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The Strangers in Criminal Procedure: Restorative Justice as a Possibility to Overcome the Simplicity of the Modern Paradigm of Criminal Justice*

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Abstract

The present paper addresses the crisis of penal procedure in the contemporary society from its epistemological basis to, then, present restorative justice as a concrete alternative to the traditional criminal procedure. The intention is to describe how criminal procedure got established since its modern scientific roots and, then, to show the impossibility of a satisfactory management of social conflicts according to its standardized rules. After it, is argued that restorative justice is able to better deal with social conflicts than criminal procedure, once that system does not have standardized rules and allows the stakeholders to decide the situation according to their own deliberation, instead of being obliged to follow a decision from another person, usually a judge.

Key words

Modern science; Penal procedure; Restorative justice.

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This republication of the article is dedicated to Prof. Salo de Carvalho, PhD (Universidade Federal do Rio Grande do Sul – Porto Alegre, Brasil).

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Introduction

Since our first exposure to the lessons of Ferrajoli (2000), we have begun to think of criminal procedure not as a mere means of applying criminal law and punishing citizens accused of crimes, but, more so, as an indispensable instrument for applying this punishment, as the necessary path to be taken when it is intended to accuse, condemn, and punish someone.

However, being structured on modern presuppositions, it was doomed to failure since such presuppositions are epistemologically rooted in the Middle Ages. As this paper will try to demonstrate, there was a "change of packaging", and things continued exactly as they always have been. And this crisis indicates, necessarily, the need for new thoughts and new paths. If it's not possible to produce the desired *effects* with the current structure of criminal procedure, what is stopping us from thinking of alternatives? Nothing, however, should be put into practice before a long and serious discussion with the stakeholders: as to this, we agree with Coutinho (2004, p. 4-5): you cannot play with the freedom of citizens.

However, we also think that it is no longer possible to remain passive in regards to this problem: we must think of new and concrete alternatives for the criminal procedure. And this is precisely what we tried to accomplish with this paper, in regards to restorative justice, in order to initiate a discussion which, we believe, is just beginning.[1]

1. Modern science and conflict solution through criminal procedure

According to Gauer (2001, p. 101), the Scientific Revolution of the 16th century, one of the most important and influential revolutions for human thought, was inextricably linked to the name of Galileo Galilei, whose "thinking structured modern thought and shook the foundations of medieval knowledge, which was based on the principles of faith and revelation." To Capra (1983, p. 25), he is the "father of modern science", who enabled that which Max Weber called the "disenchantment of the world"; that is, the phenomena of nature which before were explained by divine will and whose spokesperson was the Church went on to be explained by rational logic.

Gradually, scientific rationality acquired a high degree of legitimacy, such that moral and ethical barriers could no longer serve as obstacles to the construction of knowledge. With nature as a mere object of scientific knowledge, the new rationality could be used as an instrument to improve human life in the world. Instead of contemplation, what mattered then was intervening and domesticating nature to improve the conditions of life. Carvalho states that

> the scientific rationality of modernity has postulated, since its birth, the creation of mechanisms capable of generating happiness for men through the control of nature. The project of modernity is centered on this quest for constant pleasure and the unlimited satisfaction of desires, as if the possibility of suppressing scarcity would generate (or would be synonymous with) happiness. (2005, p. 311-12).

Thus, it can be said that

> rationalism, a power exclusive to reason for discerning, distinguishing, and comparing, substituted medieval dogmatism, taking on a critical and controversial attitude towards tradition. Anthropocentrism eliminated theocentric thought, enabling modern man to place himself in the center, thus changing his world view. (Gauer 2001, p. 102).

[1] It is important to say that the analysis of this paper is restricted to Brazilian's Criminal Procedure and it's Modern roots. The discussion about restorative justice is just beginning in Brazil, and we still have to establish grounds to justify our option for this model of criminal justice.

Ever since Descartes began to question the world views imposed by the Catholic Church (a result of the officialization of the Catholic religion by the *State*[2] around the 4th Century[3]), the world was no longer the same: questioning if man could not *think the world* and *think of himself in the world* without the influence of ecclesiastical interpretations of the Holy Scriptures, the French philosopher gave impetus to a new world view for men.[4] Modern thought, therefore, was built on a logic of domination which was based on enlightenment, knowledge, and reason to the detriment of illusion, myths, faith, and religious beliefs, produced mainly by the Catholics.

According to Baumer (1990, p. 67), in accordance with Galileo's vision, "nature continued being pictorial, but now it was increasingly described not as an organism, but as a machine or a clock, which captured the European imagination for the next two hundred years." A rigorous determinism was consolidated to the vision of the world: "Everything that happened had a set cause and generated a set effect: the future of any part of the system could – in principle – be predicted with absolute certainty if all of the details of its state in a specific moment were known." (Capra 1983, p. 50) The philosophic basis originated from the division between *res cogitans* and *res extensa* held by Descartes: it was believed possible to explain the world without any influence from the human observer, objectively and universally. (Capra 1983, p. 50).

This mechanistic cosmovision was defended by Isaac Newton, "who set forth his model of mechanics based on these grounds, making it the foundation of classical physics. From the second half of the 17th century to the end of the 19th, the Newtonian mechanistic model of the universe dominated all scientific thought." (Capra 1983, p. 25).

This whole construction of thought and modern knowledge (re)established the concept of searching for *the truth of all things* (already present in medieval times) which, since then, has dominated scientific practice in the Western world, excluding any other forms of non-rational knowledge and spreading to all other fields of knowledge. Gauer (2004, p. 1) also stresses that "the association of knowledge to the Galileic-Newtonian model and the consideration of science as a privileged field for revealing truth establish the most relevant matrix of knowledge of the modern Western tradition."

Upon disenchanting the world and divesting it from the myths that shaped it, science gave itself the privileged position of revealing the truth, and by doing so mythicized itself. It replaced one myth for another, namely, that scientific rationality could account for and explain all of the phenomena of the world. According to Souza (2004, p. 34), "human beings ended up making science their rational truth, tending to, especially in Western culture, make of it an idol to which everything else – especially other forms of rationality – was sacrificed."

Law, in turn, operating within the same scientistic conception and, furthermore, maintaining the same logic that stirred the inquisitorial process of medieval times – but with the only difference of now having a rational justification for the realization of the fundamental objective of the instrument – established the criminal process as the privileged location for revealing the truth of a past event: with the codification process and the consequent simplification of social phenomena, nothing

[2] Note that the term "State" here should not be understood the same as it is today, due to the temporal separation of over fifteen centuries between the 4th and 21st centuries.
[3] See generally Batista (2000, p. 169-73).
[4] In the wake of Gauer (2006, p. 139-40) it is worth nothing that "Descartes' work is cited here since it encouraged the creation of a rational, thinking, aware being, the center of knowledge, the *cartesian subject*."

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further could escape the unifying design, consistency, and coherence of "legal science".[5]

And it is in this world that we are contextualized: modern scientism and legal science no longer dialoguing with uncertainty and with the *profane realm* of *disaggregation*. If *totality*[6] is, also, what sanctifies the law, it's possible to say that since its modern rendition this was potentiated: nothing else matters(ed) except for its own standard and its commandments, which resulted in the formation of a supposed *science* which is (was) sufficient for itself, independent of everything that could arrive to support it. Any element that was outside of the presuppositions of scientific rationality doesn't (didn't) have validity.

The unrestricted migration of the knowledge and methodology of the natural sciences to the science of law conditioned it and established epistemological ceilings of significance and the production of meaning. Thus, *legal science* began to work within a rationalist, mechanistic, and merely instrumental conception, that is, disassociated from any other ends that could *hinder* the progress of legal knowledge and, on our topic, the elucidation of truth in the criminal process. The law works(ed) in the same way as science: it itself is its own source of legitimacy.

2. On the modernization of criminal procedure: the abandonment of the theological justifications and the maintenance of its purpose

Although much is said of a new scientific stance from the 16th and 17th centuries on, it seems to us that little (or nothing) has changed in criminal procedure: the categories existing today reflect nothing more or less than the medieval features dressed up as science.

With the laicization of certain practices, it can be said that modern criminal procedural law took on the manner of searching for the truth that the Church used in the periods of the Merovingian and Carolingian Empires: they used the *visitatio*, then performed statutorily by the bishop when traveling through his bishopric: upon arriving to the locations, an *inquisitio generalis* was held, which consisted of collecting information about what had occurred in his absence and which could confirm criminal practices;[7] next, if there was an affirmative answer, the bishop held an *inquisitio specialis*, "which consisted of investigating who had done what, of determining who in fact was the author and the nature of the act." (Foucault 2001, p. 70) This method presents itself as a kind of instrumentation of the procedure which would later be used by the Church from the 18th century on with the courts of the Inquisition.

The predominant justification for the criminal process in Brazil – presented as "the goal" of the criminal process by some authors and as the "purpose" by others – essentially did not change the justification presented by the inquisitors in the Middle Ages; that is, the search for truth (real).

Exactly as in the procedures used by the courts of the Inquisition, acts of interrogation, examination of the witnesses, of reconstructing the facts, among others, are still practiced. For Carvalho (2005, p. 316), "in the space between [medieval and modern] projects, it can be noted that there is not, essentially, a break." Rosa (2006, p. 32), in turn, states that "the matrices of 'Canonical Law' received new packaging, maintaining, however, in their secrecy and multiplicity of (said) scientific methods, the censure and conditioning on what can and should be

[5] An example from Article 4 of the Introduction to Brazilian Civil Code Law (Decree-Law n. 4.657/1942) was cited, which states: "When the law is omissive, the judge will decide on the case according to the analogy, customs, and general principles of law."
[6] The words *totality* and *disaggregation* were paraphrased from the title of Souza (1996).
[7] See specially Foucault (2001, p. 70) and Batista (2000, p. 234).

said." What was before said/revealed by the Pope is now translated by specialists in Law, or by the "lawyers by profession".[8]

Rightly so, Grossi (2004, p. 15) affirms that "simplism and optimism seem to be traits that most identify modern lawyers, strengthened in their hearts by certain illuminists": a complex situation is simplified and, grounded on the (modern) legal and penal apparatus, a wave of optimism emerges from among the lawyers, who believe that the criminal process is able, on its own (since it is self-justifiable), to handle contemporary social problems.

And with this latent *love for the Law*[9] and an apparent *aversion* to that which strikes it as strange, the law begins to operate on a logic of self-sufficiency, of self-production: codes, laws, and articles (mere *texts*) as legal imperatives in the application of the law, resulting in little (or no) reflection on the legal phenomenon as a social, cultural, historic, political, et al. fact; that is, as an essentially transdisciplinary phenomenon. Legal education, in turn, is taken by the reins of codification and led to transmit only "what the law says", leading many lawyers from different generations to consider the standard as justice *in itself*.

In this process of the self-enclosing of legal knowledge, law and the criminal process – justifiable by themselves and autonomous in relation to the real world – would be the most efficient[10] means to *protect* humanity (and its future[11]).

In criminal procedure specifically, the legal actors, practically unanimously, do not acknowledge the epistemological fragility of this (in)fallible method. Thus they accept the results of criminal proceedings as *absolute truths*, "as if they were the emanation of that which effectively occurred in the realm of life, because it is the result of a (said) scientific method, and comes with a seal of quality: *scientifically proven*." (Rosa 2006, p. 54).

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[8] See also Rosa (2006, p. 28; 32-33): "Because the Pope has the 'keys of the kingdom', he grants the power of judgment to his bishops, since he is the one who 'generates the divine word' and its guarantor. The artifice completes itself because he takes on the role of the 'Absent', possessor of perfect qualities." Next, the author continues: "The guardians, pastors, in short, the 'lawyers by profession' will soon encircle the interpretive possibilities, guaranteed the *true meaning of the text* by their authority, because differing from them, remember, is a sin [...]. The Law, by its specialists, aims at having the keys of the kingdom and the production of subjectivity, the only ones who can reveal the word of the *Other*. [...] The results of this are legal discourses aiming at completeness, which sell the idea of correct and safe answers, promising the illusion of legal security...".

[9] On the *love for the Law*, see specially Legendre (1983).

[10] It is important to mention the differentiation between *efficiency* and *effectiveness* given by Coutinho (2002, p. 145-6): while the former is connected to the means used to reach a desired result, the latter is linked to the ends aimed at. For Thums (2005, p. 43) "Professor Jacinto [Coutinho] affirms that efficiency, allied with time, may be synonymous with the exclusion of rights or guarantees. This observation is precise, considering that the recent movements in the United States move towards, in the name of the pseudo-efficiency of fighting terrorism, supressing individual rights and guarantees". Thus, we conclude that the Patriot Act, written shortly after the attacks of September 11, 2001 and, more recently, the Military Commission Act, are examples, since, in the latter, the secret process and even torture are authorized for the ill-omened *search for the truth* – always in the name of *national security*, or *for the good of the nation*...

[11] In the wake of Carvalho (2005, p. 200), we mention the Professor Dr. Jorge de Figueiredo Dias, who can be considered the *flagship* of this *ode* to criminal law, when he mentions that "if it is up to criminal law to protect the main legal goods of humanity, how can it excuse itself from facing (possible) actions which put its future at risk? How can it not act in situations which threaten future generations?" It is worth noting Carvalho's (2005, p. 200) criticism: "[...] the power of speech tends to blind the judge, preventing him from perceiving his limitations and his real capacity for action. The narcissistic dream is that of resolving civilization's biggest issues, defending Humanity from its own extinction, while at the same time numbing criminal-legal thought, obfuscating reality, providing unreal elements for anamnesis, and, consequently, prognosis. [...] A double failure in the criticized system of criminal law is generated. The ineffectiveness unveiled by the social sciences of criminal control on the issues related to liberal and social rights is added to a new expectation (tutelage of transindividual rights). The results seem foreshadowing: operational ineffectiveness due to the lack of new mechanisms to face new problems. However, the rhetorical narcosis is a hindrance towards dealing with the problem, thus creating another crisis, this time in the very genealogical structure of liberal criminal law since, when it is flexibilized to meet new ends, it only ends up increasing the ineffectiveness. In this scenario, penal discourse becomes lost, stagnating in a circular crisis."

In this context of legal purity and the presumption of the law to face problems, the criminal process is, thus, presented as a *magic formula* for the solution of conflicts in contemporaneity: through its scientifically-legitimized theoretical structure, it takes the spotlight and licenses itself as an efficient means of reconstructing a past event, attributing blame in the present, and determining the punishment to be carried out in the future.

In an environment where the individual is thought above everything else, nothing is more logical than inverting the logic of the inquisitorial process of *divine protection* to establish the logic of *individual protection*. The inversion which secularization proposes is visible in the modern criminal process, since the quest for truth is left aside in favor of the quest for the protection of the individual facing governmental punitive power. The danger, however, is in leaving this structure at the mercy of methodological purity, as legal positivism would have it.

According to Ferrajoli (2000, p. 604), "the process, such as the punishment, is strictly justified as a technique to reduce social reaction to crime: violence and discretion reduction, that otherwise could arise in more uncivilized and no limited ways."[12]

Note that the criminal process, for the author, would have the purpose of protecting those accused of crimes, who cannot be penalized before being tried. It wouldn't be possible, then, to carry out the punishment of an accused without, previously and formally, taking him to court. And further: such trial cannot be held without the observance of instruments for the protection of the accused – in short: the individual rights and guarantees which, in Brazil, may be found in the Constitution of the Republic.

However, although the Brazilian Code of Criminal Procedure (CCP) should, necessarily, be consistent with the Constitution, what is observed, in practice, is not only an enormous disregard for the Constitution by the rules of the CCP, but also a considerable non-application of constitutional rules by the judges (in first and second degrees, as well as in the Political Courts). And, based on a constitutional reading of criminal procedure, it is understood as a democratic place for debates (prosecution and defense) and trial to which every citizen accused of a crime has the right to be submitted: it is therefore an instrument at the service of the citizen (subjective right) facing the punitive power of the State, and not a method scientifically legitimized to *chase after the truth*.

3. The 20th century and the end of certainties

Now, in law – chiefly in criminal rights and criminal procedure – the arrogance[13] of its operators and theorists hinders the recognition of the bankruptcy of the current structural model of criminal procedure, based and founded on inquisitorial logic, and difficult to reconcile with what the critics of the modern scientific model say.

According to Gauer (2006, p. 137), at the end of the 19th century and the "beginning of the 20th, there were many expressions of the horror brought to humanity by science and by the techniques based on the supposed governance of reason, [...] which would lead humanity to a paradise built on Earth through scientific rationality." However, since the inaugural rain of bombs of the First World War, it was possible to perceive that technique and science serve not only for the *evolution* of the human race, but can, likewise, serve for their annihilation.

[12] Free translation from the original, in Spanish: "*el proceso, como la pena, se justifica precisamente en cuanto técnica de minimización de la reacción social frente al delito: de minimización de la violencia, pero también del arbitrio que de otro modo se produciría con formas aun más salvajes y desenfrenadas.*"
[13] See also Thums (2005, p. 186) "[...] in the social sciences, especially the legal sciences, man is arrogant, petulant, audacious (imperious), and at the same time reckless upon affirming that he searches for the real and absolute truth through criminal procedure."

This perception revealed a dirty, greedy, violent world which, before, thought it could be *corrected* with science, at first only thought of for the *good of humanity*. But the mask had fallen: the modern project of *salvation* entered a crisis; there is no longer thought of the *future*, but of the *present*, living each minute as if it were the last. For Morin (1986, p. 276), it is necessary to "teach and propagate the bad news: *there is no salvation in this world*."

Only one way of thinking was imposed, excluding the rest except for those considered *scientific*. Carvalho (2005, p. 312) affirms that "the belief in the unity of discourse and in the power of the scientific methods forged in modernity obfuscates the researcher's gaze, impeding him from perceiving the dimension of the contemporary revolutions and challenges (risks)."

The old Newtonian paradigm presupposes an absolute, universal, and stable space. "All of the changes noted in the physical world were described in terms of a separate dimension, called time; this dimension, in turn, was also absolute, without any link to the material world and flowing softly from the past through the present and towards the future." (Capra 1983, p. 48-9).

Accordingly, it was believed possible, upon writing history, to be able to "seize an exact reflection of the past. [...] Upon looking back, the historian apprehended the times of these events, and the instinct of history was demarcated by this unchangeable harmonic axis." (Gauer 1998, p. 18) That is: it was thought possible to apprehend a specific "space of time" from the past in the present and examine it until the truth was revealed – authorized *because* it was scientific.

Again citing Capra (1995, p. 69), it can be noted that "two discoveries in the field of physics, culminating in the theory of relativity and quantum theory, pulverized all of the main concepts of the Cartesian world view and Newtonian mechanics." Firstly, it should be emphasized that from the moment Einstein, realizing

> the impossibility for the observer to establish the temporal order of events in space – since in nature there is no speed greater than that of light, to measure speed it is necessary to know the simultaneity of the events –, calls into question the absolute character of time and space, breaking with the modern cosmovision. Einstein shows that the simultaneity of distant events cannot be verified, only defined and, given the arbitrariness of the measurements, the hypothesis of contradictory results is strongly incorporated. In this regard, a new conception of knowledge affects the view of time associated to it. (Gauer 2006, p. 174-5).

According to Elias (1998, p. 35), "The corrections introduced by Einstein to the Newtonian concept of time illustrate this mutability of the idea in the modern era. Einstein showed that the Newtonian representation of time as single and uniform throughout the whole physical universe was not sustainable." Upon stating that it is impossible for the "observer to establish the temporal order of events in space [...] – the absolute character of time and of space is called into question," effectively breaking with the modern cosmovision: "time in the world, upon becoming uncertain, becomes, consequently, different from the time of the modern sciences, where it was defined by the possibility of defining universal and eternal laws of nature." (Gauer 2004, p. 6).

Since then, thinking of time as an absolute factor that is universally valid became complicated, triggering an important break with the Newtonian cosmological model, in which time was the same for everyone. "In other words, the theory of relativity gets rid of the concept of absolute time!", affirms Hawking (1988, p. 44), considered by many to be the successor of Galileo, Newton, and Einstein.

History (and any other *science*) can no longer be produced based the idea that it will accurately report the "truth" of what happened in that past space-time, and is forced to accept that it will rescue only a fragment of the fact, based on the viewpoints of the historians (and in the other sciences, there are lawyers, psychologists, etc.). This result is shown to be crucial for criminal procedure, when

the "little history" of the conflict at stake[14] can no longer be wholly recovered, as if it were a mere object waiting for its subjects.

And we cannot leave out what was noted by Werner Heisenberg in 1926: the *uncertainty principle*. According to Hawking (1988, p. 87),

> in order to predict the future position and velocity of a particle, one has to be able to measure its present position and velocity accurately. The obvious way to do this is to shine light on the particle. Some of the waves of light will be scattered by the particle and this will indicate its position. However, one will not be able to determine the position of the particle more accurately than the distance between the wave crests of light, so one needs to use light of a short wavelength in order to measure the position of the particle precisely. Now, by [Max] Planck's quantum hypothesis, one cannot use an arbitrarily small amount of light; one has to use at least one quantum. This quantum will disturb the particle and change its velocity in a way that cannot be predicted. Moreover, the more accurately one measures the position, the shorter the wavelength of the light that one needs and hence the higher the energy of a single quantum. So the velocity of the particle will be disturbed by a larger amount. In other words, the more accurately you try to measure the position of the particle, the less accurately you can measure its speed, and vice versa.

In more realistic terms, it is noted that it would not be possible to predict the consequences of our actions. "The uncertainty principle had profound implications on our manner of perceiving the world that, even after fifty years, still have not been completely examined by the philosophers and is still the subject of many controversies." (Hawking 1988, p. 87).

Accordingly, the predictability of results, possibility of success and/or failure, etc. can no longer be discussed: there are only probabilities, and these cannot be predicted or determined. For Hawking (1988, p. 87-8),

> the uncertainty principle signaled an end to Laplace's dream of a theory of science, a model of the universe that would be completely deterministic: one certainly cannot predict future events exactly if one cannot even measure the present state of the universe precisely!

These discoveries and observations not only put in check the entire structure of modern thinking but also highlight the urgent need to rethink thought itself, as Morin (2005) would have it. The structure of legal thought, in this regard – and, on our topic, the structure of criminal procedure – is placed under suspicion. There is a pressing need to completely rethink what is understood by criminal procedure.

As the first steps towards thinking in a new scientific practice, Carvalho (2005, p. 311) suggests "a liberation from the claim of searching for definitive truths and exhorting the totalizing units from the projects of Modernity [...]." Acting otherwise, the scientist would again come across the same problem of the moderns: aiming at searching for just *one* truth and *unifying* the method. The epistemology of the certainty with which we work remains, likewise, questionable.

Thus everything that is *subjective* and *creative* was diluted.[15] The reduction of mundane complexity to mere mathematical laws ultimately presents a simplification that is unsustainable when facing an applied social science, such as law, whose

[14] See specially Pletsch (2007).

[15] Edgar Morin's footnote (2005, p. 15) on this is clarifying: "The type of thinking which clips and isolates allows specialists and experts to perform very well within their compartments and cooperate effectively in incomplex areas of knowledge – notedly, that which concerns the functioning of artificial machines. But the logic which they follow extends to society and to human relationships the constraints and inhuman mechanisms of the artificial machine and its deterministic, mechanistic, quantitive, formalist vision, and ignores, hides, or dillutes all that is subjective, affective, free, and *creative*.

phenomena cannot be described through formulae or symbols, under penalty of a reductionism that borders the irrational.[16]

Thus, thinking of criminal procedure as a means of searching for the real truth of a past fact not only goes against the latest interpretations of the exact sciences but also shows a conservatism characteristic of the dogmatism related to the subject.[17] The insistent *revealing* nature of criminal procedure submits the accused in general to a procedure that is scientifically unjustifiable, sustained only by the belief in what can be called the *modern illusion*, that is, that man is capable of reconstructing, through memory (witnessed and/or documented), a past fact and, also, of making a precise judgment call on it, based (always) on the Cartesian method.

What is the criminal process, after all, if not a *formula for reducing complexity*, or exactly that which Carvalho (2005, p. 311) calls the *dismantling method*?

4. The logic of exclusion and the criminal procedure: the accused and the stranger

Ever since this critical position, in which criminal procedure has its roots placed under suspicion, the need for a (re)questioning of the (modern) structure of criminal procedure itself remains more than necessary: those directly involved in the conflicts have a secondary role, while those who can do nothing to *solve* the conflict or to, at least, *appease it*, emerge as protagonists in the procedural scenario.

The victims and the accused do not have a podium, while the judges, prosecutors, and defense "dialogue" interminably among themselves, giving the others a mere supporting role, since *they do not have the technical knowledge necessary to face the criminal process*. Clearly they do not have the aforementioned technical knowledge, since *they are not technicians in criminal procedural law.* It couldn't be otherwise. And this exclusion, typical of the moderns and, especially, of the lawyers, makes it unfeasible for a less painful and more dialogical criminal justice: the suffering comes with the technique, and the silence with the excuse of scientific ignorance. As can be seen, nothing has changed in the last thousand years...

Camus (1946, p. 102), perched high on his phenomenal worldly perception, clearly demonstrates the sentiments of those who have no say in criminal procedure:

> It is always interesting, even in the prisoner's dock, to hear oneself being talked about. And certainly in the speeches of my lawyer and the prosecuting counsel a great deal was said about me; more, in fact, about me personally than about my crime. Really there wasn't any very great difference between the two speeches. Counsel for the defense raised his arms to heaven and pleaded guilty, but with extenuating circumstances. The Prosecutor made similar gestures; he agreed that I was guilty, but denied extenuating circumstances. One thing about this phase of the trial was rather irksome. Quite often, interested as I was in what they had to say, I was tempted to put in a word, myself. But my lawyer had advised me not to. "You won't do your case any good by talking," he had warned me. In fact, there seemed to be a conspiracy to exclude me from the proceedings. I wasn't to have any say and my fate was to be decided out of hand. It was quite an effort at times for me to refrain from cutting them all short, and saying: "But, damn it all, who's on trial in this court, I'd like to know? It's a serious matter for a man, being accused of murder. And I've something really important to tell you."

[16] See specially Santos (2002, p. 72): "[...] the simplicity of the laws constitutes an arbitrary simplification of reality which confines us to a minimal horizon beyond which other understandings of nature, likely richer and of more human interest, are left."

[17] See also Thums (2005, p. 8): "[...] the man of the natural sciences each day seeks to discover new horizons, and that is how challenges are constantly found, while the man of the legal sciences has not yet awoken to the 'new times'. The Law, as a social science, despite the need to accompany the evolution of society and its phenomena which require standardization, cannot fulfill its role, manifesting too much attachment to conservatism, reflected in the laws and in the court decisions."

What can be noted from this narrative is the absolute lack of attention that those directly involved in the conflict have and what can (or not) be useful for unraveling the cause. The suspicious gaze of the scientist is a hindrance towards transcending the barrier of modernity and, thus, the *enlightened* cannot leave out the *irrational* from the dialogue: it is impossible to lend a voice to those who have no light, those involved, since they do not have the distance necessary to not allow their sweet and unmeasured emotions from getting in the way of their hardened and square Reason. It is no surprise that anyone who tries to bypass this barrier – in any area of knowledge – is treated as a poet, as an artist, as a theologian, or even as a "dreamer", and always pejoratively, since rigorous Reason does not accept this type of perspective.

Although the narrative shows the thoughts of an accused, it can be said that, even more so than this, the victims in criminal procedures, when they are not dead, also do not have a say. And when they are called to speak in criminal procedure, they are considered mere *informants*, since their "emotional side" would be interfering with their "rational side" and, certainly, they will want revenge against the accused: it would be an emotion (again) imposed on Reason... As we are modern, this is not possible to accept, obviously.

But, to try to take a step past our modern-legal arrogance, is there another alternative aside from criminal procedure? Is it possible to establish a dialogue *in* criminal procedure without being forced to give up human rights – so hard won? That is what the following debate proposes.

5. Restorative justice: beyond the simplicity of criminal procedure

In this scenario of constant questioning of everything that is understood by modern science and, thus, of all its results, it is necessary for us to think – in regards to legal science and, more specifically, to criminal procedure – of alternative ways for its mechanic gears.

Thus, we present Restorative Justice, that can be thought of as a means which seeks to confront the phenomenon of violence privileging "all forms of action, individual or collective, aimed at correcting the consequences experienced when an infraction is committed, the resolution of a conflict, or the reconciliation of the parties connected to a conflict." (Jaccould, 2005: 6) It emerges as an alternative to the structural failure of the traditional model for the criminal system, and has the challenge of reworking the dogmas of criminal justice in order to restore as much as possible the *status quo* prior to the offense.

At first strongly associated to the movement for decriminalization, Jaccould (2005, p. 4) states that Restorative Justice

> made room for the deployment of numerous pilot-experiences of the criminal system from the mid-seventies (experimental phase), experiences which became institutionalized in the eighties (institutionalization phase) through the adoption of specific legislative measures. From the nineties on, restorative justice goes through an expansion phase and becomes included in all stages of criminal proceedings.

Its objectives would be to "restore security, self-respect, dignity, and, most importantly, a sense of control to the victim," and assign "[...] to the offenders the responsibility for their crime and the respective consequences; restore the feeling that they can correct that which they have done and restore the belief that the trial and its results were fair and just." (Morris 2005, p. 3).

According to Jaccould (2005, p. 4), the differences between criminal law and restorative law are in the fact that **(a)** the first is grounded on the offense committed, while the second adopts as a reference the errors caused by the offense; the former **(b)** grants the victim a central place while the latter relegates the victim to a secondary place; **(c)** restorative law discovers its objectives based

on the satisfaction experienced by the main parties involved by the offense, while criminal law is centered on the notion of *justly punishing* the guilty.

Restorative Justice also seeks to support itself "on the principle of a redefinition of crime. Crime is no longer conceived as a violation against the state or as a transgression against a legal standard, but as an event that causes harm and consequences" (Jaccould 2005, p. 7), focusing on the possible solution of the problem through a dialogue between the parties (directly or indirectly involved: aggressor, victim, friends, relatives, people important to both parties, etc.). The offense, therefore, is no longer merely a type of violated code and is then seen from a wider context, of obscure and complex origins, and not merely from a cause and effect relationship.

Morris (2005, p. 3) emphasizes this same idea, stressing that "the conventional systems of justice view crime mainly (many times exclusively) as a violation of the interests of the State – and the responses to such transgressions are formulated by professionals representing the State," excluding, however, the victim of the procedural post-transgression relation and relegating the victim to a secondary place.

Similarly, Rolim (2004, p. 25) states, "the procedures of Restorative Justice require that the parties expose in all frankness their sentiments, their agonies, and their fears and make it clearer what their expectations are." They will be called to disclose their points of view, their versions of the event, and each will be given an opportunity to express themselves, even if they were not present when the offense was committed. However, the parties involved cannot be obligated to participate in this procedure: they should do so voluntarily, under penalty of there being latent harm, so that the desired results can be reached. (Pinto 2005, p. 3).

Offering "genuine opportunities for the total and direct involvement of the parties in legal proceedings," in a way absolutely different from the conventional modes of criminal justice, is what Scuro Neto (2005, p. 5) advocates. For him, the inclusion of the parties in the development of the confrontation of the problem is a fundamental characteristic of the restorative model. On these same lines, Pinto (2005, p. 3) calls attention to a possible *participative democracy* in Restorative Justice, "in which the victim, the offender, and the community take a significant part of the decisory process, in the shared search for cure and transformation, through the construction re-contextualization of the conflict, in a restorative experience."

Restorative practice should be characterized, therefore, by voluntary participation and by the consensus by both victim and offender as to the essential facts related to the offense and, also, by the assumption of responsibility by the offender, according to Vitto's (2005) understanding. For this author (2005, p. 4), there should "be signs that sustain the reception of a formal accusation so that it can be initiated," such that the individual rights and guarantees of the supposed offender are not excluded from Restorative Justice.

Gathering the involved parties in a neutral location should proceed, "basically in two stages: one in which the parties are heard on the facts that took place, their causes and consequences, and another in which the parties should present, discuss, and agree to a restoration plan." (Vitto 2005, p. 5) However, it is fundamental that the parties be ensured: the necessary information about the stages of the procedure and the consequences of their decisions, without excluding the guarantee of their physical and emotional safety; the confidentiality of all the discussions during the restorative practice; and the writing of the future agreement in clear and precise terms, an agreement which should be reasonable, proportional, and satisfactory, with the provision of ways to guarantee its fulfillment and a monitoring of the conditions it imposes. (Vitto 2005, p. 5).

However, Vitto (2005, p. 4) also stresses that it is not possible

> to go beyond the establishment of the model's blueprints, for two reasons: the system is characterized by considerable diversity, including the realization of restorative meetings, panels, and conferences, among other methods; the procedure is profoundly characterized by flexibility, since it should adjust to the reality of the parties involved, and not force them to adapt to the rigid, formal, and complex dictates characteristic of the traditional justice system.

Finally, Pinto (2005, p. 3) points out that, because this is a new paradigm, "the concept of Restorative Justice is still something inconclusive," and cannot be taken as anything but a movement still emerging.

6. Critical approach

The concern with leaving the old criminal procedural paradigm behind appears to be present in the Restorative Justice model, since it breaks with a few basic characteristics of the criminal procedural model currently in effect: **(a)** the victim may participate in the debates; **(b)** the procedure might not result in prison for the accused, even if an admission of guilt and evidence corroborates with the confession; **(c)** there is the possibility of an agreement between the parties; **(d)** the legal operators are no longer the protagonists, making way for an interdisciplinary confrontation of the interpersonal conflict; among other characteristics.

Note that this is an attempt at creating a new criminal justice model, disconnected from excessive formality – typical of modernity – and aiming at thinking of *solving* the situation-problem, and not simply *attributing blame* to someone.

It is worth noting Azevedo (2005, p. 6), to whom

> Restorative Justice presents a conceptual structure substantially distinct from the so-called Traditional Justice or Retributive Justice. Restorative Justice emphasizes the importance of raising the role of the victims and the members of the community, while at the same time the offenders (charged, accused, indicted, or author of the fact) are effectively held accountable to those who were victimized, restoring the material and moral losses of the victims and providing a range of opportunities for dialogue, negotiation, and resolution of issues.

Vitto believes that Restorative Justice cannot be disassociated from the model for the protection of human rights since they both seek a common good: the respect for human dignity. The author (Vitto 2005, p. 7) warns, however, that

> in a scenario with the proliferation of the so-called "culture of fear" and the amplification, by the means of mass communication, of the doctrine of the law and of order, all possible precautions must be taken so that the empowerment of the community when seeking solutions for its own conflicts is not done to the detriment of the entire historic process of the protection and affirmation of human rights.

In other words, the author deals with the possibility of placing the victim in the development of the process with some restrictions, at the risk of the restorative procedure escaping the limits of human rights when poorly managed with the delegation of excessive powers in the hands of the victim.

We believe, however, that "Restorative Justice represents a new paradigm applied to criminal procedure, which seeks to interfere effectively in the conflict which is exteriorized by the crime, and to restore the relationships that were shattered by this event." (Vitto 2005, p. 8) And the apparition of the new paradigm resides precisely in the concrete possibility of establishing a dialogue between victim, offender, and any other parties involved in the conflict, based on the idea presented by Melo (2005, p. 11), for whom

> the pluralism that a restorative model of justice permits us to realize is that, the evaluations we perform do not logically refer to the values from which we deduce the conduct that we should adopt, but refer, to the contrary, to manners of being, of living, of feeling that we should, in our existential singularity, seek to structure

> and justify, with everything that we are provided – feelings, passions, reason –, to affirm ourselves in the world. And this affirmation must be done before a concrete Other with whom we relate, who has a different mode of existence, who also is incapable of, on his own, understanding us.

It's worthwhile to again cite Melo (2005, p. 7), who synthesizes the motives which demonstrate, effectively, the emergence of a new procedural paradigm, based on Restorative Justice, to confront criminal conflicts: firstly, it takes the opportunity to show another perception of the relationship between the individual and society "in regards to power: against a vertical vision in the definition of what is just, it makes room for a horizontal and pluralist adjustment of that which can be considered just by those involved in a conflict"; secondly, the author stresses that RJ focuses "on the singularity of those who are involved and on the values which they hold, opening up, with this, to that which led to the conflict"; thirdly, if the focus is more on the relationship than on the punitive response from the state, the conflict itself and the relational tensions acquire another statute, "no longer as that which must be rejected, erased, or annihilated, but instead as that which has to be worked on, acted on, powered by that which can be positive, to move beyond a crude expression with destructive shapes"; in fourth place, "against the model centered on a settling of accounts merely with the past, restorative justice permits another relationship with time, attentive also to the terms of which those involved in the present might in the future have to settle"; in fifth place, "this model aims at a severance of the limits set in place by liberal law, revealing in them, beyond the interpersonal, a social perception of the problems placed in the conflictive situations."

7. Final considerations

Restorative Justice presents itself bearing a new ideal, a new possibility of facing criminal conflicts, abandoning the old paradigm of blame-punishment to a paradigm of dialogue-consensus. Its suitability to the Brazilian legal system is not yet clear, and its premises are little known, in the academies as well as in the courts abroad. However, a greater understanding of its system and a wider dissemination in the universities and in the courts could make it the new procedural paradigm for the (re)solution of criminal conflicts.

It is, essentially, a strong alternative to the traditional criminal process, which chooses not to treat the accused and those involved in the conflict as undesirable Strangers, but as citizen-Strangers, bearers of voices, rights, and humanity. Treating them with dignity and respecting their rights is a precondition for the implementation of a new procedural model, well beyond the penal.

Thus, Restorative Justice, despite a few problems which must be discussed, signals a new path for facing criminal conflicts, but that, necessarily, cannot be implemented without substantial changes in what is currently understood as criminal law and criminal procedure.

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