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THE POLICE POWER AND COMPLIANCE IN A LEGAL STATE AND THEIR INFLUENCE ON THE ANTI-CORRUPTION LAW (LAW 12,846 DATED AUGUST 1, 2013).

O PODER DE POLÍCIA E CUMPRIMENTO EM UM ESTADO LEGAL E SUA INFLUÊNCIA NA LEI ANTI- CORRUPÇÃO (LEI 12.846 DATADO DE 01 DE AGOSTO DE 2013).

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ABSTRACT

This scientific paper deals with the intensity and extent of police power exercised by the State of Law on issues relating to anti-corruption practices that should be

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adopted by companies and their managers, especially in light of Law 12,846 dated August 1, 2013, formal introducer in Brazil of compliance practices. Compliance is evidence of self-regulation granted by the State to the companies for the effectiveness of the police power internally in companies, for themselves, through compliance programs containing the code of conduct and ethics and internal policies to spread the good conduct and ethics in business and preventing acts of corruption.

KEYWORDS: Compliance; Anti-Corruption Act; Police Power; Ethics.

RESUMO

O presente artigo científico aborda a intensidade e extensão do poder de polícia exercido pelo Estado de Direito nos temas relativos às práticas anticorrupção que devem ser adotadas pelas empresas e seus administradores, especialmente diante da Lei n º 12.846 de 1º de agosto de 2013, introdutora formal no Brasil das práticas de *compliance*. O *compliance* é a evidência da autorregulação conferida pelo Estado às empresas, para que o poder de polícia seja exercido internamente nas empresas, por elas mesmas, através de programas de *compliance* contendo código de conduta e ética e políticas internas, com o objetivo de disseminar a boa conduta e ética nos negócios e coibir atos de corrupção.

PALAVRAS-CHAVE: *Compliance*; Lei Anticorrupção; Poder de Polícia; Ética.

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INTRODUCTION

This is a brief legal study about compliance programs and the self-regulation as an actual tool of the State in the fight against corruption, based on Law 12,846/2013. The research was developed by way of bibliography and interpretation of legal texts, as well as an historical perspective. In the first and second chapters, there is a study about the police power in the State, from the Absolutism era until the Regulatory State, including regulatory agencies. In third and fourth chapters there is a brief analysis of the concept of police power and also its reference to tax legislation. The fifth chapter has the concept of compliance and a brief history, with more detail in compliance programs. The sixth, seventh and eighth chapters refer to corruption in Brazil, the references to police power in the anti-corruption law and the importance of compliance programs in such law.

The choice of this theme is due to the relevance and originality of the subject in Brazil and its exposure in the international market, where these practices are consolidated and serve as a divider for countries that strongly reject corruption in trade relations and by public officials.

The theme is relevant to the insertion of Brazil in the group of countries that fight corruption and to its good reputation and permanence in the international commercial market.

1. POLICE POWER – FROM THE ABSOLUTIST STATE TO THE REGULATORY STATE

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Returning time in history, all activity carried out by the king (other than legislative) was considered police power in the Absolutist State. Thus, the police power was treated as law enforcement. From the point of view of content, the police power could be either an activity of limitation and restriction of property and freedom or the amplification of the liberty and property of its subjects. (RODRIGUES. 2008, p. 17).

Upon the occurrence of the Liberal State there was a reduction of police power only to certain State activities. The Liberal State is a state characterized as a "minimal state" with regard to the freedom of the individuals, especially the economic freedom. The police power is renamed as a power or competence of the State or Public Administration to limit or restrict the liberty and property administered in the name of security and public order. We can even say that the police power may define the entire set of administrative activities in charge of the Liberal State and intended for the implementation of legislation. Only those tasks, due to the inherent ideology of the Liberal State were quantitatively and qualitatively reduced (compared to the activities of the previous Absolutist State) in favor of a proportionate expansion of autonomy of free activities and / or free initiative of individuals. (RODRIGUES. 2008, p. 17)

Thus, for liberalism the administrative-state activity of police is an anomalous and exceptional activity that limits and restricts something that is already ruled in another branch of law - freedom and private property of individuals.

Adam Smith is considered the father of the Minimal State doctrine. According to Adam Smith, cited Nunes Avelãs, the characteristics of the system of natural liberty are:

> *"The duty to protect society from the violence and invasion of other independent societies; a duty to protect as much as possible, all members*

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> *of the society of injustice or oppression of every other member, or the duty to establish an administration of justice; and the duty to create and maintain certain public services and certain public institutions that can never be created or preserved in the interests of an individual or a small number of individuals, since the profit never repay the expense to any individual or small number of individuals although you can often do more than repay that profit to a great society." (AVELÃS. 2007, p. 70)*

In this sense, the idea of police power was built for a Minimal State, which did not seek to interfere in economic life. The Minimal State imposed negative limits to liberty and property. Thus, it was understood at the time to be the best way to allow the conditions for the right of all to coexist. The don'ts of duty were taken as a State imposition.

The concern of the Liberal State of the nineteenth century was so great not to intervene, that such government policy led to a very limited regulatory power, always focused on giving guarantee freedom for individuals to realize their intentions. Calixto Salomão Filho states that:

> *"If with exaggeration of the pretension and without attachment to the originality someone sought to establish a historical trajectory of State intervention in the economic domain in its modern era (adopting as a starting point the reassertion of State power in revolutionary France), could do it as follows. At first, and for over a hundred years, there was belief in the police State, which sole function was to protect economic freedom and private policy. To this overly Liberal State opposes the State of the Keynesian era and the revolutionary communisms. In many ways, these States intended to be the main managers of the economic system. Not coincidentally both cited movements are macroeconomic. There is, effectively, during this period, which lasts more than eighty years, a State conception as maximum manager, superior and far from the economic system." (SALOMÃO FILHO. 2002, p. 41)*

Where Emerson Gabardo affirms that

> *"In fact, the interventional practice of the Liberal State, beyond the theorizing physiocratic, or classical, was characterized preliminarily by an elimination of any direct intervention of the state guaranteeing, however, the establishment of an antitrust policy (at least at the end of XIX century). The*

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> *recognition of a "natural order" which seemed reasonable to assume that only the best competitors would survive, supported a progressive interventionist posture in which the law becomes eminently formal and individualistic (interesting example is the success of the Napoleonic Code and its formal guarantee of formal equality and the autonomy of choice)". (GABARDO. 2009, p. 155-158)*

The fact that the State, as a manager, does not fulfill its functions satisfactorily, in the opinion of Calixto Salomão Filho does not mean it is necessary to reduce its presence or remove up function. The author believes that it should be assigned another function to the State to redistribute, basing its management (including in the economic field) on values rather than economic goals, giving efficiency to the State. (SALOMAO FILHO. 2002, p. 41)

In the early nineteenth century the State has also become a service provider and focused its attention on the needs of social life. It became the State Entrepreneur and guided by the ideology of Welfare State. As a participant of the private life of its citizens, the State devised and implemented new sectors of industry and commerce. There was not a single recipe of Welfare State. Each State had different needs and expectations, as well as peculiar economic situations. The common feature in all of them was the intervention focused on economic and social development. There is no doubt that, with so much welfare from the government, a significant improvement in quality of life. However, this bonanza of the Welfare State could not last forever, by various factors. One was the tax crisis due to increased population and not monitoring the State of social and welfare activities, which led the State no longer to be able to meet its obligations and develop social projects.

> *"The appearance of the Welfare state corresponds to a unique period in human history, characterized by unprecedented wars, by a strong ideological competition between capitalism and socialism and the failure of classical liberalism in preserving the existing system. The industry advancement, housing policies, increase of the basic consumption, full*

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> *employment and the general improvement of living conditions in the occident contributed to the belief in the State and its capacity of normatization of the reality." (GABARDO. 2009, p. 155-158)*

Marçal Justen Filho brings his explanation of the difficulties faced by the Welfare State regarding the moral responsibility of the individual and human dignity:

> *"These days, where one affirms the reduction of State dimensions, society is faced with an impasse. The assignment of functions to the countless state structure produced not only the reduction of private autonomy, but also the moral responsibility of the individual. The ampliative vision of State functions generated paternalistic views that unburden individuals. It means the irrelevance of private participation to promote the principle of human dignity and other core values. Allude to human solidarity has become almost unreasonable, given the illusion that a state agency would be responsible for meeting the needs of others. From one angle, the affirmation of the rule of Social Welfare State was carrying a large philosophical comfort: a transplant of social responsibility of the individual to the State." (JUSTEN FILHO.2002, P.11)*

Marçal Justen Filho in the same work teaches that the State is unable to solve all the problems, either within the individual, or as to society, thus requiring the active participation of individuals and non-state organizations.

We conclude that, in the Welfare State, the interventionist state acts to reduce social inequalities, and its main activities in this area are, among others, to monitor the private agents through the police power, provide public services, promote social projects, maintain public defense, social security and social assistance.

The failure of the Welfare State was due to the lack of a tripartite joint effort between the State, civil society and the individual. The whole operation was under State responsibility. Hence, we can also say that the moral and political commitment to human dignity would be of all. As a natural evolution resulting from lessons learned from the Welfare State, there was further reduction of State functions in conjunction with the imposition of certain powers and duties to the community and

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people. We treat here the Regulatory State and state intervention in the economic domain. The State started using the legislative competence to regulate the activities of individuals. The State not really decreased its police power.

For Ari Carlos Sunfeld:

> *"The regulation is indeed a characteristic of a certain economic model, where the State does not directly assume the exercise of business activity, but strongly intervenes in the market using power tools. Thus, regulation is not proper from a specific legal family, but a choice of economic policy." (SUNFELD Apud JUSTEN FILHO. 2002, p. 15)*

Insofar as the State moves to the regulator position, with the assumption of large power control on private activities, increases its police power to ensure social stability and the maintenance of public property, democracy, freedom and of tasks required by the public objectives. The State will have to exercise monitoring and control mechanisms of private agents. The state realizes the public objectives in regulatory action, such as editing rules and other acts to influence the actio3ns of individuals and institutions. There was a constraint of limits of the purpose and nature of private activity, with intense and continuous control to achieve the public objectives. The State regulation is oriented to impress to the private activity the performance of objectiveness consistent and necessary to the public interest, emerging constraints on private activity that did not exist in the Social Welfare State model. It is the increase of police power as well. The State requires that individuals become more transparent in their performance in face of State controls and to the community as a whole. Surveillance is permitted through the participation of entities representing members and the community. Therefore arises the need to make up a control of State regulation so that the State does not make bad choices and act improperly its regulatory powers. (JUSTEN FILHO. 2002, p.11).

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The police power is strongly present in the Constitution of 1988. We have the example of the personal limitations (art. 5, VI and VIII), property (art. 5, XXIII and XXIV), the exercise of professions (art. 5, XIII), the right of assembly (Article 5 XVI), freedom of trade (art 170 and 173) as well as in the legislation that also regulates the matter: the civil code, art. 188, the water code, the forestry code, the environmental law, the hunting and fishing code and the regulation of cities and others..

In the current administrative law system, there are two forms of regulation - the granting of public service and the exercise of police power. Both have absolute different historical origin. The police power is born with the Liberal Modern State of the nineteenth century and results from the belief that the State can regulate simply through a passive role, limiting the freedom of individuals. For Salomão Filho a clearly liberal and passive conception of the police power is not enough to meet the needs of economic systems with so many structural imperfections as are the modern capitalist economies. (SALOMÃO FILHO. 2002, p. 41)

Marçal Justen Filho advocates the conception of the regulation as

> *"An ordered series of public policies, which seek the achievement of economic and non-economic values, reputed as essential for certain groups or the community as a whole. These policies involve the adoption of legislative measures and administrative nature, to encourage desirable private practices and punish individual and collective trends incompatible with achieving the cherished values. Regulatory policies involve also the judicial application of law." (JUSTEN FILHO.2002, p.11)*

The laws usually contain sanctions, which are the result of negative slant backed by State power. But in the Regulatory State, it shall institutionalize other laws to influence human behavior. Very properly, Marçal Justen Filho discusses the soft law, which are manifestations of State encouragement, guidance, suggestions, requesting the State to adopt certain parameters. According to him:

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> *"It is problematic to bring this kind of State action to traditional regulatory scheme. Towards that, these State action formulas are classified as "non-legal" or merely irrelevant demonstrations. However, it seems that these instruments are used to influence effectively the conduct of human beings and businesses. The so called "soft law" became widespread in doctrine to indicate "a statement whose purpose is normative (in the sense to influence the conduct of the recipients), the most often adopted by the Public Administration or international organizations, but defined (usually by the authors) as lacking full legal binding force". To Chevalier this is one of the characteristics of the so-called postmodern Law, where the legal normativity is associated with technical normativity, which is especially relevant in the context of state regulatory activities." (JUSTEN FILHO. 2002, p.11)*

In the view of Alexandre Santos de Aragão, when there was the first crisis of public services in the last century, the theoretical paradigms of public services have been threatened by the increase of state intervention in the economy and increase of intensity of regulatory intervention in private economic activities, functionalizing them to the public interest. Alexandre Santos de Aragão believes that, positively, there were constraints of entrepreneurial freedoms (obligations not only to harm the public interest, but to contribute to its realization), which was why he considered an evolution of the police power. (ARAGÃO. 2007, p.41)

Egon Bockmann Moreira explains that, until the mid-90s it was well considered the division of State activities by the binomial "police power" - "public service". To the traditional theory, public services could not accommodate the regulation (from the perspective that who governs grant no benefits). Thus, the right of regulation was included in the genus "administrative police power". Alongside these two categories, the State also acted entrepreneurially in the private economic sector - neither just to discipline the markets nor for them to install competition, but with a view to join them due to various reasons (lack of interest or resources of the private sector, national integration projects, consolidation of political and economic power, etc.). (MOREIRA. 2013, p.87 – 118)

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Egon Bockmann Moreira also differentiates and explains the regulation on the point of view of intensity, as soft or hard. For him, the soft regulation (called soft law by Marçal Justen Filho):

> *"is structured through incentives and stimuli and their respective positive sanctions, as a premium and not through commandment orders under threat of negative sanctions. The intention is that the economic agent, if he desires, adopts certain conduct that the regulation seeks to achieve. Freedom is the brand of soft law, which can give, for example, through economic development, subsidies and tax benefits." The hard regulation, says the author, "is one in which the competent authority (public or private) establishes orders to be followed by economic agents, who are required to comply with them: prohibit and force are the verbs used for the hard regulation. The clearest example is the pricing (and their respective ceilings)." (MOREIRA. 2013, p. 87-118)*

Johan den Hertog also comments on the difficulty of the conceptualization of the term "Regulation":

> *"In the legal and economic literature there is no fixed definition of the term "regulation". Some researchers devote considerable attention to various definitions and try through systematization make affordable term for further analysis (Mitnick, 1980). Other researchers, however, refrain entirely from making a definition of regulation (Joskow and Noll, 1981). So outlining the subject and because of the limited space, a definition of regulation is therefore needed. In this article, regulation will mean the legal instruments for the implementation of socio-economic policy objectives. The characteristic of legal instruments is that individuals or organizations can be compelled by the government to conform to predetermined behavior under threat of penalty. Companies can be forced, for example, to observe certain prices, provide certain products, stay out of certain markets, particular techniques applied in the production process or to pay the minimum wage. Penalties may include fines, the publication of violations, arrest, an order to make specific arrangements, a restraining order against the retention of certain actions or termination of business." (HERTOG. 1999, p. 223-270)*

The 1988 Constitution emphasizes the profile of an active Administration - public services, public works, state exploitation of economic activity, police power, operationalized by a complex of organs and corporations, but also favors a

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controllable Administration grounded in citizen participation - internal and external control, constitutional principles, procurement, concessions and permits, legal defense and contradictory in the administrative process. (FINGER. 2003, p. 56)

Luis Roberto Barroso has the same point of view as Ana Claudia Finger and teaches us that it is a markedly directive Constitution, stamped by concern for democracy, human rights and social justice, such Constitution delimitates public purposes to be achieved by conditioning the powers to act in the direction chosen by the constituent, notably in fields such as education, health, culture and realization of values as the material justice and the rights inherent to it. (BARROSO. 2002, p. 36)

1. THE REGULATORY STATE AND REGULATORY AGENCIES

The Regulatory State continues to evolve. The creation of regulatory agencies is a result of State reform, which is revolutionizing the administrative law and business law. A new economic administrative law finally arises. The presence of the State police power is still strong through the regulatory agencies, where the State influences the organization of economic relations exercising authority and giving to the authorities responsible for these agencies autonomy to regulate and exercise police power. The police power granted to agencies manifests itself through the control of business concentration, the repression of economic order infringement, price controls and tariffs, environmental measures, urban planning, discipline of professions. They typically have tasks of State to issue rules, inspect and apply sanctions. (SUNFELD. 2002, p. 2002)

2. POLICE POWER - CONCEPT

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The police power has always been considered as a State power to limit the freedom of citizens in the public interest. The police power had been used in the elaboration of normative acts prohibiting certain behaviors (including in the performance of the Administration as abuse of power), either in a preventive or repressive manner, preventing certain conducts. It is worth mentioning that the police power has always been interpreted as a negative performance of the Administration rather than the competence of the Administration to stimulate certain behavior of the citizens positively.

The institute of the police power has the important function of carrying out a series of policies and principles, serving as an instrument of paramount importance. The performance of such activities, however, should be based on the principles and norms of our legal system so that its exercise does not occur in an abusive and harmful way. This is where the forms of control must act.

Hely Lopes Meirelles affirmed that "the police power is the braking mechanism available to the public Administration to curb abuses of individual rights." In his book he quotes Thomas Cooley , classical liberal author of the nineteenth century, a university professor and judge of the US Supreme Court, who gives his definition of "police power": "The police power , in its broad sense, comprises a total system of internal regulation, whereby the State seeks not only to maintain public order but also to establish for the life of relationships of citizens those rules of good conduct and good neighborly relations, which are supposed necessary to avoid conflict of rights and to ensure each uninterrupted enjoyment of their own right, as far as it is reasonably compatible with the rights of others. "Among us Caio Tácito explains that "the police power is, in short, the set of permissions granted to the Administration to discipline and restrain in favor of adequate public interests, rights and individual freedom". (MEIRELLES. 2008, p. 134-135)

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As well explains Agustín Gordillo, the American law was very used to call the "police power", but nowadays simply refers to "regulation" or also "rulemaking" to describe the issue of administrative regulations, differentiating the specific law ("legislation") that is produced by a representative legislature. (GORDILLO. 2014, p. 205)

In Brazil, the institute of the police power reveals applicability since the Constitution of the Empire, which sought to regulate a state intervention in the private sphere in order to protect issues related to the public interest.

The term police power is seen as inappropriate for a large part of the doctrine. This is because the word would prove unfortunate and would bring a negative charge, as stated earlier, with a sense of repression and going back to the repudiation of the Police State period.

Celso Bandeira de Mello understands that the term designation of police power is clearly inappropriate because it encompasses under one name radically different things, subject to the regime of irreconcilable diversity: laws and administrative acts; i.e. superior provisions and subordinate measures. It also brings with it the assumption of prerogatives that existed before in favor of the "prince" and which inadvertently communicates with the executive power. In short, one reasons as if there were a natural ownership of powers in favor of the Administration and as if from it emanated intrinsically, the result of an abstract power of police. (MELLO. 2011, p. 829)

Anilly Gisela Ascanio, in an article elaborated on police power in Colombia, believes that:

> *"It is the form of the police activity, which is carried out by the authorities of the administrative order, when they develop the power of limiting the activity*

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> *of the governed in pursuit of maintenance of public order, distinguishing it from the activity performed by certain authorities when they perform functions to collaborate with the authorities of criminal jurisdiction which is called judicial police. Referring to the concept of administrative police, the State Council pointed out that "according to our legislation, this includes the police power, the police function and a mere power to issue general rules, impersonal and pre-existing national rules of behavior that deal with public order and freedom, that is, do the policing law, dictate police regulations. This Corporation also notes that the police function is the concrete administrative management of police power exercised within the framework imposed by the latter, exercised by the police administrative authorities, that is, the central governing body and decentralized public administration, as superintendents, mayors and inspectors." (ASCANIO. 2014)*

The police power in the mid-twenty-first century and in the light of the Democratic State of Law is considered an instrument of public administration in collective welfare quest, always subordinate to the principles of legality and due legal process (as well as the other constitutional and administrative principles) and the forms of control.

According to Celso Bandeira de Mello

> *"Activity known among us as administrative police - Today studied preferably under "the name of" administrative constraints to liberty and property"- corresponds to the administrative action to make the conditioning provided by law to the exercise of freedom and property of people in order to make it compatible with the social welfare. It is then encompassed in the midst of such activity the practice of preventive actions (such as permits, licenses), inspection (such as inspections, surveys, tests) and repressive (fines, embargoes, activity interdiction, seizures). It is a significant practice of expressive acts of public power." (MELLO. 2009, p. 295)*

Celso Bandeira de Mello continues stating that:

> *"What the "administrative police" directs, otherwise, is the issuance of legal provisions: acts which enable the administered to practice a certain activity (license to construct, license to drive cars, carry weapons permit, etc.) or, to the contrary, prohibit (denying the referred acts) or prevent (issuing orders,*

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> *such as when the traffic policeman diverts traffic) or sanction, if disregarded the relevant rules (issuing fines, determining embargo activities) when verified its violation, which occurs as a result of surveillance of the administered behavior." (MELLO. 2009, p. 295)*

Marçal Justen Filho "the administrative police power is the power to regulate the exercise of autonomy for the realization of fundamental rights and democracy, according to the principles of legality and proportionality." The social life entails the need for limitation of individual rights in order to avoid that the maximum freedom of each private agent reduces the freedom of others. The State seeks to prevent that the enjoyment of freedom and rights of private rights produce injuries to rights, interests in others rights, public or privately. It translates both the repression and the development of conducts. The police power is not only discipline in the meaning of issuance of rules of conduct, but also towards adoption of the necessary facilities to enforce in fact the observance of legal controls (including through the effective use of force). (JUSTEN FILHO. 2002, p. 569-579)

In order to limit the exercise of freedom not to be considered an anti-democratic act, the legal and constitutional principles disciplining democracy must be in compliance, which are the major limitators of police power.

Pierre Tifine, professor of administrative law at Lorreine in France, explains the definition of public policy in the context of police power, knowing that in France the police power is called administrative police:

> *"La notion d'ordre public est très largement différente de celle retenue par les civilistes, telle qu'on la retrouve notamment à l'article 6 du Code civil selon lequel « on ne peut déroger, par des conventions particulières, aux lois qui intéressent l'ordre public et les bonnes mœurs ». La notion publiciste d'ordre public recouvre tous les aspects de la vie en société, y compris certains aspects de la vie privée. Il existe une conception traditionnelle assez restreinte de la*

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notion d'ordre public qui a connu une extension récente de son champ d'application" (TIFINE, 2013)[1]

Hely Lopes Meirelles teaches that the administrative police focuses on assets, rights and activities, whereas judicial police focuses on people individually and indiscriminately. Hence, we conclude that, if administrative police does not act towards people, based on the current Constitution there cannot be administrative detention. The administrative detention, although expressly provided for in the Code of Criminal Procedure, has no more validity in our legal system, as it is ordered by a strange organ to the judiciary structure, offending the principle of jurisdiction (MEIRELLES. 2002, p. 105),.

Celso Bandeira de Mello asserts that the reason of the distinction between administrative police and judicial police is in antisocial activities targeted by the former, while the latter aims at criminal liability (MELLO. 2011, p. 545).

For Sylvia Maria Zanella di Pietro the divergence is in the occurrence of criminal offense that marks the acting of judicial police. (DI PIETRO. 2009, p. 345)

The police power has specific and peculiar attributes to its exercise which are the discretion, self-enforceability and the coercivity.

In the lesson of Celso Antonio Bandeira de Mello it does not exist a power, itself, which is discretionary and exercised by the Public Administration. There are acts in which it can manifest discretion and acts where it is fully bound. Therefore,

1 Our translation: "The concept of public policy is very much different from that used by civil law, as it is provided in particular in Article 6 of the Civil Code that "one cannot derogate by private agreement laws that interest the public order and good morals. "The publicist notion of public policy covers all aspects of life in society, including some aspects of privacy. There is a fairly traditional view of limited concept of public policy that has seen a recent extension of its scope."

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there is no discretionary power encompassing an entire class or branch of administrative action (DI PIETRO. 2011, p.843).

Self-execution is the faculty of Public Administration to decide and directly apply its own decision by its proper means without the intervention of the Judiciary, i.e. whether a judicial writ is imposed or not. The Administration directly imposes measures or sanctions of administrative police that are necessary to curbing antisocial activity it seeks to prevent. If the individual feels violation of rights he may claim judicially. (2002, p. 140).

Finally, the third attribute of police power is the coercivity it means the coercive imposition of the measures adopted by the Administration. Every act of police is mandatory (compulsory for the recipient), admitting the use of public force for its compliance when resisted by the administered. This attribute does not legalize unnecessary or disproportionate violence to the resistance. (MEIRELLES. 2002, p.141)

The police power is inherent to Public Administration. However, in the State of Law no sacrifice or restriction can be imposed on the citizens without any provision in law. It is the principle of legality. The fundamentals of rights and guarantees, freedom and property can only be restricted by law.

Besides the provision in law, it is also key to determining the legitimacy of the law, considering the means employed and the ends pursued. Proportionality is essential to the validity of any action of Public Administration. The same applies to actions relating to the police power.

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The reasonableness arises from the relationship between the public interest and social benefit, which is the only possible justification for the State acts. The will of the legislator has no value by itself, but only to the extent that observed rationality.

As an exemplification of the police power of the Central Bank over banking activities, Fernanda Uchoa Costa comments that:

> *"The financial system is structured to constitute as a whole an instrument of public policy consummation, not meaning, however, that the system carries public function. It is about economic activity performed by individuals, which has its exercise set and molded by the State to the achievement of a function: to enable the execution of the monetary policy of the State (as prerequisite for the functioning of the national economy) and provide the necessary economy flow of credit for its development." (COSTA. 2006, p.35)*

3. POLICE POWER AND TAX LAW

The link between tax law and the police power is clear, such that the elements of its doctrinal concepts were adopted by the National Tax Code in Article 78 and its sole paragraph.

> *"Article 78 - It is considered police power the activity of the public administration that, limiting or disciplining right, interest or freedom, regulates the practice of an act or abstention of a fact by virtue of public interest related to safety, hygiene, order, customs, discipline of production and market, the exercise of economic activities which are dependent of concession or authorization of the Public Power, to the public peace or to the respect for property and to individual or collective rights.*
>
> *Sole paragraph. The exercise of police power is considered regular when performed by the competent body within the limits of applicable law, in compliance with the legal process and, in the case of activity that the law provides as being discretionary without abuse or misuse of power."*

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We infer from tax legislation that police power is one of the triggering events of this kind of tribute, alongside the provision or making available to the taxpayer of specific and divisible public service. Such taxes are charged as a result of State activity, that verifies compliance with the relevant legal requirements and for the regular development in a particular activity. The surveillance role of the State is aimed at the public interest, of the community, but the private agent that should contribute (taxpayer) is monitored, since it was he who immediately led to State action

As per article 195 of the National Tax Code, the police power also manifests itself in the access to company information of tax interest. Such access, which integrates surveillance, break the confidentiality of accounting books, documents and goods. The tax agents, however, have a duty-power survey, entering the realm of relative secrecy of the company. Such exception is justified by the exercise of police power to ensure tax compliance and fair competition. It is the realization of police power: the confidentiality restriction (individual right) and activity in the public interest.

4. COMPLIANCE

It is visible the change in the corporate world due to the globalization, which puts pressure on companies, to remain in the market, to discover and introduce new techniques and tools to minimize risks caused by their actions (risk management systems). In the past companies only assessed the risk from the point of view of economic loss. These days there is an increasingly approach to the potential legal liability of directors or the company itself, either by the abuse of power of the administrators, the incidences of internal fraud with injury to third parties or social responsibility. Compliance is the new model in the management and translates the

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good corporate governance, the relentless fight against the abuse of power within the companies.

Compliance is a tool for risk management of a company, such as risk of legal or regulatory sanctions, financial loss, reputational losses arising from failure to comply with laws, regulations, codes of conduct, etc.

There are many benefits in the use of compliance tools, such as integrity of the organization, employee loyalty, good reputation, good relations with stakeholders, suppliers, customers, investors and regulators.

Compliance incorporates principles of integrity, ethical and moral conduct. Therefore, it should be borne in mind that, even if no law or regulation is breached, actions that bring negative impacts to stakeholders can lead to reputational risk and diverse advertising, endangering the continuity of any company.

Compliance is understood as to act according to the established by law, regulations, protocols, standards or recommendations of a specific industry, codes of conduct and regulatory bodies. It is a desired compliance status before the law, regulation or due to demand. The term originating from the English verb "to comply" means to fulfill, perform, meet or perform something imposed, by putting in place internal and external regulations, aiming to mitigate risks and losses, especially in the business sector, but also being applied with increasing intensity in the public sphere (BREIER. 2013) .

The compliance mission is to ensure, together with other areas of the company, the adequacy and strengthening of its internal control system, seeking to mitigate the accounting risks to the complexity of its business, as well as disseminating control culture to ensure compliance with existing laws and

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regulations, as well as acting on guidance and awareness of prevention activities and conducts that could cause risks to the image of the institution.

On the other hand it shoud also be highlighted the real difficulty in placing the compliance in practice and also its verification mechanisms, as Matthew Bretzius says, experienced in compliance in the United States:

> *"The real challenge comes from the intersection of policy and practice. It is important to understand that regardless of the source of the mandate, one challenge faces all of these organizations - once they have created their policies they must decide how to enforce those policies and measure their effectiveness. On the surface this may seem like a simple task. In practice, though, the dilemma is that creating a policy – without any mechanism (automated, manual, or third-party) to measure and monitor compliance of the aforementioned policy – is somewhat like setting a curfew for a teenager and then going away for the weekend. How do we know if people will live up to our expectations? How do we know if those expectations are even reasonable? In order to build effective policies, we must not only have an understanding of the legal and statutory requirements that will shape the policy within our organizations, but we also must understand how these policies relate to the business practices, people, and technologies within our organizations. (BRETZIUS. 2013)"*

The concept of compliance originated in Brazil was also inspired by the American system, after the increasing trade liberalization around the 1990s Collor de Mello government, when the country began to occupy a prominent international position. Thus, Brazil began to suffer frequent pressure to develop a policy that would satisfy the standard of transparency required and adopted by the US Agency Securities Exchange Commission.

Money laundering Act (Law 9,613 / 1998), especially with its amendment by Law 12,683 / 2012 is an example of compliance provisions in Brazil. In addition to establishing money laundering in the country, this law also created the Council for Financial Activities Control (COAF), responsible for coordinating and proposing

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mechanisms of cooperation, exchange of information and internal control among the subjects on the control mechanisms to combat money laundering.

In 2012 it was expressly provided for the obligation of individuals and legal entities, the fulfillment of obligations related to combating money laundering, the adoption of policies, procedures and internal controls, compatible with their size and the volume of operations.

Given the international commitments assumed by Brazil, as a signatory of the Convention on Combating of Foreign Public Officials Corruption in Trade Transactions promoted by the Organization of Trade for Economic Cooperation and Development (OECD), it was necessary to enact clearer, detailed and effective anti-corruption rules for public officials.

5. COMPLIANCE AND SELF-REGULATION.

According to Rafael Guedes de Castro "self-regulation constitutes a kind of self-discipline assignment of duties to economic agents in the conduct of their activities. This can be defined as regulated self-regulation, that is, the search for an articulation that proposes a new way of regulating, combining the presence of the State in the role of supervision and surveillance and assigning to the private entity the obligation to self-discipline its activities". (CASTRO, 2010).

Self-regulation is strengthened in the State in this era of globalization because it does not regulate efficiently the business activities, either by the total lack of information or lack of expertise to do it as a state regulatory strategy. The benefits of self-regulation will only be fully utilized if it is implemented in a flexible manner, combining the development of private norms with direct governmental supervision,

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where the interested sector may also participate in the elaboration and application of the rules on its members. Still, this regulatory framework should provide a convergence between private interests and the outside community in general to ensure the full success of the self-regulatory system. (BREIER, 2013).

The regulated self-regulation model, which is the self-regulation of the Anglo-Saxon doctrine, is the most common and important form of manifestation of private participation in the regulatory process. It is characterized by the involvement of private entities in the regulatory process, in a subordinate form to the purposes of public interest established by the State. This, holder of the right to regulate, relies on companies to collaborate on the development of norms. There are three possible models for its implementation: delegated self-regulation, devolved self-regulation and cooperative self-regulation.

Is spite of the term "self" regulation, Anthony Ogus clarifies the collective character of the expression:

> *"When used in a legal context, the 'self' in 'self-regulation' is not used in the literal sense. Rather it connotes some degree of collective constraint, other than that directly emanating from government, to engender outcomes which would not be reached by individual market behaviour alone. It is also normally taken to imply 'a fairly well established and generally recognised set of rules, whether customary or reduced to writing, in accordance with which the activity is regulated." (OGUS. 2011, p. 588)*

Codes of business conduct that support corporate compliance originate from self-regulation processes. They serve to transcribe the state regulation for risk situations that may occur in the company, determining which are the obligations that derive from the law for every situation and inform all team members in the organization exactly what is allowed and what is not, as a direct result of State rules.

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It should also be emphasized the importance of legitimation of compliance programs, i.e. the limit and the legality of self-regulation through compliance. Eduardo Saad Diniz comments that:

> *"[...] the mechanisms of intensive verification of the application of fundamental rights. In line with the constitutionalization of the legal order, institutionalizing duties between private, State bodies or even that recommend duties of cooperation on the relationship between private and State entities, Matthias Jestaedt suggests the "intensive" use of constitutional verification: "the Constitution is not reduced to mere special right (Sonderrecht) of political relations, but rise to an order of values pervasive in each of the legal relations". This intensive verification constitutes a powerful tool for limiting the areas of incidence of the duties, reducing the impacts observed in the institutionalization of compliance programs and the integration and cooperation pressures on individual freedoms." (DINIZ. 2013, p. 439)*

The theme of self-regulation is gaining more importance, whereas legal systems begin to deal with more attention the internal structure of organizations, seeking an increasingly effective accountability, noting the individualization of conducts and consequent sanctions. It is increasingly clear the close and inseparable relationship between self-regulation and criminal law, so that codes of conduct are presented as fairly effective measures to prevent crime and determination of authorship. (BREIER, 2013).

6. THE ANTI-CORRUPTON LAW

Before we talk about corruption, it is important to comment on national identity, which is not yet formed due to so much social and economic gap that occurs in Brazil since Portuguese colonization to the present day. According to Jesse Souza, the illusion of national identity considers the "Brazilian way" and the warm and friendly man. It is said that all evil began with the Portuguese colonization,

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forgetting that living conditions in Portugal were totally different from living conditions in Brazil, where there was slavery. There was not the construction of a large Portugal in Brazil. The world of social relations and institutions that the Portuguese built in Brazil was totally different from what occurred in Europe. The culture and institutions, which are inseparable, were different in Brazil and formed a distinct individual behavior of Portuguese in Europe. Brazil was dominated by slavery, which completely changed the behavior of individuals and produced entirely different social relations, which helped to shape who we are today, the formation of Brazilian society, its social, cultural and economic uniqueness.

In Brazil there is an assumption that culture never changes. We still think that the culture of Portugal of 1500 is responsible for the widespread corruption of the State and institutions, as an inherited and unchangeable cultural trait, oblivious to individuals, including therein also the culture of "favor" and "privilege" as main cultural trait of Brazilians, who are closely related to corruption. We do not stop to reflect how is the culture in modern conditions in Brazil and, therefore, we use to our advantage the perception as a legacy of the Portuguese past. I.e. corruption is not from Brazil, but brought from Portugal and was apparently here "forever". (SOUZA. 2009, p. 103-110)

As previously mentioned, corruption in Brazil has very deep historical roots that ratify the bad habit of its citizens and has to do with the dynamics of the Brazilian democratic process. The insensitive posture to corruption by the majority of the population perceived from the consolidation of the republic installed a very marked climate of impunity. The person who occupied a public office considered that both the State and its assets were entirely at one’s convenience, ignoring or giving too little attention and respect for the public asset. The disapprovement to corruption was very low in all social levels. The lack of punishment for acts of

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corruption was widespread throughout the State. In the absence of specific legislation and monitoring instruments, everyone believed would never be punished. (PADILHA NETO. 2010, p.32-41).

The media have evolved and have become effective tools for disclosure of acts of corruption. Thus, increased the interest and participation of the people in monitoring the Public Administration. There was a growing feeling that the money used in corruption drag out the needs of the society. There is a Brazilian self-centeredness that shows little interest in any subjects other than his individual interest, resulting from the large gap for centuries between the public and private sectors, as well as the distance between the people and the political process. (PADILHA NETO. 2010, p.32-41).

The maturation process continues to happen with the enactment of Law. 12,846 called "Anti-Corruption Law."

The Brazilian legislator was inspired by US legislation (Foreign Corrupt Practices Act) to draft the Anti-Corruption Law. In the United States, which had an original colonization and culture very different from Latin, the repulsion against corruption occurred earlier than in Latin America.

In the 1970s US law resulted from the verification of numerous investigations carried out by the US Securities and Exchange Commission (SEC), which is equivalent in Brazil to the Brazilian Securities Commission (CVM), on questionable payments made by several US companies to public officials, politicians or political parties of foreign nations, resulting in a very bad image of US companies on the world stage. (THE CRIMINAL DIVISION OF THE U.S, 2012)

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The bribe payments were made to ensure some kind of "positive action" by foreign governments or concession of facilities. Among the most famous scandals of the time are the cases of bribes to foreign governments by Lockheed employees who bribed them to give preference to the purchase of aircrafts produced by Lockheed.

After the scandals of Enron and World.com and hence the enactment of the Sarbanes-Oxley Act (SOX), there was an increase in investigations by the Securities Exchange Commission as well as the growing concern of US firms in preventing corruption by compliance tools.

On August 1, 2013 was enacted Anti-Corruption Law, which provides for administrative and civil liability of legal entities, regardless of the form of organization or corporate model adopted, including foundations, associations of entities or persons, as well as foreign companies that have their registered office, branch or representation in Brazil, the practice of unlawful acts against the Public Administration, national or foreign.

The Anti-Corruption Law adds to a series of legal rules that in recent years are, through self-regulation systems, transferring from the government to the private sector the responsibility for the prevention and investigation of crimes.

The Anti-Corruption Law is not a criminal law. Pursuant to article 30 it is part of the microsystem to fight corruption, and expressly provides that the application of penalties under the anti-corruption law does not affect the accountability processes and application of penalties of Law. 8,429 1992 (act of administrative misconduct), unlawful acts by Law. 8,666 1993 or other rules of bidding and contracts of Public Administration. Thus, there is a danger to occur a *bis in idem*, since the harmful acts to the Public Administration and the legally protected interests either identify

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themselves or are present in the Anti-Corruption Law, showing a real apparent conflict of provisions on sanctions. (GRECO FILHO. 2013, p. 19)

7. THE ANTI-CORRUPTION LAW AND THE POLICE POWER

We note in the Anti-Corruption Law that the States of the Federation may also establish their specific regulations. The anti-corruption law provides that the determination of the liability within the limits of this Law shall be incumbent upon the head of each agency or entity of the executive, legislative and judiciary in the spheres of the Union, States and Municipalities.

The new civil or administrative sanctions created by the Anti-Corruption Law are also very close to criminal sanctions such as penalties applied to companies due to infringement of criminal environmental law (where there is strict liability), fine, forfeiture of property, suspension of activity, ban on receiving incentives or compulsory dissolution of the legal entity. Finally the power of anti-corruption police was significantly expanded with the punitive provision for two systems: one in the Public Administration, through administrative procedures; another in court and with extremely serious penalties, always with the highlighted active legitimacy of the prosecution in civil action in any way guaranteeing - formally - the due legal process of accountability of the legal entity for harmful actions against public property, to the principles of Public Administration and to the international commitments undertaken by Brazil. (DINIZ. 2014, p. 163-187).

It is provided for in article 8 of the Anti-Corruption Law that the ultimate authority of any entity of the executive, legislative and judicial powers, by their top managers, may initiate the administrative process and apply sanctions. The

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application of punitive measures against individuals, legal or natural person, is private of public law entities, because the sanctioning power is due to the so-called administrative power that only legal entities of public law hold.

Vicente Greco Filho understands that:

> *"We must not forget, however, that the executive power has indirect administration entities of private law and cannot apply sanctions to anyone. Public companies and private and public joint stock companies, although they are bodies of executive power, do not or cannot exercise it and therefore cannot file punitive administrative proceedings, much less the application of sanctions, as with the exercise of the so-called police power. If they do, it will be considered unconstitutional for violating the principle of the freedom to act and integrity of the person, which can only be restricted by law and, in the case of sanction, can only be applied by a public law entity." (GRECO FILHO, 2010)*

The constitutional grounds completed by the understanding of article 173 of the Constitution, which places public companies and the private and public joint stock companies in terms of economic activity and private sector level, excluding from them, therefore, the power to impose sanctions to individuals or legal entities. The sanctioning power belongs to the State as such and it acts through the legal entities of Public Law.

In the above paragraphs the allusion of Vicente Greco Filho refers to Decree 60,106 of January 2014, which besides conferring jurisdiction to file and prosecute administrative proceedings to the Secretaries of State and the State Attorney General, in their respective spheres, and to the President of the General Administration of Internal Affairs, also granted authority to apply penalties on public companies and private and public joint stock companies, which, in fact, are private law entities. Before the judiciary to declare, it is expected that the unconstitutionality is corrected by amending such Decree to assign the power to impose penalties solely to the public organ of the Direct Administration, which is exempt and can also

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have transparency to be monitored by the citizens. Also considering that each state of the Federation or municipality will have its own regulations, it is expected to avoid repeating this unconstitutionality.

8. THE ANTI-CORRUPTION LAW AND COMPLIANCE

We noted in Article 4 paragraph 2 of the Anti-Corruption Law that the parent companies, subsidiaries and affiliates will be jointly responsible for carrying out actions provided for in the Anti-Corruption Law, restricting such responsibility to the fine and indemnification. In this sense, the legal entity will have to monitor (perform acts of compliance) the conduct and behavior of its affiliates, subsidiaries and consortiums to avoid joint liability.

Compliance programs effected by the companies will have to incorporate a Code of Ethics and Conduct easy to understand, reporting channel covering anonymity, continuous training, communication mechanisms easily accessible to all employees of the company, monitoring sensitive areas etc. to achieve an environment free from conducts that tend to violate the Anti-Corruption Law.

In Article 7 paragraph VIII of the Anti-Corruption Law, the legislator provides that it will be taken into account in the application of sanctions the existence of mechanisms and internal integrity procedures, audit and encouragement of whistleblowing and the effective implementation of codes of ethics and conduct in the legal entity.

The Regulator State expects corporations to realize a strong and intense self-surveillance, self-regulation with codes of conduct, ethics and compliance-related policies, as well as self-control through a compliance program, with internal

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termination facilitators channels (0800), internal controls, training to their employees, internal and external audits, among other activities, to detect employees' behavior deviations.

Article 7 paragraph VIII, linked to the introduction of strict liability of the legal entity, will require the company to do what is required, at high costs, due to the fact that it is the main interested in preventing, investigating and discovering conduct deviations and possible law violations carried out by its employees. This forecast will strengthen the compliance culture in Brazil, with the incentive to entrepreneurs to invest in internal control policies to comply with rules and regulations to mitigate risks, with the objective to avoid the commitment of the legal entity with unlawful conducts and strengthen the image of the company before the society in general, and in particular before their consumer customers, partners and employees.

CONCLUSION

The compliance provided for in the Anti-Corruption Act is the result of a self-regulation demanded by the Regulatory State. In the midst of the Regulatory State there is a discussion of the dispute of the functions reserved to the State and the extent of autonomy and responsibility of individuals and legal entities. It remains clear the inability of the Regulatory State to deal with the reduction of anti-corruption practices by the companies and the citizens.

It is too early to know the actual effectiveness in the implementation of self-regulation in compliance based on corporate policies and codes of conduct and ethics. That is, if such practices result in a real inhibiting the anti-corruption practices, or only become written documents to be saved in files to be eventually shown to the authorities as proof of compliance with the legislation and to reduce

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fines. I believe that the institution of compliance linked to the anti-corruption legislation is a good start, but it will depend on how committed are company directors to give importance to compliance, live the rules embodied there and be an example for the other employees of the organization.

The police power exercised by the Regulatory State through the Anti-Corruption Law is intense and, in my opinion, so it should be. The legislative, by enacting this law, strengthened the police power needed to protect the public interest in matters of restraint of public official corruption acts and also instituted appropriate safeguards in administrative and judicial process to curb the abuse of power by the authorities.

It is clear that the Anti-Corruption Act did not create new behaviors never before typified by the Penal Code or special legislation. It means that it did not include in its list of illegal acts against the Public Administration any conduct that in the past was considered licit and practiced by all. The novelty brought by those rules is the change of perspective given by the legislative in the fight of crimes against the Public Administration replacing the criminal law and the pursuit of individual agent, by the sanctioning of administrative law aimed at corporations, even though it continues to make use of concepts and tools derived from the criminal law.

Brazil lacks a cultural environment of value and honesty. It is still missing a national identity to its citizens. Honesty lives with the political appreciation of corruption, creating a culture, if not encouraging, at least tolerance for illegal behavior. The level of public official corruption is very high in Brazil and it is expected that the application of the Anti-Corruption Law be effective and have a real influence on the values of the business in general and society.

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