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OVERCHARGING" IN CORPORATE CRIMES

"*OVERCHARGING*" NOS CRIMES EMPRESARIAIS

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RESUMO

Objetivos: o presente texto destaca a importância do princípio do *ne bis in idem* no contexto do direito penal brasileiro, com ênfase em sua violação em casos de crimes empresariais. O *ne bis in idem* estabelece que uma pessoa não pode ser processada ou punida mais de uma vez pelo mesmo fato, sendo um importante mecanismo de controle contra abusos estatais.

Problema de pesquisa: No entanto, em crimes empresariais, observamos o uso da prática do *overcharging*, em que diversas acusações são feitas com base em uma única conduta, gerando sobrecarga processual e psicológica sobre o acusado. Essa prática, muitas vezes, é usada como estratégia para forçar o réu a buscar um acordo ou colaboração premiada, renunciando a direitos como a ampla defesa.

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Metodologia: Para atingir os objetivos do presente estudo se fez necessário a realização de uma investigação bibliográfica. Por via de consequência, a pesquisa qualitativa dentre as principais obras do autor brasileiro, culminando em hipóteses dedutivas.

Contribuições: O texto formulado explora os aspectos teóricos e práticos desse princípio, destacando sua relevância para o equilíbrio no processo penal, especialmente diante da pressão acusatória nos crimes complexos que envolvem pessoas físicas e jurídicas. A análise também ressalta a importância de garantir que o sistema jurídico não permita múltiplas ações baseadas no mesmo fato, evitando, assim, violações aos direitos fundamentais do réu e preservando os pilares de um Estado Democrático de Direito.

Palavras-chave: colaboração premiada; abuso de poder punitivo; duplicidade de acusações.

ABSTRACT

Objectives*:This article addresses the ne bis in idem principle in the context of Brazilian criminal law, with an emphasis on its violation in cases of corporate crimes. The ``ne bis in idem`` principle establishes that a person cannot be prosecuted or punished more than once for the same act, serving as an important mechanism of control against state abuses.*

Research problem: *However, in corporate crimes, we observe the use of the practice known as overcharging, in which multiple accusations are based on a single conduct, causing procedural and psychological overload on the defendant. This practice is often used as a strategy to force the defendant to seek a plea bargain or leniency agreement, thus renouncing rights such as the right to a full defense.*

Methodology: *In order to achieve the objectives of this study, it was necessary to carry out a bibliographical investigation. Consequently, qualitative research was carried out among the main works of the Brazilian author, culminating in deductive hypotheses.*

Contributions: *The analysis also emphasizes the importance of ensuring that the legal system does not allow multiple proceedings based on the same act, thus preventing violations of the defendant's fundamental rights and preserving the pillars of a Democratic Rule of Law.*
Keywords: *plea bargain; abuse of punitive power; double jeopardy.*

1 INTRODUCTION

There is no way to discuss criminal law without debating its foundations. Its foundations are found in its principles. The principle of *ne bis in idem* occupies a central place in criminal law and will be the object of study throughout this article. The ``*ne bis in idem*`` ensures that no one is prosecuted or punished more than once for the same

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conduct. This is a principle to limit the punitive power of the State, protecting the individual against procedural abuses and ensuring legal certainty, as do most criminal principles. Its importance has been increasingly evident in the context of corporate crimes, where the complexity of organizational structures and the nature of the offenses may favor the multiplication of accusations against the same individuals.

In this scenario, the practice of *overcharging* is studied, which consists of imputing several charges based on the same fact, often putting the defendant under strong pressure, encouraging him to seek agreements to avoid the risk of a severe sentence. Although this prosecution strategy is used as a way to combat complex crimes, such as corporate crimes, it compromises the fairness of the criminal process by violating the principle of ``*ne bis in idem*`` and consequently the Democratic Rule of Law.

This article has the goal to analyze the application of ``*ne bis in idem*`` in Brazilian criminal law, focusing on the practical and theoretical challenges that arise in its observance in the context of corporate crimes. In addition, it will be discussed how the abuse of *overcharging* can harm the fundamental rights of the defendant, forcing the negotiation of agreements under unequal conditions.

To understand this is essential to preserve the integrity of the Rule of Law and avoid legal uncertainty that compromises justice and equity in the Brazilian criminal system, mainly in the corporate branch, which even allows for the criminal liability of legal entities.

2 REGARDING "*NE BIS IN IDEM*"

When we think about criminal law, we inevitably discuss one of its most relevant principles, the so-called: "*ne bis in idem".* This is a principle that seeks to curb state limits. We would like to draw a parallel: vaccination against smallpox was suspended until the 1970s, when in 1977, it was eradicated after the last case of the disease according to the World Health Organization (W.H.O.).

If nowadays we had to discuss the need for vaccination against smallpox again, it would be because of an unfortunate fact: the return of the disease. In the same sense, unhappily, when discussing its application of the principle: "*ne bis in idem"*

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becomes heated, possibly the State is abusing its power of prosecution. When we turn our attention to crimes in the corporate sphere, we observe that this is fertile ground for violation of "*ne bis in idem*".

In a subtle way, the violation of the *"ne bis in idem"* without being fully aware of what happened, the prosecuting departments intend to characterize the accusation as a legal act and, not infrequently, find support in judicial decisions, under the grounds of repression against crimes perpetrated by legal entities.

The principle of *"ne bis in idem"*, is intended to avoid double punishment for the same act and, as already emphasized, it has been frequently disregarded, often without the parties involved realizing the irregularity. These are not two identical criminal proceedings, a situation that we understand as lis pendens and with a simplified solution, but an occasion in which the businessman, with a single conduct according to the view of criminal law, is imputed several crimes, both to him as an individual and to his company.

By presenting this scenario, it is especially important to understand both the practical and theoretical aspects of this principle in the Brazilian legal system. A starting point is that when a principle of criminal law is violated, fundamental rights that support a democratic state governed by the rule of law are inevitably violated, thereby creating a sad scenario of legal uncertainty.

For a more accurate understanding, we begin by understanding the terminology of the principle of *"ne bis in idem".* The term: "*ne*", as it was stated by Arcenales (2018, p.20), it must be used to designate the prohibition of assessing the same fact twice, seeing that it is a general prohibition that is not restricted to a particular situation. Unlike "*non*" "which is used to deny what is stated as real and as a negative preposition".

Therefore, seeking a technicality, the author states that the term to be used will be that of "*ne*", which, "translates into an intention not to do something. More than one punishment must not be considered for a specific fact".

In order to understand the importance and position of this principle in the current legal system, it is essential to understand that the Brazilian State, after the promulgation of the 1988 Constitution, began to be characterized as a Democratic Constitutional State of Law. According to Maia (2018, p.6), this characterization results from: (a) its structuring as a Democratic State of Law; (b) the establishment of restrictive mechanisms for the modification of the norms that make up the Political

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Charter; (c) the adoption of the principle of human dignity as the maximum foundation of the standard of constitutional values; and (d) the recognition and constitutionalization of human rights.

Thus, with the formalization of the rights and guarantees of human beings in a political charter, Maia (2018) points out that there is a clear perspective that the State is a Democratic Constitutional State of Law, and must not only formally hold, but assume a role of recognition, respect and guarantee of the fundamental rights of its citizens, which has become the determining factor for measuring the level of democratic development and social justice of a nation, and it is through the way in which the State ensures these rights, promoting dignity and collective well-being, that the degree of commitment to building a more just and egalitarian society can be assessed. The more effective and comprehensive the protection of fundamental rights, the greater the indication of a country's democratic maturity and social balance.

This statement gains special relevance because, although most legal doctrine recognizes that the principle of ``*ne bis in idem*`` is not explicitly provided for in the list of fundamental rights and guarantees of the Constitution, it is widely considered as an implicit norm within this protection system. Tojal (2023, RB-4.21) writes that “the ``*ne bis in idem*`` is brought up only “exceptionally”, in cases where denying it would be equivalent to assuming that the same fact could simultaneously exist and not exist before the law and the State”, reinforces the author who “The principle must be received as a fundamental, dense and indeclinable right”, pointing out its importance, by providing that the *ne bis in idem* “is built on solid theoretical foundations and does not depend on benevolent interpretations to be implemented. This must be the deontological key of the legal operator, under penalty of leaning towards an authoritarian and, thus, illegitimate bias”.

Its implicit presence reflects the need to ensure that no one is punished more than once for the same act, thus protecting individual rights against abuses of the State's punitive power. This principle, when properly applied, reinforces the character of a Democratic Constitutional State under the Rule of Law, ensuring that justice is exercised with balance and without excesses, contributing to the full realization of constitutional values.

The term studied: "*ne bis in idem*", according to Maia (2018), it is frequently used in Latin, which carries in its own meaning the immediate understanding that it is necessary to clarify what (idem) cannot be repeated (ne bis). Thus, as a preliminary

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matter, it is possible to state that its use in the legal field, in general, is related to the prohibition of a State applying a double punishment or process (ne bis) to an individual as a result of the same infraction (idem).

Mendes (2023, p. 20) teaches that “this way, it limits both a double criminal prosecution in the procedural scope and a double sanction, whatever its nature”. This indicates that it is not just a prohibition on imposing a second punishment by the State, but also the impossibility of the holder of the "*jus puniendi*" initiate new criminal proceedings that refer to the same fact or an extension of it, even if in a disguised or artificial form. This principle aims to ensure that an individual is not placed in a position of legal defenselessness, being constantly subject to new criminal prosecutions for conduct that has already been the subject of a trial or is already being tried.

In the meantime, legal fiction is mentioned when considering the institute of continuing crime, which is written in article 71 of the Brazilian Penal Code of 1941, which makes it clear that the criminal liability of the individual who, through various actions or omissions, commits two or more crimes of the same nature and, due to circumstances of time, place, form of execution or other similar circumstances, the subsequent crimes must be considered as a continuation of the first, and in this case the judge must apply the penalty for only one of them, if there is a more serious one among them, the most serious one, with an increase of one sixth to two thirds. From this perspective, what the legislator anticipated was not just an advantage or benefit to the agent, but a legal construction that creates a fiction by treating each fact as if it were unique.

In other words, only the first crime is taken into consideration in isolation, while the others are understood as a logical and natural extension of the first offense committed by the author. This means that, although there are multiple infractions, they are treated as a single continuous set of conducts, resulting in a punishment that encompasses all illicit behavior.

It is noted that the plausible justification for the existence of the aforementioned institute would be that, according to Silva (2011, p.14), there will be the “occurrence of external situations that drive the agent's activity which, compared to the concurrence of crimes, considerably reduce the agent's guilt”. With this, the author states that “also for reasons of procedural economy that have to do with the difficulty of proving a huge number of acts that are repeated over a given period of time”.

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The relationship with the principle of "ne bis in idem" is evident, as it prevents multiple criminal proceedings relating to the same act, ensuring that the agent is not prosecuted repeatedly for similar conduct. This protection is fundamental, above all, because avoiding multiple legal proceedings ensures the efficiency and speed of the criminal process. Otherwise, the repetition of hearings, instructions, defenses, charges and sentences would create an unnecessary overload on the judicial system.

In addition, this procedural multiplicity would harm not only the procedural economy, but also the administration of justice itself, which would be forced to focus on acts that, despite being formally distinct, arise from the same factual context, involving a single agent and acts committed in a short sequence of time and space. This reinforces the need for a unified trial, avoiding contradictions and promoting greater legal certainty.

Therefore, it must be inferred that, despite the existence of the aforementioned institute before the 1988 Constitution, when considering a hermeneutical reinterpretation, the aforementioned institute gains relevance for compliance with the principle of fundamental guarantee, especially to avoid unnecessary criminal prosecutions, which clearly lead to wear and tear on the human being investigated.

With this scope, Tojal (2022) explains that it is necessary to understand that the application of this institute must take into consideration, the subjects, the facts and the foundations of the facts investigated. In this vein, there is a clear discussion of what would be the unity of facts, with a theory that applies only in space-time, which is called naturalistic, and which finds critics, especially when the action is separated from the result.

Therefore, according to Tojal (2022), the normative theory is born, which verifies strictly legal criteria, verifying whether a certain conduct has the legal assessment designated by the legislator or not, regardless of space-time. As for the subject, it is clear that, given that it is impossible for the same person to be prosecuted in two separate criminal actions simultaneously, the issue seems simple. However, what is not so clear and generates legal discussions is when the individual and his/her company appear as passive parties in the action. In these cases, attempts are often made to attribute responsibility for the acts committed by the company to the individual, which raises questions about the correct attribution of responsibilities. Thus, it is necessary to define precisely whether the sanction must be applied to the individual or

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to the legal entity, taking into consideration, the particularities of each situation. Following this line, Tojal (2022, p. 121) mentions that:

> The double sanction will be incompatible with the law if the liability of the natural person has been grafted onto the legal entity. After all, if it is true that the legal entity is only liable through the extension of the capacity for action and the culpability of the natural person, there is no need to speak of the sanctioning autonomy of subjects.

Therefore, when the managing partner and the company are sued for the same act, even in separate actions, the aforementioned principle must be applied, because, although the "company" has autonomy, it is driven by a physical entity, hence this application, following the author above.

Finally, Tojal (2022, p. 121) explains that it is necessary to verify the grounds that led to that action, whether they are compatible or not, which would be the verification of the "identity of the basis of the legal consequences proposed for the same injustice".

In conclusion, the principle of *ne bis in idem* plays a fundamental role in protecting individual rights, avoiding double punishment for the same act, especially in the context of corporate crimes. Its correct application ensures that the Brazilian legal system remains aligned with constitutional values, preserving dignity and justice, especially when it involves corporate crimes, which, unfortunately, may lead to a breach of the aforementioned principle by disguising different facts and consequences.

3 *OVERCHARGING* ACCORDING TO DOCTRINE AND JURISPRUDENCE

As it was previously mentioned, Brazil is recognized as a Constitutional State of Law, which implies compliance with the fundamental principles of the legal system, especially in the procedural field. These principles emphasize the need to ensure the effective application of justice, particularly in situations involving double criminal prosecution, that is, the possibility of a person being prosecuted twice for the same act, with the same parties and aiming at the same legal consequence.

In this sense, it is possible to note a clear correlation between the previous topic and the present one when addressing the practice known as "*overcharging*", which refers to the excess of accusations imputed to an individual in the same factual context, generating a procedural overload.

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This phenomenon, which commonly occurs in criminal law, can be used strategically by the prosecution to force agreements or increase pressure on the defendant, which ends up putting the balance and fairness of the criminal process at risk, since, according to Ferreira; Nascimento; Magalhães (2024, p.4) refers to a "common practice in the United States, in which members of the Public Prosecutor's Office present excessive accusations against a defendant, with the aim of pressuring him to accept a deal by pleading guilty to a less serious crime".

The term in question is not an original creation of Brazilian law, but had its origins in United States. The central idea of the concept is to reference the practice adopted by the Public Prosecutor's Office of presenting multiple charges against the accused, with the clear objective of forcing the defendant to accept a negotiation, leading him to be held responsible in some way. This type of procedural strategy becomes especially relevant in the North American legal system due to the prevalence of the institute of *plea bargaining*, which consists of a direct negotiation between the prosecution and the defense.

Furthermore, this practice is not new in criminal law. Maierovitch (1992) mentioned that the constitutional principle requires that there be a perfect correspondence between the act and the criminal type abstractly provided for in the law. However, the experience of the United States is not a good example in this regard.

According to the author, there, the Public Prosecutor's Office has the advantage of choosing both the crime for which it will charge the defendant and the penalty it will seek to apply. This often results in the phenomenon known as "*overcharging*", which is widely criticized by American criminologists.

In this practice, the Public Prosecutor's Office initially accuses the defendant of serious crimes, with the intention of, through negotiations, obtaining an agreement for a lighter charge and sentence. This strategy is seen as a common but dangerous method of coercion and psychological pressure, which exploits the fear and uncertainty of the accused, forcing him to opt for a guilty plea as a way of guaranteeing a lesser evil through the agreement.

In Brazil, Law 12.850/2013 stipulates in its article 4 that "the judge may, at the request of the parties, grant a judicial pardon, reduce by up to 2/3 (two thirds) the custodial sentence or replace it with a restriction of rights for anyone who has effectively and voluntarily collaborated with the investigation and criminal proceedings, provided that such collaboration results in one or more of the following results." The

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same article also states in its §6 that "the judge will not participate in the negotiations carried out between the parties to formalize the collaboration agreement, which will occur between the police chief, the person under investigation and the defense attorney, with the manifestation of the Public Prosecutor's Office, or, as the case may be, between the Public Prosecutor's Office and the person under investigation or accused and his defense attorney." However, in order to apply the agreement, the defense gives up certain procedural rights in exchange for benefits, such as a reduced sentence or the withdrawal of some charges. However, Camargo (2021) emphasizes that it is important to highlight that this practice can compromise the right to a full defense and to adversarial proceedings, putting the defendant in a disadvantageous position by encouraging him to accept a less favorable solution to avoid greater risks in a trial.

Thus, the creation of the concept of "*overcharging*" together with the institute of "*plea bargaining*" assumes crucial importance for a more in-depth analysis. This combination can generate a scenario in which the defendant feels pressured to waive fundamental rights to avoid psychological stress, the cost of defense and the possibility of a more severe procedural outcome, given the excessive accusations as a strategy of the prosecuting department.

However, the issue is not limited to the combination of these two elements. Even when considering "*overcharging*" in isolation, concerns arise regarding the violation of the implicit principle of ``*ne bis in idem*``, which prevents a person from being punished or prosecuted more than once for the same act. The practice of imputing multiple charges, aiming to increase pressure on the defendant, results in a direct violation of this principle.

From another perspective, it is noted that the Superior Court of Justice, in information no. 825, published on September 17, 2024, made clear the possibility of applying the aforementioned "term" and, even in the case of crimes against life, shows the evolution of the applicability of guarantees.

In the case in question, more specifically in the special appeal: 2,583,236-MG, the STJ (Superior Court of Justice) prevented the defendant from being indicted by the Jury Court, applying the concept of "*overcharging*" to avoid excessive accusations. The decision was based on the lack of robust evidence to corroborate the minimum indications presented in the inquisitorial phase, such as indirect testimony (hearsay) and popular outcry, which cannot support an indictment.

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The court reinforced that the principle of *in dubio pro societate* must not prevail when there is insufficient evidence in the procedural phase, in accordance with articles 413 and 414 of the Code of Criminal Procedure. The STJ (Superior Court of Justice) highlighted the need for a concrete judgment of probability, in compliance with due process and the presumption of innocence, avoiding decisions that lead the accused to trial without just cause, as understood by the STF (Supreme Federal Court). In this sense, the STJ (Superior Court of Justice) is notoriously concerned with the development of complaints and the continuation of criminal actions of a merely strategic nature, that is, without clear evidence to accuse a certain individual, especially in the criminal field, where “in itself” the initiation of a criminal action or investigation causes embarrassment to the citizen who has it against him.

Furthermore, *overcharging* is gaining prominence in higher courts, especially in cases related to drug trafficking. Specifically, the topic was addressed by the STJ (Superior Court of Justice**) in the judgment of the Habeas Corpus Appeal (RHC) number: 188.699/SC, in 2023,** where the legitimacy of such charges and the legal limits that must be respected were discussed.

This understanding is relevant, as it demonstrates the concern of the higher courts with the abuse of power by the prosecuting department, which, by inflating the charges, can induce the defendant to accept agreements that he might not have made under more just circumstances, in addition to potentially influencing the trial in a negative way. As judged:

> Occasionally, the Public Prosecutor's Office, when filing the complaint, may end up incurring excessive accusation, either in relation to the severity of the charge or in relation to the number of facts imputed. In the United States, this practice is called *overcharging* and often leads the person under investigation to opt for a plea bargain agreement as a means of avoiding the risk of a more severe criminal proceeding. In Brazil, where there are legal limits - related to the amount of the reprimand - for the incidence of the decriminalizing institute, a similar phenomenon occurs, but sometimes inverted, which could be called "*overcharging in reverse*": excessive accusation does not lead the accused to accept a plea bargain, but prevents him from entering into the agreement.

In the same subject, Habeas Corpus, number: 822.947/GO, also judged by the STJ (Superior Court of Justice) in 2023, in a drug trafficking crime, points out that:

> Once the application of the minor circumstance of privileged trafficking has been recognized, the abstract levels of punishment established by law are within the limit of 4 years for the minimum sentence, provided for in article 28-A of the Code of Criminal Procedure. In addition, with the application of the minor circumstance in this STJ (Superior Court of Justice), the accused is

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> entitled to the ANPP, even if the Public Prosecutor's Office has described the facts in the complaint imperfectly, since the excessive accusation (*overcharging*) must not harm the accused.

*The decision of the STJ (*Superior Court of Justice*) reflects a scenario in which the Public Prosecutor's Office, when filing a complaint, may incur excessive charges, either by exaggerating the seriousness of the conduct (vertical overcharging) or by imputing several offenses based on the same fact (horizontal overcharging). In Brazil, however, the scenario is different, as overcharging induces the accused to accept the plea bargain.*

In corporate crimes, the concern must not be less, as sometimes there may be criminal actions that violate the "*ne bis in idem*", with a clear method of "*overcharging*", filing reckless lawsuits against the partner and the company at the same time, with the clear objective of achieving psychological and financial pressure against the accused, Silva (2021, p. 2) also provides:

> *Overcharging* prosecution is the tactic of exceeding the criminal charge, using non-existent elements, not yet verified or that cannot be proven, or even that have no relation to the criminal case, with the purpose of causing procedural confusion, excessively exasperating the penalty to be applied and/or instilling in the mind of the accused that he will obtain the maximum penalty in court. With this, the prosecution intends to frighten the accused, hinder the right to defense, forcing him to participate in a plea bargain and confess the crimes committed in exchange for some legal "benefit".

In this context, the accusing party often uses a clear strategy to impose an "excessive accusatory overload, which has the undisguised objective of forcing judicial negotiation" (SILVA, 2021, p.2). This practice is especially common in corporate crimes, where there is a tendency to accumulate multiple charges against the company and its partners, often simply because they are partners, regardless of their direct participation in the illegal acts.

This creates potential pressure, with a clear, albeit disguised, aim to force the accused to seek agreements to avoid a long and uncertain process, compromising fundamental principles such as due process and the presumption of innocence, in reverse violation of the "ne bis in idem" principle set out in the following topic.

Therefore, although it is a term of American origin, its use is noted in the country, which is prohibited by the principle of "*ne bis in idem*", especially because the accused holds fundamental rights and guarantees, which implies that it is the

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defendant's right to be properly accused, and it is not up to the prosecuting department to use American strategies to pressure the Defendant to give up his right to defense.

4 REGARDING CRIMINAL LIABILITY IN CORPORATE CRIMES

According to Santos (2022, p. 2), when it comes to crimes involving companies, the investigation into the punishability of the person actually responsible comes with “several challenges for criminal dogma”, especially, according to the author, when it seeks to “delimit authorship within the scope of complex business organizations, in which, generally, the criminal act is diluted among highly specialized structures”. Santos (2022, p. 2) explains that:

> This is a difficult task to define, especially in highly specialized organizations, divided into several sectors, with the presence of several employees, with the most varied functions. The difficulty in defining authorship in this context occurs because crimes are generally committed by a group of individuals, with different degrees of power and information. Not everyone has the same information and not everyone has sufficient knowledge and expertise to commit certain crimes, which may require special qualities from the agent.

Despite this, the complexity is clear. With this in mind, it is important to highlight the credible paradigm, which is the possibility of mitigating rights and guarantees in order to punish and achieve general prevention accepted by society, in other words, a feeling that the laws are being complied with from the perspective of the common citizen. Smanio (2004, p.1) explains in this sense that:

> The presence of economic and environmental crimes in our society, with the increasing participation of companies in their implementation, economic growth, globalization, which entails a true denationalization, and, mainly, the depersonalization of phenomena related to legal entities, have provoked a worldwide discussion on the need for their criminal liability.

Smanio (2004, p.1) points out that this topic is one of the most relevant and controversial in Criminal Law, including three doctrinal positions: those who do not accept the criminal liability of legal entities, those who only agree with the application of special measures and those who admit criminal liability. However, despite the various criticisms of the liability of legal entities, national legislation does not condemn this practice.

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It is important to highlight that the Federal Constitution clearly establishes the liability of legal entities, especially with regard to environmental protection and the economic order.

In article 225, § 3, the Federal Constitution provides that conduct and activities that are considered harmful to the environment will subject offenders, whether individuals or legal entities, to criminal and administrative sanctions, without prejudice to the obligation to repair the damages caused. This means that, in addition to civil compensation, legal entities may be held criminally and administratively liable, reinforcing the preventive and punitive nature of environmental regulations.

In addition, in article 173, § 5, the Federal Constitution provides that the law will establish the liability of legal entities for acts committed against the economic and financial order, as well as against the popular economy. This provision, although the individual liability of directors is provided for, also imposes the liability of the legal entity, subjecting it to sanctions compatible with its nature.

Although the Federal Constitution allows for the criminalization of crimes against the environment, against the economic and financial order, as well as against the popular economy committed by legal entities, the ordinary legislator has effectively complied with the constitutional provision only with regard to the criminal liability of these entities in relation to environmental crimes. This was achieved through Law No. 9,605, of February 12, 1998, also known as the Environmental Crimes Law, which in its Article 3 clearly provides for the criminal, civil and administrative liability of legal entities.

According to Article 3, "Legal entities shall be held administratively, civilly and criminally liable as provided for in this Law, in cases where the infraction is committed by decision of their legal or contractual representative, or of their collegiate department, in the interest or benefit of their entity". This legal provision establishes that the legal entity may be held directly liable, provided that the environmental infraction was committed by its directors or decision-making departments in the interest or benefit of the company.

Furthermore, the sole paragraph of this article complements this by providing that the liability of the legal entity does not exclude that of individuals who have acted as authors, co-authors or participants in the same act.

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This means that the criminal liability of legal entities is autonomous and does not depend on the conviction of the individuals involved, reinforcing the legal commitment to protecting the environment.

In this context, it is worth noting that, as already decided by the STJ (Superior Court of Justice) in 2022 regarding the award-winning collaboration for legal entities:

> The award-winning collaboration, today provided for in several punitive legal diplomas - Law 7,492/1986 - article 25, § 2; Law 8,137/1990 - article 16, sole paragraph; Law 9,034/1995 - article 6 (revoked by Law 12,850/2013); Law 9,613/1998 - article 1, § 5; Law, number: 9,807/1999 - article 13; Law, number: 11,343/2006 - article 41; and Law, number: 12.850/2013 - article 3-A item 7) -, was introduced in Brazil by Law 8.072/1990 (articles 7 and 8, sole paragraph), and always has for the collaborator the very personal objective of obtaining a reduction or even exemption from punishment, as is clear in Law, number: 12.850/2013, which even provides that the Public Prosecutor's Office may not file the complaint (article 4, §§ 2 and 4), which, even due to the exceptionality of the criminal or pre-criminal procedural norm, does not apply to legal entities, whose criminal liability is limited to environmental crimes (article 225, § 3 - Federal Constitution), and even less in relation to their executives, natural persons, who have the very personal right to, according to their own convenience, admit against themselves the practice of crimes with the aforementioned criminal purposes.

It must be noted that this prerogative applies exclusively to individuals, since the criminal liability of legal entities in Brazil is limited to environmental crimes, according to article 225, § 3, of the Federal Constitution. However, companies cannot benefit from plea bargain agreements, since their criminal liability does not extend to other types of crimes. Furthermore, executives or directors of legal entities, when agreeing to cooperate with the justice system, exercise a very personal right, in which they admit their participation in crimes in order to obtain procedural benefits. This right, however, cannot be transferred or shared with the legal entity they represent.

5 REGARDING DOUBLE PERSECUTION IN CORPORATE CRIMES

The phenomenon of *overcharging* in the context of corporate crimes occurs when the authorities responsible for the prosecution formulate several charges against the accused based on a single conduct or on interconnected facts, with the aim of increasing the chances of conviction or forcing a cooperation agreement.

This practice manifests itself in different ways, such as dividing the same unlawful act into several charges, or formulating more serious charges than the facts would originally support.

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*In the business context, where crimes are often complex and involve large volumes of documentation and financial transactions, the practice of overcharging may occur when the Public Prosecutor's Office charges the defendant with multiple crimes, such as tax fraud, foreign exchange evasion and money laundering, all resulting from a single accounting manipulation. Note that in view of the position of the STJ (*Superior Court of Justice*) in the Special Appeal, number: 1535111/SC of 2018, the understanding that the crimes must not be absorbed creates even more fear among the company's directors. Thus, in a situation of overcharging, the defendant would feel even more pressured to accept the agreement.:*

> The appellants ran a financial institution that operated irregularly, as they operated the financial institution as a commercial bank, acting outside the limits of the authorization granted to them by the Central Bank. Therefore, the crime described in article 16 of Law, number: 7,492/1986 was characterized, in relation to which the statute of limitations on the punitive claim was recognized when the special appeal: 1,113,655/SC was judged by this honorable Fifth Panel. IV - On the other hand, they carried out unauthorized exchange transactions, with the purpose of promoting foreign exchange evasion, without declaring them to the competent federal department, evidencing that they engaged in the conduct described in article 22, sole paragraph, of Law, number: 7,492/1986. V - Therefore, the thesis that one crime is absorbed by another by applying the principle of consumption or absorption, which is limited to situations of progressive crime, criminal progression or means crime absorbed by end crime, is unfounded, which, it must be repeated, does not conform to the factual framework outlined in the r. decision. Despite the allegations of the appellants, the principle of consumption or absorption is verified when the first offense provided for in a rule constitutes a simple phase of the execution of the second offense, established in a different provision, and only the last one must be applied. In the case at hand, there is no relationship of means crime and end crime between the crimes of "operation of a financial institution without authorization" (article 16 of Law, number: 7.492/86) and "currency evasion" (article 22, sole paragraph, of Law, number: 7.492/86), and the latter must be punished independently. Doctrine. Precedents of the honorable Sixth Chamber and by the team of STF (Supreme Federal Court).

Otherwise, the defendant may be simultaneously charged with environmental crimes and financial crimes in cases where the alleged environmental violation also results in undue economic benefit. This accusation may be considered forced and lacking solid grounds, suggesting, once again, an attempt to induce a confession or a plea bargain. This strategy is often based on psychological pressure or distortions of facts, in the search for a convenient result for the accusing parties.

There is also the imputation of both individual and collective criminal liability. As already mentioned, both directors and managers and the legal entity itself may be charged, resulting in a duplication of charges. In certain cases, prosecutors may use

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legal devices aimed at combating criminal organizations in a frivolous manner to increase the number of charges, alleging that the corporate structure acted in an organized manner to commit crimes, multiplying the responsibilities of those involved.

These practices can be seen as a pressure strategy, often used to force the accused to seek a quick solution, such as plea bargains or confessions, in order to avoid the financial cost and emotional strain of facing a high number of charges, in addition to the risk of a severe conviction.

6 FINAL CONSIDERATIONS

This study highlighted the importance of the principle of *ne bis in idem* in Brazilian criminal law, focusing on the challenges that arise in its application in the context of corporate crimes. It was observed that, although the principle seeks to prevent double punishment or prosecution for the same act, the practice of *overcharging* has violated this principle by overloading the defendant with multiple charges based on a single conduct. This generates significant psychological and procedural pressure, often forcing the defendant to seek agreements to avoid more severe sentences, to the detriment of fundamental rights such as full defense.

The results of this analysis demonstrate that disrespect for *ne bis in idem* is not a merely theoretical issue, but a concrete threat to justice and legal certainty, especially in cases involving both individuals and legal entities. The legal system must be vigilant so that multiple actions based on the same facts do not compromise the rights of defendants and the integrity of the criminal process.

Despite the relevance of the doctrinal findings, there was a difficulty in finding judicial decisions recognizing the practice of *overcharging* in the Brazilian judicial system in relation to crimes in the corporate sphere.

Therefore, respect for the principle is of utmost importance to ensure a fair balance in the exercise of the State's punitive power, preserving fundamental rights and consolidating trust in criminal justice.

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