CORPORATE CRIMINAL LIABILITY IN BRAZIL:
THE PARADOX OF ITS INTERPRETATION
BY BRAZILIAN COURTS

Marta Rodriguez de Assis Machado
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Corporate criminal liability in Brazil: the paradox of its interpretation by Brazilian Courts

Marta Rodriguez de Assis Machado

Send your comments to: marta.machado@fgv.br

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1 Professor of Law, Fundação Getulio Vargas School of Law – São Paulo since 2007 and Researcher at the Law and Democracy Group in the Brazilian Center of Analysis and Planning (CEBRAP) since 2004; Doctorate in Law 2007 (SJD equivalent), Universidade de São Paulo; Visiting Scholar 2006, Universidad de Barcelona; Visiting Scholar 2006/2007, Max Planck Institute for Foreign and International Criminal Law; Master in Law (LLM equivalent) 2004, Universidade de São Paulo; Bachelor degree in Law 1999, Universidade de São Paulo. I would like to thank the participants of the Fundação Getulio Vargas School of Law [São Paulo] Research Workshop and Roundtable on Criminal Law’s Impact on Business Activity, and the Escola de Direito FGV Rio de Janeiro Colloquium on Empirical Research for helpful comments and discussion. This Article is part of a more comprehensive study on Corporate Criminal Liability coauthored with Flávia Püschel and Deborah Kirschbaum, which was developed within the Project “Pensando o Direito” [Thinking the Law], and received funding from the Ministry of Justice of Brazil and UNDP – United Nations Development Programme. I am also grateful to Carolina Cutrupi, Pedro Schaffa and Yuri Luz for invaluable assistance in collecting and assembling data for the project.
Abstract
This article discusses corporate criminal liability in Brazil and how it is being interpreted and applied by the Brazilian Courts. It incorporates the results of empirical research on criminal cases involving corporations as prosecuted parties at the Superior and Federal Appeals Courts. The adoption of the principle of corporate criminal liability is relatively recent in Brazil. It was for the first time provided for in the Federal Constitution of 1988 and regulated only 10 years later, under the “Law of Environmental Crimes”. To date, corporate criminal liability is applicable in Brazil solely for cases involving crimes against the natural environment, although there are a number of legislative bills to be discussed in the Brazilian Congress, which aims to broaden its scope.

Even after almost 10 years, there are still substantial controversies among legal professionals as to whether corporations should be liable for acts committed by its employees and managers and how the liability rule should be interpreted.

Strongly influenced by European Civil Law, Brazilian Criminal Law is rooted in the principle of guilt or attribution of liability based on individual guilt, meaning the guilt [with or without intent] of a natural person. This notion lies at the heart of the principle of the individualization of criminal conduct. Operation of that principle within legislation on criminal procedure requires not only that the individual conduct of each participant in the illicit activity be thoroughly proved so that it leads to a conviction proportional to the level of individual involvement, but also that the conduct that is attributed to each natural person is duly described in the indictment. This means not only that many cases end up in acquittals for insufficient evidence or lack of certainty regarding the actual participation of the accused in the criminal act, but also that the lack of description or vague description in the indictment as to the level of individual participation in the conduct gives rise to dismissal of the criminal suit. As a consequence, many cases involving criminal acts committed within corporations are dismissed early in the process in Brazil. Making corporations criminally liable for misconduct meant to benefit them has been suggested as a solution to these problems.

However, the intent behind the law that makes corporations criminally liable faces a paradox in the Brazilian system. This is so because Courts have been conditioning criminal liability of a corporation upon the possibility of identifying at least one individual, that is, a natural person, who is found to act for the purpose of benefiting the corporation. It seems that judges are still attached to the principle of individualization of criminal conduct. That is why doubt is cast on the ability of the Brazilian model regarding corporate criminal liability to attain its purported end, to diminish the obstacles to the imposition of liability regarding acts committed within corporations.
I. Introduction

The criminal liability of corporations is an issue that has become increasingly relevant on the national and international level, both in terms of public policies aimed at deterring illicit acts committed by corporations, and the legal-doctrinal debate. The background to this discussion is characterized, on the one hand, by the increased demands for the regulation and treatment of problems connected to economic crime, corruption, money laundering, damage to the environment, etc. and, on the other, by the central role played by business organizations in these practices, aggravated by significant obstacles hampering the criminal justice system, designed to allocate individual liability, in the pursuit and punishment of unlawful acts. It is in this context that there have been proposals to expand and render more effective the imposition of corporate criminal liability.

In Brazil, this principle was first expressed in legislation in the Federal Constitution of 1988 and regulated ten years later by Law 9.605/98. It is presently applicable only to cases involving crimes against the environment. The National Congress, however, is now considering several proposals for legislative reform that aim to expand the application of this principle, in order to reach other kinds of corporate conduct.

Despite the adoption of this principle more than ten years ago in an important field for the application of criminal law, and its imminent expansion, we determined that the application of this principle is incipient, while the relevant jurisprudence is underwhelming. Moreover, there has been little reflection in the Brazilian debate on prior experience applying this principle, or on how best to configure a system of collective liability, so that it functions more efficiently.

We will discuss, in this article, elements that describe this scenario: the results of a study conducted in Brazilian courts on decisions regarding corporate criminal liability; and the terms of a doctrinal discussion of this principle. We put forth, at the end, the hypothesis that we face a delicate case of transplanting legal models, in which obstacles linked to Brazilian legal culture have impeded the principle’s implementation.
II. The deterrent shortcomings of individual liability: the problem of the individualization of conduct within the corporation

In general terms, corporate criminal conduct can be grouped into three major categories: criminal conduct that takes place outside the company, criminal conduct that takes place inside the company and, finally, criminal conduct that the corporation itself commits. (SCHÜNEMANN, 1988, p. 529-531). This last category, which sees the company as the main culprit, has been gaining relevance in the current criminological landscape, due to “companies’ structural capacity to enable new forms of delinquency” (GARCIA ARÁN, 1999, p. 325).

In fact, actions taken in a collective entity are often difficult to investigate for those who are not part of it. In addition, it is easy to imagine the difficulty in attributing criminal conduct to an individual when that conduct takes place in a group setting, especially in complex institutions, which are highly differentiated and hierarchically organized around the principle of the division of labor. In this kind of organizational structure, unlawful conduct is generally caused by the joint action of many individuals, who occupy different positions in the hierarchy and who have differing degrees of information, making it difficult to identify all individuals involved in the scheme and the extent to which each one contributed.

This difficulty in determining individual conduct is explained fundamentally by the traditional structure of imputation that was consolidated in the Roman-Germanic systems, a model followed by Brazilian criminal law. This structure, which uses the so called “classic paradigm of murder”, presupposes that a single actor possesses three fundamental capabilities: the ability to perform an action, the ability to comprehend the wrongfulness of the action and the ability to make a decision. In fact, many criminal acts committed on a daily basis can be understood in these terms. The problem arises, however, when this traditional model of individual liability (in which these three abilities are concentrated in one person) needs to account for complex phenomena occurring in the context of hierarchically and functionally structured organizations, in which decision, action, and knowledge are pulverized. In other words, in these settings, these abilities are not necessarily concentrated in one person; instead, they might be distributed in different sectors of the collective entity. Thus, in a company, the relevant action is often performed by those in the lower levels of the company who, normally have neither a sound understanding of the possible illegality of their acts, nor the ability to determine whether these acts will be fully realized, and often do not realize the consequences of their actions. The so-called intermediate sectors of the organization, in turn, generally have the relative capacity to comprehend the possible illegality of the acts realized in the lower sectors, but have neither the power to decide if they should be carried out nor the competence to implement them. Finally, the company’s higher sectors (directors or management), despite having the ability to decide whether the acts should be executed, do not directly participate in their implementation and, in some cases, are not even able to recognize the possible illegality of the acts committed within the complex network of relationships they lead (SCHÜNEMANN, 1994, p. 272).

In this scenario, a model of individual liability cannot be effective, in that it is not able to locate the three fundamental components of culpability – action, decision, and knowledge – in a single individual. Given the relative difficulty in identifying the division of responsibilities, competencies, and information flow that determines the
orders to be followed, it becomes extremely difficult to identify which actors are involved in a possible unlawful act committed within the organization (SCHÜNEMANN, 1982, p. 42-43). To the extent that the punishable act often is the result of the sum of partial and fragmentary acts – which, when assessed individually, appear not to fit the definition of the crime – in practice, there are distinct elements that define the criminal offense.

These conditions outline the difficulties in determining the competencies and responsibilities of different actors in the organization. This has represented a veritable obstacle in determining whom to charge with unlawful conduct, in the corporation, both for the reasons specified above, regarding the departure from typical conduct, as well as for the difficulties in proving the unlawful act and the surrounding circumstances (COSTA, 1992).

In light of the critiques of individual liability, proposals that seek to establish standards of collective liability, of the corporation, have gained momentum. According to its supporters, in contrast with the individual model, corporate liability would have some advantages, as it would force the collective entity to internalize the costs of unlawful conduct, which could be desirable from the standpoint of prevention. Furthermore, many authors believe that the corporation would be better situated than the State or the victims to prevent the commission of the crime and to identify the individuals responsible for its commission.

Bernd Schünemann, an author who argues in favor of corporate criminal liability, states, in the wake of what had already been pointed out by Ulrich Beck and synthesizing the political-criminal defense of collective liability, that insisting on a system of individual culpability for violations committed in the context of a corporation would lead us to a state of “organized irresponsibility” ([organisierte Unverantwortlichkeit]) (SCHÜNEMANN, 1979, p. 30 ff).

A criminological analysis of the foundation of corporate criminal liability was outside the scope of this text; we thus limited ourselves to describing the current status of the debate on this issue, which underlies the discussion about the adoption of this principle, which is being considered in a number of countries whose criminal justice systems traditionally focused on individual liability.

In Brazil, based on the data we will present, it is possible to hypothesize that those who engage in unlawful conduct in the corporate context benefit from the lack of a framework governing the allocation of liability.

In the field of criminal law, we have, on the one hand, a system fundamentally based on individual liability, which shows itself inadequate in addressing the individualization of liability in the corporate context. On the other hand, the application of this principle of corporate liability in cases involving environmental crimes has been unsatisfactory (as shown by the results of our empirical research, outlined below), in addition to facing significant resistance from the national doctrine.

This scenario is especially problematic, because a system allocating liability through administrative law has a structure in place in only some regulatory sectors (such as, for example, competition, finance and capital markets) and civil law, in turn, primarily functions to indemnify - although decisions involving punitive damages have been identified, there has been no clear discussion in Brazil on using civil law to
punish\(^2\). A deeper and more coherent discussion about the model of assignment of liability within the corporation is urgently needed in Brazil.

The Brazilian criminal liability model is based on a system of individual liability enshrined in the General Section of our Criminal Code. The corporation’s administrator or employee will thus be charged criminally only for an unlawful action or omission (when the omission is attributable) personally practiced. As a general rule, liability can be attributed to the individual who by action or omission caused the harm, in proportion to his culpability (Criminal Code [CC], Arts. 13 and 29). This rule of criminal procedure requires that the proscribed conduct be specifically described when the charges are filed [Criminal Procedure Code - CPC, Art. 41] and, evidently, that the conviction and punishment reflect the individual culpability of the accused, in light of a judicial assessment of the circumstances (CPC, Art. 59).

As mentioned above, in a system whose foundation is individual liability, the rules of allocation encounter obstacles when they are applied in the corporate context. An empirical study developed recently of judgments issued by the High Courts (the Brazilian Supreme Court and the Superior Court of Justice) from 2005 to 2007, on the issue of the liability of companies’ directors\(^3\) shows that the majority of decisions about criminal matters is about the closing of criminal cases, either for lack of evidence or an inability to attribute wrongdoing to a particular individual. Despite the limited scope of this survey, it is a strong indication that regarding the Brazilian courts we could make a diagnosis similar to the one we presented above: there is a deficit of accountability because of the system of individual liability.

This provides the context for the discussion in Brazil about corporate liability. This principle was introduced into our legal system for cases involving environmental crimes. Expanding the scope of its applicability, especially for corporate crimes, has been discussed in a series of legislative bills presently being considered\(^4\). The

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\(^2\) Punitive civil liability in Brazil is the result of case law and is limited to cases where moral damages are found. It continues to be quite controversial.

\(^3\) The research project “Corporate Directors’ Liability in the Jurisprudence of the Brazilian Supreme Court and Superior Court of Justice,” coordinated by Marta Machado and Viviane Muller Prado, was developed with the support of the Getulio Vargas Foundation Law School, with the objective of studying the implementation of the legal regime of corporate directors’ civil and criminal liability, using a quantitative and qualitative analysis of the jurisprudence of Brazil’s High Courts – the Brazilian Supreme Court (STF) and the Superior Court of Justice (STJ). This jurisprudential survey was conducted using search tools available on the courts’ websites and databases, using keywords to find decisions about the liability of company directors, including: “responsibility and administrato$", “liability and manage$", “liability and directo$", “liability and advise$", “complaint and administrato$", “complaint and manage$", “complaint and directo$" and “complaint and advise$". The search was limited to decisions issued between January 1, 2005 and April 1, 2007. After manually deleting those decisions that were not relevant, we analyzed 276 judgments, of which 270 were issued by the STJ and 6 by the STF. 224 of the judgments are about non-criminal matters, while 52 are about criminal matters. For more detailed information, see MACHADO, M.; MÜLLER, V.; GANZAROLLI, M.; MARQUES, L. (2010).

\(^4\) Congress is presently debating four primary bills that would effectively establish criminal liability for corporations: (i) Senate Bill No. 4.842/1998 (“Regulates access to genetic resources and products derived therefrom and includes other measures”); (ii) House Bill No. 27/1999 (“Adds an article to Law 7.716, approved January 5, 1989, which defines the crimes resulting from discrimination or prejudice based on race, color, ethnicity, religion or nationality, imposing criminal liability on corporations whose employees engage in racist conduct”); (iii) House Bill No. 1.197/2003 (“Requires the areas occupied by sand dunes and cliffs as spaces to receive special protection and includes other measures”); (iv) House
Federal Constitution of 1988 includes, in two of its articles, provisions regarding corporate liability for unlawful conduct. Article 173, Section 5 provides that “the law, without prejudice to the individual liability of the corporation’s leaders, will establish the liability of the corporation, subjecting it to penalties consistent with its nature, for acts committed against the financial and economic order and against the general economy”. Art. 225, Section 3, in turn, provides that “activities and conduct considered harmful to the environment will subject the violators, individuals or corporations, to criminal and administrative sanctions, independently of the obligation to remedy the damage caused”.

In 1998, to regulate these precepts, Congress passed Law No. 9.605 (better known as the Environmental Crimes Law), which provides for, on the subconstitutional level, corporate criminal liability. In Article 3 of the law, corporate criminal liability was established in the following manner: “corporations will be held administratively, civilly and criminally liable under the provisions of this law, in cases where the violation is committed by the decision of its legal or contractual representative, or Board of Directors, in the collective entity’s best interest.

Paragraph one: the liability of the corporation does not exclude that of individuals, authors, co-authors, or participants who engaged in the conduct at issue.” Accordingly, the liability of collective entities is thus presently applicable only in cases involving environmental crimes.

The application of this principle in the context of environmental crimes, however, has encountered a series of obstacles, as is evident from our empirical analyses about the application of the liability model of the Environmental Crimes Law in our courts. This principle has also faced a series of obstacles from the national doctrine, which shows itself, on the one hand, quite resistant to its adoption. On the other hand, few have made the true effort to creatively think about which institutional solution would best address the social problem of liability for acts committed in a collective entity.

This scenario of apparent stagnation may be contributing, in our view, to the deficits of accountability for such acts - both regarding individual liability, as well as collective liability in the context of environmental crimes.

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Bill No. 1.142/2007 ("Defines the crime of corporate corruption in the presence of government officials").

The data presented here is part of the results of a broader research project on corporate criminal liability in Brazil financed by the Ministry of Justice and the United Nations Development Programme (UNDP) and executed in 2008-2009. The data regarding the application of the principle by the Brazilian Courts are set forth below and the whole research report (in Portuguese) is available in: http://www.presidencia.gov.br/revistajuridica/.
III. Empirical study of jurisprudence: the application of a corporate criminal liability standard to environmental crimes in Brazil

In order to gather information about the application of corporate criminal liability by our courts, we conducted a systematic study of judgments involving corporate crimes against the environment, in the Superior Courts and Regional Federal Appeal Courts of the First, Second, Fourth and Fifth Regions. This study included an analysis of 48 decisions between 2001 and 2008. Although the Environmental Crimes Law was passed in 1998, the first court decisions reached the Appeal and Superior Courts only in 2001.

With this, we could gather relevant data on how the Judiciary understands the regulations governing corporate criminal liability, the kind of result that these cases have achieved and the main problems faced in its implementation.

From this analysis, several points require our attention. First, note that the survey yielded few results - 48 in all. This is a possible indication that the number of criminal charges filed against corporations is small, but we might also hypothesize that many cases were dismissed in the lower courts for procedural reasons.

Second, we observe that there is a large discrepancy in the number of cases involving lawsuits filed against corporations, depending on which Court’s database is searched: while there are a large number of relevant cases at the TRF1 and TRF4, no relevant case was found at the TRF3. Although our data does not extend to the trial courts, this may mean that we are still faced with a principle that is both applied in a variety of contexts and that has not yet been addressed by some courts.

The appeals forwarded to the Courts for their analysis are, in large part, appeals in the strict sense, of habeas corpus petitions and writs of mandamus, with a small number of criminal appeals (only 4 out of 48 cases). There is a predominance of appeals that are brought before sentencing takes place at the trial court level, making up 80% of the total. The decision regarding the judge’s acceptance of the criminal charges (or the beginning of the criminal action) is the most controversial, as more than 50% of appeals are brought from this decision. There are also many cases discussing the dismissal of the criminal suits in early steps.

In the cases involving dismissal or continuation of the suit, there were more decisions allowing the suit to continue than those dismissing it (21 decisions allowing continuation versus 13 of dismissal). These results, although most favorable to the continuation of the lawsuits, indicate several factors that affect their continuity. Since these questions are sent to be analyzed by the superior instances during their course, cases take longer to be completed (and many – 13 out of 43 - were not completed).

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6 This survey on Court decisions was conducted on the basis of judgments available on the case law database of the five Regional Federal Courts (TRFs, abbreviation in Portuguese), the Superior Court of Justice (STJ, abbreviation in Portuguese) and the Brazilian Supreme Court (STF, abbreviation in Portuguese), between March 1 and 7, 2008. We selected all of the entries that resulted from a search of the terms “corporate criminal liability” and the necessary variations, due to the different search engines of each court or those that could yield a larger number of results. We used only this search term (and, when necessary, its variations), since it is commonly used and allows for a greater number of hits. All of the duplicate decisions or those that were not relevant to corporate criminal liability were discarded, consolidating, in this way, our sample of 48 decisions.
It is interesting to note that many appeals question the very legitimacy of this liability model. Although it continues to be polemical, in the decisions analyzed, the principle’s acceptance in the Brazilian legal system is non-eventful.

In the Courts, what is required, however, to accept the notion of collective liability is the presence of an individual co-defendant. One of the most important pieces of data from our empirical research refers precisely to this issue, which has appeared in a large number of decisions and appeals that specifically questioned the legitimacy of the corporation as sole defendant in a criminal lawsuit. In these cases, the predominant view of the Courts was that it was necessary to file suit against an individual co-defendant to be able to criminally sue a corporation.

Of the cases analyzed, 75% of the justifications given for the dismissal of criminal cases spoke of the non-existence of the individual co-defendant and a lack of concrete evidence of individual conduct. This same issue appears as well in 40% of the justifications for the non-receipt of the complaint, in which the inability to assign concrete criminal conduct to an individual is cited in the court’s decision.

These data are reinforced by the fact that, of the decisions analyzed, most refer to cases in which there was an individual co-defendant with the corporate co-defendant (68.75% of the total)\(^7\).

These data allow us to draw some conclusions about the functioning of the corporate criminal liability model. First, we observe that the courts are being asked to resolve, in the early stages of the criminal action, primary matters – such as the constitutionality of this type of criminal liability and whether the presence of an individual co-defendant is required, determinations made at the beginning of a criminal lawsuit. Only a small number of these cases actually reach the merits.

Moreover, since most of the cases analyzed seemed to indicate that the presence of an individual co-defendant was necessary, the challenge of ascribing conduct to an individual and proving individual responsibility in corporations still remains. In other words, the corporate liability model, as it is applied in our country, is not fully able to overcome the difficulties derived from the strictly individual liability model.

\(^7\) If we exclude from the total the decisions in which there is no mention of the existence or not of a co-defendant, this number increases to 80.48%.
IV. The resistance of traditional criminal theory to the principle of corporate criminal liability

The empirical data reported above suggest that a theoretical and doctrinal debate about corporate liability is necessary to consider this principle’s limits and possibilities. In fact, the criminal liability of collective entities is one of the most polemical issues currently faced by criminal justice theory. If, on the one hand, political-criminal demands calling for the regulation of corporate activities are strong, on the other, this principle calls into question traditional concepts of criminal theory, such as [and especially] notions of action and culpability. The tension between this principle and the traditional understanding of criminal theory could be causing a short circuit in its application.

It is thus critical to reflect upon how to reconcile the traditional model of criminal theory with this new liability model. In the field of the criminal theory in general, we identify, on the one hand, arguments against this new model of liability, because of its incompatibility with doctrinal concepts of action and fault and, on the other, some attempts to redefine these categories so that they can be applied not only to individuals, but to groups. We cannot overlook that the arguments based on traditional concepts of criminal theory have influenced political-criminal decisions to reject the collective liability principle in many legal systems and is also quite relevant in the Brazilian debate. Furthermore, in the cases in which the legislator decides to approve a law incorporating this principle, it can have an impact at the moment of its application, which is also the case in Brazil.

In our research, we sought to show that the resistance to the new model is related to the influence of traditional doctrinal notions developed by the “Finalist” criminal law school of thought. Regarding the notion of action, this school of thought defines it ontologically, as a “modification of the external world, conditioned by the will of a conscious being and propelled to a particular goal” (WELZEL, 1969, p. 33). Regarding the notion of guilt, it is defined according to psychological criteria, as the imputation of fault consists in “an objection raised before a person who voluntarily decided to behave unlawfully, despite having the obligation to act in accordance with the law” [GRACIA MARTÍN, 1995, p. 66].

This way of understanding the structural elements of the notion of crime has a strong impact on the debate about corporate criminal liability. According to this understanding of the notion of action, only the members of a collective entity

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9 The “Finalist” school of thought, founded by Hans Welzel, could be considered the primary school of thought of criminal law in the 20th century. Its ideas, which continue to be widely accepted, state that laws are determined by a priori categories, and that certain structures in society necessarily define the manner in which conduct can be legally evaluated and regulated. By way of example, Hans Welzel affirms that the legal-criminal concept of Action cannot ignore the fact that every human action is an action guided by teleology – in other words, behavior endowed with meaning and a final purpose. When this premise is transposed into the analysis of corporate liability, it is necessary, according to the “finalists,” to note that the modes of organization and activities of corporations constitute for the purposes of legal regulation previously established data [...], in that the structural elements of this reality outline, on their own, limitations to its valuation and, thus, to the establishment of possible legal consequences.” GRACIA MARTÍN, 1996, p. 38.
would be capable, in a “finalist” manner, of giving rise to a causal nexus and, in this way, causing changes in the outside world capable of violating the relevant legal norms [GRACIA MARTÍN, 1996, pp. 40-41].

Conduct (action or omission), cornerstone of criminal law theory, would exclusively be the dominion of man, and the capacity for action would require the presence of volition, which is understood as the psychic ability of the individual. [BITTENCOURT, 2000, p. 199].

From this perspective, corporations are generally determined not to have the capacity for action in the criminal sense and, consequently, are generally not held criminally liable (JESCHECK, 1988, p. 204) [ROXIN, 1992, p. 154] [MUNOZ CONDE, 1989, p. 276]. Similarly, regarding the concept of guilt, the traditional doctrine views corporations as entities incapable of being guilty. Supported by the maxims “societas delinquere non potest” [HUNGRIA/FRAGOSO, 1978, p. 628-631] and “nulla poena sine culpa”, it can be stated that the concept of criminal guilt cannot be applied to entities that are different in nature from individual persons [EHRHARDT, 1994, p.45]. This is because, traditionally, the concept of guilt presupposes the existence of a being capable of free, moral self-determination (freie und sittliche Selbstbestimmung), which only human beings can have [GRACIA MARTIN, 1995, p. 66].

Understanding the doctrine in this way, therefore, leads to the negation of corporate criminal liability, to the extent that a corporation is not capable of acting, and much less of being held guilty.

It is necessary to point out, however, that this position reflects only one of many forms of understanding criminal law doctrine in the Roman-Germanic systems. Indeed, as we mentioned above, there are efforts in European literature, in the field of criminal law doctrine, to reformulate the categories of criminal theory so as to consider and incorporate issues involving corporate criminal liability. We highlight here theories that seek definitions of action and guilt that can be understood from a social, and not merely ontological, perspective, and that form the basis for the claim that, under legal doctrine, corporations can be held criminally liable. It is within this line of reasoning that the most successful attempts at reconciling the principle of corporate criminal liability with notions in criminal law theory can be found. It is worth nothing, however, that this doctrinal effort is practically non-existent on the national level in Brazil.

A snapshot of the doctrinal debate in Brazil regarding corporate criminal

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9 According to Gracia Martín, “corporations lack a conscience and will in the psychological sense, and consequently the capacity for self-determination.” He still affirms, however, that “in the case of corporations, the subject to whom we impute conduct and the subject who acts do not coincide, as they can only act through their representative organs and agents, made up of individuals (the subjects who act) (...) The element tied to the possibility of criminal liability is always and only the exertion of will, as well as its formative process”.

10 The assertion made by Nelson Hungria and Heleno Fragoso expressed this traditional understanding of the concept. Hungria-Fragoso’s emblematic assertion was that “in Brazilian law, the principle ‘societas delinquere non potest’ is an absolute rule”.


12 Examples of these attempts can be found in ALVARADO, 2007; GOMÉZ-JARA DÍEZ, 2005; LAMPE, 1994.
liability shows that it is engaging a limited set of issues. In the context of the Brazilian debate, there is still a vigorous discussion about the constitutionality of this principle. In this context, the arguments discuss, i) whether, in the initial analysis, the provisions of Article 173, Section 5 and Article 225, Section 3 of the Federal Constitution would be compatible with other constitutional principles, and ii) whether, in a secondary analysis, the provisions of the Environmental Crimes Law would be, in turn, deemed unconstitutional and thus struck down.

On this point, the doctrine affirms that, from the viewpoint of both a literal and systematic analysis of these legal provisions, the Constitution could not sanction the notion of corporate criminal liability [CRETELLA JÚNIOR, 1988, p.4045. Along the same lines, see SANTOS, 2006, p. 428; PRADO, 1992, p. 32-33].

From the perspective of criminal law doctrine, the debate centers on the incompatibility of corporate criminal liability with the structural elements of the concept of crime, especially the concepts of action and culpability. Accordingly, there is a strongly held position in the national doctrine that is rooted in the traditional understanding of action and that states that a corporation is incapable of developing an activity through the exertion of free will to achieve a specific purpose [PIERANGELLI, 2004, p. 430; SANTOS, 2006, p. 432; PRADO, 2001, p. 105-106; MIRABETE, 1987, p. 106; CONSTANTINO, 1999, p. 1].

Thus, even if one accepts the formation of a collective will within a corporation, the deceit driving the illicit conduct would, ultimately, be tied to the psychic apparatus of the individuals who compose the corporation.

With regard to culpability, the majority of Brazilian criminalists believe that a corporation is not capable of acting culpably, because it would not be attributable to the corporation (incapable of culpability) and consciousness of wrongdoing can only be verified in individuals [PRADO, 2001, p. 106; SANTOS, 2006, p. 440; ROBALDO, 1998, p. 1; BITENCOURT, 1999, p. 62]. For the reasons briefly presented here, the majoritarian national doctrine generally denies the possibility of doctrinally incorporating corporate criminal liability.

Finally, we note that the criminal policy debate is still incipient in Brazil, as evidenced, for example, by the great dearth of empirical research on this topic so far. The two main political-criminal issues – regarding which goals should be pursued by the criminal justice system and the means that should be used to this end – are not well defined in Brazil. Often, the goals of criminal regulation are discussed without adequate deliberation as to the most effective mechanisms and models for their realization.

13 The full report presents in detail the context of the doctrinal discussion and the supporters and detractors of the theories discussed here.
This situation seems to suggest that the Brazilian debate about the formulation of a liability policy requires reflection on various kinds of issues, which presently are being neglected.
V. Conclusions

How to impose corporate liability is one of the most important issues in the discussion, above all, about public policies to control and repress illicit conduct that harms financial and economic activities and the so-called public goods, such as the environment and consumer health. Indeed, there is a consensus amongst various groups in the debate that mechanisms to determine individual liability (criminal or not) do not effectively deter crimes committed by organizations. The imposition of corporate criminal liability appears to be a solution to this problem.

In Brazil, the attempts in current congressional legislative bills to broaden the application of the principle of corporate criminal liability reproduce, in general, the system already in place for environmental crimes and lack a more detailed analysis about the current design of this principle in Brazilian law. These attempts neither take into consideration how this principle is applied by the courts nor how effective it is in accomplishing its proposed goals.

The empirical study brought some important insights about the application of this principle by the Brazilian courts.

First of all, the low number of cases found in the courts’ databases is a possible indication that the number of criminal charges filed against corporations is still small.

The analysis of the cases involving corporate criminal liability also reveals the existence of significant divergences between the different players in the legal system on how corporations should be held liable for acts committed by their employees or managers. There is a predominance of appeals that are brought before sentencing takes place at the trial court level, making up 80% of the total. These are appeals or counterclaims that refer to motions to dismiss and other similar procedural motions in the initial phase of the lawsuit, resulting in low percentage of cases in which the courts actually reach the merits of claims involving corporate criminal liability. This number shows a clear tendency to question the continuation of the case in early phases and is an important sign that the normal continuation of cases in court trials has encountered obstacles.

We found that the courts are being asked, in the majority of cases, to resolve fundamental questions about the principle’s application and configuration – such as its validity and constitutionality and how to prosecute cases involving corporations. An important question that has been brought up is whether it is necessary to simultaneously fill charges (and ascribe guilt) and also to an individual co-defendant.

In this point, we can clearly see that to prosecute corporations and impose corporate criminal liability Courts are requiring the identification of at least one individual, a natural person, who has demonstrably committed an unlawful act to benefit a corporation. Consequently, as we saw in the forementioned account of the courts’ activities, cases brought before the judiciary without a named individual defendant were dismissed; and, in the few cases in which the corporation was convicted, there was a simultaneous conviction of the individuals involved.

In light of these results, it should be emphasized that this position adopted
by Brazilian Courts has a highly debatable potential capacity to resolve the issues arising from the difficulty of ascribing to individuals conduct that takes place in the context of a corporation.

It is easy to see a paradox here. The idea of holding corporations liable would seek to eliminate the necessity of proving the culpability of an individual or individuals, with or without criminal intent. But the Brazilian model of criminal corporate liability, as interpreted by the Courts, while still requires that a natural person be identified as making a decision that ultimately leads to the crime, fails to attain to that goal. This alone shows that there needs to be more discussion about the Brazilian model of corporate liability.

We put forth, at the end, the hypothesis that we face a delicate case of transplanting legal models, in which obstacles linked to Brazilian legal culture have impeded the principle’s implementation.

The position adopted by the Courts can be understood in light of the strong influence of the principle of guilt or attribution of liability based on individual guilt, meaning the guilt (with or without intent) of a natural person.

The Brazilian doctrine, influenced by the Finalist Criminal Law school of thought, shows strong resistance to assigning criminal liability to corporations. The majority of Brazilian authors concentrate their efforts in impeding the acceptance of corporate criminal liability, based on ontological definitions of action and guilt. Even amongst the authors who favor adopting the principle we still do not see a systematic attempt to redefine criminal categories.

In our view, the low impact of the introduction of the principle of corporate criminal liability in the Brazilian legislation is a clear case of obstacles created by the pre-existing juridical culture.

We note, however, that there still have been no efforts made in Brazil to evaluate the corporate criminal liability model or to remove the obstacles posed to its effectiveness.

The operationalization of a liability regime requires that several issues be taken into consideration, especially those tied to its compatibility with the criminal justice system in force and the local legal culture. The mere adoption of the principle without sufficient deliberation about the doctrinal implications can undermine the efficacy of its application. Consequently, all of the efforts made to emphasize the importance of a sound collective liability standard and its symbolic and deterrent potential would be rendered fruitless.
VI. Bibliography


______. “La cuestión de la responsabilidad penal de las propias personas jurídicas”. In: Responsabilidad Penal de las Empresas y sus Órganos y Responsabilidad por el Producto. Barcelona, J. Bosch, 1996.


LAMPE, Ernst-Joachim. „Systemunrecht und Unrechtssysteme“. In: Zeitschrift für die gesamte Strafrechtswissenschaft 106/1994


______. „Strafrechtsdogmatische und kriminalpolitische Grundfragen der Unternehmenskriminalität“. In: Zeitschrift für Wirtschaft-, Steuer- und Strafrecht (Wistra), 1982/2


______. “Die Strafbarkeit der juristischen Personen aus deutscher und europäischer Sicht”. In: Bausteine des europäischen Wirtschaftsstrafrechts: Madrid-Symposium für Klaus Tiedemann. Berlim, Carl Heymanns Verlag, 1994


