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CONSENSUS IN THE CRIMINAL PROCESS: THE EFFECTIVE PARTICIPATION OF THE VICTIM IN THE NON-PERSECUTION AGREEMENT

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RESUMO

O presente artigo objetivou analisar a construção do consenso no processo penal, por meio do artigo 28-A do Código de Processo Penal brasileiro. A ênfase foi dada na participação da vítima na construção do acordo de não persecução penal. Com destaque ainda para as ações do Ministério Público. Isso na tentativa de aproximar a vítima do processo e as medidas legislativas voltadas para essa figura processual. Adotou-se na pesquisa a metodologia referencial bibliográfica, utilizando-se de li- vros, artigos e obras que versam a respeito do tema ora estudado e da legislação brasileira. Nesse propósito, foram estudados, inicialmente, os aspectos gerais so- bre o consenso no processo penal, a partir da reanálise da estrutura do processo penal brasileiro na busca de explorar a sua conceituação e o seu aspecto restaura- tivo. Na segunda parte do estudo fez-se uma análise do artigo 28-A do Código de Processo Penal, ao esmiuçar o acordo

de não persecução penal, com passagem pelos planos de existência, validade e eficácia. Na sequência, foi analisado o objeto do referido acordo, para se chegar à reparação do dano causado à vítima. A partir daí, foram expostos os meios de participação da vítima na construção do consen- so. Assim, o destaque foi para as ações efetivas a serem tomadas pelos membros do Ministério Público na trazida da vítima para a construção do acordo.

Palavras-Chave: Consenso. Processo Penal. Acordo de Não Persecução Penal. Vítima. Ministério Público.

ABSTRACT

This article aimed to analyze the construction of consensus in the criminal process, through article 28-A of the Brazilian Penal Procedure Code. The emphasis was placed on the victim's participation in the construction of the non-criminal prose- cution agreement. Also noteworthy are the actions of the Public Ministry. This in an attempt to bring the victim closer to the process and the legislative measures aimed at this procedural figure. The bibliographic referential methodology was adopted in the research, using books, articles and works that deal with the subject studied and Brazilian legislation. In this regard, the general aspects of consensus in the criminal process were initially studied, based on a reanalysis of the structure of the Brazilian criminal process in an attempt to explore its conceptualization and its restorative aspect. In the second part of the study, an analysis of article 28-A of the Code of Criminal Procedure was carried out, by scrutinizing the non-criminal prosecution agreement, passing through the existence, validity and effectiveness plans. Subsequently, the object of the agreement was analyzed, in order to arrive at reparation of the damage caused to the victim. From there, the victim's means of participation in building consensus were exposed. Thus, the highlight was the ef- fective actions to be taken by members of the Public Ministry in bringing the victim to the construction of the agreement.

KEYWORDS: Consensus. Criminal proceedings. Non-Persecution Agreement. Victim. Public Ministry.

1 INTRODUCTION

Brazil began to experiment with the possibility of an agreement between the State Prosecutor's Office and the perpetrator in 1995. The purpose was to

prevent the perpetrator from being held criminally liable for the crimes committed. This was the birth of the penal transaction.

> Nos crimes de menor potencial ofensivo, em que a pena míni- ma cominada for igual ou inferior a um ano, abrangidas ou não pela Lei dos Juizados Especiais Criminais, o Ministério Público, ao oferecer a denúncia, poderá propor a suspensão do processo, por dois a quatro anos, desde que o acusado não esteja sendo processado ou não tenha sido condenado por outro crime, e considerados os demais requisitos que autorizariam a suspensão condicional da pena. Ver artigo 89 da Lei nº 9.099/95. (BRASIL.Conselho Nacional do Ministério Público, Online).

The National Council of the State Prosecutor's Office issued Resolution number 181 (BRA- SIL, 2017), bringing to the national legal system the "agreement not to prosecute" twenty-two years later. The Resolution innovated the national legal system by creating the possibility of an agreement between the member of the State Prosecution Office and the investigated person for crimes of medium offensive potential. The reffered document, however, was subject to questionings about its constitutionality.

In this specific question, a serious mistake was observed. As it was put in a published article focused on preliminary observations about the agreement not to prosecute: from unconstitutionality to argumentative inconsistency. The authors commented as follows:

> Esse grave erro deriva do próprio conceito de interesse de agir utilizado pelo Conselho Nacional do Ministério Público. Segundo a melhor doutrina, o interesse de agir se justifica pela necessidade do provimento judicial e pela adequação do provimento pedido à vontade da lei71. Assim, se a imposição de pena não cabe ao Mi- nistério Público, mas ao Poder Judiciário, e se a pena a ser impos- ta por este último estiver dentro dos limites legalmente previstos, não há como negar a permanência do interesse de agir, mesmo com a realização e cumprimento do acordo de não-persecução penal por parte da pessoa investigada. Se, como, representante da sociedade, não cabe ao Ministério Público a "autoexecutorie- dade do direito de punir" 72, por óbvio que, em razão disso, latente estará o interesse de agir a justificar o ajuizamento da ação penal pública, que, no caso, caberá a ele próprio (ANDRADE e BRANDALISE, 2017, p. 253 -254).

Law No. 13,954, of December 24th, 2019 (BRAZIL, 2019), made, at least in the formal aspect, the constitutionality of the agreement not to prosecute unquestionable. This became part of the Code of Criminal Procedure, inserting there its new article 28-A.

The focus of these legislative innovations has always been the criminal. It is the criminal to whom all decriminalization measures are directed; it is the criminal who is the target of criminal policy, the guarantees of due process. However, the victims are also part of the criminal act, they are the first ones to be violated, psychically, morally and even physically.

It is certain that during the evolution of criminal law, the victim was gradually relegated to a secondary, supporting role. Thus, in order to understand the criminal phenomenon, criminology for a long time dedicated itself solely to the attempt of understanding the nuances of the perpetrator of the crimes. Added to this, the removal of the victim from the criminal procedure relationship also contributed to this scenario. Therefore, the punitive power is exercised by the state in the vast majority of existing crimes.

Gomes, when discussing the position of the victim in the Brazilian criminal procedure, reached the following conclusion:

> Dessa forma, quando se fala em uma maior proteção do Estado para com a vítima, deve-se entender como um tratamento espe- cializado que toda a pessoa merece após a ocorrência do delito, que em nada atinge os direitos e garantias do acusado ou colide com eles. Deve-se anotar, porém, que a concessão de direitos como tratamento especializado, sala reservada, demandam inves- timentos do Estado. E, sabe-se que a sobre vitimização não será afastada apenas pela previsão legal de direitos, mas, somente, pela efetivação de seus direitos (GOMES, 2012, p. 114).

In view of the above, it can be considered that, since the victim is the direct addressee of the correct application of the criminal law, his interests are of utmost importance. The human dignity of the victim is based on the state response to the harm that has been caused. Isn't this the role of justice before the expected social peace?

Having said this, it is plausible that the participation of the victim in the agreement not to prosecute is the first step towards the effectiveness of a de facto restorative justice.

The United Nations (UN) conceives restorative justice as follows:

> A Justiça Restaurativa refere-se ao processo de resolução do crime focando em uma nova interpretação do dano causado às vítimas, considerando os ofensores responsáveis por suas ações e, ademais, engajando a comunidade na resolução desse confli- to. A participação das partes é uma parte essencial do processo que enfatiza a construção do relacionamento, a reconciliação e o desenvolvimento de acordos concernentes a um resultado alme- jado entre vítima e ofensor (ONU, 2006). [Traduzido].

For the National Council of Justice (CNJ), Restorative Justice constitutes an ordered and systemic set of principles, methods, techniques and activities. This set aims at raising awareness about the relational, institutional and social factors that motivate conflicts and violence, in which conflicts that generate damage, concrete or abstract, appear and are solved in a structured way (BRAZIL. CNJ, online).

Even with the emphasis given to the aforementioned concept, the reading of article 28-A of the New Brazilian Penal Code shows that the legislator timidly tried to guarantee the victim only his right to repair the damage, but did not give him a more active participation in the business to be entered into.

Also from this reading, it can be observed that the legislator limited itself determining that the victim be notified of the ratification of the agreement and of the eventual non-compliance by the investigated. The victim is not even summoned to accompany the ratification act in court.

As may it seem, the new legislation is still insufficient in solving issues related to victimology in the Brazilian criminal procedure. However, despite seeking to minimize the evils of a process for the criminal, it was unable to give similar attention to the victim.

Therfore, it is possible that the state agents involved in the agreement not to prosecute will make an effort in the negotiations, in order to formulate this agreement with the constant verification of the maximum restaration of the victim's dignity.

Rodrigues explains, when speaking about the victim and the Brazilian criminal procedure that

> O resgate da vída vítima no processo deve partir necessariamente do Princípio da Dignidade da Pessoa Humana que, inicialmente invo- cado em favor do acusado, também precisa servir de vetor para o aperfeiçoamento de uma maior proteção da vítima, visando a uma maior humanização do processo penal. Para uma melhor análise acerca desse

> aperfeiçoamento, propõe-se a divisão dos direitos da vítima nas seguintes vertentes: a) direito à proteção;
>
> b) direito à informação; c) direito à participação; d) direito à solu- ção consensual do processo, divisão essa que se prestou de ar- cabouço ao desenvolvimento do presente estudo (RODRIGUES, 2012, p. 9).

It is on this object of study that this article is focused, aiming to analyze the consensus in criminal procedure, the formation and application in forensic practice of the new institute, and its use in order to bring more dignity to crime victims.

For this purpose, initially, the general aspects about the consensus in the criminal process were studied, from the reanalysis of the structure of the Brazilian Criminal Process in order to explore its conceptualization and its restorative aspect. In the second part of the study, an analysis of article 28-A of the Code of Criminal Procedure was made, detailing the agreement not to prosecute, going through the plans of existence, validity and effectiveness. Next, the object of the agreement was analyzed, in order to reach the reparation of the damage caused to the victim. From there, the means of participation of the victim in the construction of the consensus were exposed.

2 CONSENSUS IN THE CRIMINAL PROCEDURE

In an analysis of the means of reaction to criminal conflicts, two models immediately In the first, the victim has a protagonist role, participating directly in the in the law applied to the criminal. In the second, the punitive system is vertical, and the exercise of the power to punish is attributed to a third party, not linked to the agents of the criminal act.

When taken in a historical perspective, there is a record of the current model of reaction to criminal conflicts. The foundations of the model were laid with the emergence of nation states. This was between the end of the 12th century and the beginning of the 13th century. CENTURY. This genesis occurred with the creation of a centralized power structure.

Rafael Oliveira clarifies that the current penal system is composed of four inseparable characteristics, which arose in conformity with the medieval model: an external power, which not only regulates punishment, but also decides on it; the appearance of the representative of the sovereign, who, under the allegation of the affront to the law, removes the victim from the pursuit of his wrongdoer

and does so in the name of the sovereign; the notion that the criminal practices a damage to the victim is replaced by the idea of infraction of the law, society and the sovereign; and the reparation of the damage becomes done by the sovereign himself, creating the idea of fine (OLIVERIA, 2015, p. 19).

From then on, the verticalization of the criminal punishment system was established. As a result, the world lives in a model in which the victim is removed from the power to determine the sanction to be applied to his aggressor.

However, with the horrors experienced during the first half of the 20th century, law, as a whole, faces a new perspective of democratization and growth of its social aspect. In this way, the victims once again came to occupy a prominent position in the relationship with crime and criminals. Obviously because of the human dramas experienced.

This new social scenario, involved in legal and political issues, has repercussions on the level of Criminal Procedural Law. This leads to the idealization of an instrumental process for the application of the criminal law. Thus, issues of criminal policy and criminology itself were included.

Emília Merlini Giuliani explains all this change by the migration from enforced law to negotiated justice. In this way, the procedures have become more flexible and informal. She continues her analysis by stating that

> partindo de uma ótica interna ao direito penal, percebe-se que a crise de legitimidade e eficiência agravou-se com a expansão do direito penal, que trouxe problemas de 'aderência aos valores e interesses impostos pela norma' conjuntamente com a dificuldade de operacionalização frente à nova leva de crimes ou medidas intervencionistas. Desta forma, uma decisão negociada a respeito dos conflitos mostra-se mais aceita tanto socialmente quanto pe- las partes envolvida se, por conseguinte, mais facilmente cumprida, trazendo benefícios ao funcionamento do sistema como um todo" (GIULIANI, online).

In Brazil, the Consensual Criminal Procedural Law is gaining more space. Thus, the traditional responses of the vertical punitive system give way to alternative solutions to the process and the application of the penalty or security measure.

Although the discussion on the subject has gained more prominence with the disclosure of Operation Lava Jato, the institutes of consensual criminal procedural law have been operating for a long time. An example of this is the criminal transaction instituted by Law No. 9.099, 1995 (BRASIL, 1995). Other

examples are: the pleabargain, the conditional suspension of proceedings and the agreement not to prosecute.

Cabral clarifies that all the institutes named above "have in common the need for an agreement between the parties legitimated to appear in the criminal process" (CABRAL, 2020, p. 66).

3 THE AGREEMENT NOT TO PERSECUTE

In 2019, Brazil came to rely on Law No. 13,964, which gave the agreement of non-prosecution an ordinary law character. The Code of Criminal Procedure now has article 28-A, which brings the following legislative prescription in the caption:

> Art. 28-A. Não sendo caso de arquivamento e tendo o investiga- do confessado formal e circunstancialmente a prática de infração penal sem violência ou grave ameaça e com pena mínima inferior a 4 (quatro) anos, o Ministério Público poderá propor acordo de não persecução penal, desde que necessário e suficiente para reprovação e prevenção do crime, mediante as seguintes condições ajustadas cumulativa e alternativamente (BRASIL, 2019).

Given the panorama described above, after comparing the legal text with the provision contained in Resolution 181 of the National Council of the Public Prosecutor's Office (CNMP[1]), Rogério Cunha defines the agreement not to prosecute by saying:

> Tomado pelo espírito de justiça consensual, compreende-se o acordo de não persecução penal como sendo o ajuste obrigacional celebrado entre o órgão de acusação e o investigado (assistido por advogado), devidamente homologado pelo juiz, no qual o indigitado assume sua responsabilidade, aceitando cumprir, desde logo, condições menos severas do que a sanção penal aplicável ao fato a ele imputado. (CUNHA, 2020, p. 127)

There seems to be no doubt about the business nature of the agreement not to prosecute. Thus, despite some divergent opinions, such as that of Marcelo

[1] Introduziu no ordenamento jurídico nacional o ANPP, tendo sido questionada por duas ADI's.

Mendroni[2], the agreement not to prosecute keeps all the characteristics of procedural legal business, being in full alignment with the national legal system (MENDRONI, 2016, p. 151).

At this point, it may be worth clarifying that although the agreement not to prosecute occurs outside of a judicial process, because, as a rule, it occurs within the police investigation, it will bring procedural consequences. An example might be the non-issue of the accusation. This is one reason why its nature is not merely extra-procedural.

3.1 Three plans: existence, validity and efficiency

As analyzed, the agreement not to prosecute constitutes a procedural legal transaction, and therefore, in order to be understood as perfect, it must surpass, in accordance with the Ponteana Staircase, the levels of existence, validity and effectiveness (PONTES DE MIRANDA, 1974).

It is a fact that, when dealing with criminal procedural legal business, these assumptions are not necessarily the same as in private law. This becomes clear in article 28-A of the Code of Criminal Procedure (CPP) when it states how they should be constructed in order to be perfect.

When dealing with the existence plan, Antônio Cabral clarifies that he is dealing with the "essential elements of the procedural agreement". Thus, for excellence, it must have the manifestation of will of the parties consenting to the specific determined effects (CABRAL, 2016, p.255).

That way, the first posed question, and perhaps the most important of all, is to define who can be considered a party for the purposes of entering into a non-prosecution agreement.

At first, it should be noted that the expression "party" could only be coined for when there is a judicial proceeding in progress. In the investigation phase (police inquiry or Criminal Investigative Procedure (PIC)) there are no parties. Instead of using this expression, the doctrine should refer to the subjects with potential to ccupy one of the poles of the criminal action.

Therefore, the State Prosecution Office and the investigated, supported by his attorney, must manifest their will freely and consciously, in order to enter into

[2] Afirma que a colaboração premiada "não pode ser considerado acordo porque envolve a decisão de uma terceira parte – o Juiz, que não participa da 'negociação'. Arrastando tal enten- dimento ao acordo de não persecução penal" (MENDRONI, 2016, p. 151).

the agreement. There can be no intervention capable of vitiating the wills there or obscurantism in the consequences of the agreement.

In this regard, Rodrigo Cabral states that it is "important to note that the main defects of consent in legal transactions are constituted by error (false represenattion of reality), malice (induction of one of the parties to error) and coercion (use of physical or moral force to perform the agreement) (CABRAL, 2020, p. 117).

At this point, it should be noted that the victim is not a "party" in the criminal process and does not conduct criminal investigations. As can be seen in the legal text of the Code of Criminal Procedure, it is reserved for allocation in the chapter on evidences, demonstrating the distance it has from the quality of party or recipient of the restorative consequences of the criminal law.

On the level of validity, Antônio Cabral clarifies that:

> Grande parte da doutrina, no Brasil e no estrangeiro, defende que os atos processuais em geral (e também os acordos proces- suais) dependem dos requisitos da lei material, definidos na nor- ma de direito civil (geralmente aquele campo no qual se estuda a teria geral do direito): agente capaz, objeto lícito e forma prescrita ou não defesa em lei. (CABRAL, 2016, p. 268).

At this point, it should be noted that the "parties" to the non-prosecution agreement, in addition to the need of manifesting a free and conscious will, must meet the other conditions to occupy the poles of the action. In other words, they must have legal capacity, if the accused is over eighteen years old or a duly constituted legal entity, and if the State Prosecution Office is the natural prosecutor of the case.

As for the object of the agreement to be signed, the provisions of Article 28-A must be carefully observed, as they contain the provisions on what can be transacted.

Regarding the form of the legal transaction, it is a formal business. Thus, it must observe the written form and the signature of the subjects involved. In other words, the member of the State Prosecution and the investigated party, accompanied by his attorney.

The presence of the defender of the investigated is a sine qua non condition for the validity of the act. Notably because of the legl requirement of confession of the criminal act and the need for clarification on the consequences of signing the agreement.

In this context, Rodrigo Cabral states:

> Ademais, conforme preconiza a Resolução n. 181-17, do CNMP, em seu art. 18, §2º - cuja normatividade ainda persiste, uma vez que constitui elemento disciplinador da atividade dos Membros do Ministério Público - 'A confissão detalhada dos fatos e as tra- tativas do acordo serão registrados pelos meios ou recursos de gravação audiovisual, destinados a obter maior fidelidade das in- formações, e o investigado deve estar sempre acompanhado de seu defensor. (CABRAL, 2020, p. 122).

In terms of effectiveness, it is verified which condition is capable of making the agreement not to prosecute generate the intended effects. Paragraphs 4 and 6 of article 28-A clarify that this condition is the judicial homologation.

This judicial homologation, because foreseen by law, is an integrating element of the agreement. It depends on that condition to generate the intended efficacy. This conditio iuris does not concern, repeat, the validity of the deal, but the effects of that agreement are only produced with the homologation.

Rogério Cunha, when dealing with the solemnity required by law for the ratification of the agreement not to prosecute, highlights the need for a specific hearing for this purpose, with the hearing of the investigated in the presence of his attorney and affirms:

> A 'Ratio legis' fica bem clara. Confere-se ao juiz, com a oitiva do investigado (compromissário) e de seu defensor, a salutar possi- bilidade de avaliar se o acordo foi ou não forçado, contra a von- tade do investigado. Daí porque, na audiência a que se refere o dispositivo, não haver previsão quanto à presença do proponente do acordo (Ministério Público), mas somente do indigitado e seu defensor. A legalidade do ANPP também será objeto de análise judicial (CUNHA, 2020, p. 136).

Once again we observe that the victim did not deserve greater legislative prominence, since he was not called to participate in the ceremony, nor to sign the agreement. Article 28-A only foresees, following the constant in article 201 of the Code of Criminal Procedure, that the victim will be notified of the ratification of the agreement not to prosecute and of any non-compliance by the investigated.

3.2 Object of the agreement not to prosecute

At this point, it is important to examine what must be the object of the legal deal entered into, what obligations must necessarily be assumed by the parties, as can be seen in Article 28-A, so that the member of the Public Prosecution Office can transact with the investigated party; the latter must, obligatorily, assume certain conditions, those contained in items I to V.

As we read in the caption of the mentioned article, these conditions must be signed "cumulatively and alternatively", that is, in the best interpretation, the conditions of clauses I, II, and III are mandatory and cumulative, while those of clauses IV and V are alternatives to each other, and it can be one or the other to accompany the obligations of the preceding clauses.dos incisos antecedentes.

3.2.1 The reparation of the damage caused

The first of the conditions required by article 28-A is the reparation of the damage caused to the victim. This is truly the moment when the legislator turned to the victim, to the one who suffered the direct consequences of the criminal act and observed the minimum for an effective restorative justice.

The Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, adopted by the United Nations General Assembly in its Resolution No. 40/34 of November 29, 1985, states:

> Entendem-se por 'vítimas' as pessoas que, individual ou coletiva- mente, tenham sofrido um prejuízo, nomeadamente um atenta- do à sua integridade física ou mental, um sofrimento de ordem moral, uma perda material, ou um grave atentado aos seus direi- tos fundamentais, como consequência de atos ou de omissões violadores das leis penais em vigor num Estado membro, incluin- do as que proíbem o abuso de poder (ONU, 1985).

Perhaps it can be said that victims of crime have over time been marginalized and excluded from criminal prosecution. In this dimension, Anderson Burke states that:

> A lógica de um processo penal simplesmente retributivo e opres- sor faz a vítima ser uma mera testemunha importante para a produção de provas necessárias para a condenação do autor do crime, o que culmina num cenário de degeneração de direitos e garantias fundamentais previstos na carta magna (BURKE, 2019, p. 109).

The Constitution of the Republic (BRASIL, 1988), promulgated under a democratic character, when dealing with the fundamental rights and guarantees of the victims of crime, brings minimal explicit passages, perhaps the main one, the text of Article 5, V. This provides the fundamental right to reparation for damage due to the practice of an illicit act.

Note that all the psychological, moral and even physical damage resulting from the criminal act must be assessed for compensation to the victim. The property stolen from the victim must be immediately returned. Therefore, the reparation must be integral. The effectiveness of justice - the maximum pursuit of criminal law and of the process that enforces it - must necessarily include compensation to the victim.

4 MEANS OF THE VICTIM PARTICIPATION IN THE CONSTRUCTION OF THE CONSENSUS

In May 2017, Brazil was condemned by the Inter-American Court of Human Rights in the New Brasilia Case, with the sentence in one of its passages highlighting that,

> 238. A respeito do direito dos familiares de participar de todas as etapas dos respectivos processos, a Corte lembra que isso signifi- ca a possibilidade de apresentar sugestões, receber informações, anexar provas, formular alegações e, em síntese, fazer valer seus direitos. Essa participação deverá ter por finalidade o acesso à justiça, o conhecimento da verdade dos fatos e a eventual con- cessão de uma justa reparação. A esse respeito, o perito Weichert declarou que a vítima no processo penal brasileiro tem uma po- sição secundária e é tratada como mera testemunha, carecendo de acesso à investigação. A falta de disposição legal no ordena- mento jurídico brasileiro impede a possibilidade de que as vítimas ou seus familiares participem ativamente da fase de investigação, limitando-as à fase judicial, o que violou o direito dos familiares das pessoas mortas em 18 de outubro de 1994 de participar dessa investigação" (CORTE INTERAMERICANA DE DIREITOS HUMANOS, online).

The highlighted passage evidences the serious consequences of Brazil's choice not to allow the victim a direct and immediate follow-up on state actions taken as a result of a crime.

As a consequence of the above reasoning, the Court condemned Brazil to adopt legislative or other measures necessary to allow the victims of crimes or their relatives to participate formally and effectively in the criminal investigation conducted by the police or the Public Prosecution Office, without prejudice to the need for legal reserve or confidentiality of these procedures. However, more than three years after the conviction, and even with the Anti-Crime Package having become law, introducing in the procedural codex the Non Prosecution Agreement, in the criminal investigation phase, nothing was said about the effective participation of the victim.

It is certain, however, that despite the absence of express provision in the legal text regarding access to justice, the recognition of this right cannot be denied. It stems directly from the constitutional text and, above all, from international treaties and conventions ratified by the Brazilian State, such as the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, adopted by the General Assembly of the United Nations in its Resolution No. 40/34 of November 29th, 1985[3].

Therefore, the Internal Affair Offices of the Public Prosecution Offices started to issue recommendations to their members so that, before signing the agreements of non-prosecution, they hear the victims about the quantum of compensation. The victim can and should be called by any means of communication, whether by e-mail, telephone call or in person.

The means of consensus building necessarily involve putting the victim in his or her rightful place, giving him or her the opportunity to participate in the process and experience justice as something real, offering him or her the right to speak, to be consulted, and to be seated in the resumption of his or her own dignity.

The participation of the victim in the construction privileges the good restorative practices. It is imperative that the member of the Public Prosecution Service and of the Judiciary pay attention to the fact that, although the agreement not to prosecute has been designed without the necessary hearing from the

[3] Dispõe em seu anexo: "4. As vítimas devem ser tratadas com compaixão e respeito pela sua dignidade. Têm direito ao acesso às instâncias judiciárias e a uma rápida reparação do prejuízo por si sofrido, de acordo com o disposto na legislação nacional. 5. Há que criar e, se necessário, reforçar mecanismos judiciários e administrativos que permitam às vítimas a obtenção de repa- ração através de procedimentos, oficiais ou oficiosos, que sejam rápidos, equitativos, de baixo custo e acessíveis. As vítimas devem ser informadas dos direitos que lhes são reconhecidos para procurar a obtenção de reparação por estes meios". Acessível em https://www2.camara.leg.br/ atividade-legislativa/comissoes/comissoes-permanentes/cdhm/comite-brasileiro-de-direitos-hu- manos-e-politica-externa/DecPrincBasJustVitCriAbuPod.html, consultado em 30/8/2020.

victim, his participation is the only effective and healthy way to equate justice to the case.

5 CONCLUSION

Criminal procedure is undergoing a reformulation of its foundations, and is currently looking at consensus. Some authors point out that the crisis is due to unsatisfactory protection as to the guarantees of the accused, the recovery of the offender, and a failure in general and special prevention[4]. However, it is forgotten that dissatisfaction with the consequences of the process is much more related to the victims and the population in general, who suffer from a feeling of impunity.

It is important for state agents to pay attention to the necessary participation of the victim in building consensus. Brazil missed a great opportunity to rescue the importance of the victim in criminal proceedings when the anti-crime package, Law No. 13,964 of 2019, was issued, when it chose, once again, to look at the process only from the criminal's point of view, moving away from the construction of effective criminal justice.

The rules embodied in the various recommendations made by the Internal Procedures of the Brazilian State Prosecution's Office have come to the aid of ministerial members in the adequate protection of victims of crime, so that there is an institutional duty to treat these victims as instruments to bring about justice.

From all that was said, it remains the conviction that the principle of the prohibition of insufficient protection shows that neither the law nor the State can be insufficient to guarantee the fundamental rights of crime victims. Therefore, there is a duty for the State (meaning the legislator, the Judge, and other enforces of the law) that it cannot give up the mechanisms of protection in order to ensure effective criminal justice, that is, justice that takes into account the existence of the necessary return to the victim's dignity.

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