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Facing problems of Restorative Justice in Portugal and Brazil: learning with/from the fields

Cómo hacer frente a los problemas de Justicia Restaurativa en Portugal y Brasil: aprender con/desde la práctica

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Abstract

Currently restorative justice for adults enforced by the Law n.º 21/2007, of 12 June, faces difficulties in Portugal and has a limited application (or no application at all). Rather the opposite tendency exists in Brazil: despite the absence of legal regulation, the restorative movement seems to be expanding. Starting from this difference, this article aims to uncover the institutionalization processes of restorative justice, arguing that it can be useful to (re)think the model adopted by those countries and learning from their lessons. On the one hand, the article reflects on several issues that can be associated with the failure of practices in Portugal, such as: a) the restrictive legal framework; b) the protagonists and the roles they played during the creation of these *top-down* models. On the other hand, it is important to understand the hegemonic model adopted in Brazil in order to identify the risks to the principles and values that restorative practices face, such as their cooptation by political interests that do not put victims, offenders and community at the center of restorative justice.

Keywords

Institutionalization, victim-offender mediation, peacemaking circles, Portugal, Brasil.

Resumen

La justicia restaurativa para adultos aplicada por la Ley n.º 21/2007, de 12 de junio, tiene que hacer frente a dificultades en Portugal y tiene una aplicación limitada (o ninguna). En el escenario opuesto, a pesar de la ausencia de regulación legal, el movimiento restaurativo parece estar expandiéndose en Brasil, según lo observado en la investigación de campo. Considerando eso, el artículo quiere descubrir los procesos de institucionalización de la justicia restaurativa, presentando la hipótesis que puede ser útil para (re) pensar el modelo adoptado por esos países y aprender



con/desde sus lecciones. Para hacerlo, será necesario reflexionar sobre varios temas que pueden estar asociados con el fracaso de las prácticas en Portugal, tales como: a) el marco legal restrictivo; b) los protagonistas y qué papel desempeñaron durante la creación de estos sistemas de arriba hacia abajo. Por otro lado, es importante comprender el modelo hegemónico adoptado en Brasil para identificar los riesgos para los principios y valores que enfrentaron las prácticas restaurativas, como su cooptación por intereses políticos que no ponen a las víctimas, a los delincuentes y a la comunidad como protagonistas de las prácticas restaurativas.

Palabras clave

Institucionalización, mediación penal, Portugal, Brasil.

Introduction

The concept of restorative justice (RJ) is complex and has a lot of possible definitions – being an “unfinished product”¹ Walgrave (2008: 11) or an open concept that is still in a constant transformation (Achutti, 2014: 57). It is important to realize, as Pali explained (2016: 50), that the adoption of one concept depends on “[...] the timescape of the work published, on geopolitical or ideological standpoint or affiliations of the author, or the particular program and context being studied”. Despite that, the majority doctrine adopted a core of values and principles that must be respected in order to preserve what restorative justice needs to achieve – such as the encounter between those involved in the conflict, reparation of material and psychological damages and transformation of society (Johnstone and Van Ness, 2007: 9-16).

Based on these references it is possible to conceive restorative justice as “[...] an option for doing justice that is primarily focused on repairing harm that has been caused by the crime. It is best accomplished through cooperative process that include all stakeholders” (Vanfraechem, 2007: 75). Nowadays, countries around the world are creating and implementing restorative practices in a variety of fields, promoting practices for adults and juvenile public, dealing with conflicts inside and outside the criminal justice system aiming, in the end, to modify “[...] all entire legal system, our family lives, our conduct in the workplace, our practice of politics. Its vision is of a holistic change in the way we do justice in the world” (Braithwaite, 2003: 1).

1 According to Walgrave (2008: 11), “[...] restorative justice is an unfinished product. It is a complex and lively realm of different – and partly opposite – beliefs and options, renovating inspirations and practices in different contexts, scientific ‘crossing swords’ over research methodology and outcomes. [...] It is a field on its own, looking for constructive ways of dealing with the aftermath of crime, but also part of a larger socio-ethical and political agenda”.



In order to understand the subject without forgetting the North-South political, geographical and economical dimension that knowledge has and can influence the contents of the subject (Santos, 2007: 4-5), the article discusses the development of restorative justice in two specific countries that institutionalized their practices adopting different models, using a variety of protagonists and mechanisms to structure and manage their initiatives.

According to this North-South representation (Santos, 2007), Portugal was chosen as an European state that enforced into the criminal jurisdiction the victim-offender mediation practice for adults under the Law n.º 21/2007; however, the model faces problems and is not being applied by judicial actors responsible for conducting criminal processes. In the opposite way, in Latin America Brazil does not have a national law (hard law) for that public but there are resolutions from the National Council of Justice (NCJ) adopted as a legal instrument leading the creation of restorative practices. As a result, since 2005 the Ministry of Justice came out with experimental programs and there are currently a lot of practices across the country.

Based on those top-down and bottom-up models, this article aims to present how restorative justice has been institutionalized and what problems, difficulties and concerns that were identified in these different processes can promote reciprocal learnings to improve the effects and results that are necessary to reach good practices.

It is important to inform that these findings are part of a doctoral research² that adopted a case study methodology to observe the Portuguese and Brazilian experiences in the implementation of restorative justice practices. In order to do that, four experimental projects in the South region of Brazil were chosen to be observed in “*locus*” during a six months period; in Portugal I decided to work, for two months, with the cases that were referred to the mediation system at the Public Prosecutor’s Office at the Oporto city. The investigation mixed qualitative and quantitative methodology: a) almost 50 (fifty) semi-structured interviews were done with actors that worked with restorative justice in both fields; b) based on the consultation of 100 (one hundred) processes that were mediated between 2007-2014, I collected data aiming to understand why the practice did not work well in Portugal.

Presented the context of the investigation, in the first part of this article, an overview of the Portuguese model will be present, followed by the Brazilian

2 This article is part of a Ph.D. dissertation within the Doctoral Program at the University of Coimbra named “Law, Justice and Citizenship at the XXI Century”. Based on the limitations of this paper, we are going to present only a part of the findings.



system observed in two specific states of the country; finally, the main problems and the impressions that can be used to improve the models will be explained.

2. Restorative Justice in Portugal: victim-offender mediation for adults

2.1. Contextualizing the institutionalization process of restorative justice

The institutionalization of victim-offender mediation was complex and resulted from different factors that Beleza and Melo (2012: 15) classified according to the type of impulses that were determinant to: named as “external impulses”, the international political pressure that came from different organizations were important to stimulating the adoption of restorative justice in the territory by the Legislative and Executive Power; regarding “internal impulses”, the necessity of the decongestions of Courts, reduction of moroseness and bureaucratization creating a proximity justice toward citizens were essential to actors who undertook an experimental and feasible project. Finally, a “diffuse impulse”, that come from society, especially from the civil movements and associations, as was the case of the initial actions from the Portuguese Association for Victim Support (APAV) that was a member since the creation of the *European Forum for Victim-Offender Mediation and Restorative Justice* (nowadays *European Forum for Restorative Justice – EFRJ*) in 2000.

With the spreading of the restorative movement around the globe creating different types of programs and practices, applied in a variety of scenarios, legal standards are edited to systematize all initiatives – or, at least, are trying to create procedural and substantial principles that should be followed as guidelines by the practitioners of the restorative justice philosophy. Of importance are: the Council of Europe Recommendation R (99) 19 concerning Mediation in Penal Matters³ and the United Nations Basic Principles on the use of restorative justice programs in criminal matters in 2002; and the European Union (EU) Council Framework decision n.º 2001/220, 15 march 2001, relating to the standing of the victim in penal proceedings, that was replaced by Directive 2012/29/EU, which determined to all states the time limit on 22 march 2006 to create measures to implement a penal mediation regime (article 10 and 17).

3 Recently the Recommendation CM/Rec(2018)8 concerning restorative justice in criminal matters was adopted by the Committee of Ministers on 3 October 2018. Available in: https://search.coe.int/cm/Pages/result_details.aspx?ObjectId=09000016808e35f3.



Before that, starting in November 2004, a pilot-program of victim-offender mediation was implemented in Portugal through an initiative between the Faculty of Law - University of Oporto, the Oporto District Attorney General's Office and the Oporto Department of Penal Action and Investigation. The program was known as the "Oporto Project - Restorative Justice and Mediation" and proposed to encourage the practice of mediation during the inquest stage of the penal proceeding in those cases in which it was possible to use mechanisms of celerity and consensus already inserted at the Penal and Procedural Code (Agra & Castro, 2005). The procedure that was adopted presupposed that the Oporto Department of Penal Action and Investigation would send a letter to the direct stakeholders involved in the criminal dispute, providing an overview of facts under inquest and explaining the steps of mediation. The sessions took place at the University facilities and the project continued for two years (2004-2006).

After that first experience, the Portuguese legislation regarding restorative justice for victims and offenders adults⁴ was enforced by the Law n.º 21/2007, of 12 June, creating the Penal Mediation System⁵ (PMS), which came into operation in 2008, as an experimental project for a two-years period in four cities: *Oporto*, *Seixal*, *Oliveira do Bairro* and *Aveiro*. After that period, extending the Law 732/2009, the PMS to different districts in the country⁶.

2.2. The legal framework of the victim-offender mediation

Despite the discussion between the importance of a legal framework to develop a restorative practice and the limitation of the typology of tools that can result in its constraint, in Portugal the steps of the mediation process were detailed in a specific law. Before analyzing this framework, we adopt the definition of victim-offender mediation practice as a

[...] process based on a voluntary participation of agents of crime and its victims; secondarily, the intervention of an instance of mediation that aims to favor the communication and guarantees the safety of the intervenient, but that does not have the authority of the decision in the conflict; and third, there's a communicational process-oriented to express the feelings and necessity of the intervenient; finally, looking for pacification of the conflict through responsibility and reparation (Santos, 2014b: 642).

4 It is important to notice that Portugal has a specific law applied for juveniles since 1999 (Law n.º 166/99) but it is not a goal of this paper to go deeper in this specific system.

5 It means that mediation for adults only applies to crimes committed by offenders who are at least 16 years old, against victims who are also at least 16 years old (art. 2.º, 3, d, Law 21/2007).

6 Working in these cities: Barreiro, Braga, Cascais, Coimbra, Loures, Moita, Montijo, Porto, Santa Maria da Feira, Seixal, Setúbal e Vila Nova de Gaia, Alentejo Litoral, Baixo Vouga e Grande Lisboa Noroeste.



Under this possibility, the legislator chose the minimalist model of judiciary penal mediation since the practice can be applied, in a restrictive way, just during the pre-trial⁷ (art. 3.º, 1, Law 21/2007). Its realization is not authorized in other stages of the criminal justice process, such as during a trial. The Code for Execution of Penalties and Measures involving deprivation of liberty, approved by the Law 115/2009, of 12 October, introduced a general possibility of post-sentencing restorative practices. But, in reality there are no restorative program in progress⁸.

During the investigation stage, if the Public Prosecutor evidences the occurrence of the crime and if it is possible to individualize the offender, understanding that the agreement can pursue the goals of penalty (special and general prevention), the case can be submitted to the PMS (art. 3.º, 1, Law 21/2007). After that, one mediator will be chosen by a computer system and will receive information about the case aiming to contact people involved in the conflict, scheduling a meeting session. At the end of the encounter, the case will be closed if the participants reach an agreement. The penal mediation is admitted as a penal procedural diversion mechanism that avoids subjecting the case to trial, as the agreement is equivalent to a desistance from the complaint, being homologated by the Public Prosecution Service (art. 5.º, 4, Law 21/2007).

The article n.º 3, the second part of the Law 21/2007, authorizes the formal suspect and the offended party involved at the conflict to request the Public Prosecution to refer their case to the PMS, if they are both in accordance – what seems unlikely, because people do not know about the existence of the mediation system and how it works. Consulting the data publicized by the Ministry of Justice, it was not possible to identify whether this type of request had ever happened in Portugal.

Talking about the material aspect, the article n.º 2, part one, determines that mediation is only applicable for crimes that are prosecuted upon complaint or private accusation (private offense in the broad sense) – so, mediation cannot have as an object “public crime”. That is a political option based on the necessity to protect relevant juridical interests by the State that confines restorative jus-

7 Considering the differences between legal systems in Europe, we are using “pre-trial” in this article to refer to a procedural phase during the crime's investigation that precedes the instruction and trial.

8 There were different projects at the sentence level in Portugal but in none of them the victim and the offender had the opportunity to a face-to-face meeting. We can cite: a) “Restorative Justice at the post-sentencing level: supporting and protecting victims” (Lummer, Hagemann e Reis, 2015); b) “Education for Reparation –restorative practices in a prisional context” coordinated by the Ministry of Justice (2014-2015); c) a project in Cascais City developed by the Prison Fellowship International and Confiar Association that aims to transform Cascais City in a restorative city.



tice only to less serious crime – assuming that, in the most serious crimes, “[...] community interested on punishment must prevail under the individual interest when is related to criminal intervention by the state” (Santos, 2014b: 675). On the other hand, for less serious crimes, “[...] the interests of intervenient on the conflict must predominate under a decision that protects values-oriented by a public conflict” (Santos, 2014b: 675).

However, the law still has restrictions in order to identify the cases that might be referred to PMS that have to be analyzed cumulatively: crimes which have been committed against persons and property (art. 2.º) and, since the conditions of article n.º 2, third part, have been observed – in other words, the case cannot be referred to PMS if the crime committed is punishable with a prison sentence that exceeds five years of punishment. And, to avoid revictimization of the aggrieved party, crimes against sexual liberty or sexual self-determination (such as rape, sexual fraud or sexual acts with teenagers), corruption, embezzlement or influence peddling are excluded from the list of crimes that can be mediated (art. 2.º, 3, Law 21/2007).

According to the Law n.º 21/2007, the mediator is an impartial and independent actor that must maintain confidentiality about the content of the sessions. The mediator is prevented from participating as witness in a judicial proceeding that may occur after a mediation process in which no agreement was reached. For being a mediator, the article 12.º defines as requirements: a) to be older than 25 years of age; b) to have all political and civil rights⁹; c) to have a bachelor's degree or professional experience in this subject; d) to be a suitable person¹⁰. It is necessary to have attended a course recognized by the Ministry of Justice (which is the competent agent responsible for paying the activity as well).

If the mediator understands that is possible to initiate a mediation session, all participants must voluntarily agree with the terms or, if not, on the contrary, the traditional process will start. It means that there will only be a mediation if the formal suspect and the aggrieved party agree that it should occur. This consent may be revoked at any time.

When the session results in an agreement, its content at the end of the mediation is freely established by the participants, aided by the mediator who aims to facilitate the communication. In the end, it will be homologated

9 Means that for being a mediator is necessary to have the possibility of the vote and be voted in the national and local elections since there is not a criminal sentence suspending their political rights.

10 The legislation related to the penal mediation system adopted abstract concepts that make it difficult to understand their meanings. Considering this, being a “suitable” person can be related to those people that have never been convicted for practice a crime.



by the Public Prosecutor if it respects all legal terms: prohibition of sanctions involving deprivation of liberty or duties that offend the dignity of the formal suspect or whose compliance should extend for more than six months (art. 6.º Law 21/2007). On the other hand, if the agreement is not in line with the law prescriptions determinations, the victim has one more month to renew his/her complaint and reopen the criminal process.

Normally, the mediation process has to finish in a three months period, but the mediator may request to a Public Prosecutor a two more months extension, when he/she considers that there is a high probability of reaching an agreement within this time period enlarged (art. 5.º, 1 e 2, Law 21/2007).

2.3. The inefficiency of the restorative practices in the country

Nowadays it is possible to demonstrate that restorative justice (for adults) in Portugal is facing a phase of normative and practical constriction visible not only in the criminal mediation system enforced by Law no. 21/2007 but in several spheres of its application.

Analyzing the numbers of the victim-offender mediation collected by the Portuguese Ministry of Justice, it is possible to observe that, during the first three years (2008, 2009 e 2010) the cases sent to the PMS increased significantly (almost doubled). Considering the results of the mediation session, as illustrated in the table below, the number of agreements at the end of the mediation sessions decreased after 2011 (almost two times) and the number of cases that finished without agreement was higher (55% more).

Table 1. Victim-offender mediation processes between 2008 e 2013

Year	2008	2009	2010	2011	2012	2013
Cases referred to PMS	95	224	261	90	65	23
Agreement	16 16,8%	47 20,9%	71 27,2%	35 38,8%	14 21,5%	10 43,4%
Without Agreement	14 14,7%	40 17,8%	87 33,3%	50 55,5%	NI	NI

(Santos, 2014b: 201); DGPJ (2015, Dezembro 2).
 (NI) not informed; not available.

Specially after 2014, the number decreased significantly: during the first six months of 2014, the PMS only received 5 cases reaching to zero in 2019 at the entire country, which shows that the penal mediation, as a restorative instrument, does not work in Portugal at all.



Table 2. Victim-offender mediation processes between 2014 e 2019.

Year/Status	2014	2015	2016	2017	2018	2019
	31/12/2013	1/1/2015	1/1/2016	1/1/2017	1/1/2018	1/1/2019
In progress	---		05	---	---	---
New cases referred to PMS	05	33	04	---	---	---
Finished	05	28	08	---	---	---
In progress	31/12/2014	31/12/2015	31/12/2016	31/12/2017	31/12/2018	31/12/2019
	---	05	---	---	---	---
Total	05	33	04	---	---	---

DGPJ (2015, Dezembro 2) e SIEJ-DGPJ (2019).

(---) not informed; not available

Besides that, the Law n.º 112/2009, of September 16th, establish the “legal standards applying for domestic violence prevention, protection and assistance of victims” (art. 1º). According to the legal document, a restorative encounter between the stakeholders involved in the conflict was admitted, since the practice is important to the “[...] restoration of the social peace, respecting the necessity of victims and ensuring their safety” (art. 39º). However, as the practice have never occurred in this typology of crime, the article was revoked by the Law n.º 129/2015, of September 3rd.

Another symptom of the Portuguese crisis is related to the transposition of the Directive 2012/29/EU. The Portuguese Standing of Victims (Law n.º 130/2015, of September 4th) did not enforce the contents of the article n.º 12.º, 1 and 2, that provide to all victims the access to restorative practices under the state protection. In other words, the state is the responsible for the availability of practices conducted by competent professionals avoiding revictimization (art. 12.º, n.º 1). Obviously, since the mediation system proved to be ineffective, the Portuguese legislator dismissed restorative justice as the victim's “right”, instead of, in due course, retake the debate on the national scene to improve the system.

2.4. Why does restorative justice for adults face problems in Portugal?

As pointed out above, the PMS is being inefficient to solve criminal conflict as a diversionary model in the traditional criminal system, since the decreasing number of cases shows that stakeholders are refusing to submit processes to me-



diation. Based on this assertion, the sections will highlight factors that can shed light on the problem and which, in a broader sense, can be useful to identify issues that surpass the model on which we are focusing.

1. *A top-down system. The influence of the international rules to implement a restorative practice in Portugal.* The normative regulation of victim-offender mediation in Portugal resulted from the influence of the standards and frameworks created by international institutions – such as the United Nations and European Union –, since the grassroots movements in the country were weak and did not have a national repercussion. To this absence of a *bottom-up community initiative* in the field it is possible to add another consequence: the imposition of an external regulation was not enough to change the historical and social context that remains tied to the state as the protagonist in the treatment of conflict. In other words, the Portuguese juridical actors prefer to adopt the traditional system to solve crimes. In this case, if the adoption of a new way to deal with criminal conflicts needs the acceptance of the Public Prosecutor to be effective, it is essential to consider how these agents should be involved in the process of creation and discussion of the law, about its terms and purposes, expressing all possible transformations and limitations that can (or not) be done in practice.

2. *The restrictive legal framework.* The Law n.º 21/2007 forbids the victim-offender mediation in several cases, avoiding the incidence of the practice in many cases:

a) when “public crime” was committed by the offender. In relation to which category of crimes are possible to be sent to the PMS, the restriction to semi-public and private crimes – which is how the less serious offences regulated by law are classified – makes it difficult to expand restorative justice in Portugal.

b) the law does not authorize the application of mediation in other phases of the process, only during the initial stage (pre-trial phase). In Portugal, the possibility of the application of mediation for adults during the juridical process as adopted in several other European countries was not approved by the political actors;

c) the law gives to the Public Prosecutor the power to choose which cases will be sent to the PMS, and to decide according to the traditional functions of the penalty, such as whether general and special prevention will be satisfied in that individual conflict;

d) the law created difficulties for the offender and victim to choose to participate in mediation. First of all, because the people do not know about the existence of the mediation as an alternative possibility to be selected instead of a traditional process; second, because the legal requirement that both



can inform the Public Prosecutor is not an easy task – it is hard to demand consensus before mediation, especially when people do not know each other. In this sense the normative restriction can be considered as a way to create difficulties for access to justice to all participants, and because of this, it is necessary to change the article 3º, n.º 2, to substitute the conjunction “and” for the conjunction “or”, as the only way to increase the possibilities of legitimacy by the involved parties.

3. *Criticism of the Public Prosecution Office in the restorative practices.* The Organic Statute of Public Prosecutor’s (Law n.º 60/98, of August 27th) established, as its principal functions, to participate in the execution of criminal policy, the exercise of criminal action oriented by the principle of legality and the defense of democracy, as stated by the Constitution of the Republic (article 1.º, n.º 1). However, the action of Public Prosecutor at the development of criminal politics level can be restricted by the legal conception that, with the occurrence of crimes, they must adopt institutional measures against criminality through the traditional procedure and penalties involving deprivation of liberty.

Since the enforcement of the Law n. 38/2009, of July 20th, the orientations of criminal policies in 2009/2011 in Portugal were defined, especially in articles 16, n.º 1, g, demanding the necessity to increase the use of an alternative dispute resolution mechanism, and saying that the Public Prosecutor must refer cases to the PMS when: a) the offender has less than 21 years of age; b) the offender does not have criminal records; c) when the offender confesses all facts; d) when the damage has been repaired or the offender shows the intention of repairing the damage.

The number of cases sent to the PMS is insignificant. Given that the Public Prosecutors are the competent authority to select the possible cases to be sent to mediation, it is important to ask whether these actors actually believe in this practice as the more suitable one to solve criminal conflicts. The statistical data showed that the option of restorative justice practices is not important as an alternative approach to solve criminal processes.

However, this situation is not the same when we compared with mechanisms applied to different subjects in the field of law, such as family and consumer conflicts. An important research developed by the Permanent Observatory for Portuguese Justice, from the Social Centre for Studies at the University of Coimbra, in a project called “Who are our magistrates? A professional characterization of judges and public prosecutors in Portugal”, that was done in 2012, asked in part of its surveys sent to the Public Prosecutor’s Office what was the importance of the alternative dispute resolution mechanism in its daily practices:



Table 3: Importance of alternative resolution mechanisms in Portugal

	Without Importance	Little Important	Important	Relatively Important	Extremely Important
Courts of Peace	6,3%	32,1%	42,2%	15,2%	4,2%
Arbitral Tribunals	3,8%	27,8%	50,5%	13,2%	4,7%
Consumer Conflicts Arbitration Centre	4,7%	17%	52,7%	19,6%	6,0%
Family Mediation	5,1%	24,6%	48,2%	15,3%	6,8%
Labour Mediation	6,0%	22,8%	47,5%	19,4%	4,3%
Penal Mediation	14,1%	38,0%	31,2%	12,0%	4,7%
Média	6,7%	27,1%	45,4%	15,8%	5,1%

Consulting the results of the research, it is possible to notice that the “majoritarian negative opinion about the Penal Mediation System, with 52,1% as classifying as Nothing Important/Less Important, and, in the same way, as the less positive opinion was emanated (Important/Totally Important) only for 16%” (Dias, 2014: 218), showing that the Public Prosecutor does not agree with the adoption of the restorative practice.

4. *Lack of dialogue in the field: tension between Mediators and Public Prosecutors.* Mediator (or, facilitator according to the Recommendation CM/Rec(2018)8 concerning restorative justice in criminal matters adopted by the Committee of Ministers on 3 October 2018¹¹) is a new category of actor that emerged in the context of the new possibilities to deal with criminal conflicts – that can be called as “*restorative justice professionals*” (Olson & Dzur, 2003: 57). These actors have to develop new expertise and abilities to conduct a dialogical encounter that differing of the juridical knowledge used by actors that integrate and work at the criminal system.

Olson and Dzur (2004: 94) argue that “[...] laypeople are better than criminal justice professionals at certain key tasks, such as reprobation and reintegration of offenders and communicating sympathy for victims”. Laypeople establish direct communication with different actors since they “speak the same language” and are capable to inform the reprobation of the behavior in a more productive way when compared with a sentence emanated from the criminal system sustained in a juridical language that is not accessible to all (Olson & Dzur, 2004: 95).

11 Appendix to Recommendation CM/Rec(2018)8, n. 3. Available in: https://search.coe.int/cm/Pages/result_details.aspx?ObjectId=09000016808e35f3.



In other words, these two categories of actors share the competence to deal with crime and, consequently, dispute the prerogative to be important protagonists in the criminal field. In this line of tensions observed in Portugal, Public Prosecutors and Mediators avoided communication and worked without cooperation between them, making it difficult to understand the benefits and the good results of the mediation that can be offer to victims and offenders.

5. *The necessity to exchange the litigation culture to a consensual resolution of criminal conflicts.* The adoption of a new paradigm invariably goes through a transformation of the juridical culture replicated by the professionals of law (Santos, 2014a: 100), being necessary to review the theoretical and practical education of these operators inside the universities. It is important to change the social image that maintains that only judges and courts have the legitimacy to solve conflicts, and to promote the idea that people can solve their problems. In this perspective, according to Caupers (2000: 225),

[...] the courts are not capable of solving in a reasonable time, the multiplicity, diversity and complexity of demands. Either we face bravely the problem, proceeding to a deeply revision of the paradigm, understanding that is not possible any longer to guarantee justice for all in all conflicts (...) retrieving from such the right conclusions, particularly in the judiciary reorganization plans and extrajudicial conflict resolution or the justice to all will be, soon, a denegation of generalized justice, with courts completely submersed in process and incapable of solving conflicts.

It is important to create different forms of thinking and producing law, which value the plurality of community experiences and that those are not, at the end, colonized by hegemonic ways of applying justice. So, it is necessary to rethink the litigation culture that accompanies all social sectors (and institutions too), to transform them in the logics of consensus, pacification, and dialogue, able to find a new relationship between society and state.

In other words, that restorative instruments can be used as ruptures (or, at least, as an alternative) to traditional justice if the operators of law and participants are aware of the positive results.

3. Restorative Justice in Brazil

3.1. Contextualizing the phases of the restorative justice movement

Restorative justice in Brazil is still in development since experimental projects started only a few years ago. In this perspective, it is possible to classify the emergence of the movement in two continuous phases.



According to Andrade (2018: 113), the first one – called the “implementation” phase – started in 2005 through the initiative of the Secretariat for the Reform of the Judiciary from the Ministry of Justice in partnership with the United Nations Development Programme (UNDP). After an agreed upon protocol, a program called “Promoting Restorative Practices in the Brazilian Justice System” was created, which implemented experimental pilot projects in three different states and cities (Porto Alegre – Rio Grande do Sul state, Brasília – Brasília state and São Caetano do Sul – São Paulo state).

These projects had different approaches. With the collaboration of local judges that were the leaders in the field, distinctive restorative practices were testing – since “Brasília's programme adopted the Victim-Offender Mediation model in all of its applications, while São Caetano's and Porto Alegre's programmes have instead adopted the restorative circles model” (Achutti & Pallamolla, 2012: 1094) – and were applied to young and adult offenders to deal with minor criminality.

However, until now, there is an absence of a legal framework emanated by the Legislative Power that contains the core values and principles of restorative justice – since the draft law 7006/2006 was not approved by the National Parliament and is still open to discussion¹². Despite that, the experiences are spreading in the territory because of their leadership (Achutti & Pallamolla, 2012: 1094), since there is a movement trying to create an alternative way to solve conflicts inside the traditional criminal system, and, of course, the “protagonist” of this new philosophy is the judiciary power.

As a result, since 2010, we are witnessing a second phase in the development of restorative justice in Brazil, which Andrade (2018: 2013) calls as “expansion-institutionalization” phase. In this period, restorative justice is being regulated and applied inside the court's country by the initiative of the National Council of Justice (NCJ), which is an *administrative body* constitutionally integrated at the Judiciary Power level.

In 2010, a first legal document was created by NCJ (Resolution n.º 129/2010), followed by the Resolution n.º 225/2016, elaborated by a specialized group composed only of judges (thirteen representing the national and local jurisdictions). This last one, that is the most important normative¹³ created by the NCJ, authorizes that all courts embrace new strategies to adopting

12 The topic of restorative justice was inserted in the draft law of the Penal Code (n.º 2.976/2019) and the Processual Penal Code (n.º 8045/2010) that are both under discussion at the National Parliament.

13 Resolution n.º 125/2010 and Resolution n.º 225/2016 can be consulted in: http://www.cnj.jus.br/files/atos_administrativos/resolucao-n225-31-05-2016-presidencia.pdf



restorative instruments – that should be concerned with the best way to help victims and offenders but, also, focused on reducing the number of processes and spend less financial resources in minor criminal cases. Nowadays, Brazil has at least one such experience in each Tribunal, with a total of almost 44 projects in progress in 2019 (NCJ, 2019: 10).

In the rest of the article, following the reflections of Andrade (2018: 11), we try to provide some answers to the questions she asks about the development of restorative justice in Brazil:

[...] how does restorative justice, as led in (and handled by) the judiciary power in Brazil, look like? When, where, how, and with which theoretical and methodological characteristics is it being developed? What are the human and material resources being used? How can the relationship between restorative justice and the current Brazilian criminal justice system be described?

3.2. The hegemonic model of practices: peacemaking circles

As the restorative justice movement started latter in comparison with countries around the globe, the Brazilian perspective suffered from “the cultural ‘importation’ (which reaffirms the ‘coloniality of knowledge’), as well as the ethnocentric (particularly Euro-American) influence in the process of reception-translation of restorative justice models” (Andrade, 2018: 15). This characteristic is evident in the theoretical reference mostly adapted from Howard Zehr’s (2008) lessons or from the Nonviolent Communication model used by Marshall Rosenberg (2006)¹⁴. According to Achutti and Pallamolla (2012: 1102), “there are only few publications on the topic in Portuguese, and many lawyers, judges, public prosecutors and other legal or non-legal actors are still reluctant to discuss its possibilities further”.

In the same way, despite the variety of restorative practices that can be applied to deal with conflicts, for the majority of cases in Brazil the peacemaking circles are applied, a model hugely influenced by Kay Pranis’s methodology. According to the author, the circular strategy aims to establish active and free communication between all the participants joined at the circle (Pranis, 2010: 16) – victims, offenders and other members of the community. Adopting the storytelling tool, the goal is to develop empathy between the people involved, offering a voice to each person to tell about their needs and to support their restoration.

14 Especially because the “Nonviolent Communication” and “Changing Lenses” books were translated to portuguese language in 2006 and 2008 respectively.



The facilitator is the person responsible for creating a safe space for talking and listening aiming to connect people. Pranis, Stuart and Wedge (2003: 9-10) point out that through the circle “we can rediscover our core values [...] and also uncover our deep-seated desire to be positively connected”. As a result of the empowerment of the stakeholders, it will be possible to witness four shifts in the way that the conflict is dealt with: “from coercion to healing; from individual to individual and collective accountability; from primary defense to on the state to greater community self-reliance; from justice “as getting even” to justice as “getting well” (Pranis, Stuart & Wedge, 2003: 15).

There are three steps that compound the methodology constructed by Pranis. In the beginning, the pre-circle is intended for the preparation of the encounter, since the facilitator will be in contact with the stakeholders to explain in what consists the practice, its procedure and values, and to select the community of care that can be involved (Pranis, 2011: 12). After the voluntary acceptance from the participants, the circle should start according to these key elements:

a) first, a ceremony that delimits when the circles are open or close, aiming to construct a separate space apart from the others that people are daily involved in (Pranis, 2005: 33). After a “*check-in*” will be made and the stakeholders present themselves and their expectations and, at the end of the practice, say what they felt about the experience (“*check-out*”);

b) the two facilitators working together help the participants to define collectively the guidelines – or the rules, cores, and principles – that will conduct that specific circle and after that all will commit to follow them (Pranis, Stuart & Wedge, 2003: 81);

c) sequentially, a central piece of the circle and a talking piece will be chosen aiming at the organization of the process. The *talking piece* “creates a space for deep listening, so that each person’s voice can be heard” (Pranis, Stuart & Wedge, 2003: 81), since only its holder has the right to talk without interruptions.

d) at the end of the encounter, they will try to reach *consensus decision-making* that means finding a solution to the conflict that “incorporate everyone’s interests as fully as possible” (Pranis, Stuart & Wedge, 2003: 121).

After these steps, a post-circle will be done in order to evaluate the outcomes of the practice: the achievement of the obligations and the analysis of the satisfaction level of the stakeholders need to be considered to improve the circle’s methodology implemented.

The expansion of the practices in the Brazilian territory depends on the voluntary work of people from the community to act as facilitators of circles



since there is no remuneration by the Judiciary Power or from the Ministry of Justice for those that decided to join at the restorative movement that do not have a professional position in the penal system¹⁵.

3.3. The hegemonic actors: the Judiciary Power as protagonist

As a complex process, the institutionalization of restorative justice in Brazil needs to be understood through a complex analysis. At the first hand, because of the absence of the Legislative and the Executive Power in the second phase of the implementation of practices, it was the initiative of the individual judges that improved the development of the movement in the country, spreading the practices into the traditional system of justice and beyond that (Andrade, 2018: 12). However, from a critical perspective, this behavior may contain certain problems that need to be clarified in order to think about what results can be achieved by this model.

Acting as a hegemonic actor, the Judiciary Power is managing the implementation of the new projects inside the courts, creating public policies that have as a starting point the judicial administration of the crime (NCJ, 2019). In other words, to consolidate these pilot experiences, specific judges need to foment the communication between different stakeholders in the field – such as public prosecutors, lawyers, professors, universities, organizations in general, new professionals (mediator, facilitator), actors from the Legislative and Executive Power and community – aiming to provide a more democratic debate with them about the goals of these new practices.

As a matter of fact, the judges are cumulating different functions that can create several risks to restorative justice practices such as being coopted by the ideology that guides the criminal justice system. As an actor from the traditional model of dealing with conflicts, while these protagonists are managing pilot programs, they are also sentencing criminal processes and referring cases to restorative practice, homologating the agreement reached at the end of the encounter. As pointed out by Andrade (2018: 18),

[...] even when a restorative encounter (circles or mediation) is possible between the parties (offender–victim– community), and space is made for them to be heard, they are not empowered to voice what they think would be fair. Indeed, the judge remains with the last word regarding the validity and normative efficiency of restorative justice processes.

15 Excluding the employees that were already working inside the judicial system and that are cumulating functions and competencies inside the restorative projects.



What are the difficulties that arise with the concentration of competences in actors involved in the implementation of restorative practices? Is there a risk of the expansion of criminal control of the population that will be selected by judges to act as stakeholders? Is this type of empowerment of stakeholders that restorative practices are looking for?

4. Drawing lessons from the comparison between the Brazilian and Portuguese experiences of restorative justice

Summarized both institutionalization processes of restorative justice in Portugal and Brazil, it is possible to learn from different aspects of those models, according to the typology of practices and the roles that their protagonists assume. Portugal adopted a *top-down* model where victim-offender mediation was chosen by the legislator to accomplish supranational normative since the only pilot project that survived for a couple of years had a minimum social expression when the law was implemented.

In the second model, as Brazil still does not have a legal framework, the movement should be, as one of the main hypothesis of this research, characterized as *bottom-up*; however, after going deep into the field and since the guidelines from NCJ reflect and replicate the leadership of judges, the experiences analyzed informs that the implementation model in the country can be classified as a top-down too.

Deficit of community participation

An important characteristic must be highlighted when the institutionalized practices are compared: there is a recognizable deficit of community participation in both. The mediation applied in Portugal does not involve the “community of care”¹⁶ (McCold, 2004: 156), being applied just to victim and offender directly involved in the conflict; in Brazil, the peacemaking methodology seems to enlarge the participation of the community, since the circles permit the participation of people related to the offender and victims during the practice, or, at least, allows them to work as a volunteer facilitator.

However, the community has been a passive actor in the Brazilian implementation of practices, against the main purpose conceive by Kay Pranis,

16 The community of care refers to family, friends, and neighbors that have a closer relationship with the victim or the offender and that offers “[...] personal, emotional and material care and support to face problems” (McCold, 2004: 161).



because the community does not have the power to manage projects or shape the ways of their implementation. In other words, community is only being used as a workforce that makes circular processes feasible. Pranis explained to Dzur (2016: 261) during an interview that

[...] when we did the first sentencing circle projects here, I felt that it had to be *driven by community*. In partnership with the system, to be sure, but it had to be driven by community. We had to community organize first, to find a group of citizens who would be willing to commit volunteer time to help implement these processes, very much in partnership with the system.

As consequences, the empowerment element or, as Olson and Dzur (2014: 147) pointed out, the assumption of responsibilities to frame restorative practices needs to offer a place to *combine* community participation and “democratic professionalism”, whereby “[...] professionals do not inevitably reduce the sphere of lay or citizen involvement, but share decision-making domains rather than monopolizing them”. This situation was not observed in both fields under investigation.

Judges and Public Prosecutors as Protagonists

Despite the social, economic and political differences that Portugal and Brazil have, the role of juridical actors can be defined as a *conservative* approach, revealing a direct dependence with the legal culture adopted in both countries. The traditional principles that conduce penal and procedural law – such as legality, culpability, due process of law, and others – associated with the absence of knowledge about what is “restorative justice” are obstacles to theories related to how to deal with serious criminality. In this route, judicial actors understand that only the State – read, the judiciary power and its professionals – have the responsibility to resolve the conflict.

Analyzing the Portuguese experience, it was possible to realize that Public Prosecutors did not agree with the restorative philosophy, resulting in the failure of the victim-offender mediation. However, if the sensibilization about the positive results that the model can achieve had been done, the opposite effect could have resulted. In this perspective, as the initial step, it is important to make clear what restorative justice is, explain its goals, benefits and principles, and explain that different ways to solve conflicts can bring to people a better form to create proximity relationships and social harmony.

In Brazil, the criminality crisis announced by the higher incarceration rates, the negligence of human basic rights and the explosion of criminal processes in Courts makes it feasible for restorative practices to be a legitimate instrument appropriated by the judges to reduce conflicts (Andrade, 2018: 13).



The necessity of reducing numbers without preserving the core values and principles of restorative justice justify the concerns that the practices shaped by these actors can move away from being restorative.

Cooperation or confrontation between practitioners?

The restorative justice needs to create a communicative process between the people involved, aiming to repair all possible types of damages suffered by them. To promote this cooperative environment, their practitioners (facilitators or mediators) are responsible for conducting practices, after gathering theoretical and empirical knowledge about the subject. In Portugal, the lack of communication and trust between the traditional and the new category of actors that have the same competence (to deal with conflict) made the victim-offender mediation inoperative. It was possible to evidence a dispute for competence and legitimacy to solve criminal conflicts between the Public Prosecutor and the Mediators: since they are the protagonists in the traditional and restorative justice fields (respectively), a tension to define who was the authority was consolidated.

On the other hand, in Brazil, the application of peacemaking circles depends on the voluntary work done by members of the community – what was possible because of the closer relationship between them and judges, since the Judiciary Power was responsible for providing courses and invite interested parties to participate in the projects. Despite this collaboration, laypeople remain away from the organization, implementation and evaluation of practices, which can reduce the transformative potential that restorative justice has in the society.

Absence of evaluation of practices

Another similar deficiency present in both countries was detected at the evaluation level of the practices. In Portugal, the evaluation of the experimental period of the PMS was done by the Faculty of Law at the New University of Lisbon as a result of a Protocol with the Ministry of Justice in 2007 (Beleza & Melo, 2012: 10). After this period, even with the difficulties that the mediation faces, there was no other qualitative or quantitative study of the practice.

In the same route, in Brazil the experiences observed had no public or no evaluation at all: in some cases, the evaluation was done by the internal staff working at the project or had an external partner working as a collaborator, such as universities that worked in a closer partnership with the Judiciary Power (Andrade, 2018b). Reflecting on this tendency, there will be difficult to obtain an impartial analysis from the results of the initiatives, since the judges responsible for the projects seem to avoid critics of the practices that they are development.



5. Conclusions

In order to conclude the article, the case study of countries at South (Latin America) and North (Portugal) that institutionalized restorative practices informed common issues that can be associated with the novelty of the subject and the absence of knowledge about what it is and how to apply its tools, respecting the core principles that guide them. In this sense, the development of restorative practices without an efficient evaluation of the results and prospects is a risk to its values and processes – what clearly happened in Portugal, since the difficulties faced by mediation was not the subject of discussion by their protagonists.

The responsibility of these professionals that work at the criminal justice system is crucial because they are implementing restorative practices in a common space where traditional ways of dealing with crime is still in practice. As consequence, since restorative practices can be cooptated by the penal rationality, these models can be used as another possibility of widening criminal control under the population.

In both countries, it was evident that the protagonists must improve their experiences and models of implementation aiming to guarantee the best way to deal with conflict for victims, offenders and community. Therefore, creating a network composed of different stakeholders that will work together should be able to improve the quality of practices and, indeed, be important to offer empowerment to those involved in.

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