CRIMINAL COMPLIANCE, CONTROL AND ACTUARIAL LOGIC: THE RELATIVIZATION OF THE *NEMO TENETUR SE DETEGERE*

// *CRIMINAL COMPLIANCE*, CONTROLE E LÓGICA ATUARIAL: A RELATIVIZAÇÃO DO *NEMO TENETUR SE DETEGERE*

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>> ABSTRACT // RESUMO

The present article will seek to investigate the phenomena actually known as criminal compliance that, especially with the Law 9.613/1998, brings to the Brazilian criminal law scenario deeply and important modifications. We believe that the implementation of the so called compliance duties, especially with the advent of the new anti-money laundering law (Statute 12.683/2012), is responsible for the deterioration of the fundamental principle of *nemo tenetur se detegere*, characterized by the statal limitation in achieving evidences against the will of the suspect or the indicted. This new facet of penal intervention that mitigates and weakens constitutional rights of the jurisdictionalized integrates a larger context, that a long a time ago David Garland called as culture of control. The institutional modifications brought by the new law, inside this criminological vision may be better understood through the demonstration that the Brazilian State, as it happens in United States and some European countries, adopt an actuarial criminal politics, responsible, mostly, by the risk management and by the apparatus of governmentality dissemination, what, according to Foucault, will give rise to an actuation focused on prevention, precisely with the aim to gain security. // O presente artigo procurará investigar o fenômeno atualmente conhecido como *criminal compliance*, que especialmente com a Lei 9.613/1998, trouxe para o cenário do direito penal brasileiro importantes e profundas alterações. Acredita-se que a implementação dos denominados deveres de *compliance* seja responsável, especialmente com o advento da nova lei de lavagem de dinheiro (Lei 12.683/2012), pelo enfraquecimento do princípio fundamental do *nemo tenetur se detegere*, caracterizado pela limitação do Estado na obtenção de provas contra a vontade do suspeito ou acusado. Essa nova faceta da intervenção penal, que mitiga e enfraquece direitos constitucionais dos jurisdicionalizados, integra um contexto mais amplo, e que há bom tempo David Garland denominava como cultura do controle. As modificações institucionais trazidas pela nova lei, dentro dessa visão criminológica, podem ser mais bem compreendidas através da demonstração de que o Estado brasileiro, na esteira do que ocorreu nos Estados Unidos e em alguns países europeus, passa a adotar uma política criminal atuarial, responsável, sobretudo, pela gestão de riscos e pela disseminação de dispositivos de governamentalidade, que segundo Foucault, ensejarão uma atuação voltada para a prevenção, justamente com o fito de se obter segurança.

>> KEYWORDS // PALAVRAS-CHAVE

Criminal Compliance; *nemo tenetur se detegere*; culture of control; actuarial logic; economic reason. // *Criminal Compliance*; *nemo tenetur se detegere*; cultura do controle; lógica atuarial; razão econômica.

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1. WHAT IS CRIMINAL COMPLIANCE? BRIEF CONCEPTUAL EXCURSUS

Compliance comes from the verb *to comply*, which can be presented as "acting in accordance with a rule, an instruction or request of someone". Naturally the *compliance* function assumes a strategic position in neoliberalism, because it is intrinsically linked to good business practice, i.e. integrates what might be called business ethics[1].

The *compliance* is also associated with what might be called *corporate governance*, which can be comprehended as a guidance system of business organization[2]. Corporate governance involves regulatory mechanisms of market as well as the relationship between the direction of the company, shareholders and *stakeholders*[3] regarding the core activity for which the company was created. The *compliance* is thus an essential element of business practices, as a kind of ethical commandment, becoming the theme set by economic law.

It can be affirmed, along with Silverman, the context in which *compliance* is inserted is relatively new. The development of legal and regulatory *compliance* as a growing force in organizational life results from a clump of several spheres: legal, legislative, economic, social and technological[4].

The *compliance* should not be confused with the implementation and efficiency. Unlike these two elements, the *compliance* do not cares about authoritarian regulatory in directives of public policies and policy changes offered over a period of management (implementation), neither consists in effectiveness of certain regulation to solve a political problem for which it was instituted[5]. The research on *compliance* is primarily concerned with the degree of adherence of the addressees of the standard processes of operation and analysis of obedience obout legal parameters established by it[6]. The *compliance* with a high degree of commitment is a necessary condition for effective governance[7].

The opposite of *compliance* becomes the *non-compliance*, which may result from the anti-facticity[8] legal command, as well as *non-compliance* can be effectively a process itself [9]. In the first case it will be possible to verify the *non-compliance* by the finding that the recipients of the standards do not act according to the normative commandments. This is the regulatory standards of behavior that agents are not guided by legal commands. There is obviously a great difficulty for the law sociology in assessing the difference between the behaviors adopted by the parties as conduits of diverse normative prescriptions. Issues such as breach the duty to conduct and its extension (mild, medium or severe violations), the very terminology employed by the normative (the interpretation as a condition for the emergence of the rule itself - difference between text and standard - as suggested hermeneutics) are some examples that attest to the complexity of this task bow between behaviors normatively guided and those empirically verified. The second form of *non-compliance* can result as a kind of procedure. In order to evaluate the procedure as *non-compliance*, it must register both situations. There was a *non-compliance* when the initial practiced conduit which lies outside the regulation scope is identified

immediately. This way, such identification allows the supervisory agency control (*compliance officer*), the judicial or investigative authority (criminal police or prosecutors). The second form would be a "procedure crisis in *compliance*", much more serious than the first[10]. The crisis in procedure *compliance* result of a systematic disregard of the legal standards which guide that action, even after the onset of a controlling agent[11].

Regarding to criminal law, social relations and processes globalization in its complexity have allowed the emergence of transnational criminal practices. This new scenario on which it began to demand the economic criminal law a new guise of their categories as objective type, intent, causality, tender people, etc., also demanded that were object of study certain duties of information and acting on some agents, when it comes to market relations and practices of economic transaction.

May speak therefore in *compliance criminal* when you are facing the possibility of illicit activities covered up or directly related to the economic and financial practices of certain agent. Hence the prosecution of economic institutions and entrepreneurs are immediately connected with the *criminal compliance*[12]. Can estimate that *criminal compliance* has claim to guarantee that illicit activity that aims to tackle will be eradicated even before their practice[13]. In other words, the *criminal compliance* deals with the issue of crime prevention, an *ex ante* perspective[14]. Basically, the *criminal compliance* seeks to avoid agent or company accountability, that operates with the financial markets, determining procedures for that with its fulfillment, is a practice avoided of criminal offense. What is with this strategy promotes corporate governance is the risks management of criminal prosecution through standardized procedures and, therefore, can be controlled by an inspector agency (*compliance officer*) who must necessarily be created by the economic and financial institutions of traded (in the case of Resolution 2554/1998 National Monetary Council). Its importance is directly linked to the use, sometimes legal, sometimes illegal, activities and services available to the society for the conduct of economic transactions, and in most of them, not the regulation of investment activities, purchase and sale, offset assets, may be confused with illegal practices. Within a criminological perspective, sometimes it is hard to distinguish the lawful from those illegal practices[15], constituting the company in a central *management* of *compliance* risks. In short, the establishment of standardized and sectored activities allows control within the company, the practices in accordance with the procedures manual[16], allowing, in turn, the verification of a protocol or another practice that exception, by monitoring that practice and theory, allowing an analysis of *non-compliance* early and avoid trying to make it endemic or criticism. As noted by the *Advisory Group on the Federal Sentencing Guidelines for Organizations*, "organizations must periodically prioritize their *compliance* and ethics resources to target those potential criminal activities that pose the greatest threat in light of the risks identified"[17]. These priority activities are: a) the distinction between major and minor risks, b) assessment of each risk and its importance to the objectives and purposes of the institution; c) assess the level of internal

controls and test its frequency d) determine the resources required to manage risk[18].

The *compliance* risk is nothing more than the possibility in application of legal or regulatory sanctions, financial loss, or credibility of the financial agency market due to non-fulfilment laws, regulations, codes of conduct or best practices in a particular sector[19]. Certainly, also, one of the *compliance* function is the identification and prevention of money laundering conduct, which is at the origin of the specific regulations of *criminal compliance* in Brazil.

In Brazil, the *criminal compliance* arises only with the advent of Law 9613/1998 - Money Laundering Act - now altered in the resolution 2.554/1998, of National Monetary Council. In both regulatory instruments establishes a policy to risks control derived from financial and economic activities, including the creation of responsibilities of the board from such institutions. In the United States, for examplethe the creation of *compliance* duties has the systematic attempt to processing avoidance[20] through *wilful blindness doctrine*[21].

The following will analyze the changes introduced in the scenario of money laundering, with the enactment of Law 12683/2012.

2. THE NEW *CRIMINAL COMPLIANCE* MONEY LAUNDERING LAW: REACH OF THE LAW 12683/2012

As previously mentioned, the *criminal compliance* aims to prevent economic and financial crimes at an early stage of criminal prosecution. In addition, the foundation of *criminal compliance* lies in the avoidance of any legal action, criminal sanctions, investigative character or even a judicial nature. The first legal documents that take care of this matter are deposited in Resolution 2.554, from 1998 National Monetary Council and the Law of Money Laundering (Law 9613/1998), now modified by Law 12683/2012. It must be emphasized that on September 1st, 2012 came into effect Resolution 20 of Coaf (Financial Activities Council), a body created to combat money laundering crime and asset recovery.

Anyway, will be necessary, first, briefly review what is understood by money laundering, since in a second moment, determine which innovations were derived with the Law 12683/2012, especially in what regard, the denominated, *compliance* duties. Finally, on this same topic will examine the expansion of duties alluded to then, further, to analyze such modifications in the light of criminal procedure and criminological digressions needed for the good availability to unfold the Brazilian politica criminall horizon.

First, it must be highlighted that the *compliance* duties arise in conjunction with the Money Laundering Act. And this is not a episodic or accidental relationship. Because it is the money laundering crime of an offense which falls within the practice of favoring many other crimes, ie washing corresponds to the transformation of illegal practice origin of certain goods or assets in other, apparently legitimatethe, attempt to

preventing criminal offense of this type would require an act of State that allowed detection of their practice at a prior moment to the masking the origin illicit of those goods or values. The difficulty to prove[22] the crime of money laundering and to recover, therefore, of the assets has an enormous scale[23]. Many problems could be leveraged here. Mentioning only a few in the scope of the thematic context: a) as a general rule, these are offenses that cover up other criminal practices. The fragmentation of proof is pretty much given in trivial crimes of money laundering, making it difficult "puzzle" to mount by authorities; b) the money laundering offense also occurs with the utilization of financial markets through "cascade" operations, ie, by a chain of transactions apparently legal that often unfolds by several countries (stratification - layering). Therefore, legal international cooperation ends up being necessary, with all sorts of obstacles to celerity and effectiveness of their own evidence found; c) not infrequently money laundering is practiced with the companies help whose lawful activities and also with mixture of values also from licit nature, making it difficult to demonstrate the values introduction derived from criminal activity within these strings on financial operations. There are of course difficulties regarding the separation of originating amounts from illegal operations of those who have a lawfully thirst; d) because it is a crime that admits only the willful figure, subjective proof of element type, not to admit any interpretation that mitigates legality principle (presumptions, evidentiary burden inversions, admission similar to the eventual intention figures as *reckleness*[24] from the United States) also makes a clear demonstration of the offense tempestuous; e) the use of *offshore* companies for illegal practice and the inadequacy of means placed at the international law service in adoption of facilitating policies to bank records access and business transactions in some countries must also be enrolled as a factor that makes difficult to procecute this crime[25].

As can be seen, the admission of certain duties to be supported by the companies agents in the financial market and economy is intimately linked to the prevent efforts of money laundering crime. The adoption of the *compliance* duties by own Money Laundering Act specifies this idea passing to the State act directly on suspicious transactions or even about that transactions category that commonly serve to practice this offense. In other words, the State to prevent the commission of the offense in question ultimately determines that certain people or companies assume determined burden of practice activities (bear the risk of fulfilling duties established by good business practices) and also achieve with *ex ante* prevention of money laundering crime, the assets or securities resulting from an criminal offense before practice are more easily retrieved and proof to be easier, since no matter the process introduced by the camouflage money laundering. In short, it seems easily verifiable the close relationship among the state and international efforts towards combating the crime of money laundering and the establishment of *criminal compliance*. Currently, *compliance* duties are based on occupational *standards* developed by organs such as the *U.K Financial Services Skills Council* (FSSC)[26] in association with the *International Compliance*

Association (ICA) and are used to ensure the smooth functioning of financial markets and avoid the utilization of this market for the practice of money laundering activities[27].

With the enactment of brasilian Law 9613/1998, regulated for the first time in the legal-criminal set the money laundering crime. It is, as portion spots of doctrine, a law called the second generation. That by the fact that the money laundering crime requires prior commission of an offense, previously enrolled in a series of primary crimes. Therefore, if the first legislations to combat money laundering antecedent crime maintained the linked trafficking in narcotic substance and third-generation laws did not require the closed list, allowing the washing to fall on any criminal behavior (laws of third generation) the Law 9613/1998 allowed certain category of offenses authorizing the practice of washing. Therefore, a second generation law. In the original wording of Law 9613/1998, for existing offense of money laundering was necessary that the antecedent crime, whose product it would hide or transform the nature it were practice was founded: a) illicit trafficking in narcotic substances or similar drugs; b) terrorismo; c) the terrorism financing; d) the smuggling or weapons trafficking, munitions or materials used for their production; e) of extortion through kidnapping; f) crimes against public administration; g) of crimes against the national financial system. These antecedents crimes are subject to lead to commission of money laundering offense. With the enactment of Law 12683/2012, there was suppression from the predicate offenses list in the legislation (Law of third generation), assuming the content of Art. 1st of the said rules, the money laundering offense is derived from assets, rights or values derived from the practice of any criminal offense. Thus then, including the practice of a misdemeanor becomes susceptible of supporting the washing practice.

Secondly, with regard to the duties of *compliance* established by Law 9613 of 1998, it should be emphasized that the mentioned legal provision contemplated as being subject to control activities and, cumulatively, had the obligation to notify some suspect financial activity practice those entities that develop certain activities legally consigned.

The Law 12683/2012 expanded and modified persons with *compliance* duties. Thus, first of all the biggest change introduced by the novel legislation concerns the extent of coverage, no longer confined to the rule that only legal entities were inserted in this context, with only a few exceptions that admit natural persons as the receivers of mentioned duties. As a general rule, Art. 9th of Law 9613/1998, with the changes introduced by Law 12.683/98 establishes that *compliance* will extend the duties, indistinctly, to individuals beyond the legal entities. What are the duties which *compliance* must be subordinate those recipients? The Art. 10 of Law 9613/1998, with the wording of Law 12683/2012 asserts that the individuals and companies object of Art. 9th should: a) identify their clients and maintain data in up to date terms instructions issued by the competent authorities; b) keep records of all transactions, national or foreign currency, marketable securities, bonds, metals, or any asset that can be converted into cash that exceed limits set by the competent authority and

in accordance with instructions issued by this; c) duty to adopt policies, procedures and internal controls, consistent with its size and volume of transactions, enabling them to meet the provisions of Art. 11th, in a disciplined manner by the competent bodies; d) duty to register and keep their registration current in the regulator or supervisory, in the absence by this, the Council for Financial Activities Control (Coaf) in the manner and conditions set by them; e) duty to suit requests made by Coaf in frequency, form and conditions established by it, and shall preserve, under the law, the information provided under confidentiality.

Still, according to art. 11th of Law 9613/1998, now with the modifications introduced by Law 12683/2012, individuals and legal entities referred in art. 9th : a) pay special attention to transactions which, in terms of instructions issued by the competent authorities, may constitute serious indications of crimes defined in this Law or they relate; b) shall inform the Coaf, abstaining to give knowledge of such action to anyone, even to that of which the information relates, within 24 (twenty four) hours, a proposal or accomplishment: 1) all transactions mentioned in item II of Art. 10th, accompanied by referred identification in item I of the aforementioned article; 2) the referred operations in item I; c) must notify the regulatory or supervisory agency of their activities or, failing that, to Coaf in frequency, form and conditions set by them, the non-occurrence of proposed transactions or operations that can be communicated in accordance with item II; d) the competent authorities, in the instructions referred to in item I of this article, draw the operations relation that, by its characteristics, in respect to the parties involved, values, embodiment, instruments used, or the lack of economic or legal base, can configure the hypothesis stated therein; e) communications in good faith, made in the manner prescribed in this article, shall not generate civil or administrative liability. All these *compliance* duties are still regulated by Resolution nº 20 of Coaf, which is on effectiveness since september of 2012 and will further broaden the range of obligations that individuals and companies described in Art. 9th of Law 9613/98 will be subject to.

Finally, there is the analysis of the legal consequences from failure of so-called *compliance* duties. According to art. 12 of Law 9613/1998, with the modifications introduced by Law 12683/2012, the persons referred to in art. 9th, as well as managers of legal entities that fail to comply with the obligations foreseen in the Arts. 10th and 11th will be applied together or separately, by the competent authorities, the following sanctions: I - warning; variable monetary penalty not exceeding: a) twice the amount of transaction; b) twice the actual profit achieved or that would presumably be obtained from the transaction; or c) the amount of R$ 20,000,000.00 (twenty million reais); III - temporary disability for a period of ten years, to exercise the director office of legal persons referred to in Art. 9th IV - terminate or suspend the activity authorization, operation or functioning. § 1st The warning penalty is applied by an irregularity in the instructions fulfillment referred to in sections I and II of art. 10th. § 2nd. The fine will be applied whenever persons referred in art. 9th with malice or negligence: I - no longer remedy the object deficiencies warning within

the period marked by the competent authority; II - do not fulfill provisions of sections I to IV of art. 10th; III - fail to respond within the specified period, a request made in accordance with section V of article. 10th ; IV - disobey the seal or fail to make the communication referred to in art. 11th.

Presented the configuration of compliance duties and institutions subject to control by the Coaf, remains therefore a critical analysis of such institutes, which will be held on topic.

3. THE *NEMO TENETUR SE DETEGERE* PRINCIPLE DETERIORATION PROCESS: THE USE OF SANCTIONING CRIMINAL LAW AS A MEANS OF WEAKEN THE RIGHT TO SILENCE

As glimpsed, an extensive list of individuals and *companies* remains covered by Law 9613/1998, and must perform a number of *compliance* duties. However, this series of obligations - especially those relating to the information provision - must be vented under the aegis of principles relating criminal procedure and its constitutional instrumentality.

It is not difficult to think of an hypothesis in which, for example, a financial institution, subjected to the rules of Art. 9th of Law 9613/1998, may be involved in a crime of money laundering. Starting with this assumption, so how could conciliate *compliance* obligations, their administrative sanctions and the right not to provide evidence against himself? In other words, the possible consequences that come from breach of the *compliance* duties possess legal liability when the institution itself is suspected of practice of capital laundering methods listed in article 1st of Law 9613/1998?

Even before proceeding with the analysis about the hypothetical response to the case, it has been a duty weave brief comments about the so-called "right not to produce evidence against himself," which results from a contemporary conception of the maxim *nemo tenetur se detegere*. Preliminarily, from the starting point that, the Constitution, with the paradigmatic rupture to the totalitarian model carved in the Criminal Procedure Code of 1941, provides comprehensive filtering required for some Constitutional devices. By accusatory system, defending here, the system that centralizes production and evidentiary initiative in the hands of the parties (device principle) was not observed any kind of instructive *ex officio* power in the hands of the judicial authority.

As a corollary of an accusatory system, as a general rule, the principle device that determines the rules of evidence comes associated with many others procedural safeguards of Constitutional ranking. Like clear example mentions the right not to produce evidence against himself. It is a principle constitutive of contemporary criminal procedure, which erects a barrier against coercive methods to force the accused to cooperate with the prosecution. In the words of Bacigalupo, the State is the suspect guarantee of not incriminate himself against their will, because the current Right imposed on criminal prosecution authorities the duty to instruct anyone who is interrogated[28].

The right to non-self-incrimination is correlative to the right to ample defense, which may be expanded in self-defense and defense technique[29]. Self-defense concerns the possibility to be informed of the charge that weighs against you as well as opt for refute it personally or even refuse to provide any kind of information. In this latter sense you can affirm the existence of a negative personal self-defense. In the same direction can be sought in the words of Pisapia, for whom there is a necessary overlap between the defense right and the interrogation act of the accused or indicted[30].

In the inquisitorial system, in which the accused is a mere investigation object there is a true exploration of defendant for psychic probes, being found and adjusted the axiom *reus tenebatur se detegere*[31], not admitting the use of silence. In order to break the defendant silence, the torture was a strategy used by the inquisitorial evidence system. The *nemo tenetur* principle, therefore appears linked to a matrix that starts from renegation to the dogma of real truth as the purpose of criminal proceedings. Moreover, as Schmidt asserts, limiting the means to access the truth is an important tool to control the legality of the acts committed by its agents, consisting undeniable achievement of the Democratic Rule of Law[32].

However, further exploration of this principle in the universe, is necessarily refer to the treatment accorded by this warranty, called adversarial system[33], which has a intense connection with the concept of accusatory system advocated here[34]. Several conclusions can be pointed on the applicability of this principle in of *common law* regime: a) the prohibition of self-incrimination principle does not know the existence in England during the birth of modernity; b) its functionality is bound to the procedure reconfiguration implemented by the emergence of the adversarial system and the defense attorney participation; c) there is a significant change in the course of time with regard to ensuring the self-incrimination prohibition, which passes from the right not to deliver a complaint against itself to the right not to testify, including in this core, the right to be free from corporal interventions designed to extract evidence from the defendant body the; d) there is no sense at all in getting a deeply cut in the right to not autoincrimination from the right to a technical defense, since he only has sense when you admit that someone can speak on defendant behalf[35]. In the U.S. system this fundamental right gains strength through the *Miranda vs. Arizona* case, deriving then so-called *Miranda warnings*, ie, the necessary warning that suspect or accused is not obliged to cooperate with the State investigation.

As previously mentioned, there is a gradual transformation of *nemo tenetur se detegere* principle which encompassed in the beginning only right to not answer, and that goes later to cover other probationary forms as the body intervention itself and the right not to serve as a witness when such a position can somehow compromise the exercising the right to silence. However, this same organic change of principle has led some situations to be left outside the scope of warranty protection. In the United States, the paradigmatic case *Schmerber v California*, in which he was collected accused's blood without the consent while he was in

unconsciousness state. Despite remains shrouded by Fifth Amendment in the U.S. Constitution, the Supreme Court denied any kind of violation of the the right to non-self-incrimination principle.

This tendency can recently be found in Brazil, where the enactment of Law 12.654/12 introduced what can be termed "genetic investigation", substantially altering the Law 12.037/09, which deals with criminal identification. Upon judicial authorization, even without suspect consentment, the police can collect, by painless method, when essential for police investigations, the suspect's DNA in order to confront the genetic material found on the crime scene. The major problem brought by this legislation - alongside his immovable unconstitutionality - is the possible ripple effect that could fall on other species of evidence, especially those whose investigated body or accused may establish a probationary causal link between action and outcome. Certainly the redimensioning on warranty clause against self-incrimination may carry interpretations to conclude for mandatory submission to the breathalyzer test, among many other inadequacies that can be built from precedent normative.

Once crossed the theoretical analysis point of the *nemo tenetur se detegere* principle, fulfills return to the original point topic. The determination of sanctions provided in art. 12th of Law 9613/1998, may be applied to suspect of some form of money laundering practice? Preliminarily, it must be emphasized that German Constitutional Court itself recognized existence of a obligation to ensure the *compliance officer's* employee (responsible agency for supervision over the financial institution activities) on the grounds of crime prevention, having assumed the responsibility for result avoidance, having duties of care, surveillance and protection[36]. As emphasize by Badaró and Bottini[37], there is a increasingly tendency towards the resource utilization to the improper omissive crimes, as a means to criminalize certain conduct supported by law of money laundering. Naturally, individuals and legal entities described in art. 9th of Law 9613/1998 could collaborate, intentionally, for the offense commission, according to proponents of the thesis proponentes, the applicability of improper omission offense the in question. The central nerve of the matter lies in the circumstance that the *compliance* duties would be true result avoidance standards, so now, not existing as only "programmatic" rules for the financial institution or the individual activities management and control, to be executable. On the contrary, the procedures creation and the administrative rules observance located in Law 9613/1998 and especially in Resolution nº 20th of Coaf, would indicate that is being described to a true duty of result avoidance attributed to such persons (legal and natural). Therefore, from this point of view, the improper omission punishment that would be appropriate for such situations, may therefore, arise conflicting with the incidence of *compliance* duties.

In being admitted the hypothesis that the persons addressed the *compliance* duties may suffer administrative sanctions for the regulatory guidelines breach when suspected or accused of money laundering offense, there would be inevitably, a serious *nemo tenetur se detegere* infringement of principle.

The fines introduced by Law 12683/2012 in Law 9613/1998 are of such amount that it becomes possible the affirmation that they constitute a real administrative nature sanction. Although unannounced as such, the eminently expropriation nature reach values (up to R$ 20,000,000.00) does not allow other conclusion. If indeed it comes to administrative penalties that try to coerce or force the compliance duties recipients to fulfill the inspection agentes role, what is doing is an indirect coercion that such duties be fulfilled, by appeal to some kind administrative penalty so severe that it would also be incompatible with the very nature of administration ground that you want to assign. In addition, it is argued here that such penalties and activities termination, for example, differ in no way from those of criminal conviction, such as fine and activities prohibition (see that in the environmental crimes even with regard to corporation conviction would configure main penalties). These features of severe sanctions, without, however, resorting to criminalization are themselves called the administrative law sanctioning. In a few words, the Law 9613/1998 establishes a administrative law true sanctioning to favor the fulfillment of *compliance* duties in Brazilian standards stipulated. However, in many European countries that adopt administrative law sanctioning, is found a renunciation of criminal law use. Or guardianship certain circumstances by the administrative law use by sanctioning or criminal law. Everything depends on the offensiveness of the conduct.

The situation remains aggravated when considering the double, criminal and administrative sanctions, acceptance will have the following consequences for the same fact: a) heavy administrative fine falls on the *compliance* duty recipient's may cause the information be provided, even it implies a " responsibility assumption" before the criminal sphere. Given that the money laundering penalty - which ranges from 3 to 10 years – could authorize, in the absent of increased and aggravating causes to estimate that imprisonment sentence be less than four years prison, allowing thereby the application of art. 44 of Criminal Code and the liberty restricting penalty substitution for two rights restricting penalties; b) not providing information may, admitted the concourse standards possibility of *compliance* duties addressees heavy fine, which may be even most severe than criminal; c) provision of information to achieve success in the money laundering appointment, with substantial recovering in part of the assets could even depending on how it proceeds, bring the reduced penalty cause, called plea bargaining, the content of § 5 art. 1 of Law 9613/1998.

What can be glimpse, before this scenario, is the relativization progress of *nemo tenetur se detegere* from what could be denominated as a legal standards juxtaposition imposed on the same consignee, starting from the different perspectives that each law field is able to offer. This phenomenon is responsible for the increased uncertainty in state response. And more than that, the administrative sector, more and more threatens herding tasks previously linked to strict jurisdictionality view. So, there is a growing criminal law administrativisation by recourse "to layers of legal norms formation", focusing each according

to its rationality. The bifurcation point, and (perverse) continence will occur when these norms authorize, necessarily, a waiver of rights (in this case even unavailable), in favor of a penalty release which may, case by case, configure equal intensity penalty, "administrative penalty" masked.

We must remember here this procedure is not new in Brazil. Somehow the *nemo tenetur se detegere* principle had been relativized when the enactment of Law 8.137/90 and the wording of art. 1st of this Law. The situation becomes aggravated when the Law 12.654/12 arises, which regulates genetic identification. Therefore, carved by Law 12.683/98 was solely broaden the scope of *compliance* duties and increase the "encouragement" dose to accomplishment of these duties. The result is a legal-criminal-administrative normative elaborate in a superposed layers, so the same situation of two distinct branches of legal system is expected from the perspective, encouraging, so to speak, the fundamental rights waiver by threat with parallel-punitive control devices. The numerous standards determination that act on the same fact makes sense facing a perverse logic of efficiency and the primacy of public over private. A simple analysis of new money laundering regulations establishes a very worrying situation: either the recipient of *compliance* duty relies on the constitutional right not to produce evidence against himself, and may suffer with it, one great magnitude administrative sanction, either as well waives the right to that and disclaims suffer the administrative penalty, naturally assuming one of a criminal nature. Here's a good example how the economic instrumental rationality colonizes law (criminal) and the constitutional rights pass through a stage of exceptionality.

It seems that with this overlapping legal rules phenomenon that protect the same factual circumstances it was already possible explain this new control form over fundamental rights. In short, one can say that will fall administrative criminal law sanctioning for those who do not waive their constitutional right not to provide evidence against himself. Penalizes with this, regular exercise of a right. Behold offense to Democratic State by diffuse and ramified safety devices mechanisms that consolidate contemporary governmentality. This is the final assay task.

4. THE ACTUARIAL CRIMINAL POLICY AND CONTROL CULTURE IN BRAZIL: GOVERNMENTALITY DEVICES, RISK MANAGEMENT AND SECURITY POSTULATE

David Garland, in an important trilogy, culminating in the book *culture of control* tried to examine a radical change wrought in the North American punitive system, with the so-called abandonment of previdenciary criminal[38]. The central aspect of this work is to highlight the culture of control emergence, captained by criminology of the Other. This new criminology deviates from the XX century 60s and 70s discussion itself, dedicated on the responsibility concept. The theoretical basis modification of this new criminology rests on criminal risk management aspects, especially with causation and prevention "scientific" theories[39].

There is a criminological rationality transformation itself, operating discussions on economic thinking applied. In the words of Garland, there is a new way of operation of criminal justice: costs of crime are now routinely calculated, as are the costs of prevention, policing, prosecution and punishment; numbers produced help guide policy choices and operational priorities[40].

This economic approach, management or actuarial of crime appeals directly to economic rationality. The so-called economic analysis of crime - whose developments are due to Becker[41] – allows the punitive modeling construction and the system according to instrumental rationality maximization. Perhaps the high point of actuarial criminology structuring is leaning on the statistics and calculus management use as capable elements of changing the punitive system very self-definition. There are herecurrently, in British and American criminological literature, a profusion of texts ranging from explanatory formulas of the crime to hypothetical victimization limits demonstration of particular crime practice. And that correspond to Jock Young as a loss of "criminological imagination"[42]. It is a new sort of criminological positivism that uses the economicist orthodoxy. There are undeniably a numbers fetish concerning the precision illusion they are charged[43], allegedly under the pallium of eradicating the ontological insecurity.

No wonder that in parallel to criminal law administrativization will compete also criminology administrativization. Something Zaffaroni baptizes the end of history criminology[44]. This administrative criminology corresponds, what grants a rather troubled relation, on that governmental aspect that hosts the nominated actuarial criminal policy. Here follows the Dieter Maurício analysis, in a deep and accurate pioneering study on the topic, when examining the actuarial criminal policy. The actuarial logic: refers to actuarial calculation systematic adoption as *rationality* criteria of an action, such as defining itself *mathematical weighting* of data - typically inferred from samples - to determine probability of future concrete facts[45]. It can be, as a consequence, set the actuarial criminal policy as reproduction of economic instrumental rationality with the use of this arsenal combined epistemic procedures of secondary criminalization[46].

One can not fail to observe that we are faced with the true instrumentalized knowledge domain by neoliberal and market interests (*business principles*). To this economic form of rationality Garland has claimed to be derived from private sector practices[47]. This approach logically, has quickly reached the criminal field conferring a radical economic disposition[48]. This is the arithmetic control under a gaze whose hostility nothing stays out. This way of interest managing meets the economic globalization logic itself, increasingly colonizing more and more territories[49]. In the society of control, moreover, regulations models developed from the organizational economy logic will become increasingly influent[50]. These mechanisms consecrate themselves as master criteria on articulation of prevention and control criminality strategies. It is a rationality that no longer eludes the crime eradication, knowing, in contrast, there is some everyday criminal offenses regularity[51].

Around the actuarial logic centers the concept of *risk*, which previously was co-opted by criminal law discourse. However, managerialism and the fetish caused by the numbers dominance - something undoubtedly presented by actuarial logic - demonstrates to satiety there is a collective imagination, alongside the contemporary ontological insecurity context, highlighted by Giddens[52], there was a possibility to recover security. It is, as if the actuarial logic represent one (subject supposed to) know now able to ensure that it is in fact (!), before the truth in order to minimize contemporary life risks and uncertainties and to ensure our decisions correctness[53].

This actuarial criminal policy can be better understood through an examination that relates to *governmentability*[54]. The latest Foucault seminars in *Collège de France* was directed in order to examining conditions, structures, associations and small diagrams of power headed by devices called governance. The governance strategies, especially by studies that looked regarding the inexorable link between criminality and governmentality - as nicely demonstrated by Simon[55] – passes directly by devices production. The devices according to Agamben are like network species, allowing connectivity between several elements. And still, has a strategic role in the governmentality study[56].

Foucault's thesis is that the disciplinary society - especially those outlined in *Vigiar e Punir* – already can not account for the whole phenomenon of governmentality. Evident that in a post-disciplinary society, discipline will not simply be replaced by another element. There will be a juxtaposition of both naturally. It happens that the unsuccessful lessons in disciplinary logic undeniably well absorbed without, however, his manifest ideals - at least by the well intentioned - to be consummated. Thus, within the governmentality genealogy, it can be said that unfolds by legality way(which acts through a permitted and forbidden binary code), discipline (through surveillance and correction mechanisms) and finally, security. In respect to this new technology of power, reactions facing criminality, for example, will operate through the cost estimate[57]. The legality system is that referring the Middle Ages, the second, the disciplinary system is that of modernity, while the third - the security - is the contemporary, which is organized around the cost estimate and corresponding the american and european forms of criminality treatment.

Foucault sets out essential differences between discipline and safety devices. The discipline is essentially centripetal, by isolating space and acts in a segmental manner, isolating the phenomenon. The security mechanisms, however, are designed to centrifugal expand. Producing, through the imbrications whenever new elements. Foucault sustain many other differences that arise between disciplinary system and safety devices. Yet, for this essay task, this unevenness between the disciplinary and security system is vital to understand the conclusions raised here[58].

In this direction, a new form of crime management develops from responsibility transfer strategy[59], according to which delegates to groups and individuals control responsibility, so the State, in some sectors, no longer acts against crime directly (with: police, courts, prisons, etc..), but

indirectly, with support agencies and non-governmental organizations preventively. It is as well a new ethics or ethical commandment[60] that spreads according to governance regime whose strategic interest is none other than to form a culture *compliance* and, consequently, increase the economic control. It is precisely what this is about, will say that some authors: The culture is the most effective conduct guidance and control of individuals and organizations[61]. Then, with that delineates an forced attempt to establish a delusional administration culture of social life in our context, such as a master significant[62] establishing by force and violence a new order. And nevertheless the very judicial system takes on more regulatory function, as predicted Foucault[63].

With the *managerialism* spread, makes possible even the existence of a double regular codes that permeates this field from the imperative populist tendencies nature and international criminalization commandments supported by constant paranoid threats visions. Ends up thereby functionalizing criminal law with the symbolic criminalization second market interest and hypertrophy the unsustainable suspicion that everyone is guilty (it can not be reach another conclusion on the exacerbated prevention of new Money Laundering Law). The atuarialism comes to be, in our case, the reason hyperbole that ferments figures and intends to subject everything from world to numerical view, which corresponds to a refined calculator paranoia to employ an expression of Sloterdijk[64]. In terms of subjective structure, it is about somewhat similar to Freud's crystal metaphor in which, by breaking the crystal is not broken at random, but only along the cleavage lines, fragments of which are predetermined[65]. Seems to be experienced the same consequence in the society of control: there is a way to organize the individuals experience in which all behavior is previously included in risk and control analysis as omnipresent and annihilating, as a absolute father figure who does not allow failure in let te *moi* be constituted.

The present thesis shows that so-called *compliance* duties are nothing more than capillary structures control, addressing the intersection between administrative and legal. Through acting on reality, there is kind of adjustment of its features and elements. The very prevention function usually attributed to these duties makes clear it is a strategic regulator. Through these state control devices goes the enlargement of the, in large part with the same core of risk category fetish. So much so that the *compliance* duties are justified by the use of risk *compliance* decreased factor. Between *compliance*, *compliance* risk, administrative and criminal sanctions, there will be a reality background that enshrines and perpetuates the relationship between these categories, allowing these elements dispersal for all areas of sociality. The analysis carried out by Silva-Sánchez[66] which became known worldwide could be explained with much more depth and property by safety devices lenses, designed to expand.

Because these devices will exercise obviously latent and undeclared functions, even not possible to summarized in a few previously attributable purposes. Besides the relativization of *nemo tenetur se detegere* principle, would be possible to associate the so-called *compliance* duties

to forcible attempt, with the use of administrative sanctioning law as a veiled form to obtain on the plane of preliminary investigation, one *total enforcement*. Brazil, fleeing the other countries adopted example[67], does not make the notice-crime in order to initiate the preliminary investigation. It is noted here the introduced exception by Law 3.688/41, in its art. 66, I and II (failure to communicate public criminal action crime when, by virtue of his functions, the public official took note of his practice; failure to communicate crime; failure to communicate public criminal action crime by medical professional). In the remaining cases, the notice crime is optional. Failure to comply the *compliance* duties established, as mentioned several times, the omitting agent will be subjected to administrative penalties of high magnitude. As we can see, behind the regulatory changes there is a great elements network capable of allowing governmentality maximization, that is, subject to the subordination of statistical control purely (remembering that statistic is nothing more than a mechanism of the *state reason*). It is clear, yet again, the correct analysis of Foucault about the expand tendency of safety devices. An analysis as basted allows immediate diagnose, two direct affectations of criminal procedure system: next to preliminary investigation and self-incrimination prohibition principle. Certainly further analysis might raise many other mutations series in the criminal justice functioning brought by the *compliance* duties.

On completion rate, seems easily understandable the broadening and deepening of administrative and punitive control over certain economic practices. As also occur numerous devices that operate in other venues. The punitive system functioning, through the use of standards juxtaposition, strategically arranged to relativize constitutional guarantees incidence appears to be an important tool of contemporary governmentality. The insertion of safety devices reveals a tendency to blurring the codes legality themselves of criminal justice.

It was verified by the prohibition of self-incrimination fundamental principle analysis, that the *compliance* duties are presented as devices which make legal logic to an actuarial logic. The driving idea of prevention and risk management, embedded in the administrative criminology discourse, is precisely the *leitmotiv* of these *compliance* duties. The salacious logic of constitutional guarantees is supported by neutral institutes without pretense to maximize state control apparently. It must be exercise due care to be wary of this duties expansion and even opening to economic and managerial rationality that threat to govern the juridical issues. These profound changes in the punitive system functionality begin to be noticeable, at least to a certain contemporary criminology sector.

The big debate to be waged will reside in the battle against these guarantees gradual removal, alerting the fact that the punitive system has been gradually colonized by economic rationality. The *compliance* duties are just another safety device immersed in the vast network of post-disciplinary governmentality. Therefore, it is necessary investigate in which extent they are compatible with the Constitution and what the limits to be imposed.

>> ENDNOTES

[1] Cf Weber, 2001.

[2] Aglietta/Rebérioux, 2005.

[3] Stakeholder was first employed by Robert Edward Freeman to designate essential participants of a negotiating strategic planning.

[4] Silverman, 2008: 05.

[5] Neyer/Wolf, 2005: 41-42.

[6] Neyer/Wolf, 2005: 42.

[7] Cf Deacon, 2007.

[8] For Luhmann "behavior expectations norms are stabilized in terms factual expectation. His unconditionality sense implies its validity insofar as the term is experienced, and therefore also institutionalized, regardless of factua satisfaction or not of the norm. The symbol 'should be' mainly expressed in the effective expectation against factual, without putting in discussion this actual quality - there are, heare, the meaning and function of 'must be'". Luhmann, 1983: 57.

[9] Neyer/Wolf, 2005: 42.

[10] Neyer/Wolf, 2005: 46.

[11] Neyer/Wolf, 2005: 46.

[12] Saavedra, 2011: 11.

[13] Blount, 2002.

[14] Saavedra, 2011: 12.

[15] Cf Ruggiero, 2008.

[16] Yeung, 2004.

[17] Organizations should prioritize their ethical resources periodically and compliance to achieve those potential criminal activities that place the greatest threat in the identified risks light. Free translation.

[18] Silverman, 2008: 231.

[19] The Compliance Funtion in Banks. Bank for International Settlements. Available in: <http://www.bis.org/publ/bcbs103.htm.>.

[20] Stessens, 2003: 178.

[21] The United States in regard of the Control Act Money Laundering (Money Laundering Control Act of 1986) use, the courts have, however, flexibilized the requirement of illicit practice common awareness needed in order to exercise greater pressure on business person. With this, employed an alternative institute, the "willful blindness". The willful blindness theory basically deals with situations where the agent intentionally sought ways to make impossible to create awareness of specific illicit activity or the particular fact existence. Would be concrete situations with high probability resulting in a criminal activity that the defendant chose to ignore, or knew be existing. Nothing becomes willful blindness, inasmuch as recognized hermeneutic institute easy handling by indeterminacy reason applicative (which therefore gives enormous power to the courts), rather than a mental substitute prosecution that satisfies the consciousness criteria essential to the criminal practice configuration. A typical example of willful blindness would be the traveler who accepts shipping a package to a stranger under payment of some value to do it. The traveler may bring a reasonable suspicion if it is contraband. But without investigation, it would not be possible to ascertain whether or not the traveler knew of the illicit package content. However, the willful blindness theory allows this inference. If the traveler claim ignorance, the theory encompasses the subjective actual knowledge requirement imputed. Of course in terms of due process, it can

bring some problems. By adopting such intentionality method, clearly expanded, one ends up weakening and reduce the prosecutor body of proof burden as there is no way to create direct evidence, the burden shifts to the defendant probativeness, strengthening an undesirable – *juris tantum* - assumption of guilt and knowledge imputed. In short, the willful blindness theory comes precisely to break with a traditional knowledge standard, expanding it and equalizing culpability either for knowledge or for the deliberate ignorance. Cf, Kaenel, 1993: 1189-1216.

[22] Cf Demetis, 2010.

[23] Pieth/Aiolfi, 2004.

[24] It is a figure linked to the "mental state" of a criminal conduct agent, constituting *mens rea* (guilty mind). The reckleness figure means that the agent that did not wanted the result but, foreseeing the outcome, acted in such a way to expose anyone to risk. It is a very similar figure to the *dolus eventualis* in Brazilian law.

[25] Bernasconi, 2005: 247-256.

[26] These *standards* can be found at: <www.fssc.org.uk.>.

[27] Howarth, 2007: 17-20.

[28] "el Estado es garante de que el sospechoso no se incrimine contra su voluntad, pues el Derecho vigente impone a las autoridades de persecución del delito el deber de instruir a cualquier persona que es interrogada" Bacigalupo, 2005: 69.

[29] Armenta Deu, 2004: 54.

[30] Pisapia, 1975: 31.

[31] Cordero, 2000: 94.

[32] Schmidt, 2006: 67.

[33] Langbein, 1997: 82.

[34] Damaska emphasizes: "by adversary I mean a system of adjudication in which procedural action is controlled by the parties and the adjudicator remains essencially passive." Damaska, 1997: 74.

[35] Langbein, 1997: 108.

[36] Saavedra, 2011: 12.

[37] Cf Badaró/Bottini, 2012.

[38] Garland, 2008: 50.

[39] Garland, 2008: 390.

[40] Garland, 2008: 396.

[41] Becker, 1990: 39-85.

[42] Young, 2011: viii.

[43] Young, 2011: 44.

[44] Zaffaroni, 2011: 305.

[45] Dieter, 2012: 05.

[46] In a similar vein see: Dieter, 2012: 06.

[47] Garland, 1999: 65.

[48] O'Malley, 2009: 12.

[49] This does not mean, frize up, the State to weakens. Ferguson/Gupta, 2005: 123.

[50] Braithwaite, 2003: 10, 20-3.

[51] Sets up a real Penology transformation under three main dimensions: (1) discursive change with the a new numerical language implementation of probabilities and risk analysis, (2) new imposition objectives guided by the control efficiency primacy, not more intending eliminate crime, but run it through a systematic coordination, crime management process (a fair acceptable amount of crime in any society), and (3) a new verification techniques application

of risk profiles for the increase prevention purpose of health hazards,selective incapacitation promoting of high risk offenders, with a promise to reduce the crime effects on society. Feeley/Simon, 1992.

[52] See Giddens, 2003.

[53] Zizek, 2008: 79.

[54] By this word, 'governmentality', understand the structure composed of the institutions, procedures, analyzes and reflections, calculations and tactics that authorizes the exercise of this very specific ways, although complex, power that is the population as primary target for main way of knowing the political economy and essential technical instrument, the safety devices. Foucault, 2008: 143.

[55] See Simon, 2007.

[56] Agamben, 2009.

[57] Foucault, 2006: 20-21.

[58] The other elaborated distinctions by Foucault would be that: a) while the disciplinary system has a tendency to all regulate, safety devices would act on permittivity in the "let to do"; b) discipline would distribute things according to the allowed/prohibited code. There is a constant codification tendency of permitted and prohibited by disciplinary mechanism. The security device does not fully adopts the point of view of the allowed or forbidden. The security device acts directly on reality, nullifying it. Foucault, 2006: 66-67.

[59] Garland, 1999: 67.

[60] Saavedra, 2011: 11-12.

[61] The culture is the most effective guidance and control of the individuals and organizations conduct. Coimbra/Manzi, 2010: 87

[62] Zizek, 2008: 57.

[63] Foucault, 1998: 157.

[64] Sloterdijk, 2012: 500.

[65] Safatle, 2011.

[66] Silva-Sánchez, 1999.

[67] For example, in Spain, the crime notice is mandatory, and subject the agent who omits to penalties of art. 450 of the Organic Law 10/1995.

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