REVISTA COLETA
Científica
Year 1, Vol. I, n.1, Jan.-Jul., 20 17
(CC BY 4.0) | ISSN 2763-6496
DOI: 10.5281/zenodo.4737550
ARK: https://n2t.net/ark:/24285/RCC.v1i1.3 2

THE court hearing of custody and The justice restorative at promotion of human dignity: by adopting the posture of the democratic state of right

The custody hearing and restorative justice in the promotion of human dignity: for the adoption of the posture of the democratic state of law

Received: 12/15/2016 | Accepted: 06/20/2017 | Published: 06/20/2017

Anderson Melo de Almeida
https://orcid.org/0000-0001-7574-2584 _
http://lattes.cnpq.br/3547362927474937
Cenecist College of Rio das Ostras, FACRO, RJ, Brazil
Email: anderson.almeida@gmail.com

Summary
Faced with an old criminal and criminal procedural model that does not address the conflicts between the interested parties, thus generating discredit to justice in general, Restorative Justice with the Custody Hearing arises, as a possibility to solve this problem and as an element of implementation of the Direct Democratic State. The Magma Carta of 1988 represents the greatest symbol of the process of democratization and national constitutionalization, being seen as the Citizen Constitution. The above principle of the Dignity of the Human Person contained in the constitutional text is one of the main foundations of the Republic, functioning as a basis for the fundamental rights and guarantees of the citizen, especially in the criminal area. From the arrival of the new National Constitution, there is a rereading of the infraconstitutional laws, which are interpreted in accordance with the new constitutional text. In the current national legal-criminal context, it is associated with the idea of guaranteeism, linked to the concept of the Democratic State of Law, presenting Restorative Justice together with the Custody Hearing as the possibility of a new model of justice, more humane and quotient , aiming at applying the correct penalty by the State, solving the conflict, in the search for positive results in the reduction of criminal recidivism, the victim's satisfaction and the change of the culture of violence, so that we can be compatible with the Democratic State of Right.

Keywords : Restorative Justice. Custody Hearing. Criminal System. Dignity of human person. Democratic state.

Abstract
Faced with an old criminal and procedural criminal model that does not respond to conflicts between the interested parties, thereby creating a discredit our justice in general, the Restorative Justice with the Hearing of Custody appears as a possibility to solve such problem and as an element of Democratic State of Direct. The Carta Magma of 1988 represents the major symbol of the process of democratization and national constitutionalization, and is seen as our Citizen Constitution. The above principle of the Dignity of the Human Person contained in the constitutional text is one

REVISTA COLETA
Científica
Year 1, Vol. I, n.1, Jan.-Jul., 20 17
(CC BY 4.0) | ISSN 2763-6496
DOI: 10.5281/zenodo.4737550
ARK: https://n2t.net/ark:/24285/RCC.v1i1.3 2

of the main foundations of our Republic, functioning as a basis for the direct and fundamental guarantees of the citizen, especially in the criminal sector. From the arrival of the new National Constitution, a re-reading of the infraconstitutional legislations, that begin to be interpreted according to the new constitutional text. In the current national juridical-juridical conjuncture, it is associated with the idea of garantism, linked to the concept of Democratic State of Right, presents the Restorative Justice together with the Hearing of Custody as the possibility of a new model of justice, more human and quotient, in order to apply the correct sentence by the State, to resolve the conflict, to seek positive results in reducing criminal recidivism, victim satisfaction and changing the culture of violence, so that we can be compatible with the Democratic Rule of Law.

Keywords: *Restorative Justice. Custody Hearing. Criminal System. Dignity of human person. Democratic state.*

Introduction

The current Constitution brings, in its 1st article, the constitutional political definition of the Brazilian State, affirming it as a Democratic State of Law, bringing with it the greatest and perhaps even the most important of all devices, since all the other principles that underpin the legal system.

Through a rereading with observance of the foundations and objectives of the 1988 Charter, Brazil is now recognized not as a State of Law, but as a Democratic State.

In article 1, item III of the Federal Constitution, we have the Principle of the Dignity of the Human Person, recognized as one of the foundations of the Democratic State of Law, being this principle of greater scope in what refers to the fundamental rights and guarantees of the citizen, where protects, as applicability of this device, life, physical and mental integrity, freedom, education, among other legally protected assets.

The democratic rule of law model is aimed at curbing state arbitrariness, the foundation of which has been built since the Enlightenment period. It is necessary to seek a critical and dialectical understanding of legal science, in addition to greater integration between the Science of Law and the other sciences, based on interdisciplinarity, as elements of satisfaction Social.

Today in Brazil, we have a Judiciary system that causes discontent in large parts of the population, due to its lack of organizational structure, having a low number of servers, the accumulation of piles of processes, lack of Judges and several other reasons that lead to systemic slowness procedure, in addition to the various resources, which make the process have its procedural progress postponed, especially in the Criminal Procedure, leaving society and especially the victims of criminal acts with helplessness in relation to the performance of the Judiciary.

In Brazil, there is an aggravation resulting from criminal legislation, which has the victim of crimes as a mere supporting element within the Criminal Procedure, with the State as the greatest element and most interested in resolving the generated conflict. The detachment of those involved in decision-making within the criminal process leads to great dissatisfaction on the part of the victims and their relatives, since

REVISTA COLETA
Científica
Year 1, Vol. I, n.1, Jan.-Jul., 20 17
(CC BY 4.0) | ISSN 2763-6496
DOI: 10.5281/zenodo.4737550
ARK: https://n2t.net/ark:/24285/RCC.v1i1.3 2

they cannot even express their thoughts, fears and anguish, where the only place for its manifestation is the hearing, only when asked by the Judge, Prosecutor or Lawyer.

It is noted that incarceration does not solve the serious problem of criminality growth, this discourse ends up gaining strength when mistakenly associated with democratic measures. The great challenge of society is to conquer, in a wrong way, the democratic measures. The great challenge of society is to conquer, in a democratic way, institutions capable of giving rise to a civil society endowed with a critical sense, participative and that acts in a coherent way, whose civic competence, authoritarian regimes seek avoid.

As an alternative way of resolving or reducing such difficulties, the national legislator, mirroring himself in several countries on countless continents, have sought in sparse laws and in various devices related to criminal legislation, the inclusion of the victim in the solution of conflicts, making it helps the Judiciary in the search for a better path that meets its interests and those of society in general, in addition to criminal procedural criminal law, having acquired in recent years mechanisms for greater protection of the victim, aiming to treat them as subject of rights and no longer as a mere element of evidence.

It is worth highlighting a new model of Justice for the 21st century that is called “Restorative Justice”, a matter of the utmost importance, which requires, in addition to state aid, also real and effective community participation, as a way of making the difference. victim and their family members for a more active role in the process, the inclusion of the aggressor of the protected legal interest in this debate, in addition to increasing the credibility of Justice in the eyes of citizens.

On several occasions, the victim in the Criminal Procedure is left aside and seen simply as evidence, which in most cases causes great dissatisfaction with the Judiciary, since it is prevented from exposing its feelings, anguish, pain brought about because of the crime, when all this would be possible in dialogue with the accused in question (Lake, 1992).

Regarding the offender, based on knowledge of the consequences of his/her criminal practice, through contact with the victim and their relatives, in addition to the possibility of the participation of the aggressor's relatives and other social entities, this may be the first step to a constitution of the harmful effects of his attitude and of a non-recurrence of crime (Lake, 1992).

There is a gain for the victim who feels important and recognized, for having been able to put his feelings directly to the one who caused him harm and jointly seeking the best solution for the evils suffered as a result of the crime. On the other hand, the State gains in the reduction of crime, through non-recurrence, in addition, of course, to the aggressor who is able to think about his negative attitudes and with the possibility of no longer acting in crime, since he also feels valued as a human being, for not being treated as marginal.

The work has the proposal that aims to join all the norms already present in the national legislation and the public policies in progress, all in a systematic way, with its own method, following the line implanted by some Countries, which already

REVISTA COLETA
Científica
Year 1, Vol. I, n.1, Jan.-Jul., 20 17
(CC BY 4.0) | ISSN 2763-6496
DOI: 10.5281/zenodo.4737550
ARK: https://n2t.net/ark:/24285/RCC.v1i1.3 2

demonstrate satisfactory indexes in the reduction in criminal law, seeking to adapt them to the national reality.

The work is divided into three chapters, where the first deals with criminal sanction as a regulatory instrument, the second addresses the distinction between retributive and restorative justice: values, procedures, different results and the reconfiguration of the subjects of the process and the third chapter and presented the custody hearing as a criminal procedural instrument in the service of restorative justice (Lake, 1992).

With this, it is intended to bring to the discussion the possibility of the systematic implementation of this new model of Justice, which seeks to rescue the Dignity of the Human Person through the participation of the victim within the Criminal Procedure together with the aggressor, relatives of both parties and the community, in the solution of the conflict, as being another mechanism for the implementation of the Democratic State of Law, through the direct participation of those interested in decision-making, this being another mechanism for the effectiveness of participatory democracy.

In this way, Restorative Justice, together with the Custody Hearing, becomes a new model of Criminal Justice, and Criminal Procedure within the perspective of rescuing the victim, voluntarily placing her in direct contact with the aggressor in a first Hearing, in a form of application and effectiveness of the principle of the Principle of Human Dignity and Due Process of Law, with the Brazilian State acting in the resolution of social conflicts and in the reduction of violence.

The criminal sanction as an instrument of regulation (inclusion/ exclusion) of the men:

Criminal sanctions: their conceptions in story.

By taking the path by analyzing the sanctions applied to the crimes committed, we have the death penalty as the greatest punishment imposed in the history of mankind.

Humanity has followed and continues to follow a long and arduous path towards the affirmation of a punitive human right in the quest to guarantee and enforce the realization of fundamental human rights, universally recognized and established over time. In this sense, Human Rights are characteristic of man and must be respected, without distinction, including those of those who are fulfilling the penalties of the law. Consequently, this recognition and ideals must be transferred to the reality of penal institutions and not be restricted to the letter of a law, or the ineffectiveness of a rule.

In order to place the concepts of punishment and respect in human rights, we will make a brief entry into the history of Law Criminal.

1.1.1 Antique

The penalty is originally based on the institute of reaction and defense, against the aggression of individual or collective goods of a community. Its beginnings can be traced back to the era of private revenge, in which sanctions were used in a completely disproportionate and arbitrary way. Over time, in favor of the organization of primitive

REVISTA COLETA
Científica
Year 1, Vol. I, n.1, Jan.-Jul., 20 17
(CC BY 4.0) | ISSN 2763-6496
DOI: 10.5281/zenodo.4737550
ARK: https://n2t.net/ark:/24285/RCC.v1i1.3 2

communities, the formation of the State and the need for limitations on criminal punishments began to be outlined. taxes.

In the Classic Period of Antiquity, several manifestations of Criminal Law are found in the legal systems of civilizations: Chinese, Indian, Egyptian, Babylonian, Hebrew, Greek and roman.

Historians such as Eugenio Raúl Zaffaroni (2001, p. 181) teach that in ancient China there are proven existences of the "five penalties", of which he quotes, "homicide punishable by death, theft and injuries punished by the amputation of a or both feet, rape with castration, fraud with the amputation of the nose, and minor infractions with the mark on the forehead".

Such sanctions demonstrate the thinking of society at the time and the stage of evolution of this penal culture, which had a very severe character.

In the Code of Manu in Ancient India, which dates back to the 10th century BC, this had moral penalties, which served to remove the evils committed by the offender, its foundation was divine and organized according to social castes. In this way, the penalty that would be applied was earned according to the social hierarchy.

Egypt, at the time, had an organized and individualistic system of penalties, considered advanced for the ancient period and without many death sentences. The Egyptians were theocratic, so that infractions directly affected religion, which evidenced the nature of the penalties that were considered severe, including sanctions that affected life, the soul or life after death, such as curses. and exile.

In Mesopotamia in the 17th century BC, the Babylonians developed one of the most important codes of antiquity, the Code of Hammurabi. This code, which bears the name of its creator, is formed by a set of rules of conduct and had the talion as an exponent rule.

Paradoxical as it may seem, the Talion Law, defined in Article 196 of that code, was a true victory for peoples and human rights, since, at the beginning of time, crimes were punished with extreme disproportionate and cruelty.

With the advent of the Talion Law, revenge was limited to the *lex talionis* , that is, to the proportion of the offense, not exceeding the equivalent of the damage, a criterion used mainly in criminal sanctions.

The Code of Hammurabi is divided into fourteen parts, with 282 articles dealing with the following matters: criminal, patrimonial, procedural, obligatory and family, succession, regulation of professions, prices and remuneration of services. Almir de Oliveira (2000, p.101) declares that the Code of Hammurabi stipulated strict penalties for slander, defamation and injury, with which the protection of the honor of others was sought. The penalties for bodily injuries and homicides were extremely severe, with the adoption of talion and ordeal, with which one sought to protect the physical integrity and life of women. people.

The penalties varied according to the social category of the perpetrator and the victim and were unequal if the categories of one or the other were different. Theft, robbery, assault, kidnapping, slander and falsehood were punishable by death. a testimony.

REVISTA COLETA
Científica
Year 1, Vol. I, n.1, Jan.-Jul., 20 17
(CC BY 4.0) | ISSN 2763-6496
DOI: 10.5281/zenodo.4737550
ARK: https://n2t.net/ark:/24285/RCC.v1i1.3 2

The monarch Hammurabi ordered his laws engraved in stone, proclaiming himself the chosen one of the Gods - the theocratic character of the Law of the time is observed in the expression “chosen of the gods” - to bring justice to the earth. The Code of Hammurabi brought legal certainty never seen before in the history of mankind, as the norms were written and not subject to simple ruling arbitration.

The Code divides men into three social classes, starting with the *awelum* (son of man), made up of free men belonging to the highest class of the social pyramid; by common free men and, finally, the *mushkenum class* , composed only by common free men and, lastly, the *wardum class* , composed by slaves (Lake, 1992).

With a careful look at the Code of Hammurabi, it is clear that despite the class differences within society, the treatment given to offenders had a certain equality. After all, the principle of equity was inherent in the code.

The higher the agent's social status, the greater the sanction for the offense. Despite being more seriously applied to the ruling class, it demonstrated greater equality in the application of justice by treating the application of law with equity, a notion of proportionality that gave that society a historical highlight.

Having an observant view of other historical periods of humanity, the scholar Jhon Gilssen (2003, p. 610) comments on humanity's first attempts at a legal systematization, stating that the oldest known code is the Ur-Nammu code -written around 2040 BC-, although there are traces of other attempts at systematization, such as the code of Urakagina from Laga from the 3rd millennium before Christ.

In antiquity, the Hebrews were one of the main peoples to present a monotheistic theocratic regime, in which the rulers were subject to the law. Its main legal text is the Bible, which presents legislation aimed at all, without exception, even subjecting kings and interpreters of the text sacred.

For Jews, the power of kings was inferior to the mandates of the lahweh. Therefore, the power of kings was limited. Proof of this concept of Law intertwined with religion is the biblical passage in which God delivers the ten commandments to the Jews, present in the Old Testament, book Exodus, chapter 20, in the following verses: “(...) 13- Do not kill. 14-Do not commit adultery. 15- Don't steal. 16- Don't give false testimony against anyone. 17- Do not covet another man's house ".

Such orders to the Hebrew people, have a divine character, as they are emanated from God himself to the Jewish people. They also demonstrate a greater concern for human life and for several fundamental social values, such as the right to life, family, property and honor.

There are other passages that, in a first interpretation in their literal sense, present unreasonable penalties for the practiced act. However, it is argued that, if the overall meaning of the text is observed, it can be concluded that they had a meaning aimed at proportionality, in order to emphasize the importance of the manifestations of a humanitarian nature contained in the biblical text. This sense of proportionality can be seen in the Law of Talion found in the Bible in its book of Exodus, when dealing with the laws regarding violence, where chapter 21, verses 24 and 25, reads: “24 - an eye for an eye, a tooth for tooth, hand for hand, foot for foot, 25 - burn for burn, wound for hurt”.

REVISTA COLETA
Científica
Year 1, Vol. I, n.1, Jan.-Jul., 20 17
(CC BY 4.0) | ISSN 2763-6496
DOI: 10.5281/zenodo.4737550
ARK: https://n2t.net/ark:/24285/RCC.v1i1.3 2

Among the Jewish people, punishments gradually gained the status of public revenge. Although still used in a no less violent way than the previous one, this model represented the beginning of the path towards the principles of the Law of Talion. This law, which proposed greater control over punishments, applied to punishment the idea of punishment as retribution for the evil caused in the measure of evil, being applied in a more consistent way to the crime. committed.

When observing the Greek civilization, despite being considered the one that had the greatest political thinkers and philosophers of antiquity, the Greeks did not stand out with the same relevance in the sciences of law.

No traces of a literature or an organized legal system were found, but individual legal systems in each city-state with sparse manifestations and, often, with a close right between the cities due to the common culture, which, however, did not represent a legal order. John Gilissen (2003, p.186) when dealing with the evolution of Greek political systems states what:

> It is not exactly necessary to speak of a Greek law, but of a multitude of Greek laws, because, with the exception of the short period of Alexander the Great, there was never political and legal unity in Ancient Greece. Each city had its own law, both public and private, having specific characters and evolution of the law of most cities; only Athens left enough traces to make it possible to know the successive stages of the evolution of law.

In Ancient Greece, the sanction was applied through social coercion, in which the community and the family group were involved. The criminal law was severe and at the same time respected in the face of the control exercised by society.

Eugenio Raul Zaffaroni and José Henrique Pierangeli (2001, p. 186) explain that each individual in the social group becomes an agent of the security police; in this way the so-called 'blood corruption', that is, the penalty that reaches the family and the group, is an immense means of social control.

José Reinaldo de Lima Lopez (2002, p. 39) observes that,

> The fear of impunity was enormous. A small, unpunished offense might throw the whole city into disarray, enacting revenge, etc. Thus, the penalties were often disproportionate to the crimes, by our standards. The penalties were, in general: punishment, fines, wounds, mutilations, death and exile.

In the same sense, Fábio Konder Comparato (2003, p. 41) addresses the devotion of the Greeks to their laws, pointing to the famous passage in the work of the Greek historian Herodotus, who narrates a dialogue between the king of the Persians, Xeres, and the ancient Spartan king , so let's see:

> The Persian sovereign, on the verge of invading Greece, manifests the deep contempt inspired in him by that few people, composed of people 'all equally free and who do not obey a single leader'. The Spartan replies that, if the Greeks are free, their freedom is not complete: they have a lord, the law, whom they fear more than your subjects do. you.

REVISTA COLETA
Científica
Year 1, Vol. I, n.1, Jan.-Jul., 20 17
(CC BY 4.0) | ISSN 2763-6496
DOI: 10.5281/zenodo.4737550
ARK: https://n2t.net/ark:/24285/RCC.v1i1.3 2

Capital punishments also predominated in the Roman Empire and the sanctions of exile, flogging, corporal punishment and mutilation, among other tortures. However, Julio Fabbrini Mirabete (2005, p.224) teaches us what:

> In the midst of so much human insensitivity, however, Seneca already preached the idea that higher purposes should be attributed to punishment, such as the defense of the State, general prevention and correction of the delinquent and, although in the times of Solo and Anaximander, punishment was considered punishment, in Classical Greece, among the sophists, such as Protagoras, a pedagogical conception of feather.

In the case of Rome, the law of the XII Tables (450 BC) transformed the customs in force into a set of written norms. It was, therefore, a collection of customs and not a systematized code, as we moderately adopt. This legal document already differentiated private crimes, thus highlighting those that would carry out the criminal prosecution. The influence of the Code of Hammurabi on Roman Law can also be observed in this document through passage 11 of the Seventh Table, which determines that if someone strikes another, he must suffer the penalty of Talion unless there is an agreement .

At the beginning of the Empire, Roman Criminal Law became almost exclusively public in character, so that jurisdiction and penal protection also became a matter of public order.

With the emergence of the Catholic Church and consequent Canon Law, according to Ney Moura Telles (20014, p. 57), “debates have arisen about the retributive nature of penalties, translated with at notions gives immortality gives soul. Of that manner, The soul would be save case O sinner redeemed himself through penance, through repentance and redemption. Thus, one starts to consider intentionality as mediated by punishment.

1.1.2 Age Average

Several factors contributed to the formation of feudalism. We will emphasize here those of Roman origin, those of Germanic base and the conjunctural factors.

The factors of Roman origin resulted from the constant struggles for the power of the Empire, the moral and ethical crisis between the rulers, the wars to protect the borders and the consequent crisis in the supply of slaves, which resulted in inflation in the cities, which were unleashed around the fourth century AD, due to the crisis of the Empire and the urban exodus, which led to aristocratization and contributed to the solidification of the Christianity (Lake, 1992)

In turn, the factors of Germanic bases were characterized by the rural way of life, the oral, tribal and customary laws, and the *comitatus* that had, through reciprocal oaths, a relationship of fidelity between the members of the social group and the head of the community.

Conjunctural factors, such as the barbarian invasions, the Norman attacks and the blockade of the Mediterranean by Muslims, trigger new impacts on the system of penal applications.

REVISTA COLETA
Científica
Year 1, Vol. I, n.1, Jan.-Jul., 20 17
(CC BY 4.0) | ISSN 2763-6496
DOI: 10.5281/zenodo.4737550
ARK: https://n2t.net/ark:/24285/RCC.v1i1.3 2

In the Middle Ages, politics and law were decentralized, with application of varied sanctions according to the feudal lord. Tobeñas, quoting Almir de Oliveira (2000, p. 110), explains that:

> The recognition of Human Rights only appeared as a reaction against the excesses of the authority that denied them and almost always with a contractual character and the attribution of concessions or particular privileges, as recognized prerogatives to groups of people.

The Germans had a customary law, initially tending to reparation without state action. It was a private revenge that did not necessarily mean a violent and disproportionate reprisal. The offended person could carry out pecuniary reparation negotiations to restore the shaken social peace and recover honor without the need for physical harassment. Eugenio Raúl Zaffaroni and José Henrique Pierrangeli (2001, p. 190) clarify what:

> The most serious penalty known by Germanic Criminal Law was the 'loss of peace' (Frieldlosigkei), which consisted of withdrawing social protection from the convict, with which anyone could kill him with impunity. In private crimes, Faida or enmity against the offender and his family was produced. The Faida could end with the composition (Wertgeld), consisting of a sum of money that was paid to the offended person or his family, or also through the judicial combat, which was an ordeal, that is, a judgment of God.

According to these authors, the importance of the rights of these peoples is evident due to their propensity to restore social peace through reparation. Its purpose was, as a rule, to restore relations and social order, instead of directly sending the fact to the State for treatment.

Law in the Middle Ages is known to have a direct influence on canon law, evidenced in the figure of theologians who discuss the concept of just punishment of men. One of them, Saint Augustine, proposes the need for the penalty to be absolutely proportional or equivalent to the crime, promoting ideas about the reasonableness of sanctions and the utilitarian character of the penalty. But, that was far from the modern concepts of punishment and dignity of the human person – medieval utilitarian punishments had a brutal character. Terrible examples were marked in historical writings, such as death by fire, by the sword (for the nobles), outside, strangulation for women, by the wheel, by drowning, by boiling oil, live burial, blinding of the eyes, section of body members, brands with red-hot irons, among other ways that lasted until the 18th century.

In this regard, Margarida Genovis (2010, p. 13) points out that:

> At the end of the Middle Ages, Saint Thomas Aquinas directly discusses the issue of Human Rights, returning to Aristotle and giving his philosophy a Christian vision. The foundation of St. Thomas is theological: the human being has natural rights that are part of his nature, as they were given to him by God.

REVISTA COLETA
Científica
Year 1, Vol. I, n.1, Jan.-Jul., 20 17
(CC BY 4.0) | ISSN 2763-6496
DOI: 10.5281/zenodo.4737550
ARK: https://n2t.net/ark:/24285/RCC.v1i1.3 2

John's magna Carta "Sem Terra" which is, without a doubt, the most important medieval document in the defense of man. Its first celebration took place in 1215, when the nobles, unhappy with the monarch's government, besieged the city of London, forcing the king to sign a Charter. However, João Sem Terra, after signing the treaty, sought Pope Innocent III, stating that the document was null, since he would have signed it under coercion. The Pope accepts the monarch's arguments and declares that the treaty had been signed without his consent and advocated, finally, that the Magna Carta was really null, despite having been written by a cardinal.

In view of its initial nullity, the document was reaffirmed three more times in 1216 and 1217, and declared authentic in 1225. It is also in the Magna Carta that it is expressed that the king is bound by the enacted laws, including those written by him, bringing foundations to the principle of legality and inviolability of domicile. This letter was arranged in the form of a text, and its division into clauses was done later.

Age Modern

The beginning of the great transformations was marked by the Renaissance, being political and ideological in the world, The medieval way of thinking underwent changes with the advent of Enlightenment ideas that provided a new way of seeing the environment in which we live. This new conception brought changes to the performance of many sciences, with Law not immune to the new angles of vision awakened in the period and, naturally, with direct implications for Criminal Law.

Criminal sanctions gain contours from a more humane thought, with emphasis on a work written in the 18th century by the Italian Marquês Cesare Beccaria (2010) called “Dos Delitos e das Penas”, with great repercussions at the time and which remains very up-to-date as a source of information. doctrine and study for the current Criminal Law.

England

After the War of Succession for the English throne (War of the Roses or Two Roses), from 1455 to 1485, that is, after thirty years of battles, the English nobility weakened and created conditions for a post-war period in which the monarchy would be strengthened.

Thus, with the nobility weakened and in the face of existing conflicts with the pope, King Henry VIII managed to subject Parliament and force it to proclaim the Act of Supremacy in 1534, becoming head of the Church and instituting Anglicanism in England. It was almost 100 years of royal supremacy.

Years later, the monarchy weakened again and ended up having to accept the Petition of Rights, imposed by Parliament in 1628. jurisdiction and the legality.

Habeas Corpus Law was signed , whose official name was “a law to better guarantee the freedom of the subject and to prevent pressures overseas”.

This document had an irrefutable importance, the following passage is found in its text:

> The complaint or written request of any individual or in favor of any individual arrested or accused of committing a crime (except in the case of felony

REVISTA COLETA
Científica
Year 1, Vol. I, n.1, Jan.-Jul., 20 17
(CC BY 4.0) | ISSN 2763-6496
DOI: 10.5281/zenodo.4737550
ARK: https://n2t.net/ark:/24285/RCC.v1i1.3 2

> treason, as stated in the respective mandate, or of complicity or suspected complicity, [...]), the Lord Chancellor or, in time of vacation, some judge of the higher courts, after having seen a copy of which has been refused, to ask for his release) for the benefit of the prisoner, which will be immediately enforceable before the same Lord Chancellor or Judge; and, if bailable, the individual will be released, during the execution of the measure (*upon the return*), committing to appear and answer the accusation in the competent court.

Habeas *Corpus* maintains its concept since that time it is considered a procedural norm. It brought with it a guarantee of freedom for those involved in criminal proceedings, that is, for the individual arrested or accused of a crime.

However, the Magna Carta of 1215 guaranteed freedom of movement within England, however, its effectiveness did not generate good results. Thus, in the event of threat or arbitrary arrest, freedom was protected by a mechanism similar to *Habeas Corpus* called *writ* , synonymous with a court order, which aimed to protect the freedom of the individual, although its actual protection was greatly reduced.

In 1689, the Bill of Rights was developed by the English Parliament, signed that same year, *Bill of Rights* (1689).

Initially, in the aforementioned Declaration in items 1 and 2, the king's binding to the laws is affirmed, and he cannot suppress or modify them, leaving Parliament to exercise legislative power. Faced with the suppression of the king's power to legislate, the creation of tributes by Parliament was definitively established, as defined in clause 4.

Faced with the formation of an autonomous Legislative Power, immunities were also created for its members to better exercise their role as representatives of the people. The separation of the Legislature and its prerogatives are inserted in articles 8, 9 and 13, in which they also expound that the election of parliamentarians must be free, enjoying freedom of expression in the exercise of office. Moreover, the Parliament itself became the competent body to analyze the speeches of its legislators.

In addition, the right of petition is guaranteed in the fifth item, a right that ensures citizens the right to invoke the examination of a certain matter by the king.

The principle of legal reserve, when dealing with the right of Protestants to defend themselves and to own weapons, is inferred from the use of the term “allowed by law”. In clause 10, the principle of proportionality is reaffirmed. It is revealed that both principles mentioned are contained in the Magna Carta of 1215.

important to point out that the *Bill of Rights* is still present today as one of the fundamental documents of the United Kingdom, forming part of the current norms that defend the human.

In France: the Declaration as a fruit of Revolution

When analyzing the Declaration of the Rights of Man and Citizen, there is a paradox in its title. If we make a grammatical interpretation, the additive conjunction “and” suggests the differentiation of the elements “man” and “citizen”. Faced with the principle of equality listed as one of the principles in the Declaration of Rights, it is

REVISTA COLETA
Científica
Year 1, Vol. I, n.1, Jan.-Jul., 20 17
(CC BY 4.0) | ISSN 2763-6496
DOI: 10.5281/zenodo.4737550
ARK: https://n2t.net/ark:/24285/RCC.v1i1.3 2

necessary to highlight the revolutionary social framework to understand the meaning of “man” and “citizen” in its Declaration of Rights.

The members of the Revolution, when writing the Declaration of Rights, broke with all the political parameters of the past. No other revolution took place in the same political context and yearning for freedom. France, for having been the country that most rooted monarchical absolutism, was also the one that took the longest to break with its chains of estates. The exploited people and the bourgeoisie, which was growing at an accelerated pace, had ties to the State that impeded their development. The Catholic Church condemned usury; the nobility and the king, together, “bled” the people with the exploitation of labor and acceleration of impoverishment as a result of the collection of high taxes. Even within this framework, inflation rose faster than the salary.

In this context, the revolutionaries, by undoing the established state structure, sought, in addition to the creation of a new state, a free, equal and fraternal state. The propagation of the new ideology to all the peoples of the world was the logic. This political thought of the deputies present at the French National Assembly on how the Declaration should be governed is brought by Fábio Konder Comparato (2003, p.130):

> Démeunier affirmed, in the August 3 session, that "these rights belong to the times and to all nations". Mathieu de Montmonrency repeated on August 8: 'the rights of man in society are eternal, (...) invariable like justice, eternal like reason; they are from all times and from all countries. Pétion, who was maire of Paris, considered it normal that the Assembly addressed all of humanity: “It is not a question of making a declaration of rights only for France, but for the man in feral”.

Faced with this universalist thought, they implemented ideas in their text that encompassed not only the French, but all men. Here, the difference between man and citizen in his title. The term “citizen” would encompass the French, and “man”, the population of the world. It was an ideal of making “brothers” members of all nationalities, equal, free and fraternal.

The evolution of political frameworks in the main nations that influence the modern era resulted in the evolution of the understanding and defense of Human Rights. The consolidation of the principles of equality, although not entirely in its ideal state, ended up ensuring prerogatives in favor of being human.

Reasoning in this sense we have in England the *Petition of Rights* , which rescues existing individual rights that were being suppressed by sovereigns. The *Habeas Corpus Act , on the other hand* , brought a procedural mechanism in defense of individual freedoms against the king's arbitrariness, as a way of helping the citizen.

In the series of rights listed in the *Bill of Rights* , of singular constitutional importance for the English people, in addition to granting various rights to the citizen, the document rooted the separation of powers by assigning the Legislative Power to Parliament, removing it from the hands of the monarchs English.

In France, with the Declaration of the Rights of Man and Citizen, we have as a result ideals of freedom, equality and fraternity and the universal propagation of

REVISTA COLETA
Científica
Year 1, Vol. I, n.1, Jan.-Jul., 20 17
(CC BY 4.0) | ISSN 2763-6496
DOI: 10.5281/zenodo.4737550
ARK: https://n2t.net/ark:/24285/RCC.v1i1.3 2

modern Enlightenment thought. From a legal point of view, it brought a list of fundamental rights, becoming the basis of Constitutional Law. modern.

The two documents commented on here reflect the efforts in favor of the defense of Human Rights, an ideal that has been consolidated in the Contemporary Age, reinforced especially after the bloody wars that marked the 20th century.

It is with this foundation that the Law reproduces the humanization of the penal system. Sanctions gradually being humanized; some nations begin to abolish or restrict the death penalty, as well as largely eliminate corporal punishment, torture, torture, forced labor and infant sanctions, a new sanctioning ideal begins to be outlined, based on the recovery of the convict.

The recognition of fundamental rights in Brazil since the constitution of the empire and the reflexes in the order criminal

The Constitution of the Empire was promulgated in 1824 and brings among its articles the main Human Rights proclaimed throughout history. Among all its clauses, only its last article emphasizes the civil and political rights of the citizen, whose importance appears overshadowed in the last plan in the Constitution.

In its first articles, the 1824 Constitution is concerned with defining the form of government and State adopted by Brazil, claiming to be a free and independent nation, with a monarchical, hereditary, constitutional and representative government. It also defines as the official religion the Roman Catholic Apostolic.

In the constitutional text, the protection of the individual begins in article 179, declaring inviolable the political and civil rights of Brazilian citizens, which would be based on freedom, individual security and property. Then, the rights of citizens are listed in 35 items.

In item I of CR1824, we have clearly ensured the principle of legality by determining that “no Citizen may be obliged to do, or refrain from doing something, except by virtue of the Law”.

This principle originated in the Magna Carta of 1215, has been successively reaffirmed throughout history and was included among one of the constitutional guarantees proclaimed in the first Constitution of Brazil.

In item IV, we have protected the right to free communication of thought by words, writings, and publications by the press, ensuring freedom without censorship, necessarily responding to the excesses practiced in the exercise of this right:

> IV- Everyone can communicate their thoughts, by words, writings, and publish them through the press, without dependence on censorship; so long as they have to respond for the abuses that they commit in the exercise of this Right, in the cases and in the manner determined by the Law.

Item V brings religious freedom to the country; however, the religion of the State and the morality propagated by this form of religious doctrine should be respected. In this sense, it determined that “ No one may be persecuted for reasons of Religion, as long as he respects the State and does not offend Public Morals”.

REVISTA COLETA
Científica
Year 1, Vol. I, n.1, Jan.-Jul., 20 17
(CC BY 4.0) | ISSN 2763-6496
DOI: 10.5281/zenodo.4737550
ARK: https://n2t.net/ark:/24285/RCC.v1i1.3 2

We observe that the Constitution of the Empire was influenced by the Declaration of the Rights of Man and Citizen. Therefore, in item VI, freedom of movement, also contained in the Magna Carta of João Sem Terra, was expressed: "CR 11824, art. 179, VI - Any person may remain, or leave the empire, as he sees fit, taking his goods with him, safeguarding the Regulated police officers, and save the damage to third ".

The principle of equality is ensured in item XIII, preventing differentiated and arbitrary treatments. This mechanism works in front of the legislator, avoiding discrimination by law and also against the applicator of the norm, who must impose the Law without discriminatory differentiation, since signing provided that "the Law will be the same for all, that it protects, whether it punishes, the reward will be in proportion to the mechanisms of each a".

In its item XIX we have assured the prohibition of torture, flogging and all cruel punishments. Such a device is extremely important for citizens, as there will be no dignity if these threats continued to exist in legal systems, although its text needs determination by the legislator of what would be considered torture. Thus, it provided that "scourges, torture, branding with a hot iron, and all other cruel punishments are now abolished".

The inviolability of the home is enshrined in item VII, which addressed night and day, provided that the period when the sun is shining, regardless of the time, should be considered day. The differentiated guardianship begins, therefore, from the moment the sun goes down and the sky becomes dark.

> VII- Every citizen has an inviolable asylum in his home. At night, you cannot enter it, except with your consent, or to protect it from fire or flooding; and during the day, its entry will only be allowed in the cases, and in the way, that the Law to determine.

In items VIII and XI the essence of the principle of the presumption of innocence, since it defended the elaboration of a process to investigate the guilt of the convict, with only the competent authority to apply the law and issue the verdict.

> VIII- No one can be arrested without formal guilt, except in the cases declared in the Law; [...] will inform the Defendant of the reason for the arrest, the names of the arrest, the names of his accuser, and those of the witnesses, having them.
> XI- No one will be sentenced, except by the competent Authority, by virtue of a previous Law, and in the formula established by it. prescribed.

The principle of the personality of the penalty is of paramount importance for a humanitarian legal system, since only those who commit a crime should be punished by the sovereign power. The State is authorized only to punish the violator of the norm, being able to apply a sanction to the agent of the crime and to those who help in its practice, thus guaranteeing the inviolability of the family members, which was provided for in item XX.

REVISTA COLETA
Científica
Year 1, Vol. I, n.1, Jan.-Jul., 20 17
(CC BY 4.0) | ISSN 2763-6496
DOI: 10.5281/zenodo.4737550
ARK: https://n2t.net/ark:/24285/RCC.v1i1.3 2

The principle of humanity is intrinsic to item XXI, so that the State has the obligation to adapt its prison infrastructure in order to prevent convicts from deteriorating their physical and mental structure. The Jails will be safe, clean, the goods ventilated, with several houses for the separation of the Defendants, according to their circumstances, and the nature of their crimes.

The devices below the following protected rights: education, essential for the development of citizenship; the inviolability of correspondence; property, mainly protecting the assets of individuals against the State; and the right to the immutability of res judicata.

> XII- The independence of the Judiciary will be maintained. No Authority will be able to recall the pending Causes, sustalas, or revive the Proceedings ended.
> XXII - The Property Right is guaranteed in all its fullness. If the legally verified public good requires the use and use of the Citizen's Property, he will be previously compensated for its value. The Law will mark the cases in which this single exception will apply, and will provide the rules for determining the indemnity.
> XXXII- Primary instruction, free of charge to all Citizens.
> XXXIII- Colleges, and Universities, where the elements of Science, Fine Arts, and Art.

Since the beginning of the Constitution in Brazil, fundamental rights have been ensured in which the State remains inert to its development, that is, they are, in general, classic public freedoms, given rise in several legal documents such as the Magna Carta, the *Petition of Rights* and the *Bill of Rights.*

The division of powers in the Imperial Constitution was not identical to that conceived in the classic French texts, proclaimed by Montesquieu. Its division included, in addition to the traditional three - Legislative, Executive and Judiciary - a fourth, called Moderating Power. This was considered by the Charter to be the key to all political organization, determined in its articles 10 and 98:

> Article 10. The Political Powers recognized by the Constitution of the Empire of Brazil are four: the Legislative Power, the Moderating Power, the Judicial.
> Article 98. The Moderating Power is the key of all Political organization, and is delegated privately to the Emperor, as Supreme Head of the Nation, and its First Representative, so that he may incessantly watch over the maintenance of Independence, balance, and harmony of the other Political Powers.

Title 5 of the CR of 1824 deals with the provisions on the Emperor, and in its articles 98 and 101 with the fourth power of the Nation, represented by the figure of Emperor Dom Pedro, considered inviolable and sacred. The term sacred brings us to remnants of the monarchical absolutism of the Modern Age, in which the king had sacralized sovereign power, that is, with divine origin. Due to the term “sacred” used in its text, the person of the emperor would not be subject to any responsibility for his actions.

In Brazilian criminal history, we have that Criminal Law was governed by the Afonsine, Manoeline and Philippine Ordinances until the Empire. After independence,

REVISTA COLETA
Científica
Year 1, Vol. I, n.1, Jan.-Jul., 20 17
(CC BY 4.0) | ISSN 2763-6496
DOI: 10.5281/zenodo.4737550
ARK: https://n2t.net/ark:/24285/RCC.v1i1.3 2

it began to be governed by a series of criminal documents. Criminal Code of the Empire, of December 16, 1830; Penal Code of the United States of Brazil, Decree No. 847 of October 11, 1890;

Consolidation of Penal Laws, Decree No. 22,213 of December 14, 1932; Penal Code, Decree Law 2.848 of December 4, 1940 (still in force in its special part, with subsequent reforms); Penal Code, Decree-Law No. 1004 of October 21, 1969 (this Penal Code did not come into force in Brazil); Penal Code, Decree-Law 2.848/40, reformed in its general part by Law 7.209 of July 11, 1984.

The Penal Code in force is divided into two parts. The first, called the General Part, assists in the interpretation and guides the application of the criminal law. The second part, called the Special Part, contains a non-exhaustive list of crimes present in the national legal system.

At the beginning of the 21st century, in Brazil, a series of incriminating criminal laws takes place, in addition to the list contained in the Penal Code, aimed at the protection of specific goods such as the environment, the elderly, minors, consumers, the Public Administration , diffuse and collective rights; in addition to others that are more severe in nature, such as the law on heinous crimes, the drug law on drug trafficking, and so on.

In the Brazilian historical evolution, Criminal Law has progressively increased the role of protections for human beings and improved the forms of sanctions in the world and national order. The current Criminal Law cannot remain unscathed by the changes that have taken place in society, demanding constant evolution. The sanctioning mechanisms must converge to the humanization of the penal system, with a view to enabling a better performance in resocialization.

For a humanized penal legislation: a history to be reinvented.

Criminology understands that the current punitive paradigm is exhausted not only in its practical effectiveness, but also in its moral (regarding the right to punish) and political (regarding the definition of events classified as crimes) legitimacy. According to critics, this model is based on quite questionable traditional assumptions, such as that there are bad people, deserving of imprisonment. This is due to a norm arising from collective consensus, in this sense, criminal law is an expression of collective thinking.

With regard to the legitimacy of the right to punish, we have that the purely application of punishment and punishment on the condemned comes from the tradition that confers religious and moral authority on the sovereign. Warat (2001, p. 170) considers that modern law boasted this authority, legislating the standards of justice in the name of a supposedly complete rational order.

Habermas (1997, p. 23) criticizes this view, asserting that the concept of sovereignty, according to which the State monopolizes the means of legitimate application of force, brings with it an absolutist idea of concentration of power, capable of overcoming all others. powers of this world. According to the author, the ideal is a proceduralist view of the exercise of power that refers to the idea of sovereignty of the

REVISTA COLETA
Científica
Year 1, Vol. I, n.1, Jan.-Jul., 20 17
(CC BY 4.0) | ISSN 2763-6496
DOI: 10.5281/zenodo.4737550
ARK: https://n2t.net/ark:/24285/RCC.v1i1.3 2

people and “draws attention to marginal social conditions, which enable the self-organization of a legal community”

Regarding the second type of legitimacy, that of criminalization or the definition of events classified as crimes, the criminal law declares certain types of conduct as wrong and requires that all citizens comply with its decrees. Such legitimacy has been contested not only because of the absence of a consensus on the values it affirms, but because its determinations generally reveal the imposition of principles of more socially favored citizens or those exercising some power.

Maira Lúcia Karam (2004, p. 73) argues that:

> Crimes are mere creations of criminal law, through the selection of certain conflicting or socially negative behaviors, which, through the intervention of criminal law, receive this denomination. What is a crime in one place may not be in another; what is a crime today may not be tomorrow to be.

According to Queiroz (2017, p. 71):

> Regarding the Brazilian prison reality, the perversity in serving the sentence makes the offender become, at a certain point, a victim, as the violence perpetrated by him is responded to with another type of violence, state violence. This is because, under the pretext of combating violence, criminal law ends up generating more violence, not always legitimate, but as a pretext for the systematic violation of human rights.

Edmundo Oliveira (2010, p. 460) cites some human problems of the inmate: insecurity, stultification, loneliness, idleness, abandonment of the family, sexual maladjustment and uncertainty about the free future”. Such feelings, according to the author, are likely to cause him the so-called "prison victimization syndrome" that makes him feel like a "creditor" of society and free to exercise violence, due to the routine violations he suffers in prison, violence that go beyond the deprivation of freedom.

For these reasons, instead of controlling delinquency and reintegrating the convict into the community, the custodial sentence has encouraged exclusion and crime, stigmatizing the convict and serving as an incentive for learning about criminal practice. To survive in this inhospitable environment, the offender assimilates new practices criminal activities in a process of acculturation according to its values and norms (such as violence, corruption and “malandragem”, in the words of Juarez Cirino dos Santos (2013, p. 5). It creates associations and parallel power relations, which reinforce the culture of violence and the generation of future criminal organizations (CRUZ, 2011, p. 62-63).

In Paladino (2010, p.406):

> (...) although the State spends more and more with repression, with the police, with the construction of new prisons, with the edition and application of more incriminating laws with convictions, the response of a fairer and safer society has not yet been is present. In this context, what stands out is the legislative inflation, the overload of the courts, the inefficiency of justice and the ineffectiveness of the classic penalties.

REVISTA COLETA
Científica
Year 1, Vol. I, n.1, Jan.-Jul., 20 17
(CC BY 4.0) | ISSN 2763-6496
DOI: 10.5281/zenodo.4737550
ARK: https://n2t.net/ark:/24285/RCC.v1i1.3 2

It is concluded, therefore, that incarceration is costly for the State, does not reintegrate or re-socialize and even turns the prisoner into criminal careers.

In the distinction between retributive and restorative justice: values, procedures, different results and the reconfiguration of the role of the subjects of the process.

Using a well-known constructive thought: “Bridges instead of walls”, we can make a correlation between the current retributive system (wall) and the desired restorative system (bridge). In the latter, there is a greater humanistic focus and not what we see today of a corrupted system where the victim is forgotten, the defendant is transformed into a monster, in a corrupted and out-of-control State that in no way manages to reach the true character resocialization of the sentence, resulting in a collapse of the Brazilian penal system.

It is in this bias that Giamberardino (2015, p. 57) clarifies:

> The direct Criminal Procedural revolves around the real victim of a punishable fact. He must be offered more protection, he must be granted more protection, he must be allowed more right of action and participation. She must be freed from her powerless position in the formalized process, where she must observe, without considerable chances of intervention, the discussion 'about her' cause by others and can still be forcibly interrupted by these others due to a collaboration, in which she – in any case this way – has no regular interest. Instead, the victim must be able to take 'his' cause into hands and enter, even under a certain state supervision, into mediation with the suspect of the act, in which both direct participants in the conflict, in a mutual learning process, can bring up to date, both personally and legally, the problem of this punishable fact.

The proposal to be presented is not, as will be seen, about excluding or displacing the State in favor of the private resolution of conflicts, but about being able to humanize the system aiming at the good of all those involved in the process, bringing a peaceful end to the conflict, in order to reduce criminal recidivism.

The different facets between retributive and restorative justice

Observing the failures of the punitive system, Rolim (2006, p.90) asks:

> And what if, after all, we were facing a broader phenomenon than the simple malfunctioning of a punitive system? Without there, instead of pragmatic reforms or topical improvements, we would be facing the challenge of reordering the very idea of justice 'Criminal Justice'? Would it be possible to imagine a justice that exists able to face the modern phenomenon of criminality and that, at the same time, produces the integration of the perpetrators into society? Would it be possible to imagine a justice that, acting beyond what is conventionally called of 'restorative practice', did it bring more satisfaction to victims and communities? Proponents of Restorative Justice believe so.

REVISTA COLETA
Científica
Year 1, Vol. I, n.1, Jan.-Jul., 20 17
(CC BY 4.0) | ISSN 2763-6496
DOI: 10.5281/zenodo.4737550
ARK: https://n2t.net/ark:/24285/RCC.v1i1.3 2

Using this thought as a starting point, we have that the Restorative Justice model presents itself as a contrasting paradigm to Criminal Justice, indicating solutions to its main flaws and inefficiency, changing the focuses and solutions, as will be indicated.

At first, it is noted that the criminal procedure is specifically focused on the issue of the accused's guilt and, once established, procedural guarantees and fundamental rights are left aside, resulting in less attention to the outcome of the process, as highlights (Zehr, 2008).

Also, when guilt is determined, the focus is on the past, as an attempt is made to "reconstruct" the criminal fact in question. Thus, it is possible to conclude that the focus is not on the damage caused to the victim, the offender and the community, or on the latter's experience in the occurrence of the crime, as Restorative Justice does, but rather on the violation of the law and the determination of fault.

In contrast, the restorative model focuses its attention on the harmful act, on the harm caused to those involved: victim, offender and community, and on possible solutions to the conflict.

After the establishment of guilt, it moves to the determination of punishment. In the words of Zher (2008, p. 64): "Guilt and punishment are the twin fulcrums of the judicial system. People must suffer because of the suffering they cause. Only through pain will the scores be settled [...] The basic objective of the criminal procedure is the determination of guilt, and once established, the administration of pain".

In this way, it is stated that the retributive system only seeks to repay the evil done, without bringing any benefit to the community, or to the offender and, mainly, to the victim. In this sense, Zher (2008, p. 64) asserts that the institutions and methods of law are integral parts of the cycle of violence rather than solutions for it.

Restorative Justice, in turn, expresses a form of justice centered on reparation, representing a true break with the principles of retributive justice, which is based only on punitive sanctions.

In addition, the Criminal Procedure distances the parties actually involved in the conflict. The manifestation of the accused boils down only to his interrogation regarding the criminal facts, without any inquiry as to the reasons that led him to commit the crime, as well as the consequences that this brought in his life.

Victims are replaced by State authority, with minimal participation in the criminal process, acting as a witness or through a prosecution assistant, in crimes prosecuted through unconditional public criminal action. Furthermore, legitimacy is granted to victims in crimes prosecuted through unconditional public criminal action. Furthermore, legitimacy is granted to victims in crimes that are prosecuted through private criminal action and public criminal action conditioned to the representation.

In opposition, Restorative Justice brings the parties to the center of the process, offering them autonomy to expose their feelings and needs, as well as the possibility of listening to the other party, in a balanced discourse.

Possibly the biggest difference between the two models of justice is the definition of crime adopted by each of them that the conventional criminal justice system sees crime primarily as a violation of state interests. In contrast, restorative

REVISTA COLETA
Científica
Year 1, Vol. I, n.1, Jan.-Jul., 20 17
(CC BY 4.0) | ISSN 2763-6496
DOI: 10.5281/zenodo.4737550
ARK: https://n2t.net/ark:/24285/RCC.v1i1.3 2

justice goes further, offering decisions on how best to serve those most affected by crime, prioritizing their interests.

Restorative Justice proposes to reconstruct the notion of crime, specifying that it is more than a transgression of a legal norm or a violation against the State; it is also an event that causes damage and consequences. Zehr (2008, p. 171) defines the lens of retributive justice as: “Crime is a violation against the state, defined by disobedience to the law and guilt. Justice determines guilt and inflicts pain in the context of a dispute between offender and State, governed by norms systematic”.

On the other hand, Zher (2008, p. 171) describes how Restorative Justice sees crime: “Crime is a violation of people and relationships. It creates obligation to correct the mistakes. Justice involves the victim, the offender and the community in seeking solutions that promote reparation, reconciliation and security.

Unlike the alternative adopted, Restorative Justice is based on a non-punitive paradigm, which presents solutions to the inefficiencies of the current Criminal Justice system, changing the focus of the criminal process on the establishment of guilt and punishment for the harmful act, its consequences and its consequences. possible solutions.

Values

Regarding values, it is possible to observe a dichotomy between justices. One aims at unidisciplinarity and the other at multidisciplinarity, in retributive there is a state monopoly of criminal justice and restorative justice is characterized as participatory criminal justice.

In the words of Slakon, Vitto and Pinto (2005, p. 24) redistributive and restorative justice bring specific elements into their definition:

> Legal normative concept of Crime-act against the society represented by the State-Unisdisciplinarity; primacy of interest
> Public (Society, represented by the State, the Centre)- State monopoly of Criminal Justice; Individual guilt facing the past - Stigmatization; Dogmatic Use of Positive Criminal Law; State indifference to the needs of the offender, victim and affected community-disconnection; Mono-cultural and exclusionary; Dissuasion. Realistic concept of Crime - Act that traumatizes the victim, causing damage. Multidisciplinary; primacy of people's interests
> Stakeholders and Community - Participatory Criminal Justice; Responsibility, for restoration, in a social dimension; Critical and Alternative Use of Law; Commitment to inclusion and Social Justice generating connections; Culturally flexible (respect for difference, tolerance); Persuasion.

It is noticed that in relation to values, Restorative Justice has its basis based on the valuation of the protection of the victim and not only on the condemnation of the accused, as it happens today, thus giving a humanistic focus on its values.

2.1.1 Procedures

In relation to the procedural part, there is a reduction in bureaucracy that establishes itself in the sense of demanding a solemn and public ritual, making room

REVISTA COLETA
Científica
Year 1, Vol. I, n.1, Jan.-Jul., 20 17
(CC BY 4.0) | ISSN 2763-6496
DOI: 10.5281/zenodo.4737550
ARK: https://n2t.net/ark:/24285/RCC.v1i1.3 2

for a dialogical action in communities with the resumption of value in the subjects involved in the legitimate.

In this sense, Slakon, Vitto and Pinto (2005, p. 25) point out the procedural difference:

> Retributive Justice: Solemn and Public Ritual; Unavailability of Criminal Action; Contentious and contradictory; Language, norms and formal and complex-guarantee procedures; Main actors - authorities (representative of the State) and legal professionals; Decision-making process in charge of authority (Police, Delegate, Prosecutor, Judge and legal professionals) - Unidimensionality.
> Restorative Justice: Community, with the people involved; Opportunity Principle; Voluntary and collaborative; Informal procedure with reliability; Main authors - authorities (representing the State) and legal professionals; Decision-making process shared with the people involved (victim, offender and community) - Multidimensionality.

It is noted that the procedural part of the Restorative Process is governed by the principle of opportunity, so the procedure is informal with confidentiality. There is thus a sharing with the people involved (victim, offender and community). Unlike Retributive Justice with its Unavailability of Criminal Action bringing a great formalism already outdated.

Results

The restorative process can achieve several results. The agreement may include the aggressor's referral to damage repair programs, restitution to victims and community services, in order to meet the individual and collective needs and responsibilities of those involved, and to achieve the reintegration of the victim and the aggressor. In the case of serious offenses these measures can be combined with others.

In this sense, Slakmon, Vitto and Pinto (2005, p. 25 and 26):

> Retributive Justice: General and Special Prevention – Focus on the offender to intimidate and punish; Penalization- Penalties depriving liberty and restricting rights, fine Stigmatization and Discrimination; Criminal Protection of Assets and Interests, with the Punishment of Society; Unreasonable and disproportionate sentences in an inhumane, cruel, degrading and criminogenic prison system – or – ineffective alternative sentences (basic basket); Victim and Offender isolated, helpless and disintegrated. Secondary Resocialization; Social Peace with Tension.
> Restorative Justice: Addressing Crime and its Consequences – Focus on relationships between parties, to restore; Apology, Reparation, restitution, provision of community services, reparation of moral trauma and emotional damage - Restoration and Inclusion; Spontaneous liability on the part of the offender results; Proportionality and Reasonability of the Obligations Assumed in the Restorative Agreement; Reinstatement of Priority Offender and Victim; Social Peace with Dignity.

With this, we observe that one of the main points of a restorative process is the participation of those interested, those affected, the community, the victim and the

REVISTA COLETA
Científica
Year 1, Vol. I, n.1, Jan.-Jul., 20 17
(CC BY 4.0) | ISSN 2763-6496
DOI: 10.5281/zenodo.4737550
ARK: https://n2t.net/ark:/24285/RCC.v1i1.3 2

aggressor in the development of the process. This makes the solution found in the restorative much more effective since it was built with the participation of all those involved and meets their needs.

Effects for victim

The effects are seen as a major difference factor, since part of the analysis of the treatment given to the victim is that he is no longer just someone who has suffered an unfair aggression and becomes the important point in the restorative process. For the purpose of better elucidation, Slakmon, Vitto and Pinto (2005, p. 26) say:

> Retributive Justice: Little or no consideration, occupying a peripheral and alienated place in the process. He has no participation, no protection, he hardly knows what is going on; Virtually no psychological, social, economic or legal assistance from the State; Frustration and Resentment with the system. Restorative Justice: It occupies the center of the process, with a role and an active voice. Participates and has control over what happens; Receives assistance, affection, restitution of material losses and reparation; It has positive gains. The individual and collective needs of the victim are met and community.

From the perspective of Restorative Justice, the victim is placed at the center of the process, providing positive gains, meeting their needs and restoring the trauma suffered, thus removing the negative effects of retribution.

For the Offender

The offender, in restorative justice, starts to have a humanitarian focus, ceasing to be someone willing to suffer only, a sanction, to participate in a restoration, thus really being aware of his actions, thereby reducing a possible recurrence. The difference between the effects of each justice is pointed out by Slakmon, Vitto and Pinto (2005, p. 27):

> Retributive Justice: Offender considered in his faults and his bad training; Rarely has participation; Communicates with the system by the lawyer; Is discouraged and even inhibited to dialogue with the victim; Is uninformed and alienated about procedural facts; It becomes untouchable; No needs considered.
>
> Restorative Justice: Offender seen in his potential to be responsible for the damages and consequences of the law; Participate actively and directly; Interacts with the victim and the community; He has the opportunity to apologize by becoming aware of the victim's trauma; Is informed about the facts of the restorative process and contributes to the decision; Is aware of the consequences of the fact for the victim and the community; He is accessible if he is involved in the process; Your needs are met.

After the analysis carried out, it is noted that for the offender, Restorative Justice is effectively positive and beneficial in terms of the care directed at him, allowing him to participate and get involved in the process, from the identification of his

REVISTA COLETA
Científica
Year 1, Vol. I, n.1, Jan.-Jul., 20 17
(CC BY 4.0) | ISSN 2763-6496
DOI: 10.5281/zenodo.4737550
ARK: https://n2t.net/ark:/24285/RCC.v1i1.3 2

guilt to the opportunity to apologize, take a stand and even justify what motivated him to commit the criminal act, it is still possible to become aware of the consequences of his acts by supplying thus the offender's needs. What does not happen as Retributive Justice, which focuses on dogmatically punishing, evidencing disadvantages for the offender.

Factors that enhance and minimize the implementation of restorative justice in Brazil: a brief survey.

Restorative Justice is applied in several countries around the world. However, it is necessary to have a critical view at the time of its transport to the Brazilian national reality, as each society has its own characteristics. Therefore, this form of justice must be adapted to the national means and forms, because if these elements are not taken into account, there is a tendency to create a system that looks good on paper and is applied null. In the words of (Slakmon, Vitto & Pinto, 2005):

> In this work, we focus on the legal compatibility of restorative justice with the Brazilian Criminal Justice system, and we express some thoughts about its possible implementation in Brazil. We want to emphasize that such compatibility is not only with our Constitution, our legislation and our judicial practices, but also with the sense of justice and the diverse culture of our people. That is why we cannot copy, naively and alienated, foreign models, mainly from countries whose legal tradition differs from ours, as is the case of countries that adopt the common law. We argue that restorative justice is legally sustainable and compatible with our legal system.

With this brief explanation, the possibility and need for the full implementation of restorative justice in Brazil can be seen, which Slakmon, Vitto and Pinto (2015, p. 29) clarify:

> The restorative model is perfectly compatible with the Brazilian legal system, despite the principle of unavailability of public criminal action still prevailing in our criminal procedural law.
> This principle, however, became more flexible with the possibility of the conditional suspension of the process and the criminal transaction, with Law 9099/95. Also in infractions committed by adolescents, with the institute of remission, there is considerable discretion on the part of the Public Prosecutor's Office.
> In common law countries, the system is more receptive to restorative diversion, mainly due to the so-called discretion of the prosecutor and the availability of criminal action (prosecutorial discretion), according to the principle of opportunity. In that system, there is, therefore, a great opening for the referral of cases to alternative, more autonomous programs, unlike ours, which is more restrictive.
> But with the innovations of the 1988 Constitution and the advent, mainly, of Law 9.099/95, a small window opens in the legal system of Brazil, at the principle of opportunity, allowing a certain systemic accommodation of the restorative model in our country, even without legislative change.

REVISTA COLETA
Científica
Year 1, Vol. I, n.1, Jan.-Jul., 20 17
(CC BY 4.0) | ISSN 2763-6496
DOI: 10.5281/zenodo.4737550
ARK: https://n2t.net/ark:/24285/RCC.v1i1.3 2

In this bias, with the permissive of the Magna Carta, the bill 7.006/2006 was created that suggests the implementation of Restorative Justice in Brazil. This bill would bring elements to the necessary penal reform and lay the foundations for the effective application of this approach throughout the national territory. Thus, with its enactment, it would have the long-awaited reforming advance in the Brazilian Penal System.

However, after the legislative process, the referred project was considered inapplicable to the Brazilian social context due to a "society's yearning" for the hardening of criminal legislation. Therefore, the non-implementation of the Project was recorded in the final report, which, in turn, was definitively sent to the archive. Thus, there was no direct and immediate insertion of Restorative Justice in the national legal system, for the installation of these essential reforms to the criminal system, in spite of the fact that there are already some laws in force bringing traces of Restorative Justice in their wake.

One can cite as an example article 98, item I, of the Federal Constitution, where it is stated that the Special Courts will be provided by judges who would be those entrusted with the jurisdictional power and with competence to judge crimes submitted to their jurisdiction and judges and lay people, which would be the meeting of the former with lawyers with more than five years of training. At this point, it is proposed the preparation and insertion of these lay judges as facilitators of dialogue, using the process as a foundation in Restorative Justice.

Such lay judges, entering the sphere of facilitators, would not have the competence to judge the fact, but would have the function of promoting the restorative approach. In the same way, it exposes about the conciliators, it is recommended the use of law graduates, who could have the necessary preparation to proceed with the restorative dialogue.

It is proposed that the action be carried out in different spheres: an action by the judiciary in the face of criminal action, acting in the criminal prosecution and another action front, which occurred in a second stage through the facilitators in the Restorative Justice centers.

Subsequently, article 98 of the Federal Constitution declares that lay judges and lay judges are competent for conciliation and transaction. Conciliation and transaction make room for the application of Restorative Justice, and these institutes can be managed based on the new approach. Conciliation would aim not only at agreement, but at restoration through dialogue, in which the transaction would bring about the agreement itself, covering the needs of those involved in the rights and also of the community.

It should be noted, therefore, that there are already some compatibility between Restorative Justice and current criminal legislation, such as Law No. 9,099/2005, which deals with Special Civil and Criminal Courts and foresees alternative penalties to closure with new sanctions. However, the alternative penalties are limited to the payment of food baskets, or equivalent amounts, donated by the offender to charitable institutions in the region of the Court.

REVISTA COLETA
Científica
Year 1, Vol. I, n.1, Jan.-Jul., 20 17
(CC BY 4.0) | ISSN 2763-6496
DOI: 10.5281/zenodo.4737550
ARK: https://n2t.net/ark:/24285/RCC.v1i1.3 2

It should be noted that the restorative process is also possible in crimes against the elderly, as observed in article 94 of Law 10741/2003, because the procedure of Law 9099/1995 is applied to crimes whose penalties do not exceed four years old.

In this bias, SICA (2007, p. 89) declares:

> In this way, the restorative justice program can be perfectly compatible in Brazil, being able to use community spaces or even integrated citizenship centers, places where restorative justice centers would be installed, being composed of a coordination and a multidisciplinary council, and dirty structure one would understand restorative chambers where the parties and mediators would group together, with due administrative support and safety.
> Therefore, it is possible to use existing structures to be used as restorative spaces, but provided that the support of government agencies, companies and non-governmental organizations, operating in a network and directing victims and offenders to programs in order to reach an agreement restorative.

In Brazil Restorative Justice has only been implemented in the judicial system on a small scale, which absolutely does not suggest that it will not be able to enter the national legal system very soon. Despite the positivism and the little flexibility of the procedures, it is possible to adapt them to the judicial routine through the acceptance of the parties, even with the moderate removal of the criminal action.

Restorative Justice aims at social restoration; however, its foundations bring several beneficial consequences for society through secondary reflections. It is not intended to reduce recidivism. However, the offender, when faced with restorative methods, often understands that his attitude causes greater damage than the simple crime, and that such damage occurs as a result of his act. So that, understanding the extent of the crime, assuming responsibility for the fact and having the perspective of the future addressed, the offender can, through dialogue with the victim, seek to reestablish the affected order and achieve social balance. And yet, in the face of such awareness, there is a tendency not to relapse.

It is faced with the often unimaginable extent and burden of the offender, who may not understand the depth of the consequences of his actions and, through Restorative Justice, ends up redeeming himself and changing his way of acting.

With regard to the judiciary, there is an ease in the number of processes, since with the beginning of the restorative procedure, it will remain suspended, and may even be archived during the restorative acts and, with its success, total extinction of the deed.

Paul Mccold and Ted Wachtel (2003, p. 3) argue that:

> The restorative justice system aims not only to reduce crime, but also to reduce the impact of crime on citizens. Restorative justice's ability to fulfill these emotional and relationship needs is key to achieving and maintaining a healthy civil society.

There is also the possibility of exchanging custodial sentences for sentences that can be replaced by others. Avoiding the “contamination” of the individual with the prison reality, since this contact fatally deteriorates the sociability of the offender, instead of re-educating him to return to life in society.

REVISTA COLETA
Científica
Year 1, Vol. I, n.1, Jan.-Jul., 20 17
(CC BY 4.0) | ISSN 2763-6496
DOI: 10.5281/zenodo.4737550
ARK: https://n2t.net/ark:/24285/RCC.v1i1.3 2

The monetary expenditure presented by Restorative Justice can be equivalent to that represented by Retributive Justice. However, Restorative Justice has better effects on social pacification, reduction of recidivism, acceptability of decisions and participatory citizenship.

Tahinah Albuquerque Martins (2003) also demonstrates some levels of satisfaction regarding the use of Restorative Justice, stating that:

> Excellent results have been noted in the satisfaction index of victims and offenders in relation to this process. Victim satisfaction with the outcome of mediation reaches 90% in the US and 84% in England. The offender, on the other hand, says he is satisfied with the result in 100% of English mediations, against 91% of American ones. It is also observed that the fear of the victim, after mediation, regarding revictimization by the offender, decreased by about 50% in both countries, in relation to victims who did not participate in mediation. In the USA, only 18% of adolescent offenders who participated in mediation programs have committed new offenses. On the other hand, those who did not participate in the programs reached the rate of 27%.

Such data are extremely relevant and show that the results are very positive, emphasizing the possibility of implementing Restorative Justice in Brazil, as its implementation will bring enormous benefits to the Brazilian penal system, making the community more participatory and confident in the system, acting in a directly in the reduction of criminality and including the satisfaction of the needs of the victim.

The custody hearing: a criminal procedural instrument at the service of restorative justice.

For Mauro Fonseca Andrade and Pablo Rodrigo Alfen (2016, pp. 15 to 48) the possibility of using the custody hearing as the starting instrument in the restorative process to achieve a humanization in the criminal procedural system, thus bringing a significant advance to the current archaic system, in dealing with those involved in apparent conflicts in the current legal system.

What is meant by 'custodial hearing'

The custody hearing is an institute foreseen for decades in international texts protecting human rights, there is a whole culture already formed around the custody hearing, not only coming from the international organizations issuing those texts, but also from the International Courts responsible for the interpretation and applicability of treaties and conventions, when signed by the countries that propose to be signatories to them.

This institute starts from the basic premise, which is the concern for the person who had his freedom restricted in some way by a crime committed.

With this, the custody hearing consists of ensuring that, within 24 hours, the prisoner is presented and interviewed by a judge, in a hearing in which the manifestations of the Public Ministry, the prisoner's lawyer or the Public Defender's Office will also be heard.

REVISTA COLETA
Científica
Year 1, Vol. I, n.1, Jan.-Jul., 20 17
(CC BY 4.0) | ISSN 2763-6496
DOI: 10.5281/zenodo.4737550
ARK: https://n2t.net/ark:/24285/RCC.v1i1.3 2

During the hearing, the arrest will be analyzed from the perspective of legality, the need and suitability of continuing the imprisonment or the possible possibility of granting freedom, with or without the imposition of other precautionary measures, in addition to possible occurrences of torture or ill-treatment. dealings, among other irregularities. (Andrade & Alfen, 2016).

custody hearing in Brazil : its way to recognition legal

In Brazil until 2011, little or nothing was known about the Audiencia de Custodia institute. Although Brazil had already ratified the Pact of San José in Costa Rica and the Pact of Civil and Political Rights in 1992, and the legislation already contemplated something similar in laws of a special nature prior to that year, the dedication of the doctrine and contribution of the Jurisprudence was practically nil for a better knowledge of that institute.

Perhaps for this reason, many disagreements began to be committed by groups in favor and against the implementation of the custody hearing in Brazil, sometimes giving it a meaning that it does not have, sometimes invoking inconsistent excuses for its non-realization. For this reason, it was necessary to carry out a study on how that institute is treated internationally, especially based on the guidelines adopted by the UN, a huge collection of decisions already handed down by the International Courts of Human Rights Humans.

After this phase – so to speak – of presenting the custody hearing to legal practitioners in Brazil, a new stage in this study is necessary. Now, the attention will be directed to the approach of some themes that are linked to them to be implanted in Brazil, to the reflexes that its realization can produce in other institutes of equally procedural nature and how it can be better used, in order to provide greater celerity to the criminal prosecution as a all.

Notwithstanding PLS n°554, of 2011, was not the first initiative aimed at implementing the custody hearing in Brazil, there is no denying that it was the driving force behind a huge discussion that took over Brazil. This discussion reached such a point that, as the country institutionalized that act for the entire State, the CNJ, in partnership with the São Paulo Court of Justice and the Ministry of Justice, created, in February 2015, a pilot project to its progressive national expansion.

With this pilot project in mind, two institutions holding enormous political power – namely, CNJ and the Ministry of Justice – made it clear that the custody hearing institute would be a reality from which Brazil could not continue to escape. More than that, a very clear message was given to the various institutions against their full incorporation into the national procedural practice, that is, the custody hearing would, in the short or medium period of time, be integrated into the procedural routine of criminal prosecution, as pilot project was intended to observe the operational problems that it could present in this first moment of implantation, and to correct them gradually, aiming at the definitive insertion of that institute in the national scope. In other words, the creation of that pilot project provoked a curious situation and an apparent discomfort with the Legislative Power: the great merit of PLS nº 554, of 2011, was to

REVISTA COLETA
Científica
Year 1, Vol. I, n.1, Jan.-Jul., 20 17
(CC BY 4.0) | ISSN 2763-6496
DOI: 10.5281/zenodo.4737550
ARK: https://n2t.net/ark:/24285/RCC.v1i1.3 2

become dispensable for the beginning of the incorporation of the custody hearing in Brazil .

Even so, it was necessary that certain rules were established so that there was a procedure to be followed, as a way of ensuring respect not only for the judicial presentation of a person arrested or detained, but also for constitutionally provided individual rights and guarantees. That was the reason why the Presidency of the Court of Justice of São Paulo and the Judiciary Office of the same State issued Joint Provision No. 03/2015, taking advantage of several provisions already present in that draft law.

The regulation of the custody hearing through an administrative act was the loophole found for some institutions to attack that institute, precisely because they were the ones that would most strongly feel the impact of its implementation on their work routines and the lack of personnel and structure that has hit them for a long time. The best representation of this attack was the Direct Action of Interconstitutionality filed by ADEPOL (ADI nº 5240), in February 2015, in which the affront of that administrative act to the Federal Constitution was pointed out, under the invocation of four arguments.

First, the custody hearing was created by the provision under attack, which would be the Federal Constitution, since it is only up to the Union to legislate on matters related to procedural law (article 22, item I). This would remain clear, according to the argument presented, due to the absence of an internal law to be regulated by a provision issued by the Judiciary, which would qualify this administrative act as being innovative.

Second, because the ACHR has, according to ADEPOL, constitutional status, it could not have been regulated by an administrative act, but by an ordinary law, as it is proposing in the National Congress with the bills that are being processed in it.

Thirdly, the imposition of conduct on the procedural subjects involved with the custody hearing – read – whether judges, members of the Public Ministry, defenders, Police Chiefs and the arrested or detained subject himself – could only have occurred by legal imposition, and never by administrative act, due to the fact that the Federal Constitution ensures that “no one shall be obliged to do or refrain from doing anything except by virtue of the law” (Article 144, § 6th).

Well then; What caught our attention right from the start was the occurrence of a strategic error made by the Ministry of Justice, in having signed an agreement with a Court that is part of the State Justice. Better explained, if this Ministry was engaged - as, in fact, it was – in the full incorporation of the custody hearing into the practice of criminal prosecution, it could well have signed the same agreement with a Court that is part of the Federal Justice, since it – the Ministry of Justice - would be solely responsible per bear all the costs derived from the lack of structure that could affect the Federal Police. More than that, with the simple edition of an administrative norm, the Ministry of Justice would easily dismiss the argument of disrespect for the separation of powers, because the Federal Police is subordinated to this portfolio. The impression one has is that the Ministry of Justice teamed up with the CNJ and the Judiciary of São Paulo simply to lend its political weight to that pilot project, since a

REVISTA COLETA
Científica
Year 1, Vol. I, n.1, Jan.-Jul., 20 17
(CC BY 4.0) | ISSN 2763-6496
DOI: 10.5281/zenodo.4737550
ARK: https://n2t.net/ark:/24285/RCC.v1i1.3 2

large part of the cost - financial, personnel and structural - that resulted from its execution would be borne by the Executive Branch of that State.

With this, the degree of importance that the definition of the constitutionality, or not, of the custody hearing in the country represented for the Federal Supreme Court, the judgment of ADI 5,240 took place about six months after its filing, an opportunity in which they were rejected all the arguments presented in that action. As a result of this judgment, even the most reticent courts ended up accepting the pilot project of the CNJ, and also issued their administrative regulations on the custody hearing that would be implemented in their territorial circumscriptions.

Mauro Fonseca Andrade and Pablo Rodrigo Alfen (2016, p. 111-114) stipulate that during the execution of the pilot project in all states of the Federation, the Federal Supreme Court granted an injunction in ADPF n° 347, ordering the putting into practice the terms of article 7.5 of the ACHR and article 9.3 of the ICCPR, accelerating its national implementation process. It was then that the need arose for a regulation that, uniformly throughout the national territory, would put that judicial decision into practice, hence Resolution No. 213, of December 15, 2015, of the CNJ.

Procedural

In the procedural case, the Legislative Power turned its attention to the content of article 7.5 of the ACHR and to article 9.3 of the ICCPR, presenting several bills that aimed, among other objectives, to make clear the need to present all person arrested or detained before a judge. The first of them was derived from the movement that took place in the Federal Senate, with the presentation of PLS n° 554, of 2011. The second was the result of action in the Chamber of Deputies, with the presentation of PL n° 7.871/2014. The third, also originating from the Chamber of Deputies, is the PL 470/2015.

What stands out in all these initiatives is that each one presents a different procedure: sometimes the act of presenting the arrested or detained subject involves only he and the judge; sometimes it involves a prisoner, the judge, the Public Prosecutor's Office and the defender; sometimes it is just an optional measure (Bourhis, et al., 1997).

Having all these projects presented, the CNJ's pilot project made the multiplicity of administrative regulations come into force in all the States of the Federation, each one with a different formality to put it into practice. Finally, that same Council, motivated by an injunction issued by the Federal Supreme Court, presented its understanding of the procedure to be followed nationally, derogating the local administrative regulations hitherto in force. Mauro Fonseca Andrade and Pablo Rodrigo Alfen (2016, p. 120)

THE CUSTODY HEARING UNDER THE PRISMA OF JUSTICE RESTORATIVE.

The restorative procedure would be started in parallel with the criminal procedural procedure, walking together so that they can reach a desired end for all those involved in the generated conflict.

Mauro Fonseca Andrade and Pablo Rodrigo Alfen (2016, p. 111-13-) and Edgar Hrycylo Bianchini (2012, p. 137 to 153) bring the idea that the restorative team would

REVISTA COLETA
Científica
Year 1, Vol. I, n.1, Jan.-Jul., 20 17
(CC BY 4.0) | ISSN 2763-6496
DOI: 10.5281/zenodo.4737550
ARK: https://n2t.net/ark:/24285/RCC.v1i1.3 2

be present at the custody hearing itself, a member of the society, and the victim, plus the already mentioned components of the aforementioned hearing, where the restorative process would begin, with an individualized follow-up of the concrete case, this will bring a humanization to the system that will better welcome all those involved in the case, enabling the reinsertion of the offender into society, leading to the victim, the possibility of recovery from the trauma suffered, I try to ease the heavy hand of the State on the Defendant, by allowing the restorative process to be used as a mitigating factor in the course of the criminal procedural process. criminal proceedings, a peaceful resolution being better for the parties than an endless process where no one wins.

Principle of humanity

Undoubtedly, it is seen as one of the most important principles in the field of Human Rights, and one that influences the entire legal system. It is included in Article 1, item III of the Magma Carta Patria, as one of the foundations of the Republic.

With the application of the principle of the dignity of the human person, it is clear that the criminal procedure cannot serve as an instrument for imposing punishment at any cost, but on the contrary, it should be seen as an investigative instrument, developed with faithful observance of due legal process, in several respects, which aims to determine the circumstances in which the determined fact with criminal relevance occurred, with a view to pointing out or not the criminal responsibility of the accused, without include practices that expose man to degrading situations, embarrassment or torture.

Thirty years have passed since the promulgation of the Federal Constitution of 1988 and more than twenty years since the incorporation of the prisoner's right to interview with a judicial authority, immediately after his arrest, it is imperative that the Brazilian State fulfills its duty to guarantee the effectiveness of these commandments and make possible the implementation of an instrument with this objective, so that the commandments of the Pact of San José of Costa Rica are faithfully complied with, under penalty of continuous and unacceptable disrespect for the dignity of people fangs.

Thus, guaranteeing personal contact with the judicial authority, the prisoner will be able to expose his social, family and professional situation, being able, at this moment, to demonstrate that he does justice to the right of provisional release or even to the replacement of precautionary arrest by another less burdensome measure, such as those inserted in the system through Law 12403/2011.

The memorable Minister of the Supreme Federal Court Teori Zavascki, as rapporteur for HC: 113611 RJ-STF, thus declared “The prolonged, abusive and unreasonable duration of the defendant’s precautionary detention, without judgment of the cause, offends the postulate of the dignity of the human person and, as such, constitutes an illegal constraint, even if it involves the attribution of a serious crime”.

In the words of Edgar Hycylo Bianchini (2012, p. 111-113):

REVISTA COLETA
Científica
Year 1, Vol. I, n.1, Jan.-Jul., 20 17
(CC BY 4.0) | ISSN 2763-6496
DOI: 10.5281/zenodo.4737550
ARK: https://n2t.net/ark:/24285/RCC.v1i1.3 2

This principle, studied in the context of Restorative Justice, argues that the punitive power should not apply sanctions that affect human dignity. It is, therefore, a protection against cruel and infamous punishments and a guideline for the improvement of the penal system. For Restorative Justice, the Principle of Humanity comes to model the focus of action and prevent it from deviating from the purpose of Restorative Justice, which is the restoration and resumption of the shaken social balance. This principle is still a shield against financial reductionism, after all, this new approach does not appear as a simple means of exchanging sanctions for some pecuniary value, but for social restoration. It is stressed that if we forget this end we create a mechanism of impunity for the rich. After all, they will have the necessary resources for the "restoration".
It is still through this principle that the Study loses the character of the main afflicted of the law, to fit in a subsidiary position to the real victim - the one who suffered the crime - who starts to have an active role in the criminal dispute. The victim, as the main member of the dispute, is the element that suffers the greatest damage. They receive aggression from different perspectives, so their role needs to be active in recovering and overcoming the fact.
Aggression is an attack on public order in need of repression; however, maintaining order is not an exclusive need, so that the purposes of Criminal Law must be highlighted, instead of remaining embedded in the model of repression.
For Restorative Justice, the Principle of Humanity comes to model the focus of action and prevent it from deviating from the purpose of Restorative Justice, which is the restoration and resumption of the shaken social balance. This principle is still a shield against financial reductionism, after all, this new approach does not appear as a simple means of exchanging sanctions for some pecuniary value, but for social restoration. It is stressed that if we forget this end we will create a mechanism of impunity for the rich. After all, they will have the necessary resources for "restoration".
It is also through this principle that state action is defended in equipping and providing infrastructure for restorative action for the rehabilitation of the condemned, through social integration, responsibility for understanding the evil inflicted.

Principle of intervention minimum

The principle of minimal intervention for Restorative Justice would design the performance of the conventional criminal procedure - deprivation of liberty through incarceration - to the minimum essential for maintaining order. So, when feasible - compliance with the admissibility requirements and the other principles governing Restorative Justice and which will be discussed below - it should be referred to the action of Restorative Justice.

Edgar Hrycylo Bianchini (2012, p. 112-113) says that Criminal Law, through Restorative Justice, should base its action on the *ultima ratio* , that is, the most important goods and the most serious aggressions. That said, less serious aggressions tend to be treated with better results using Restorative Justice.

In this bias, the author Edgar Hrycylo Bianchini (2012, p. 113-114) clarifies that:

REVISTA COLETA
Científica
Year 1, Vol. I, n.1, Jan.-Jul., 20 17
(CC BY 4.0) | ISSN 2763-6496
DOI: 10.5281/zenodo.4737550
ARK: https://n2t.net/ark:/24285/RCC.v1i1.3 2

> This principle takes on the character of expanding the role of Restorative Justice and consequently reducing unnecessary incarceration. César Roberto Bitencourt emphasizes that if other forms of sanctions or other means of social control prove to be sufficient for the protection of this good, its criminalization will be inadequate and unnecessary. If civil or administrative measures are sufficient for the re-establishment of the violated legal order, these are the ones that must be used and not the ones criminal.

Adequacy Principle Social

This principle of social adequacy represents the molding of the penal system to the social values considered historically relevant and suitable.
In the words of Edgar Hrycylo Bianchini (2012, p. 114-115):

> This principle is one of the pillars for implementing Restorative Justice. So, in occurrence in a fact what if frame in a type penal, this It is, fulfill the requirements of the conduct, result, causal link and typicality, illegality and culpability, the need and possibility of referring the fact to Restorative Justice can be verified. Such criminal fact must be analyzed by the authority and verified if the requirements for the shipment to the approach have been fulfilled, as well as it is essential to ask the interested parties about balance in the relationship.

For Edgar Hrycylo Bianchini (2012, p. 116) society requires harmony in social connections and order, when there is a crime, this stability is shaken, leaving citizens helpless. The State, as holder of punitive power, has the role of restoring social order through the Penal System, so that the good is protected and the balance can be resumed. Whenever there is a less onerous form of response to crime, however adequate for the purposes of Criminal Law, with better results and that brings a balance in relations, this approach should be implemented.

Principle of proportionality and reasonableness

Proportionality in criminal matters is a fundamental element for equating the criminal act with the penalty that will be applied. Likewise, when concluding a restorative agreement in Restorative Justice, it is necessary to pay attention to the fact and the objective, seeking to reach a parameter of “sanction” consistent with all parties.

We will exemplify as a crime of a clock: a simple theft that has as penalty the resolution of one to four years. In this crime, it would be completely disproportionate to enter into a “restorative” agreement in which the offender would have to render services to the victim's community within a period of twenty years. Such a dispare agreement represents the exact attention that should guide the restorative approach. In the case in question, there would be almost a slavery agreement if we compare the value of the good to that of the provision of service. After all, the objective of the State is to achieve the restoration of balance with maximum efficiency and with the least possible suffering for the citizens. members.

In the work of Edgar Hrycylo Bianchini (2012, p. 116-117):

REVISTA COLETA
Científica
Year 1, Vol. I, n.1, Jan.-Jul., 20 17
(CC BY 4.0) | ISSN 2763-6496
DOI: 10.5281/zenodo.4737550
ARK: https://n2t.net/ark:/24285/RCC.v1i1.3 2

> The principle of reasonableness was developed by the US Supreme Court and means “that which has the ability to achieve the objectives it proposes, without, however, representing any excess”. In this way, the principles of proportionality and reasonableness are not confused: reasonableness represents a controlling force to proportionality; It is through this principle that the adage “an eye for an eye, a tooth for a tooth”, or the law of Talion.
> Such reasonableness-proportionality also does not represent an identity of solutions, as it is up to those involved to negotiate the agreement and discuss the damages and consequences. It is not a matter of proportionality in the sense of equality of the “sanction”, as there are subjective elements that cannot be equated. After all, each human being has a reaction to the crime and this generates differentiating elements for the agreement.

Such reasonableness - proportionality also does not represent an identity of solutions, as it is up to those involved to negotiate the agreement and discuss the damages and consequences. It is not a question of proportionality in the sense of equality of the “sanction”, as there are subjective elements that cannot be equated. After all, every human being has a reaction to a crime and this generates differentiating elements for the agreement. Edgar Hrycylo Bianchini (2012, p. 118-119)

The principle of *due process of law* : the Custody Hearing as a guarantee.

The Federal Constitution provides, in article 5, item LIV, that "no one shall be deprived of liberty or of their property without due process of law", giving life to the principle " *due process of law"* with immediate reach both in relation to the legal process and in civil proceedings. From its postulates arises the prohibition of admitting illegal evidence in the process and the very idea of contradictory and ample defense.

The Principle of due process of law also incorporates the idea of "due legal procedure" since it is in its body that it is possible for the defendant to deduce in a more or less extensive way his full defense and his contradictory, which is why, if there is a specific procedure for the type of criminal conduct imputed to the accused, non-compliance may constitute an incurable vice of the judge's principle natural (Dixon, 1994).

Regarding the custody hearing, as it is not regulated and its regulation stems mainly from the Pact of San José, Costa Rica and the International Covenant on Civil and Political Rights, which do not provide for a specific procedure for its realization, I believe that a once the fundamental guarantees of the parties and, particularly, of the collected party are observed, there will be no direct affront to the principle of Due Process of Law. However, the standardization of the procedure, at the national level, via amendment of the Code of Criminal Procedure, is necessary for the definitive introduction of the institute in the national legal system. Mauro Fonseca Andrade and Pablo Rodrigo Alfen (2016, p. 150)

In the words of Daniel Amorim Assumpção Neves (2016, p. 257 and 258):

REVISTA COLETA
Científica
Year 1, Vol. I, n.1, Jan.-Jul., 20 17
(CC BY 4.0) | ISSN 2763-6496
DOI: 10.5281/zenodo.4737550
ARK: https://n2t.net/ark:/24285/RCC.v1i1.3 2

It is common ground that due process of law works as a supra principle, a basic principle, guiding all others that must be observed in the process. In addition to the procedural aspect, due process of law is also currently applied as a limiting factor of the Public Administration's power to legislate, as well as to guarantee respect for fundamental rights in legal relationships. private.
As this is a basic principle, as an indeterminate concept, it would be enough for the constituent legislator, with regard to procedural principles, to limit itself to providing for due legal process, that in practice the values essential to the ideal society of fairness would provide sufficient elements for the judge in the concrete case to perceive other principles derived from the due process of law. This was not, however, the option of national law, which, in addition to the provision of the divided legal process, contains provision for several other principles that currently derive from it, such as contradictory, the motivation of decisions, publicity, isonomy, etc. The option should be praised due to the evident difficulty of concretely defining the meaning and scope of the principle of due process of law, but it should be noted that, despite the fact that art. closing, the indeterminate amplitude allows the conclusion that even non-typified requirements can be associated with the ideal of due process cool.
Currently, the principle of due process of law is analyzed from a perspective, speaking of substantive due process (*substantive due process*) and due formal legal process (*procedural due process*). In a substantial sense, due process of law concerns the field of elaboration and interpretation of legal norms, avoiding abusive and unreasonable legislative activity and dictating a reasonable interpretation regarding the concrete application of legal norms. It is a field for applying the principles - or as you prefer part of the doctrine, the rules - of reasonableness and proportionality, always functioning as a control of the arbitrariness of the Power Public.

Conclusion

Despite the need to reform the national Penal System and the creation of new effective public policies on crime, it is observed that, throughout history, Criminal Law has always leaned towards the humanization of sanctions. In this regard, in recent decades, several studies and experiences have been undertaken on criminality, seeking to develop more effective and less severe approaches and solutions to crime. In this context, Restorative Justice emerged as a result of new social aspirations not covered by the criminal system.

Restorative Justice, as a new branch of the retributive system, began to develop a new approach to crime, creating new alternatives for dialogue between the entities directly involved with the crime and, also, enabling direct action by “unrelated” characters from the technical world. legal. Such individuals enter the approach and start to have a greater involvement with the victim, with the delinquent and with the social body.

The victim, who until then was segregated from the conventional system and left in a position of simple witness or spectator of the process, starts to have a decisive role in the restoration, which also derives from his performance.

In general, the victim in the standard jurisdiction system does not envisage participatory justice, where there is no consideration for his opinion. The victim does not have the opportunity to dialogue with the offender and help in determining a sanction for the offender, which could be more effective and more humane. Restorative

REVISTA COLETA
Científica
Year 1, Vol. I, n.1, Jan.-Jul., 20 17
(CC BY 4.0) | ISSN 2763-6496
DOI: 10.5281/zenodo.4737550
ARK: https://n2t.net/ark:/24285/RCC.v1i1.3 2

Justice offers victims the possibility of meeting their needs through a new criminal process, achieving a more personal and human.

In turn, the community starts to play a decisive role by verifying the real penal response in a direct and effective way. The performance of the social body is also close, and must work to help restore social balance, incorporating dignified solutions to those involved. It encompasses, therefore, a strengthening of social bonds that help in the reduction of conflicts and in the informal social control of the crime.

As a result, given this "informal" control exercised by the State in its formal scope of action, social bonds are solidified, bringing better results in crime control, reducing recidivism rates. Consequently, the State's expenses with the direct control of crime, carried out by means of police officers in judicial action and movement, are reduced, in addition to the reduction of the incarceration.

Therefore, with such a reduction, such funds can be reverted to other forms of more humanized social controls.

In this way, when structuring Restorative Justice through conceptualization, determination of its legal nature and extraction of the principles that govern its action, there are mechanisms that can solidly help to develop this approach in the context of national.

Regarding the Custody Hearing, it is already in force in Brazil and its use as an instrument of Restorative Justice would be fully appropriate, thus ensuring a humanized process from the beginning.

Through such structuring, it is understood that the current legislation is directly able to apply this approach to crime, with procedural adequacy being enough for a more humanized criminal action to exist around the national Penal System.

References

Andrade, M. F & Alfen, PR (2016). *Custody Hearing in the Brazilian Criminal Procedure* **.** 2nd edition. Porto Alegre: Lawyer's Bookshop, 2016.

Bourhis, RY, Moise, LC, Perreault, S., & Senecal, S. (1997). Towards an interactive acculturation model: A social psychological approach. *International Journal of Psychology* , *32* (6), 369–386. https://doi.org/10.1080/002075997400629

Brazil. (1992). Decree Law nº 592. *International Acts* . International Covenant on Civil and Political Rights. Promulgation. Available: < http://www.planalto.gov.br/ccivil_03/decreto/1990-1994/d0592.htm> Accessed on October 15, 2017.

Cirino, JS (2005). *30 years of watching and punishing* **.** Paper presented at the 11th IBCCRIM international seminar (October 4-7, 2005). São Paulo, 2005.

Comparato, FK (2003). *The historical affirmation of Human Rights* **.** Sao Paulo: Saraiva.

REVISTA COLETA
Científica
Year 1, Vol. I, n.1, Jan.-Jul., 20 17
(CC BY 4.0) | ISSN 2763-6496
DOI: 10.5281/zenodo.4737550
ARK: https://n2t.net/ark:/24285/RCC.v1i1.3 2

Cruz, DS (2011). *Crime Studies* **:** The Chicago School of Sociology. Vitória: Jones dos Santos Neves Institute, 2011.

Dixon, WJ (1994). Democracy and the peaceful settlement of international conflict. *American Political Science Review* , *88* (1), 14–32. https://doi.org/10.2307/2944879

Fauconnier, J., Bénézech, M., Hitier, F., & Le Bihan, P. (2015). L'intime conviction du juge des libertés et de la détention dans les soins psychiatriques sans consentement. *Annales Medico-psychologiques, revue psychiatrique* , *173* (7), 627–628. https://doi.org/10.1016/j.amp.2015.07.009

Fearon, JD (1994). Domestic political audiences and the escalation of international disputes. *American Political Science Review* , *88* (3), 577–592. https://doi.org/10.2307/2944796

Fleury-Steiner, RE, Miller, SL, Maloney, S., & Bonistall Postel, E. (2016). “No contact, except”: Visitation decisions in protection orders for intimate partner abuse. *Feminist Criminology* , *11* (1), 3–22. https://doi.org/10.1177/1557085114554259

Genevois, M. (1992). *Brazilian Civil Procedural Law* **.** 7th edition. Sao Paulo: Saraiva.

Giamberardino, AR (2015). *Criticism of punishment and restorative justice* **:** Censorship beyond punishment. Florianópolis: Emporium of Law.

Gilsen, John. (2003). *Historical Introduction to Law* **.** 4th edition. Lisbon. Calouste Guilbenkian Foundation.

Habermas, J. (2002). *The inclusion of the other* **:** Studies in political theory. Sao Paulo: Loyola.

Karam, ML (2004). *For the abolition of the penal system* **.** In: PASSETTI, Edson (org). Free course on penal abolition. Rio de Janeiro: Revan.

Lake, DA (1992). Powerful pacifists: Democratic states and war. *American Political Science Review* , *86* (1), 24–37. https://doi.org/10.2307/1964013

Maoz, Z., & Russett, B. (1993). Normative and structural causes of democratic peace, 1946–1986. *American Political Science Review* , *87* (3), 624–638. https://doi.org/10.2307/2938740

Mccold, P., & Wachtel, T. (2003). *In search of a paradigm:* A theory of restorative justice. Paper presented at the XIII World Congress of Criminology on August 10. Rio de Janeiro: International Institute for Retroactive Practices, 2003.

REVISTA COLETA
Científica
Year 1, Vol. I, n.1, Jan.-Jul., 20 17
(CC BY 4.0) | ISSN 2763-6496
DOI: 10.5281/zenodo.4737550
ARK: https://n2t.net/ark:/24285/RCC.v1i1.3 2

Martins, TA (2007). Implementation of restorative justice through special criminal courts. *Magazine of Law Students of the University of Brasilia* , *6* . https://periodicos.unb.br/index.php/redunb/article/view/20428

Mirabete, JF (2005). *Criminal Law Handbook* **.** General part. 22nd edition. Sao Paulo: Atlas.

Oliveira. A. (2000). *Human Rights Course* **.** Rio de Janeiro: Forense.

Paladino, C. de F. (2017). Minimalism, abolitionism or guaranteeism: what is the solution to problems in the criminal sphere?. *Law School Notebooks* , *2* (13).

Paz, SS & Paz, SM (2005). *Restorative Justice:* Collection of articles **.** Brasilia: Ministry of Justice and United Nations Development Program - UNDP.

Queiroz, PS (2007). *Why I support a minimum criminal law* **.** December 5, 2007. Available at: <http://pauloqueiroz.net/por-que-defendo-um-direito-penal-mínimo > Accessed on November 13, 2017.

Ramos, MF (2017). SGHC Accounting Fees. *Revista Coleta Científica* , *1* (1), 01–16.

Slakmon, C., Vitto, RPC & Pinto, RSG (2005). *Restorative Justice* **.** Collection of articles **.** Brasilia: Ministry of Justice and United Nations Development Program-UNDP, 2005.

Sica, L. (2007). *Restorative justice and criminal mediation:* The New Model of Criminal Justice and Crime Management. Rio de Janeiro: Lumen Juris. 2007.

Teles, NM (2004). *Criminal Law:* General part **:** articles 1 to 120.volume 1. São Paulo: Atlas.

Zaffaroni . ER & Pierangeli, JH *Handbook of Criminal Law* **.** General part 3. 3rd edition. São Paulo: Magazine of the courts.

Zehr, H. (2005). *Changing Lenses:* A new focus for crime and justice Scottdale: HeraldPress, 2005.