PARTICIPANTS' PAPERS

THE ROLE OF THE VICTIM IN THE CRIMINAL PROCESS AND USE OF RESTORATIVE JUSTICE PRACTICES IN BRAZIL: PROBLEMS AND CHALLENGES IN SEARCH OF PRINCIPLES AND NATIONAL GUIDELINES

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I. INTRODUCTION

This article aims to briefly present notions of victim participation in criminal proceedings and on the use of restorative justice practices in the criminal justice system in Brazil. Thus, initially, we present an overview of the role of victims in Brazilian criminal proceedings, highlighting the recent changes in legislation that gave greater importance to the victim in the criminal prosecution.

Whereas one of the basic principles of restorative justice refers to the rediscovery of the victim in criminal proceedings, some good practices of restorative procedures used in Brazil will also be presented, which highlight, to some extent, the victim's role in conflict resolution.

Finally, taking into account the cultural and normative constraints existing in Brazil on the subject, this paper exposes the challenges and issues which should be discussed in order to develop a national programme with basic guidelines for the application of restorative justice practices in the country.

II. THE ROLE OF VICTIMS IN THE BRAZILIAN CRIMINAL SYSTEM

The Brazilian criminal justice system follows the Civil Law tradition, due to the strong influence of the country's colonization by Portugal, from the sixteenth century onwards. Thus, the models of conflict resolution and the sanctions used by the indigenous communities had little influence on the formation of the judicial culture in Brazil and, therefore, are studied very little in Brazilian legal literature.

By the time of the Brazilian colonization, Portugal already used a criminal justice system based on the expropriation[1] of the conflict from the victim, and on the monopoly of its solution by agents of the State. This characteristic had a strong influence in shaping the current criminal justice system of Brazil, and especially in building a legal sensibility that values the role of a third party, the professional judge in the case, to resolve social conflicts.

This expropriation of the victim's conflict by the State is reflected in the Brazilian legal system in the Federal Constitution, which restricts to the Prosecutor's Office, as a general rule, the proposal of all public prosecutions[2]. Basically, in Brazil, there are two ways to initiate criminal prosecution: a) through public action (indictment); and b) through private action (criminal complaint). In the public criminal action, there may be two other hypotheses: the criminal action conditioned to a representation —which can only be filed by prosecutors with the previous consent of the victim—and the unconditioned public criminal action, which regardless of the opinion or will of the victim can be filed by the prosecutors[3].

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[1] The term expropriation of conflict is widely used in Brazilian legal literature and has a strong significance beyond the exclusion of victims of the conflict, as it is also related to the importance of property in our culture.

[2] Article 129. Institutional functions of the Prosecutor's Office:
I - promote, exclusively, public criminal action, according to the law;

[3] There is also the public prosecution subsidiary, which is offered by the victim, in the case of inertia of the prosecution, but it is rarely used.

As a general rule, the punishment for crimes deemed most serious is done through the public prosecution and they represent the vast majority of criminal conduct typified in the abstract in Brazil. Only a few criminal offences, most of them lighter ones[4], rely exclusively on the initiative of the victim through a criminal complaint or a representation for the indictment.

Moreover, in addition to the concentration of most of the initiative to start the criminal process in the hands of the State, through the public prosecutors, there is another big barrier that hinders or even prevents the resolution of disputes through conciliation: the principle of obligation. In general, this postulate consists in the unavailability of prosecution by the prosecutor, whose duty is to take action every time that he takes cognizance of a criminal offence which entails a public criminal action, when it is not the case to terminate the investigation[5]. In this case, if he does nothing, he commits the crime of prevarication. Thus, the principle of obligation complicates the search for alternative solutions to the conflicts in the criminal legal system in Brazil, and contributes to a lack of participation of the victims in most crimes.

However, following global trends related to restorative justice, as well as the increased focus on the need to increase the participation of victims in the criminal prosecution system[6], and also in the context of the resolution of the General Assembly of the United Nations 40/34, November 1985, which provides for the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, the Constitution of 1988 (the seventh Brazilian Constitution) provided for the creation of a simpler justice system to manage less serious conflicts—civil and criminal—which would be based on the principles of morality and simplicity, and would allow interaction and agreement between offender and offended[7].

Seven years after the promulgation of the Constitution in 1988, the Brazilian National Congress enacted Law 9.099/95, which created the Special Criminal Courts at the state level[8], which brought an important starting point for the development of restorative justice practices in the country.

A. Law 9.099/95—Law of Special Criminal Courts

The Law 9.099/95, drafted with the spirit of minimal intervention of the criminal law, has the basic principles of morality, simplicity, informality, judicial economy and expediency, seeking, wherever possible, reconciliation and transaction, in crimes whose maximum penalty does not exceed two years in prison[9]. Generally, the prosecution of these less offensive crimes can be initiated only with the consent of the victims. However, there are several criminal offences of public criminal action encompassed by this law, for example, abuse of authority (Law 4.898/65), environmental crimes (Law 9.605/98) and crimes against consumers (Law 8.078/90).

In the crimes in which the victim's participation was already needed to start the criminal process,

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[4] The prosecution for the crime of rape, despite not being minor crime, is of private prosecution, because it is understood that it should fit the victim in this case, the decision to undergo, or not, to the scandal of the process.

[5] The prosecution is expected to promote the termination of investigation, when it is believed that there is no crime in the case, or investigation line capable of obtaining the evidence needed for the public criminal action.

[6] Ricardo Luiz Barbosa de Sampaio Zagallo notes the increased participation of victims in proceedings after Nazism. This subject was also treated in some congresses around the world. In his master's thesis, he evaluated some practices of restorative justice in Brazil, following the principles developed by John Braithwaite. His work is available at ‹http://repositorio.unb.br/bitstream/10482/7687/1/2010_RicardoLuizBarbosadeSampaioZagallo.pdf›, accessed 26/10/2013.

[7] Article 98. The Union, the Federal District and the Territories, and States shall establish:
I - special courts, filled by professional judges, or professional and lay judges, competent for conciliation, trial and execution of civil suits of lesser complexity and criminal offenses of lower offensive potential through accelerated, and oral procedures, allowed in the cases provided in law, settlement and judgment of appeals by panels of judges of first instance;

[8] Later, it was also introduced the Law 10.259/01, which, with the same conciliatory principles of the Law 9.099/05, dealt with the federal crimes in which the victim are the Union and its legal entities.

[9] In Brazil, all conduct considered to be a criminal offence is subject to punishment with imprisonment, which, in some cases, depending on the subjective aspects of the offender's conduct and the aim of the conduct itself, may be replaced by alternative penalties, such as restriction of specific rights or community service. However, with the enactment of Law 11.343/06, which deals with combating crimes related to trafficking in narcotics, the crime of use of drugs doesn't receive anymore the penalty of deprivation of freedom. Moreover, for material impossibilities, there is also no punishment of prison for the crimes committed by a legal entity, as provided for by the Law 9.605/98.

this participation was highlighted by Law 9.099/95, as, before the beginning of the prosecution, a conciliation hearing is needed to be held, where the victim and accused will be present. The hearing is guided by a conciliator, who helps both parties to discuss a possible deal, a composition of the damage or any other measure that satisfies the victim, which will then be approved by the judge. If the reconciliation is successful, the victim waives the right of representation or to file a complaint against the perpetrator, and the case is closed with the approval of the judge.

Furthermore, for the crimes that depend on the action of the prosecutor to start the criminal prosecution, Law 9.099/95 provided some flexibility to the principle of obligation, creating the possibility of reconciliation[10]. In this transaction, the public prosecutor enters into a deal with the offender: the prosecutor won't initiate criminal prosecution if the offender fulfills certain requirements, including providing compensation for damages suffered by the victim, attendance in court with some frequency over a period of time, the prohibition of visiting certain places, providing community service, etc. Besides permitting reconciliation, Law 9.099/95 also establishes the conditional suspension of the criminal process[11]. In this second measure, the criminal process already has been started, and the public prosecutor may propose the suspension of the process, subject to the offender's compliance with measures similar to those already mentioned, within a certain time interval. If the accused follows the restrictions, after the agreed time period has passed, the process is extinguished, and he cannot be punished for this crime.

In these 18 years of enactment of Law 9.099/95, while bringing significant changes in the criminal justice system in relation to the participation of victims, some Brazilian jurists, as Aury Lopes Júnior[12], have some criticisms of it, since one of its basic philosophies, the deployment of conciliation

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[10] Article 76. If there is representation or in the case of the crime of public criminal action, not being the case filing, the prosecutor may propose the immediate application of a penalty of rights restriction or fine, to be specified in the proposal.
§ 1 In the cases that the fine is the only penalty applicable, the judge can reduce it to half.
§ 2 There won't be a proposal if it is proved :
I - have been the offender convicted of a crime, and applied the penalty of imprisonment by a final judgment ;
II - have the agent previously received, within five years, the application of restrictive penalty or fine under this article;
III - the background, social behavior and personality of the agent, as well as the reasons and circumstances of the crime, doesn't indicate that the transaction is necessary and sufficient.
§ 3 Accepted the proposal by the offender and his counsel, it will be submitted to the Judge.
§ 4 Accepting the proposal of the prosecutor accepted by the offender, the judge will apply the penalty of restricting rights or fine, it won't be counted to the verification of relapse, being registered just to block the concession of the same benefit within five years.
§ 5 From the sentence in the paragraph above will fit the appeal referred to in art. 82 of this Law.
§ 6 The imposition of the sanction in § 4 of this article shall not bear a certificate of criminal record, except for the purposes specified in the same device, and will not have civil effects, leaving it to interested propose appropriate action in the civil court.

[11] Article 89. In crimes where the minimum penalty is equal to or less than one year, covered or not by this Law, as he presents the indictment, the public prosecutor may propose the suspension of the procedure for two to four years, if the accused isn't being processed or has not been convicted of another crime, present the other requirements that authorize the probation (art. 77 of the Criminal Code).
§ 1 Accepted the proposal by the accused and his counsel, the Judge, after receiving the indictment, may suspend the process, subjecting the accused to a trial period, under the following conditions:
I - repair the damage, unless unable to do so;
II - prohibition from attending certain places;
III - ban to absent from the county where he resides, without authorization of the judge;
IV - personal and mandatory attendance to the court each month to inform and justify his activities.
§ 2 The judge may specify other conditions which shall be observed during the suspension, which shall be appropriate to the fact and the personal circumstances of the accused.
§ 3 The suspension will be revoked if, in the course of the term, the beneficiary were to be prosecuted for another crime or not perform, without justification, the repair of the damage.
§ 4 A suspension may be revoked if the accused were to be processed, in the course of the term, for a misdemeanor, or breaches any other condition imposed.
§ 5 The deadline expired without revocation, the judge will declare extinct the punishment.
§ 6 The prescription won't run during the period of suspension of proceedings.
§ 7 If the accused does not accept the proposal under this article, the process will continue in their later terms.

[12] AURY LOPES JR. "DIREITO PROCESSUAL PENAL - 9ª edição." Editora Saraiva, 2012-04-05T13:07:29+00:00. iBooks.

in the context of criminal law, was frustrated by the "resurrection in the social imaginary of criminal misdemeanors and other criminal offences of minimal social relevance". In fact, some criminal conduct that, before the enactment of Law 9.099/95 was not even subject to registration in police stations, such as honour crimes, disturbing the peace by neighbours and other incivilities, returned to the police counters, and are sent to the Judiciary for the implementation of the quicker procedure of the the Special Criminal Courts. Hence, rather than a reduction in the size of the state intervention, there was a considerable increase, so that such demand represents a significant portion of police work in the Civil Police of the Federal District.

Another criticism of the procedure of Law 9.099/95 is founded on a survey conducted by the Ministry of Justice of Brazil, in 2010, which concluded that, because there is little room for victims to present their views at the judicial hearings, as the legal professionals end up dominating the negotiations and the time to negotiate reconciliation is short to meet the high demand. Therefore, some victims leave unsatisfied with the conciliation, and they are often unhappy with the proposals made by the prosecutor[13].

Undoubtedly, Law 9.099/95 inaugurated a new philosophy in the criminal justice system. It encouraged and enhanced the participation of victims in criminal proceedings, as before it was completely ignored, serving only as means to an end.

However, the aforementioned law also inaugurated a serious discussion nationwide about the trivialization of domestic violence against women, that many times took the guise of low offence crimes, and so received only light punishments (community service and payment of money), mainly in cases of physical harm against wives and companions.

Furthermore, the complexity of the situation of domestic violence, in which generally the women are financially and emotionally dependent on the perpetrators, influenced them to make arrangements, using the restorative tools of Law 9.099/95, to ward off criminal liability of the offender, as the start of the prosecution relied on the representation of the victim.

In this context, to address the need for specific treatment of gender violence against women, Law 9.099/95 was amended to prevent the application of the mentioned instruments in these cases. Furthermore, because of this modification, the Brazilian Supreme Court ruled that criminal action on the crime of corporal injury, in the context of domestic violence against the woman, is public and unconditional and not private anymore.

B. Law 11.340/06—The Maria da Penha Law

An important legislative instrument enacted in Brazil in 2006, as a major victory for the defence of women's rights, was Law 11.340/06, which, besides creating concrete measures to curb domestic violence against women, brought more legal instruments to ensure protection of victims of this type of crime both in the civil and in the criminal sphere. The need to promote mechanisms for the prevention and repression of domestic violence is also a topic in the Brazilian Federal Constitution[14].

Law 11.340/06 is known in Brazil as the Maria da Penha Law, in honour of Maria da Penha Maia Fernandes. She fought for twenty years to see her companion arrested, due to an assassination attempt that occurred in 1983, in which she was shot in the back while asleep and became a paraplegic. Then he tried to kill her again through electrocution in the shower. The trial took place eight years after the crime, but the conviction was overturned in 1991. In 1996, there was a new trial that resulted in a sentence of 10 years in prison, but the defendant appealed. After great international pressure, the case

[13] MINISTRY OF JUSTICE, Office of Legislative Affairs. Final research report: The victim in criminal proceedings Brazil: a new role in the contemporary scene? Available at: 〈http:// participacao.mj.gov.br / pensandoodireito / wp-content / uploads / 2012 / 12 / 24Pensando_Direito_relatorio.pdf〉, accessed on October 24, 2013.

[14] Article 226. The family, the basis of society, has a special state protection.

§ 8 - The State shall ensure assistance to the family in the person of each of the members, creating mechanisms to suppress violence within their relationships.

was sent to the Commission on Human Rights (OAS), which received, for the first time, a complaint of domestic violence. Brazil was then condemned for negligence and failure to respond to such aggression, and was assigned as punishment the preparation of appropriate legislation to respond to this type of violence.

The aforementioned law brought a rather broad concept of domestic violence against women —defined as any action or omission based on gender that will cause death, injury, suffering physical, sexual, psychological and moral or patrimonial damage—which facilitates the protection of the victims by public agents, such as the police, the prosecutors and the judiciary.

Additionally, Law 11.340/06 established expedited procedures for immediate protection of the victims of domestic violence. So, as soon as the aggression happens, the victim must head for a police station, where she will declare the facts in an official document and request protective measures[15], which range from restriction of rights—suspension or restriction of possession of firearms, prohibition of approaching the victim or his family or contact with the victim by any means—to the removal of the aggressor from the common home and the provision of aliments to the victim. After the application, the Police Authority must send it within 48 hours to the Court, which will consider the request promptly. If the protective measures are imposed, the offender will be informed, and, in case of noncompliance, he may have his freedom curtailed.

In more severe cases, where the victim is at risk of death, there is the possibility of referral to a shelter house, whose location is kept secret, and also the possibility for victims to receive aid from the state for their survival until the threats cease.

In light of the need to empower the victim in the criminal justice system, an important dilemma to be evaluated is a recent decision of Brazil's Supreme Court, which, in cases of domestic violence with bodily injuries, the criminal action is public and unconditioned, and the victim's will is disregarded. The aim was to offer better protection to women, as many times they were coerced to withdraw the charges, and this new interpretation made it impossible. On the other hand, this interpretation has also expropriated the conflict from the women, and blocked her from seeking a bargained solution to solve problems within her own family. The question, however, remains open, and also represents another challenge for the discussion of the implementation of the principles of restorative justice in Brazil.

C. Recent Changes and News with Discussions of the CP and the New CPP

The Brazilian Code of Criminal Procedure (1941) and Penal Code (1940), legislation in existence for over 70 years, presents a philosophy originally directed to the expropriation of the victim's conflict,

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[15] Article 22. Confirmed the practice of domestic and family violence against women, under this Law, the judge may apply immediately to the offender, together or separately, the following urgent protective measures, among others:
I - suspension of possession or restriction of authorization of bearing arms, with communication to the competent body, in accordance with the Law 10.826/03;
II - removal from the home, residence or place of coexistence with the victim;
III - prohibition of certain conducts, including :
a) approximation of the victim, her family and witnesses, fixing the minimum distance between them and the offender ;
b) contact with the victim, witnesses and their families by any means of communication;
c) frequenting certain places in order to preserve the physical and psychological integrity of the victim ;
IV - restriction or suspension of visits to minor dependents, heard the multidisciplinary team or similar service;
V - providing provisional or temporary aliments.
§ 1 The measures referred to in this Article shall not preclude the application of other under the laws in force, where the safety of the victim or the circumstances so require, and this other measure shall be communicated to the prosecutors.
§ 2 In the case of application of item I, finding the perpetrator under the conditions mentioned in the heading and items of Article 6 of Law 10.826/03, the judge shall inform the respective body, corporation or institution the urgent protective measures granted and determine the restriction of carrying weapons, becoming the immediate superior of the abuser accountable for compliance with the Court's order under penalty of the crimes of disobedience or prevarication, as appropriate.
§ 3 To ensure the effectiveness of urgent protective measures, the judge may order, at any time, assistance of the police force.
§ 4 Applies to the cases specified in this Article, as applicable, the head and the paragraphs 5 and 6 of Article 461 of the Law 5.869/73 (Code of Civil Procedure).

focusing the response to crimes on state agents, without taking much into account regarding the wishes of the victim.

However, such statutes have undergone various changes over time in order to be harmonized with the new philosophies of criminal process relating to the minimum penal law paradigm, the valorization of the victim in criminal proceedings and measures of Restorative Justice.

In this context, for example, the Code of Criminal Procedure undergone significant changes through the recent laws 11.719/08 and 11.689/08, which brought an appreciation of the victims, expanding their rights and guarantees. They brought, for example, the right of the victim to be alerted of the arrest or release of the accused, and the possibility of overlapping the criminal action with the request for compensation for the damage caused by the crime.

These limited reforms to the Brazilian system of criminal justice undermine the notion of its systemic ordering, so currently there are, in the final stages of discussion, two bills to replace, in full, both the current Criminal Code and Criminal Procedure Code.

Regarding the victim's rights, the new project of the Criminal Procedure Code—Bill 156/2009—provides for a new chapter on the subject, in which the victim is no longer considered just an instrument of evidence to support the conviction of the accused, but happens to be a subject of rights. Hence, in keeping with the content of the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, approved by the United Nations in 1985, the new code proposes, in the course of sixteen statements[16], better treatment of victims with the principles of compassion and respect for their dignity, as well as psychosocial assistance and immediate treatment of any traumas resulting from the offence.

Moreover, despite plans to eliminate private criminal action, the victim will be able to directly follow the criminal case, receiving copies of the police investigation and judicial proceedings, which is not the usual practice today, except when enacted confidentiality in the investigation's interest.

Another novel measure that the future Code of Criminal Procedure will provide, if approved, is the possibility of the victim receiving financial aid from the State both for her and for her close relatives. This is important in order to avoid secondary victimization of the offended, consisting of difficulties experienced throughout the criminal process because of the crime.

The bill of the new Penal Code, Bill 236/2012, also introduces modifications which, albeit timid, are important in relation to the rights of victims. It introduces, for example, the incidence of automatic fine against the perpetrator when the crime generated harm to the victims, to their benefit, and the judge's obligation to fix aliments for family members of homicide victims, to be imposed on the accused.

Despite these measures, it appears that, in the discussion of the construction of the main legal

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16 Article 91. Are rights guaranteed to the victim, among others:
I - to be treated with dignity and respect befitting his situation;
II - receive immediate medical and psychosocial care;
III - to be sent to a forensic exam when suffering personal injuries;
IV - recover in case of crimes against property, objects and personal belongings which were stolen, except for the cases in which a refund cannot be done immediately because of the need for expert examination;
V - to be informed of:
a) the arrest or release of the alleged perpetrator;
b) the completion of the police investigation and the offering of the indictment;
c) the filing of any investigation pursuant to Article 39;
d) the conviction or acquittal of the accused ;
VI - obtain copies of parts of the police investigation and criminal proceedings, except when justifiably kept in strict confidence;
VII - be counseled about the appropriate exercise of the right of representation, the private action subsidiary of the public, civil action for patrimonial and moral damages, the civil accession to the criminal prosecution and about the composition of the damage to effect the extinction of criminal liability in cases prescribed by law;

instruments for the consolidation of a criminal justice system, there still isn't a philosophy focused on the use of restorative justice practices in a systemic way, consolidated into a nationwide programme, nor is there sufficient attention focused on the valuation of the victim in criminal proceedings.

III. RESTORATIVE JUSTICE PRACTICES IN BRAZIL

Despite not being able to claim that there is a national programme aimed at restorative justice practices, it is possible to find in Brazil local examples of applying restorative programmes. Several factors, including the overcrowding of prisons—in December 2012, the Brazilian prison system had room for 310,667 inmates, and a prison population of 548,003 people—the index numbers for criminal relapse, the high costs for the maintenance of the criminal justice system, the difficulty in repairing the damage and dissatisfaction of victims with the criminal proceedings are some of the factors that win more and more fans to the model of restorative justice.

Although there is no clear definition or consensus on what restorative justice is, it is understood as a set of practices aimed at conciliation and reconciliation between the parties, at the resolution of the conflict, the reconstruction of the ties broken by the criminal offence, the prevention of recurrence and personal accountability[17].

The Australian John Braithwaite believes that "restorative justice is a process where all people affected by an injustice have an opportunity to decide what should be done to fix it"[18]. Braithwaite outlines some key elements of the restorative justice model: 1) willingness to participate, 2) equal opportunities for the manifestation of the parties, 3) prohibition of humiliating punishments; 4) restoration of human dignity, property, security and the human relations. Besides these elements, the author points to other standards that attest to the success of restorative practice, for example, remorse for the injustice done, apologies, forgiveness of the victim and compassion.

Another important element that integrates the model of restorative justice is the responsibility of those involved, characterized by their empowerment to manage the conflict. Although there is a third side guiding the procedure, the parties directly involved assume the central role of the process, a task normally given to a third party, usually a state agent, in the traditional model of conflict resolution.

In Brazil, despite the indicated legal limits to the model of restorative justice, one can identify some pilot restorative justice projects. ZAGALLO pointed to three experiments: São Caetano do Sul, in the state of São Paulo; Porto Alegre, in the state of Rio Grande do Sul; and Núcleo Bandeirante, in the

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VIII - testify on a day other than the one stipulated for the hearing of the alleged perpetrator or wait in a separate location until the procedure begins;
IX - to be heard before other witnesses, according to the order under the heading of Article 276;
X - to petition the authorities to be informed about the progress and the closure of the investigation or proceedings, as well as express their opinions;
XI - get the offender to repair the damage, secure the assistance of a public defender for this purpose;
XII - intervene in criminal proceedings as assistant prosecutor or as civil suitor for the claim for indemnification;
XIII - receive special protection from the State when, due to his cooperation with the investigation or prosecution, suffering duress or threat to their physical, psychological and patrimonial integrity, being extended the protection measures to the spouse or partner, children, family and the like, if necessary;
XIV - receiving financial assistance from the Government, in specific cases and conditions determined by law;
XV - be referred to shelters or programmes for the protection of women in situations of domestic violence, if applicable;
XVI - get, through simplified procedures, the premium of the compulsory insurance for personal injuries caused by motor vehicles.
§ 1 It is the duty of all to respect rights under this title, especially the public security organs, prosecution, the judiciary, the government agencies and social services and health.
§ 2 The communications referred to in item V of the head of this Article will be made by post or e-mail address registered and will be done by the authority responsible for the act.
§ 3 The authorities will always careful to preserve the address and other personal data of the victim.

[17] PALLAMOLLA, Raffaella da Porciuncula. *Justiça restaurativa: da teoria à prática*. 1ª. ed. São Paulo: IBCCRIM, 2009. p. 53.

[18] ZAGALLO, Luiz Barbosa de Sampaio Ricardo. *A justice restaurativa no Brasil: entre a utopia e a realidade*. Available at ‹http://repositorio.unb.br/bitstream/10482/7687/1/2010_RicardoLuizBarbosadeSampaioZagallo.pdf›, accessed 26/10/2013.

Federal District.

The first two experiments concern the application of restorative justice practices to conflicts involving young people. The age at which a person may be responsible for a practice of criminal conduct, in Brazil, is 18 years. If the agents is between 12 and 18 years, he doesn't commit a crime, but an infractional act, resembling a crime, and is submitted to the infractional justice system, aimed at teenagers. This system, however, offers more flexibility in relation to the criminal justice system, because instead of being governed by the principle of obligation, the principle of opportunity is applied, through the possibility of remission provided for in Article 126 of Law 8.069/90 (Statute of Children and Adolescents)[19]. In the remission, the public prosecutor, before starting judicial procedure, can forgive the teenager, according to the circumstances of the case, subject to the approval of the judge.

Thus, in the city of São Caetano do Sul, the restorative justice project is intended to resolve conflict in the school environment, where restorative circles are established with the participation of victim and offender, their supporters, community representatives and two facilitators. Where conflicts involve the practices of infractional acts, the terms of the agreement, formulated in the restorative circles, are sent to the public prosecutor and subject to the approval of the Judiciary.

In the city of Porto Alegre, the use of restorative justice measures is also aimed at young people, but more broadly. The project covers not only school conflicts prior to the initiation of judicial proceedings, but there is also the possibility of submission to restorative circles during court proceedings and even in the execution of educational measures—the punishments in case of the practice of infractional acts.

Differently, the project implemented in Núcleo Bandeirante is intended to reduce crimes. Since 2006, the Court of Justice of the Federal District and the Territories created a center of restorative justice practices to work in conjunction with the Special Criminal Courts and improve the implementation of the institutes of the Law 9.099/95. Thus, when the public prosecutor, judge or public defender perceives a conflict with potential to be solved by those involved, they are referred to a restorative meeting. There, the best techniques of mediation will be applied to seek the solution of the problem and an agreement, or to prove its impossibility.

The timid practices of restorative principles in Brazil, as well as the weak measures for recovery of the victim's importance in the criminal justice system, point to the need for discussion of the subject in the country and to identify its challenges.

IV. CHALLENGES AND WAYS TO ENHANCE RESTORATIVE JUSTICE IN BRAZIL

When compared to the traditional way of resolving conflicts in the western world, especially in countries of the Civil Law tradition, the dialectical and consensual logic of restorative justice, more typical of the Common Law tradition, presents a break in the paradigm of criminal legal systems focused on the offender, to the detriment of the victim.

In this context, the concept of legal sensibility developed by the anthropologist Clifford Geertz is an important guideline for comparative studies of legal institutions based on different legal systems such as the Common Law and Civil Law. Geertz proposes a study that emphasizes the context of the

[19] Article 126. Before starting the procedure for judicial determination of an infractional act, the public prosecutor may grant remission, as a form of exclusion from the process, given the circumstances and consequences of the fact, the social context as well as the teenager's personality and its largest or lesser participation in the infractional act.
Unique paragraph. Initiated the procedure, the granting of remission by the judicial authority will imply the suspension or termination of the process.
Article 127. Forgiveness does not necessarily imply recognition or proof of responsibility, nor prevail for purposes of background and may eventually include the application of any of the measures provided by law, except the placement in the regime of semi-freedom and internment.
Article 128. The measures applied by virtue of the forgiveness may be judicially reviewed at any time, at the express request of the adolescent or his legal representative, or by the prosecutor.

institutions and their local significance, which lend it the legitimacy required to produce its organizing effect[20]. So he adopts the view that the right is a local knowledge, putting in question the roots of its legitimacy, founded by those who choose to owe it obedience, or that are required to do so.

From this premise, Roberto Kant de Lima briefly explains the different trappings of the idea of legitimacy in the Civil Law and the Common Law traditions. Under the Civil Law tradition, the legitimacy is based on abstract rationality, in which it is considered that the technical judgments, made by judges, are better than the judgments of ordinary people, who don't have access to a specialized legal knowledge. Differently, the legitimacy of the judgments under Common Law tradition is based on reasonableness, in which the parties discuss their arguments and the decision emerges from the consensus of the referees.

The valorization of the technical judgment of a third person is a deep-rooted tradition in Brazil, and this characteristic is essential for understanding the challenges of restorative justice in the country. In the criminal trial, the suitors adopt the practice of endless contradiction of versions, which is finished only with the sentence of the professional magistrate. In this context, rarely the parties adopt a consensual and dialectic approach.

It is a Brazilian cultural characteristic or legal sensibility which points to the need of building specific principles of restorative justice for the country. The traditional paternalistic attitude of the state towards its citizens is another cultural aspect of Brazilian society to be considered as a challenge to the application of restorative justice practices, and to the enhancement of the role of victims in criminal proceedings.

Considering the historical aspects of Brazil, as well as the youth of our Constitution, which reopened the Democratic State, as well as the socio-economic aspects of the country, in which there is great inequality between citizens, much of the population adopts a passive stance about the defence of their rights. Such a stance is not consistent with the principles of restorative justice, which value the capacity and autonomy of the parties to discuss the best solution to the conflict.

So it is critical to think about a model of restorative justice in Brazil that takes into account this passivity and encourages emancipatory practices in the use of conciliatory mechanisms. Alongside these cultural aspects, there is also a large formal challenge that still must be overcome at a systemic level: the relaxation of the principle of obligation.

As stated earlier, the bills of the new Penal Code and the new Code of Criminal Procedure bring only timid enhancements for the rights of the victims, and showed no major change in the prevailing logic of expropriation of the conflict. Without a relaxation of the principle of obligation, allowing the use of restorative practices for any type of crime, always according to the characteristics of the case, it is not possible to achieve great advances towards restorative justice in Brazil, as well as the appreciation of the role of the victim in criminal proceedings.

However, while these bills proceed through the Brazilian Parliament, the legislative procedure of Bill 7.006/06 is also going forward. This bill provides for the use of restorative procedures for all types of crimes, if it is advisable under the facts and circumstances of the case as well as the personalities of the parties. Under the mentioned bill, these procedures shall be governed by the principle of voluntariness, human dignity, impartiality, proportionality, cooperation, informality, confidentiality, interdisciplinarity, accountability, mutual respect and good faith. It appears that the proposal constitutes a true relaxation of the principle of obligation, enabling the prosecution to forbear criminal action while there is an ongoing restorative procedure[21]. It is also interesting to notice that, during the

[20] LIMA, Roberto Kant de. *Sensibilidades jurídicas, saber e poder: bases culturais de alguns aspectos do direito brasileiro em uma perspectiva comparada*. Anuário Antropológico/2009 — 2, 2010: 25-51.

[21] Article 14 - added to Article 24 of Decree-Law n. 3,689, of October 3, 1941, the third and fourth paragraphs, as follows:
§ 3 - The judge may, with the consent of the prosecutor, refer the case to the centers of restorative justice, when victim and offender demonstrate voluntarily intend to undergo the restorative procedure.
§ 4 - The prosecutor may not propose the criminal action while ongoing restorative procedure.

investigation, the police authority itself may suggest the referral of the parties to find a solution to the case through a restorative procedure. If an agreement is reached, with the consent of the public prosecutor, the judge will approve this conciliation[22].

Although Bill 7.006/06 presents a significant advance for the intensification and development of restorative justice mechanisms in Brazil, as it proposes important modifications to the current system of the Penal Code and Criminal Procedure Code, its rapporteur in the Parliament, Congressman Antonio Carlos Biscaia, opined for its rejection. He stated that, although the project is important, it goes against the desires of the Brazilian society, that currently suffers the feeling of impunity, as it would decriminalize behaviours.

However, the implementation of a restorative justice project in Brazil has nothing to do with decriminalization of behaviours considered criminal. Rather, it seeks more effective measures for the satisfaction of the parties involved, with the compensation for property, social and psychological damage. It promotes democratic and social accountability mechanisms in cases that recommend the use of restorative methods, irrespective of abstract legal prohibition. The sense of satisfaction after the success and effectiveness of a restorative circle, unlike the argument of Congressman Antonio Biscaia, leads to a reduced sense of impunity, not to its increase.

The possibility of greater freedom of the police authority also stands out as a breakthrough in Bill 7.006/06, in which the police may directly refer the parties to the restorative procedure.

In Brazil, police stations operate 24 hours, and are responsible for receiving most reports of crimes, recording them and ascertaining the facts. Victims seek the police and report the facts, which should be taken immediately to the Chief of Police, who is responsible for deciding whether or not the reported facts constitute a crime, and for explaining the procedures for the settlement of that conflict to the victim. In many cases, the Chief of Police just mediates the differing interests between the parties, which many times are characterized as family or neighborhood conflicts.

The possibility of the use of restorative instruments from the first contact of the victim or the offender with a state agent—what generally happens at the police station—would constitute a major breakthrough for the development of justice in Brazil, and to the construction of a more democratic criminal justice system. It would also promote a paradigm shift in the Brazilian legal sensitivity, which is grounded in the valorization of the "technique" of "knowledge-power".

V. CONCLUSION

The path to the development of restorative justice in Brazil, as well as the appreciation of the dignity of the victim in criminal proceedings, still requires hard work to be followed, although it is possible to say that some windows have been opened by means of restorative practices introduced by the Law of Special Criminal Courts and the Law Maria da Penha.

However, the major challenges related to the sensitivity of the Brazilian legal culture in relation to the valuation of technical judgments, instead of dialectic debate and emancipated citizens, present a major barrier to achieve a national project, based on the principles and guidelines of the restorative procedure, and the necessary relaxation of the principle of obligation. Despite these difficulties, it is important to continue following this path in practice in order to truly improve the Brazilian democratic state.

[22] Article 13 - It is added to Article 10 of Decree-Law n. 3,689, of October 3, 1941, the fourth paragraph, as follows:
§ 4 - The police authority may suggest, the investigation report, the referral of the parties to the restorative procedure.