

# Brief Reflection About Restorative Justice 2011 By the light of the Portuguese legislation

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## Rezumat:

*Obiectivul firesc și final al justiției este realizarea păcii sociale și a dreptății. Orice încălcare a unei reguli sociale, și în special a normei penale, vatămă nu numai persoane concrete, ci și societatea în sine. Justiția restaurativă este chemată să readucă pacea socială, prin refacerea relațiilor dintre victimă și persoana responsabilă de prejudiciu. În opinia autorului, deși acest tip de justiție nu trebuie să se rezume la conflictele de natură penală, totuși, în acest din urmă domeniu, se pot obține rezultate notabile, mai ales prin intermediul medierii. Mediarea nu reprezintă un substitut al jurisdicției, ci o modalitate de rezolvare a conflictului și mai ales de cooperare între victimă și agresor, întrucât acordul nu poate viza aplicarea de sancțiuni privative de libertate, ci doar impunerea unor obligații ce nu sunt arbitrare sau disproporționate, fiind reciproc acceptate, iar, ca urmare a validării de către instanță, capătă forță obligatorie. Desigur, nu orice conflict e pretabil medierii, în cazul infracțiunilor grave neputându-se admite o soluție consensuală. Pentru a-și atinge scopul, această procedură nu ar trebui să fie limitată la faza urmăririi penale, ci să fie inclusă în întreaga proces. Mai mult, o condiție sine qua non a reușitei o reprezintă cooperarea între părțile aflate în conflict, între acestea și mediator, între sistemul judiciar și mediator, între judecător și procuror, între puterile statului.*

## Abstract:

*Natural and final goal of social justice is to achieve peace and justice. Any violation of social rules, and especially the criminal standards, harms not only specific individuals, but society itself. Restorative justice is required to bring social peace, to balance the relations between victim and the person responsible for the injury. According to the author, although this type of justice should not be limited to criminal conflicts, however, in this last area, we can get good results through mediation. Mediation is not a substitute for jurisdiction, but a way of resolving the conflicts and especially of cooperation between victim and aggressor, because agreement can not inflict custodial sanctions, but impose only duties that are non-arbitrary, non-disproportionate and mutually accepted and, following validation by the court, become legally binding. Of course, not every conflict is suitable for mediation, for serious offenses not being acceptable a consensual solution.*

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*To achieve this goal, this procedure should not be limited to the prosecution stage, but it must be included throughout the process.*

*Moreover, a sine qua non condition is the cooperation between parties involved in conflict, between them and mediator, between the judiciary and mediator, between judge and prosecutor, between states powers.*

**Keywords:** Restorative Justice, mediation

1. The basic issue that is put to me has **two previous questions: what is Restorative Justice and if has any future.** Only knowing what it is Restorative Justice (and do not know if we will agree on its amplitude) and only believing that it has a future, it is when we can reflect about this future.

2. Though I know that this was already discussed but, because some concepts are not yet a legal requirement, I would say, conclusively, for me, **Justice is a value** and a fundamental objective of any human society: the continent is constant, but the content is a variable according to the times and spaces<sup>622</sup>

**Restorative** is, obviously, an attribute that reflects an **intention of recovering of something that was lost**<sup>623</sup>. This something, in my view, is the **just peace**, whether the relationship victim - infringer, whether in relationship society - infringer, and vice versa. As a matter of fact, **the natural and final objective of justice is the realization of peace**<sup>624</sup> **to what I call fair.** And, in my view, any crime, especially criminal nature, offends concrete persons and offends the **society**, sometimes more, sometimes less seriously.<sup>625</sup>

**Restorative justice has a future? Naturally yes.** Of course that I speak as a Portuguese citizen is valid to say that is inserted into the idiosyncrasies of



the People we are. As I reflected, just peace requires Justice and, when there is a factor that disturbs the peace that is presumed natural, to restore is the elimination of the disturbing factor. So, unless I did not believe in Justice - and I believe, even because it is a condition "sine qua non" of social survival itself - I believe in the future of Restorative Justice. When it is asked if the Restorative Justice has a future and what future, in the end, we are thinking more about in the criminal mediation what will be, which is, I believe, a reducing line of Restorative Justice. In terms of the values, and, even, of the practice, **Restorative Justice can and must exist with or without mediation, and not only in the criminal field.**<sup>626</sup>

<sup>622</sup> Alain Supiot, Homo Juridicus, 19.

<sup>623</sup> - Dicionário da Academia das Ciências de Lisboa, II, 3228.

<sup>624</sup> Paul Ricoeur, O Justo ou a Essência da Justiça, 167; King D. Dinis, as to Rui de Pina, ut Ruy de Albuquerque and Martim de Albuquerque, História do Direito Português, I, 516.

<sup>625</sup> Our Brazilian brothers, in their reconstruction of the Portuguese, they would say that the offensive potential is variable.

<sup>626</sup> Already in 1519, the regiment D. Manuel I, true heralds of the Restorative Justice, spoke of "concertadores de demandas" which would be the Judges of Peace, and today, Authors as Eliezer

Marcelo Gomes da Silva and Gonçalves Saliba (Brazil – Revista 10B Direito Penal e Processo Penal, S. Paul, year IX, No. 52, Oct. / Nov. 2008/ p.171 - 198), speak of the aid of a "facilitator" (not necessarily mediators) as Pascual Ortuño and Javier Hernández (Spain, Alternative Systems, pg. 61). Returning to Brazil, when it comes to Restorative Justice can not be ignored several studies, in particular, Renato Socrates Gomes Pinto, especially: Justiça Restaurativa – Um novo Caminho? (Revista 10B Direito Penal e Processo Penal, Porto Alegre, vol. 8, No. 47, Dec. 2007/Jan. 2008, p. 190-202) and Justiça Restaurativa, Um Paradigma de Paz.

But I recognize that, in our time, the study of the Restorative Justice stems, most of the time, of considerations about Criminal Law and about the undeniable merits of the mediation.

3. I have no time to talk, more in detail, about the tutelary educational mediation of Restorative Justice to young persons less than 16 years. But I must say that, in this context (which I am very sensitive, because I was a Judge in a Juvenile Court Center), we have traditions that have come, namely, from the last century. There are capacity and people very committed to this issue and it is a field where merit is indisputable, but there is also the need to develop the performance of the mediation services and to sensitize the Courts. It is a field where there should be a significant interaction between the judicial and extrajudicial in the interests of the minors, whether victims or offenders.

4. Anyway, we must recognize that when we talk about criminal mediation and Restorative Justice, normally, we are thinking about the Restorative Justice connected with criminal mediation “of adults”, although this one regards, as general rule, persons older than 16 years - age in which, by general rule, criminal responsibility begins, which has nothing to do with common Civil majority age.<sup>627</sup>

The Portuguese law on criminal mediation (of “adults”), Law 21/12.06.2007, sought to implement, in Portugal, a system that was giving execution to the Decision - No 2001/220/JAI of the Council, of the European Union, from

15.03.2001<sup>628</sup>, which intended, not directly, to establish Restorative Justice and to prescribing, namely with the intervention of criminal mediation, **a status of victims in criminal proceedings**. Therefore, we must not forget that, if the victim and offender deserve - as persons - the same attention, that is assumed to be impaired and, therefore, in the center of a Justice, that calls herself or not, Restorative, the victim, in order to restore what existed before the infraction, is entitled to a form of indemnification, directly or indirectly, even if the offender does not leave. The offender is also deserving attention and even compensation, but this may be, only, psychological.

If this is or is not a new “paradigm of Justice”, as someone, eruditely, asked<sup>629</sup>, I do not think so. But that it is an **underlined system**, emphasized, in a **renewed way** to the Justice. In other words, it is not the question of new Justice; **it is a question of a special paradigm for the Justice.**

**What future?**

**5. All, if ??factors “sine qua non” will be assumed**

First of all, I insist that, in my view, **this is not a new “paradigm of Justice”, but, rather a new momentum in a system of “deflection” suitable for a more effective criminal jurisdiction.**<sup>630</sup> System of “deflection” must be understood as a different way, deviated from the normal or common of the criminal jurisdiction. The mediation is part of this perspective, looking for a “cooperative or consensual resolution of the conflict.”<sup>631</sup> But as also

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<sup>627</sup> - Article 19 of Código Penal; article 130 of Código Civil

<sup>628</sup> - Due to the initiative of Portugal, during its Presidency in the first half of 2000

<sup>629</sup> André Lamas Leite, A Mediação Penal de Adultos / Um novo « Paradigma » de Justiça ?

<sup>630</sup>. See namely, André Lamas Leite, A Mediação Penal de Adultos / Um Novo “Paradigma” de Justiça? 141

<sup>631</sup> For all, Faria Costa, BFDUC, vol. LXI (1985), 94.

stated, clairvoyantly, Faria Costa<sup>632</sup>, given that it seeks to solve problems of criminal character, the idiosyncrasies of the People we are, however much he likes speaking badly of everything, including of the Courts and of the Judges, in general does not exempt them of the assumption of function of these problems. It is common to be heard to say, before a dispute, sometimes not even legal, sometimes even political, **I go to Court!**

It would be a tragic mistake for the Justice and for the mediation that passed through the minds of decision makers that mediation can be a substitute path, in general terms, of jurisdiction<sup>633</sup>. The mediation must not even be mandatory,<sup>634</sup> in my view, as much as substitutive of jurisdiction!

**Mediation is a good system, if properly practiced. Humanist and peace-maker deserve the whole support. But each thing must be in their place.** One of the most important international texts in favor of mediation and Restorative Justice is the Recommendation No. R (99) 19 of the Committee of Ministers of the Council of Europe of 15.09.1999, and only those who do not want to see, certainly, not only the sense of **cooperation between victim and offender** but, **also, between jurisdiction and mediation**. It is not subordination; it is cooperation, each one in its place. **If there is subordination is both of the jurisdiction, such as mediation, face to the Justice.**

Moreover, it constitutes, I believe, a truism reflect **that** in all criminal cases, sometimes more, sometimes less, the society is also interested as a victim and, in a private procedure of simple mediation, nobody represents her, regarding to the triumvirate mediator / mediated. On the other hand, being the society interested; the possibility of the respective reparation will be always feasible. And, so much as it is, in a mediated agreement there cannot be include penalties privative of freedom or custodial duties that offend the dignity of the offender or whose fulfillment extends exaggerated in time, **but duties may be imposed**; which supposes not arbitrariness, but **proportionateness, conscience and free acceptance** and can bring to the fore in paragraph 2 of Article 281 of the CPP,<sup>635</sup> whose injunctions and rules of conduct require validation and, thus imposed by the Court, under penalty of being legitimized the privatization of criminal Justice against one of the most significant victories of the Justice and Civilization as they are known by our culture and our idiosyncrasy.

**6. Our Law 21/2007 being right on two basic points must be amended in other two, so that o be possible for the future.**<sup>636</sup>

The Restorative justice should be encouraged and, therefore, should not be

<sup>632</sup> Ibidem, 155/156

<sup>633</sup> So the in ways as an alleged "Cour de Médiation" that one was tried in France.

<sup>634</sup> Normativity in the sense of obligation led to a strike by lawyers in Italy.

<sup>635</sup> - "They are enforceable against the defendant, either cumulatively or separately, the following orders and rules of conduct: a) To compensate the injured party; b) Provide adequate moral satisfaction to the injured; c) Deliver to the State or private institutions of social solidarity a certain amount or make service provision in the

public interest; d) To stay in one place; e) To attend certain programs or activities; f) Not to engage in certain professions; g) Do not go certain places or means; h) Do not live in certain places or regions; i) Do not accompany, host or receive certain persons; j) Do not attend certain associations or attend certain meetings; l) Do not have in his possession certain objects capable of facilitating the commission of another crime; m) Any other conduct specifically required by the case.

<sup>636</sup> How would say, generally, François Ost, O Tempo do Direito, 227.

forgotten Justices of the Peace and desirable their criminal jurisdiction<sup>637</sup>.

For to Restorative Justice is co-natural the public mediation. This procedure should continue inserted intra procedure, in jurisdictional proceedings of criminal nature, although it can be initiated by the offender or the victim, as of the Prosecutors or of the Judge, if it has the acceptance of those. In any case, if the initiative will not compete, namely the position of The Prosecution will always be essential, as representative of the State and therefore, of the society.

Never an agreement between victim - offender should be enough; but always is necessary a validation by the competent judicial authority, to prove the **conditions of consciousness, voluntariness, freedom of the victim and the offender**, as well as conditions which respect the **dignity of the persons** and proportionality; and can never give wrong idea that the offender "buy" the not fulfillment of the penalty<sup>638</sup>.

On the other hand - and as it happens with the law in force - not all the criminal situations can make viable the intervention of the mediation. The most serious situations must not admit a consensual solution because, in these cases, it is difficult to guarantee tranquility to the dialogue, sometimes some people do not dialogue and, still other times, the offense does not allow depreciation of repair. But I understand that, excluding certain types of crimes or certain situations, the Judge should take the initiative, as the Prosecution, as the victim, as the offender. Although, naturally, the mediation only should be able to pursue if there is no opposition from any of the entities or of any of the interested parties mentioned.

**The possibility of intervention of the criminal mediation should not remain limited to the phase of the inquiry. It has to include the entire course of criminal proceedings, at least until the delivery of the final decision.**

On the other side, it is necessary to change, fundamentally, two points – which, after all, are interconnected - so that the system to be coherent and harmonious, either with the scope of the cited Decision of the European Union or, even more clearly, with the referred Recommendation of the Council of Europe, either as a comprehensive perspective of Justice held cooperatively.

The possibility of intervention of the criminal mediation **should not remain limited to the phase of the inquiry**. It has to include the entire course of criminal proceedings, at least until the delivery of the final decision.

And in the end is the beginning of all this, **the Judge can not** – under penalty of severe amputation of element that must be considered fundamental – **the Judge can not be kept away from mediation and restorative procedures**. If the jurisdiction can not - and it cannot - be removed from a cooperative paradigm aimed to the criminal Justice, it does not make the slightest sense that the Judge - who acts, constitutionally, on behalf of the People - to not have the initiative to motivate, in any procedural time, the intervention of mediation, since he does not collide with opposition of the victim or of the offender or of the Prosecution (this

<sup>637</sup> - On the basis of paragraph 2 of art. 9, Law 78/2001, of 13.07.

<sup>638</sup> - The question was put to me by the president

(English) from the Groupement Européen des Magistrats pour la Médiation in the conference in Budapest, Hungary.

one, while representative of the State and, therefore, of the society) and can not compete with the validation of the agreement, by sentence, which is a noble act of the Judge.

Moreover, in my view, the **pre** - mediation, enlightening, should be mandatory. Only the mediation should not be mandatory. And the mediation is and ought to be held up by those who made the pre-mediation.

### **7. I conclude by “plagiarizing myself”**

I wrote, in 2007, about this same theme<sup>639</sup> and I keep:

**The hour is of cooperation.** Cooperation in a non-conflicting, non-sectarian, non-belligerent vision, **in the perspective of a new frontier of the Procedural Law,**

**namely Criminal. Cooperation between plaintiff and defendant, between these and the mediator.**

**Cooperation between jurisdiction and mediation. Cooperation between Judge and Prosecution. Cooperation between the Powers of the State.**

Cooperation is the civic stance that I aim to have while pronouncing me on this thematic, suggesting certain modifications, just because I applaud the Restorative Justice and the projection of criminal mediation of adults. Let's hope in **totally** cooperative.

**If there will be spirit and cooperative intention, the Justice will win and, therefore, the citizens will gain.**

And paraphrasing the words of François Ost that I have already cited, *future to the future of Restorative Justice will have happened.*

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<sup>639</sup> - CRP, artigo 202. O Direito, ano 139, 2007, V, págs. 1013 e Seg.