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The audience of custody and restorative justice: the third way of the punitive system

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SUMMARY: INTRODUCTION; 1. CONTEMPORARY CRIMINOLOGY AND THE BRAZILIAN PENITENTIARY SYSTEM - A VISION; 2. CUSTODY COURT-HEARING; 3. RESTORATIVE JUSTICE; 4. APPLICATION OF RESTORATIVE JUSTICE AT THE AUDIT OF CUSTODY; CONCLUSION

ABSTRACT: The custody hearing had its practice begun in Brazil through an incentive of the National Justice Council - CNJ in partnership with the Ministry of Justice and Courts of Justice which, in creating the Custody Hearing Project in 2015, Of the American Convention on Human Rights, which guarantees the presentation of the prisoner to the judicial authority as soon as possible. Restorative Justice consists of a method used in the ADR as an alternative to traditional criminal proceedings, in order to ensure the restoration of social peace through dialogue between the parties, empowering them and ensuring that the Overcome traumas, and the offender, accountability for their actions and subsequent reintegration into society. This procedure is followed by a way of guaranteeing respect for the human rights of the prisoner, since his *raison d'être* is the verification of possible illegality of the prison, due to ill-treatment, for example, and the possibility of applying alternative measures To imprisonment by presenting the prisoner to the judicial authority within 24 hours after his arrest.

KEYWORDS: Restorative justice, custody hearing, adequate resolution of disputes

INTRODUCTION

Considering that the Brazilian prison situation is chaotic and needs urgent practices for its improvement, and that among the possibilities of result of the custody court-hearing is the application of several precautionary measures of imprisonment, it is understood that there is, at this point, the possibility of implementation of the practice of restorative justice methods when presenting the prisoner at the custody court-hearing, thus guaranteeing a way of humanizing the conflict and seeking social pacification in order to avoid recidivism.

According to data from the Conselho Nacional de Justiça (CNJ), Brazil has the 4th largest prison population in the world, behind only the United States, China and Russia, and provisional prisoners, who should be an exception due to the constitutional principle of innocence, have become the rule in the country prison system.

Data from the Ministério da Justiça from 2014 show that the number of people

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arrested in Brazil has increased more than 400% in 20 years. According to the International Center for Penitentiary Studies, linked to the University of Essex in the United Kingdom, the global average of incarceration is 144 prisoners per 100 inhabitants. In Brazil, the number of prisoners rises to 300. Thus, prison, which should be the *ultima ratio* of the penal system, has become the rule, so that because of the prison population, the prison system has a deficit of about 200 thousand vacancies.

The model of incarceration practiced, above all due to the degrading conditions in which the prisoners are subjected because of the lack of prison structure, feeds a cycle of violence that is projected for the whole of society. The dignified and respectful treatment of prisoners is an indication of the civilization of a society and the first step in the attempt to regenerate the lives of those who will one day be among us.

In this context restorative justice appears as a way of giving greater respect and dignity not only to the prisoner, but above all to the victim and all those who, in some way, have been offended by the crime committed. The practice is to promote dialogue and understanding between the parties and the community, promoting social harmony and restorative results.

There is a strong tendency to encourage the spread and dissemination of restorative practices for conflict resolution, especially in the criminal arena, since such practices involve greater participation of the parties, such as the victim, the offender and the community, when they deem it necessary.

Through Resolution 125, the Conselho Nacional de Justiça -CNJ initiated the dissemination of the culture of social pacification, with provisions on the appropriate treatment of conflicts, using alternative methods of conflict resolution.

Subsequently, through Resolution 225, the CNJ ruled on Restorative Justice, taking into account the constitutional right of access to justice, as well as recommendations from the United Nations, which see in practice an effective way of dealing with conflicts of a penal nature without necessarily applied to the prison in the traditional molds.

The advantages of the use of restorative practices in the criminal area still present some resistance in Brazil, due to the traditional culture of incarceration present in the culture of the country, including by the law operators. However, with the incentives promoted by the Conselho Nacional Justiça - CNJ, it is possible to verify a change of behavior.

What is sought is the dissemination of restorative practices and the institutionalization of its practice in the Judiciary, which may occur at different moments in the process, even during the so-called Custody Court-hearing.

Among the objectives of the project is the establishment of centers of penal alternatives, criminal mediation chambers, among other places where restorative practices can be developed with victims and offenders when crimes occur.

1. Contemporary Criminology and the Brazilian Penitentiary System - A Vision

The rapid growth of the seventeenth-century prison population, which led to the construction of new prisons in Europe at that time, where thousands of people were arrested in a few years, is repeated at the beginning of this century in Brazil. When a democratic state opts for the use of intimidation and force, it reveals behind its acts a fragility in the authority that is pertinent to it.

Public security has been one of the most discussed state infrastructure issues in these times. The use of criminal control as an instrument of public policy, distorting the use of criminal law and emphasizing that control must be effective with the use of jail, which undoubtedly translates into authoritarianism that departs from the premises that guide the Constitutional State. However, it is not denied that the more incarceration increases the more popular support of the rulers who draw upon it. The management of public security is *conceived and executed not so much by itself, but for the express purpose of being exhibited and seen, examined and spied: the absolute priority is to make it a spectacle in the proper sense of the term* (WACQUANT, 2007, P.9).

The liberal state set in the late 1970s, in the last century, reconfigures the

democratic state and accelerates changes that imply large-scale privatization in the second and third sectors of the economy, social security reforms, opening of markets, reduction of state protectionism, loosening of labor laws, wage flexibility, mitigation of social policies. Liberal governments thus cease to be concerned with the causes of the problems and attack their consequences, revealing authoritarian bias against the emergency policies they propose and carry out, which is evident through the penal policies of incarceration, which are accompanied by penitentiary policies anchored in the absolute theory of punishment, which only aims at retribution of evil by punishment, which is also evil.

Nowadays the workers have been anxious to know how their security life will be from now on, or, it is not incorrect to say that the unregulated operation of the liberal market implies in the true lack of predictability of the future, since the state presence is of decisive actions of a police and penitentiary kind, but inexpressive in the economic and social field. In the words of (WACQUANT, 2007: 40):

...the uncontested hegemony of neoliberal security thinking on both sides of the Atlantic" has associated the "'invisible hand' of the disqualified labor market with its ideological extension and its institutional complement in the 'iron fist' of the penal State. (WACQUANT, 2001, p.7) also discusses the neoliberal paradox that seeks to remedy with a 'more police' and penitentiary State the 'less state' economic and social which is itself the cause of the widespread escalation of objective and subjective insecurity in all the countries.

In this way, the role of the State is diminished for interventions of criminal nature, especially in the areas of exclusion, where those who stay away from social policies are oppressed. The nascent lump movement of the criminal State and the reduction of the social State indicates that social inequalities are increasing in a global scale. Teaches (BAUMAN, 1999, p. 128):

In the world of global finance, governments hold little more than the role of oversized police districts; the quantity and quality of police officers on duty, sweeping the beggars, troublemakers and street thieves, and the hardness of the prison walls arise among the main factors of "investor confidence" and thus among the considered key data when decisions are made to investing or withdrawing an investment. Making the best possible police officer is the best (perhaps the only) thing the State can do to attract nomadic capital to invest in the well-being of its subjects; and thus the shortest route to the nation's economic prosperity and, supposedly, to the feeling of "well-being" of the voters, is the public display of police competence and State dexterity.

The liberal States reinforce their police instruments, in an authoritarian way, to maximize their penal and penitentiary policies, in order to guarantee the security of the fiefs of the 21st century, while in the surroundings of these pockets of misery and social exclusion build up. However, the aim is to ensure that the affluent do not submit to the yoke of violence that affects the vast majority of the population. Interesting is what they claim (Passion and Blessed, 1997, p. 2) *on the essential function of the bourgeois State: the assurance of the quiet sleep of the owner of Adam Smith and the reduction of the risk of the violent death that terrified Thomas Hobbes.*

In our country, the use of Criminal Law as a public policy accommodates itself as the panacea of Brazilian problems, especially in the reinforcement of aphorisms that include expressions such as *more police in the streets* and *a good perpetrator is a dead one*. The state symbolic response, aimed at immediacy and media repercussions, does not meet the demands of security that must be preceded by structural policies composed of, at least, the adoption of measures pertinent to public health, quality education and free access, guarantee of opportunity of employment and income, so in the end have a state-based equipment aimed at security and the prison system. Obviously, it must be the public security policy subsidiary to the others, becoming its intervention at the

moment the others fail.

It matters arguing that at the end of the second world war, the criminal policy that the national States adhered allowed that there was the control of the crime rate, since the scope was the reconstruction of nations and in the criminal sphere the personalized treatment to the perpetrator, with emphasis on re-socialization of this and support for family members for social inclusion. Criminal Law was not used as the main tool of the public policy manager. (GARLAND, 2008, p.59):

In the postwar welfare system, imprisonment was seen as a problematic institution, necessary as a last resort, but counterproductive and disoriented in relation to corrective purposes. A great deal of government effort was expended in creating alternatives to incarceration and in encouraging the sentences to enforce them. Throughout most of the twentieth century, there seems to have been a secular movement of detachment from prison for pecuniary punishment, conditional release, and many other forms of community supervision.

The view of Criminology mirrored Benthan's thinking in the Panopticon, for what was expected of man with deviant behavior as confined was to be disciplined to return to society adapted to the values it preserves, namely, order, progress, and job. Therefore, Criminal Law had as its immediate objective the re-adaptation of the inmate to meet the social requirements that were imposed on citizens who did not break the law, (Foucault, 1987).

The Illuminism with its contractual concepts uses utilitarian logic to justify the purpose of punishment. It is not to be forgotten that the purpose of imprisonment, by this utilitarian logic, should be the improvement of man through the jail, which is compared to other social institutions that aims at the integration of the individual into the community. (FOUCAULT 1995: p. 131): "since its origin, linked to a project of transformation of individuals. [...] From the beginning the prison should be as well-equipped as the school, the barracks, or the hospital."

The conception of social control implies in "taming" those who do not submit to the rule of the contemporary state, resulting in restraining the less favored and discipline them for the projects of progress of the liberal State. So that this restraint, through discipline, subjugates the otherness of the majority by subjecting it to the desires of the dominant minority. Well, it is a permanent exercise of the destruction of free will, with the clear purpose of standardizing such deviant behaviors. (ZAFFARONI and PIERANGELI, 2002, p.279):

The ideology of the penalty was that of training, through strict control of the conduct of the convicted, without the latter having a single moment of privacy. This ideology will be expanded and formulated by the various creators of "progressive" regimes and systems, but in the end it will remain the same: vigilance, repentance, learning, "moralization" (working for happiness). In general, it corresponds to the form of industrial work, as it was conceived and practiced at the time: the strict supervision of the worker in the factory, permanent control by the foreman, the impossibility of having free time during work, etc.

Indeed, man having his freedom and autonomy limited will rebel at any moment. The speech of the lowest State intervention in private life by the liberal model, in practice is fallacious, since inequality imposes rigid control on those who do not have capital as an instrument of dialogue. The limitation determined by the positive law used to guarantee law and order has proved fragile and incapable of meeting what it has proposed, freedom and security.

Discussing bio-politics (FOUCAULT, 2005b) reveals that State security instruments are technologies of liberal government power. The population is the object of these technologies. The thought of the renowned French thinker indicates that there is a logic in the liberal society regarding the intervention of the State in the criminal and penitentiary area, this, the logic of ruling, is of limited interference in the face of its

managerial function. However, this does not leave out the control, which is exercised through subjective normativity. This normatization acts through the normal and the abnormal, depending on the positive description, the law. Thus, the existence of the social phenomenon of aggression is not impeded as described in the law, but it manages to keep them at tolerable levels, since they act by statistical predictability that seek the balance of social security.

The bio-political regulation system, in short, creates risk groups and adopts security policies according to the variations of occurrences, observing the quantification of events and the calculations of risk. From this extract is withdrawn the degree of danger and the need for prevention. Thus, those who transgress the norms are punished, according to the positive social rule.

From self-defense to the current system of punishment there was a painful course. The understanding that, initially, the jail was used for the atonement of sins by the Church of the Middle Ages and only in the XIX it is transformed into place of fulfillment of punishment, indicates that the prison model is new for humanity, but without discussing the dignity of the fulfillment of the penalty, little or nothing will be achieved in the pursuit of social equality.

Brazil has been unsuccessful in penitentiary politics, since the current model has done little or nothing to contribute to the social insertion of inmates in the system. It is not without reason that the expression *faculty of crime*, in reference to Brazilian prisons, must be taken as a metaphor without fail. The lack of care with the prison system shows that Brazilian society as a whole does not care about what happens in its prisons, despite having the fourth prison population on the planet. In that it is observed that the isolation of the man, by itself, satisfies the yearning of a community, since this one has so many deficiencies of infrastructure that does not have serious concerns with the rehabilitation of the one who has broken the law. This assertion is accommodated in the concern with prisoner escapes, which for the prison administrator is much more important than enabling inmates to rejoin society (TEIXEIRA, 2008).

Countries such as the United States, Russia and Brazil, incorporated in their model of punishing and recovering the offender citizen deprivation of liberty. Time has shown that the path traveled was not very effective. The country legislation with fulcrum in the 1940 Criminal Code and, later, in 1984, with the Law of Penal Execution, makes possible the so-called regime progression. It is understood by prison regime the closed, semi-open and open regime. Finally, conditional release. These forms enable the convicted person to leave, through time and favorable personal conditions, from a burdensome to a less burdensome regime. According to the penalty enforcement regime that is the criminal establishment that intended the punished. They may be Penitentiaries or House of Detention for the convicted or provisional prisoners, respectively; Industrial or Agricultural Penal Colonies for prisoners in semi-open regime; And Hostels for the prisoners in open regime. The legislation requires that there be patronage to welcome the released ones from the prison system, including those who are in the probation period in the conditional release.

Law 7.210 / 84, Law on Criminal Enforcement, establishes that there be a penal establishment for women and those over 60, as well as special penal establishments for those subject to the security measure. Although not contained in the LCE, maximum security prisons also form part of the penitentiary system.

The state members are responsible for the custody of the majority Brazilian prisoners, although in 1998 the Federal Penitentiary System was implemented. Prior to this event, prisoners who committed federal crimes were kept in state prisons. The Federal Penitentiary System is of maximum security, receiving provisional prisoners or convicted of high dangerousness. So, the member states still have the burden of guarding the prisoners involved in crimes of federal jurisdiction that have medium or low risk. Teaches (TEIXEIRA, 2008, pp. 95-96):

In spite of the form of organization used by the member state, there is almost unanimous feeling that in all Brazilian states the prison situation is distressing, desperate, apart from some encouraging experiences, further explored, such as the Res-

socialization Centers in São Paulo (CR's) , the APAC's in Minas Gerais and the privatized prisons, or, in other words, outsourced ones, such as Puraquequara, in Manaus, Amazonas.

One of the most common criticisms of the prison system is that Brazil follows a worldwide trend, notably in Europe and in the United States of America, for an exaggerated option for custodial sentences as a mechanism of combatting crime and protection of society, with a consequent increase in prison populations, combined with an increase in crime rates, upsurge in the criminal policies and hardening of sentences.

Brazilian legislation points towards the respect for the dignity of the human person as a basic principle for the recovery of the convicted. However, such an expression is limited to the field of legal fiction. In most penal establishments prisoners are not separated according to their dangerousness or previous life. This scramble of convicts generates a spreading of criminal doctrine, perverting human beings who need to adjust to the rules that are imposed by criminal organizations operating inside and outside criminal establishments to survive. These organizations recruit their personnel within the penitentiary system, as the Red Command does in the State of Rio de Janeiro; the First Command of the Capital, in the State of São Paulo and the Northern Family, in the State of Amazonas.

According to the Conselho Nacional de Justiça, between 1990 and 2013 the growth of the prison population in Brazil was 507%, the second highest rate of prison growth in the world, with a deficit of 206.307 vacancies in the prison system.

In turn, in the year 1980 the homicide rate was 11.7 per 100 thousand inhabitants. In 2003 this rate reached 28.9 homicides per 100 thousand inhabitants, which shows that crime did not decrease with the increase in the number of people arrested.

Minister Luiz Fux pointed out in the Direct Action of Unconstitutionality - ADI 5240 that the proposal of court-hearing custody led by the Conselho Nacional de Justiça is extremely relevant and has had satisfactory results so far, mentioning as an example the reduction of 50% of the custody prisons in the Court of Justice of the State of Espírito Santo and 40% reduction of custody prisons in the Court of Justice of the State of São Paulo, and in the first month of court-hearing custody, it is estimated that the penitentiary system of the State of Paraná there saved 75 million reais per year with expenditures and Amazonas saved 27 million reais per year.

At the ADI trial, Minister Ricardo Lewandowski, then president of the Conselho Nacional de Justiça, called the attention of the Court for the fact that today there is an index of about 50% of custodians who are released or whose arrest is considered illegal, and therefore subject to a decision to relaxation of this imprisonment, under the terms of arts. 310, I, of the CPP, or, then, the granting of provisional liberty. In most cases, said the Minister, the custodians committed or are accused of committing a crime of trifling, or a crime of little offensive potential, and therefore do not present the least danger to society and occupy for months, sometimes, even years, the vacancies destined to violent prisoners, those that put at risk the social harmony.

What can be observed, therefore, is the urgent need for measures to be taken to reduce the number of arrests, especially when there is a possibility that alternative measures to prison be enforced, such as precautionary measures, and, in the proposed study, the use of restorative justice alone or in conjunction with the application of the precautionary measure.

What is proposed in this study is that, when its viability is verified during the court-hearing custody, the judge, when deciding on provisional release or not, directs the accused to a penal alternative center, so that the appropriate restorative process be utilized accordingly to the characteristics of the offense.

2. CUSTODY COURT-HEARING

The Custody Court-Hearing or Court-Hearing Presentation, a nomenclature suggested by Minister Luiz Fux in the Direct Action of Unconstitutionality - ADI 5240, has

supralegal provision in article 7, item 5 of the American Convention on Man's Rights, ratified by Brazil in 1992, which states that "any person arrested, detained or restrained shall be brought without delay to the presence of a judge".

Although there is a bill in the National Congress (PLS nº 554/2011), the court-hearing custody has not yet been regulated by law in Brazil. This means that there is no law establishing the procedure to be adopted for this court-hearing (CAVALCANTE, 2016).

Faced with this scenario, and in order to give concrete substance to the ACMR projection, recently, some Courts of Justice, encouraged by the CNJ, began to regulate the custody court-hearing through internal acts issued by the Courts themselves, such as provisions and resolutions.

In compliance with the provisions of the Convention, in 2015, the Conselho Nacional de Justiça, in partnership with the Ministry of Justice and the Court of Justice of the State of São Paulo, initiated the Court-Hearing Custody Project, which is to guarantee the prompt presentation to a judge in cases of arrests in the act.

The Code of Criminal Procedure in conjunction with the 1988 Constitution affirms the assignment of the chief police officer to draw up the caught in the act arrest warrant, which takes the people involved to transform their reports into a document that leads to criminal prosecution. Can measure bail in cases allowed by law. However, the chief police officer can not pronounce the granting of provisional release or precautionary measures other than the precautionary prison.

The accused must be presented and interviewed by the judge at a hearing in which the public prosecutor, the public defender or the prisoner's lawyer will also be heard. Because it is a judicial act, the presiding authority has competence to assess the legality of the prison, its maintenance or relaxation. The Public Prosecution and defense participate in this hearing.

During the hearing, the judge shall analyze the imprisonment in terms of legality, necessity and adequacy of continuation of imprisonment or possible release, with or without the imposition of other precautionary measures. The judge may also assess possible incidents of torture or maltreatment, among other irregularities by means of an interview of the perpetrator during which questions will be raised about his qualification, personal conditions, objective circumstances of his arrest, without being asked questions that anticipate proper instruction of eventual knowledge process.

Among the possible results of the court-hearing custody are those listed in clauses of article 310 of the Code of Criminal Procedure, which are the relaxation of possible illegal imprisonment; the granting of provisional release, with or without bail; the replacement of the caught in the act prison by several precautionary measures (article 310, final part II and 319, all of the Code of Criminal Procedure) and the conversion of the act imprisonment into custody imprisonment.

The Court-Hearing Custody Project, therefore, has the objective of avoiding illegal arrests, carried out through violence or violation of human rights, as well as being a way of helping to improve the Brazilian prison system, offering alternatives to imprisonment in order to reduce prison population, since the precautionary prisons, which should be the exception in a Democratic State that effectively values the principle of presumption of innocence, has become the rule, leading to the so-called "mass incarceration."

Law No. 11.719 / 2008 established rules regarding criminal instruction procedures, which requires the magistrate to question the defendant at the end of the hearings of the prosecution and defense witnesses, guaranteeing a greater breadth of defense, in the manner of art. 5th, LV, CF. In these terms, the contact of the judge with the prisoner is postponed until the end of the instruction, which can take months, perhaps years, increasing the imprisonment without being such reasonability. However, the court-hearing custody seeks to remedy this procedural misconception by means of a more accurate analysis of art. 312, CPP, *verbis*:

Art. 312. Pre-trial detention may be ordered as a guarantee of public order, economic order, for the convenience of criminal instruction, or to ensure the enforcement of criminal law, when

there is proof of the existence of the crime and sufficient indication of authorship. (Wording given by Law No. 12,403, of 2011).

Single paragraph. Pre-trial detention may also be ordered in case of non-compliance with any of the obligations imposed by other precautionary measures (article 282, § 4o). (Included by Law No. 12,403, of 2011).

The primary analysis is essential for two requirements, the proof of the existence of the crime and the sufficient indication of authorship. As for the former, it is understood that the penal norm is subsumed in fact, and that fact must be punishable. Such base should come in the initial evidence set arising from the pre-trial investigation and/or the criminal action already established. In the same vein, as an essential condition, it is to have the exegesis of the concrete case examining the evidence, which are indicative, that the criminal act, with a high probability, was committed by the accused. Although such indications are called semi-full proof and may be de-constituted during the criminal action, these in summary cognition must be consistent to result in the precautionary arrest inscribed in article 312 of the code of rites.

In this act prior to the criminal action, court-hearing custody, there will be no questioning about merit, since the core of the hearing is the instrumentality of the prison, the safety and personal security of the defendant caught in the act, with emphasis on the existence of evidences of mistreatment or risks of life on the person arrested, as well as the presence of the prisoner one before the judgment allows a better analysis as to the prison decree or not. Teaches (PAIVA, 2015, p.56):

The accomplishment of the court-hearing custody will contribute to the overcoming of the "paper boundary" of the purely notarial system, which is practiced by the Brazilian criminal procedural system, as it requires the member of the Public Prosecutor Office and the judge to see and talk to the prisoner, which will contribute to the humanization of criminal jurisdiction.

Therefore, it is evident that there is no damage to the content to be determined in the criminal instruction, the contact between the judge and the accused during the court-hearing custody. Thus, what is taken care of is the importance of only being enforced the preventive detention in an exceptional manner and the one who is accused of an unlawful act be able to answer by the accusation against him at liberty. It should be noted that alternative measures to jail can be imposed on the nominee, verbis:

Art. 319. They are precautionary measures different from imprisonment:

I - periodic attendance at court, within the period and under the conditions set by the judge, to inform and justify activities;

II - prohibition of attendance or going to certain places when, due to circumstances related to the fact, the accused or defendant should stay away from these places to avoid the risk of new infractions;

III - prohibition of maintaining contact with determined person when, due to circumstances related to the fact, the defendant or accused must keep distant;

IV - prohibition to leave the Shire when the stay is convenient or necessary for the investigation or instruction;

V – getting home at night and on days off when the investigated or accused person has fixed residence and work;

VI - suspension of the exercise of public function or activity of an economic or financial nature when there is a fair fear of its use for the practice of criminal offenses;

VII - temporary admission of the accused in cases of crimes committed with violence or serious threat, when the experts conclude that they are unimputable or semi-imputable (article 26 of the Penal Code) and there is a risk of repetition;

VIII - bail, in the infractions that admit it, to assure the

attendance to acts of the process, to avoid the obstruction of its progress or in case of unjustified resistance to the judicial order;

IX - electronic monitoring.

§ 1o

§ 2o

§ 3o

Paragraph 4. The bail shall be applied in accordance with the provisions of Chapter VI of this Title and may be cumulated with other precautionary measures.

Despite the uncontested technological advances, it is not possible for the custody court-hearing to be held by videoconference, since the digital means used would prevent direct contact between the defendant and the judge, creating an obstacle regarding the physical eye contact that should have the magistrate of the accused, in particular as regards the observation of the state of health and possible mistreatment resulting from abuse of authority perpetrated at the time of arrest.

Thus, being the accused having any injuries or affirming that it was victim of torture will be the demand that the fact is elucidated to penalize those responsible for the abusive acts. Even the media already knows that in several police actions cameras are used to accompany all diligences and allow the lawfulness of the arrest not be put in doubt. Therefore, the use of technology would be an additional tool that would ensure the perpetrators physical and moral safety and the legality of the act.

It evinces that the court-hearing custody does not deliver itself to collecting evidence. Ensuring the principle of orality, as the basic principle of the act, however, there is no specific interrogation of the accused, because what is narrated by him is restricted to how he was arrested and whether subjected to abuse of some kind or even torture, where violence is used for a specific purpose. The adversarial is installed in the presence of the Public Prosecution and Defense, which may be constituted by the defendant or dative. These are acts of the court-hearing custody, LOPES JR & ROSA (2015):

1) Is the arrest legal, that is, was a caught up in the act hypothesis (CPP, article 302, 303)?

2) If not, relax; 2.1.) When released the imprisonment, the Public Prosecutor Office may request the preventive detention or the application of precautionary measures;

3) Sustaining the reasons of the caught up in the act; 3.1) The Public Prosecutor Office manifests by the request for preventive detention or application of precautionary measures or accepts the reasons eventually formulated by the police authority; 3.2) The defense expresses on the requests made by the Public Prosecutor. If there has not been a request from the Public Prosecutor Office, the judge can not decree it ex officio, since there is no process (CPP, article 311, it is worth checking the wording).

4) The magistrate decides – underpinnedly - on the application of several precautionary measures or, if they are insufficient and inadequate, for the exceptional decrees of pre-trial detention.

It is not possible to gather documents at the court-hearing custody, except those that already come in the box of the caught in the act arrest warrant. In the same case, it is not possible to hear witnesses, but it is possible that the hearing will continue, in cases of domestic violence and those that require the initiative of the victim, in a public criminal action conditioned to representation or in private criminal action, LOPES JR & ROSA (2015).

There are no doubts about the advantages of establishing court-hearing custody, among them, the adequacy of the Brazilian criminal procedure to international human rights treaties, especially regarding the use of violence at the time of arrest; reduction of the mass incarceration, due to the obligation of the Judge to have physical contact with

the accused, so that it removes the legal fiction of acts celebrated only by sending the caught in the act arrest warrant to the judge, in the mold of art. 306, paragraph 1, of the CPP.

3. RESTORATIVE JUSTICE

In the United States and Canada, criminal mediation was confused with Restorative Justice, originally. So the similarities between institutes and their practices are explained. However, in other countries Restorative Justice has distanced itself from the Criminal Mediation, since it is not restricted to the victim-offender binomial.

Criminal Mediation differs from Restorative Justice because the former deals with interpersonal conflicts and uses dialogue as a tool between the parties involved; there is a mediator or facilitator of dialogue; individual accountability; the result is in the power of the process parties and the objective is in the satisfaction of these parties and in the reestablishment of relations through the construction of an agreement; it presents as a voluntary and cooperative act. While in Restorative Justice there is a focus on learning to deal with conflict with the involvement of the parties directly and indirectly involved in the conflict; accountability is collective; the relationships are horizontal, and there is no subordination among those involved; there is the inclusion of everyone and everyone has a voice; the positive connotation of the conflict is sought, with a focus on repairing the damage to meet the need of all, through the construction of an action plan.

So, the Restorative Justice is concerned with understanding and assisting the injured party, the offender and the community that received the consequences of the harmful action. Such practices are directed so that everyone can contribute to the prevention of similar future acts and in obtaining suitable methods to repair the damages caused.

The Adequate Dispute Resolution - RADs appears as an extrajudicial way to achieve social pacification through the use of alternative methods to imprisonment able to solve conflicts. Among the existing methods will be chosen one that best suits the characteristics and peculiarities of the conflict presented, in order to reach a consensus, an interim understanding, peace or just an agreement.

The institutionalization (GOLDBERG et al., Apud AZEVEDO, 2015 p.187) of these instruments began in 1979, with the proposal of Professor Frank Sander, later called the "Multiple Doors Forum". In this model of organization, the Judiciary is presented as a center of dispute resolution and social harmonization, presenting different types of processes to be used to solve the conflict, always aiming the greater satisfaction of the jurisdictioned, since one of the outstanding characteristics in the methods used is the active participation of the victim.

Unlike the traditional Retributive Justice whose structure is formal and the perspective of justice derives from the axiological analysis of representatives of the State, and that, in addition, the needs of the victim are not considered, Restorative Justice arises before the need to promote "Access To Justice ", seeking to adopt the perception of the jurisdictioned itself on what it understands as fair.

Thus, moral and material reparation of harm will be sought through communication between victim, offender and community representatives, aimed at encouraging accountability for injurious acts, material and moral assistance of victims, inclusion of offenders in the community, empowerment of solidarity, mutual respect between victim and offender, humanization of procedural relations in criminal cases, maintenance or restoration of the underlying social relationships that may exist before the conflict (GOMMA AZEVEDO, 2015).

Although it is understood that the new dispute resolution mechanisms appear as an evolution of the merely punitive function of the criminal legal system, seeking not only the punitive or retributive function, this does not mean that the Restorative Justice aims to replace the traditional penal model of retribution. It is an initiative aimed at complementing the criminal procedural order to, in specific circumstances, provide more efficient results from the perspective of the jurisdictioned. Its use does not imply in the fulfillment of the traditional penalty nor in the reduction of the sentence. Both can be enforced, even if concomitantly. What is in restorative justice is a reparation agreement.

(GOMMA AZEVEDO, 2015)

That said, the restorative agreement resulting from the process will have to be approved, or not, by the Public Prosecutor Office and by the Public Defender Office or by the lawyer, as well as having to be ratified or not by the Judge. None of this repeals the principle of non-detachment of the jurisdiction, that is to say, both the victim and the offender - through lawyers - as the Public Prosecution Service, on its own initiative or at the request of the interested party, may question the restorative agreement in court. (GOMES PINTO, 2015 p.28).

Likewise, when the restorative process is not indicated or when the restorative process is not possible, the case should be referred to the common judicial system, without withdrawing the duty to encourage the offender to take responsibility for his actions towards the victim and the community by promoting the reintegration of both.

Resolution 2002/12 from UNO, which deals with the basic principles for the use of restorative justice programs in criminal matters, points to restorative justice "as a response to crime that respects the dignity and equality of persons, builds the understanding and promotes social harmony through the restoration of victims, offenders and communities."

According to the Resolution, in this approach the victim has the opportunity to be repaired in order to overcome the problem. As for the offenders, they come to understand the causes and consequences of their behavior and are held accountable. Restorative justice seeks community well-being and crime prevention.

The Restorative Justice has as characteristic to be a voluntary and relatively informal process to take place preferentially in communitarian spaces. The dialogue between the victim, the offender and, when necessary, any other individuals or members of the community affected by a crime, will be facilitated by a third party, generally called a mediator or facilitator, and mediation, conciliation and transaction techniques may be used to achieve the restorative outcome. (GOMES PINTO, 2005)

Although in Brazilian criminal procedural law it takes effect the principle of unavailability and mandatory public prosecution, it is understood that it is possible to reconcile the restorative model to this reality.

The principle of compulsory public prosecution has been relaxed with innovations brought in the Federal Constitution of 1988 and with the advent of Law 9.099 / 95, which allows for the conditional suspension of the process and the criminal transaction. In spite of this, it is not possible to attribute a restorative characteristic to the mentioned practices, because in them it is not possible to identify the restoration of the social relations underlying the dispute, since there is no use of adequate self compositional technique. However, this does not prevent Courts of Justice from establishing Restorative Justice programs based on the law of Special Courts. (GOMMA AZEVEDO, 2015 p.190).

Practices used in restorative processes may include mediation, conciliation, family or community gathering, also called conferencing and decision-making circles.

Criminal mediation, considered by some as the main instrument of Restorative Justice, consists of an informal and flexible process where a third party, generally called a mediator or facilitator, will act in a neutral and impartial manner, in order to facilitate dialogue between the parties and thus promote their approximation so that they can, themselves, achieve a restorative result, which may consist of responses and programs such as reparation, restitution and community service, intended to grant individual and collective needs and promoting the reintegration of the victim and the aggressor.

The existence of a third party, generally called a mediator, although it means that the parties have relinquished part of the control over the conduct of the resolution of the dispute, does not mean that the method loses its self compositional characteristic, since the autonomy of the parties will always be prioritized, so that, whatever the final decision is, it will be up to the parties involved only, and the conciliator and the mediator will not be subject to any imposition.

The norms implicit in mediation contradict those of conventional law. Mediation revolves around key words that define it: negotiation, confidentiality, consensus, future relationships, while the process has fundamental terms such as norms, sanctions, and past relationships. (PAZ, 2015 p.131)

A common feature to all self compositional processes and not differently in mediation is the possibility that the parties may continue, suspend, abandon or resume negotiations without suffering further loss, since the mediation process is not binding, that is, the parties concerned do not have the burden of participating in procedural acts and their withdrawal from participation in the proceedings does not result in any procedural loss as would be the case with the ordinary judicial process in which certain facts alleged by one of the parties are presumed to be true when the party chooses to not participate in the procedure, which, as a consequence may increase the chances of his conviction.

In the light of the foregoing, the offender's participation in restorative processes shall not be used as evidence of admission of guilt in court proceedings. Likewise, failure to implement the agreement made in the restorative process can not be used as a justification for a more severe penalty in subsequent criminal proceedings.

In turn, victim-offender mediation, considered a kind of the gender mediation, consists in placing the parties in the same environment, protected by legal and physical security, in order to seek an agreement that entails the resolution of other dimensions of the problem other than only the punishment, such as the repair of emotional damage.

Victim-offender mediation is a process that gives victims of property crimes and minor assaults the opportunity to find perpetrators (offenders) in a safe and structured environment with scope of establishing direct liability of offenders while providing relevant assistance and compensation to the victim. Assisted by a trained mediator, the victim is able to demonstrate to the offender how the crime has affected her, receiving an answer to him or her questions, and be directly involved in developing a restitution plan for the offender to be held liable for the damage done. (UMBREIT apud GOMMA AZEVEDO, 2015 p.191)

While some other self compositional forms are clearly directed to agreement, victim-offender mediation is directed to establishing effective dialogue between victim and offender, with emphasis on victim restoration, accountability of the offender and recovery of moral, patrimonial and affective losses.

Although its application was initially restricted to some crimes with less offensive potential and crimes against property, GOMMA AZEVEDO (2015) it indicates a worldwide tendency, portrayed in Resolution No. 2002/12 of the Economic and Social Council of the United Nations, in the sense of establishing studies in public policies regarding the application of the principles of Restorative Justice in crimes of medium and strong offensive potential.

Therefore, public policies to mitigate the use of violence as a tool for conflict resolution have been weak in Brazil. It is noted that the punitive approaches to this confrontation suffer from effectiveness, since they do not tend to improve people and society, acting with imprisonment punitive will and not understanding the social phenomenon that generates violence.

The Restorative Justice establishes divergent points from the punitive approach. This understands to be the search for the culprit at the center of the conflict; focus on the past; needs are secondary; emphasis on differences; imposition of pain considered normative; focus on the offender, ignoring the victim; the response to conflict is institutional. In another direction, the Restorative Justice affirms to be the conflict the central point; has a forward-looking view; needs are primary; importance is at the points of convergence; repair and restoration are normative; the victim's need is the north of the job; the roles of each actor, victim, offender and society are identified, MEIRELLES (2011).

The culture of punishment as a rule does not induce the offender to reflect properly on the offense he committed, let alone on the true causes that led to the commission of the offense. Submitted to the light of Restorative Justice, the transgressor begins to commit himself to the cause and effect of his conduct, by virtue of being involved in the dialogic process that is the tool of the restorative encounters. This interaction allows everyone to have a voice without judgments or to establish right and wrong, because the main objective is that people feel responsible for the restorative solution, in order to satisfy the content of the conflict.

4. APPLICATION OF RESTORATIVE JUSTICE AT THE AUDIT OF CUSTODY

Resolution 125 of the Conselho Nacional de Justiça (CNJ), approved on November 29, 2010, tells about mediation and conciliation and aims to disseminate the culture of social pacification, stimulate self-compositional services quality, encourage the courts to organize and plan breadth self-compositional programs and to reaffirm the role of supportive agent in the implementation of the CNJ public policies.

In this regard, the Court-Hearing Custody Project of the Conselho Nacional de Justiça foresees the creation of multidisciplinary structures in the Courts of Justice, such as alternatives penal centers, electronic monitoring centers, service and social assistance centers and criminal mediation chambers which will be responsible for presenting the judge options other than provisional incarceration.

States may adhere to the proposed practices through a cooperation agreement. Among the actions contemplated in the project, the CNJ proposes the training of judges and civil servants of the Judiciary, in addition to the other actors of the justice system, as well as the daily monitoring of results, aiming to follow the local criminal movement and the use of experience.

In turn, UNO Resolution 2002/12 establishes basic principles for restorative programs, and searches to promote the encouragement of the expansion and effectiveness of restorative procedures and results by exploring ways to incorporate their practices into criminal justice action.

In this sense, considering that the Court-Hearing Custody Project seeks not only to verify the legality of prisons, but also the use of alternative measures other than imprisonment and that one of its objectives is to create nuclei for restorative justice practice, it is observed that everything walks towards the procedure to take place.

Thus, if in a given case the conditions for admissibility of the restorative process from a legal point of view (objective and subjective requirements to be defined in accordance with the criminal law) are present, the accused would be referred to the Restorative Justice Center, for multidisciplinary evaluation and, converging on its technical feasibility, would advance in the preparatory actions for the restorative encounter. (GOMES PINTO, 2005)

Restorative justice programs may be used at any step or stage of criminal proceedings and will only be used when there is sufficient proof of authorship and the consent of the victim and the offender, which may be revoked when the parties so wish. Therefore, considering that because of the voluntary nature of the alternative method that, as stated in previous topic, does not cause any burden to the offender in the sense of being found guilty or aggravate the situation in case of withdrawal, there are no greater obstacles as to its application, especially when placed before the advantages that a good restorative result may cause, such as the recovery of the dignity of the victim and the reintegration of the offender to the society.

The justice must identify the needs and obligations arising from the crime and the trauma caused and that must be restored. It should also give the means and encourage those involved to dialogue and come to terms, as central subjects of the process, being the Justice, evaluated by its ability to ensure that the responsibilities for the commission of the crime be taken, the needs arising from the offense are satisfactorily served and the cure, that is, an individually and socially therapeutic outcome is achieved. (GOMES PINTO, 2005 p.21)

In the State of Pernambuco, some important initiatives regarding Restorative Justice were implemented as the Community Mediation Centers Program, a non-governmental project. It aims to stimulate communicative skills, establishing empathy to achieve the paradigm break, transforming the community into the protagonist of actions that satisfy their structural interests, without depending exclusively on the state entity to decide on their desires. The results were significant until early 2007. There were 28 nuclei implanted and 719 mediations were performed, serving more than 2,500 people, with increasing participation of the communities served, (PELIZZOLI, 2014).

In the 1st Special Criminal Court of Jaboatão dos Guararapes/PE, a nucleus of community mediation with restorative practices was installed, but this nucleus did not

thrive due to the bureaucracy of the Judiciary, which indicates that it is necessary to break paradigms and believe the benefits that the Restorative Justice is able to bring to those involved, (VASCONCELOS, 2014).

Other initiatives have been valued as the implementation of three pilot projects of Restorative Justice, in the cities of Porto Alegre/RS, São Caetano do Sul/SP and Brasília/DF. The experience in São Paulo is in schools, in the capital of the state of Rio Grande do Sul, the model answers the questions that deal with Childhood and Youth. In Brasília it serves the delinquent adults with crimes of minor offensive potential in the satellite city Núcleo Bandeirantes.

CONCLUSION

The use of restorative justice in the scope of court-hearings custody is fully possible, and the Judiciary, in partnership with the Executive, should adopt measures to address the problems of the country prison system, especially with regard to the excess of precautionary prisons, which represent a large part of the contingent of penal establishments.

It is therefore necessary and urgent that the measures implemented by the Conselho Nacional de Justiça and the Ministry of Justice, which, inspired by international resolutions and based on guaranteeing the preservation of human rights, represent an important tool for judicial control.

According to the proposal of the Multiple Doors Forum that emerged in the 1970s, it is understood to be necessary that the State should offer other types of responses to crimes, not only the traditional application of punishment, according to the traditional model of punitive and retributive justice.

The restorative model, if well applied, can be an important instrument for the construction of a participatory justice that operates in real transformation, paving the way for a new way of promoting human rights and citizenship, inclusion and social peace with dignity.

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