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Restorative Justice Strategies in the Field of Corporate Criminal Liability: A Theoretical Approach*

Una «estrategia restaurativa» en el ámbito de la responsabilidad penal de personas jurídicas: una aproximación teórica

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Abstract: This article analyzes the potential criminal policy benefits associated with the use of a restorative justice strategy in the field of corporate criminal liability. I first address a number of the shortcomings of strategies which focus exclusively on punishments designed to incapacitate corporations, as discussed in the specialist literature. I then discuss the issue of the lack of concern for the interests of those harmed by such offenses, especially those who are directly affected, as well as the ineffectiveness of this strategy in terms of reducing corporate crime. Finally, I will examine potential solutions to the problems identified, drawing a distinction between *reparative* and *restorative* strategies and concluding that the latter may be particularly effective in the pursuit of objectives commonly associated with corporate criminal liability.

Keywords: Corporate criminal liability, corporate crime, harm repair, restorative justice, industry self-regulation

Resumen: En el presente artículo se analizan los posibles beneficios político-criminales asociados a la admisión de una «estrategia restaurativa» en el ámbito de la responsabilidad penal de las personas jurídicas. Para eso se abordan ciertas falencias, detectadas por la literatura especializada, que estarían asociadas a una estrategia de reacción frente a la criminalidad empresarial centrada exclusivamente en la imposición de sanciones incapacitadoras para las personas jurídicas. Al respecto, se ahondará tanto en el problema del desconocimiento de intereses fundamentales para la resolución del conflicto, especialmente el de los afectados, como en el problema de la ineficacia de tal estrategia de cara a la disminución de esta forma de criminalidad. A continuación, se estudian posibles vías de solución para enfrentar los problemas detectados, distinguiendo entre una estrategia «reparadora» y otra «restaurativa» con el objeto de determinar por qué esta última podría resultar especialmente beneficiosa para la consecución de los objetivos comúnmente asociados a la responsabilidad penal de las personas jurídicas.

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I. INTRODUCTION: A CRITICAL REVIEW OF CURRENT MEANS OF HOLDING CORPORATIONS CRIMINALLY LIABLE

One of the most important advances in the fight against corporate crime in Latin America has undoubtedly been the gradual introduction of means of holding corporations criminally liable—or, failing that, administratively liable—for crimes committed by their employees. Notwithstanding the obvious variations in the way business entities are regulated, it is first and foremost essential to acknowledge that this is an extremely important process. Punishing corporations for crimes committed by their employees for the benefit of the corporation shows that in the eyes of the law not only the individuals who directly commit these crimes should be punished, but that the corporation itself should also be held liable for its role in the crime. This liability stems from the fact that the organization did not fulfil its duty to ensure the corporate structure is properly organized in order to prevent employees from committing criminal offenses, in pursuit of corporate objectives, during the routine carrying out of corporate procedures (Cigüela & Ortiz de Urbina, 2020, p. 80; García, 2019, pp. 906-907). Following broadly the same logic, if the corporation is considered to have been properly organized prior to the commission of the crime this may be seen as a mitigating factor[1]. This is an adequate representation of the structural

1 For example, this is taken into account in Chile, where in order for a corporation to be held liable the offense must be a consequence of a breach of its duty to manage and supervise employees in order to ensure such offenses do not occur, in accordance with the provisions of Article 3 of Law No. 20.393, which concerns corporate criminal liability. In Peru, Article 17 of Law No. 30.424, which regulates the "administrative liability of corporations for the offense of transnational active bribery" expressly stipulates that fulfilment of the duty of management and supervision results in "exemption from liability". In Argentina, Art. 9b of Law No. 27401, the Law on Corporate Criminal Liability, contains a similar clause. A discussion of the regulations related to corporate criminal or administrative liability in each of these legal systems is beyond the scope of this paper; for a discussion of the norms in Peru, see García (2019, pp. 902-921), Balmaceda (2017, pp. 15-36), and Artaza (2019, pp. 35 *et seq.*); for the laws in Argentina, see Merola (2020, pp. 25 *et seq.*).

or organizational nature of this type of crime, an understanding of which can increase the efficiency of the response when such crimes are discovered (Van Erp, 2018, p. 2; Fisse, 1978, pp. 391 *et seq.*).

One of the main objectives of corporate criminal liability laws is to encourage adequate self-regulation in the business sector with regard to managing the risk of illegal acts being committed by employees for the benefit of their employer organization. Self-regulation is encouraged through the abstract obligation mentioned in the laws and also through rules related to the determination of penalties which recognize measures to manage risk as a mitigating factor even if they are taken after the commission of the crime in question (Nieto, 2008, p. 49; Coca, 2013, pp. 43 *et seq.* 49; Coca, 2013, pp. 43 *et seq.*; Gómez-Jara, 2014, pp. 6 *et seq.*)[2]. This expectation of self-regulation on the part of the business sector has led to the design and implementation of criminal risk management models and systems known variously as "compliance programs," "prevention models" and "integrity programs."

It is noteworthy that many researchers in the field consider that one of the purposes of holding corporations liable, especially in criminal cases, is to effectively communicate that corporations should also be held liable for certain crimes committed by their employees (Fisse, 1978, p. 394; Bussman, 2010, p. 66). Holding corporations liable has important additional benefits for society such as helping counter the belief that corporate crime is merely the result of corrupt individuals and, therefore, not the responsibility of organizations themselves. Such a belief makes it more difficult to efficiently address the organizational factors—for example, elements of the organizational culture which may encourage crime or shortcomings in internal monitoring procedures or operational planning—which may directly contribute to this type of crime (Van Erp, 2018, p. 1; Bussman, 2010, pp. 66 *et seq.*). Simply put, effectively tackling the issue of corporate crime involves ensuring the corporation is also held liable and suffers consequences for the wrongful act (Fisse, 1978, p. 394).

As such, it seems pertinent to openly question whether the strategies currently followed by South American legal systems are adequate or whether it may be necessary to consider additional methods to complement or improve approaches to tackling corporate crime in the region. In order to define the objectives of this study the first thing we must specify is what kinds of flaws or shortcomings we are looking for in our analysis of the various systems for determining corporate criminal liability. An obvious place to start is a critical evaluation of the reasons

2 Chile's Law No. 20.393 (Art. 6, No. 3) includes such a rule.

why—with certain exceptions[3]—current systems for determining corporate liability in the region are extremely limited with regard to the type of crimes for which corporations can be held liable, in that they cover only a fraction of the spectrum of what we call *corporate criminal offenses*[4].

Another important question to ask is whether the punishments imposed on corporations found criminally liable are the most appropriate alternative. A cursory glance at the various laws which regulate corporate crime is enough to observe that the various categories of sanctions and penalties for such offenses are geared—with certain exceptions—towards incapacitating the corporation involved[5]. Examples of such punishments are dissolution of the legal entity involved[6], loss of tax benefits, prohibition from doing business with or entering into contracts with the state, and fines, among others. It is worth debating whether this strategy of imposing incapacitating punishments is the most effective available or whether alternative legal measures could be introduced which may help tackle the issue of corporate crime more efficiently.

In seeking to answer this question we must first discuss the reasons why a focus on incapacitation might yield unsatisfactory results. Such an approach does not take several fundamental considerations into account, among which are the adverse social consequences which may result from the incapacitation of business organizations which generally carry out their economic activity in a lawful manner (Lord *et al.*, 2018, p. 3). It seems logical to seek to avoid penalties which have negative consequences for related communities—the workers, suppliers, consumers, etc. In order to take the social utility of the organization deemed criminally liable into account (Nieto, 2021, p. 6; Pujiyono, 2016, p. 132), incapacitating punishments should only be imposed in particularly serious and exceptional cases[7]. Moreover, in certain cases such an approach may even be counterproductive in relation to the purposes of the laws, namely that of promoting self-regulation by

3 The situation is different in Guatemala for example, where Article 38 of the Criminal Code (Decree No. 17-73) stipulates that "corporations shall be liable for all offenses in which any director, manager, executive, representative, administrator, official or employee participates with their authorization or consent; in addition, they shall be liable in the following circumstances:
a) When the offense is committed due to a lack of monitoring or supervision and the results benefit the corporation.
b) When the decision-making body of the corporation makes the decision to carry out the offense."

4 Despite the efforts made by the states in question, this is still the reality, for example, in Chile (Law No. 20393, Art. 1), Peru (Law No. 30424, Art. 1) and Argentina (Law No. 27401, Art. 1).

5 By "incapacitating" I refer to all those punishments which seek to diminish the operational capacity—*i.e.*, the ability to continue carrying out their economic activity—of the organization or prohibit it completely from doing business. Nieto (2021, p. 6), for his part, speaks of "interdictive penalties."

6 This penalty is restricted—in different ways in different legal systems—to the most serious cases. In Chile, it is imposed in accordance with Article 8, No. 1 of Law No. 20.393; in Peru, in accordance with Article 10 of Law No. 30424; and in Argentina, in accordance with Article 7, No. 4.

7 Nieto (2021) says that "Interdictive punishments can be especially detrimental to groups related to the company's activity" (p. 6).

the business sector. As Nieto (2021) explains, such punishments may make it difficult for corporations which have been party to criminal behavior to invest resources in measures aimed at preventing employees from committing crimes in pursuit of organizational objectives in the future (p. 6).

Finally, as we will see below, this strategy has recently been criticized on the grounds that it does not adequately consider the complexity of the crisis at hand, since it neglects the goal of repairing the harm done to those affected.

Given this scenario, one way to tackle the issues identified would be to adapt the rules for imposing punishments in order to focus on alternatives which address these shortcomings. Options worth considering are rules for determining penalties which are aimed at encouraging effective self-regulation by the company concerned, including legal sanctions and punitive and other measures whose purpose is harm repair[8]. Such sanctions or rules for determining penalties would not only contribute to achieving the core objectives of holding corporations criminally liable, but would also consider the interests of a variety of other groups —mainly as regards harm repair—thus avoiding the shortcomings associated with the focus on incapacitating penalties criticized above. Adapting the traditional approach in this manner would be based on the premise that repairing the harm done should be one of the purposes of all rulings handed down by the authorities, in addition to punishing the corporation concerned.

Another alternative which has been proposed is directly inspired by the principles of restorative justice; that the objectives of both harm repair and the modification or correction of the organizational factors which contributed to the commission of the offense can be achieved by encouraging the corporation to accept liability and reach a settlement with the victims and communities affected[9].

I will analyze this alternative in more depth in a later section in order to explore the potential benefits of employing the criteria or principles of restorative justice to resolve conflicts with the community when holding corporations criminally—or administratively—liable for corporate crimes. As will be seen throughout this paper, the principal concern of restorative justice is to identify practices which, without neglecting

8 Noteworthy examples are Article 18 of Argentina's Law No. 27401, which expressly mentions "taking the necessary actions to repair the harm caused" with regard to agreements with the prosecutor, and the regulations in Chile and Peru which stipulate that efforts to repair harm will be taken into consideration when determining penalties. In the case of Peru, harm repair is emphasized with regard to the option of "suspending the penalty" in accordance with the provisions of Article 16 of Law No. 30,424. In contrast, the rules in Chile related to suspended sentences, as stipulated in Article 29 of Law 20,393, do not take harm repair into account, only factors such as "the number of employees or annual net sales or exports of the company."

9 For an overview of the use of this method in Latin America, see Carnevali (2019, pp. 415-420).

the importance of the retrospective dimension—the liability of the organization itself for the crime committed—also have a prospective dimension, in that their main purpose is to reestablish trust between the business organization and the community in which it operates, and which was affected by the criminal conduct.

It is important to clarify that I will by no means advocate for the replacement of the traditional punitive approach which has served as the basis for the various systems of holding corporations criminally liable for their offenses. Rather, what I propose is to investigate whether these systems could be complemented—and to what extent—with alternative measures in order to enhance and increase the effectiveness of responses to the issue under discussion. These responses should be aimed at achieving greater benefits for the community—in comparison to purely incapacitating measures—without neglecting the traditional objectives of holding corporations criminally or administratively liable for their offenses. I advocate, in short, for the adoption of a "restorative justice approach" in addition to the punitive or incapacitating approach, one which emphasizes the acceptance of liability, and, as a consequence, focuses on harm repair and encouraging corporations to make commitments to their communities with the goal of preventing future offenses.

To this end, I will briefly analyze the main criticisms of the traditional incapacitating approach which have been discussed in the specialist literature. My goal is to demonstrate that its shortcomings are twofold: firstly, its focus is extremely narrow and does not take the complexity of the issue into account in ignoring the harm done to those affected; and, secondly, it is not necessarily the most effective approach to achieving the objectives of holding corporations criminally liable for their offenses, especially that of encouraging effective self-regulation. I will refer to the first of these shortcomings, which is related to the objectives associated with the traditional punitive strategy, as *insufficiency,* and the second, which concerns the potential to identify more effective means of achieving these objectives, as *ineffectiveness*.

After outlining these shortcomings, I will discuss proposals to adapt current systems, distinguishing between those that focus exclusively on repairing the harm done to affected communities and those which advocate for the incorporation of restorative justice practices to complement the traditional approach. I will particularly focus on identifying precautions which should be taken when discussing or analyzing the potential application of these proposals to resolve conflicts

in the field of corporate crime, as well as what the main advantages could be with respect to the foundations of corporate criminal liability[10].

II. SHORTCOMINGS OF THE INCAPACITATION APPROACH: CRITICISMS THAT IT IS INSUFFICIENT AND INEFFECTIVE

A common assertion in proposals made by researchers in the field is that the traditional punitive approach to holding corporations liable for offenses committed by their employees is insufficient or unsatisfactory. They argue that such an approach neglects a number of worthy objectives, and that it is not the most effective means of achieving the purposes traditionally associated with corporate criminal liability. This distinction is extremely important in demonstrating that criticism of the traditional approach has been made on at least two grounds.

Firstly, detractors argue that the traditional approach is insufficient as it does not take the interests of a number of groups into account, in particular those of the victims and the community affected (Guardiola, 2021, p. 43); a number of adaptations need to be made to systems for tackling corporate crime to include a focus on these interests. In this regard, Nieto (2021) recently pointed out that the discussion on corporate criminal liability has so far focused mainly on the "criminal charges model", leaving important aspects associated with the "penalty system" in the background. This discussion should certainly be guided by research related to the victims of corporate crime, which would facilitate "a response based on restorative justice approaches as a means of incorporating the interests of the victims" (p. 2). According to Nieto, considering these interests in the field of corporate crime is especially important given that this category of crime is characterized by, among other things, the mistaken belief that such offenses are victimless (Rodriguez, 2021, p. 90). As he explains, offenses such as offering bribes in order to obtain or maintain business contracts with the state and environmental offenses are punished based on the belief that doing so protects collective or shared legal interests, which has resulted in the social harm of such crime being "minimized" by regulations which are overly narrow and thus unsatisfactory (Nieto, 2021, p. 2)[11].

In this regard, it should be noted that the fact that punishing these criminal offenses protects collective or shared legal interests—this is the justification for criminalizing the behaviors—and that, in addition, they are classified as 'dangerous' offenses, meaning proof of harm is not

10 For this reason, this first paper will focus exclusively on analyzing certain theoretical aspects which need to be considered when advocating for such measures to be incorporated; I will discuss the operational aspects—*i.e.*, *how* they could be incorporated into our legal systems—in a second paper.

11 For more on the harm involved in this type of crime, see Umbreit *et al.* (2015, p. 45).

necessary to convict, does not mean that it is impossible to identify those affected by the conflicts generated by such offenses. In general terms, those who argue that the traditional approach to corporate crime is insufficient claim that ignoring this reality—that there are real victims, and that real people are harmed—is wrong, in the sense that it reinforces an extremely limited and harmful view of corporate crime.

The following example illustrates this idea: imagine that a company manages to manufacture a situation in which it has a permanent advantage over its competitors in a given locality through one or more bribery offenses, such as by obtaining its operating permits or winning new business in the public sector by bribing public officials. To tell the community that in this case the only victims are the shared interests of honest administration and the abstract principle of government impartiality would be incorrect; this does not recognize those business who were illegitimately forced into a situation in which they are at a disadvantage relative to the company who bribed the officials, nor the sectors of the community—for example, the people who live in the area where the crime was committed—that were likely harmed by the well-known effects of corruption[12].

Secondly, critics of the traditional approach argue that it is largely ineffective; it is based on the assumption that the threat of incapacitating penalties will have a deterrent effect, but this is not the best means of achieving the objective of reducing corporate crime (Werle, 2019, p. 1369). This argument, an examination of which is beyond the scope of this paper, has mostly been put forward in that portion of the English language literature which has questioned whether a strategy focused on deterrence is the best way to decrease the rates of corporate crime. The alternative measures proposed focus on compliance and cooperation with the private sector as mechanisms of controlling the behavior of corporations (Piquero *et al.*, 2008, p. 211; Bennet *et al.*, 2013, p. 431). However, other authors have pointed out that it is erroneous to believe that—from a strictly consequentialist point of view—deterrent effects can only be achieved through the threat of harsh punishments (Gabbay, 2007, p. 448)[13].

Furthermore, it is important to note that if the aim is to improve self-regulation by the business sector, a strategy focused exclusively on punishment may be counterproductive; this means that it could be

12 The following question posed by Nieto (2021) illustrates this point: "What benefit, for example, do victims who have been left without basic infrastructure in a third world country as a result of corruption derive from the fact that the multinational responsible is punished with a heavy fine in the country where it is headquartered?" (p. 4).

13 With respect to the theoretical development of the concept of restorative justice, see Braithwaite and Roche (2001, pp. 65 *et seq.*), who point out that, although deterrence is not a specific objective of restorative justice, its potential in this regard should not be ignored.

advisable to establish cooperative practices focused principally on fostering alliances between regulators and the entities they regulate in order to enhance their capacity to comply with the law (Laufer & Strudler, 2007 p. 1311). As Piquero *et al.* (2008) point out, although these strategies may seem incompatible or contradictory, a number of practices related to the application of sentencing guidelines in the United States have shown that this may not be the case (p. 211).

An additional finding of interest with regard to this particular problem is that of Spalding (2015), who discussed criticisms of the deterrence strategy in the fight against corruption in international business transactions. According to his investigation, although it is true that convicting organizations for such offenses can have a deterrent effect on the convicted organization, it does not have the desired impact on the "environment"—for example, the region or the country—where the offense was committed (p. 383). In other words, this strategy which focuses exclusively on one dimension of the offense—that is, the offending organization—neglects other crucial dimensions which must be tackled in order to adequately address the roots of this category of criminal behavior, such as the effects on the business community and the social environment which "enabled" the offense (Umbreit *et al.*, 2015, p. 46).

For the purposes of this study, I will divide criticisms of the strategy which focuses exclusively on the desired effects of punishment into two groups; arguments that it is not the most effective method of achieving the goal of improving the level of corporate self-regulation, and arguments that it is not the most effective method of reducing the rates of corporate crime. Below I will discuss a number of proposals which aim to address one or other of these categories of criticism.

As mentioned, one such proposal is aimed at modifying punishment-based systems to include consideration of the needs of the victims, which are not addressed in the traditional approach. This proposal is referred to as the reparative approach, and its main objective is to address the criticism of insufficiency outlined above. A second group of proposals aims to go further by looking at the legal response to corporate crime from a restorative standpoint. Such proposals aim not only to tackle the problem of the insufficiency of the traditional approach, they have the additional advantage of addressing its ineffectiveness, which is one of a number of compelling arguments for building on its potential to become a successful method of reducing corporate crime rates.

III. PROPOSALS TO ADAPT THE TRADITIONAL APPROACH: REPARATIVE VS. RESTORATIVE APPROACHES

III.1. A brief outline of alternatives to strategies focused on incapacitation

As noted above, one possible means of adapting the traditional punitive strategy of incapacitating offending organizations is to modify the penalty system so that the emphasis is broader than simply imposing punishment and ensure that it also includes methods of repairing the harm caused by the offenses. One of the advantages of such a system is that it may avoid scenarios in which "the punishments imposed on companies have indirect effects or cause collateral harm, for example by impeding efforts to repair harm" (Nieto, 2021, p. 6). This would of course have a positive effect overall and help engender a belief among the population that the legal response to these offenses is proportional to the harm caused, *i.e.*, the magnitude of the consequences generally associated with such crimes. As White (2017) points out, such a response could be more effective than the traditional strategy as public exposure may be more damaging for business organizations, and because the obligations imposed by this type of penalty—and the resulting commitment of time and resources required—could be especially beneficial in certain cases, *e.g.*, efforts aimed at repairing harm caused to the environment (p. 130)[14].

An obvious advantage of this first alternative is its feasibility. An examination of practices in criminal prosecution of corporations the United States, for example, shows that the courts have increasingly favored penalties focused on direct harm repair[15] and which empower the affected community—penalties such as community service or work on projects which benefit the community (Nieto, 2021, p. 10; Spalding, 2015, p. 388; Harrell, 1995, pp. 248 *et seq.*)[16]. A further advantage is the fact that such a system of penalties facilitates harm repair while not necessarily requiring the consent of the convicted entity (White, 2017, p. 130).

It is worth noting that in the United States the objectives implicit in this strategy have been pursued through encouraging corporations to negotiate or come to agreements with prosecutors—such as *deferred*

14 An example in Latin America are the Peruvian regulations regarding administrative liability, which expressly recognize this possibility, providing for the suspension of punitive measures in cases in which the corporation involved has implemented mechanisms to prevent the offense from happening again—*i.e.*, compliance programs—and in which the harm caused by the offense has been repaired.

15 According to Nieto (2021, p. 10), harm repair is often a condition for probation.

16 According to Spalding (2015, p. 388), the U.S. Department of Justice has implemented an alternative sentencing system for white-collar crime in conjunction with the Environmental Protection Agency for more than twenty-five years, based on a "robust and well-defined" practice referred to as *supplemental sentencing*.

prosecution agreements and *non-prosecution agreements*—geared towards repairing the harm caused by corporate crime (Bennett *et al.*, 2013, p. 414). These agreements are in widespread use and are viewed as a fundamental tool in the fight against corporate crime which can be applied in a coordinated manner by authorities in different countries, given that this form of crime often involves transnational offenses (Pérez, 2020, pp. 5-15). In Latin America, countries such as Argentina—through its "effective collaboration agreements"—and Chile—by permitting "conditional suspension of proceedings"—expressly accept negotiations with prosecutors as a means to avoid conviction of a crime within the framework of their systems of holding corporations criminally liable. In Argentina, Law No. 27.401 stipulates that harm repair is a necessary condition for an agreement to be reached (Law No. 20.401, Art. 18d), while in Chile a similar condition is implicit in the requirement to "provide a particular service to the community" or agree to "any other condition which may be appropriate in accordance with the circumstances of the particular case" (Law No. 20.393, Art. 25, Pars. 2 and 5).

Of course, this is not the only alternative; researchers in the field have also proposed the incorporation of restorative justice practices as a method of resolving the conflicts generated by corporate crime. As will be seen below, implementing such practices requires great care since doing so demands more than merely modifying traditional punishment-based regulatory systems or enhancing existing options of negotiating with prosecutors, as is the case with "reparative" justice. Advocates of this approach also need to examine whether applying it in the area of corporate crime is legitimate, and if so to what extent, by analyzing the basic parameters and foundations of the strategy.

At this point I should clarify my objectives in analyzing these proposals. Firstly, I would like to reiterate that I will not address in detail what "restorative justice" consists of or what it should be composed of in institutional terms; I intend only to explore how it is understood by those who advocate for its use in the field of corporate crime. In other words, my objective here is to elucidate the common concerns and debates behind various proposals related to incorporating restorative justice principles into legal systems as a means of tackling these offenses. It is important to note that this issue has been addressed in the specialist literature both in general terms, *i.e.*, whether it is possible to apply these practices in the framework of resolving the conflicts between "white-collar" offenders and those affected by their behaviors (Guardiola, 2020, pp. 530 *et seq.*; Gabbay, 2007, pp. 422), and in terms of the conflict between the company or organization within which the crime is

committed and those affected by it (Nieto, 2021, p. 13; Spalding, 2015, pp. 383 *et seq.*)[17].

As we will see, a number of problems have been identified with respect to the application of "true" restorative justice in this area. For one thing, it is difficult to identify a common definition of restorative justice among this group of proposals; this is a consequence of the fact that, strictly speaking, no single model of restorative justice exists (Von Hirsch *et al.*, 2003, p. 22; Preston, 2011, p. 2; Luedtke, 2014, pp. 317-318)[18]. Even so, the majority of the proposals advance similar arguments in a number of areas, mainly with regard to the particular focus of this approach and how it differs from the traditional approach. According to Spalding (2015), restorative strategies, rather than focusing on a single dimension of the offense—the offender—have a triple focus: on the offender, the victim, and the community or social environment in which the offense takes place (p. 385).

In the following section, I will examine these dimensions in further detail, particularly with respect to the factors which should be considered when evaluating the feasibility and practicability of employing restorative justice practices in the field of corporate crime. My intention is not to advocate for the approach or to analyze whether it is possible to apply "true restorative justice" in efforts to tackle the conflicts generated by this type of crime, but to raise a number of questions related to the current debate on best practices in the field of legal responses to corporate crime. For example, what aspects or principles of restorative justice could help address the criticisms associated with systems focused exclusively on imposing incapacitating punishments? To what extent could adopting the principles of restorative justice, even in a limited manner, contribute to achieving the objectives of holding corporations criminally liable for their offenses? I will not address certain basic questions related to restorative justice practices such as whether it is correct to refer to processes which seek to repair the harm caused to indirect or secondary victims, including the affected community, as "restorative justice", and whether or not the creation of victims' groups or associations may be a useful means of achieving the associated goals. Rather, my analysis will focus on the fundamental issues of the theoretical discussion which should be kept in mind when implementing practices inspired by the principles of restorative justice in the field of corporate crime.

17 See Theile (2008, p. 407) and Van Erp (2018, p. 1) for further discussion on corporate criminal offenses as a category of white-collar crime.

18 According to von Hirsch *et al.* (2003, pp. 22-23), one of the "internal" criticisms of the study of restorative justice is that "multiple poorly defined objectives" seem to exist, and that the means and mechanisms proposed to achieve them are unclear.

III.2. Acknowledging the affected parties

Researchers in the field often begin discussions on this topic by clarifying that restorative justice is envisioned as an alternative to the traditional punitive approach to corporate crime, which seeks to harm those who have harmed others, to repair harm through further harm. Indeed, a fundamental goal of restorative justice is to avoid the problem of "harm begetting further harm" (Piquero *et al.*, 2008, p. 211), which is at the heart of the traditional punitive model (Guardiola, 2020, p. 559). As such, one of the principal features which most of the proposals outlined in the literature have in common is that their primary focus is on the issue of the "harm caused", even if there is ongoing debate—at least in theoretical analyses of restorative justice—regarding how we should define *harm* and what precisely requires *repair* (Karp, 2001, p. 729)[19]. However, one of the central tenets which distinguishes this approach from merely *reparative* strategies is the idea that the harm should be repaired through methods or processes which involve the "stakeholders", meaning all of those groups and individuals which are connected with the offense, coming together to discuss possible means of resolving their conflict. This dialogue should consider the positions of and impacts on the various stakeholders (Luedtke, 2014, p. 318), who should share their diverse points of view (Boyd, 2008, p. 507)[20].

It is thus clear that those who advocate for the use of restorative justice in this context believe that the harm to be repaired should be understood in a much broader sense than in cases of conventional crime with a single aggressor and a clearly identifiable victim (Guardiola, 2020, p. 558), and that they acknowledge that a broad or "maximalist" vision of restorative justice can better justify its application (Cardona, 2020, pp. 5-9). This important difference from conventional crime poses significant challenges for its advocates, who acknowledge that legal systems have more experience of applying restorative justice in cases of conventional crime and that more research has been carried out in this area (Spalding, 2015, p. 387). However, away from the procedural issues arising from the need to bring victims and offenders face to face, I would like to discuss in more detail what precisely is meant by the expression "harm repair" in the field of corporate crime.

The differences between the various categories of corporate crime have received much attention. For example, cases of environmental crime, where an "affected community" can be identified and the interests of particular individuals who have suffered harm are readily apparent

19 As Karp (2001, p. 729) points out, it is important to note that so far no consensus has been reached regarding exactly "what harm should be repaired" by restorative justice. When we speak of harm, we must therefore keep in mind that it is not only possible to distinguish between harm to the community and harm to the victims, but that several additional variables must be considered, such as whether we are referring to material harm or "personal" or "relational" harm, or to private harm or public harm.

20 This is a fundamental parameter of restorative justice; see Braithwaite (2003, p. 10).

(Ufran & Amaral, 2019, p. 677; Preston, 2011, pp. 8 *et seq.*), are very different from cases of corruption involving private parties in which indirectly affected individuals can generally be identified—business owners who are put at a disadvantage with regard to attracting potential customers because they are not willing to pay bribes in order to obtain business, for example.

As such, it seems especially important to accurately identify and specify the affected community which will be the target of harm repair, in order to avoid any distortion of potential restorative justice processes. Guardiola's (2020) contribution to the Spanish literature regarding safeguards which can be implemented in this regard, especially when dealing with "indistinct victims"[21] is noteworthy. She makes mention of offenses in which "an attack on a collective legal right causes direct harm—which may not be criminal but is nonetheless deserving of an award of civil harms—to a particular person or persons." Cases involving "indistinct victims" include environmental offenses and other offenses in which it may not be possible to identify direct harm, but which clearly involve "indirect and collective" harm, such as bribery and other "crimes against the public interest", among others (p. 578). The author points out that often these "indistinct victims" will be confused with the "affected community", while noting that this does not detract from the "restorative" nature of associated interventions (p. 579). In short, "partially restorative" processes can also be proposed, in accordance with the distinction proposed by McCold and Wachtel (2002), which depends on whether or not all those directly involved participate (pp. 115-116).

It follows that any attempt to incorporate restorative justice principles in the field of corporate criminal liability implies acknowledging that, when harm has been done to identifiable individuals, their interests merit special consideration, and they should be the first to be invited to join the relevant proceedings. This includes, for example, offenses which impact on the particular interests of identifiable individual consumers, such as cases of mass fraud or misleading advertising. When this is not possible, only partial restorative justice processes which target the affected community as a whole can be instigated. These also require certain safeguards to be in place, the most obvious being that restorative practices should only be made available to those considered to be at least indirectly affected by the offense in question (Gabbay, 2007, p. 426)[22]. In addition to those affected by the environmental and bribery offenses which are usually used as examples in the specialist literature, businesses

21 According to Guardiola (2020, p. 577), this is the reality in the case of most economic crimes which affect collective legal rights.

22 Von Hirsch *et al.* (2003, p. 28) mention cases such as tax offenses as examples of where applying restorative justice would not make sense.

in a particular market where a competitor obtains business through corruption between individuals, consumers affected by price fixing, and groups affected by stock market manipulation or insider trading are also pertinent examples[23].

In this respect, Laufer and Strudler (2007) warn that a potential risk associated with encouraging corporations to make agreements with prosecutors is that people who have been affected and who should have been included may end up being left out. An associated problem —according to certain models—is the transfer of decision-making power and discretion from the courts to the prosecuting body (p. 1318). This is obviously crucial, since the legitimacy of alternative methods of tackling the effects of corporate crime, especially if they are used in place of convictions and punishment, depends on the affected parties reaching satisfactory agreements; any decision which excludes a section of those affected which is perceived as arbitrary would have a serious effect with regard to the particular purposes of holding corporations criminally liable. An effective method of avoiding this is to incorporate mechanisms which are supervised by the courts, and which ensure that certain minimum conditions are met, such as that mentioned above.

In addition to the issue of identifying "stakeholders" and "affected parties," another problem to be solved—which is beyond the scope of this paper—is precisely what practices would satisfy certain important requirements related to the opposing interests of the offenders and the affected parties. It has been pointed out, for example, that the use of common restorative justice practices such as mediation may not be feasible in the field of corporate crime, which is not to say that these cannot be replaced by others, such as *conferencing* (Guardiola, 2020, p. 566). The impossibility of implementing the kind of practices typically employed in restorative justice proceedings is a common concern of researchers in the field. Nevertheless, some have reported positive results in studies of typical practices and discussed adapting them for use in cases of transitional crime (Gabbay, 2007, p. 423)[24] or environmental crime (Preston, 2011, pp. 12 *et seq.*; Ufran & Amaral, 2019, pp. 671-687). In addition, many practices aimed at encouraging corporations to come to agreements with prosecutors which could be said to be "inspired" by this alternative method of tackling corporate crime have been put

23 It is important to note that a number of researchers in the field consider these groups to be directly involved, at least from the perspective of restorative justice. For further analysis of this proposition, see McCold and Wachtel (2002, p. 115). However, what is important is that, regardless of who is considered to be a "victim" strictly from the perspective of criminal law, the understanding of what it means to be affected by these offenses and who should be considered in restorative justice processes is broadened, without prejudice to the distinctions which merit debate in this regard.

24 The process led by the South African Truth and Reconciliation Commission has been cited as an example of a set of mechanisms which considered the interests of a large number of affected people. See Gabbay (2007, pp. 476 *et seq.*), Spalding (2015, p. 388) and Umbreit *et al.* (2015, p. 45) for further detail.

forward as examples worth considering (Spalding, 2015, p. 388; Boyd, 2008, pp. 507 *et seq.*)[25].

III.3. The offender dimension: distinguishing between white-collar offenders and corporations when evaluating whether to employ restorative justice practices

As mentioned above, one of the main differences between restorative approaches and those focused exclusively on harm repair is related to the "offender dimension." Restorative approaches do not attempt to repair the harm done through court-imposed penalties, but rather by means of an agreement between those involved. However, such agreements require that the offender first accept liability, either explicitly or implicitly, and also an "attitude of repentance on their part" (Von Hirsch *et al.*, 2003, p. 25).

This attitude towards the past, an apologetic attitude which includes accepting liability, is necessary for agreements to be reached which are aimed at repairing the harm done and for the offender to make commitments to ensure the offense will not be repeated. This is the main advantage of this strategy over merely reparative approaches; the focus is broader than harm repair, in that the aim is to establish conditions under which the offender can be effectively reintegrated into the community, by learning about the consequences of their actions and committing to modify their behavior in the future.

As can be seen, restorative approaches involve both prospective elements—harm repair and commitments regarding the future—and a purely retrospective element—the acceptance of liability. This means, as Duff (2003) has rightly pointed out, that "restoration" is not only compatible with the idea of "retribution" but, strictly speaking, "requires it" (p. 43). In simple terms, while it is true that in this case retribution does not result from a court assigning liability on behalf of the state, it can come about through an autonomous acceptance of liability or "active liability" (Braitwhaite & Roche, 2001, p. 64). As such, restorative justice requires retribution and, hence, a particular attitude towards the past on the part of the offender. Restorative justice processes require the offender to play a very different role than that required by simple reparative approaches. In the latter, the most the offender must do in order to reduce their sentence or to reach an agreement with the

25 It is important to be careful when using the term "restorative" in reference to practices in the United States related to prosecution agreements. Strictly speaking, the experiences described by Spalding (2015) reflect a relatively recent tendency for prosecutors to encourage agreements which aim to repair the harm done to those affected by environmental crimes through community service, which is not in itself sufficient for such agreements to qualify as "restorative" justice.

prosecution to avoid conviction is agree to make reparations (and to accept liability, if necessary) (Nieto, 2021, p. 17).

In the field of corporate crime, it is necessary to distinguish between restorative justice practices which may be employed to resolve conflicts between victims and white-collar criminals on the one hand, and to resolve conflicts between victims and the corporations within which the crime was committed on the other.

III.3.1. Difficulties in the application of restorative justice in cases involving white-collar criminals

The majority of researchers in the field accept that employing restorative justice practices is not always possible or even advisable. It has been argued that "it is not for everyone," since it is not recommendable in cases involving "certain types of victim or certain types of offender" (Chiste, 2008, p. 120). This caveat is often applied when assessing the possibility of applying restorative justice methods to address the conflict between victims of corporate crime and the white-collar offenders who commit such crimes.

Gabbay (2007) makes the point that in certain cases some basic or fundamental condition required in order for such practices to be successful may not be met, such as the principle of "non-domination" and the active acceptance of liability for the act and the harm caused on the part of the offender (pp. 453-454). As the author explains, it can be argued that the power and influence wielded by corporations may enable them to manipulate the process for their own benefit, thereby preventing true restorative justice, which presupposes that the parties participate in the process on an equal footing and that there is no imbalance of power (p. 454).

Furthermore, it has been argued that the perpetrators of these offenses, as a general rule, are unwilling to accept liability and often seek to deny it or to transfer it to others (Guardiola, 2020, pp. 537 *et seq.*; Chiste, 2008, pp. 92-93). Acceptance of liability is, of course, a basic condition for the objectives of restorative justice to be achieved.

It is essential to bear in mind that researchers specializing in corporate crime generally agree that a principal characteristics of those who commit such offenses is that they rationalize their behavior using various justifications; that the act is commonplace in the context of their industry, that they had no alternative because it is the only way to operate in a given locality, that it does not harm anyone, or even that it is necessary in order to demonstrate loyalty. In short, through a series of "neutralization techniques" the offenders see the illicit behavior as correct or unavoidable and refuse to accept the role of offender (Schoultz & Flyghed, 2019, pp. 1-19; Trahan, 2011, p. 95; Artaza &

Galleguillos, 2018, pp. 252 *et seq.*). It has also been pointed out that, in general, when offenders accept liability for this kind of offense, they do so for the purpose of reducing their sentence or making an agreement with prosecutors, which does not reflect the necessary predisposition for restorative processes to succeed (Chiste, 2008, p. 93).

Another reason to doubt the likelihood of restorative processes being effective when white-collar offenders are directly involved is that it can be extremely difficult to fulfil another fundamental requirement of these processes: that the parties meet face to face and put themselves in the place of the other. This is largely due to the fact that it is one thing to ask a victim to put themselves in the place of an offender who acted out of necessity, or when specific failures can explain their behavior, and quite another to ask them to put themselves in the place of someone who acted primarily out of greed or ambition (Gabbay, 2007, pp. 452-453).

I highlight these difficulties only to demonstrate that the processes should be applied with certain safeguards in place, not that they are impossible or undesirable. For one thing, as Guardiola (2020) points out, the personal characteristics described above "are not always present, so this argument is not sufficient to discard the potential of restorative justice processes in all such cases" (p. 568). In addition, if those involved are willing to participate in such practices, specific measures can be taken to mitigate the power imbalances between them; special training for the people who implement the processes (Gabbay, 2007, p. 457), for example, or ensuring they are used only to complement the criminal justice system, meaning that restorative justice principles can be applied in ensuring that "sentences take mitigating circumstances into account"as suggested by Guardiola (2020, p. 548). Ultimately, according to its advocates, such practices can contribute to successful reintegration of the offender by increasing their understanding of the harmful consequences of their actions (Gabbay, 2007, p. 457; Guardiola, 2020, pp. 551-552).

III.3.2. The corporation as offender in the restorative justice model

Due to the reasons outlined above, it is not surprising that those who advocate for the use of restorative justice in the field of corporate crime often argue that the most effective means of doing so is to employ these methods exclusively in the area of corporate criminal liability[26]. In order to evaluate this possibility, we need to establish whether or not the problems described above in relation to white-collar crime are also

26 Nieto (2021) suggests that "a combined strategy may be most effective in order to achieve the various objectives of holding corporations criminally liable; focusing on the individual responsible with regard to prevention and retribution, and on the corporation with regard to the other elements which are essential to resolve the conflict generated by the offense" (p. 19). For further detail see also Chiste (2008, p. 118).

an obstacle to applying the methods in the area of corporate criminal liability.

Some key points need to be clarified in order to guide the discussion. It is important to consider that one of the main arguments in favor of these practices is that promoting legal compliance is a means of preventing organizations from employing techniques to neutralize the illegal conduct being engaged in to achieve its corporate objectives. It should not be forgotten that holding corporations criminally liable is part of a new formula or strategy for monitoring business activity commonly known as "regulated self-regulation" (Coca, 2013, p. 45), which aims to encourage the private sector to take responsibility for managing the risks inherent to its activity.

Many demands are currently being made of the private sector regarding self-regulation in relation to risk management; not only are businesses expected to be able to detect processes involving a high degree of risk and to establish controls to mitigate this risk, they are also expected to incorporate mechanisms to ensure their crime prevention systems are adapted and updated on an ongoing basis (Portales, 2019, pp. 205 *et seq.*). Examples are mechanisms aimed at developing an organizational culture which fosters compliance with the law, and ensuring the controls implemented are regularly evaluated; an important requirement to ensure compliance with laws is that if an organization detects that its mechanisms have failed or are insufficient, corrective measures must be implemented immediately. This means that if it is verified that an employee has committed a crime, the organization must make it clear to the rest of its employees that such actions will not be tolerated; this can be demonstrated by taking disciplinary measures, but also by triggering corrective mechanisms aimed at ensuring the offense is not repeated.

Indeed, a corporate culture which fosters compliance with the law enables an organization to identify management or organizational shortcomings more easily, whether or not it has a dedicated compliance program in place. It follows that companies which participate in restorative justice processes should do based on a genuine commitment to identifying the weaknesses which explain why the offense was carried out or the fact that it was not detected in time, thereby demonstrating the necessary attitude to meet the requirements of restorative justice practices described above. As such, it seems clear that certain safeguards must be put in place when considering how best to incorporate such practices. For example, it seems advisable to avoid their use in the case of organizations which have repeatedly demonstrated uncooperative behaviors, such as those which have already been convicted of corporate crimes and been punished or had the penalties or procedure suspended

as part of an agreement with prosecutors[27], so that restorative justice processes do not end up being viewed as a sort of undeserved privilege for organizations which repeatedly resort to crime in the course of their economic activity.

Finally, it is important to reiterate a point made in the previous section which deserves special consideration, concerning a difficulty associated with the implementation of restorative justice processes in this area which has come to light during our analysis of various proposals. According to Gabbay (2007), one argument against incorporating a restorative approach is related to the evident differences between those who commit common criminal offenses, especially against property, and those who commit corporate criminal offenses. The author suggests that these differences may be such that this form of intervention will be impractical (p. 452), pointing to the fact that those who promote the use of these methods of conflict resolution have not offered details regarding how exactly the requirement of "face-to-face dialogue" between offenders and the affected parties so that they can "share their different points of view regarding the conflict" might be achieved (Boyd, 2008, p. 507). The research into this aspect of restorative justice in the field of corporate crime has shown that such encounters, in which differing viewpoints of the conflict are shared, usually focus exclusively on the perspective of the victim and the affected community.

As Gabbay (2007) explains, a skeptical attitude towards restorative justice practices in this field is understandable given that a significant number of researchers believe that these encounters should necessarily involve both victims and offenders putting themselves in the place of the other in order to achieve a sort of reconciliation. This concern is wholly understandable considering that these processes have been developed in the field of crimes which are driven by "necessity", such as crimes against property, and not by "greed", as is the case with white-collar crime (p. 452). This is relevant because research intended to promote restorative justice processes in the field of corporate criminal liability (such as this paper) must recognize that it is somewhat naive to expect those affected by such crime to put themselves in the place of the corporation, even in the broadest sense, in order to understand the "necessity" behind the offense.

Nevertheless, this argument is not sufficient to reject outright any strategy inspired by restorative justice in the area of corporate criminal liability; at most, it obliges us to give due consideration to what the

27 It may be useful to consider the distinction proposed by Silva Sánchez and Ortiz de Urbina (2020) between quasi-criminal organizations, which are characterized by operating in "a permanent state of total non-compliance—that is, of total refusal to adopt any crime prevention measures" (pp. 30-31), and organizations which have adopted compliance mechanisms which have proved to be insufficient.

foundations and objectives of "partially restorative" practices should be. It is important to recognize that the objective of an encounter between the parties involved is not to achieve reconciliation in the sense traditionally understood in the field of restorative justice, rather that the encounters should facilitate the deserved reintegration of the business organization into the community involved and help it regain the trust required to continue to be a fundamental participant in said community.

In other words, one of the functions of restorative justice, at least in the field of corporate criminal liability, is to avoid companies maintaining an "undeserved good reputation" by quickly attempting to separate themselves from criminal acts committed by employees through the use of various strategies—generally communicative—which lead the community to believe that only the individuals who participated in the offense should be held accountable (Fisse, 1978, p. 394). While it is true that criminal convictions can certainly be considered a communicative means of preventing corporations from maintaining an undeserved good reputation and making clear that they share liability, this is not the only means of achieving this purpose. For example, the organization involved independently accepting liability would—in certain circumstances—have the same effect. However, it is undeniable that the mere acceptance or declaration of liability and the imposition of incapacitating punishments is not sufficient to tackle this issue in all its complexity. The benefits of incorporating restorative processes, even partially, are that organizations can gain an understanding of the adverse consequences of their offenses and make commitments to the community as a result, that reparations can be made for the harm done, and that consideration for the affected community can become the cornerstone of the organization's future compliance policies.

IV. CONCLUSIONS

As demonstrated in this analysis of various proposals which advocate for the use of restorative justice practices—or are inspired by them—in the field of corporate crime, such a strategy can be extremely beneficial as a means of addressing the issue of corporate criminal liability. As such:

1. It is important to emphasize that this approach should not be understood as a step backwards in terms of meeting the objectives of corporate criminal liability; strategies to increase compliance with the law in this sector do not necessarily need to base their methods of deterrence on the threat of incapacitating punishments. The possibility of being involved in restorative justice processes and an understanding of what that means can also be an effective deterrent if such practices are taken seriously and not seen merely as a privilege available to a particular sector.

2. Furthermore, current systems of punishing organizations for criminal offenses do not differentiate between those which largely respect regulations and are willing to incorporate or reinforce a culture of compliance and those which habitually demonstrate a lack of commitment to compliance with the legal system. One option for differentiating between these two categories would be to allow the former to avoid punishment by negotiating agreements, a practice inspired by restorative justice concepts. This involves the company concerned accepting liability for offenses committed by employees, recognizing the harm caused to the community and developing a risk management system as part of a process of making reparations and commitments to said community. Such a strategy may be much more effective in terms of increasing compliance than forcing companies to implement dedicated compliance programs or them deciding to do so as a reaction to a conviction.

   In addition, such agreements allow organizations to maintain their role within the community by helping to rebuild trust; encouraging this recognizes the importance of the role they play and contributes to avoiding the potential negative consequences outlined in Section I.

3. While it is true that effectively communicating the message that corporations should be held liable for offenses committed by their employees is still an essential objective of legal responses in the field of corporate criminal liability, imposing punishment retrospectively is not the only way to achieve this objective; a process including corporations accepting liability and recognizing the harm they cause can also communicate this message effectively.

4. Adopting a restorative justice strategy could contribute to achieving an additional objective which has thus far not been given due consideration by Latin American countries with regard to corporate criminal liability; to recognize and address the harm done to those affected by the offense. As mentioned throughout this paper, it is essential not to neglect this dimension, since to do so perpetuates misconceptions related to the harmfulness of corporate crime and can thus be detrimental to efforts to address the negative effects on society. As such, encouraging corporations to come to agreements with prosecutors, a method inspired by restorative justice concepts, could be extremely valuable as a means of educating the public regarding the scale and seriousness of the harm caused by corporate crime. However, it is essential to put in place safeguards in terms of monitoring processes and tracking results in order to avoid the dangers

discussed in this paper, including the exclusion of those affected and the perception that such agreements are merely a privilege available to certain sector of society.

5. In conclusion, the advantage of restorative justice strategies over merely reparative ones—keeping in mind that they are not incompatible—is that the former not only seek to repair the harm done, they can also be extremely useful in drawing attention to the organizational factors which enabled or encouraged the offense. As pointed out, when corporations accept liability, make efforts to repair the harm done and make commitments to the affected community in order to avoid the act being repeated, they strengthen their internal culture of compliance. As such, restorative justice strategies may have a much greater and more lasting positive impact over time, both within the offending corporation and in the community, than strategies focused solely on harm repair.

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