COMPLIANCE, FUNDAMENTAL RIGHTS AND EXCEPTIONALITIES: QUESTIONS AND PRACTICAL AND THEORETICAL REDUNDANCIES ACCORDING TO APPLICATION FINDINGS?[1]

COMPLIANCE, DIREITOS FUNDAMENTAIS E EXCEPCIONALIDADES: QUESTIONAMENTOS E REDUNDÂNCIAS PRÁTICA E TEÓRICA MEDIANTE CONSTATAÇÕES APLICACIONAIS?

DOI: 10.19135/revista.consinter.00017.18
Received/Recebido 11/04/2022 – Approved/Aprovado 26/05/2023

Luigi Bonizzato[2] *– https://orcid.org/0000-0002-3221-4068*

Abstract
This legal article aims to confront and foster interactions between the compliance institute and fundamental rights, in theoretical and factual terms. Thus, the present text, resulting from analytical-bibliographic, deductive, inductive and propositional methodology research, intends to advance in one of the facets of the advent of compliance, namely, the relative to its arrival amid the figure of a lot of fundamental rights already classically and constitutionally established. At times in agreement, at times in contrast, compliance policies deserve a deep examination, in order to confirm or not the hypothesis according to which they contrast, harmonize or, simply, are epistemological redundancy inside the larger universe of legal sciences. Classificatory creations and examples will be brought to light, with a greater focus on specific Brazilian legislation, towards which the entire construction and evolution of this Article will be based.

Keywords: compliance; fundamental rights; Constitution.

Resumo
O presente Artigo jurídico tem por meta central confrontar e fomentar interações entre o instituto do compliance e os direitos fundamentais, teórica e faticamente considerados. Assim, o texto, resultado de pesquisa que se vale de metodologias analítico-bibliográfica, dedutiva, indutiva e propositiva, em uma montagem que permite a comunhão dos métodos citados, pretende avançar em uma das facetas do advento do

---

[1] The present work is also the result of a research carried out by the Author in a course on *Financial Crimes Compliance*, in 2017 at Fordham Law School – New York/Lincoln Campus.

[2] Doctor/PhD in Law from the Universidade do Estado do Rio de Janeiro (UERJ). Professor of Law at the Universidade Federal do Rio de Janeiro (FND/UFRJ). *Fordham Law School Financial Crimes Compliance Course* (NY/2017). Co-coordinator and member of LETACI (Laboratório de Estudos Institucionais – Institutional Studies Laboratory). Creator, administrator and coordinator of LACENJUR (Laboratório Cenários Jurídicos – Juridical Scenarios Laboratory) and of the APP "Constituição para Leigos" (Constitution for Lay People). Lattes: http://lattes.cnpq.br/8169452504332343. Site: <www.bonizzato.com.br>. E-mail: luigiboniz@direito.ufrj.br. https://orcid.org/0000-0002-3221-4068

compliance, a saber, a relativa à sua chegada em meio à figura de inúmeros direitos fundamentais já clássica e constitucionalmente consagrados. Ora de acordo, ora contrariamente, políticas de compliance merecem um exame aprofundado, a fim de que se possa confirmar ou não a hipótese segundo a qual conflitam, harmonizam-se ou, simplesmente, são redundância epistemológica dentro do universo maior das ciências jurídicas. Criações classificatórias e exemplificações serão trazidas à tona, com foco maior destinado a específica legislação brasileira, em direção à qual se fundará toda a construção e evolução deste Artigo.

Palavras-chaves: compliance; direitos fundamentais; Constituição.

Summary: 1. Introduction. 2. Fundamental rights in the development of the Compliance institute: categorizations and initial classifications entitled "brutality" and "non-brutality" with regard to conflicts between both. 3. Critical and exemplary examinations of “brutally conflicting” norms, acts and interpretations with other fundamental rights: an extra and ultra compliance in Brazil? 4. Final Considerations. 5. References.

1 INTRODUCTION

In the sphere of relational examination between the advent of practices and policies of what is conventionally called compliance, as a real and true institute, and the classic figure of fundamental rights, there are areas of intersection, conflict and distancing. However, this critical and provocative Article will try to focus on the aforementioned conflict zones, taking the central goal of confronting and fostering interactions between the compliance institute and the figure, classical and theoretically more consolidated, of fundamental rights.

Compliance imposed profound changes on private and public structures and organizations, generating, in an attempt to change certain practices and conduct more quickly and in particular, discomfort and difficulties for the implementation of its objectives. In order to combat illegality, corruptive, harassing acts, among others, it ended up bumping into the fundamentality of many rights, which, at times parallelly, at times contrarily, already existed as guarantees for citizens and people.

Considering and always having the Brazilian case as the main focus, the very figure of compliance deserves special attention with regard to how “brutally” (in the highest sense of intensity), as throughout the text will be better understood, it will conflict with the fundamental rights and vice versa. The present text, which results from analytical-bibliographic, deductive, inductive and propositional methodology research, in an assembly that allows the communion of the aforementioned methods, will bring a concrete Brazilian example of how standardization can be questioned and lead to the promotion of constantly critical thinking, without, but not necessarily, being destructive, with regard to the themes chosen for confrontation and scrutiny.

Fundamental rights are generously described in the 1988 Brazilian Constitution, which should not be ignored, whatever the social and legal intentions that lead to the establishment of compliance policies. The lines that follow will address this central theme.

2 FUNDAMENTAL RIGHTS IN THE DEVELOPMENT OF THE COMPLIANCE INSTITUTE: CATEGORIZATIONS AND INITIAL CLASSIFICATIONS ENTITLED "BRUTALITY" AND "NON-BRUTALITY" WITH REGARD TO CONFLICTS BETWEEN BOTH

With the advent of modern Constitutional states and their evolution to contemporary models, the rule of law was gradually consolidated, followed, in several countries, by the democratic rule of law. States with a main characteristic in common, that is, the idea according to which, initially the rulers, and later all society, under the *aegis* of a Constitution, would be governed by norms, above or in the position of which no one alone could be.

Therefore, if the overcoming of absolutist States and Monarchies depended on the magnitude conferred to the Law, the evolution of the post-revolution rupture, even more European, caused a series of improvements to emerge. And, for the purposes that are just beginning to be announced, the concern and emergence of the so-called fundamental rights came to fortify what history has tried to refute and, even because of this, paradoxically or, a *contrario sensu*, overestimate and resize in the future.

The fundamental rights of first, second and third generations or dimensions[3], as classically conceived, are thus linked, above all, to the different historical moments in which they were awakened and constitutionally imprinted. Basic individual rights and freedoms, as well as political rights in a new scenario of valuing representation, marked the first mentioned generation. Rights linked to equality and, therefore, mainly social, including greater attention to workers' rights, after industrial revolutions and labor manifestos, occupied a second historical moment, with, among other countries, Mexico and Germany, respectively in 1917 and 1919, inaugurating Constitutions with spaces for the so-called social rights. Finally, after two World Wars and a long period of international tensions, under an atomic global bipartition, the third generation fundamental rights added to the previous ones to bring to light the relevance of collective, diffuse, cooperative rights, among which, for example, the right to the environment and its protection.

However, the classic and triple subdivision of generations – plus others that the Author respects, but still prefers to redistribute by the first three ones[4] – also needed time to consolidate and sediment itself in a series of legal and social orders, even more democratic ones, that is, where regimes focused on mainly representative

---

[3] The Author of this Article prefers the word "generation", although he does not disagree with the use of the word "dimension".

[4] The author suggests that, in addition to the traditional first three subdivisions of generations, social-digital rights linked to new platforms and applications of advanced technology, brought with them real new ways of looking at the fundamentality of rights, as well as true new legal relationships, especially after the first decade of the 21st century. Social networks, communication and dissemination of ideas applications, virtual universes, etc., are simple examples of instruments through which distinct and previously unseen legal relationships began to consolidate in the factual world. On the subject and some of its more acute sociological aspects, it is worth checking, among other studies by Manuel Castells, the work "Networks of indignation and hope: social movements in the age of the internet" (CASTELLS, 2012).

and participatory democracies managed to establish themselves. And, still on the aforementioned tripartition, it certainly continues to depend on time, given not only the amount of disrespect to the referred rights – as well as the very fast changes in contemporary social and factual dynamics -, but also the ever greater complexity of the relationships human and, again, social. Fundamental rights are certainly one of the greatest achievements of most democratic countries on the planet, but an achievement to be constantly monitored, preserved and, when necessary, updated.

In this sense, in several legal systems in developed countries, rights such as human dignity, equality, freedom, due process of law, among others and their countless developments, have outstanding importance, stability and, logically, legislatively or judicially controlled evolution. And also, in developing and underdeveloped nations, which were able to organize themselves, socially and legally evolve, in addition to forming democratic States, these rights gained considerable strength, even though variable mishaps have ended and effectively ended up being more impactful than compared to similar obstacles in countries with more mature, consolidated and/or developed democracies.

In this scenario, therefore, it is common in countries where fundamental rights (most of which coincide with the notion of human rights – which here is slightly closer to predictions from international bodies, with pretensions to universalization[5]) find greater shelter, acceptance and understanding, a citizen to know and be more aware of their responsibilities and rights. Understanding that one is free, based on the guarantee of freedom rights, but with a duty to respect similar freedoms of others. Understanding that one can defend themselves against an abusive State which, in turn, will also have greater chances of having the most exact (or least inexact) measure of its policies, so as not to carry out the aforementioned excesses against its citizens. Finally, having a basic knowledge of the rights that will defend them – they, the citizens -, against arbitrary acts also by an economically powerful private power and, commonly, minimally aware of its limits.

At least in theory, the deductions and conclusions of the paragraph and other previous moments are not surprising. Or they shouldn't. But, on the other hand, it is also known that the path of strengthening fundamental rights still has to be paved, most likely being a journey without a glimpsed epilogue, a certain and determined end point. And since, as solidified by several theorists[6] on the fundamentality of rights, no setbacks are allowed, only advances, with the agglomeration of new rights, without eliminating others.

---

[5] Luigi Ferrajoli, in defense of the universalization of fundamental rights, exposes: "*Esta internacionalización de los derechos fundamentales es la tercera de las tesis indicadas al principio y en la que ahora voy a detenerme. Después del nacimiento de la ONU, y gracias a la aprobación de cartas y convenciones internacionales sobre derechos humanos, estos derechos son 'fundamentales' no solo dentro de los Estados en cuyas constituciones se encuentran formulados, son derechos supraestatales a los que los Estados están vinculados y subordinados también en el plano del derecho internacional; no, pues, derechos de ciudadanía, sino derechos de las personas con independencia di sus diversas ciudadanías*" (FERRAJOLI, 2002, p. 55).

[6] Among others, Robert Alexy, internationally, and Ingo Sarlet, in Brazil, are selected by the present Author as references. Robert Alexy, with his "*El concepto y la validez Del Derecho*" (ALEXY, 1997) and "*Teoria de los derechos fundamentales*" (ALEXY, 1993); and Ingo Sarlet with his "*The effectiveness of fundamental rights*" (SARLET, 2001).

In this direction, if surprises should not be a cause for concern, especially for the so-called developed countries (although not only them), it is not uncommon for societies and legal systems to sometimes face direct disrespect, sometimes indirect; sometimes with dribbling, sometimes with strategies; and sometimes with distinction, sometimes with different and even reductionist interpretations of fundamental rights. For example, not that reductions in the applicability of fundamental rights cannot or have to occur for their own harmony and survival, but it's essential that such reductions are not schizophrenic, teratological and eliminatory of rights equally considered to be fundamental. Accepting the practice of torture in the name of the right to security and various freedoms is a measure here considered unreasonable and completely repudiated, as a simple and direct illustration of what is presented. Restricting freedom of movement, in extreme circumstances to combat violence and protect security, on the other hand, may be an acceptable measure and not representative of setbacks or elimination of fundamental rights.

At the same time and, however, not only from the above-mentioned logic of departures numerous problems involving fundamental rights can be found. For these are called "rights," but they naturally imply duties. If human dignity is a fundamental right, as well as equality and freedoms, each and every citizen of the countries, maximum, but not only, democratic ones exposed since the beginning of this text, knows and has the notion of what one can and cannot do[7]. At least in the broadest sense, in a rather condescending view of people's knowledge of their most basic rights and duties. Certainly, they know and have the notion that they should not steal, kill, torture, corrupt or be corrupted, etc. And, it should be noted, this notion derives from the social, civilizing and legal progress of countries in which several rights, including and, above all, fundamental ones, have gained greater protection, in a scenario of State Powers acting in favor of their achievement.

However, modernity and countless forms of damage to rights that benefit from fundamentality, whether by the State, or by individuals,-be it from the latter over the former, or the former over the latter- or even by anyone, in an endless list of possibilities, given human creativity, technological advancement and the varied possibilities, ranging from large corporations and business societies to small businesses and public and private individuals caused a new measurement curve to gain great strength and manage to reach a level of great acceptance by numerous social groups in this 21st century. The norms and conducts that revolve around specific notions of ethics and the so-called compliance invaded, mainly, the Western private world, with a strong initial influence from the developed countries of North America, especially the United States, and Europe. And this to later represent justifications for including in legal norms and conduct (mainly judicial and legislative decisions), commonly infraconstitutional reductionists of fundamental rights, but whose application was consented to by appeals, including, much more moral than those related to law. But, in any case, an implacable reality in this current contemporary world and scenario.

---

[7] With very few justified exceptions, such as, among others, people with mental or cognitive disabilities, etc., for illustrative purposes.

Indeed, if the idea and strengthening of compliance has become a differential nowadays, here we ask, right away: from the most basic to the most complex notions of compliance and its developments, to its various forms of application and demand, wouldn't it be , in parts (a) brutally[8] conflicting with other fundamental rights (here already announcing a first categorization to be explained below), in the face of a repetition of the latter and a very concept of civility[9], on which are also based all the statements and theories which separate civilized countries from partially or non-civilized ones? Wouldn't we be facing an obviousness that would have to be repeated due to the serious deviations of human conduct, science and awareness of incorrectness on the part of those involved in reprehensible attitudes? Would there be real room for real innovation in the idea of acting "in accordance with" the rules? And, at the core of compliance policies and practices, would countless acts not end up turning their backs on fundamental rights themselves and all their long history and journey of hard achievements and consolidations in legal systems around the world? Finally, and at the same time, in the face of conflicts between now key and fundamental principles, more restricted foundations on which States and nations are supported, which end up also demanding an appeal to the aforementioned civility for understandings about possible collisions, in which case one could speak of, mainly, interpretations and norms (b) not brutally conflicting with several fundamental rights (second categorization, to be explained below), could one accept the same critical tone just previously ventilated with regard to compliance and its bases?

It is believed that, if not answers, reflections on these questions are essential for an adequate deepening of a subject with space for legal thinking and questioning that has not yet been so well explored. And with attention to the chosen categorization, in which the word "brutally" is inserted in a hermeneutic context of the present text, which must be well digested, in order to avoid dissonant interpretations with what one wishes to conclude. Let us then take a walk along these apparently thorny roads, with an important sign for the dear reader: in the lines below, the analysis of the categories created above will be inverted and we will begin with the second categorization, after which we will move on to the first exam.

In this sense, the second proposed categorization embraces the encouragement to "non-brutally" conflicting legal norms and interpretations[10] with fundamental rights accepted in a legal system. In this context, cases of extreme conflicts between rights of great legal relevance, through situations in which basic and key principles and values of a legal order clash, especially in specific concrete events, deserve a more favorable and positively careful look. In other words, it means that the creation of norms and the taking of legal decisions, in situations where the magnitude of both the fundamental rights involved and the possible

---

8 Word chosen by the Author, focused on the idea of great intensity, but without losing the very notion of violence, aridity and harshness.

9 This Article does not intend to define or conceptualize civility. The reader is given the interpretation he deems most reasonable, but only for the purposes proposed here.

10 By way of introduction, "not brutally conflicting" norms and interpretations would occupy intersection zones with cases in which doubts arise and spaces for interpretation occur, since magnanimous principles and values can be at stake in extreme situations. In a supposed and hypothetical compliance linked to non-brutally conflicting norms and hermeneutics, tolerability could be more easily found, understood and justified.

conflicts and clashes between them is not contested, mean that the need for social and state action is called into question, towards a majority desired resolution. Thus, it should be noted that the very concept of "non-brutal", in this Article, is applicable in the relationship between legislative creations and judicial interpretations, and the fundamental rights themselves.[11]. A terrorist attack in a given country, in which the guarantee and protection of the most basic fundamental rights is present, can "quietly" lead to executive and legal decision-making, as well as the creation of emergency norms, which will not brutally affect the logic of the respective order of fundamental rights, in favor of the need for immediate guarantee of the right to security, positive expectation of citizens in States with a, albeit minimal, sedimentation of more basic fundamental rights. In the classic, but ever present, already mentioned here and such a relevant conflict between freedom values and security values, the restriction of the former through legal, administrative and legislative decisions, provided that due legal process is respected – even if previously adjusted for extreme cases or moments of potential need for state interventions -, in favor of not wasting seconds in extreme situations, it will hardly be understood by the author now as something that will brutally hurt the dynamics, route and virtuous circularity of fundamental rights[12].

It is important to reinforce, although it has been previously explained, that the notion of "non-brutality" is built on the fact that a momentary unevenness in the application degrees of fundamental rights, may not be considered gross, given the magnitude of a concrete problem or of the principles involved in the dispute. Taking as an instance the terrorist act, it will be much less likely that people, victims or not of the attack, will not allow some restrictions on their fundamental freedoms, so that security is prestige and the balance of the virtuous circle of fundamental rights returns to be a stable and protective system of the fundamentality of rights.

Therefore, if this was the notion of "non-brutality" to be conveyed to the reader, that of "brutality" will consider situations in which fundamental rights may get lost in their virtuous circularity, enter into a collision course with other fundamental rights, in concrete cases or abstractly envisioned as more everyday and less drastic compared to the illustration of the conflict between freedom and security. These will be situations in which a virtuous circle in full operation may have compromised parts, which, if persistent and in uncontrolled growth, may lead an entire system of guaranteeing fundamental rights to an applicational and incidental inversion, in which case virtuosity will be transformed into addiction, that

---

[11] Here, the notion of "brutality" will focus on values and principles that may be clashing or whose very existence may be threatened in a concrete situation. If large-scale principles collide in concrete cases, here it will be understood that eventual legal interpretations and legislative creations will have a greater chance of not being brutally conflicting with the legal structure of constitutionally consolidated and positivized fundamental rights. And it may also justify, in a broad spectrum and scale, the determination to implement measures, practices and policies of what is conventionally conceived as compliance.

[12] For more details on the subject, check out the work "*The Constitution of health and life: issues, approaches and facticities for findings, delimitations and new theoretical advances in social and fundamental matters about public and private health in Brazil*", by Luigi Bonizzato (BONIZZATO, 2022).

is, the sometimes acclaimed virtuous circle will change and may lead to the formation of a vicious circle.

3 CRITICAL AND EXEMPLARY EXAMINATIONS OF "BRUTALLY CONFLICTING" NORMS, ACTS AND INTERPRETATIONS WITH OTHER FUNDAMENTAL RIGHTS: AN EXTRA AND ULTRA COMPLIANCE IN BRAZIL?

Consequently, in exact sequence to what was discussed in the last paragraph of the previous chapter, if in the depths of the most common, frequent and customary application of fundamental rights, respect for freedoms, due process of law, human dignity, equality , among many others, is doubted and called into question, it can then be said that certain judicial, administrative and legislative decision-making will generate a "brutality" conflicting with the fundamentality of rights. It should be noted that the maturation of the fundamental rights in several legal systems would already be enough to avoid the creation of norms or, among other examples, judicial interpretations and administrative measures which reduce dimensions, but questionable from the maintenance point of view integrity of the fundamental rights. It comes closer to the boundary between law and morals[13] and, even without deviating from the sphere of law, concrete situations will insert the benefit of the doubt in favor of recipients eventually harmed or injured in their most basic rights. Encouraging plea bargains, for example, can be understood as a strong weapon against corruptive, reprehensible and harassing acts, but, at the same time, it can also be contrary to traditional, classic and centuries-old (if not millenary) ethical norms, in addition to driving springs for a structural deviation in the very logic of fundamental rights. Now, if an entire system of creation and consolidation of fundamental rights took centuries and more centuries to be created and continues in constant evolution, is it justifiable to encourage plea bargains if citizens and people who are recipients of fundamental rights should already presume to be protected by the rights equality, non-discrimination, the need for private and administrative probity, among many other constitutionally posited fundamental rights that could still be mentioned here? Are modern codes and norms of conduct in private societies and in the scope of public administration sustained, justified and should they be considered appropriate, if a contemplation arising from a whole dynamic circle of existence and application of fundamental rights already exists within a legal system?

It is true that each country has a degree of evolution in the application, guarantee and protection of fundamental rights, but, as presented since the beginning

---

[13] It is worth mentioning Chaïm Perelman, who states: "*Faced with the multiplicity of norms and values, the law, aiming to guarantee the legal security that would establish the rights and obligations of each one, has to grant to some of them, the legislators, the authority to elaborate the rules that will be imposed on all, and must designate those, the judges, who will have the task of applying and interpreting them*". And inclined to the idea of morality, he concludes: "*Practical reasoning, applicable in morality, should not be inspired by the mathematical model, inapplicable in this case, but by virtue, characterized by restraint and consideration of diverse aspirations and multiple interests, qualified by (...) 'prudence' by Aristotle, and which manifested itself so brilliantly in law in the jurisprudentia of the Romans*" (PERELMAN, 2000, p. 303-306).

of the text, the focus of this research now takes into account legal orders where fundamental rights were minimally valued and constitutionalized, from its temporal evolution in generations or dimensions, in the process of creation of the Rule of Law and Democratic States of Law.

The growth of indictments in Brazil, many of which are inaccurate and encourage disrespect for due process of law as a fundamental right provided for in Art. 5, item LIV ("*no one shall be deprived from their freedom or their property without due process of law*"), of the Constitution of the Brazilian Republic, can lead to a new circularity and make innovation a double-edged sword: to combat corruption (financial crimes, etc.), is there room for the so-called "snitches"? Is a new conception of ethics imposed and presented? Or rather, it would soon be considered an ethical shock not adequately dimensioned by the States and social groups staunch defenders of compliance norms, which, when newly implemented, generated applause, but, over the years and times, showed their cracks and problematic manifestations?

In this direction, it is important to talk about the figure of "comply to", "compliance", of being in conformity. Private business companies, based on sometimes legislative, sometimes executive, judicial or even simply social permissions, began a massive process of creating norms of conduct, consolidated into internal Codes of behavior understood as "adequate", as defenders of the somewhat fluid ideas of correctness and smoothness, among others. But why fluid? Because if a direct subordinate of a person occupying a management position in a private company makes a report to a Compliance Department of such company (also part of the modern creations derived from the "compliance" policies) claiming that the aforementioned manager, his immediate boss, is committing an illegal act, this is a straight and honest act (ethically questionable depending on some aspects) of the whistleblower, which aims to attack, ultimately, the corruptive practice as an endemic social evil. However, on the other hand, and from another point of view, which will ensure that the manager is a person with specific and peculiar relationships within society, an estimated employee among his/her immediate superiors, will the subordinate's indictment be covered up or disregarded and, finally, will the whistleblower be dismissed and perhaps legally prosecuted for slander, defamation or slander and for moral damages to his manager? Or, perhaps in a more serious scenario, what will ensure that the working environment does not collapse for the whistleblower, even if any co-worker harmed by the denouncement takes any retaliatory action? Harassment, in its broadest sense, has several facets and some of its consequences are certainly not embraced by law.

In any case, it should be emphasized once again that the development and attempt to always improve policies and theories about the so-called compliance have advanced and continue to grow. However, with some inquiries and questions not invoked or unanswered. In the micro example discussed above, solutions such as outsourcing the Compliance Department can be defended as a guarantee of impartiality in judgments arising from complaints. But what will ensure that the outsourced Compliance Department is not co-opted by the company that outsourced it? The author of this Article, up to this moment, has not found satisfactory answers

yet. Whether they are practical or theoretical answers. Whether they are strongly in favor of compliance policies, or against them. But, certainly, through a situation of necessary choice, here the option for the protection and defense of the fundamentality of rights is defended, consolidated in the figure of fundamental rights. And, in this regard, it should be noted that the conduct protected and encouraged by the well-known Codes of Ethics and Conduct of private companies, which eventually occupied spheres of public administrations, whether through laws or judicial decisions, or through Internal codes, created by Ordinances, Resolutions, among other acts more linked to administrative powers and Public Law itself, do nothing more than reinforce a sort of "blatant obviousness", quoting the expression eternalized by a well-known and now deceased Brazilian playwright (RODRIGUES, 1993). More precisely, they do nothing more than ratify the need to respect constitutionalized fundamental rights, such as non-discrimination, the reduction of social inequalities, equality, various types of freedoms, such as, for example, the right to manifest thought that, in its negative and opposite sense, causes the right to silence, the right to tolerance, the respect to differences, among many others, to be invariably revered.

In this sense, it should be noted that the same practices which allegedly are protective of good conduct and compliance with the rules, described in the aforementioned Codes of Conduct, can lead to restrictions on enshrined fundamental rights and, ultimately, even to situations or states of exception, most of which are certainly informal and unofficial. The right and also the reputed principle of the adversarial system and full defense can remain patently difficult, since the stimulus for the production of evidence ends up becoming greater and, when reached its apex, the violation of privacy, intimacy and, finally, the own defense of the use of illicit evidence, prohibited in the Brazilian Constitution in Art. 5, item LVI ("evidence obtained through illicit means are unacceptable in the process"), can become an implacable reality and against which acts of defense can become innocuous, harming one of the institutes and greatest achievements of modern and contemporary nations: the fundamental rights.

Moreover, it should be noted that the danger of reversing classic presumptions surrounds the compliance institute, which, in order to stay alive, must overcome its own legal vicissitudes. The norm of presumption of innocence can, in situations defended by the institute now in vogue (compliance), become a new normative orientation, that is, the presumption of guilt. Undoubtedly, more extreme situations are being considered, which, however, cannot be discarded, let alone considered as a minor incidence, since the practical side and facet of certain daily conducts, especially linked to labor activities[14], lead to wide possibilities of occurrences.

[14] It should be stressed that compliance is preponderant and immediately aimed at qualifying labor relations and conduct and, indirectly, at qualifying conduct and social practices in a broad sense. However, it is worth remembering that this research works with a critical hypothesis to the figure of compliance, in an attempt to demonstrate that clashes with fundamental rights, flirtations with dangerous exceptionalities from the point of view of defending democratic institutions, are a reality

And, along these lines, it is also essential to emphasize that the very idea of compliance has already surpassed the institute's initial and vestibular limits, invading the scope of action of numerous Brazilian institutions and around the world, reinforcing that the focus of the present study is the National law, that is, Brazilian law, although broader mentions are necessary throughout the text.

Therefore, it was not, and will not even be rare, the incidental application of exceptionalities to fundamental rights, in the name of supposed values and convictions (many of which are personal and, no, impersonal – as ordered by the Constitution of the Republic, in its Art. 37, caput), at the heart of the Judiciary, Executive and Legislative Powers, according to what is inferred from the beginning of this brief research, which is now consolidated in this Article. In other words, the central bases and foundations of the compliance institute, beyond the sphere of private relations[15], already achieved the *modus operandi* of judicial decisions, administrative acts and legislative productions, in a risky and reckless journey towards an unknown, hypothetical and, by the Author considered unreachable, place of inexistence of corruption, of illicit practices and of conducts that may endangering private societies and entire collectivities, such as nations and states. Without forgetting, the thin dividing line between the attempt to combat, at all costs, what is supposedly and socially considered wrong, misguided, misconduct, etc. – from an idea of illegality, with areas of intersection with the moral zone -, the attempt to create unreasonable exceptions to constitutionally foreseen and established fundamental rights. And in order to establish a true situation of exception, in which exceptionalities are transformed into general rules, through which old understandings[16] return to a surface that generates great social, legal, economic, political risks, etc.

In any case, note how the Brazilian legal system seems to walk in an oscillating way. And, as a mere but representative example, the legislation created in 2018 follows, in which whistleblowers are encouraged within the scope of public administration, with even the figure of awards appearing in parallel. Below, given the relevance of the chosen illustration, other parts of the original version of the Law

---

to be faced, both in the scope of Private Law and in the sphere of Public Law, in an interdisciplinary and complementary research dynamic.

15 In conclusion to her article on the compliance institute, its advantages and the attention to be given to it, Eloisa Helena Severino de Souza Crivellaro writes: "*The present study sought to demonstrate that the main objective of the new legislation goes beyond the accountability of the corruptor and corrupted, it is a cultural change for companies, as an uncorrupted environment generates healthy competition and rewards those who are technically more prepared to produce on a larger scale*" (CRIVELLARO, 2019, p. 65).

16 Among others, there is the understanding according to which "the end justifies the means", which leads, in many cases, to a rupture with guarantees and rights, that one should not and cannot give up, based on the defense of fundamental rights as rigid defenders of the Democratic State of Law and its developments in favor of public policies, social justice, respect for the Constitution and its principles, such as the due process of law.

are transcribed[17], more precisely, Law number 13.608, January 10th 2018 (BRASIL, 2023)[18]:

> *Law 13.608, January 10th 2018.*
>
> *(...) Art. 4. The Union, the States, the Federal District and the Municipalities, within the scope of their competences, may establish forms of reward for providing information that is useful for the prevention, repression or investigation of crimes or administrative offenses. Sole Paragraph. Among the rewards to be established, the payment of amounts in cash may be instituted. Art. 5. The* ***caput*** *of Art. 4, Law No. 10,201, of February 14th, 2001, becomes effective with the addition of items VI and VII: "Art. 4 (...) VII – cash prizes for information leading to the resolution of crimes (...)"*
>
> *(original in bold) (My translation)*

By means of standardization, resulting from a bill approved by the National Congress, institutes related to what is now being developed in this Article were created. And would it not be, before an ultra or extra compliance[19], the one which is

---

[17] Check "Law 13.608, January 10th 2018" (BRAZIL, 2023).

[18] This legislation has already been amended, in part, by Law 13.964, of December 24th 2019 (BRAZIL, 2023), which broadly reformed Brazilian criminal and criminal procedural rules. It should be noted that Law 13.964/2019 did not bring changes to existing rules with regard to Law nº 13.608/2018; it actually brought new norms, which were included through Articles. 4-A, 4-B and 4-C. In accordance with the Author proposal, the additions to Law nº 13.608/2018 are transcribed below, this time in original language (Portuguese), brought by rules present in Art. 4-C of Law nº 13.964/2019: "*Art. 4º-C. Além das medidas de proteção previstas na Lei nº 9.807, de 13 de julho de 1999, será assegurada ao informante proteção contra ações ou omissões praticadas em retaliação ao exercício do direito de relatar, tais como demissão arbitrária, alteração injustificada de funções ou atribuições, imposição de sanções, de prejuízos remuneratórios ou materiais de qualquer espécie, retirada de benefícios, diretos ou indiretos, ou negativa de fornecimento de referências profissionais positivas. (...) § 3º Quando as informações disponibilizadas resultarem em recuperação de produto de crime contra a administração pública, poderá ser fixada recompensa em favor do informante em até 5% (cinco por cento) do valor recuperado*". With regard to § 3º of Art. 4-C, just transcribed exactly as provided by the Brazilian Law (13.964/2019), relates to Art. 4º, *caput* and sole paragraph, of the Law nº 13.608/2018. And even establishes a percentage of 5% of award to the person who, in the exercise of the so-called right to report, helped to recover values to the public property. More precisely, 5% of the recovered amount. In this sense, the question that is developed revolves around the positivity or not of such a stimulus to the delation.

[19] When it comes to compliance, there is a constant reminder of the so-called codes of conduct, practices and behaviors, which, in turn, are first presented in the private sphere of labor relations and, slowly, were and will be presented in the sphere of public administration either through executive acts or through legal and legislative acts. However, it is a fact that the exhaustion around their figures is already a reality against which arguments are starting to weaken. After all, most or all of the predictions contained in these codes are provided for in the sphere of law or, ultimately, of morality itself. Therefore, the improvement and social evolution with regard to reprehensible behavior, should not depend more on a growing rooting of constitutional norms than on codes of conduct spread in Brazil and around the world? In his work "*Governance, risk management, and compliance: it can't happen to us-avoiding corporate disaster while driving success*", Richard M. Steinberg, from a critical perspective, states: "*Certainly companies are finding legal and regulatory compliance costs soaring while effectiveness declines, giving rise to huge fines, penalties, awards, and settlements-often in the billions of dollars. Policies and procedures build with each new law and regulation but are disparate, duplicative, and fail to comprise an effective compliance program*" (STEINBERG, 2011, p. 21).

either excessive, considering the legal, social and behavioral *lato-sensu* of a nation, or is and can be framed as beyond the needs of the same nation, mainly due to both its degree of advancement in terms of a broad sedimentation of fundamental rights, as well as in terms of the opposite need to maintain and strengthen their bases, which can be injured and diverted through strict legal, administrative or normative acts, sometimes contrary , sometimes exaggerated, sometimes recklessly parallel to the constitutional fundamentality of countless rights?[20]

Acclaiming plea bargains[21], especially in the scope of Brazilian public administration, it is an act to be socially debated in a wide spectrum, so that infraconstitutional norms do not collide with fundamental rights, such as privacy and intimacy, which are inviolable in essence and exceptionally fragile, according to Art. 5º, item X (" *the privacy, private life, honour and image of persons are inviolable, and the right to compensation for property or moral damages resulting from their violation is ensured;*"), of the Brazilian Constitution, among many other provisions that could be raised here. Making the exception a general rule is conduct to be, *a priori*, repudiated, as this would mean encouraging practices that, for the most part, would harm due process of law in its most elastic conception.

It should be noted that Art. 4 of Law 13.608 of January 10th 2018 brings manifest and patent concerns for the purposes of this research, since, in normative homage to the capture of crimes and illegalities, it consecrates the disrespect for fundamental rights. And one of the propositional questions already asked and present in this Article is about the validity of these practices, since each and every citizen, whether being or not a member of the public administration or the private labor network, already knows or should know what is lawful or illicit, especially when dealing with harassing or corruptive practices. Exchange of favors, whatever they may be, diversion of funds, political co-options, among other examples, are conducts, if not directly and immediately illicit and unconstitutional, indirectly or mediately, which does not remove their gravity and condemnation.

---

[20] On compliance and its developments, it is worth mentioning what was exposed by Luigi Bonizzato: *"Word and institute translated by this Author as 'acting accordingly', policies and theories related to compliance invaded private and public institutional environments, in their most varied spheres, always with the aim of defending the practice of what is 'right', against the practice of what is 'wrong', with the elevation of the word 'corruption' to the highest level of reputed reproach. But what is 'right' and what is 'wrong'? And, moreover, what would be the most appropriate, in-depth and correct concept of 'corruption'? In addition to a discussion of an ethical and philosophical nature on the subject, the fact is that the so-called compliance has been classically stimulating behavioral changes and, until not long ago, understood as ethical and socially protective of good conduct*". And the author continues: *And, many of these changes, for example and, in the Brazilian case, encouraged the creation of new laws, based on modern so-called moral values. Check out, for illustrative purposes and, among many others, Law 13.608, of January 10th, 2018. Dealing with an incentive to indictments with even the figure of 'rewards', its articles could be very close to a reconstruction of the colloquially called 'snitch'* (BONIZZATO, 2020, p. 205).

[21] The new text brought by Law 13.964/2019 reduces the vernacular semantic weight, by changing the word "blow whistling" for "report", in accordance with Art. 4-A: "*(...) ensure to any person the right to report information about crimes against the public administration (...)*", a fact that does not diminish, in the author's opinion, what has been exposed so far about the problems related to the institute of compliance.

In this context, by making it possible for the Union, States, Federal District and Municipalities, within the scope of their competences, to establish forms of reward in exchange of information that are useful for the prevention, repression or investigation of crimes or administrative offenses, also allowing, among the rewards to be established, the payment of amounts in cash, a sandy terrain is invaded. In which a false step can already mean a complete change of course regarding the maintenance and protection of a stable legal order and defender of itself, within the very idea of circularity of fundamental rights, previously presented and explored by the present Author.

And, it is worth remembering that Art. 4-C, in a later normative complementation, reinforces the institutes of whistleblowing (or reporting) and rewards, under which a patent punitive path comfortably established itself, from the moment it provides a financial reward percentage (5% – five per cent), related to what was returned to the public administration. Is it good and positive to get public money, illicitly embezzled, returned to the State? In the opinion of the Author here, rightly and clearly. However, the means to obtain such ends are brought up, discussed and questioned in this Article.

It should be noted that, among other fundamental rights, privacy, intimacy, inviolability, secrecy, among other guarantees, did not appear in the 1988 Constitution as Brazilian creations and innovations. The same can be said in relation to the due process of law (due legal process, with deliberate quotations in English, given the strength of this clause within the scope of US jurisprudence), the prohibition of the use of illicit evidence, the presumption of innocence and, not of culpability, among many other fundamental rights. They were all the result of blood, sweat and tears, shed over centuries and more centuries, so that we could reach the current level and look at a less turbulent horizon of preservation, guarantee and increasing of rights, without which there are no duties or prospects for intensifying the values of justice, correctness, loyalty, ethics, etc. for present and future generations. Sustaining the fundamentality of rights depends on "now", even with an attentive and careful look at the past and the future.

And, lastly, the 1988 Constitution was and it is the first to disapprove hateful and discriminatory conduct in the current Brazilian legal system, which includes society as a whole, in its most varied groups, ranging from rudimentary family structures, to the most robust nuclei of public and private powers. Through the constituent generosity, several were the constitutional predictions. So why not concluding with the assertion that establishes that "*the fundamental objectives of the Federative Republic of Brazil are to build a free, just and solidary society* (...) and "*to promote the well-being of all, without prejudice as to origin, race, sex, color, age and any other forms of discrimination*." In 1988, compliance was not thought of as in the current standard, not even in so many evolutions and technological progress, etc. But this will not prevent constitutional normative longevity, especially when one is faced with the present application and interpretation of the core values that guided the original constituent legislators in the creation of the current Brazilian constitutional text.

4 FINAL CONSIDERATIONS

The new directions taken in Brazil, based on administrative acts, judicial decisions and regulations arising from the Legislative Power, show that not only compliance practices and policies, but also measures, in a broad sense, brutally conflicting with fundamental rights provided for in the Constitution of the Republic, are a separate concern for Brazilian society, generally considered. And, as classified, conceptualized – for the purposes of this Article – and explored throughout the text, the term "brutal" was chosen in order to escape other more traditional classifications and, at the same time, draw due attention to the issues raised in this Article.

While, on the one hand, there is an attempt to evolve in the fight against corruptive, harassing and illicit practices, all of which are undoubtedly reprehensible and hateful, there might be a regression in the defense of fundamental rights which, in their essence and form, are much more efficient and potential protectors of citizens, people and aggressors of the aforementioned practices, truly and totally unacceptable in a democratic State, whose Law ensures equality, non-discrimination, correctness, fairness and, finally, morality.

It is true that the critical and questioning tone in some parts of the present study aimed to raise questions. However, at the same time, we wanted to establish an understanding that many governmental and private acts are strongly and brutally colliding with fundamental rights, which are one of the greatest civilizing victories of modern and contemporary societies. The final part of the Article, which uses specific normative examples from the Brazilian National Congress, ratifies the textual construction, by showing that both Law and the very notion of morals and ethics have been the target of attempts to be changed and redefined. Whistleblowing, reporting and perhaps being rewarded, quickly and without fundamental constitutional guarantees, is more adequate than protecting due legal process, the rights to privacy and intimacy, among others mentioned along the foregoing lines.

Therefore, equating compliance with the protection of fundamental rights is no longer viable, due to the awareness, in the view of the Author, that the latter must always prevail. Because the error must be dealt with by the State and not by the citizen. A plea bargain that, after a long period of time, is not confirmed, will lead to real and reprehensible damage to the person who was attacked, without, in most cases, a full defense and contradictory, as defined by the Constitution and procedural encodings, have been minimally guaranteed. By way of conclusion and also in summary, unconditional respect for due legal process is not a mere favor from the State. It is its obligation, as well as of every citizen, although contemporaneity and its punitive desire have been attacking it. However, from a broader and less specific analysis, in addition to examining several concrete situations, it should be celebrated that such attacks are still dealt with by this giant legal principle, which is ready to counterattack whenever invoked.

5 REFERENCES

ALEXY, ROBERT, *El concepto y la validez Del Derecho*, Barcelona, Gedisa, 1997.

ALEXY, ROBERT, *Teoria de los derechos fundamentales*, Madrid, Centro de Estudios Constitucionales, 1993.

BONIZZATO, LUIGI, *A Constituição da saúde e da vida: questões, abordagens e facticidades para constatações, delimitações e novos avanços teóricos em matérias sociais e fundamentais sobre saúde pública e privada no Brasil*, Rio de Janeiro, Editora Lumen Juris, 2022.

BONIZZATO, LUIGI, *A Constituição Urbanística e a confirmação de uma teoria do Direito Constitucional Urbanístico: 2ª e Nova Edição, uma continuação completamente revista, ampliada e atualizada*, Rio de Janeiro, Editora Lumen Juris, 2020.

BONIZZATO, LUIGI, SOUSA JUNIOR, MANUEL RODRIGUES DE, *A propriedade constitucionalmente positivada no Brasil e o Direito Ambiental a partir da concepção de fundamentalidade dos direitos*. *In*: Revista Internacional CONSINTER de Direito, nº IV, 1º Semestre de 2017, p. 363-386. Editora Juruá, Lisboa, 2017.

BRAGA, NIVEA CORCINO LOCATELLI, VAL, EDUARDO MANUEL, *A vileza dos direitos sociais: o dumping social e a dignidade da pessoa humana*, *In*: Revista Internacional CONSINTER de Direito, nº IV, 1º Semestre de 2017, p. 515-534, Editora Juruá, Lisboa, 2017.

BRASIL, *Constituição Federal da República Federativa do Brasil*: Senado Federal, 1988, Disponível em: www.URJ:http://www.planalto.gov.br/ccivil_03/constituicao/constituicaocompilado.htm. Acesso em: 09 mar. 2023.

BRASIL, *Lei 13.608, de 10 de janeiro de 2018*, Disponível em: https://www.planalto.gov.br/ccivil_03/_ato2015-2018/2018/lei/l13608.htm. Acesso em 09 mar. 2023.

BRASIL, *Lei 13.964, de 24 de dezembro de 2019*, Disponível em: https://www.planalto.gov.br/ccivil_03/_Ato2019-2022/2019/Lei/L13964.htm#art15. Acesso em 09 mar. 2023.

CARVALHO, VINICIUS MARQUES DE, MENDES, FRANCISCO SCHERTEL, *Compliance, concorrência e combate à corrupção*, São Paulo, Trevisan Editora, 2017.

CASTELLS, MANUEL, *Redes de indignação e esperança: movimentos sociais na era da internet*, Tradução de Carlos Alberto Medeiros, Rio de Janeiro, Jorge Zahar Editor, 2012.

CRIVELLARO, ELOISA HELENA SEVERINO DE SOUZA, *Lei anti-corrupção, as boas práticas de governança e o papel do Conselho de Administração*, *In*: KLEINDIENST, Ana Cristina (Coord.), Grandes Temas do Direito brasileiro – *Compliance*, São Paulo, Editora Almedina Brasil, 2019.

FERRAJOLI, LUIGI, *Derechos y garantías: la ley del mas débil*, Traducción de Perfecto Andrés Ibáñez y Andrea Greppi, 03. ed, Madrid, Editorial Trotta, 2002.

MAQUIAVEL, NICOLAU, *O Príncipe*: *Coleção "Os Pensadores"*, São Paulo, Editora Nova Cultural, 2000.

PERELMAN, CHAÏM, *Ética e Direito*, Tradução de Maria Ermantina Galvão, São Paulo, Editora Martins Fontes, 2000.

RODRIGUES, NELSON, *O óbvio ululante*, 6ª Reimpressão, São Paulo, Companhia das Letras, 1993.

SARLET, INGO WOLFGANG, *A eficácia dos direitos fundamentais*, 02. ed, Porto Alegre, Editora Livraria do Advogado, 2001.

STEINBERG, RICHARD M, *Governance, risk management, and compliance: it can't happen to us-avoiding corporate disaster while driving success*, Hoboken/New Jersey, John Wiley & Sons Inc., 2011.