determine a binding character, the regulation of companies to Human Rights under the soft law standards bias tends to a perspective of more agility and less dependence on institutions, given that its informal nature could insert a larger number of non-state actors, so as to benefit the enforcement of these standards and alternative methods of accountability (SAAD-DINIZ, 2019, p. 187).

According to the perspective of the Economic Analysis of Law, for example, the adequacy of the company to human rights norms tends to cause an increase in the costs of business activity, which will reflect throughout the production chain and in the relationship with stakeholders. However, the business organisation may enjoy the profitability that comes from its performance in respect to Human Rights, because besides the risk prevention and attraction of investments and trained professionals, the company may improve its reputation due to the label "Companies and Human Rights", as it is provided in Article 1, § 3, of the decree (PASSOS, 2021, p. 379).

Such analysis denotes that Decree No. 9.571/2018 is based on the Reputation Theory, since there is no type of sanction, financial or fiscal benefit or obligation for companies to adhere to the guidelines established in the national standard, so that reputation, being relevant in the globalized world, will allow the company that respects Human Rights to acquire a "title" and obtain better economic benefits (SILVA; MOREIRA, 2020, p. 8).

From this perspective, Cristiane Mancini, who understands that Corporate Social Responsibility is an important instrument of Compliance, points out that, in addition to the quality of the product or service and the ethical, responsive and transparent practices, the adherence of good practice conducts, suitability, responsibility, respect in different links of the production chain, reflect on the business reputation, which is the main driver of competitiveness, survival and business leverage (MANCINI, 2019, p. 293).

However, the mere adherence by the company to Decree No. 9.571/2018 to the reputational goal would imply the failure of the relationship between the business organisation and society, since it would not represent engagement to Human Rights that the national standard intends to establish (PASSOS, 2021, p. 383).

It is noteworthy that fundamental rights in the Brazilian legal system are effective in the scope of private relations, so that the observance and compliance of these standards is due by business organisations. In this step, unlike what is suggested by Decree No. 9.571/2018, it

should not be understood as liberality and voluntariness the observance of human rights norms by companies, because it is about impositions that must be followed, especially because, in the light of the Brazilian legal order, fundamental guarantees are effective in relations between private individuals (NETTO JUNIOR et. al, 2019, p. 15).

Furthermore, although it is notorious that the company can obtain economic benefits through the reputation that it may acquire by implementing a Human Rights Compliance programme and adapting its performance to the guidelines described in Decree No. 9.571/2018, Rafaella Mikos Passos mentions that, to date, no company has obtained from the competent authority the seal provided for in the decree in question (PASSOS, 2021, p. 383).

Thus, although Decree No. 9.571/2018 is an important milestone for the protection and promotion of Human Rights in the corporate-business environment, it is noted that the proposed Guidelines have not yet been adhered to by the private sector, so that, due to the absence of companies certified with the seal proposed in the decree, it is assumed that the national standard is insufficient to compel companies to voluntarily adapt to a Human Rights Compliance programme.

5 FINAL CONSIDERATIONS

Compliance programmes are instruments that are introduced in a corporate governance perspective, which have their origin as a control mechanism of the financial market and that due to the advances resulting from the globalization processes and the complexity of the economic-corporate relations, its implementation in other sectors of the company has acquired grounds and relevance, especially due to the objective characteristic of implementing rules and codes of ethical conduct for the prevention and mitigation of risks.

It is noteworthy that Compliance is introduced in a context of regulated self-regulation. In other words, the State, admittedly ineffective in its control functions, establishes a "distance control" of the private sector through the enactment of laws and rules, many of them of conduct. The private sector, on the other hand, which historically strives for less state intervention, establishes its self-control procedures based on legislation issued by the state.

Business organisations play an important role in the development of societies and human beings. However, many companies have participated in actions considered criminal. Moreover, history reveals that many business organisations, for the sake of profit and the greed of their leaders, have fomented wars, dictatorships and autocratic regimes, circumstances in which the most varied violations of human rights have been committed.

Although the post-war period was marked by the internationalization of Human Rights and by the concept of the dignity of the human being, it is clear that business organisations have distanced themselves from the figure of the individual holder of rights, whose perception is noted from the various standards and documents issued by international organisations, which relate the need for and greater participation of companies on this issue, in a clear conception that business organisations must align their activities and be actors of protection and promotion of Human Rights.

Thus, it is evidenced, from 1999 onwards, an advance in the international agenda, especially in the United Nations Organisation, in order to establish the conformity of the business activity with the protection and promotion of Human Rights, where we can highlight the Global Compact and the Guiding Principles on Business and Human Rights of the United Nations Organisation - the "Ruggie Principles".

However, even with the advancement of the perception of the development of the corporate activity with respect to the standards of protection of the Human Rights and the sense of Corporate Social Responsibility, the scenario of violations to the Human Rights that result from the activity performed by the companies, and many of the cases had media repercussion, it is explicit the importance of establishing the Compliance programme as an instrument to prevent and mitigate such violations.

In this context of proximity between the business activity and Human Rights, Decree No. 9.571/2018, which establishes the National Guidelines on Business and Human Rights, is now in force in the Brazilian legal system. The national norm established four basic principles that bind the State to the protection of these rights in the business sphere; the companies with their responsibility towards Human Rights and provides guidelines for redress and monitoring.

Since this is a voluntary standard, i.e., non-binding, which does not offer companies any type of tax or economic benefit or simply obliges them to adhere to the Guidelines defined in the national standard, it was assumed that companies would benefit economically from the reputation and distinction conferred by the national authority. However, the Reputation Theory did not prove effective regarding the adherence of companies to the Guidelines outlined in Decree No. 9.571/2018, given the absence of business organisations holding the distinctive seal.

Although it presents relevant Guidelines under the topic of protection of Human Rights, Decree No. 9.571/2018 is considered ineffective, since the norm was not able to encourage companies to implement specific Human Rights Compliance programmes. However, it is understood that it is up to the State to establish adequate mechanisms to bind companies to the decree.

Finally, in addition to the intensification of the studies on Decree No. 9.571/2018, especially due to the difficulties of aligning the economic and humanitarian perspectives in the same purpose and means, it is understood that the Compliance programmes can fulfil a relevant and determining role for the reduction of inequalities in the corporate-business environment and, consequently, in societies, through the promotion of diversity and inclusion policies, the adequacy of the relationship procedures with its stakeholders, the due verification and accountability of possible violations to Human Rights occurred because of the business activity, among others.

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CHAPTER IX

COMPLIANCE
DIALOGUES



THE INSS GOVERNANCE SYSTEM AND THE LIABILITY OF THE MANAGING SERVANT FOR DELAYS IN THE GRANTING OF BENEFITS

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Abstract

The object of this article is the integrity and governance programme instituted by the National Institute of Social Security (INSS) through Ordinances 3.212/19 and 3.213/19. The problem addressed is the scenario of non-compliance of the autarchy with the deadlines for analysis and judicial implementation of benefits provided by Law 8.213/91, leading to the application of fines and official letters reporting crime of prevarication and disobedience of public servants. Will this governance system provide the manager with tools to prove the absence of personal responsibility in decision-making? It is intended to demonstrate that this legal regime of governance can impact the limits of personal liability of public servants. Its specific objectives are to evaluate such Ordinances; to establish a comparison with the decisions of the Federal Regional Courts and the Federal Court of Auditors and, finally, to verify if the autarchy is structured to demonstrate the exemption of responsibility of the manager. The applied methodology includes the deductive method, considering a systemic analysis, with bibliographic review and data collection. The research findings indicate that the INSS integrity and governance programme is still incipient, with a threat of liability falling on the servant, which can be mitigated by data transparency and permanent collaborative governance.

Keywords: Liability; Public Servant; External Control Organisations; Public Compliance.

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1. INTRODUCTION

The National Institute of Social Security (INSS) administers the analysis of requests for social security benefits, in accordance with Law No. 8.213/91, and must do so within the deadlines established therein.

Seeking to improve the management decision-making process and make improvements in its institutional performance and in compliance with Decrees No. 9.203/2017 and No. 9.746/2019, also considering the guidelines of the Office of the Comptroller General (CGU) established in Ordinance No. 1.089/2018, the INSS instituted the integrity programme and its governance system through Ordinances No. 3.212/2019 and No. 3.213/2019, respectively. Among other planned objectives, the programme seeks to "promote the strategic management of the INSS, focused on the continuous improvement of the services offered to beneficiaries", leading the autarchy "to maintain evidence-driven decision-making process" and "by legal compliance".

However, since 2019, when almost half of the public servants retired, the autarchy began to delay, considerably, the analysis of administrative requests and the implementation of benefits judicially granted, which led to the application of fines by the Judiciary and the issuance of official letters reporting the crime of prevarication and disobedience.

In this context, the INSS managers are at risk of personal responsibility for possible damages caused to the public treasury, especially before external organs, such as the Federal Audit Court, the Public Prosecutor's Office and the Judiciary. How can the manager prove the absence of responsibility in decision-making and administrative measures? Will the governance system and the integrity programme created by Ordinances No. 3.212/2019 and No. 3.213/2019 provide the manager with tools to do so?

This paper aims to demonstrate that the governance system of the INSS must be improved to protect servants from the application of penalties. To this end, it will be necessary to evaluate Ordinances No. 3.212/2019 and No. 3.213/2019 against the bibliographic review on public compliance and governance; compare with decisions of the Federal Regional Courts and the Federal Audit Court that face the theme of the liability of the servant, both for damages to the treasury and for crimes of disobedience and prevarication; ascertain if the autarchy is structured so as to demonstrate the manager's exemption from liability when facing the structural limitations of the body, especially if there is coordination and participation of the autarchy in the social security public policy, which impacts on the management of the service.

As a theoretical framework, one highlights the guidelines on public governance developed by the Organisation for Economic Development (OECD) and the ISO standards.

The methodology applied involves the deductive method, considering a systemic analysis, with literature review and data collection. From the survey and analysis of judgments of the Federal Regional Courts and the Federal Audit Court, we sought to investigate any imposition of liability to the INSS employee regarding the delay in the implementation of benefits and compliance with court decisions. Subsequently, the ordinances were compared with the literature review, especially with the OECD's public governance guidelines, in order to evaluate the programme.

In jurisprudential research, appeals and filing of writs of mandamus in defence of public servants who suffered personal penalties due to non-compliance with court decisions were identified. Several public policies from the federal government that negatively impacted the management of the INSS were also identified, over which the social security agency had no control or did not demonstrate it had made formal warnings about the risk of non-compliance when it approved them.

Furthermore, the agency has not been able to meet the deadlines established by law, beyond those set in an agreement in the Supreme Federal Court, which mitigated the legal requirement in favour of the effectiveness and organisation of the INSS. In other words, it has not been meeting the governance system's goal of "promoting strategic management focused on continuous service improvement" and legal compliance.

The hypothesis is that the INSS governance and integrity programme is still incipient and poorly understood by the other external control actors, imposing on the public servant a threat of responsibility arising from the lack of structure of the body. This threat further compromises the quality of the agency's public service, as it establishes a work environment under pressure and without prospects for improvement, due to the absence of effective governance over the development of public policy. It is also noteworthy that the situation can be mitigated by easy access to management dashboards, on sight, increasing transparency and by an effective interinstitutional dialogue and permanent collaborative governance.

2. THE INSS GOVERNANCE SYSTEM AND COMPLIANCE IN THE DELIVERY OF PUBLIC POLICY WITHIN THE LEGAL TIMEFRAME

The public policy of state provision of social security, with regard to social welfare and in part, social assistance, provided for by Law no. 8.213/91, is administered by the National

Institute of Social Security (INSS), created by Decree no. 99.350/1990, now regulated by Decree no. 9.746/2019.

It is incumbent upon the INSS, within the time limits provided for by the legislation, to analyse the administrative applications for obtaining benefits, in accordance with the law. As to the deadline, §5° of article 41-A of Law no. 8.213/91 provides that the INSS has 45 days to analyse the application after the presentation of the documentation.

Seeking to improve the management decision-making process and make improvements in its institutional performance, and in compliance with Decrees no. 9.203/2017 and no. 9.746/2019, also considering the guidelines of the Office of the Comptroller General (CGU) established in Ordinance no. 1.089/2018, the INSS instituted the integrity programme and its governance system, through Ordinances no. 3.212/2019 and no. 3.213/2019, respectively.

Public governance is conceptualized by Decree no. 9.203/2017 as a "set of leadership, strategy and control mechanisms put in place to evaluate, direct and monitor management, with a view to conducting public policies and providing services of interest to society" (Brazil, 2017). The principles of public governance are responsiveness, integrity, reliability, regulatory improvement, accountability, responsibility and transparency.

The main guidelines of public governance, provided in Article 4 of Decree No. 9.203/2017, are directly related to the effective delivery of public policy, using resources rationally, with innovative and simplified solutions. This duly accompanied by control and monitoring of the quality, efficiency and performance of management in its deliveries, providing for the creation of internal governance committees in the organs and entities of the federal public administration.

The Organisation for Economic Development (OECD) has long been dedicated to the study of public governance. In the document "Policy Framework for Investment User's Toolkit", it defined good public governance as the framing of the exercise of power and decision-making in the public interest with a set of arrangements, formal and informal, which establish standards of respect for the law and human rights, either within the State or in relations between the State and non-state institutions. The following basic principles of good governance also stand out: accountability, transparency, efficiency, effectiveness, responsiveness and respect for the law (OECD, 2011).

CGU Ordinance No. 1.089/2018, which provides recommendations for the implementation of integrity programmes, specifically aimed at preventing fraud and corruption in the public sphere, in turn, establishes that agencies should internalize processes to "promote

active transparency and access to information", in accordance with the Access to Information Law (Law No. 12.527/2011).

As for the INSS' governance and integrity programmes, Decree No. 9.746/2019 provided for their structuring, establishing that the Integrity, Governance and Risk Management Board would be responsible for, among several functions, "planning, guiding and coordinating the activities of control and compliance, investigation and reduction of fraud and corruption risks". Therefore, Ordinances No. 3.212/2019 and No. 3.213/2019 were responsible for establishing the integrity programme and the INSS' governance system.

The governance system of the autarchy seeks to "promote the improvement of the decision-making process and the improvement of institutional performance", also highlighting its function of implementation of the compliance system, due to the binding nature of the public administration to the principle of legality. This is in line with many provisions of the ordinance, especially item VII of Article 3 of Ordinance No. 3.213/19, which establishes as governance objectives "to maintain the decision-making process guided by evidence, by legal compliance and by non-bureaucracy".

The governance system also establishes the collegiate form for making important decisions, through the Strategic Governance Committee (CEGOV), which is formed by the President of the autarchy and five directors, and the meetings are composed of the Audit, Internal Affairs and Federal Attorney's Office. The thematic committees were created to assist the CEGOV in making decisions, and are divided into: planning, digital governance, information management, integrity, contract management and personnel management. The minutes of the CEGOV meetings are available on the INSS website.

Moreover, the INSS integrity programme, instituted by Ordinance 3.212/2019, is focused on preventing and combating fraud and corruption. It establishes guidelines and objectives to be pursued in the structuring of practices and internal controls in the management of ethics and integrity risks. It was implemented through CEGOV Resolution no. 8 of June 29, 2020, which established the first plan for the period 2020-2021.

The OECD Council Recommendation on Public Integrity (2021) defines public integrity as "consistent alignment with and adherence to common values, principles and ethical standards to sustain and prioritize the public interest over private interests in the public sector.

It is also worth highlighting transparency as a healthy premise for the idea of governance, established in item IX of Article 3 of Ordinance no. 3.213/19, by providing that the governance system is responsible for "promoting open, voluntary and transparent

communication of the activities and results of the INSS, in order to strengthen public access to information".

Once established, the CEGOV began the development of the necessary regulations, such as Resolution no. 5, of 05/28/2020, which established the Risk Management Policy, and Resolution no. 6, of 06/02/2020, which provides for the implementation of the Organisational Performance Monitoring System. These systems have the objective of making diagnosis and acting in the reduction of risks, as well as outlining the follow-up and monitoring of action plans, programmes and priority projects and services provided by INSS.

Regarding the INSS Risk Policy, it is worth highlighting article 5, which establishes as its mission "to assist decision making with a view to providing reasonable security in fulfilling the mission and achieving institutional objectives". Thus, the greatest risk for the social security agency is not fulfilling its legal role of executor of the social security policy.

As for transparency, the sole paragraph of art. 6 of Resolution 6/2020 established that the approved monitoring indicators should be disclosed through an online viewing platform (management panel), of public access, called "INSS in numbers", which will present the indicators through graphs, tables or other forms of easy and interactive viewing.

The platform "INSS in numbers", up to the date of 09/11/2021, was still not available with the promised data, with indicators presented through graphs and tables. In any case, the press frequently requests data from the INSS to publish news about the agency in the media. There are still management reports offered by the INSS website, such as the 2020 Management Report, and statistical data published in INSS yearbooks.

In any case, the INSS, as well as all organs and public entities of the federal public administration, are subject to the policies of the Open Data Plan (PDA), according to specific regulations (Decree no. 8.777/16 and Decree no. 9.903/19). The last open data plan, of the INSS, comprises the period from 07/2016 to 07/2018.

After presenting this overview, we will now outline the critical situation faced by the social security agency, which ends up affecting its employees, when the non-compliance with the legal dictates, especially regarding the deadlines set for the completion of administrative applications and compliance with court decisions.

3. THE UNCONTROLLED DEMAND AND THE DELAY IN DELIVERING INSS PUBLIC POLICY - THE RESPONSIBILITY OF THE MANAGING AGENT ON DAILY FINES AND THE CRIME OF DISOBEDIENCE

In order to properly outline the problem, it is essential to understand what is within the scope of governance and control of the INSS. As already mentioned, the agency is responsible for the execution and administration of social security and, in part, social assistance public policy, according to legal provisions.

The scope of the INSS' activity is in the understanding of the text of the norm and its application to concrete cases (subsumption), like that of a judge in the administrative social security process. Within its hierarchical structure, should be all the servants that will receive and analyse these applications, but this is not in line with reality.

The fact is that the agency, for its full operation, depends on external structures, not hierarchical by themselves, such as the administration of the information systems (under the control of DATAPREV, a public technology company) and the social security medical expertise (under the administration of the Undersecretariat of Federal Medical Expertise). In other words, in order to fulfil a good part of its institutional mission, the welfare autarchy depends on external organs, over which it has no administrative interference.

As for the preparation of welfare public policy, it is via the federal government, through the respective ministry, depending on its internal organisation, which establishes all the rules for the concession of benefits through constitutional reforms, provisional measures or law initiatives forwarded to the National Congress. Hence, the demand of the INSS can be altered, overnight, without its participation.

It is worth mentioning an example that contributed greatly to the creation of chaos in the INSS, without the time and organisation of the structure prior to the new demand: the social security reform. The latest reform was enacted by Constitutional Amendment no. 103/2019, which substantially changed the requirements and the formula for calculating social security benefits. Most of its provisions came into force on the date of its publication, on 12 November 2019, without the prior adaptation of the INSS systems, which took months to be implemented, according to several news reports in the press media (Cavallini, 2020). However, the INSS systems were only able to implement and calculate benefits many months later, with the waiting of countless administrative requests.

Other examples follow in the impact of public policy formulation by the federal government on INSS administration: anticipation of sickness aid (COVID); operation *pente fino*; transference of the administration of *Seguro Defeso*; assumption of the benefit of

continued benefit (BPC); rural benefits without contribution in the records; appeals to the Council of Social Welfare Resources (CRPS - organ external to INSS); project of centralization of the administration of the proper regime of federal servants, among others.

All this context is aggravated by another variable out of the autarchy's control: judicialization¹⁶. In fact, the INSS workers are submitted to the public administration rules, especially the demand of strict legality to produce proof and analysis of the requirements of the benefits, fixed with objective criteria. The Judiciary, on the other hand, uses the rules of civil procedure to produce evidence (all admitted in Law) and uses subjective criteria, non-taxed, to make the subsumption of the rule to the concrete case, applying abstract principles in hermeneutics.

Even in this context of receiving extraordinary demands, the INSS does not have the prerogative to determine the opening of a public contest without the approval of the federal government, or to increase its budget in face of new demands. Several initiatives for emergency hiring have been put forward by the government, including the calling of retired public servants (Martello, 2020), which is beyond the autarchy's governance.

The problem is outlined more clearly: the lack of governance and control over the generation of new demands, human resources and the data system has generated administrative chaos¹⁷, with delays in the analysis of applications and in the implementation of benefits granted by the courts, putting great pressure and threats on the civil servants, especially the managers.

When almost half of the public servants retired in 2019, the autarchy began to delay, considerably, the analysis of administrative requests and the implementation of benefits judicially granted. In the judicial sphere, a real race began in the application of daily fines against the agency, in an attempt to force the implementation of benefits granted. According to Technical Note SEI/CJF 0115120 of the Federal Justice's intelligence centres (Otilio, 2020), the INSS would have passed on data of delay of 213,661 court orders in March 2020. Public civil actions were also filed and several writs of mandamus (against the managing agent, the

¹⁶ For the understanding of the phenomenon of judicialisation in the granting of benefits, two studies are indicated: the one conducted by the Federal Audit Court (judgment 2894/2018) and the one developed by INSPER (2019). The latter indicates that 11% of social security benefits are granted judicially, which generates another demand, the provision of information, service and implementation of judicial benefits.

¹⁷ To try to make better use of staff and material resources, the INSS, in July/2019, created the Benefit Analysis Centres (CEAB) and, as a pilot experience, implemented the semi-attendance modality, waiving attendance control for public servants who met a certain work goal. The CEABS were created at the regional level, focused on the analysis of processes of recognition of rights and service of judicial demands. As soon as the CEABS were created, there was a severe worsening in delays, perhaps due to the mismatch between various sectors, access difficulties and system limitations, among other factors.

coercive authority) seeking to force the INSS to comply with the legal deadlines for the analysis of social security benefits. However, the problem of delays remains to this day (Conjur, 2021).

In the 2020 management report, the INSS emphasizes, on pages 31/32, that one of the challenges of the agency's management is to implement the dispatch deadlines for initial applications for benefits defined in the protocol agreed upon in the scope of the judgment of Extraordinary Appeal no. 1.171.172/SC, in the Federal Supreme Court, with the establishment of differentiated deadlines for each type of benefit (INSS, 2020). The report informs that, until April 2020, before the pandemic, the INSS remained within the expected goal, according to the deadlines established in the agreement, despite the agreement foreseeing a deadline of 90 days for the concession of retirement due to contribution time and the spreadsheet showing a timeframe of 142 days for the analysis.

In November 2021, there are still news about the delays in the analysis, highlighting that the national queue has increased in recent months, passing 1.8 million requests in July 2021 (Globo, 2021). The Union of Social Welfare Workers estimates a deficit of 22 thousand workers in the INSS staff structure (Imenes, 2021).

The question that one seeks to understand is how much of these problems lead to risk of personal liability to public servants and, especially, of the managers of the INSS, and whether the agency is transparent and structured, in its governance and compliance programmes, so as to rule out this liability.

In a jurisprudence research in the TRFs¹⁸, it is revealed that the INSS has already had to appeal to the courts to reverse judicial decisions that imposed daily fines to public servants, in addition to numerous letters to the Federal Public Ministry to investigate administrative improbity and crimes of noncompliance with judicial orders.

The INSS filed several writs of mandamus (example: no. 50382313820194047100)¹⁹ before the appeal courts of Rio Grande do Sul against court decisions that fixed a personal daily fine to the public servant for failure to comply with a court decision within the established time period, with blocking of amounts via BACENJUD. According to the survey, the writs of mandamus were granted to rule out the imposition of a personal fine on the public servant. In other proceedings, daily fines were fixed against the INSS, with the determination that the

¹⁸ Both the jurisprudential research at the TRFs and the research at the TCU showed difficulties in the search for keywords. It was necessary to resort to google to obtain a more accurate search regarding the examples of accountability of public servants and the application of personal fines.

¹⁹ Other examples: 5067910-83.2019.4.04.7100, 5037188-66.2019.4.04.7100, 50375073420194047100, 50357552720194047100; 5038756-20.2019.4.04.7100.

autarchy should inform the SIAPE registration number of the public servant, for accountability purposes²⁰.

In injunctions filed against the INSS for immediate review of administrative proceedings, the servant was threatened with the configuration of a crime of disobedience, according to Article 26 of Law No. 12.046/2009. See the judgment of the interlocutory appeal of no. 5020344-30.2021.4.04.0000 (TRF4, 2021), in which the report highlights part of the sentence that warns the risk of "crime of disobedience under Article 26 of Law 12.016/09.

Thus, in addition to the risk of fixing a fine against him/her, the INSS public servant may also respond criminally, for not complying with the court decision within the deadline set, with the sending of official letters to the Federal Police or the Public Prosecutor's Office for investigation of the crimes of prevarication or disobedience. In research of jurisprudence in the site of the CJF, it was found some judgments in habeas corpus to lock the investigation instituted because of noncompliance with the judicial decision of implantation of benefit (HC No. 2005.05.99.001901-9 (TRF5, 2006); HC No. 2006.01.00.048668-0 (TRF1, 2007); HC No. 97.04.38142-5 (TRF4, 1998)

The issue of attempting to apply a fine and impute liability to a servant is not new, highlighting judgments of TRF4, which rule out this liability when there is no misconduct on the part of the servant, such as interlocutory appeal judgments no. 5020620-08.2014.404.0000 (TRF4, 2014) and no. 5048444-34.2017.4.04.0000 (TRF4, 2018). The risks of liability recognition are not low, to the extent that the TCU itself has been engaging in audits for the purpose of finding flaws or systemic errors in the granting of social security benefits. It is worth highlighting the operation of irregularities in the INSS database, described in Judgment no. 1.350/2020, when irregularities were found in 242 thousand social security benefits, in the order of 2 billion reais (TCU, 2021).

As an example of the danger of accountability, there is the account taking no. 029.573/2010-6, which arose from representation by the judiciary, where the INSS employee had a fine applied in the amount of 20% of the amount due to the plaintiff, totalling R\$716.50 (year 2009). The TCU emphasized that it did not know about the representation because the

²⁰ It highlights the magistrate in case no. 5005341-14.2018.4.04.7122/RS, that the summonses would be forwarded to the judicial representation body, "being up to the Federal Attorney who is made aware of the content of the court order to be settled, to forward it to the competent sector/servant of the social security agency for the compliance with the court decision, identifying in these records the servant who receives it, providing name, position held, SIAPE enrollment and place of assignment. Likewise, it must guide these public servants about the limits and terms of the decision to be carried out, as well as the importance and primacy that must be given to the fulfillment of judicial obligations in relation to other administrative obligations, as well as the possible procedural consequences to the INSS and its servants for the noncompliance or delay in carrying out such judicial decisions."

daily fine imposed on the public entity was less than R\$23,000.00, the minimum level for submission of a debt in an autonomous proceeding to the Court of Auditors, but that "this does not mean that the authority, within the scope of its powers and duties, is exempt from investigating the fact and establishing the debt. (TCU, 2011)

The civil liability of public servants is a recurring theme in doctrine and case law, and is the subject of extensive regulation by law. Initially, we highlight the provision of Law 8112/91, in Chapter IV, which provides numerous rules on civil, administrative and criminal liability of public servants.

Regarding INSS employees, in addition to the volume of work and the short deadline for compliance, their acts are reviewed by the TCU, which, according to art. 71, VII, §3 of the Federal Constitution, has the power to hold them administratively accountable and condemn them to pay compensation for damages caused to the public coffers, and may also impose fines and disqualification from holding commissions or positions of trust (Law 8443/1992).

With these considerations, we now evaluate whether the public governance programme of the INSS can exempt the servant from liability for non-compliance.

4. TRANSPARENCY IN MANAGEMENT AND PROTECTION OF THE SERVANT-MANAGER BY THE INSS, GIVEN THE LACK OF STRUCTURE OF THIS BODY

The formal creation of the INSS' public governance programme, as well as the acts that followed, with the creation of committees, disclosure of procedures, provisions, resolutions and meetings, already demonstrate the search for internal organisation, structuring and transparency of collegiate decisions. It happens that, in terms of demonstrating conformity with its legal obligation, especially the analysis of administrative requests within the timeframe provided by law, in addition to establishing the responsibility of the management staff, the programme is still incipient and needs to mature, which is verified in the CEGOV acts available on the INSS website.

In the strategic map 2020-2023, published by Resolution no. 2/CEGOV/INSS, of 31/12/2019, the INSS (2019) elects strategic actions related to "analyse with quality and timeliness the demands of the citizen", with goals to update normative instructions and manuals, consolidate the analysis centres, expand control and monitoring of the quality of decisions. However, the measures have not shown any impact, as can be seen by the current news of increased queues and delays in analysis, in addition to not eliminating the danger of personal responsibility of the managers.

As demonstrated, the formulation of social security policies by the government has a great impact on the management of the INSS. The reasons why politicians make decisions and the way they do so usually impact and hinder the executor of these policies. Since the INSS is an autarchy, an autonomous administrative entity, created by law, with its own legal personality, but still an administrative decentralization of the power that created it, it must actively participate in policy formulation and express itself openly and transparently about the administrative impact on the organisation.

The INSS governance system should be interlinked with the governance system of the social security secretariat (currently, within the Ministry of Labour and Welfare), and should openly demonstrate that it has highlighted the dangers of new social security policies making the institute administratively unviable and what resources are needed to do so. In other words, the planning of new policies must begin with their initial formulation and the risks must be demonstrated in a warning system.

In this case, the CEGOV should formalize its active participation in the Inter-ministerial Governance Committee (CIG) and record the meetings of these two committees, where the risks of new policies having a negative impact on the institute should be discussed. Likewise, there must be alignment with the inter-institutional committees, such as the Secretariat of Federal Medical Expertise and DATAPREV.

Effective operational risk management contributes to efficiency in the provision of public services, enables the proper accountability of managers and enhances the reputation of the public entity (OECD, 2011). The INSS has not published any risk matrix, with impact assessment and probability of occurrence, being that the periodic mapping of compliance risks is essential to demonstrate the diagnosis and effective preventive measures for its non-occurrence (Bandarovsky, 2021).

Only with a specific methodology for mapping, analysis and evaluation of risks (Steinberg, 2007) is it possible to inquire how to treat, mitigate or adapt to them, especially those related to the fulfilment of the organisation's objectives. Moreover, communication to stakeholders is fundamental to complete the risk management system, with permanent improvements to workflows. Thus, only with method and use of appropriate tools is it possible to recognize the quality and maturity of a governance and compliance programme.

The OECD, through the Committee on Public Governance, in a study conducted on Latin America (OECD, 2017), highlighted that governments should consider, among several suggestions, the best way to coordinate the various institutions and levels of government. The

idea of "coordinating the whole of government" would be fundamental to an interconnected system of public governance (Thorstensen, 2020, p. 18).

When public policies are developed by one branch of government without due consideration of the impact on others, they can have serious consequences due to lack of coordination across sectors. In the OECD's view, "policies adopted jointly by more than one ministry may be more efficient than relying on the total separation of functions" (Thorstensen, 2020, p. 18).

Much has been said about regulatory impact analysis, with steps to be taken before an act of state regulation becomes effective. Similarly, the impact of the creation, alteration, increase or revision of a benefit has not only economic, but also administrative impacts, which must be foreseen by those who carried out the state act. Without planning and predictability, the entire list of obligations that the administrative entity must already fulfil is put at risk.

At the time of the social security reform, for example, the Executive Branch could have proposed and defended, in the Legislative Branch, a longer vacancy period for the adaptation of the INSS systems by DATAPREV, which would have prevented administrative chaos. If there was previous dialogue between the Secretariat of Social Security, the Presidency of the INSS and DATAPREV, as one does not have access to this data (meeting minutes), in view of the negative results (worsening of the national backlog), it seems that the risk analysis was not adequately done.

Analysing the INSS governance programme, CEGOV had established, as a strategic action 2020-2023, the implementation of the evolution programme for the Benefits Analysis Central Offices (CEABs), seeking to fix the maximum response time to requests, within the agreement made in the scope of the STF, until 06/2021. From the news that are broadcasted in the press, the national queue has increased in size and waiting time, indicating that the INSS was unable to meet its target.

The Basic Reference of Public Governance, prepared by the Court of Audit of the Union (TCU, 2014), establishes guidelines for good governance, indicating that management should be cohesive, responsive, to achieve the goals outlined, in a harmonious and participatory work environment. The objective of good governance should be to establish mechanisms, similar to those of compliance, to ensure that measures are taken to align with the institutional purpose and with the public interest (Rodrigues, 2021).

After all, establishing a governance and integrity system that formally seems adequate, but does not provide the results that society expects from the public entity, demonstrates a low

level of institutional maturity and is not supported by national and international guidelines (CGU, 2015).

In this area, it is essential to develop horizontal and vertical cooperation mechanisms between the various spheres of government and the INSS, through informal and formal means to "support consistency and avoid overlaps and gaps and share and develop lessons learned from good practices" (OECD, 2021).

In order to mitigate and collaborate with the agency and solve the problem of delay in complying with judicial requisitions, an inter-institutional working group was implemented, within the scope of the 4th Region, derived from the Inter-Institutional Social Security Forum. Within this scope, standardization of routines and interoperability of systems was established, which culminated in the edition of Provision 90 (TRF4, 2020), with success in eliminating the stock of judicial benefits to be implemented (INSS, 2020). It is worth noting that Provision 90 was preceded by the Recommendation of the Regional Federal Court of Justice (SEI 5082815, CRC D42740B0), which authorized the closing of over 100 thousand judicial requisitions, which were redone in the manner then established, in a posture of inter-institutional collaboration with the social security authority.

The positive results of this inter-institutional work demonstrated that the open discussion of problems and the search for cooperation among all the actors is fundamental for the resolution of complex problems, making it possible for the servants to work and have maximum productivity, in a healthy environment, without the shadow of threat.

Moreover, in terms of transparency, there is still much to evolve in terms of indicators and data accessible to all. For this research, it was not possible to know, for example, what is the average waiting time for service, average waiting time for analysis, among other important indicators in the evaluation of INSS service. Similarly, all the goals of the strategic map cannot be monitored by the external public.

Transparency in terms of action plan, goals set and not met, by the top management, could subsidize the defence of the INSS public servants, when pointed out by external bodies, for not complying with court decisions or incurring in serious error in the granting of benefits, due to the large volume of work. In any case, as established by the OECD (2021), "transparency is not enough. Making information publicly available is not enough and must be accompanied by effective mechanisms for scrutiny and accountability".

The INSS already has several management dashboards that indicate the rate of compliance with institutional goals, such as "average attendance time". Although CEGOV has published a resolution about the "INSS in numbers", this management panel has not been

released. As per OECD guidelines, it is recommended to "develop benchmarks and indications and gather convincing and relevant data on the level of implementation, performance and overall effectiveness of the integrity system." (OECD, 2021).

The fact is that the national lack of coordination as for changes in social security policy by the federal government causes considerable administrative impacts and increases the pressure on public servants and managers of the agency, who are pressed by the obligation to fulfil the legal object of INSS's incumbency, without having the necessary resources to do so. In this aspect, the governance system of the autarchy is not sufficient to remove this concern and a scenario of possible threats to the civil servants.

5. CONCLUSION

When implementing governance and integrity systems in the public sector, it is expected that the organisation will acquire maturity and resourcefulness in the creation of mechanisms that actually bring greater efficiency, delivery and compliance in the realization of public policy.

The INSS has formalized and created governance and integrity systems, but the limitation to influence the previous development of the public social security policy, within the scope of the federal government, impacts negatively on its management, demonstrating that it does not have the capacity to mitigate future risks.

It has been demonstrated that, even if civil servants are not effectively penalized, a system of threats of accountability hovers over issues of difficult management, especially in face of the limited human resources and materials.

In the hierarchical structure of the INSS, not all the necessary framework for the delivery of public policy is established, especially the medical expertise and information systems, which increases the difficulty of governance.

Many points of the governance and integrity system created with Ordinances no. 3.212 and no. 3.213 of 2019 remained only on paper, such as the dashboard in sight, instituted by resolution, in the "INSS in numbers", as well as a risk mapping system, methodologically established.

On the other hand, it was shown that when the agency approaches the other actors of the social security system, in an open and constructive dialogue, surprising results are achieved, such as the one that occurred in the Interinstitutional Social Security Forum. In this scenario, the reorganisation of flows and deadlines, in reciprocal collaboration, with system

interoperability, has allowed the agency to put over one hundred thousand judicial requisitions on time.

The entire system of governance and integrity is discredited without the coordination of the "whole of government" by the higher levels of federal public administration. It will be necessary to develop interconnection and risk prevention mechanisms before the creation of public policy, demonstrating, openly, that there was participation and consideration of the obstacles presented by the INSS, on which falls all the responsibility for the non-delivery, to satisfaction, of the social security public policy.

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CHAPTER **X**

COMPLIANCE
DIALOGUES



**OVERINDEBTEDNESS AND RESPONSIBLE CREDIT: THE BREACH OF
BANKING COMPLIANCE DUTIES AND THE ENACTMENT OF LAW NO.
14.181/2021**

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Eduardo Adolfo Ferreira²²

Abstract

Compliance programmes are present in the Banking System through standards such as the Guide to Good Compliance Practices of the Brazilian Federation of Banks and the Resolutions of the Central Bank of Brazil No. 2.554/1998, 4.595/2017 and 4.557/2017 that financial and equivalent institutions authorised to operate in the country must establish responsible credit policies. However, such measures are not effective due to the broad scenario of overindebtedness of individuals borrowing credit, which are now protected by Law No. 14.181/2021, whose principle is the protection of overindebted consumers by establishing sanctions for financial institutions that irresponsibly grant credit.

Keywords: Compliance; Overindebtedness; Risk; Granting credit.

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THE COMPLIANCE PROGRAMME IN THE BRAZILIAN BANKING SYSTEM AND RESPONSIBILITY IN CREDIT GRANTING

Although since the 1970s the international context has worked in a perspective of increasing and regulating the economic-financial activities, in order to avoid the commission of illicit acts against the Financial Systems, it was from the change in the directions of economic policies, also due to an increasingly globalized market, that arose, in the economy, the need to establish ethical standards and compliance with laws and regulatory standards of certain sectors, especially after the financial scandals of Wall Street in 2002 and the global economic crisis of 2007/2008, which was marked by the subprime crisis and the burst of the American real estate bubble.

It was in this scenario that the concept of corporate governance arose, developed with the purpose of gathering and concentrating good business practices and establishing an ethical standard self-regulated by corporations, based on a perspective of transparency (disclosure), accountability, fairness and compliance (SCHMIDT, 2018, p. 181).

From this process of strategic, organisational and technological restructuring, Compliance stands out as a fundamental instrument for the protection and improvement of values and reputation of a certain society (BLOK, 2020, p. 1).

However, this restructuring process occurs in parallel to a perception that the State has proved unable to supervise and promote the repression to the practice of criminal and extra criminal offenses, while it has transferred to private corporations these duties in relation to the practices adopted by its own agents and third parties, in a perspective known as regulated self-regulation, in which the State, in addition to transferring part of its responsibility, encourages or imposes on corporations the implementation of self-monitoring programmes in exchange for reducing or excluding the responsibilities of business organisations in any illicit practices practiced directly or indirectly (SCHMIDT, 2018, p. 181-182).

Within the business scope, Compliance is understood as corporate management that is based on the observance of internal and external regulations and the business organisation (SCHMIDT, 2018, p. 182), and the expression derives from the English verb *to comply*, which should be understood as compliance with/comply to, which means "to be in compliance", "in obedience" or "must comply" (BLOK, 2020, 19).

In Brazil, although the matter has gained another proportion as from the enactment of Law no. 12.846/2013 (Anticorruption Law), the Compliance duties acquired a legal relevance as from Law no. 9.613/1998 (Money Laundering Law), modified in 2012 by Law no. 12.683, and Resolution no. 2.554/1998 of the National Monetary Council (NMC), so that financial

institutions and publicly traded companies now have the duty to gradually establish internal controls to prevent the crimes of corruption, money laundering and other conducts that may affect the integrity of the National Financial System (SCHMIDT, 2018, p. 183-184).

Along these lines, in addition to the aforementioned Resolution, the National Financial System has other regulations aimed at financial institutions and similar institutions authorized to operate by the Central Bank of Brazil (CBB), which establish Compliance standards that implement policies of transparency, diligence and responsibility in the offer of products and services to consumers - highlighting CBB/NMC Resolutions No. 4.595/2017 and No. 4.557/2017.

While CBB/NMC Resolution No. 2.554/1998 provides, in a general context, on the need for financial and similar institutions to implement internal control standards in financial, operational and management information systems for compliance with legal and regulatory standards (1998), CBB/NMC Resolution No. 4.595/2017 establishes the guidelines that compliance policies must adopt. In summary, the normative in question lists a series of generic and minimum guidelines that must be observed by banks and other institutions of the National Financial System when implementing their Compliance programmes (BACEN, 2017).

CBB/NMC Resolution No. 4.557/2017 provides, in a broader way, about the structure of risk and capital management, establishing in Section IV (articles 21 to 24) the definition of the concept of credit risk and the criteria that financial institutions and equivalent must establish to evaluate the granting of credit. Thus, credit risk is understood as the possibility of non-compliance with the obligations assumed by the counterparty (BACEN, 2017).

However, although it deals with credit risk management, it was found that CBB/NMC Resolution No. 4.557/2017 does not have evaluation criteria for granting credit risk to individuals, specifically, a circumstance which, tends to relativize or weaken the risk assessment in this type of credit (BACEN, 2017).

In turn, the Brazilian Federation of Banks (BFB) - representative entity of the banking sector, which has 116-member financial institutions (FEBRABAN, 2022) - has guides that are intended to guide its members in relation to good practices.

The first of them is the "Guide | Good Practices of Compliance", which, in short, establishes that banking institutions must adopt proactive methodologies of identification, measurement and prioritization of Compliance risks, so that the credit is inserted as a risk to be identified and that the proactive performance may occur through the programme of relationship with customers to mitigate risks, ensuring, through internal rules, guidelines to assess the offer

of products and services and the conduct of employees before customers (FEBRABAN, 2018, p. 19-20).

The other guiding instrument made available by the entity is the "Guide of Good Practices of the Function: Internal Controls", which clarifies the performance and attributions of the Risk Management, Compliance and Internal Audit areas, as well as lists components and methodologies of internal controls and tools that can be used. In this document, Appendix II clarifies that the credit limit is the one that derives from margins to guarantee derivatives, minimum scoring/rating, overdraft limits, etc. (FEBRABAN, 2020).

However, once again, there is no specific guidance on procedures and guidelines for granting credit to individual clients, leaving it up to each financial institution to control policies for these operations.

Thus, although the National Financial System has established resolutions that established guidelines for the implementation of Compliance programmes, there is an absence of specific regulations establishing integrity policies for the concession of credit to individuals. This is because the resolutions under analysis established guidelines for the concession of credit to legal entities, leaving the establishment of policies and controls for the concession of credit to individuals to the exclusive responsibility of banks and qualified financial institutions, a circumstance that reveals a vulnerability on the part of financial institutions when evaluating and establishing responsible credit criteria and policies, whose non-compliant conduct has contributed to the scenario of consumer overindebtedness.

NON-COMPLIANCE AND OVERINDEBTEDNESS OF BORROWERS FOR LAW NO. 14.181/2021

Although there is a framework of Compliance rules for the national Banking System, especially the aforementioned Central Bank Resolutions and BFB Guides, such legal devices are still not effective regarding the credit available to individuals due to the lack of specification of guidelines for these clients in a centralized manner.

The absence of specific criteria in the rules issued by CBB regarding the concession of credit to individuals has created the alarming scenario of over-indebtedness. An overindebted consumer is one who cannot, with his/her income and assets, without compromising a minimum amount for his/her maintenance, pay off his/her current and future expenses in a reasonable period of time.

The absence of specific criteria in the norms issued by CBB regarding the concession of credit to individuals has created the alarming scenario of overindebtedness. An overindebted

consumer is one who cannot pay off his/her current and future expenses within a reasonable period of time with his/her income and assets, without compromising a minimum amount for his/her maintenance.

The increase in cases of overindebted consumers is due, in great part, to the facilities proposed by the market in granting credit, whether they are long-term hire purchases, consigned loans, loans for those who have been denied credit, use of more than one credit card to purchase goods, among others. Such facilities have always been freely offered, according to the internal credit policy of each establishment, which leads to the conclusion that the absence of specific Compliance rules and the non-observance of the existing ones - if we consider the scenario of indebted companies which are entitled to judicial, extrajudicial recoveries and bankruptcies, for example - helped to create this scenario of overindebtedness.

It is necessary to clarify that, although there is no law in Brazil that indicates the most correct way to verify data for credit granting, it is common market practice to adopt some criteria, such as (i) concession based on previously well-structured internal policies; (ii) the provision, prior to the contract, of adequate information about the charges and the impact of the new debt on the budget; and (iii) the risk analysis, based on the verification of the real and global economic and financial capacity of the credit consumer under penalty, including, of civil liability of the administrators for the concession of credit if it is proven that such concession exposed the financial institution to a risk of bankruptcy (BARROS, 2021, p. 104).

Therefore, one may consider that the non-observance of the Compliance rules already existing in Brazil, even if minimally, reflected directly on the inability to pay of several consumers of banking products and services, considering that at the time of the contracting they already had no conditions to contract the credit granted to them. This situation of credit being taken out by an individual or legal entity that was not in a position, at the time of contracting, to honour the payment is called irresponsible credit - or one can say that the credit was granted in an irresponsible manner.

Credit is granted irresponsibly when, based on the elements at its disposal (record systems, verification of income, verification of payment capacity, among others), the financial institution or similar entity agrees to make amounts available to the borrower of credit who is unable to pay the contractual instalments without compromising his or her subsistence or the financial health of his or her business.

Despite the disastrous scenario caused by irresponsible credit concessions, in the year 2021 there was a great advance for prevention and treatment of this alarming scenario of overindebtedness of individuals with the update of the Consumer Defence Code from the

effectiveness of Law No. 14.181/2021, called "Claudia Lima Marques Law". This law aims to protect the so-called overindebted consumer by establishing protection mechanisms against the harassment of credit offers by financial institutions and treatment measures for excessive debts.

With the advent of Law No. 14.181/2021, there is also in Brazil the establishment of the legal concept of overindebtedness - the global inability of the consumer to pay its current and future debts with their own income and assets (OLIVEIRA, 2014, p. 105) - a concept that allows verification, clearly, the actual ability to pay the consumer. It is also noted that, from the publication of the controversial Decree No. 11.150/2022, there was the conceptualization of the value corresponding to the "existential minimum".

Moreover, Law No. 14.181/2021, in order to present a viable solution to the problem of overindebtedness, brought specific jurisdictional procedure from Article 104-A of the CDC, starting with a consumer's request for the judge to initiate a process of repatriation of debts, allowing the over-indebted to present, in relation to all creditors, a payment plan in the long term in a conciliation hearing. Therefore, from the request and the listing of the debts, the creditors will be called to negotiate in a large pact with the debtor.

With respect to responsible credit, the law did not attempt to conceptualize it, but as a great differential with respect to all the rules that we already had in Brazil, it brought the possibility of applying a sanction for cases in which it is proven that the concession of credit occurred in an irresponsible manner, in addition to a sanction for the creditor's failure to appear at the conciliation hearing or for the refusal of an amicable composition.

The sanction provided for the non-attendance at the conciliation hearing or failure to reach an agreement is that, if the overindebtedness action continues, the contract will be reviewed *ex officio* and the debt renegotiated through a compulsory judicial plan, without the possibility of negotiation with the creditor. The penalties provided for cases in which irresponsible granting of credit is verified are related to the reduction of interest and charges, extension of the payment term and even indemnification for losses and damages, including moral, among others, according to the seriousness of the credit supplier's conduct.

Therefore, as of Law no. 14.181/2021, the Brazilian legislation took a leap in regard to the credit supplier's accountability for the value concessions it makes, giving effectiveness and putting into practice all the previous Compliance rules existing for the banking system and which, many times, were not complied with without generating any sanction for such non-compliance, as well as filling the gaps on good practices of credit concession to individuals.

THE RIGHT TO INFORMATION AS A BASIC PILLAR OF RESPONSIBLE CREDIT GRANTING AFTER LAW NO. 14.181/2021 AND THE CORRECTION OF THE HISTORICAL PROBLEM OF INDEBTEDNESS

The right to information - prior and adequate to the contracting process - to which credit consumers are entitled was already established in article 52 of the Consumer Defence Code (CDC). With the effectiveness of Law 14.181/2021, articles 54, 54-A and following were included in the code, which deal with the implementation of this right.

It should be noted that there are consumers who are hyper vulnerable: those who are not able, due to lack of schooling, to deal with the high complexity of credit agreements. This situation requires the supplier to comply not only with its duty to inform, but also the duty to advise or clarify (MIRAGEM, 2014, p. 135).

Such duty of clarification stems from goodwill, because it is not enough just to offer information about values, charges, terms and forms of payment, but it is necessary to make them understandable to the consumer. In addition to the basic information, the credit supplier has the duty to inform the borrower about the risks, such as what may happen in case of non-payment. The presentation of information on credit, its use, the risks and consequences of default will allow the consumer to be aware of the terms of the contract in order to decide or not for its pact.

It is clear that in a country whose basic education is insufficient and that financial education is the privilege of a few it is very difficult to make the matters of credit and banking operations understandable to the consumer, especially the hyper vulnerable. However, the existing legislation has rules that deal with the responsible concession of credit, including with the intention of mitigating the systemic risk, whose lack of care may lead to the responsibility of the administrator of the financial institution, and what we saw before the Law 14.181/2021, on the part of banks and financial institutions, was a total disrespect to the banking compliance and the lack of interest in correctly exercising the duty to inform.

With the amendment of the CDC, the rules to which financial institutions are subject to were specified and became tangible to the consumer, considering that before the duties of conduct for the concession of credit in a responsible manner were not codified, but were dispersed in internal regulatory rules, which not always, without the assistance of a professional specialist (lawyer, for example) were known by the laymen that contracted credit.

The requirement of compliance with the duty to inform, subject to sanctions in its absence, as provided by Law No. 14.181/2021, is reasonable to the extent that financial institutions already had, by force of Central Bank Resolutions, this obligation.

It is necessary to emphasize that, based on the correct credit analysis and the verification of the consumer's real payment capacity, the financial institution is not obligated to grant the requested credit, but if it does so, it must provide all information in a clear manner, making it understandable to the borrower, being aware of the consequences if in the future the consumer is overindebted.

Thus, by expressly bringing into the consumer protection codification the need to clearly inform the consumer about the characteristics of the credit made available and to advise on the consequences of its use, duly accompanied by a penalty for breach of this duty, it became possible to implement the already existing infra-legal rules of banking compliance and the correction of a legal gap that allowed the deliberately irresponsible concession of credit. Now, in cases of overindebtedness, it is up to the credit supplier to prove that it has taken all the necessary measures for the consumer's understanding of the contract.

FINAL CONSIDERATIONS - SUFFICIENT STANDARDS, INSUFFICIENT APPLICATION AND SUPERVISION UNTIL THE ADVENT OF LAW NO. 14.181/2021

Despite the greater amplitude after the Anticorruption Law, the banking Compliance rules have been foreseen in the Brazilian legal system since 1998, when Resolution no. 2.554/1998 of CBB/NMC and the Law of Money Laundering were enacted.

However, it was verified that the Compliance rules for financial institutions and similar institutions authorized to operate by CBB, which are established by the regulatory agency and by private entities, such as BFB, do not have rules and criteria for the concession of responsible credit, especially for individuals who, many times, become victims of themselves, of the National Financial System and of a society that, many times, segregates individuals due to their possessions and financial conditions.

The overindebtedness scenario was, for a long time, object of study by the academy and institutions that work directly to protect consumer rights, since such circumstance makes the personal development of the individual unfeasible and, indirectly, brings systemic risk to the financial market, due to the high default rate.

With the advent of Law No. 14.181/2021, the consumer in a situation of extremely high default now enjoys state protection in order to regain a state of dignity, since sanctions were disciplined to stop irresponsible credit granting by financial institutions, which will certainly generate results in the long term.

According to the duty to inform, which already existed before the law, it is the role of the financial institution that grants credit to reduce the information asymmetry existing between it and the bank consumer, who is generally a layman in relation to the operations and their peculiarities and, eventually, is hyper vulnerable for not having enough training even to read the contract to be signed. With the advent of specific legislation that updated the CDC, the country now has a codified standard regarding the criteria for granting responsible credit aimed at the individual public.

Based on the conceptualization of overindebtedness, the criteria defined for adequate information and the sanctions imposed by Law no. 14.181/2021, the Compliance rules pertaining to the Banking System are now complete with regard to the responsible concession of credit and these rules, together with the now updated CDC, will guarantee the improvement of the overindebtedness scenario in Brazil. However, for this improvement to occur, the rules need to be applied by the financial institutions and closely monitored by the Central Bank, since a legal framework on paper is not enough, it is necessary to put the rights and duties into practice.

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CHAPTER XI

COMPLIANCE
DIALOGUES



THE ROBOTS OF WAR: SOCIO-LEGAL CHALLENGES FACING THE ADVANCEMENT OF ARTIFICIAL INTELLIGENCE IN THE FIELD OF WARFARE

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Abstract

Technology is becoming increasingly relevant in the social space. Therefore, the presence of Artificial Intelligence in people's daily lives becomes more common, mainly because it has a range of applications. Among these, the development of autonomous war machines is highlighted. As for these inventions, the discussion about the pros and cons of its development is fundamental. From the moment new war productions are developed, new forms of extermination are also created. In this sense, it is noted that the main challenges for law, in this context, it is the regulation of such technologies and the impasses that autonomous weapons of war face in ethical and humanitarian issues, which is the focus of this article.

Keywords: Autonomous War Machines; Artificial Intelligence; Human Rights.

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1 INITIAL CONSIDERATIONS

Since the emergence of the first technologies, one can see an increasingly rapid adaptation and facilitation of human work. However, this adaptation quickly turned into integration and necessity, so that what was once a facilitator, became, little by little, fundamental to the exercise of certain activities. In order to aim the human comfort and efficiency, new technological forms have been emerging and, among them, the Artificial Intelligence (AI) stood out.

AI has a huge range of applications, either in the creation of war robots, or in the completion of domestic tasks, this new technology is present and due to its wide range of performance, it presents itself as an incognito to many. Objectively, Artificial Intelligence enables machines to learn from experiences, adjust to new data inputs and perform tasks like human beings. It is also evident that such actions occur through the machine learning process, which is expressed by the ability to accumulate experiences from repeated tasks using an algorithm to extract learning (Goldberg; Holland, 1988, p. 95-99).

From this point of view, one wonders how artificial intelligence could be used in a war context and how this technology should be regulated so that fundamental rights are not violated. The question arises because, on a global scale, it is undeniable that war is a fundamental element of nations. A continuous game of world forces is observed, marked by diverse forces of conflict, such as the conflict between Palestine and Israel and the retaking of Afghanistan by the Taliban. The impact of artificial intelligence in the fields of war is therefore questionable.

The present research aims, through the panorama presented, to discuss such issues, in order to initiate the discussion about war robots in future confrontations and their impact on ensuring the human rights of individuals. Aiming at this, in the classification of Gustin, Dias and Nicácio (2020), this article belongs to the legal-social methodological strand. As to the generic type of research, the legal-projective type was chosen. In turn, the reasoning developed in the research was predominantly hypothetical deductive and as to the research genre, the theoretical research was adopted.

2 DEVELOPMENT

2.1 The advance of technology and the insertion of artificial intelligence into society

To discuss artificial intelligence in warfare, it is initially necessary to understand how technology advanced until war robots came on the scene. For this, it is paramount to discuss the industrial revolutions. The first one was linked to the use of steam power and mechanization of production. From such inventions, there was a significant increase in human productivity and improvement of locomotives used to distribute the products produced.

Subsequently, the second industrial revolution began in the 19th century with the discovery of electricity and the production of assembly lines, which brought great changes to automobile production, since vehicles were now produced faster and at lower cost. In the third industrial revolution there was partial automation through controls and computers programmable by memory, in order to insert in the context of society production processes that did not necessarily need human assistance.

Then came the fourth industrial revolution, driven by the application of information and communication technologies to industry, the so-called "Industry 4.0". With the introduction of cyber-physical systems, one can finally think of Artificial Intelligence. It is therefore urgent to discuss this technology.

Until the present moment, there is no unanimity in relation to the definition of what constitutes AI. However, according to Stuart Russell and Peter Norvig, the definitions of AI found in the scientific literature can be grouped into four main categories: systems that think like humans, systems that act like humans, systems that think logically and systems that act logically.

In the present research, it is not possible to work with only one conceptualization. This is because the construction of autonomous weapons involves from the capture of systems capable of reproducing human thought, to the logical execution of war actions. The theory works alongside the formulation of hypotheses, so one cannot think of an artificial intelligence that does not encompass both aspects.

As Caio Augusto Lara, master and PhD in Law, states about Artificial Intelligence,

Strictly speaking, it is incorrect to say that such devices are intelligent, since intelligence is a human psychic attribute. In fact, the devices that operate with the so-called Artificial Intelligence manifest nothing more than the answers foreseen in their programming lines. They only do so at a higher level due to the complexity of their algorithms (Lara, 2019, p.89).

From this perspective, it is worth understanding that, if the devices that operate with Artificial Intelligence only manifest the answers foreseen in their programming

lines, it is possible that it reproduces premises, of discriminatory nature for example, which are rooted in society. In this sense, there is an urgent need to analyse the problem of Artificial Intelligence, specifically autonomous weapons.

2.2 War robots and their impasse with the ethical and humanitarian issue

In order to be able to discuss the ethical and humanitarian issues that limit the action of war robots, it is essential, first, to develop what are war robots and what is their role in today's society. For this, it is worth analysing the speech of Caio Augusto Lara. According to him, the term "robot", based on its common meaning, refers to any machine able to move and act, and this terminology was widely spread by Isaac Asimov, Russian writer and biochemist, in his works. From Caio's point of view,

He became famous during the peak of the literary movement that later became historically known as the Golden Age of Science Fiction (Artoni, 2007). Due to the nature of his works, Asimov was called the precursor of robotic terminology since he was the first author to address the topic of artificial intelligence as a future reality (Raga *apud* Lara, 2019, p.140).

In contemporary times, the complexity and development of the so-called robots present themselves in a much more challenging way than that addressed by the Russian writer, as Caio says, so that according to Mark Robert Anderson,

The highly evolved field of robotics is producing a huge range of devices, from autonomous hoovers to military drones and full factory production lines. At the same time, artificial intelligence and machine learning are increasingly behind much of the software that affects us daily, whether searching the internet or being deployed in government services. These developments are rapidly leading to a period when robots of all kinds will become prevalent in almost every aspect of society, and human-robot interactions will increase significantly. (Anderson *apud* Lara, 2019, p.141).

One of the aspects in which robots gain space is in the war field, for example. In this context, autonomous weapon systems are the subject of great debate. War robots are machines whose decision to kill is made independently. Therefore, it is not necessary that the command is made by a human control, because through Artificial Intelligence, the robot itself would be able to make such a decision.

Such a theme generates great divergence, because while military experts understand that "autonomous weapons systems not only confer significant strategic and tactical advantages on the battlefield, but are also preferable, for moral reasons, to the employment of human combatants" (Etzioni & Etzioni, 2017, p.1), critics of such

technology "argue that these weapons should be limited, if not outright prohibited, for a variety of moral and legal reasons (Etzioni & Etzioni, 2017, p. 1).

In order to work on the dilemma between autonomous weapons and moral and humanitarian issues, therefore, it is necessary to understand the arguments for and against such innovation. Regarding the arguments in favour, this support is divided into two categories: on the one hand, there are the military advantages, and on the other, the protection of human life.

Regarding the military advantages, there is the force multiplier, since fewer soldiers will be necessary for the execution of a certain mission, and the effectiveness of such a group will be greater. This scenario occurs because autonomous weapons ensure an expansion in the battlefield, so there is greater coverage compared to what would be possible through the use of people. Moreover, with the use of robots, quantitatively, the number of casualties among soldiers would be reduced, since the number of soldiers in the field would also fall.

In turn, with regard to moral advantages, in view of the capacity of Artificial Intelligence, the use of autonomous weapons in the field would be a further guarantee of dignified treatment to opponents. Such understanding is given, because the war robots have no instinct for self-preservation, so it would be possible to avoid deaths resulting from the search for survival and self-preservation.

Furthermore, because they perform actions logically, no decision of autonomous weapons would be influenced by emotions or thoughts. With this, the processing of information would be significantly more effective. However, decision making free of oppressive, segregation or discriminatory assumptions, for example, is utopian, because until such precepts, on which the algorithms on which Artificial Intelligences are based, are extinguished, logical decision making cannot be sustained.

Now when it comes to the disadvantages of war robots in the field of war, on October 15, 2013, there was the promulgation of the Scientists' Call to Ban Autonomous Lethal Robots. In this, the risk that autonomous weapons could generate in the future is observed, since nothing guarantees that there will be the necessary precision "in target identification, situational awareness or decisions related to employment proportional to the force" (International Committee for Robot Arms Control [ICRAC], 2013).

Still on target identification, the justification used concerns the difficulty in identifying who is a civilian and who is a combatant. Considering that such identification

is already difficult for experienced soldiers, it is assumed that autonomous weapons could not guarantee the correct interpretation in this regard.

Besides, the introduction of such invention could end up generating a new arms race, which would harm the use of another artificial intelligence, due to the apprehension of this technology. In relation to this, hundreds of scientists, researchers and experts signed an open letter, announced during the 2015 International Conference on Intelligence, warning about the risks of using artificial intelligence in weapons. According to what Isabela Moreira reported in *Revista Galileu*, "among the signatories of the letter, there are personalities of science and technology such as Elon Musk, from Tesla Motors, Steve Wozniak, from Apple, Demis Hassabis, from Google, Noam Chomsky and Stephen Hawking" (Stephen, 2015).

In the content of the letter, it is stated that

Technology related to artificial intelligence has reached a point where the disposal of these systems is possible in a matter of years, not decades, and expectations are high: autonomous weapons have been described as the third revolution for warfare, after gunpowder and nuclear weapons (...) The key question for humanity today is whether we should start an arms race made with artificial intelligence or whether we should prevent it from even starting (Stephen, 2015).

The question that lies behind is how far the introduction of war robots will be beneficial and when the threshold between defensive and offensive actions will be crossed. It is undeniable that robotic weapons are lethal, from this perspective, what risk such technology can bring if there is a war between a nation equipped with such artificial intelligence and a country whose war resources are of low offensive potential. In this regard, the reality of the confrontation between Israel and Palestine is cited. Since even if Israel does not use war robots, the fact that they have a military power significantly higher than that of Palestine already shows that for those at a disadvantage, the number of losses will always be greater.

Still on the disadvantages of introducing war robots in a war context, Elon Musk, in 2017, headed a new open letter, presented at the International Congress on Artificial Intelligence. In the document, it was warned that

Once [autonomous weapons] are developed, they will allow armed conflict to be waged on a larger scale than ever before, and on time scales faster than humans can comprehend. These could be weapons of terror, weapons that despots and terrorists use against innocent populations, and weapons hacked to behave in undesirable ways. We do not have much time to act. Once Pandora's box opens, it is hard to close it (Zuriarrain; Pozzi, 2017).

In relation to this, it is questionable whether autonomy and impartiality really exist when talking about autonomous weapons. What we observe is that, although Artificial Intelligences are capable of making decisions without the need for human control, in practice, the algorithms used in the construction of such technologies show an opposite facet to this impartiality. What used to be observed as the oppressive actions of certain groups is now dangerously transmitted to artificial intelligences, since those who hold the necessary knowledge to produce such machines are, in many cases, those responsible for the oppression of minorities around the world.

The ethical and humanitarian issue occurs, in this context, through the fact that those who hold the power to develop algorithms, also have, as Caio Lara states, "the power to oppress people on the margins of society, only with a devastating efficiency gain" (Lara, 2019, p. 95). As the author mentions, "technology, which could stand up to discriminatory movements, has often shown itself to be a perverse mechanism for reinforcing stigmas and social prejudices" (Lara, 2019, p. 95).

Given such issues, it is necessary to discuss the regulation of war robots in order to ensure that the use of such technology does not violate fundamental rights.

2.3 Regulation in the face of human rights guarantees

According to Oren and Amitai Etzioni,

"AI-equipped machines make decisions on their own, so it is difficult to determine whether a wrong decision is due to defects in the programme or in the autonomous deliberations of the (supposedly intelligent) AI-equipped machines"(Etzioni e Etzioni, 2017, p. 5).

Still on this issue, the authors argue that

In situations where a human being makes the decision to employ force against a target, there is a clear chain of responsibility, extending from the person who actually "pulled the trigger" to the commander who gave the order. In the case of autonomous weapons systems, there is no such clarity. It is uncertain who, or what, should be blamed or held accountable (Etzioni & Etzioni, 2017, p. 5).

From this perspective, there is an urgent need for a regulation aimed specifically at Artificial Intelligence, since the actions taken by such technology must have an appropriate legal provision. In order for a technology to be inserted in society, limits on its development and performance must be clearly presented.

In the Brazilian context, it is worth analysing the Brazilian legislation for such technology. We will therefore discuss Bill 21/20, developed by Deputy Eduardo

Bismarck, from the Democratic Labour Party of Ceará. The bill regulates that AI agents have

A series of duties, such as being legally accountable for decisions made by an AI system and ensuring that the data used respects the General Data Protection Law. The standard regulates the processing of personal data of customers and users of public and private sector companies (Projeto, 2020).

In addition, the proposal also provides for the rights of AI agents and everyone affected by artificial intelligence systems. According to the House of Representatives, the text determines that AI should respect human rights and democratic values. From this perspective, it is understood that for Artificial Intelligence to be used in the country, it is necessary that it has equality, non-discrimination, plurality, free enterprise and data privacy as its foundation.

Therefore, for international legislation, on April 21, 2021, there was the presentation of the proposal that would regulate AI technologies. The so-called Artificial Intelligence Act is intended, by the European block, not only to regulate the use of technologies in member countries, but also, as Demócrito Reinaldo Filho states, "to make Europe a global hub of excellence and trust in artificial intelligence" (A proposta, 2021). It is observed that this analyses two aspects of Artificial Intelligence: the opportunities and the wealth that such technology provides.

From this perspective, the proposal aims to find a normative balance between risks and opportunities, so that there is the promotion of AI, without harming, in the ethical and humanitarian sphere, the individuals. As Demócrito mentions, the aim is "to ensure that AI systems placed on the European market are safe and comply with the legislation in force, guaranteeing the legal certainty necessary to foster investment and technological innovation" (A proposta, 2021).

Based on European regulations, the basic principle is the hierarchy of risks offered by systems and technologies that will use Artificial Intelligence. Hence, Demócrito evidences that

The regulatory conception based on the levels of risks of AI systems has a proportionality character, in the sense that the most severe restrictions and most onerous requirements only apply to programmes and applications that offer greater risks to the safety and fundamental rights of individuals (A proposta, 2021)

With regard to high-risk systems, in which war robots are included, "regulatory requirements are greatly increased, including the obligation of documentation,

traceability, human supervision and other impositions that are essential to mitigate harmful consequences for users" (A proposta, 2021).

When it comes to war robots in particular, the question mainly arises of the responsibility attributed to them in the event of deaths, since, as Oren and Amitai Etzioni mention, "there is a clear chain of responsibility, extending from the person who effectively "pulled the trigger" to the commander who gave the order" (Etzioni and Etzioni, 2017, p. 5).

On this, the authors state that

What Sharkey, Sparrow and the open letter signatories propose can be labelled "upstream regulation", that is, a proposal for setting limits on the development of autonomous weapons systems technology and for defining limiting lines that future technological developments should not be allowed to cross. This type of upstream approach attempts to predict the direction of technological development and prevent the dangers that such advances would pose (Etzioni and Etzioni, 2017, p. 5).

Even so, there are those who prefer 'downstream regulation' and will follow a wait-and-see attitude. From this point of view, regulations will be developed as advances occur. The authors also point out that

Academic jurists Kenneth Anderson and Matthew Waxman, who advocate this approach, argue that regulation will have to appear along with technology because they believe that morality will evolve hand in hand with technological development (Etzioni and Etzioni, 2017, p. 5).

With this, it is observed that regulations on AI are being developed. However, while their application is not fully effective, there are risks that will not be regulated, which may harm various rights already effective in the legal context, especially when it comes to war robots, which in themselves already present excessive lethality.

3 FINAL CONSIDERATIONS

For algorithms to have a more impartial performance in society, it is necessary, initially, that the guiding precepts of discriminatory nature are faced and extinguished. In this sense, it is essential the encouragement and application of an egalitarian education whose premises are able to, little by little, break the oppressive precepts of society.

Artificial intelligence is not yet something that has an express legal provision in Law, since it is a recent technology. However, its benefits are undeniable. In the military field, the focus must be on risk prevention and protection of individuals, because even if

such technology is made for war, ethical and humanitarian principles must be respected, so that genocides and massacres are not committed.

The present research understands that the path to the regulation of Artificial Intelligences by international and Brazilian law is slow, however, it must be increasingly discussed. War power presents itself as a great attraction, considering that wars are part of the fundamental elements of a nation. However, respect for life and the protection of human rights must take precedence over the benefits that military power presents.

From this perspective, one concludes that for autonomous weapons to be introduced in society and in war fields, it is fundamental that, *a priori*, their development is based on an action limited by the protection and respect for human rights. This is observed because, if they are programmed to do so or function incorrectly, the risks to civilians' lives will be immense, since there are, so far, no devices to stop such weapons. Thus, ideally, in this context, nations are willing to "avoid this advantage of fully autonomous weapons in order to obtain the assurance that, once hostilities cease, they can avoid involvement in new combat cycles" (Etzioni and Etzioni, 2017, p. 9).

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CHAPTER XII

COMPLIANCE
DIALOGUES



ACCESSIBLE TOURISM AND COMPLIANCE

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Abstract

The concept of Accessible Tourism recognises that tourism is for everyone and, therefore, everyone should be able to enjoy tourism products and services. This concept not only translates into benefits for tourists, as it provides an improvement in the quality of life of the local population, who benefits from the creation of improved accessibility conditions. Promoting accessibility is a fundamental condition for the full exercise of citizenship rights enshrined in the Portuguese Constitution. Although there is growing awareness of the need to make spaces more accessible, translated into compliance with European guidelines and legal standards, there are still numerous gaps and examples of exclusion. The measures which are necessary to guarantee the enforcement of rights can be operationalised based on examples of good practices. In this sense, this paper analyses good practices of inclusion implemented in the Autonomous Region of Madeira. Even though these measures promote inclusion, it is still verified that they are insufficient to respond to the needs of citizens with disabilities, limitations or incapacity. Even so, it should be noted that Madeira has been increasingly strengthening its offer as an accessible destination, in order to boost demand for the region as an inclusive destination.

Keywords: Accessible Tourism, Compliance, Inclusion.

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1. INTRODUCTION

As leisure is a right of all citizens, guaranteed by the Constitution, tourism should be available to all, without any group of the population being excluded. However, currently, tourism is not yet an activity accessible to all citizens, especially to people with some limitation of motor, visual, hearing or intellectual nature (Santana & Lima, 2018; Araújo, 2011). There are few destinations that meet the demands and peculiarities of tourists with specific accessibility needs (Santana & Lima, 2018).

According to a study conducted by Rede Europeia para o Turismo Acessível (European Network for Accessible Tourism) (2015), less than 10% of tourism providers in Europe offer accessible tourism services, even though the demand for such services tends to increase due to the ageing population.

Compliance with decree-laws which oblige the adaptation of public spaces has significantly contributed to the accessibility of people with disabilities. Accessible tourism not only translates into benefits for tourists, but also improves the quality of life of the local community, which benefits from the creation of better accessibility conditions (Devile, 2009).

2. THE CONCEPT OF ACCESSIBLE TOURISM

The concept of accessible tourism recognises that tourism is for everyone and therefore everyone should be able to enjoy the tourism supply. In this sense, infrastructures used by tourists should be free of any architectural barriers. Measures such as facilitating access at a passage point, improving signage and using portable equipment can make all the difference for people with some kind of disability (Devile, 2009).

Research on the relationship between tourism and disability has received increasing attention over the last two decades (Buhalis & Darcy, 2011). This recent phenomenon was first examined in detail in the literature on leisure restrictions (Smith, 1987). Since then, a number of individual studies on the demand, supply and organisation of travel for people with disabilities emerged. More recently, this topic has begun to mature with a conceptualisation that sought to make sense of the individual studies and provide a general framework for understanding the phenomena (Eleni et al., 2015).

Accessible tourism aims, therefore, to enable people with some specific needs to perform their leisure activities independently and with equality and dignity, through the supply of appropriate tourism products or services (Buhalis & Darcy, 2011).

Sibirino and Figueiredo (2015) point out that people with disabilities or reduced mobility are entitled to access to any place, including for the practice of leisure and tourism, in accordance with Resolution No. 48/96, of 20/12/93, on the United Nations Standard Rules on the Equalisation of Opportunities for Persons with Disabilities (Santana & Lima, 2018).

The National Strategic Tourism Plan (2007) points out that it is essential to develop an accessible tourism supply that gives everyone the opportunity to make use of Portugal's distinctive supply (PENT, 2007).

In this context, communication plays an extremely important role. It is crucial that information on accessible services reaches potential markets of people with disabilities, in order to minimise their perception of the risk of using such services (Devile, 2009; Mayordomo-Martínez et al., 2019).

3. TARGET AUDIENCE

According to the European Union Labour Force Survey, the population between 15 and 64 years old in Europe with some kind of disability represents 14% of the world population, which translates into about 45 million potential customers for the accessible tourism market (Mayordomo-Martínez et al., 2019).

Approximately 120 million citizens of the European Union are, to a greater or lesser extent, affected by a disability. This number is expected to increase gradually due to an ageing population (Accessible Portugal).

Only in Portugal, a small country with about 10 million inhabitants, there are around 2.5 million elderly people, 1 million people with disabilities, 550 thousand children under 5 years old and thousands of other people with temporary or permanent limitations (Accessible Portugal). More specifically, there are in Portugal 1 792 719 people with disabilities, whether visual, motor, mental or hearing. This means that 17% of the Portuguese population faces some kind of difficulty in their daily activities, namely walking, climbing stairs, speaking/hearing, memorising, or eating. According to the results of the 2021 Census (not yet released), 61% of this population are female and 39% are male (Fricón, 2021).

Based on these data, it is important that the accessible tourism supply not only includes people with some kind of disability, but also all citizens with temporary disabilities or reduced mobility, as a result of an accident or illness, as well as pregnant women, families with small children, the elderly and overweight people (Devile et al., 2011; Devile, 2012; Santana & Lima, 2018).

Tourists with accessibility needs seek inclusion and new experiences that are only possible through accessible and quality facilities and services (Smith et al., 2013).

People with disabilities participate less in various forms of social participation (Barnes, Mercer, & Shakespeare, 2010), not because of a lack of desire to participate, but because of discriminatory practices that do not enable their inclusion (Darcy & Taylor, 2009).

4. ACCESSIBLE TOURISM AND UNIVERSAL DESIGN

Buhalis & Darcy (2011) define accessible tourism as "a form of tourism that involves collaborative processes among stakeholders that enables people with accessibility requirements, including mobility, vision, hearing and cognitive access dimensions, to function independently and with equity and dignity through the delivery of universally designed tourism products, services and environments." (Darcy & Dickson, 2009, p. 34).

This definition adopts a comprehensive approach, which recognises that the development of inclusive destinations and accessible experiences also benefit other segments of the population (Buhalis & Darcy, 2011).

Buhalis & Darcy (2011) suggest that in order to develop future accessible tourism destinations, strategic planning by destination managers should be done from a universal design perspective.

Universal design is defined by the UN Convention as the design of products, programmes and environments to be used by everyone without the need for adaptation or specialised design. This concept aims to simplify the lives of all people of all ages, sizes and abilities. The universal design approach goes beyond traditional design, which tends to focus on the "average" user. This concept integrates the accessibility requirements of the population, so that more people can enjoy products and services without the need for adaptations (Mace, 1985). Applying the principles of universal design can help increase destinations' target markets, make experiences more accessible, reduce seasonality and support destinations' competitiveness, while contributing to social inclusion (Buhalis, 2000).

5. ACCESSIBILITY AS A COMPETITIVE FACTOR OF THE TOURISM DESTINATION

The supply of accessible tourism services is a competitive advantage of destinations. This differentiation is made on the basis of social inclusion. Besides strengthening its competitive position, the association of a destination with accessibility improves its image

(Devile et al., 2011). As a competitive advantage, accessible tourism presents itself as a differentiator of a destination with respect to its competitors (Smith et al., 2013).

This segment of the population has many advantages for accessible destinations. Among them, the availability of time, the long period of stay at the destination, the spending above the average and the strong tendency to loyalty when satisfied with the product or service, mainly because of the current difficulty of finding adequate supply (Smith et al., 2013).

Motivated to leave home in search of new experiences, and increasingly independent, the accessible tourist changes consumption patterns. However, attracting this specific audience requires careful planning and constant adaptation to accessibility tourism trends (Santana & Lima, 2011; Smith et al., 2013).

6. THE ECONOMIC POTENTIAL OF ACCESSIBLE TOURISM

More than 80% of tourists with reduced mobility travel with family and/or friends (Buhalis et al., 2005), which gives rise to a multiplier effect and consequently creates a significant market. However, this economic potential of accessible tourism is still relatively unknown and therefore ignored by tourism service providers (Devile et al., 2011).

Tourists with reduced mobility show a high level of loyalty as, once satisfied, they tend to return to accessible destinations that provide them with barrier-free experiences (Burnett & Baker, 2001).

The ageing population in developed countries and the progressive increase in the income of people with disabilities and/or impairments will lead to a significant increase in people with reduced mobility who can afford to travel (Devile et al., 2011).

In addition, accessible tourism "can contribute to combat the seasonality of the hotel network in periods of low occupancy, boost the sectors that benefit from the increased flow of travellers, and enhance the tourism product by social inclusion, eradication of poverty and access to information" (Kiefer & Carvalho, 2013).

7. THE HOLISTIC APPROACH TO ACCESSIBLE TOURISM

There are countless barriers that make it impossible or condition the participation of people with disabilities in tourism, throughout the whole process involved in the experience, from the travel planning process to transportation to the destination, besides the barriers at the destination itself and back home (Turco et al., 1998; Mazars Turismo, 2003).

In this sense, Darcy et al. (2008) advocate a holistic approach to accessible experiences provided at destinations, which means that tourism organisations should consider more than

simply the conditions of physical access. The total tourism experience is not only about accessible transport, accommodation, and activities (Buhalis & Darcy, 2011). The availability of adequate information and human resources prepared to welcome this target audience is increasingly relevant for the differentiation and competitiveness of destinations (Devile, 2003; Devile, 2009).

Tourists with disabilities attach great importance to prior information about the place, to avoid unpleasant situations when travelling (Santana & Lima, 2018). Leaving the everyday environment and travelling can create great anxiety for this target audience (Darcy, 1998). People with disabilities have routines to deal with any difficulties and limits they are aware of. This does not apply to new environments while travelling, where they have no prior knowledge of the potential barriers to face and strategies to overcome them. A European study (GfK, 2015) suggests that around half of people with disabilities do not travel on holiday, due to a combination of lack of reliable information, lack of financial resources and bad previous experiences.

The development of accessible tourism destinations implies action, not only from local tourism stakeholders, but also from other sectors, in order to encompass the various services that make up the tourism supply (Devile et al., 2011).

It is up to the tourism officials to provide accessible and adapted physical facilities and equipment, trained staff with compatible services and environments with safety and quality. Adaptations in infrastructure and equipment are not enough if the way people with disabilities are treated is not also given attention and preparation, with awareness and appropriate training for those working in the tourism sector (World Report on Disability, 2011).

8. TOURISM AND COMPLIANCE WITH THE LAWS IN FORCE

People with disabilities face daily barriers that affect their participation in various sectors of the economy, including tourism. Accessibility is seen by this segment of the population as a prerequisite for participation (Accessible Portugal), as only with accessible spaces, services and products can people with disabilities enjoy the tourism offer of a destination.

Their participation and inclusion in the most diverse spheres of society is ensured by the Constitution of the Portuguese Republic, which recognises that all people are equal in rights, as stated in article 13, even if their differences are considered and respected. Article 26(1) of this Constitution recognises all citizens as having "the rights to personal identity, to the development of personality, to civil capacity, to citizenship, to a good name and reputation, to image, to

speech, to the privacy of private and family life and to legal protection against any form of discrimination". This article is strengthened by Article 71, which ensures the recognition of the rights and duties of people with disabilities and establishes that the State has the duty to promote a national policy of prevention, treatment, rehabilitation and integration of disabled citizens, as well as to support their families.

In order to minimise the daily barriers faced by these citizens, the Convention on the Rights of Persons with Disabilities defines obligations in terms of accessibility and requires member states of the European Union to take the necessary measures to ensure accessibility (Accessible Portugal). This Convention represents a binding instrument for Portugal and aims to promote, protect and guarantee the human rights and fundamental freedoms of people with disabilities, promoting respect for their inherent dignity and recognising their self-determination. These principles have been reinforced, especially with the ratification of the Convention on the Rights of Persons with Disabilities in 2009.

Compliance with these standards enables people with disabilities to access all areas of social participation, as Article 30 of this Convention specifically recognises cultural life as an important part of citizenship for any person. This includes recreation, leisure, arts, sports and tourism activities (Buhalis & Darcy, 2011).

Following the international guiding principles, Portugal approves the National Strategy for the Inclusion of People with Disabilities 2021-2025, through the Resolution of the Council of Ministers no. 119/2021 of 31 August²⁷. This National Strategy has as its starting point the respect for the fundamental rights, freedoms and guarantees enshrined in the Constitution of the Portuguese Republic, as well as the principles and provisions recognised in the bases of prevention, qualification, rehabilitation and participation of people with disabilities in Law no. 38/2004 of 18 August²⁸. This law enshrines principles such as singularity, citizenship, non-discrimination, autonomy, information, participation, globality, quality, primacy of public accountability, transversality, cooperation and solidarity. In the defence of the transversal inclusion of people with disabilities, the National Strategy for the Inclusion of People with Disabilities 2021-2025 has dedicated its Strategic Pillar no. 7 for "culture, sport, tourism and

²⁷ Resolution of the Council of Ministers No. 119/2021: Approves the National Strategy for the Inclusion of People with Disabilities 2021-2025. (2021). *Diário da República* no. 169, Series I of 31/08/2021. <https://files.dre.pt/1s/2021/08/16900/0000300071.pdf>

²⁸ Law 38/2004: Defines the general bases for the legal regime of prevention, qualification, rehabilitation and participation of people with disabilities. (2004). *Diário da República* no. 194, Series I-A of 18/08/2004. <https://dre.pt/dre/detalhe/lei/38-2004-480708>

leisure", with the specific aim of improving access to leisure spaces and tourist resources, as well as to cultural, recreational, leisure and sporting events.

To discuss accessible tourism, it is important to mention the Law no. 46/2006, of 28 August²⁹, which prohibits and punishes discrimination, whether direct or indirect, due to disability and determines the obligation to provide equal conditions to all those who want to enjoy the tourism supply available, ensuring the absence of any practice or form of discrimination, whether direct or indirect.

Thus, through the rights enshrined in the Constitution of the Republic, the laws which prohibit discrimination, the decree-laws which make it compulsory to adapt public spaces, the ordinances which explain the procedures, the UN Conventions and the resolutions of the Council of Ministers which recommend successive governments to apply the law, accessibility has increasingly become a reality for a greater number of people. These efforts at the regulatory level are the consequence of the growing awareness of the need to make the tourism supply more accessible to all.

As a result of this growing awareness, Portugal has been making its tourism supply increasingly accessible to all. Within the framework of the International Tourism Fair 2020, in Madrid, the World Tourism Organisation (UNWTO) and the ONCE Foundation distinguished the best "Accessible Tourism Destinations". In this first edition, Portugal was distinguished, due to the importance it has given to accessibility and its involvement in the development and implementation of tourism products and services accessible to all (UNWTO, 2020).

It is important to note that Portugal has been a member of the World Tourism Organisation (WTO) since 1976 and that it has been a specialised agency of the United Nations since 2003. This organisation promotes the implementation of the Global Code of Ethics for Tourism³⁰. Article 7 of this Code advocates a universal right to tourism as a corollary of the right to rest and leisure enshrined in Article 24 of the Universal Declaration of Human Rights, as well as in Article 7 of the International Covenant on Economic, Social and Cultural Rights, which stresses in paragraph 4 that tourism for people with disabilities should be encouraged and facilitated.

²⁹ Law No. 46/2006: Prohibits and punishes discrimination on the grounds of disability and aggravated health risk (2006). *Diário da República* No. 165, Series I of 28/08/2006. <https://files.dre.pt/1s/2006/08/16500/62106213.pdf>

³⁰ World Tourism Organisation (1999). *The World Code of Ethics for Tourism*. https://www.hoteis-portugal.pt/docs/content/CTfgpevCQzOMZX8ueNSVtddbvxAbp_Fx.pdf

Aware of the growing importance of these issues, the National Strategy for Tourism 2027 (ET27)³¹, approved by the Resolution of the Council of Ministers No. 134/2017 of 27 September 2017³², proposes accessible tourism in almost all of its intervention pillars.

Legislation created with the aim of promoting accessibility and conditions of well-being and safety for people with disabilities is vast, which significantly boosts inclusive tourism. In this context, Portugal has transposed into the internal legal system several regulations of the Council of Europe regarding mobility in transport, namely Regulation (EC) No. 1371/2007 of the European Parliament and of the Council, of 23 October (referring to rail transport), Regulation (EU) No. 181/2011 of the European Parliament and of the Council of 16 February (concerning road transport), Regulation (EU) No. 1177/2010, of the European Parliament and of the Council of 24 November (maritime transport) and Regulation (EC) No. 1107/2006 of the European Parliament and of the Council of 5 July 2006 (concerning air transport). The European and, more specifically, national, regulatory effort to make tourism increasingly accessible to all is noteworthy, although access to products and services is not yet a reality for everyone with disabilities.

9. ACCESSIBILITY IN THE AUTONOMOUS REGION OF MADEIRA

Although many infrastructures in Funchal, the capital of Madeira, are properly equipped to receive people with reduced mobility, the streets and pavements keep the old stone pavements, which condition the circulation of people with special needs. Even so, there is a greater effort by the local authorities to adapt the spaces and equipment to this target audience (Visit Madeira).

Most hotels in the Autonomous Region of Madeira have lifts, access ramps and good accessibility conditions for people with reduced mobility. As for the urban public transports, they provide adapted vehicles or accesses for people with motor limitations. It should be noted that Madeira and particularly the city of Funchal have been investing in the adaptation of its transport network. Besides, a set of leisure and cultural areas in Funchal are adapted to welcome people with reduced mobility or other types of disabilities (Visit Madeira).

³¹ Turismo de Portugal I.P. (2017). Tourism Strategy 2027. <http://www.turismodeportugal.pt/SiteCollectionDocuments/estrategia/estrategia-turismo-2027.pdf>

³² Resolution of the Assembly of the Republic No. 229/2017: Recommends that the Government denounce to the Secretariat of the Espoo Convention the violation of this Convention by Spain (2017). Diário da República No. 187, Series I of 27/09/2017. <https://files.dre.pt/1s/2017/09/18700/0552205532.pdf>

In this context, Madeira has been increasingly strengthening its supply as an accessible destination, in order to boost demand for the region as an inclusive destination for all (Visit Madeira).

10. CONCLUSIONS

A destination image, when associated with accessible tourism, provides an opportunity to differentiate and attract visitors, to the detriment of other destinations that do not have these characteristics (Smith et al., 2013).

However, in the current context, much of the tourism supply is not properly prepared for the public with accessibility needs. Although the progress that has been made in terms of accessibility is remarkable, the access of people with disabilities to tourism products and services is still insufficient (Devile, 2012). For this reason, destinations that are prepared to serve this public have a competitive advantage over others (Smith et al., 2013).

The compliance with laws prohibiting discrimination and decree-laws requiring the adaptation of public spaces have contributed significantly to the accessibility of people with disabilities. Still, if today most tourist facilities or services only meet requirements imposed by law, they will soon compete to serve the needs of an audience that has economic power, time and willingness to travel (Chan, 2010; Buhalis & Darcy, 2011; FMET, 2004; DCMS, 2010). In the longer term, it is expected that other destinations that are not currently accessible will become so, either to meet legal requirements, or by recognising that this is a market with economic potential. The trend will therefore be for the supply to be increasingly prepared to meet the needs of this market segment (Smith et al., 2013).

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AFTERWORD

Organised by competent scholars, the book contains valuable papers, all of which are the result of research conducted within the framework of the 2nd Ibero-American Congress on Compliance, Governance and Anti-Corruption - CIACGA 2021, promoted by IIAC. The quality of the authors and the content presented are already evident at this point of reading.

What seems relevant to add in this brief afterword is that the book *Compliance Dialogues* could not be better titled. It is true that the study of compliance is not complete without a true dialogue. The understanding of compliance is not exhaustive in itself, since it presupposes an encounter with one or more parameters to be pursued and achieved. After all, in conformity to what? There is a certain dialogue even in the nucleus of its interpretation.

Complementing the quality and extent of the dialogue, authors from various nationalities explore very rich ideas on compliance applied to diverse areas. There are correlations between compliance and topics that concern the relationships maintained between public and private entities, as well as only between private ones, demonstrating the diversity of the application of such tools.

Compliance and Governance, in short, represent sets of practices that guide (the search for and maintenance of) compliance. Without any doubt, such themes already have enough understanding and research to grant them the status of independent objects of study, but they precisely find their true *raison d'être* in the practical application, that is, in the dialogue with norms or standards of legitimate behaviour, expected and typical of one or another area of social and economic relations regulated by Law.

It is possible to state that the study of the design and execution of compliance programmes with the legislation or even with ethical and moral parameters is recent. It is not recent, obviously, a subjective ideal of attending to and complying with what is determined by the law, in a general sense, especially when it is feared the penalty for its non-compliance. However, it goes back to recent decades structurally thinking of practical application instruments to achieve and monitor compliance, especially aiming no longer to avoid legal sanctions and their punitive aspect, but to promote social common good and, as it is absolutely legitimate, even enjoy the reputation benefits of good practices of conduct and behaviour.

In this path, pure conceptions that the application of the punitive power of the State would be enough in the practice of illegal behaviour by individuals in a society, either in their relationship with others or with the norms that regulate the collective, led to the model of external regulation and prior to the adoption of reprehensible conduct. Movements of internal allocation of inspection, through people or management tools, paved the way for compliance programmes as we know them today and are expanding.

Internal supervisory allocation movements, through people or management tools, paved the way for compliance programmes as we know them today and they are expanding.

The leading role of such programmes is unequivocal in modern society. From being a tool to fight corruption, to being a mechanism to adopt good practices and responsible business conduct, aiming at solvency, risk mitigation, sustainability or even reputation control, to the indispensable promotion and defence of human rights, one can see that there are many occupations and purposes that can be granted to the Compliance and Governance programmes, as can be learnt from the assimilation of the content present in the book.

The book *Compliance Dialogues* is a valuable contribution to the academic environment that is dedicated to research on the subject, even more so if one considers the clear intention of the coordinators to demonstrate that the study of compliance is a vast and fertile field, admitting, precisely, dialogues with innumerable fields of regulation of social and economic relations. Dialogues which, by the way, often can form or instigate a new idea.

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COMPLIANCE DIALOGUES



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ISBN 978-989-33-4180-3



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