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Restorative justice as a possible path to access to justice in Brazil: the central role of the Judiciary and the creative translation based on the Euro-American theoretical and methodological framework[1]

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Abstract: The article aims to investigate restorative practices in Brazil as a possible way to guarantee the right of access to justice for people involved in criminal conflict. The analysis is qualitative, based on bibliographic and documentary research. Thus, the article begins with a possible contemporary definition of the right to access to justice, in the double sense of access to courts and access to rights. Next, it problematizes the crisis of the Brazilian criminal justice system and indicates Restorative Justice as a possible path to achieving access to justice, considering that restorative practices propose the involvement of the victim, the offender and the community in the search for a solution that satisfies, if possible, everyone's needs. Finally, the research concludes, based on the available empirical data, that in Brazil, Restorative Justice had its institutionalization marked by the protagonism of the Judiciary and that, despite the strong influence of the Euro-American theoretical-practical framework and the predominance of peace circles, the translation of restorative practices in the country occurred in a creative way, considering that national, regional and local elements were incorporated to account for the specificities of the respective restorative programs.

Keywords: Access to Justice. Restorative Justice. Judicial Power. Euroamerican Influence. Brazil.

1. INTRODUCTION

In contemporary societies there is, to a certain extent, a consensus that the criminal justice system is in crisis. Victims often feel abandoned by the State. Offenders, as a rule, seek to evade their responsibilities. The prison system is unable to fulfill the preventive functions attributed to the sentence. In some countries, such as Brazil, the crisis of legitimacy is intensified due to the inhumane and violent reality of the system.

Considering the UN 2030 Agenda, in particular the objective "16 – Peace, Justice and Effective Institutions", there is a need to hold a qualified debate on the very meaning of justice and the paths through which it is possible to access it. Thus, the objective of this article is to investigate restorative practices in Brazil as a way of guaranteeing the right of access to justice. Regarding methodology, the analysis is qualitative, using bibliographic and documentary research techniques.

Therefore, this article will begin with a theoretical reflection on a possible contemporary definition of the right of access to justice, given the existence of a multiplicity of possible meanings. It will then problematize the reality of the Brazilian criminal justice system based on the Retributive Justice model and the deficiencies in relation to the realization of the human and fundamental right of access to justice for the victim, the perpetrator and the community.

Having outlined the central ideas of Restorative Justice, the article will verify to what extent it can be considered a possible way to guarantee access to justice for those involved in the conflict. Finally, in the light of existing empirical research on the field, it will seek to understand how the process of reception of the restorative movement took place in Brazil and what the current nature of existing restorative practices in the country is.

2. DEFINING ACCESS TO JUSTICE: A POSSIBLE STATE OF ART

Given the multiplicity of meanings of the expression Access to Justice (*lato sensu*) and the richness of the various aspects involved, it has alredy been observed

that "*Il est paradoxalement plus aisé de définir ce que n'est pas le droit d'áccès au juge*"[4]. Access to Justice is one of those kaleidoscopic expressions, reflecting an idea that "*draws the mind to a multitude of questions about the sources of injustice and the legal systems around the world that have developed to help provide an avenue for redressing a wrong*"[5]. While some take narrow views, others encompass almost all of the problems in the justice systems[6].

Currently, Access to Justice is considered an element of the category of Human Rights, it is entrenched in the Constitutions of several countries and can be seen, even in systems where there is no normative provision, as implicit in the rule of law[7]. Notably in the common law family, it is also a derivation of the due process clause[8]. Its underlying idea is to recognize each citizen's prerogative to claim a possible right, to have their claims analyzed and to have their rights assured under equal conditions[9], either judicially or extrajudicially.

In this sense, Access to Justice has basically two prevailing conceptions[10]. The locution is intended to reference, in a first conception, "*la possibilità per ogni essere umano di accedere agli strumenti, generalmente giurisdizionali*". But, in a second view, it also includes the extrajudicial instruments "*predisposti dall'ordinamento, posti a tutela dei propri diritti o interesi*"[11].

The famous Florence Access to Justice Project[12], for example, places certain focus on the input of a claim into the judicial system[13] and the system's ability to conduct a fair process and deliver timely and adequate outputs. Thus, the Project adopts something more like an "*approccio procedimentale che si resolve con la*

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[4] DONIER, V.; LAPÉROU-SCHNEIDER, B.; GERBAY, N.; HOURQUEBIE, F.; e ICARD, P. "Propos introductifs", in: DONIER, V.; LAPÉROU-SCHNEIDER, B. (sous la direction). *L'accès au juge*: reserche sur l'effectivité d'un droit, Bruxelles, Bruylant, p. 32. Translation: "Paradoxically, it is easier to define what is not the right of access to judge".

[5] RICE, T. H. S.; REISMAN B. L. "Access to justice for tort claims against a sovereign in the courts of the United States of America", in: FRANCIONI, F.; GESTRI, M.; RONZITTI, N.; SCOVAZZI, T. *Acesso alla aiustizia dell'individuo nel diritto Internazionale e dell'unione europea*, Milano, Giuffré, 2009, p. 257.

[6] JOHNSON JR., E. "Thinking about access: a preliminary typology of possible strategies", in: CAPPELLETTI, M.; GARTH, B. *Access to justice*, v III: emerging issues and perspectives, Milano, Giuffrè, Alphen aan den Rijn, Sijthoff & Noordhoff, 1978-1979, p. 07-08.

[7] MIRANDA, F. C. P. d. *Comentários à constituição de 1967*: com a emenda n. 1 de 1969, 3. ed, Tomo V, Rio de Janeiro, Forense, 1987, p. 104.

[8] VELLOSO, C. M. da S. "Apresentação", in*:* NALINI, J. R. *O juiz e o acesso à justiça,* 2. ed., rev., atual. e ampl., São Paulo, Revista dos Tribunais, 2000, p. 7.

[9] CONFORD, T. "The meaning of access to justice", in: PALMER, E.; CONFORD, T.; GUINCHARD, A.; MARIQUE, Y. *Access to justice*: beyond the policies and politics of austerity, Oxford, Hart Publishing, 2016, p. 29.

[10] ABREU, P. M. *Acesso à justiça e juizados especiais:* o desafio histórico da consolidação de uma justiça cidadã no Brasil, 2. ed. rev. e atual., Florianópolis, Conceito Editorial, 2008, p. 36.

[11] OSTI, A. *Teoria e prassi dell'access to justice:* un raffronto tra ordinamento nazionale e ordinamenti esteri, Milano, Giuffrè Editore, 2016, p. 11. Translation: "the possibility of each human being to have access to instruments, generally jurisdictional", "provided for in the legal system, made available for the protection of their rights or interests".

[12] One of the main theoretical landmarks on Access to Justice is the Florence Project. It started in Italy, in 1971, in an International Conference on Civil Procedure and was completed in 1978. The result was a great publication, under the general direction of Mauro Cappelletti and Bryan Garth and the support of the Ford Foundation, the European University Institute in Florence and others, containing 04 (four) books distributed in 06 (six) volumes. The work had the participation of jurists, sociologists, economists, anthropologists, psychologists, politicians and academics of various continents, representing a highly influential study across cultures, either in civil law and common law.

[13] CAPPELLETTI, M.; GARTH, B. *Acesso à justiça*, Trad.Ellen Gracie Northfleet, Porto Alegre, Sérgio Antônio Fabris, 1988, Original title: *Access to justice: the worldwide movement do make rights effective. A general report*, p. 08.

símplice equazione giustizia/sistema giurisdizionale"[14]. In broad terms[15], the Florence Project begins with research into the needs of judicial systems to expand access by removing economic, social, temporal, organizational and procedural barriers.

The policy oriented[16] study gave rise, in the western world, to three renewal waves in a chronological sequence[17]: the first aiming to provide legal assistance to the poor[18], the second intending to protect collective and diffuse interests[19] and the third designing systemic reforms in the organization of justice[20].

On the other hand, as mentioned above, there are complementary conceptions that prioritize, more directly, extrajudicial channels of Access to Rights, such as the view adopted by the Permanent Observatory of Portuguese Constitutional Justice[21]. This conception expands the idea of Access to Justice beyond the filing of a remedy in the judicial system. To this end, the entire socio-political context, the degree of legal information[22] and the level of accessibility of citizens to rights are included in the analysis, even if the access occurs outside the judicial apparatus, whether in other public bodies, in arbitrations, in mediations or in other informal private conflict resolution agencies. In such a framework, the removal of barriers to Access become dependent not only on the Judiciary, presupposing a more ideal

[14] OSTI, A. *Teoria e prassi dell'access to justice*: un raffronto tra ordinamento nazionale e ordinamenti esteri, Milano, Giuffrè Editore, 2016, p. 05. Translation: "procedural approach that is resolved in the justice/jurisdictional system equation".

[15] See: SALLES, B. M. *Acesso à Justiça e Equilíbrio Democrático:* intercâmbios entre *civil law* e *common law*, v. 1, Belo Horizonte, Dialética, 2021.

[16] CAPPELLETTI, M. "Accesso alla giustizia: conclusione di un progetto internazionale di ricerca giuridico-sociologica", in: *Il Foro Italiano*, Roma, Societa Editrice Del Foro Italiano, v. 102, 1979, p. 59.

[17] CAPPELLETTI, M.; GARTH, B. *Acesso à justiça,* Trad. de Ellen Gracie Northfleet, Porto Alegre, Sérgio Antônio Fabris, 1988, Original title: *Access to justice: the worldwide movement do make rights effective. A general report*, p. 31.

[18] The first wave, seen especially in Europe and United States in the 60, aimed to expand legal assistance to the poor, providing legal consultancy and private lawyers paid by the Government (*judicare* system), or public defenders and neighborhoods offices maintained by public authorities, or combining both models. CAPPELLETTI, M.; GARTH, B. *Acesso à justiça,* Trad. de Ellen Gracie Northfleet, Porto Alegre, Sérgio Antônio Fabris, 1988, Original title: *Access to justice: the worldwide movement do make rights effective. A general report*, p. 31-48.

[19] The second wave began between 1965 and 1970 in the United States and, later, in Europe and other western countries. The goal was to protect collective and diffuse interests emerging with the complexity of social relations, such as the rights of consumers and the environment. This wave faced organizational obstacles, reviewing the individualistic procedural culture and idealizing techniques such as class actions, creation of regulatory agencies and expansion of legitimacy to stand before a Court. CAPPELLETTI, M.; GARTH, B. *Acesso à justiça,* Trad. de Ellen Gracie Northfleet, Porto Alegre, Sérgio Antônio Fabris, 1988, Original title: *Access to justice: the worldwide movement do make rights effective. A general report*, p. 49-66.

[20] The third wave, which emerged in the 1970s, projects a whole new approach to Access to Justice. It articulates against the plexus of barriers in a more comprehensive way, acting on the general set of institutions and mechanisms, people and procedures used to process and prevent disputes in modern societies. The proposal includes changes to forms of procedure, changes to Court organization, creation of new Courts, use of lay or paraprofessionals, modifications to substantive law designed to avoid litigation or facilitate resolution, and private or informal mechanisms for resolving disputes. CAPPELLETTI, M.; GARTH, B. *Acesso à justiça,* Trad. de Ellen Gracie Northfleet, Porto Alegre, Sérgio Antônio Fabris, 1988, Original title: *Access to justice: the worldwide movement do make rights effective. A general report*, p. 67-71.

[21] The Observatory constitutes a research Departament of the Center of Social Studies of the Faculty of Economics of Coimbra, whose research, published in 2002, was scientifically directed by Boaventura de Sousa Santos and coordinated by João Pedroso, Catarina Trincão, João Paulo Dias, with the participation of others. The research looked at the issue from the perspective of a decentralized Access to Rights, including employment, health, education, etc, not priorizing granting them through the Courts. The studies cover civil law and common law systems, proving to be know in both families and, more notably, within civil law.

[22] FOLLEVILLE, C. de. *L'accès au droit et à la justice*, Paris, ESF Éditeur, 2013, p. 21.

functioning of society and the Government[23]. In this integrated information and dispute resolution system, the Courts are just one part[24].

As can be seen from polysemy and the two main conceptions, Access to Justice (*lato sensu*) consists of a complex construction, whose presence in legal systems appears today under varied formulas. Whether as a human right at the international level[25], or as a fundamental right explicit or implicit[26] in the Constitutions, Access to Justice has the attributes of the most relevant rights[27].

As a normative species, it is normally, but not always, presented as a principle. In any of the circumstances above, it emerges as an authentic right, even though it also has, connected and intimate, a guarantee function of allowing the access to other rights in public or private spheres, jurisdictional or not. Hence it is said that Access to Justice is genuinely a right, but a right also "*funzionale o servente*", contributing to "*l'adattamento dell'ordinamento ai diritti fondamentali*"[28].

The right of Access is commonly categorized as a provisional right[29], the promotion of which depends on state interventions (*facere*) to guarantee accessibility for all, under equal conditions, in Court or out of it. However, Access to Justice can also be seen as a type of fundamental freedom, prohibiting the Legislator (*non facere*) from acts that violate its core[30]. Furthermore, there are relations between Access to Justice and political rights, since, through acts of demand, it is possible to actively participate in public decision-making, in an exercise of citizenship[31]. As if this combination of elements was not enough, the understanding of Access to Justice is not limited to relations between the Government and individuals, also presupposing joint action and the sharing of responsibilities between the Government and the civil society[32].

It is worth mentioning that, throughout this vast terrain, Access to Justice involves a double dimension[33]: the private and the public one. The first is represented by the resolution, case-by-case, of conflicts of interests, in order to benefit those directly interest in the outcome of the dispute. The second lies in the diffuse effect of the resolution, which restores violated legalities, stabilizes social and economic development and benefits the community.

Alongside all this, the role of the judges and interprets, in national and international spectrum, is essential for defining what should be understood as the

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[23] SANTOS, B. de S. (dir.); PEDROSO, J.; TRINCÃO, C.; DIAS, J. P. (coord.). *O acesso ao direito e à justiça*: um direito fundamental em questão, Coimbra, Observatório Permanente da Justiça Portuguesa (OJP), 2002, p. 26.

[24] MENDONÇA, J.J. F. d. S. *Acesso equitativo ao direito e à justiça*, São Paulo, Almedina, 2016, p. 53.

[25] SALLES, B. M.; CRUZ, P. M. "Access to justice: a concept in the light of the european and american international systems", *Academia letters*, article 1420.

[26] MENDONÇA, J.J. F. d. S, *Acesso equitativo ao direito e à justiça*, São Paulo, Almedina, 2016, p. 15.

[27] MENDONÇA, J.J. F. d. S. *Acesso equitativo ao direito e à justiça*, São Paulo, Almedina, 2016, p. 122.

[28] OSTI, A. *Teoria e prassi dell'access to justice*: un raffronto tra ordinamento nazionale e ordinamenti esteri, Milano, Giuffrè Editore, 2016, p. 11 and 12. Translation: "functional or servant" and "the adaptation of the law to the fundamental rights".

[29] MENDONÇA, J.J. F. d. S. *Acesso equitativo ao direito e à justiça*, São Paulo, Almedina, 2016, p. 55 e 197.

[30] OSTI, A. *Teoria e prassi dell'access to justice*: un raffronto tra ordinamento nazionale e ordinamenti esteri, Milano, Giuffrè Editore, 2016, p. 22-23; and CONFORD, T., "The meaning of access to justice", in: PALMER, E.; CONFORD, T.; GUINCHARD, A.; e MARIQUE, Y. *Access to justice:* beyond the policies and politics of austerity, Oxford, Hart Publishing, 2016, p. 33.

[31] ABREU, P. M. *Processo e democracia:* o processo jurisdicional como um locus da democracia participativa e da cidadania inclusiva no estado democrático de direito, v. 3, São Paulo, Conceito Editorial, 2011.

[32] About the topic: RAPOSO, M. "Nota sumária sobre o art. 20º da Constituição", *Revista da Ordem dos Advogados*, Lisboa, v. III, Ano 44, p. 523-543, dezembro de 1984.

[33] OSTI, A. Teoria e prassi dell'access to justice: un raffronto tra ordinamento nazionale e ordinamenti esteri, Milano, Giuffrè Editore, 2016, p. 12.

content of Access to Justice. Such a definition depends not only on the degree of normativity of the right and the nature of the available means of protection and remedies, but also on the factual possibilities and restrictions established in the name of the public interest and the rationalization of public services. The subject is one more chapter of the permanent tension between normativity and real factors[34] that permeates the problem of the effectiveness of rights, the procedural practices and the political choices of each system[35].

Based on the content exposed, it is possible to risk summarizing what Access to Justice (*lato sensu*) means, in a difficult attempt to describe the state of the art:

Access to Justice is a human right at the international level and a fundamental right at the domestic level, commonly established in the form of a principle, but which can also be implicit in legal systems.

It has its own value, wich is combined with an instrumental function and with a complex content. It encompasses public and private actors behaviors, but also incorporates aspects of freedoms and participation rights.

It is specified (*stricto sensu*) in the possibilities of (***i***) Access to Courts for judicial protection, through a fair trial and with all the guarantees of the due process, such as impartiality, reasonable duration, motivation of decisions, publicity and others, and (***ii***) Access to Rights in extrajudicial spheres, in terms of information, advice and effective alternative methods of conflict resolution.

All these notions interacts and generate a non-absolute content that depends on the interpretative activity, in the tension between normativity and factual limitations[36].

Access to Justice is one of the most relevant and current concerns in the field of law. It combines theory and practice, is subject to studies from different angles and representes one of the main dilemmas of the contemporary society[37]. More than this, it provides an "privileged analitical window" to radically reinvent theoretical, practical and political foundations in law[38].

3. CRIMINAL JUSTICE SYSTEM IN BRAZIL: RESTORATIVE JUSTICE AS A POSSIBLE PATH TO ACCESS TO JUSTICE

In Brazil, the criminal justice system deals with violence and situations endowed with social negativity by adopting an approach based on Retributive Justice. In other words, in general, the State investigates, prosecutes and judges the offender, imposing a criminal penalty at the end of the process, varying the severity of the punishment in terms of prison time according to the defendant's degree of reproach. From this perspective, doing justice does not mean resolving the conflict between perpetrator and victim. Doing justice is limited to punishing the perpetrator of the crime who violated criminal law according to his or her culpability.[39]

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[34] HESSE, K. *A força normativa da constituição*, Trad. de Gilmar Ferreira Mendes, Porto Alegre, Sério Antonio Fabris, 1991. Original title: *Die normative Kraft der Verfassung*.

[35] MENDONÇA, J.J. F. d. S. *Acesso equitativo ao direito e à justiça*, São Paulo, Almedina, 2016, p. 158.

[36] SALLES, B. M.; CRUZ, P. M. "Access to justice: a concept in the light of the european and american international systems", *Academia letters*, article 1420.

[37] BENJAMIN, A. H. V. e. *A insurreição da aldeia global contra o processo civil clássico*: apontamentos sobre a opressão e a libertação judiciais do meio ambiente e do consumidor, BDJur, Brasília, DF. Available in: <http://bdjur.stj.jus.br//dspace/handle/2011/8688>.

[38] SANTOS, B. d. S. *Para uma revolução democrática da justiça*, 3. ed. rev. e ampl, São Paulo, Cortez, 2007, p. 04.

[39] According, among outhers: CARDOSO, H. S. "Justiça restaurativa judiciária como instrumento de acesso à justiça no Estado Democrático de Direito: a importância da avaliação das práticas restaurativas para a estruturação de políticas públicas eficazes", in: XXIX CONGRESSO NACIONAL DO CONPEDI BALNEÁRIO CAMBORIU – SC, Acesso à Justiça: Política Judiciária, Gestão e Administração da Justiça I, Florianópolis, CONPEDI, 2022, p. 124-142. Available in: http://site.conpedi.org.br/publicacoes/906terzx/7ci2bts7/H4p5gIa50v1s15KC.pdf;

As pointed out by Jacinto Coutinho, the criminal process serves to resolve the "criminal case" which, "limitado linguisticamente pela imputação contida na inicial acusatória, fixa o conteúdo daquilo que poderá ser cognoscível e devidamente acertado através do exercício do poder jurisdicional."[40]

Given that in Brazil, as a rule, criminal action is of unconditional public initiative, it is up to the Public Prosecutor's Office to deconstruct the defendant's presumption of innocence and prove the facts alleged in the complaint in order to obtain a conviction. In this context, the victim is not a party to the proceedings and participates in the investigation and process only as an element of evidence.

On the other hand, the defense must strategically choose between remaining silent, producing counter-evidence or carrying out evasive maneuvers to achieve, at best, acquittal - or alternatively, fight for the recognition of nullities, removal of circumstances that make the crime more serious or that increase the defendant's sentence; evaluate the convenience of using negotiated criminal justice institutions, etc.

Be it one way or another, within the framework of retributive justice, there is no real incentive for the defendant to assume responsibility for his actions, since the confession, combined with another probative element, will give rise to the certainty of his punishment, implying only the reduction of his sentence.

In this dialectical combat between the State and the defendant, theoretically governed by the principle of equality of arms, both sides seek to persuade the judge about the truth of their version of the facts, because – recalling Calamandrei's classic lesson of the "processo come giuco"[41] - "per ottener giustizia non basta aver ragione"[42], it is necessary to bring arguments capable of convincing the judge and arousing resonances and sympathies in his conscience.

CARDOSO, H. S.; GELAIN, I. L. "Justiça Restaurativa e Perdão no Ordenamento Jurídico Brasileiro", in: GELAIN, I. L. (org). *Pensamento em Movimento*: direito, justiça e cidadania, v. VI, São Paulo, Editora Dialética, 2024, p. 67-88.

[40] COUTINHO, J. N. d. M. "Caso penal e limites à cognição processual", *Revista Duc In Altum*, Cadernos de Direito, vol. 8, n. 14, jan.-abr. 2016, p. 12. Available in: https://egov.ufsc.br/portal/sites/default/files/3-12-1-pb.pdf. Translation: "(…) linguistically limited by the accusation contained in the accusatory pleading, sets the content of what may be cognizable and properly adjudicated through the exercise of judicial power".

[41] According to Calamandrei: "Affinchè la domanda proposta dall'attore possa esser accolta, occorre che sia filtrata attraverso la mente del giudice, e che riesca a farsi intendere da lui ed a persuaderlo: l'esito finale dipende dunque dall'incontro di queste due psicologie individuali e dalla forza di convinzione con cui le ragioni fatte valere dal richiedente riusciranno a suscitare risonanze e simpatie nella coscienza del giudicante." CALAMANDREI, P. "Il processo come giuco", in: CALAMANDREI, P. *Opere Giuridiche,* A cura de Mauro Cappelletti, Volume Primo, Napoli, Morano Editore, 1965, p. 539. Translation: "For the claim proposed by the plaintiff to be accepted, it is necessary that it be filtered through the judge's mind, and that it manages to make itself understood by him and to persuade him: the final outcome therefore depends on the meeting of these two individual psychologies and on the strength of conviction with which the reasons put forward by the applicant will succeed in arousing resonances and sympathies in the conscience of the judge."

[42] CALAMANDREI, P. "Il processo come giuco", in: CALAMANDREI, P. *Opere Giuridiche,* A cura de Mauro Cappelletti, Volume Primo, Napoli, Morano Editore, 1965, p. 539.

The rules of this criminal procedural game[43] are set by the legal system, with the Constitution being a parameter[44] of legitimization and control of all state acts. These rules must be followed by the State and the defendant – both in the investigation phase, as well as in the procedural investigation and criminal execution phase. Within this context, "Constitutional Justice"[45] requires a structurally impartial judge who decides the criminal case in a well-founded manner in light of full and lawful evidence of the materiality and authorship of the crime, constructed in a dialectical manner by the parties, dosing the penalty in accordance with the criminal liability of the author. Criminal execution, on the other hand, must respect the fundamental human rights of the convicted person.

Consulting the 1988 Constitution of the Federative Republic of Brazil[46], the design of a democratic criminal justice system can be seen. There are a series of commandments that are guarantees for citizens in the face of the punitive power of the State, namely: the principles of legality and culpability as prerequisites for crime and criminal sanction; the implicit presence of an accusatory criminal procedural paradigm; the guarantee of adversarial proceedings, of full defense, of due process of law, of presumption of innocence, of prohibition of illicit evidence; the requirement of publicity and reasoning in judicial decisions; the need for individualization of punishment; respect for the human dignity of the prisoner, etc.[47]

However, an analysis devoid of naivety indicates a contradiction between what is and what should be, that is, a tension between constitutional commandments and the reality of the criminal justice system.[48]

Historically, the criminal process and Brazilian legal culture are marked by an inquisitorial structure and a punitive inclination. Roughly speaking, the clientele of the criminal justice system has always been made up of the socially marginalized

[43] Applying Game Theory to criminal procedure, Alexandre Morais da Rosa states that: "O processo penal se estrutura como uma modalidade de jogo processual no qual há (a) conjunto de normas jurídicas; (b) que estabelecem expectativas de ganho/perda em momentos específicos (recebimento/rejeição da denúncia; absolvição sumária; produção probatória (informação), condenação/absolvição – em diversas instâncias), (c) mediante jogadas temporalmente indicadas (denúncia/queixa, defesa preliminar, alegações finais, recursos, similares), (d) para os quais o Estado Juiz emite comandos (despachos, interlocutórias, decisões, acórdãos, similares) de vitória/derrota (total ou parcial)." ROSA, A. M. d. *Guia compacto do processo penal conforme a teoria dos jogos*, Rio de Janeiro, Lumen Juris, 2013, p. 29-30. Translation: "Criminal procedure is structured as a type of procedural game in which there are (a) a set of legal rules; (b) that establish expectations of gain/loss at specific moments (receipt/rejection of the charge; summary acquittal; production of evidence (information), conviction/acquittal - in various instances), (c) through temporally indicated plays (charge/complaint, preliminary defense, final arguments, appeals, similar), (d) for which the Judge State issues commands (rulings, interlocutory decisions, judgments, similar) of victory/defeat (total or partial).".

[44] SCHIER, P. R. "Constitucionalização do direito no contexto da Constituição de 1988", in: CLÈVE, C. M. (coord.). *Direito Constitucional Brasileiro*: teoria da constituição e direitos fundamentais, 2 ed. rev., atual. e ampl., São Paulo, Thomson Reuters, 2021, p. 57.

[45] CARDOSO, H. S. "Justiça Constitucional, sanção penal e sistema prisional", in: CLÈVE, C. M. (coord.). *Direito Constitucional Brasileiro*: teoria da constituição e direitos fundamentais, 2 ed. rev., atual. e ampl., São Paulo, Thomson Reuters, 2021, p. 674-691.

[46] BRASIL. [Constituição (1988)]. *Constituição da República Federativa do Brasil de 1988*. Brasília, DF: Presidência da República. Disponível em: https://www.planalto.gov.br/ccivil_03/constituicao/constituicao.htm

[47] CARDOSO, H. S. "Justiça Constitucional, sanção penal e sistema prisional", in: CLÈVE, C. M. (coord.). *Direito Constitucional Brasileiro*: teoria da constituição e direitos fundamentais, 2 ed. rev., atual. e ampl., São Paulo, Thomson Reuters, 2021, p. 674-691.

[48] CARDOSO, H. S. "Justiça Constitucional, sanção penal e sistema prisional", in: CLÈVE, C. M. (coord.). *Direito Constitucional Brasileiro*: teoria da constituição e direitos fundamentais, 2 ed. rev., atual. e ampl., São Paulo, Thomson Reuters, 2021, p. 680.

population due to selective criminal social control supported by the "ideology of social defense" [49].

And despite the promulgation of a guarantor Constitution and the criminal procedural reforms of recent decades, to this day, more or less explicit "authoritarian permanences"[50] can be observed in the Brazilian criminal justice system that contravene constitutional normativity.

As an example, we can mention the maintenance in the contemporary criminal process of Summary 523 of the Federal Supreme Court (STF)[51] – published in 1969 in the most violent context of the military dictatorship to validate, within a logic of "authoritarian legality"[52], criminal processes marked due to a deficient technical defense of the accused –, stating that "No processo penal, a falta da defesa constitui nulidade absoluta, mas a sua deficiência só o anulará se houver prova de prejuízo para o réu"[53].

This transplantation of the authoritarian logic of the military dictatorship to contemporary times, which deprives the right to full defense and contradiction, is a symptom of the still predominant "inquisitorial mentality"[54] in Brazilian lands, as well

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[49] The ideology of social defense dominates the discourse of jurists, as well as common sense in society. It supports the idea that the criminal is a dangerous and violent person from whom society needs to be defended. Compare, in this sense, among others: ANDRADE, V. R. P. d. *Pelas mãos da Criminologia*: o controle penal para além da (des)ilusão, Rio de Janeiro, Revan/ICC, 2012.; BARATTA, A. A *Criminologia crítica e crítica do direito penal*: introdução à sociologia do direito penal, 3. ed., Trad: Juarez Cirino dos Santos, Rio de Janeiro, Editora Revan/Instituto Carioca de Criminologia, 2002.

[50] According, among outhers: CALDEIRA, T. P. d. R. "Violência, direitos e cidadania: relações paradoxais", *Cienc. Cult.* [online], 2002, vol. 54, n. 1, pp. 44-46. Available in: http://cienciaecultura.bvs.br/scielo.php?script=sci_arttext&pid=S0009-67252002000100021&lng=en&nrm=iso; LUZ, D. "O ius commune latino-americano e o direito brasileiro: uma estratégia para superação das permanências autoritárias e democratização do processo penal", *Cadernos de Dereito Actual*, nº 20, Núm. Extraordinario (2023), pp. 58-75. Available in: https://www.cadernosdedereitoactual.es/ojs/index.php/cadernos/article/view/955/474; LOPES JR, A.; KHALED JR, S. H. "Pelo abandono da abstração racionalista moderna: por uma fenomenologia decolonial do processo penal", Cadernos de Dereito Actual, n º 20, Núm. Extraordinario (2023), pp. 23-39. Available in: https://www.cadernosdedereitoactual.es/ojs/index.php/cadernos/article/view/925/472; PASTANA, D. R. "Estado punitivo brasileiro: a indeterminação entre democracia e autoritarismo", *Civitas*, Porto Alegre, v. 13, n. 1, pp. 27-47, jan.-abr. 2013. Available in: https://revistaseletronicas.pucrs.br/ojs/index.php/civitas/article/view/9039/9685

[51] PRADO, G. "*Defesa técnica*: da defesa deficiente ou de "quando o direito saiu de férias"", *Cadernos de Dereito Actual*, n º 20, Núm. Extraordinario (2023), pp. 98-117. Available in: https://www.cadernosdedereitoactual.es/ojs/index.php/cadernos/article/view/946/476

[52] According to the terminology employed by Anthony Pereira in analyzing dictatorship and repression in the dictatorial regimes of Brazil, Chile, and Argentina: "Apesar de todos eles terem chegado ao poder pela força, esses governantes despenderam grandes esforços para enquadrar seus atos num arcabouço legal, uma mistura do antigo e do novo. Em todos esses regimes houve, por um lado, uma esfera de terror estatal extrajudicial e, por outro, uma esfera de legalidade rotineira e bem estabelecida". *(*PEREIRA, A.W. *Ditadura e Repressão:* o autoritarismo e o estado de direito no Brasil, no Chile e na Argentina*,* Trad. de P. de Q. C. Zimbres, Paz e Terra, São Paulo, 2010, p. 53.) Translation: "Although all of them came to power by force, these rulers made great efforts to frame their actions within a legal framework, a mixture of the old and the new. In all these regimes, on the one hand, there was a sphere of extrajudicial state terror and, on the other, a sphere of routine and well-established legality.".

[53] STF. *Súmula 523 do Supremo Tribunal Federal*, *data de aprovação: 03 dez. 1969*. Available in: https://portal.stf.jus.br/jurisprudencia/sumariosumulas.asp?base=30&sumula=2729 Translation: "In criminal proceedings, the lack of defense constitutes absolute nullity, but its deficiency will only nullify it if there is proof of harm to the defendant."

[54] LOPES JR, A.; KHALED JR, S. H. "Pelo abandono da abstração racionalista moderna: por uma fenomenologia decolonial do processo penal", Cadernos de Dereito Actual, n º 20,

as the lack of political commitment to the democratic guarantees of the defendant and with the very idea of parity of arms between prosecution and defense.

In truth, it is an indication of the historical "fallacy of equality between the parties in criminal proceedings"[55], exposed by the imbalance in the material and budgetary structuring of the different state actors in the criminal justice system. The analysis of the Annual Budget Law for 2023 of the Union is illustrative, revealing the lack of material and human resources of the Public Defender's Office to cope with the avalanche of demands from its clients, considering that the Federal Public Defender's Office receives almost 7 times less than the public prosecution service and 11 times less than the police. Meanwhile, the Federal Public Prosecutor's Office and the Federal Judiciary Police have a presence throughout the national territory, with a budget allocation 18.3 times greater than that of the Federal Public Defender's Office.

The paradox of indeterminacy between democracy and authoritarianism in Brazil becomes evident when situations of institutional violence occur, eventually provoked by the operators of the criminal justice system themselves – as is the case of "torture"[56] in police stations, prisons and internment units, as well as summary executions of those individuals considered "unworthy of life"[57] justified in police operations through reports of resistance, especially affecting "the black body"[58]. Added to this is the chronic state of "inhumanity"[59] in Brazilian prisons, with overcrowded and unhealthy prisons, marked by the risk of death, whether from infectious diseases or violent deaths. It is undeniable that the shortage of places and overcrowding in prison institutions are a structural obstacle to the provision of basic health and education services, as well as working conditions that allow dignified occupation during criminal execution.

In Brazil, therefore, there is a complex relationship between the official criminal system, which applies a custodial sentence, and the "underground criminal system"[60], which works with the violation of human rights and the indirect death penalty, implying a "legitimacy crisis" [61] of the criminal justice system.

Given the scenario exposed so far, it is important to reflect on the functioning and impacts of the criminal justice system. The question arises: what does it mean to do justice? What does access to justice mean in situations involving crime?

It is reiterated: the criminal process does not focus on the conflict itself, much less on its resolution. The victim, who is the person harmed by the crime, is absolutely neglected by the criminal justice system. As a rule, she is not even part of the criminal process. She does not actively participate in the procedural game and appears before the police or judicial authority only as a probative element. No one asks about her needs. Nobody wants to know her opinion about the meaning of justice in the specific case. And, given the structural lack of the Public Defender's Office, which is unable

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Núm. Extraordinario (2023), pp. 23-39. Available in: https://www.cadernosdedereitoactual.es/ojs/index.php/cadernos/article/view/925/472

[55] PAULA, L. C. d.; BARROS, V. D. M. d. "*A falácia da isonomia entre as partes no processo penal brasileiro*: quando a estruturação material e orçamentária importa!", *Cadernos de Dereito Actual*, n º 20, Núm. Extraordinario (2023), pp. 134-156. Available in: https://www.cadernosdedereitoactual.es/ojs/index.php/cadernos/article/view/947

[56] JESUS, M. G. M. d. *O crime de tortura e a justiça criminal*: um estudo dos processos de tortura na cidade de São Paulo, 2009, Dissertação (Mestrado em Sociologia) - Faculdade de Filosofia, Letras e Ciências Humanas, Universidade de São Paulo, São Paulo, 2009. Available in: http://www.teses.usp.br/teses/disponiveis/8/8132/tde-05022010-171309/pt-br.php

[57] ZACCONE, O. *Indignos de vida*: a forma jurídica da política de extermínio de inimigos na cidade do Rio de Janeiro, Rio de Janeiro, Revan, 2015.

[58] FLAUZINA, A. L. P. *Corpo negro caído no chão*: o sistema penal e o projeto genocida do Estado brasileiro, 2. Ed, Brasília, Brado Negro, 2017.

[59] ALMEIDA, B. R. "*Prison* and inhumanity in Brazil: A critical based on the history of the present", Cadernos de Dereito Actual, Nº 21, Núm. Ordinario (2023), pp. 144-158. Available in: https://www.cadernosdedereitoactual.es/ojs/index.php/cadernos/article/view/923/491

[60] ZAFFARONI, E. R. et al. *Direito Penal Brasileiro*, v. I, 3. Ed, Rio de Janeiro, Revan, 2006.

[61] ANDRADE, V. R. P. d. *Pelas mãos da Criminologia*: o controle penal para além da (des)ilusão, Rio de Janeiro, Revan/ICC, 2012.

to assist even all defendants, the victim's legal assistance in the criminal justice system is basically limited to the actions of the Public Prosecutor's Office - which is made explicit in the usual rhetoric of their representatives when they justify the defendant's request for conviction in the jury court based on their role as "prosecutor of justice". In other words, in the criminal justice system the victim's right to access justice is reduced to obtaining a criminal sentence with the consequent punishment of the offender.

The defendant, in turn, finds himself in a criminal process marked by a warlike and inquisitorial logic. The core of the criminal process is not understanding the conflict. The fact alleged in the complaint is judged out of context with the history of the perpetrator and the victim. It is also not investigated whether the defendant has any needs that need to be met. And if he has actually committed the crime alleged in the complaint, the tendency is for the accused to do everything to avoid being convicted and sent to an inhumane prison, using in particular his right not to self-incriminate. Therefore, the criminal process does not favor the perpetrator of the crime taking responsibility for his actions. Therefore, the question remains about the degree of satisfaction of the defendant's right of access to justice within a criminal justice system marked by the authoritarian permanences outlined above.

In this context, the contemporary restorative movement – which was born in the 70s and was the object of plural theorization in the 80s and 90s – signals the possibility of a different path to thinking about the social challenges of violence, conflict, security and the sense of justice itself.[62]

But similar to what happens with the term "access to justice", restorative justice is an expression with multiple meanings. According to Tony Marshall, restorative justice is not a private practice, but is "(…) a problem-solving approach to crime which involves the parties themselves, and the community generally, in an active relationship with statutory agencies."[63] It is based on the following set of principles:

- making room for the personal involvement of those mainly concerned (particularly the offender and the victim, but also their families and communities)
- seeing crime problems in their social context
- a forward-looking (or preventative) problem-solving orientation flexibility of practice (creativity).[64]

For Howard Zehr, who is considered one of the main theorists of Restorative Justice in the West, restorative processes must prioritize repairing damage and meet the needs of everyone involved in the conflict (victim, offender and community). This is achieved through an inclusive, cooperative and empowering process for all parties that must take the needs of the victim as a starting point. The harm creates the obligation to correct the error, with the offender having the responsibility to seek a solution that satisfies the victim and the community.[65]

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[62] According, among outhers: CNJ. *Relatório Analítico Propositivo Justiça Pesquisa Direitos e Garantias Fundamentais Pilotando a Justiça Restaurativa:* O Papel do Poder Judiciário, Florianópolis, Fundação José Arthur Boiteux, 2018. Available in: https://bibliotecadigital.cnj.jus.br/jspui/handle/123456789/284; SILVA, E. L. d. "Justiça Restaurativa como meio alternativo de solução de conflito", *Arquivo Jurídico,* Teresina, v.1, n. 6, 2014, p. 22-38.

[63] MARSHALL, T. E. *Restorative justice an overview*: A report by the Home Office Research Development and Statistics Directorate, 1999, p. 5. Available in: http://www.antoniocasella.eu/restorative/Marshall_1999-b.pdf

[64] MARSHALL, T. E. *Restorative justice an overview*: A report by the Home Office Research Development and Statistics Directorate, 1999, p. 5. Available in: http://www.antoniocasella.eu/restorative/Marshall_1999-b.pdf

[65] According to ZEHR, H. *Trocando as Lentes:* um novo foco sobre o crime e a justiça, Trad. de Tônia Van Acker, São Paulo, Palas Athena, 2008; and ZEHR, H. *Justiça Restaurativa*, Trad. de Tônia Van Acker, São Paulo, Palas Athena, 2015.

Thus, restorativism suggests replacing the retribution/punishment approach with the restoration/responsibility approach. Borrowing Howard Zehr's metaphor, it's about "changing lenses". Quoting the author, "restorative justice aims at helping offenders to recognize the harm they have caused and encouraging them to repair the harm, to the extent it is possible. Rather than obsessing about whether offenders get what they deserve, restorative justice focuses on repairing the harm of crime and engaging individuals and community members in the process."[66]

With the contemporary expansion of the concept of the right of access to justice beyond mere "access to judicial protection" – as explained in the previous topic of the article –, Restorative Justice can be considered a means of realizing that right in its conception of "access to rights", considering that it proposes the satisfaction of the needs and rights of all those involved, as well as the pacification of the conflict based on consensual and dialogical tools. In particular, given the criticism regarding the actual functioning of the criminal justice system, Restorative Justice represents a possible path to be taken towards the realization of the fundamental human right of access to justice, provided for in article 5, item XXXV, of the Constitution of the Republic Federation of Brazil[67], whether inside or outside the Judiciary.

4. RESTORATIVE PRACTICES IN BRAZIL: THE PREDOMINANCE OF THE JUDICIARY AND THE CREATIVE TRANSLATION BASED ON THE EUROAMERICAN INFLUENCE

In Brazil, historically, Restorative Justice begins with initiatives from some magistrates, with later efforts by the National Council of Justice (CNJ) to standardize and encourage restorative practices in the country. Although the Judiciary is not the only possible place for the application of restorative justice, the focus of this study is centered on restorative practices within the framework of the criminal justice system because of the leading role of the Judiciary in the institutionalization of Restorative Justice in Brazilian lands.

At the outset, it is important to contextualize that there is no law in the strict sense that regulates Restorative Justice at a national level. However, there are some normative frameworks that seek to encourage and/or regulate restorative practices, with special emphasis on Resolution n. 225/2016 of the National Council of Justice (CNJ), which provides for restorative practices within the scope of the Judiciary.[68]

By defining restorative justice, in article 1, as "um conjunto ordenado e sistêmico de princípios, métodos, técnicas e atividades próprias, que visa à conscientização sobre os fatores relacionais, institucionais e sociais motivadores de conflitos e violência, e por meio do qual os conflitos que geram dano, concreto ou abstrato, são solucionados de modo estruturado"[69], the CNJ adopted a perspective

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[66] ZEHR, H. *Restorative justice? What's that?* Available in: https://zehr-institute.org/what-is-rj/

[67] BRASIL. [Constituição (1988)]. *Constituição da República Federativa do Brasil de 1988*. Brasília, DF: Presidência da República. Disponível em: https://www.planalto.gov.br/ccivil_03/constituicao/constituicao.htm

[68] According, among outhers: CARDOSO, H. S. "Justiça restaurativa judiciária como instrumento de acesso à justiça no Estado Democrático de Direito: a importância da avaliação das práticas restaurativas para a estruturação de políticas públicas eficazes", in: XXIX CONGRESSO NACIONAL DO CONPEDI BALNEÁRIO CAMBORIU – SC, Acesso à Justiça: Política Judiciária, Gestão e Administração da Justiça I, Florianópolis, CONPEDI, 2022, p. 124-142. Available in: http://site.conpedi.org.br/publicacoes/906terzx/7ci2bts7/H4p5gIa50v1s15KC.pdf; CARDOSO, H. S.; GELAIN, I. L. "Justiça Restaurativa e Perdão no Ordenamento Jurídico Brasileiro", in: GELAIN, I. L. (org). *Pensamento em Movimento*: direito, justiça e cidadania, v. VI, São Paulo, Editora Dialética, 2024, p. 67-88.

[69] CNJ. Resolução n. 225 de 31/05/2016. Available in: https://atos.cnj.jus.br/atos/detalhar/2289 Translation: "(…) an ordered and systemic set of principles, methods, techniques and specific activities, which aims to raise awareness about

that welcomes the methodological plurality of restorative practices. Following this, Resolution n. 225/2016[70] presents in article 2 a set of principles that should guide Restorative Justice in the country, namely: co-responsibility, reparation of damages, meeting the needs of everyone involved in the conflict, informality, voluntariness, impartiality, participation, empowerment, consensuality, confidentiality, speed and urbanity.

It should be noted that, in Brazil, Restorative Justice occurs as a substitute or concomitant to the traditional criminal process. Restorative processes require the free and prior consent of participants, with retraction being permissible (article 2, § 2). It is essential to inform the parties about the procedure and its possible consequences, and they have the right to request legal advice at any time (article 2, § 3). The recognition of the essential facts of the conflict as true does not imply a confession by the offender if there is subsequent criminal proceedings (article 2, § 1). Finally, restorative agreements cannot stipulate obligations that are not reasonable and proportionate (article 2, § 5).[71]

Considering that, as a rule, in Brazil criminal action is unconditionally public, the practices of Restorative Justice are concentrated primarily in the fields left open for consensus, opportunity or situations of multidisciplinary assistance to conflicts. In this sense, the application of restorativism within the criminal justice system is, in general, limited to the following fields:[72]

In socio-education, the Child and Adolescent Statute (ECA)[73] allows the childhood and youth prosecutor to offer "remission" as a form of forgiveness to adolescents between the ages of twelve and eighteen who commit an act defined as a crime (Art. 126). In turn, the Law of the National Socio-Educational Assistance System (SINASE) – Law n. 12,594/2012[74] provides for the prioritization of restorative practices to meet the needs of victims in the implementation of socio-educational measures (art. 35, III), signaling an explicit option from the legislator to restorativism.

In crimes with less offensive potential, the Lei dos Juizados Especiais[75] (Law n. 9.099/1995) mitigates the principle of mandatory public initiative criminal action, allowing the "civil composition of damages" between offender and victim, as well as the "criminal transaction" between prosecution and defense, for criminal offenses with a maximum penalty of up to 2 years (article 72). Furthermore, it establishes the possibility of an agreement between the prosecution and defense with the consequent "conditional suspension of the process" for crimes with a minimum penalty of maximum 1 year.

Still in the field of negotiated criminal justice, the Criminal Non-Prosecution Agreement (ANPP), governed by article 28-A of the Brazilian Criminal Procedure Code

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the relational, institutional and social factors that motivate conflicts and violence, and through which conflicts that generate damage, whether concrete or abstract, are resolved in a structured way".

[70] CNJ. Resolução n. 225 de 31/05/2016. Available in: https://atos.cnj.jus.br/atos/detalhar/2289

[71] CNJ. Resolução n. 225 de 31/05/2016. Available in: https://atos.cnj.jus.br/atos/detalhar/2289

[72] CARDOSO, H. S. "Justiça restaurativa judiciária como instrumento de acesso à justiça no Estado Democrático de Direito: a importância da avaliação das práticas restaurativas para a estruturação de políticas públicas eficazes", in: XXIX CONGRESSO NACIONAL DO CONPEDI BALNEÁRIO CAMBORIU – SC, Acesso à Justiça: Política Judiciária, Gestão e Administração da Justiça I, Florianópolis, CONPEDI, 2022, p. 124-142. Available in: http://site.conpedi.org.br/publicacoes/906terzx/7ci2bts7/H4p5gIa50v1s15KC.pdf

[73] BRASIL. [Estatuto da Criança e do Adolescente]. *Lei n. 8.069, de 13 de julho de 1990*. Available in: https://www.planalto.gov.br/ccivil_03/leis/l8069.htm

[74] BRASIL. [Lei do SINASE]. *Lei n. 12.594, de 18 de janeiro de 2012*. Available in: https://www.planalto.gov.br/ccivil_03/_Ato2011-2014/2012/Lei/L12594.htm

[75] BRASIL. [Lei dos JECRIM]. Lei n. 9.099, de 26 de setembro de 1995. Available in: https://www.planalto.gov.br/ccivil_03/leis/l9099.htm

(CPP)[76], provides for the possibility of an agreement between the prosecution and defense for crimes committed without violence or serious threat with a minimum penalty of less than 4 years, as long as there is a confession of committing the criminal act. Thus, the ANPP can be an important transition instrument from the punitive paradigm to the restorative paradigm.[77]

In domestic violence, the Maria da Penha Law – Law n. 11.340/2006[78] stipulates public policies to prevent domestic violence and the action of a multidisciplinary care team composed of professionals from the psychosocial, legal and health areas designed to care for the victim, the author and the family, with special attention to children and adolescents (art. 30), which is interesting for the development of restorative practices, whether they are parallel to the criminal process – in the cases of criminal action crimes of unconditional public initiative –, whether they are substitutes for the criminal process – in the cases of public-initiated criminal action crimes conditioned on the representation of the victim and private-initiative criminal action crimes.

With regard to the reality of restorative practices developed within the scope of the Judiciary, the research "Piloting Restorative Justice" [79], published by the National Council of Justice itself in 2018, covered the national territory and analyzed seven states of the federation - Rio Grande do Sul; São Paulo; Federal District; Bahia; Pernambuco; Minas Gerais; and Santa Catarina – based on a sample of 20 jurisdictional units or hubs.

It identified that in Brazil, given the central role of the Judiciary, the movement was basically translated as Judicial Restorative Justice. Furthermore, in light of the data from the restorative programs analyzed, the international hegemony of Howard Zehr (Lens theory) and Kay Pranis (peace circles) was observed as theoretical-methodological landmarks, together with Dominic Barter and Marshall Rosemberg (communication- non-violent). Other international references that appeared in the field were John Braithwaite (reintegrative shame theory and conference model) and Mark Umbreit. With regard to national references, the research highlighted the influence of Leoberto Brancher and Ana Paula Flores (State of Rio Grande do Sul), Egberto Penido, Marcelo Salmaso and Monica Mumme (State of São Paulo), Andre Gomma de Azevedo (Federal District), Juan Carlos Vezzulla (Florianópolis in the State of Santa Catarina), and Marcelo Pellizzolli (Recife in the State of Pernambuco).[80]

Looking at the restorative meetings, in turn, the research pointed out the presence of varied modalities, that is, while some offer restorative conciliation or mediation (with different names), others carry out restorative circles or peacebuilding circles, based on the principles of non-violent communication. In any case, the

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[76] BRASIL. [Código de Processo Penal]. *Decreto-Lei n. 3.689, de 3 de outubro de 1941*. Available in: https://www.planalto.gov.br/ccivil_03/decreto-lei/del3689.htm

[77] MENDONÇA, A. B. d.; CAMARGO, F. P. d.; RONCADA, K. H. M. L. "Acordo de Não Persecução Penal e a Justiça Restaurativa: mais um passo no caminho da transformação social", in: BRANCO, P. G. G. et al. (org). *Direitos Fundamentais em Processo*: estudos em comemoração aos 20 anos da Escola Superior do Ministério Público da União. Brasília, ESMPU, 2020, p. 92. Available in: https://escola.mpu.mp.br/publicacoes/obras-avulsas/e-books-esmpu/direitos-fundamentais-em-processo-2013-estudos-em-comemoracao-aos-20-anos-da-escola-superior-do-ministerio-publico-da-uniao/livro-completo-web-direitos-fundamentais-em-processo.pdf

[78] BRASIL. [Lei Maria da Penha]. Lei n. 11.340, de 7 de agosto de 2006. Available in: http://www.planalto.gov.br/ccivil_03/_ato2004-2006/2006/lei/l11340.htm

[79] CNJ. *Relatório Analítico Propositivo Justiça Pesquisa Direitos e Garantias Fundamentais Pilotando a Justiça Restaurativa:* O Papel do Poder Judiciário, Florianópolis, Fundação José Arthur Boiteux, 2018. Available in: https://bibliotecadigital.cnj.jus.br/jspui/handle/123456789/284.

[80] CNJ. *Relatório Analítico Propositivo Justiça Pesquisa Direitos e Garantias Fundamentais Pilotando a Justiça Restaurativa:* O Papel do Poder Judiciário, Florianópolis, Fundação José Arthur Boiteux, 2018. Available in: https://bibliotecadigital.cnj.jus.br/jspui/handle/123456789/284.

hegemony of peace circles prevails, followed by restorative circles, mediation (in different modalities) and conferences.[81]

Finally, seeking to describe the face of Brazilian Restorative Justice, the research concludes that, although there is a strong Euro-American influence in the process of judicial translation of Restorative Justice in Brazil, it is not a simple reproduction. There is, in fact, a continuous process of (re)creation, as we observe a "construction" that occurs through the combination of what is imported with national, regional and local elements, taking into account the contexts in which the programs and their participants are included.[82]

5. CONCLUSION

Searching for a definition of access to justice is not an easy task due to the multiple approaches that can be given to the expression. At the same time, however, it is possible to conceptualize it as a human right (at the international level) and fundamental right (at the domestic level) with complex content that encompasses the possibility of access to courts for judicial provision, as well as the possibility of access to rights in extrajudicial arenas, which includes, among others, alternative methods of conflict resolution.

Looking at the criminal justice system in Brazil, it is clear that it is anchored in a Retributive Justice model. The focus is not on understanding or resolving the conflict, but on proving (or not) the accusatory thesis. This is an adversarial model, in which the dispute, as a rule, occurs between the Public Prosecutor's Office and the offender. This is because in public criminal actions, the victim is not a party to the proceedings and is only part of the criminal process as a probative element. This means that the act of doing justice essentially boils down to applying a criminal penalty to the perpetrator of the crime, if there is proof of the authorship and materiality of the punishable act.

It should be added that the Brazilian reality is still marked by authoritarian permanence, such as the inquisitorial logic in the mentality of many legal operators, the structural absence of parity of weapons between prosecution and defense, the institutional violence practiced by some state agents against suspects/ accused/convicted, the inhumanity of most prisons in the country, etc.

Faced with the crisis scenario of the criminal justice system, the restorative movement proposes a new look at the problem of crime. The focus is on the people involved in the conflict and, although the needs of the victim constitute the starting point for the meaning of justice in the specific case, the needs of the perpetrator and the community are not neglected. Therefore, the victim, the perpetrator and the community must actively seek a solution that restores, as far as possible, what was violated by the crime and the best way to hold the offender accountable.

Therefore, considering the expanded concept of access to justice beyond the horizon of "jurisdictional protection", Restorative Justice can be a possible way to realize the right of access to justice for the victim, the offender and the community in the sense of "access to rights", whether inside or outside the Judiciary.

Finally, seeking a better understanding of the field regarding the reception of Restorative Justice in Brazil, the available empirical data indicate the strong role of the Judiciary in the institutionalization of restorative practices in the region. Furthermore, in light of the information collected in 20 jurisdictional units or hubs spread throughout the territory, the programs present a theoretical-practical

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[81] CNJ. *Relatório Analítico Propositivo Justiça Pesquisa Direitos e Garantias Fundamentais Pilotando a Justiça Restaurativa:* O Papel do Poder Judiciário, Florianópolis, Fundação José Arthur Boiteux, 2018. Available in: https://bibliotecadigital.cnj.jus.br/jspui/handle/123456789/284.

[82] CNJ. *Relatório Analítico Propositivo Justiça Pesquisa Direitos e Garantias Fundamentais Pilotando a Justiça Restaurativa:* O Papel do Poder Judiciário, Florianópolis, Fundação José Arthur Boiteux, 2018. Available in: https://bibliotecadigital.cnj.jus.br/jspui/handle/123456789/284.

framework marked by a strong Euro-American influence, verifying the prevalence of the use of peace circles in restorative meetings. However, given the incorporation of national, regional and local elements into existing restorative practices, this is not a mere transposition of foreign ideas into the Latin American reality, which allows us to conclude that there was a creative translation of Restorative Justice in Brazil.

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