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# SGHC Fees accounting

## SGHC Accounting Fees

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**Abstract**
This article proposes to make the process of making accounting fees more agile and practical through electronic means, from launch to closing. Based on this, our objective was to develop a software that allows the user to generate the monthly fee for each client with all the services performed for them, as well as to generate periodic reports with the average of the accounting fees paid. Among the main features of the software developed, discussed in this article, one can mention the option that is available to the user to generate graphical reports with the average monthly accounting fees that a given customer paid in a certain period of time. Finally, it is concluded that the objective proposed in this research was achieved, since the software can facilitate the work of the accounting professional, since it will no longer add the fees manually, saving useful time.

**Keywords:** Accounting Fees. Software. Graphics . SGHC

***Abstract***
*This article aims to make the process of making accounting fees more agile and practical through electronic means, from launch to closing. Based on this, we aimed to create software that allows the user to generate the monthly fee for each client with all services performed for them, as well as generate periodic reports with the average accounting fees paid. Among the main characteristics of the developed software, covered in this article, it is possible to mention the option that is available to the user to generate graphical reports with the average monthly accounting fees that a client paid in a certain period of time. Finally, it is concluded that the objective proposed in this research was achieved, since the software can facilitate the work of the professional in the accounting area, since it will no longer add the fees manually, saving useful time.*

***Keywords:*** *Accounting fees. Software. Graphics. SGHC*

## Introduction

This article was prepared through field research in a company that provides accounting services, whose main objective was to make the process of making accounting fees more agile and practical through electronic means, from launching to closing, as well as streamline the process of making the fee; offer transparency to the client; generate periodic reports to administrators; store all customer fees.

Glimpsing the need for modernization and speed for the development of the company and customer satisfaction with regard to the control of accounting fees, a system was thought of that could fulfill such needs and, at the same time, contribute to the technology that modernity demands in any work environment to better carry out the company's proposals.

The company for which the software will be developed does not currently have a system to manage its fees and services provided by it. Considering that its clientele grows in large proportions, the control of these fees becomes increasingly difficult, thus, the administrator is unable to measure the average expenses of each client and neither his monthly or annual billing. The objective of the project is to develop software that allows the user to generate the monthly fee for each client with all the services performed for them, as well as to generate periodic reports with the average of the accounting fees paid.

This referential present aims to demonstrate the main activities, common to software development processes, used in organizations that seek a quality standard in the development of their applications, taking into account the opinion and work of some professionals in the area. A software development process is a set of activities and associated results that produce a software product ( Somerville , 2007)

## problem formulation

Among the problems faced in the preparation of fees we can mention:

- There is no breakdown of the services provided to the customer during the month;
- The monthly fees generated are not stored for consultation which, if necessary, must be done manually;
- Waste of useful time in the sum of the services provided, which is still done manually;
- The company's need for integration with new technologies that can strengthen the quality of services provided, as well as its credibility.

## Main goal

Make the process of making accounting fees more agile and practical through electronic means, from launch to closing.

## Specific objectives

The specific objectives of the system are:

- Streamline the payroll process.
- Offer customer transparency.
- Generate periodic reports to administrators.
- Store all customer fees.

## Software development process concepts

### Common activities of software development processes

### Definition of Requirements/Implementation

It is the initial part of the development where the investigation tasks are found, it is in this phase of elaboration of the systems that the first meetings with the clients are held defining their needs for gathering the requirements.

> System requirement definitions specify what the system must do (its functions) and its essential and desirable properties. As with software requirements analysis, creating system requirements definitions involves consultation with customers and end users of the system.
> An important part of the requirements definition phase is establishing a set of objectives that the system must meet. This set should not necessarily be expressed in terms of system functionality, but should define why the system is being purchased for a given environment . The software implementation stage is the process of converting a system specification into an executable system. It always involves the software design and programming processes, but if an evolutionary approach is used, it may also involve the refinement of the software specification ( Somerville , 2007).

### Software Testing

According to Sommerville (2009, p. 7), the software must be validated to ensure that it does what the customer wants.

Like most engineering activities, building software depends primarily on the skill, interpretation and execution, of the people who build it; therefore, errors end up appearing, even with the use of software engineering methods and tools.

> So that such errors do not last, there are a series of activities, collectively called "validation, verification and testing", with the purpose of guaranteeing that both the way in which the software is being built and the product itself are in accordance with the specified . ( Delamaro , Maldonado & Jino , 2009).

### Software development methodologies

According to Sommerville (2007, p. 43) Software processes are an abstract representation of a software process. Each process model represents a process from a certain perspective and thus provides only partial information about that process. These generic models are not definitive definitions of a software process. Rather, they are process abstractions that can be used to explain different approaches to software development.
The process models are:

- *Waterfall model* : Considers the fundamental process activities comprising specification, development, validation and evolution, which represents them as separate process phases, such as requirements specification, software process, implementation and testing.
- *Evolutionary development* : merges specification, development and validation activities. In the beginning system is rapidly developed based on abstract specifications. This system is then refined with customer input to produce a system that satisfies the customer's needs.
- *Component-based software engineering* : This approach relies on the existence of a significant number of reusable components. The system development process focuses on integrating these components rather than developing them from scratch.

**Iterative and Incremental Model**

Incremental Development is a staged planning strategy in which various parts of the system are developed in parallel, and integrated when complete. It does not imply, require or presuppose iterative or waterfall development – both are rework strategies . The alternative to incremental development is to develop the entire system with a single integration.

Iterative Development is a rework planning strategy in which the time to review and improve parts of the system is predefined. This does not assume incremental development, but it works very well with it. A typical difference is that the output of an increment is not necessarily the subject of further refinement, and its testing or user feedback is not used as input to revision plans or specifications for successive increments. In contrast, the output of one iteration is examined for modification, and especially for revising the goals of successive iterations.

The basic idea behind the iterative approach is to develop an incremental software system, allowing the developer to take advantage of what was learned during the initial development phase of a system release. Learning occurs simultaneously for both the developer and the user of the system.

[SOURCE: http://protocoloti.blogspot.com.br/2012/03/os-modelos-de-desenvolvimento-de.html]

**Requirements Engineering**

*Classification of requirements*

The set of requirements is what determines the scope of the project, it is everything that the software must implement and will be the reference for the entire development team. According to Sommerville (2007 p. 83, 84, 85) the requirements are classified as:

*Functional Requirements* : They are statements of functions that the system must provide, how the system must react to specific inputs and how it must behave in certain situations, they can also explicitly state what the system must not do.

*Non-Functional Requirements:* These are restrictions on the services or functions offered by the system. Among them are time constraints, on the development process or standards.

*Domain Requirements:* These are requirements that originate from the system's application domain and reflect characteristics of that domain. Can be functional or non-functional requirements

*Elicitation Techniques*

**Requirements Gathering Techniques**

The requirements survey techniques aim to overcome the difficulties related to this phase. All techniques have their own concept and their respective advantages and disadvantages, which can be used together by the analyst. Some requirements gathering techniques will be briefly presented in this article.

**Viewpoint-oriented survey**

Viewpoint-oriented approaches to requirements engineering recognize different points of view and use them to structure and organize the elicitation process and the requirements themselves. An important capability of viewpoint-oriented analysis is that it recognizes the existence of multiple perspectives and provides a *framework* to discover conflicts in requirements proposed by different *stakeholders.*

The VORD method ( *viewpoint-oriented requirements definition* – view-oriented requirements definition) was designed as a *framework* service-oriented for requirements gathering and analysis.

**Ethnography**
Ethnography is an observation technique that can be used to understand social and organizational requirements, that is, to understand organizational politics as well as work culture in order to become familiar with the system and its history. Social scientists and anthropologists use observational techniques to develop a complete and detailed understanding of particular cultures.

**Workshops**
elicitation technique used in a structured meeting. A team of analysts and a selection of *stakeholders* that best represent the organization and context in which the system will be used, thus obtaining a well-defined set of requirements.

**prototyping**
Prototype aims to explore critical aspects of a product's requirements, quickly implementing a small subset of this product's features. The prototype is indicated to study user interface alternatives; communication problems with other products; and the feasibility of meeting the performance requirements. The techniques used in the elaboration of the prototype are several: user interface, textual reports, graphical reports, among others.

**interviews**
The interview is one of the simplest traditional techniques to use and that produces good results in the initial phase of data collection. The interviewer should give the interviewee room to express his ideas . It is necessary to have an interview plan so that there is no dispersion of the main subject and the interview becomes long, leaving the interviewee tired and not producing good results.

**Questionnaires**
The use of a questionnaire is indicated, for example, when there are several groups of users that may be in different parts of the country. In this case, specific follow-up surveys are designed with selected users, where the potential contribution seems more important, as it would not be practical to interview all people in all locations.

**brainstorming**
*brainstorming* it is a technique for generating ideas . It consists of one or several meetings that allow people to suggest and explore ideas .

**JAD**
JAD ( *Joint Application Design* ) is a technique for promoting cooperation, understanding and teamwork among user developers. JAD makes it easy to create a shared vision of what the software product should be. Through their use, developers help users to formulate problems and explore solutions. In this way, users gain a sense of involvement, ownership, and responsibility for the product's success.

*Requirements Management*

According to Filho (2003, p.5) a common problem in software development is the **instability of requirements,** which occurs when customers and users bring new requirements, or change requirements, when development is already in an advanced stage. Instability usually has a high cost, which means losing work already done and patching others. Good requirements engineering reduces requirements instability by helping to get the requirements right at an earlier stage of development. However changes in requirements are sometimes unavoidable. Requirements engineering is subject to human limitations. Requirements management is the software engineering discipline that seeks to keep the set of requirements of a product under control even in the face of inevitable changes.

**Software Analysis and Design**

*Analysis and Structured Design*

According to Jones (1980, p. 3) Structured design is a disciplined approach to computerized system design, an activity that in the past has been notoriously uneven and full of problems. Its characteristics are systems that are easy to understand, reliable, capable of "long life ", easily developed, efficient and that WORK.

*Object Oriented Analysis and Design*

*Yourdon , Argila (1999, p. 7) defined that* an AOO model portrays objects that represent a specific application domain, along with several structural and communication relationships. The AOO model serves two purposes. First, to formalize the "view" of the real world within which the software system will be built. It establishes the objects that will serve as the main organized structures of the software system, as well as the main organizational structures that the real world imposes on any software system built in that application domain.

*Aspect Oriented Software Design*

Aspect-oriented programming proposes using aspects [ Kiczales ET AL 1997] to separate the code that implements the non-functional purposes of an application, called orthogonal concerns or cross-sutting , from the code that implements the application's functionality. Aspects are modules that implement code regarding these concerns.

**Data Storage Mechanisms**

*Relational Database*

According to Nassur , Setzer (1999 p. 5 and 35) in In the relational model, data are stored in two-dimensional screens, called relations, each row of the table represents an element of the data set and each column of the table contains values from a defined set, called domain. A row in the relation is called a tuple .

*Object Oriented Database*

An object-oriented database is basically a system in which the storage unit is the object, with the same concept as object-oriented programming languages. The fundamental difference is the persistence of the objects, that is, the objects continue to exist even after the program is closed. We can classify systems that offer persistence to objects in four categories according to their architecture, which are, Extended Database System, Database Programming Language, Object Managers, and Database System Generators.

**Test Software**

*Test Process Activities*

According to Rios, Moreira (2006, p. 37) the testing activities are as follows:

- ✓ Prepare the risk analysis of the test project.
- ✓ Analyze the possibilities of minimizing business risks through testing.
- ✓ Evaluate system requirements and system planning.
- ✓ Evaluate the preliminary data model and other models and diagrams of the system.
- ✓ Identify quality and performance indicators
- ✓ Establish which products will be checked.
- ✓ Develop the Project Test Strategy document.
- ✓ Establish the types of tests to be performed in development and deployment.
- ✓ Define test priorities for modules or subsystems, aiming at integration tests .
- ✓ Identify alpha and beta testing needs.
- ✓ Set priorities for tests
- ✓ Define Infrastructure (hardware/software/tools/personnel) to be used.
- ✓ Define the operational environments for carrying out the tests.
- ✓ Identify the need for static testing
- ✓ Identify subdivisions (subsystems, modules) required for the system, aiming at better management of the testing process through its modularization.
- ✓ Validate the test strategies with developed areas.
- ✓ Conduct a technical review of the products in this stage.
- ✓ Communicate the testing strategy to the testing team.
- ✓ Identify the techniques to be adopted for the tests.

According to Fernando Rodrigues, the tests must be carried out at several levels:

- ✓ **Unit testing or unit tests.**

✓ This test level aims to test the smallest software unit, trying to cause business rule failures. This test is done by small snippets of code in isolation.

- ✓ **Integration test**

✓ Checks for gaps between modules or interfaces when these are integrated when trying to make a whole work.

- ✓ **system test**

Evaluate the system as a whole, as if you were an end user, entering real data and analyzing whether your answers meet the requirements.

- ✓ **acceptance test**

✓ At the beginning of development, the functionalities that will be tested are declared so that the software is declared as delivered, this level of testing is

usually carried out by a group of users who verify some functionalities so that the software is considered as accepted.

**white box test**

White box testing consists of testing line by line of code, flows, conditions, loops, for those who are familiar with Visual Studio it is the Unit Test with the Code option Coverage enabled.
This type of test aims to achieve the maximum possible coverage.

**black box test**

The black box test consists of testing the functionality as a whole, not caring about its flow but the expected result.

This test analyzes the handling of errors (exceptions) the validations, functions, for those who are familiar with Visual Studio, the unit tests without Code Coverage are considered as black box testing.

**Development Paradigms**

*Structured Programming vs OO Programming*

Flávia Neves explains it this way: an object-oriented system is divided into components and no longer into processes. Imagine a financial system, where we would do all the administration of a company. We would have the following differences:

- **POO** : We would have a vendors object for example where all the roles would be grouped in the object and nowhere else.
- **Structured** : Supplier routines and functions would be spread throughout the system, such as accounts payable, accounts receivable, registration, etc.

Now imagine the supplier register, with all its routines and functions:

- **Structured** : If you need to change some data, function or property in the future, what in your program will be affected? What will have to be restructured? Imagine going back to the testing phase and analyzing your entire system until you're sure the change you made didn't trigger a finite list of changes you'll have to make across the entire system.

- **POO** : the properties, functions and routines of the supplier object are all in a single object, encapsulated, facilitating this future need for changes and updates.

*Aspect Oriented Programming*

The purpose of Aspect-Oriented Programming (AOP), which emerged as a complement to Object-Oriented Programming (OOP), is to make it easier to modularize *crosscutting* concerns, which, in a computer program, are aspects that affect others. Often these aspects cannot be clearly separated from the rest of the system, either in design or implementation, resulting in program scattering or clutter .

Aspect-oriented technology has many potential benefits. It provides a method of specifying and encapsulating cross-cutting characteristics in a given system. This power, in turn, allows us to do a better job of maintaining systems as they evolve (and they tend to). APOA would allow us to add new functionalities, in the form of features, to a system in an organized way. Thus, improvements in the structure would allow us

to keep systems running for much longer and improve them without having to perform a complete rewrite of the code.

## Frameworks and Architectures for WEB Development

*Model - view - controller (MVC)*

Civil Engineer Christopher Alexander created what is considered the first design pattern in the mid-1970s. A design pattern is considered to be a tested and documented solution that can solve a specific problem in different projects. Through Alexander's work, software development professionals used these concepts to initiate the first documentation of design patterns, making them accessible to the entire development area.

The then employee of the Xerox PARC corporation, Trygve Reenskaug , started in 1979 what would become the birth of the MVC design pattern. THE original implementation was described in the article “Applications Programming in Smalltalk-80: How to use Model-View-Controller”. Reenskaug 's idea generated an application architecture pattern whose objective is to separate the project into three independent layers, which are the model, the view and the controller. This separation of layers helps reduce coupling and promotes increased cohesion in design classes. Thus, when the MVC model is used, it can greatly facilitate the maintenance of the code and its reuse in other projects.

*Client/Server*

For Sommerville , (2007, p.166) the client-server architecture model is a model in which the system is organized with a set of services and associated servers and clients that access and use the services. The main components of this model are:

> 1. A set of servers that provide services to other subsystems. Examples of these are printer servers that provide printing services, file servers that provide file management services, and a compiler server that provides programming language compilation services.
> 2. A set of clients requesting services offered by servers. These are typically independent subsystems. There can be multiple instances of a client program running concurrently.
> 3. A network that allows clients to access these services. This is not strictly necessary when both clients and servers can run on a single machine. In practice, however, most client-server systems are implemented as distributed systems.

According to Sommerville (2007 p. 16) the most important advantage of a client-server model is that it is a distributed architecture. Effective use of networked systems can be made with many distributed processors. It's easy to add a new server and integrate it with the rest of the system or transparently upgrade servers without affecting other parts of the system.

## Life Cycle of the Used Software Process Model

*Scrum Lifecycle*

The main idea of SCRUM is that software development involves many technical and environmental variables, such as requirements, resources and technology, which can change during the process. This makes the development process unpredictable and complex, requiring flexibility to keep up with changes. The result of the process

should be software that is really useful for the customer.

The SCRUM lifecycle is based on three main phases, divided into sub-phases :

1) Pre - planning ( Pre-game phase ): The requirements are described in a document called a backlog. Subsequently, they are prioritized and effort estimates are made for the development of each requirement. The planning also includes, among other activities, the definition of the development team, the tools to be used, the possible risks of the project and the training needs. Finally, a development architecture is proposed. Eventual changes in the requirements described in the backlog are identified, as well as their possible risks.

2) Development (game phase ): the many previously identified technical and environmental variables are observed and controlled during development. Instead of considering these variables only at the beginning of the project, as in the case of traditional methodologies, in SCRUM control is carried out continuously, which increases flexibility to keep up with changes. In this phase, the software is developed in cycles (sprints) in which new functionalities are added. Each of these cycles is developed in the traditional way, that is, the analysis is carried out first, then the design, implementation and testing. Each of these cycles is designed to last from a week to a month.
3) Post-game phase : after the development phase, meetings are held to analyze the progress of the project and demonstrate the current software to customers. In this phase, the integration steps, final tests and documentation are carried out.

**Requirements Gathering Methods and Techniques Used**

*Ethnography*
Ethnography is an observation technique that can be used to understand social and organizational requirements, that is, to understand organizational politics as well as work culture in order to become familiar with the system and its history. Social scientists and anthropologists use observational techniques to develop a complete and detailed understanding of particular cultures.

**Notations Used for Software Analysis and Design**

*Use Case Diagrams*
For Leandro Ribeiro, and this diagram documents *what the system does from the user's point of view* . In other words, it describes the main functionalities of the system and the interaction of these functionalities with the users of the same system. In this diagram we do not delve into technical details that say *as the system does* .
This artifact is commonly derived from the requirements specification, which in turn is not part of the UML. It can also be used to create the requirements document.

*Sequence Diagrams*
According to Geraldo Magela, Sequence diagrams are very useful in providing real implementation support and in constituting rich high-level documentation. They represent the objects participating in a collaboration while issuing and receiving messages in order to realize a use case. The messages are presented in their temporal order, which makes it easier to understand the flow of

control of the use case. The greatest difficulty associated with their creation seems to be related to the degree of detail to be applied to these diagrams. But a practical perspective can be adopted for the creation of really useful documentation, and that does not become an even more arduous task than the coding of the system itself.

*Class Diagrams*

class diagram the representation of the structure and relationships of classes that serve as a model for objects.

a very useful modeling for the development of systems, because it defines all the classes that the system needs to have and it is the base for the construction of the diagrams of communication, sequence and states .

**Mechanisms for Data Storage Used, Techniques and Levels of Applied Tests**

According to Sommerville (2009, p. 7), the software must be validated to ensure that it does what the customer wants.

Like most engineering activities, building software depends primarily on the skill, interpretation and execution, of the people who build it; therefore, errors end up appearing, even with the use of software engineering methods and tools.

> So that such errors do not last, there are a series of activities, collectively called "validation, verification and testing", with the purpose of guaranteeing that both the way in which the software is being built and the product itself are in accordance with the specified . ( Delamaro , Maldonado & Jino , 2009).

*System Test:* evaluates the software for flaws by using it as if it were an end user. In this way, the tests are executed in the same environments, with the same conditions and with the same input data that a user would use in his day-to-day manipulation of the software. Verifies that the product meets your requirements.

*Unit Test:* also known as unit tests. Its objective is to explore the smallest unit of the project, trying to cause failures caused by logic and implementation defects in each module, separately. The target universe of this type of test are object methods or even small code snippets.

**Used programming paradigms**

*Object Oriented Programming*

OOP was created to try to approximate the real world to the virtual world: the fundamental idea is to try to simulate the real world inside the computer. For this, nothing more natural than using Objects.

In OOP, the programmer is responsible for shaping the world of objects, and explaining to these objects how they should interact with each other. The objects "talk" to each other through the sending messages , and the main role of the programmer is to specify which messages each object can receive, and also what action that object must perform when receiving that specific message.

**Frameworks and Architectures for WEB Development Used**

*Model - view - controller (MVC)*

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**S *truts***

One way to separate issues in a software application is to use a Model - View - Controller (MVC) architecture. O *model* represents the company or database code, the *Vision* represents the design code of the page, and the *controller* represents the navigation code. The Struts framework is designed to help developers create web applications that use the MVC architecture.

***Hibernate***

Hibernate is an ORM - ObjectRelationalMapping framework . It is a tool that helps us to persist Java objects in a relational database. The developer's job is to define how the objects are mapped in the database tables and Hibernate does all the access to the database, even generating the necessary SQL commands.

***factory***

is a design pattern that aims to encapsulate the creation of an object in a method. Factory is probably one of the most used patterns because it is so natural. It is often used without awareness that a pattern is being used.

The implementation using this design pattern directly affects the quality of the design, facilitating any future changes in the system. The company responsible for the business area is VLM Contabilidade, where an employee will be responsible for the specific information related to the areas in which the system will operate.

The purpose of this document is to collect, analyze and define the needs and functionalities of the software project that will be developed for VLM Contabilidade, focusing on the needs of those involved who will benefit from the software.

The objective of this document is to show in a way what will be developed and who are involved in the development.

Its scope includes the handling of data provided by the company accompanied by the person in charge of the financial department.

**Scenario**

Currently, the Company does not use any specific system to detail the fees provided, but an online system is used to generate the total value of the service.

There are similar systems on the market that serve accounting firms and self-employed accountants in general, such as the one described below:

**Strong Accounting Fees**

The Fortes Accounting Fees that was developed by Grupo Fortes Informática Ltda. **(** http://www.honorarioscontabeis.com.br/ index.php ?/ content /id/2) offers the user services for calculating and controlling the costs of services provided by accounting, advisory, auditing, expertise and similar companies.

**Business Opportunity**

The software will enable the company to better control information on users, clients and specification of fee services, enabling the extraction of important information through reports, in addition to adding adequate control to access information.

**Project description**

The scope of the project is the digital control of services, accounting fees provided to customers, user management system, issuance of detailed reports of services provided and/or access to the system

**Conclusion**

From the completion of this article, it can be concluded that the developed software project, despite the difficulties encountered throughout its development, met its initial purpose, which is the management of accounting fees.

The software proved to be very efficient with regard to the control of accounting fees. The user has an easy-to-understand interface where he can register the fees, make entries throughout the month and generate the monthly fee, so that the system, by itself, automatically searches and calculates all service entries, simplifying the calculation process of accounting fees that was done manually.

Among the main features of the developed software, one can mention the option available to the user to generate graphical reports with the average monthly accounting fees that a given customer paid in a certain period of time.

Finally, it is concluded that the proposed objective was achieved, as the software can facilitate the work of the accounting professional, since he will no longer add the fees manually, saving useful time.

**References**

Delamaro, ME, Maldonado, JC, & Jino , M. ( Orgs .). (2007). *Introduction to Software Testing* . Elsevier.

Dias, BF, Barboza, LGS, Bertolini, GRF, & Vesco , DGD (2016). Intervention Applied to a Beauty Salon for Adequacy of Financial Aspects. *International Journal of Professional Business Review* , *1* (2), 76–90. https://doi.org/10.26668/businessreview/2016.v1i2.21

Higor , M. (2013). *Factory Design Pattern Method in Java* , available at <http://www.devmedia.com.br/padrao-de-projeto-factory-method-em-java/26348> Accessed on 04/23/2013.

Moraes, R. (2013). Article Software Engineering 2 - *Requirements gathering techniques*
. Available at < http://www.devmedia.com.br/artigo-engenharia-de-software-2-tecnicas-para-levantamento-de-responsabilidades/9151> Accessed on 04/20/2013.

Neto, ACD (2013). Article Software Engineering – *Introduction to Software Testing* – available at <http://www.devmedia.com.br/artigo-engenharia-de-software-introducao-a-teste-de-software/8035> Accessed 02/ 05/2013.

Portela, Cristiano RR (2013). *Requirements Analysis Concepts* – available at < http://www.paiossin.com/wordpress/wp-content/uploads/2011/11/Anlise-de-Requisitos-Conceitos.pdf> Accessed on 28/04/2013.

Prado, Alexandre A. (2013). *Fundamentals of Java Struts* , available at < http://www.devmedia.com.br/fundamentos-do-java-struts/7238> Accessed on 04/24/2013.

Protocoli , (2013). *Software Development Models* . Available at <http://protocoloti.blogspot.com.br/2012/03/os-modelos-de-desenvolvimento-de.html> Accessed on 04/21/2013.

Sommerville , I. (2007). *Ian Engenharia de Software trad* . Selma Shin Shimizu Melnikoff , Reginaldo Arakaki, Edílson de Andrade Barbosa -8. Ed. - São Paulo: Pearson Addison Wesley, 2007.

Sommerville , I. (2003). *Software Engineering/ Ian Sommerville* ; translation by André Mauricio de Andrade Ribeiro; kechi technical review Hirama.São Paulo: Addison Wesley, 2003.

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# Importance of diagnosing subclinical mastitis and its economic impacts on dairy farms – literature review

## Importance of subclinical mastitis diagnosis and its economic impacts on milk properties - literature review

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## Abstract

Worldwide, mastitis is the disease that exerts the greatest importance on the quality of milk, as it causes a decrease in production, loss of milk quality and the function of the glandular parenchyma. The subclinical form determines the greatest economic losses due to the high prevalence (44.9% to 97%) and reduction in milk production between 25.4 and 43%, being 15 to 40 times more frequent than the clinical form, most One of the estimates indicates that, on average, one quarter affected results in a 30% reduction in her productivity, and an affected cow loses 15% of her production in lactation. Losses can be expressed by the decrease in production, in the alteration of components that interfere in the manufacturing process of dairy by-products, rates of culling and replacement of animals, and treatments of affected cows. Subclinical

mastitis does not show visible changes in the mammary gland or milk, but the composition of this product undergoes considerable changes in its elements, such as an increase or decrease in chlorine ions (Cl), sodium (Na). The main diagnostic methods for subclinical mastitis are: the California Mastitis Test (CMT) and the Somatic Cell Count (SCC) of individual mammary quarters , methods that allow the producer to make decisions, such as establishing a milking line or measuring prophylactic measures to prevent spread through the herd.

**Keywords:** Diagnosis. Subclinical mastitis. Impacts economical

***Abstract***

*Worldwide, mastitis is the disease that exerts the greatest importance on milk quality, as it causes decreased production, loss of milk quality and glandular parenchyma function. The subclinical form determines the greatest economic losses due to the high prevalence (44.9% to 97%) and reduction of milk production between 25.4 and 43%, being 15 to 40 times more frequent than the clinical form, the majority of the estimates indicates that , on average, an affected quarter results in a 30% reduction in its productivity, and an affected cow loses 15% of its production during lactation. The losses can be expressed by the decrease in production, in the alteration of the components that interfere in the process of manufacturing of dairy by-products, animal disposal and replacement rates, and treatments of affected cows. Subclinical mastitis has no visible changes in the mammary gland or milk, but the composition of this product undergoes considerable changes in its elements, such as an increase or decrease in chlorine (Cl), sodium (Na) ions. The main methods of diagnosis of subclinical mastitis are: the California Mastitis Test (CMT) and the Somatic Cell Count (CCS) of the individual mammary quarters, methods that allow the producer to make decisions, such as establishing a milking line or prophylactic measures that prevent the spread by the herd.*

***Keywords:*** *Diagnosis. Subclinical mastitis. economic impacts*

## 1. Introduction

Milk and its derivatives are playing an increasingly important role in supplying food and generating jobs and income for the Brazilian population. It is a complex, nutritious and stable mixture of fat, proteins and other solid elements, which are suspended in water and constitute the compositional parameter that defines the quality of milk. In this context, bovine mastitis stands out, which is the most prevalent disease in dairy herds, capable of compromising milk quality, impacting public health and causing serious economic damage .

Mastitis is the name for the inflammatory process in the mammary gland (Costa, 1998), which occurs when an infectious, chemical, mechanical or thermal agent attacks the mammary gland, producing an inflammatory reaction and damage to the glandular epithelium, characterizing mastitis.

Bovine mastitis has been identified as the main disease that affects dairy herds in the world, causing serious economic losses to both the milk producer and the dairy industry. Studies confirm its economic importance and the relevance of the economic impact of the presence of the disease in herds, the main losses associated with the presence of mastitis in herds are the reduction in milk production, milk disposal, cost of treating clinical cases, increased cost of labor, decrease in the selling price of milk and disposal of animals. The loss with the reduction in milk

production has been identified as the one with the greatest economic impact, however, the perception of this loss is the most difficult for the milk producer to see . For Dias (2007), the control of mastitis in dairy herds is an important step towards the development of good quality products and the reduction of risks to the population ( St -Pierre, 2003).

In view of the importance of subclinical mastitis for dairy cattle, the objective of this work is to point out the impacts of this disease on milk production and the health of lactating bovine females, in addition to demonstrating the relevance of the diagnosis of subclinical mastitis, its implications for productivity and animal health. herd and point out the economic losses due to the disposal of milk and eventually animals.

This is a bibliographic review of updated scientific articles published in journals of great relevance in the field of veterinary knowledge.

## 2. Bibliographic review

### 2.1 Bovine mastitis and its economic impacts

Mastitis is characterized by a process of inflammation of the mammary gland promoted by different factors, the main ones being caused by bacteria, about 90% of cases. It represents one of the main obstacles for dairy cattle, due to the severe economic losses it entails. According to Tozzetti (2008). It can be divided into two clinical forms, which are common findings of pain, redness and heat, and subclinical ones, which are also common and can be detected through simple milk tests.

The disease has been identified as the main disease that affects dairy herds worldwide, causing serious economic losses to both the milk producer and the dairy industry ( National mastitis Council , 1987). The disease causes high losses and also the disposal of milk and, expenses with medicines, functional loss of glands and even death of the animal. (EMBRAPA 2012). This disease causes changes in the mammary glandular tissue and a decrease in milk secretion, or its total loss ( Langoni , 2000).

The subclinical form determines the greatest economic losses due to the high prevalence (44.9% to 97%) and reduction in milk production between 25.4 and 43% (Brant & Figueiredo, 1994), being 15 to 40 times more frequent than the clinical form (Brito; Brito 1998, Fonseca, Santos, 2001, 2002 & Ribeiro et al., 2003).

Cases of subclinical mastitis result in large losses in productivity, most estimates indicate that, on average, an affected quarter results in a 30% reduction in her productivity, and an affected cow loses 15% of her lactation production. The losses can be expressed by the decrease in production, in the alteration of components that interfere in the manufacturing process of dairy by-products, rates of culling and replacement of animals and treatments of affected cows ( Radostistis , et al., 2002).

In addition to the economic losses resulting from mastitis in lactating cows, its effect is noted, mainly, by the reduction in production and changes in milk composition. At the same time, it represents a potential risk to public health, due to the elimination of pathogens that cause zoonoses and toxins produced by microorganisms in milk. For the producer, the losses are of great magnitude. They are reflections of greater disposal of animals, spending on medicines, reduction in production and disposal of milk. (Embrapa 2012).

Several microorganisms are associated with the development of mastitis. Bacteria are the main microorganisms that cause mastitis, but other microorganisms

such as fungi, yeasts, algae and mycoplasmas may be involved. (SILVA 2006). Although more than 137 species and serotypes of microorganisms have been isolated from bovine mammary gland infections, most infections are caused by bacteria (Watts, 1988).

Epidemiologically , bovine mastitis is divided into contagious and environmental mastitis. Contagious mastitis is defined by the form of transmission from animal to animal, has the animal itself as a reservoir and its location is intramammary , while environmental mastitis is characterized by the fact that the pathogen reservoir is located in the very environment of dairy cows ( Pedrini , 2003 ).

**2.2 Classification of Mastitis**

According to the clinical manifestation of the disease, mastitis is divided into two groups, clinical mastitis and subclinical mastitis. However, there is the appearance of pus, lumps and other changes in the physical characteristics of the milk. The condition may present other significant changes such as fever, drop in milk production and decrease in food consumption (Embrapa, 2012).

Clinical mastitis can be classified as superacute , acute, chronic subacute and gangrenous (Fonseca, 2007). Superacute cases are usually associated with infestation by environmental agents of the coliform group, characterized by very intense inflammation, with the presence of systemic signs, such as fever, dyspnea, prostration and anorexia, among others. In the acute form these signs are present, but the evolution is slower and the systemic signs are more discreet (BURVENIC et al. 2003).

The subacute form is characterized by the presence of lumps in the mug test, with more discreet inflammatory signs. The chronic form is characterized by persistent infection of the udder, which can last for days, months or years, and fibrosis may occur in the affected quarters, in some cases accompanied by atrophy of the udder and the presence of a fistula (HILLERTON, 1996). The gangrenous form of mastitis is characterized by the presentation of the mammary quarter, with an altered color, ranging from dark to bluish-purple and without sensitivity. The affected room may be humid with constant dripping of blood serum (Embrapa, 2012).

Subclinical mastitis does not show visible changes in the mammary gland and milk, but the composition of this product undergoes considerable changes in its elements, such as an increase in chlorine ions (CL) sodium (NA) and a decrease in the concentration of casein, fat, solids total and milk lactose (Brito et al., 2007).

For Andrade (2001) the subclinical picture that is more incident in dairy herds, macroscopic changes in the milk and signs of inflammation in the udder are not observed, it is difficult to detect, long lasting and about 40% of the cases evolve to the clinical form.

The disease determines changes in the concentration of the main components of milk, such as: protein, fat, lactose, minerals and enzymes. The main factors related to the alteration of milk components are damage to milk-producing cells, which can result in changes in the concentration of lactose, protein and fat, and increased vascular permeability, which determines the increased passage of substances from the blood. for milk, such as sodium, chlorine, immunoglobulins and other serum proteins ( Steffert , 1993)

**2.3 Diagnosis**

The clinical form of mastitis presents obvious signs such as: edema, increase in temperature, edema, hardening, pain in the mammary gland, lumps, pus or any

characteristic alteration of milk (RIBEIRO, 2003). The diagnosis of clinical mastitis is possible by evaluating the appearance of the milk, regarding the peculiar characteristics of this product, the existence of lumps and changes in the glandular parenchyma, such as increased temperature, local redness and hardened consistency of the gland (Fonseca & Santos, 2001).

According to Peres (2011) the diagnosis of clinical mastitis is easily performed by examining the gland, visualizing the characteristics of the inflammatory process - the increase in volume, wounds, nodules, redness and others and by palpation of the udder, in order to check the texture, the presence of areas of hardening (fibrosis), heat, pain, edema, nodules, abscesses and changes in the milk. Visualization of the mammary gland must be performed before and after milking and palpation immediately after milking, with an empty udder.

The presence of small lumps of clots, blood, pus and or watery milk reveals the presence of acute mastitis in its initial phase. Normal milk strains completely, with no formation of lumps. It is important to make comparisons of samples from all four quarters. This test is mainly important in the rapid identification of mastitis without, however, identifying the etiological agent ( Feitosa, 2004).

For Dias (2007), because subclinical mastitis does not show visible signs and goes unnoticed by owners and employees, clinical mastitis can spread in the herd, infecting other cows. In addition, destruction of the functional capacity of the mammary gland may occur, causing a decrease in milk production and damage to the health of the animal.

The California Mastitis Test (CMT) is used worldwide for diagnosing subclinical mastitis, with the advantage of being a quick, easy-to-perform, low-cost test that can be used at the time of milking (RADOSTITS; BLOOD; GAY, 2002). It is an indirect method of counting somatic cells in milk, based on a chemical reaction between a milk sample and the reagent ( 3% sodium lauryl sulfate and purple Bromocresol ), in an appropriate tray. The reagent breaks the membrane of the cells that release the nucleic material (DNA), resulting in degrees of coloration and viscosity, caused by the agglutination of the proteins (Madalena, Matos & Holanda, 2001).

The CMT is performed with the aid of a specific reagent and a racket containing four compartments where approximately 2 ml of milk is collected directly from each teat. The same amount of reagent is then added, mixing it with the milk using gentle circular movements (Embrapa, 2012). According to Veiga (2009) the CMT reagent is prepared by mixing 300 ml of anionic detergent with 600 ml of distilled water. The pH is adjusted to 8 and 15 ml cresol bromine purple and 5 ml cresol bromine green (both 0.5% solutions) are added. The final pH should be 7.5. The reagent in contact with deoxyribonucleic acid from somatic cells present in milk, in abnormal amounts, causes precipitation and gel formation. The indicators show changes in the pH of the milk . The result is given in five scores ranging from negative (-), suspect ( dashes), weakly positive (+), positive (++) and strongly positive (+++). ( Poll , 2012).

Another efficient technique in the diagnosis of subclinical mastitis is the electronic somatic cell count in milk, which is a modern form of mastitis diagnosis that is internationally accepted as a criterion for evaluating the health of the cow's mammary gland and, consequently, the quality of the milk, individually produced or by the herd, by examining the expansion tank ( Costa, 2010). The CCS can be determined using the electronic counter of somatic cells in which the milk samples have the nuclei of the cells stained and exposed to a laser beam, reflecting red light

(fluorescence) and the signals are transformed into electrical impulses detected by a photomultiplier and transformed into number of cells/ mL (Brasil, 2003).

In addition to the aforementioned methods, Costa (2010) recommend using microbiological methods to identify the etiological agents involved, for the implementation of therapeutic procedures and adequate control and prophylaxis strategies. Microbiological examination of aseptically collected milk samples is considered the standard method for determining udder health and for definitively diagnosing bovine mastitis so that control measures can be implemented more efficiently.

## 3. Final considerations

Subclinical mastitis is a silent and costly disease in the national dairy herd, which does not present inflammatory symptoms in the mammary gland nor macroscopic changes in the raw material , however the economic losses due to the disease are due to the decrease in productivity in the alteration of the chemical composition of milk and in cases of evolution from the subclinical to the clinical form. In addition to changes in milk, another worrying factor is due to the culling of cows when the disease becomes chronic and does not respond to the treatment carried out during the drying period.

According to Cunha (2008), multiparous cows suffer greater losses, as a result of permanent damage to the mammary gland by previous infections, in addition to having more prolonged infections, which result in greater damage to the mammary tissue. Thus, the occurrence of mastitis can result in production losses not only in the current lactation, but also in the following lactation, compromising the total production of the animal.

Control of bovine mastitis includes teat disinfection before and after milking, dry cow therapy, proper functioning of milking equipment, treatment of all clinical cases, culling/segregation of chronically infected cows, and providing an environment clean, dry and comfortable for the animals (Santos & Fonseca, 2007).

The identification of positive animals makes it possible to establish an order in the milking line so that positive cows are milked last and also makes it possible to increase hygienic-sanitary care that prevents the spread of pathogens and contamination of healthy cows. The diagnosis also allows the effective treatment of subclinical mastitis in cows with the disease to be carried out during drying.

Subclinical mastitis presents itself to dairy herds as a worrying disease because it is highly contagious and presents significant damage to dairy activity, the diagnosis allows the producer to know the sick animals and becomes a key tool in decision- making in relation to sick animals such as discarding the milk of positive cows, or subjecting the animals to drying in order to carry out an effective treatment of the disease.

## References

Burvenich , C., Van Merris , V., Mehrzad , J., Diez- Fraile , A., & Duchateau , L. (2003). Severity of *E. coli* mastitis is mainly determined by cow factors. *veterinarian Research* , *34* (5), 521–564. https://doi.org/10.1051/vetres:2003023

Bueno, VFF, Nicolau, ES, Mesquita, AJ de, Ribeiro, AR, Silva, JAB, Costa, EO da, Coelho, KO, & Couto, DV (2003). Etiology and antimicrobial susceptibility of bovine

mastitis agents isolated in the region of Pirassununga-SP-Brazil. *Rev. pathol. trop* , 33–43. https://pesquisa.bvsalud.org/portal/resource/pt/lil-387492

Costa HN, Molina LR, Lage CFA, Malacco , VMR, Facury Filho EJ, & Carvalho A.U. (2017). Estimation of milk production losses in crossbred Holstein x Zebu cows with subclinical mastitis based on two analysis methodologies. *Brazilian Archive of Veterinary Medicine and Animal Science* , *69* (3), 579–586. https://doi.org/10.1590/1678-4162-9019

Brazil. Ministry of Agriculture and Supply. (2003). *Normative Instruction n.9 of June 27, 2003* . Provides for the prohibition of manufacture, handling, fractionation, commercialization, import and use of the active ingredients chloramphenicol and nitrofurans and products containing these active ingredients, for veterinary use and likely to be used in the diet of all animals and insects. Official Union Gazette, Brasília, DF, 30 June. 03. Section 1, p.1-2.

Brito, J.R & Brito, MAVP (1998). *Control programs for mastitis caused by contagious and environmental microorganisms* . n.71. Juiz de Fora: Embrapa Gado de Leite, 1998. 25p. Available at: < http://www.infoteca.cnptia.embrapa.br/bitstream/doc/593442/1/Programasdecontroledasmastites.pdf>. Accessed on: 09/04/2017.

Brito, LG, Salman, AK D., Gonçales , MA R & Figueiró, MR (2007). *Booklet for milk producers in Rondônia* . Porto Velho: Embrapa Rondônia, 2007.40 p. (Embrapa Rondônia. Documents, 116)

Costa, EO da. (1998). Importance of mastitis in dairy production in the country. *CRMV-SP Journal of Continuing Education in Veterinary Medicine and Animal Science* , *1* (1), 3–9. https://doi.org/10.36440/recmvz.v1i1.3381

Costa, AC (2010). *Subclinical mastitis: isolated pathogens and their antimicrobial sensitivity, somatic cell count variation and risk factors* . 102 f. Dissertation (Master in Animal Science). Goias Federal University. Goiania.

Dias, RV da C. (2007). Main methods of control and diagnosis of bovine mastitis. *Veterinary Minutes Brasilica* , *1* (1), 23–27. https://doi.org/10.21708/avb.2007.1.1.255

Santos, M. V & Fonseca, LFL (2007). *Strategies for controlling mastitis and improving milk quality* . Barueri. Manole.

Fonseca, LFL & Santos, MV (2001). *Milk quality and mastitis control* . São Paulo: Lemos.

Feitosa, FLF (2004). *Veterinary Semiology the Art of Diagnosis.* Sao Paulo: Rca .

Hillerton , JE (1996). *Control of bovine mastitis. In:* workshop on integrated bovine mastitis control program, 1996, Juiz de Fora. Annals. Juiz de Fora: Embrapa, 1996. CD-ROM

Langoni , H. (2000). Modernization trends in the dairy sector: Monitoring milk quality by somatic cell count. *CRMV-SP Journal of Continuing Education in Veterinary Medicine and Animal Science* , *3* (3), 57–64. https://doi.org/10.36440/recmvz.v3i3.3332

Madalena, FE, Matos L. L & Holanda, JREV (2001). *Milk Production and Society* : A Critical Analysis of the Milk Chain in Brazil , Belo Horizonte: FEPMVZ, p.61-74, 2001

Moura, E. de O., Rangel, AH do N., Melo, MCN de, Borba, LHF, Júnior, DM de L., Novaes, LP, Urbano, SA, & Neto, JC de A. (2017). Evaluation of microbiological, cellular and risk factors associated with subclinical mastitis in female buffaloes. *Asian-Australasian Journal of Animal Sciences* , *30* (9), 1340–1349. https://doi.org/10.5713/ajas.16.0744

Pedrini , SC B & Margatho , LFF (2003). Sensitivity of pathogenic microorganisms isolated from cases of clinical mastitis in cattle against different types of disinfectants. *Instituto Biológico Archive* , *70* (4), 391–395.

Perez Neto. F & Zappa, V. (2013). Mastitis in dairy cows – Literature Review, *Rev. Scientific _ Veterinary Med Electronics* , *16.*

Poll , PSEM (2012). *Milk Quality, Mastitis, and Antimicrobial Sensitivity in a Milk Production Facility with High Somatic Cell Counts* . Dissertation (Veterinary Medicine) Federal Rural University of Rio de Janeiro UFRRJ.

Radostits , OM et al. (2002). Mastitis. In: *Veterinary clinic:* a treatise on diseases of cattle, sheep, goats and horses. Rio de Janeiro, RJ: Guanabara Koogan.

Rezende E, Junior JMS, Isola AM, Campos EV, Amendola CP, & Almeida SL (2008). Epidemiology of severe sepsis in the emergency department and difficulties in the initial assistance. *Clinics* , *63* (4), 457–464. https://doi.org/10.1590/S1807-59322008000400008

Ribeiro, M., Petrini , L., Aita, M., Balbinotti , M., Junior, WS, Gomes, J., Schramm, R., Martins, P., & Barbosa, R. (2003). Relationship between clinical mastitis, subclinical indecency and non-infectious mastitis in dairy production units in the southern region of Rio Grande do Sul. *Current Agricultural Science and Technology* , *9* (3). https://periodicos.ufpel.edu.br/ojs2/index.php/CAST/article/view/606

Gulmez Saglam , A., Sahin , M., Celik , E., Celebi , O., Akca , D., & Otlu , S. (2017). The role of staphylococci in subclinical mastitis of cows and lytic phage isolation against Staphylococcus aureus. *Veterinary World* , *10* (12), 1481–1485. https://doi.org/10.14202/vetworld.2017.1481-1485

Seegers , H., Fourichon , C., & Beaudeau , F. (2003). Production effects related to mastitis and mastitis economics in dairy cattle herds. *veterinarian Research* , *34* (5), 475–491. https://doi.org/10.1051/vetres:2003027

Santos, MV & Fonseca, LFL (2007). *Strategies for controlling mastitis and improving milk quality* . Barueri: Manole.

Silva, MV M & Nogueira, JL (2010). Mastitis: control and prophylaxis in cattle. *Electronic Scientific Journal of Veterinary Medicine* , *8* (15).

St-Pierre, NR, Cobanov , B., & Schnitkey , G. (2003). Economic losses from heat stress by us livestock industries. *Journal of Dairy Science* , *86* , E52–E77. https://doi.org/10.3168/jds.S0022-0302(03)74040-5

Tozzetti , D.S, Bataier Neto, M & Almeida, L. (2009). Prevention, control and treatment of bovine mastitis: literature review. *Electronic Scientific Journal of Veterinary Medicine* , *6* (10).

Watts, JL (1988). Etiological agents of bovine mastitis. *Veterinary Microbiology* , *16* (1), 41–66. https://doi.org/10.1016/0378-1135(88)90126-5

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# THE court hearing of custody and The justice restorative at promotion of human dignity: by adopting the posture of the democratic state of right

## The custody hearing and restorative justice in the promotion of human dignity: for the adoption of the posture of the democratic state of law

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**Summary**
Faced with an old criminal and criminal procedural model that does not address the conflicts between the interested parties, thus generating discredit to justice in general, Restorative Justice with the Custody Hearing arises, as a possibility to solve this problem and as an element of implementation of the Direct Democratic State. The Magma Carta of 1988 represents the greatest symbol of the process of democratization and national constitutionalization, being seen as the Citizen Constitution. The above principle of the Dignity of the Human Person contained in the constitutional text is one of the main foundations of the Republic, functioning as a basis for the fundamental rights and guarantees of the citizen, especially in the criminal area. From the arrival of the new National Constitution, there is a rereading of the infraconstitutional laws, which are interpreted in accordance with the new constitutional text. In the current national legal-criminal context, it is associated with the idea of guaranteeism, linked to the concept of the Democratic State of Law, presenting Restorative Justice together with the Custody Hearing as the possibility of a new model of justice, more humane and quotient , aiming at applying the correct penalty by the State, solving the conflict, in the search for positive results in the reduction of criminal recidivism, the victim's satisfaction and the change of the culture of violence, so that we can be compatible with the Democratic State of Right.

**Keywords** : Restorative Justice. Custody Hearing. Criminal System. Dignity of human person. Democratic state.

***Abstract***
*Faced with an old criminal and procedural criminal model that does not respond to conflicts between the interested parties, thereby creating a discredit our justice in general, the Restorative Justice with the Hearing of Custody appears as a possibility to solve such problem and as an element of Democratic State of Direct. The Carta Magma of 1988 represents the major symbol of the process of democratization and national constitutionalization, and is seen as our Citizen Constitution. The above principle of the Dignity of the Human Person contained in the constitutional text is one*

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*of the main foundations of our Republic, functioning as a basis for the direct and fundamental guarantees of the citizen, especially in the criminal sector. From the arrival of the new National Constitution, a re-reading of the infraconstitutional legislations, that begin to be interpreted according to the new constitutional text. In the current national juridical-juridical conjuncture, it is associated with the idea of garantism, linked to the concept of Democratic State of Right, presents the Restorative Justice together with the Hearing of Custody as the possibility of a new model of justice, more human and quotient, in order to apply the correct sentence by the State, to resolve the conflict, to seek positive results in reducing criminal recidivism, victim satisfaction and changing the culture of violence, so that we can be compatible with the Democratic Rule of Law.*

***Keywords:*** *Restorative Justice. Custody Hearing. Criminal System. Dignity of human person. Democratic state.*

## Introduction

The current Constitution brings, in its 1st article, the constitutional political definition of the Brazilian State, affirming it as a Democratic State of Law, bringing with it the greatest and perhaps even the most important of all devices, since all the other principles that underpin the legal system.

Through a rereading with observance of the foundations and objectives of the 1988 Charter, Brazil is now recognized not as a State of Law, but as a Democratic State.

In article 1, item III of the Federal Constitution, we have the Principle of the Dignity of the Human Person, recognized as one of the foundations of the Democratic State of Law, being this principle of greater scope in what refers to the fundamental rights and guarantees of the citizen, where protects, as applicability of this device, life, physical and mental integrity, freedom, education, among other legally protected assets.

The democratic rule of law model is aimed at curbing state arbitrariness, the foundation of which has been built since the Enlightenment period. It is necessary to seek a critical and dialectical understanding of legal science, in addition to greater integration between the Science of Law and the other sciences, based on interdisciplinarity, as elements of satisfaction Social.

Today in Brazil, we have a Judiciary system that causes discontent in large parts of the population, due to its lack of organizational structure, having a low number of servers, the accumulation of piles of processes, lack of Judges and several other reasons that lead to systemic slowness procedure, in addition to the various resources, which make the process have its procedural progress postponed, especially in the Criminal Procedure, leaving society and especially the victims of criminal acts with helplessness in relation to the performance of the Judiciary.

In Brazil, there is an aggravation resulting from criminal legislation, which has the victim of crimes as a mere supporting element within the Criminal Procedure, with the State as the greatest element and most interested in resolving the generated conflict. The detachment of those involved in decision-making within the criminal process leads to great dissatisfaction on the part of the victims and their relatives, since

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they cannot even express their thoughts, fears and anguish, where the only place for its manifestation is the hearing, only when asked by the Judge, Prosecutor or Lawyer.

It is noted that incarceration does not solve the serious problem of criminality growth, this discourse ends up gaining strength when mistakenly associated with democratic measures. The great challenge of society is to conquer, in a wrong way, the democratic measures. The great challenge of society is to conquer, in a democratic way, institutions capable of giving rise to a civil society endowed with a critical sense, participative and that acts in a coherent way, whose civic competence, authoritarian regimes seek avoid.

As an alternative way of resolving or reducing such difficulties, the national legislator, mirroring himself in several countries on countless continents, have sought in sparse laws and in various devices related to criminal legislation, the inclusion of the victim in the solution of conflicts, making it helps the Judiciary in the search for a better path that meets its interests and those of society in general, in addition to criminal procedural criminal law, having acquired in recent years mechanisms for greater protection of the victim, aiming to treat them as subject of rights and no longer as a mere element of evidence.

It is worth highlighting a new model of Justice for the 21st century that is called “Restorative Justice”, a matter of the utmost importance, which requires, in addition to state aid, also real and effective community participation, as a way of making the difference. victim and their family members for a more active role in the process, the inclusion of the aggressor of the protected legal interest in this debate, in addition to increasing the credibility of Justice in the eyes of citizens.

On several occasions, the victim in the Criminal Procedure is left aside and seen simply as evidence, which in most cases causes great dissatisfaction with the Judiciary, since it is prevented from exposing its feelings, anguish, pain brought about because of the crime, when all this would be possible in dialogue with the accused in question ( Lake, 1992).

Regarding the offender, based on knowledge of the consequences of his/her criminal practice, through contact with the victim and their relatives, in addition to the possibility of the participation of the aggressor's relatives and other social entities, this may be the first step to a constitution of the harmful effects of his attitude and of a non-recurrence of crime ( Lake, 1992).

There is a gain for the victim who feels important and recognized, for having been able to put his feelings directly to the one who caused him harm and jointly seeking the best solution for the evils suffered as a result of the crime. On the other hand, the State gains in the reduction of crime, through non-recurrence, in addition, of course, to the aggressor who is able to think about his negative attitudes and with the possibility of no longer acting in crime, since he also feels valued as a human being, for not being treated as marginal.

The work has the proposal that aims to join all the norms already present in the national legislation and the public policies in progress, all in a systematic way, with its own method, following the line implanted by some Countries, which already

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demonstrate satisfactory indexes in the reduction in criminal law, seeking to adapt them to the national reality.

The work is divided into three chapters, where the first deals with criminal sanction as a regulatory instrument, the second addresses the distinction between retributive and restorative justice: values, procedures, different results and the reconfiguration of the subjects of the process and the third chapter and presented the custody hearing as a criminal procedural instrument in the service of restorative justice ( Lake, 1992).

With this, it is intended to bring to the discussion the possibility of the systematic implementation of this new model of Justice, which seeks to rescue the Dignity of the Human Person through the participation of the victim within the Criminal Procedure together with the aggressor, relatives of both parties and the community, in the solution of the conflict, as being another mechanism for the implementation of the Democratic State of Law, through the direct participation of those interested in decision-making, this being another mechanism for the effectiveness of participatory democracy.

In this way, Restorative Justice, together with the Custody Hearing, becomes a new model of Criminal Justice, and Criminal Procedure within the perspective of rescuing the victim, voluntarily placing her in direct contact with the aggressor in a first Hearing, in a form of application and effectiveness of the principle of the Principle of Human Dignity and Due Process of Law, with the Brazilian State acting in the resolution of social conflicts and in the reduction of violence.

## The criminal sanction as an instrument of regulation (inclusion/ exclusion) of the men:

### Criminal sanctions: their conceptions in story.

By taking the path by analyzing the sanctions applied to the crimes committed, we have the death penalty as the greatest punishment imposed in the history of mankind.

Humanity has followed and continues to follow a long and arduous path towards the affirmation of a punitive human right in the quest to guarantee and enforce the realization of fundamental human rights, universally recognized and established over time. In this sense, Human Rights are characteristic of man and must be respected, without distinction, including those of those who are fulfilling the penalties of the law. Consequently, this recognition and ideals must be transferred to the reality of penal institutions and not be restricted to the letter of a law, or the ineffectiveness of a rule.

In order to place the concepts of punishment and respect in human rights, we will make a brief entry into the history of Law Criminal.

#### 1.1.1 Antique

The penalty is originally based on the institute of reaction and defense, against the aggression of individual or collective goods of a community. Its beginnings can be traced back to the era of private revenge, in which sanctions were used in a completely disproportionate and arbitrary way. Over time, in favor of the organization of primitive

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communities, the formation of the State and the need for limitations on criminal punishments began to be outlined. taxes.

In the Classic Period of Antiquity, several manifestations of Criminal Law are found in the legal systems of civilizations: Chinese, Indian, Egyptian, Babylonian, Hebrew, Greek and roman.

Historians such as Eugenio Raúl Zaffaroni (2001, p. 181) teach that in ancient China there are proven existences of the "five penalties", of which he quotes, "homicide punishable by death, theft and injuries punished by the amputation of a or both feet, rape with castration, fraud with the amputation of the nose, and minor infractions with the mark on the forehead".

Such sanctions demonstrate the thinking of society at the time and the stage of evolution of this penal culture, which had a very severe character.

In the Code of Manu in Ancient India, which dates back to the 10th century BC, this had moral penalties, which served to remove the evils committed by the offender, its foundation was divine and organized according to social castes. In this way, the penalty that would be applied was earned according to the social hierarchy.

Egypt, at the time, had an organized and individualistic system of penalties, considered advanced for the ancient period and without many death sentences. The Egyptians were theocratic, so that infractions directly affected religion, which evidenced the nature of the penalties that were considered severe, including sanctions that affected life, the soul or life after death, such as curses. and exile.

In Mesopotamia in the 17th century BC, the Babylonians developed one of the most important codes of antiquity, the Code of Hammurabi. This code, which bears the name of its creator, is formed by a set of rules of conduct and had the talion as an exponent rule.

Paradoxical as it may seem, the Talion Law, defined in Article 196 of that code, was a true victory for peoples and human rights, since, at the beginning of time, crimes were punished with extreme disproportionate and cruelty.

With the advent of the Talion Law, revenge was limited to the *lex talionis* , that is, to the proportion of the offense, not exceeding the equivalent of the damage, a criterion used mainly in criminal sanctions.

The Code of Hammurabi is divided into fourteen parts, with 282 articles dealing with the following matters: criminal, patrimonial, procedural, obligatory and family, succession, regulation of professions, prices and remuneration of services. Almir de Oliveira (2000, p.101) declares that the Code of Hammurabi stipulated strict penalties for slander, defamation and injury, with which the protection of the honor of others was sought. The penalties for bodily injuries and homicides were extremely severe, with the adoption of talion and ordeal, with which one sought to protect the physical integrity and life of women. people.

The penalties varied according to the social category of the perpetrator and the victim and were unequal if the categories of one or the other were different. Theft, robbery, assault, kidnapping, slander and falsehood were punishable by death. a testimony.

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The monarch Hammurabi ordered his laws engraved in stone, proclaiming himself the chosen one of the Gods - the theocratic character of the Law of the time is observed in the expression “chosen of the gods” - to bring justice to the earth. The Code of Hammurabi brought legal certainty never seen before in the history of mankind, as the norms were written and not subject to simple ruling arbitration.

The Code divides men into three social classes, starting with the *awelum* (son of man), made up of free men belonging to the highest class of the social pyramid; by common free men and, finally, the *mushkenum class* , composed only by common free men and, lastly, the *wardum class* , composed by slaves ( Lake, 1992).

With a careful look at the Code of Hammurabi, it is clear that despite the class differences within society, the treatment given to offenders had a certain equality. After all, the principle of equity was inherent in the code.

The higher the agent's social status, the greater the sanction for the offense. Despite being more seriously applied to the ruling class, it demonstrated greater equality in the application of justice by treating the application of law with equity, a notion of proportionality that gave that society a historical highlight.

Having an observant view of other historical periods of humanity, the scholar Jhon Gilssen (2003, p. 610) comments on humanity's first attempts at a legal systematization, stating that the oldest known code is the Ur-Nammu code -written around 2040 BC-, although there are traces of other attempts at systematization, such as the code of Urakagina from Laga from the 3rd millennium before Christ.

In antiquity, the Hebrews were one of the main peoples to present a monotheistic theocratic regime, in which the rulers were subject to the law. Its main legal text is the Bible, which presents legislation aimed at all, without exception, even subjecting kings and interpreters of the text sacred.

For Jews, the power of kings was inferior to the mandates of the lahweh. Therefore, the power of kings was limited. Proof of this concept of Law intertwined with religion is the biblical passage in which God delivers the ten commandments to the Jews, present in the Old Testament, book Exodus, chapter 20, in the following verses: “(...) 13- Do not kill. 14-Do not commit adultery. 15- Don't steal. 16- Don't give false testimony against anyone. 17- Do not covet another man's house ".

Such orders to the Hebrew people, have a divine character, as they are emanated from God himself to the Jewish people. They also demonstrate a greater concern for human life and for several fundamental social values, such as the right to life, family, property and honor.

There are other passages that, in a first interpretation in their literal sense, present unreasonable penalties for the practiced act. However, it is argued that, if the overall meaning of the text is observed, it can be concluded that they had a meaning aimed at proportionality, in order to emphasize the importance of the manifestations of a humanitarian nature contained in the biblical text. This sense of proportionality can be seen in the Law of Talion found in the Bible in its book of Exodus, when dealing with the laws regarding violence, where chapter 21, verses 24 and 25, reads: “24 - an eye for an eye, a tooth for tooth, hand for hand, foot for foot, 25 - burn for burn, wound for hurt”.

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Among the Jewish people, punishments gradually gained the status of public revenge. Although still used in a no less violent way than the previous one, this model represented the beginning of the path towards the principles of the Law of Talion. This law, which proposed greater control over punishments, applied to punishment the idea of punishment as retribution for the evil caused in the measure of evil, being applied in a more consistent way to the crime. committed.

When observing the Greek civilization, despite being considered the one that had the greatest political thinkers and philosophers of antiquity, the Greeks did not stand out with the same relevance in the sciences of law.

No traces of a literature or an organized legal system were found, but individual legal systems in each city-state with sparse manifestations and, often, with a close right between the cities due to the common culture, which, however, did not represent a legal order. John Gilissen (2003, p.186) when dealing with the evolution of Greek political systems states what:

> It is not exactly necessary to speak of a Greek law, but of a multitude of Greek laws, because, with the exception of the short period of Alexander the Great, there was never political and legal unity in Ancient Greece. Each city had its own law, both public and private, having specific characters and evolution of the law of most cities; only Athens left enough traces to make it possible to know the successive stages of the evolution of law.

In Ancient Greece, the sanction was applied through social coercion, in which the community and the family group were involved. The criminal law was severe and at the same time respected in the face of the control exercised by society.

Eugenio Raul Zaffaroni and José Henrique Pierangeli (2001, p. 186) explain that each individual in the social group becomes an agent of the security police; in this way the so-called 'blood corruption', that is, the penalty that reaches the family and the group, is an immense means of social control.

José Reinaldo de Lima Lopez (2002, p. 39) observes that,

> The fear of impunity was enormous. A small, unpunished offense might throw the whole city into disarray, enacting revenge, etc. Thus, the penalties were often disproportionate to the crimes, by our standards. The penalties were, in general: punishment, fines, wounds, mutilations, death and exile.

In the same sense, Fábio Konder Comparato (2003, p. 41) addresses the devotion of the Greeks to their laws, pointing to the famous passage in the work of the Greek historian Herodotus, who narrates a dialogue between the king of the Persians, Xeres, and the ancient Spartan king , so let's see:

> The Persian sovereign, on the verge of invading Greece, manifests the deep contempt inspired in him by that few people, composed of people 'all equally free and who do not obey a single leader'. The Spartan replies that, if the Greeks are free, their freedom is not complete: they have a lord, the law, whom they fear more than your subjects do. you.

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Capital punishments also predominated in the Roman Empire and the sanctions of exile, flogging, corporal punishment and mutilation, among other tortures. However, Julio Fabbrini Mirabete (2005, p.224) teaches us what:

> In the midst of so much human insensitivity, however, Seneca already preached the idea that higher purposes should be attributed to punishment, such as the defense of the State, general prevention and correction of the delinquent and, although in the times of Solo and Anaximander, punishment was considered punishment, in Classical Greece, among the sophists, such as Protagoras, a pedagogical conception of feather.

In the case of Rome, the law of the XII Tables (450 BC) transformed the customs in force into a set of written norms. It was, therefore, a collection of customs and not a systematized code, as we moderately adopt. This legal document already differentiated private crimes, thus highlighting those that would carry out the criminal prosecution. The influence of the Code of Hammurabi on Roman Law can also be observed in this document through passage 11 of the Seventh Table, which determines that if someone strikes another, he must suffer the penalty of Talion unless there is an agreement .

At the beginning of the Empire, Roman Criminal Law became almost exclusively public in character, so that jurisdiction and penal protection also became a matter of public order.

With the emergence of the Catholic Church and consequent Canon Law, according to Ney Moura Telles (20014, p. 57), “debates have arisen about the retributive nature of penalties, translated with at notions gives immortality gives soul. Of that manner, The soul would be save case O sinner redeemed himself through penance, through repentance and redemption. Thus, one starts to consider intentionality as mediated by punishment.

### 1.1.2 Age Average

Several factors contributed to the formation of feudalism. We will emphasize here those of Roman origin, those of Germanic base and the conjunctural factors.

The factors of Roman origin resulted from the constant struggles for the power of the Empire, the moral and ethical crisis between the rulers, the wars to protect the borders and the consequent crisis in the supply of slaves, which resulted in inflation in the cities, which were unleashed around the fourth century AD, due to the crisis of the Empire and the urban exodus, which led to aristocratization and contributed to the solidification of the Christianity ( Lake, 1992)

In turn, the factors of Germanic bases were characterized by the rural way of life, the oral, tribal and customary laws, and the *comitatus* that had, through reciprocal oaths, a relationship of fidelity between the members of the social group and the head of the community.

Conjunctural factors, such as the barbarian invasions, the Norman attacks and the blockade of the Mediterranean by Muslims, trigger new impacts on the system of penal applications.

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In the Middle Ages, politics and law were decentralized, with application of varied sanctions according to the feudal lord. Tobeñas, quoting Almir de Oliveira (2000, p. 110), explains that:

> The recognition of Human Rights only appeared as a reaction against the excesses of the authority that denied them and almost always with a contractual character and the attribution of concessions or particular privileges, as recognized prerogatives to groups of people.

The Germans had a customary law, initially tending to reparation without state action. It was a private revenge that did not necessarily mean a violent and disproportionate reprisal. The offended person could carry out pecuniary reparation negotiations to restore the shaken social peace and recover honor without the need for physical harassment. Eugenio Raúl Zaffaroni and José Henrique Pierrangeli (2001, p. 190) clarify what:

> The most serious penalty known by Germanic Criminal Law was the 'loss of peace' (Frieldlosigkei), which consisted of withdrawing social protection from the convict, with which anyone could kill him with impunity. In private crimes, Faida or enmity against the offender and his family was produced. The Faida could end with the composition (Wertgeld), consisting of a sum of money that was paid to the offended person or his family, or also through the judicial combat, which was an ordeal, that is, a judgment of God.

According to these authors, the importance of the rights of these peoples is evident due to their propensity to restore social peace through reparation. Its purpose was, as a rule, to restore relations and social order, instead of directly sending the fact to the State for treatment.

Law in the Middle Ages is known to have a direct influence on canon law, evidenced in the figure of theologians who discuss the concept of just punishment of men. One of them, Saint Augustine, proposes the need for the penalty to be absolutely proportional or equivalent to the crime, promoting ideas about the reasonableness of sanctions and the utilitarian character of the penalty. But, that was far from the modern concepts of punishment and dignity of the human person – medieval utilitarian punishments had a brutal character. Terrible examples were marked in historical writings, such as death by fire, by the sword (for the nobles), outside, strangulation for women, by the wheel, by drowning, by boiling oil, live burial, blinding of the eyes, section of body members, brands with red-hot irons, among other ways that lasted until the 18th century.

In this regard, Margarida Genovis (2010, p. 13) points out that:

> At the end of the Middle Ages, Saint Thomas Aquinas directly discusses the issue of Human Rights, returning to Aristotle and giving his philosophy a Christian vision. The foundation of St. Thomas is theological: the human being has natural rights that are part of his nature, as they were given to him by God.

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John's magna Carta "Sem Terra" which is, without a doubt, the most important medieval document in the defense of man. Its first celebration took place in 1215, when the nobles, unhappy with the monarch's government, besieged the city of London, forcing the king to sign a Charter. However, João Sem Terra, after signing the treaty, sought Pope Innocent III, stating that the document was null, since he would have signed it under coercion. The Pope accepts the monarch's arguments and declares that the treaty had been signed without his consent and advocated, finally, that the Magna Carta was really null, despite having been written by a cardinal.

In view of its initial nullity, the document was reaffirmed three more times in 1216 and 1217, and declared authentic in 1225. It is also in the Magna Carta that it is expressed that the king is bound by the enacted laws, including those written by him, bringing foundations to the principle of legality and inviolability of domicile. This letter was arranged in the form of a text, and its division into clauses was done later.

**Age Modern**

The beginning of the great transformations was marked by the Renaissance, being political and ideological in the world, The medieval way of thinking underwent changes with the advent of Enlightenment ideas that provided a new way of seeing the environment in which we live. This new conception brought changes to the performance of many sciences, with Law not immune to the new angles of vision awakened in the period and, naturally, with direct implications for Criminal Law.

Criminal sanctions gain contours from a more humane thought, with emphasis on a work written in the 18th century by the Italian Marquês Cesare Beccaria (2010) called “Dos Delitos e das Penas”, with great repercussions at the time and which remains very up-to-date as a source of information. doctrine and study for the current Criminal Law.

**England**

After the War of Succession for the English throne (War of the Roses or Two Roses), from 1455 to 1485, that is, after thirty years of battles, the English nobility weakened and created conditions for a post-war period in which the monarchy would be strengthened.

Thus, with the nobility weakened and in the face of existing conflicts with the pope, King Henry VIII managed to subject Parliament and force it to proclaim the Act of Supremacy in 1534, becoming head of the Church and instituting Anglicanism in England. It was almost 100 years of royal supremacy.

Years later, the monarchy weakened again and ended up having to accept the Petition of Rights, imposed by Parliament in 1628. jurisdiction and the legality.

*Habeas Corpus* Law was signed , whose official name was “a law to better guarantee the freedom of the subject and to prevent pressures overseas”.

This document had an irrefutable importance, the following passage is found in its text:

> The complaint or written request of any individual or in favor of any individual arrested or accused of committing a crime (except in the case of felony

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> treason, as stated in the respective mandate, or of complicity or suspected complicity, [... ]), the Lord Chancellor or, in time of vacation, some judge of the higher courts, after having seen a copy of which has been refused, to ask for his release) for the benefit of the prisoner, which will be immediately enforceable before the same Lord Chancellor or Judge; and, if bailable, the individual will be released, during the execution of the measure ( *upon the return* ), committing to appear and answer the accusation in the competent court.

Habeas *Corpus* maintains its concept since that time it is considered a procedural norm. It brought with it a guarantee of freedom for those involved in criminal proceedings, that is, for the individual arrested or accused of a crime.

However, the Magna Carta of 1215 guaranteed freedom of movement within England, however, its effectiveness did not generate good results. Thus, in the event of threat or arbitrary arrest, freedom was protected by a mechanism similar to *Habeas Corpus* called *writ* , synonymous with a court order, which aimed to protect the freedom of the individual, although its actual protection was greatly reduced.

In 1689, the Bill of Rights was developed by the English Parliament, signed that same year, *Bill of Rights* (1689).

Initially, in the aforementioned Declaration in items 1 and 2, the king's binding to the laws is affirmed, and he cannot suppress or modify them, leaving Parliament to exercise legislative power. Faced with the suppression of the king's power to legislate, the creation of tributes by Parliament was definitively established, as defined in clause 4.

Faced with the formation of an autonomous Legislative Power, immunities were also created for its members to better exercise their role as representatives of the people. The separation of the Legislature and its prerogatives are inserted in articles 8, 9 and 13, in which they also expound that the election of parliamentarians must be free, enjoying freedom of expression in the exercise of office. Moreover, the Parliament itself became the competent body to analyze the speeches of its legislators.

In addition, the right of petition is guaranteed in the fifth item, a right that ensures citizens the right to invoke the examination of a certain matter by the king.

The principle of legal reserve, when dealing with the right of Protestants to defend themselves and to own weapons, is inferred from the use of the term “allowed by law”. In clause 10, the principle of proportionality is reaffirmed. It is revealed that both principles mentioned are contained in the Magna Carta of 1215.

important to point out that the *Bill of Rights* is still present today as one of the fundamental documents of the United Kingdom, forming part of the current norms that defend the human.

**In France: the Declaration as a fruit of Revolution**

When analyzing the Declaration of the Rights of Man and Citizen, there is a paradox in its title. If we make a grammatical interpretation, the additive conjunction “and” suggests the differentiation of the elements “man” and “citizen”. Faced with the principle of equality listed as one of the principles in the Declaration of Rights, it is

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necessary to highlight the revolutionary social framework to understand the meaning of “man” and “citizen” in its Declaration of Rights.

The members of the Revolution, when writing the Declaration of Rights, broke with all the political parameters of the past. No other revolution took place in the same political context and yearning for freedom. France, for having been the country that most rooted monarchical absolutism, was also the one that took the longest to break with its chains of estates. The exploited people and the bourgeoisie, which was growing at an accelerated pace, had ties to the State that impeded their development. The Catholic Church condemned usury; the nobility and the king, together, “bled” the people with the exploitation of labor and acceleration of impoverishment as a result of the collection of high taxes. Even within this framework, inflation rose faster than the salary.

In this context, the revolutionaries, by undoing the established state structure, sought, in addition to the creation of a new state, a free, equal and fraternal state. The propagation of the new ideology to all the peoples of the world was the logic. This political thought of the deputies present at the French National Assembly on how the Declaration should be governed is brought by Fábio Konder Comparato (2003, p.130):

> Démeunier affirmed, in the August 3 session, that "these rights belong to the times and to all nations". Mathieu de Montmonrency repeated on August 8: 'the rights of man in society are eternal, (...) invariable like justice, eternal like reason; they are from all times and from all countries. Pétion, who was maire of Paris, considered it normal that the Assembly addressed all of humanity: “It is not a question of making a declaration of rights only for France, but for the man in feral”.

Faced with this universalist thought, they implemented ideas in their text that encompassed not only the French, but all men. Here, the difference between man and citizen in his title. The term “citizen” would encompass the French, and “man”, the population of the world. It was an ideal of making “brothers” members of all nationalities, equal, free and fraternal.

The evolution of political frameworks in the main nations that influence the modern era resulted in the evolution of the understanding and defense of Human Rights. The consolidation of the principles of equality, although not entirely in its ideal state, ended up ensuring prerogatives in favor of being human.

Reasoning in this sense we have in England the *Petition of Rights* , which rescues existing individual rights that were being suppressed by sovereigns. The *Habeas Corpus Act , on the other hand* , brought a procedural mechanism in defense of individual freedoms against the king's arbitrariness, as a way of helping the citizen.

In the series of rights listed in the *Bill of Rights* , of singular constitutional importance for the English people, in addition to granting various rights to the citizen, the document rooted the separation of powers by assigning the Legislative Power to Parliament, removing it from the hands of the monarchs English.

In France, with the Declaration of the Rights of Man and Citizen, we have as a result ideals of freedom, equality and fraternity and the universal propagation of

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modern Enlightenment thought. From a legal point of view, it brought a list of fundamental rights, becoming the basis of Constitutional Law. modern.

The two documents commented on here reflect the efforts in favor of the defense of Human Rights, an ideal that has been consolidated in the Contemporary Age, reinforced especially after the bloody wars that marked the 20th century.

It is with this foundation that the Law reproduces the humanization of the penal system. Sanctions gradually being humanized; some nations begin to abolish or restrict the death penalty, as well as largely eliminate corporal punishment, torture, torture, forced labor and infant sanctions, a new sanctioning ideal begins to be outlined, based on the recovery of the convict.

**The recognition of fundamental rights in Brazil since the constitution of the empire and the reflexes in the order criminal**

The Constitution of the Empire was promulgated in 1824 and brings among its articles the main Human Rights proclaimed throughout history. Among all its clauses, only its last article emphasizes the civil and political rights of the citizen, whose importance appears overshadowed in the last plan in the Constitution.

In its first articles, the 1824 Constitution is concerned with defining the form of government and State adopted by Brazil, claiming to be a free and independent nation, with a monarchical, hereditary, constitutional and representative government. It also defines as the official religion the Roman Catholic Apostolic.

In the constitutional text, the protection of the individual begins in article 179, declaring inviolable the political and civil rights of Brazilian citizens, which would be based on freedom, individual security and property. Then, the rights of citizens are listed in 35 items.

In item I of CR1824, we have clearly ensured the principle of legality by determining that “no Citizen may be obliged to do, or refrain from doing something, except by virtue of the Law”.

This principle originated in the Magna Carta of 1215, has been successively reaffirmed throughout history and was included among one of the constitutional guarantees proclaimed in the first Constitution of Brazil.

In item IV, we have protected the right to free communication of thought by words, writings, and publications by the press, ensuring freedom without censorship, necessarily responding to the excesses practiced in the exercise of this right:

> IV- Everyone can communicate their thoughts, by words, writings, and publish them through the press, without dependence on censorship; so long as they have to respond for the abuses that they commit in the exercise of this Right, in the cases and in the manner determined by the Law.

Item V brings religious freedom to the country; however, the religion of the State and the morality propagated by this form of religious doctrine should be respected. In this sense, it determined that “ No one may be persecuted for reasons of Religion, as long as he respects the State and does not offend Public Morals”.

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We observe that the Constitution of the Empire was influenced by the Declaration of the Rights of Man and Citizen. Therefore, in item VI, freedom of movement, also contained in the Magna Carta of João Sem Terra, was expressed: "CR 11824, art. 179, VI - Any person may remain, or leave the empire, as he sees fit, taking his goods with him, safeguarding the Regulated police officers, and save the damage to third ".

The principle of equality is ensured in item XIII, preventing differentiated and arbitrary treatments. This mechanism works in front of the legislator, avoiding discrimination by law and also against the applicator of the norm, who must impose the Law without discriminatory differentiation, since signing provided that "the Law will be the same for all, that it protects, whether it punishes, the reward will be in proportion to the mechanisms of each a".

In its item XIX we have assured the prohibition of torture, flogging and all cruel punishments. Such a device is extremely important for citizens, as there will be no dignity if these threats continued to exist in legal systems, although its text needs determination by the legislator of what would be considered torture. Thus, it provided that "scourges, torture, branding with a hot iron, and all other cruel punishments are now abolished".

The inviolability of the home is enshrined in item VII, which addressed night and day, provided that the period when the sun is shining, regardless of the time, should be considered day. The differentiated guardianship begins, therefore, from the moment the sun goes down and the sky becomes dark.

> VII- Every citizen has an inviolable asylum in his home. At night, you cannot enter it, except with your consent, or to protect it from fire or flooding; and during the day, its entry will only be allowed in the cases, and in the way, that the Law to determine.

In items VIII and XI the essence of the principle of the presumption of innocence, since it defended the elaboration of a process to investigate the guilt of the convict, with only the competent authority to apply the law and issue the verdict.

> VIII- No one can be arrested without formal guilt, except in the cases declared in the Law; [...] will inform the Defendant of the reason for the arrest, the names of the arrest, the names of his accuser, and those of the witnesses, having them.
> XI- No one will be sentenced, except by the competent Authority, by virtue of a previous Law, and in the formula established by it. prescribed.

The principle of the personality of the penalty is of paramount importance for a humanitarian legal system, since only those who commit a crime should be punished by the sovereign power. The State is authorized only to punish the violator of the norm, being able to apply a sanction to the agent of the crime and to those who help in its practice, thus guaranteeing the inviolability of the family members, which was provided for in item XX.

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The principle of humanity is intrinsic to item XXI, so that the State has the obligation to adapt its prison infrastructure in order to prevent convicts from deteriorating their physical and mental structure. The Jails will be safe, clean, the goods ventilated, with several houses for the separation of the Defendants, according to their circumstances, and the nature of their crimes.

The devices below the following protected rights: education, essential for the development of citizenship; the inviolability of correspondence; property, mainly protecting the assets of individuals against the State; and the right to the immutability of res judicata.

> XII- The independence of the Judiciary will be maintained. No Authority will be able to recall the pending Causes, sustalas, or revive the Proceedings ended.
> XXII - The Property Right is guaranteed in all its fullness. If the legally verified public good requires the use and use of the Citizen's Property, he will be previously compensated for its value. The Law will mark the cases in which this single exception will apply, and will provide the rules for determining the indemnity.
> XXXII- Primary instruction, free of charge to all Citizens.
> XXXIII- Colleges, and Universities, where the elements of Science, Fine Arts, and Art.

Since the beginning of the Constitution in Brazil, fundamental rights have been ensured in which the State remains inert to its development, that is, they are, in general, classic public freedoms, given rise in several legal documents such as the Magna Carta, the *Petition of Rights* and the *Bill of Rights.*

The division of powers in the Imperial Constitution was not identical to that conceived in the classic French texts, proclaimed by Montesquieu. Its division included, in addition to the traditional three - Legislative, Executive and Judiciary - a fourth, called Moderating Power. This was considered by the Charter to be the key to all political organization, determined in its articles 10 and 98:

> Article 10. The Political Powers recognized by the Constitution of the Empire of Brazil are four: the Legislative Power, the Moderating Power, the Judicial.
> Article 98. The Moderating Power is the key of all Political organization, and is delegated privately to the Emperor, as Supreme Head of the Nation, and its First Representative, so that he may incessantly watch over the maintenance of Independence, balance, and harmony of the other Political Powers.

Title 5 of the CR of 1824 deals with the provisions on the Emperor, and in its articles 98 and 101 with the fourth power of the Nation, represented by the figure of Emperor Dom Pedro, considered inviolable and sacred. The term sacred brings us to remnants of the monarchical absolutism of the Modern Age, in which the king had sacralized sovereign power, that is, with divine origin. Due to the term “sacred” used in its text, the person of the emperor would not be subject to any responsibility for his actions.

In Brazilian criminal history, we have that Criminal Law was governed by the Afonsine, Manoeline and Philippine Ordinances until the Empire. After independence,

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it began to be governed by a series of criminal documents. Criminal Code of the Empire, of December 16, 1830; Penal Code of the United States of Brazil, Decree No. 847 of October 11, 1890;

Consolidation of Penal Laws, Decree No. 22,213 of December 14, 1932; Penal Code, Decree Law 2.848 of December 4, 1940 (still in force in its special part, with subsequent reforms); Penal Code, Decree-Law No. 1004 of October 21, 1969 (this Penal Code did not come into force in Brazil); Penal Code, Decree-Law 2.848/40, reformed in its general part by Law 7.209 of July 11, 1984.

The Penal Code in force is divided into two parts. The first, called the General Part, assists in the interpretation and guides the application of the criminal law. The second part, called the Special Part, contains a non-exhaustive list of crimes present in the national legal system.

At the beginning of the 21st century, in Brazil, a series of incriminating criminal laws takes place, in addition to the list contained in the Penal Code, aimed at the protection of specific goods such as the environment, the elderly, minors, consumers, the Public Administration , diffuse and collective rights; in addition to others that are more severe in nature, such as the law on heinous crimes, the drug law on drug trafficking, and so on.

In the Brazilian historical evolution, Criminal Law has progressively increased the role of protections for human beings and improved the forms of sanctions in the world and national order. The current Criminal Law cannot remain unscathed by the changes that have taken place in society, demanding constant evolution. The sanctioning mechanisms must converge to the humanization of the penal system, with a view to enabling a better performance in resocialization.

**For a humanized penal legislation: a history to be reinvented.**

Criminology understands that the current punitive paradigm is exhausted not only in its practical effectiveness, but also in its moral (regarding the right to punish) and political (regarding the definition of events classified as crimes) legitimacy. According to critics, this model is based on quite questionable traditional assumptions, such as that there are bad people, deserving of imprisonment. This is due to a norm arising from collective consensus, in this sense, criminal law is an expression of collective thinking.

With regard to the legitimacy of the right to punish, we have that the purely application of punishment and punishment on the condemned comes from the tradition that confers religious and moral authority on the sovereign. Warat (2001, p. 170) considers that modern law boasted this authority, legislating the standards of justice in the name of a supposedly complete rational order.

Habermas (1997, p. 23) criticizes this view, asserting that the concept of sovereignty, according to which the State monopolizes the means of legitimate application of force, brings with it an absolutist idea of concentration of power, capable of overcoming all others. powers of this world. According to the author, the ideal is a proceduralist view of the exercise of power that refers to the idea of sovereignty of the

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people and “draws attention to marginal social conditions, which enable the self-organization of a legal community”

Regarding the second type of legitimacy, that of criminalization or the definition of events classified as crimes, the criminal law declares certain types of conduct as wrong and requires that all citizens comply with its decrees. Such legitimacy has been contested not only because of the absence of a consensus on the values it affirms, but because its determinations generally reveal the imposition of principles of more socially favored citizens or those exercising some power.

Maira Lúcia Karam (2004, p. 73) argues that:

> Crimes are mere creations of criminal law, through the selection of certain conflicting or socially negative behaviors, which, through the intervention of criminal law, receive this denomination. What is a crime in one place may not be in another; what is a crime today may not be tomorrow to be.

According to Queiroz (2017, p. 71):

> Regarding the Brazilian prison reality, the perversity in serving the sentence makes the offender become, at a certain point, a victim, as the violence perpetrated by him is responded to with another type of violence, state violence. This is because, under the pretext of combating violence, criminal law ends up generating more violence, not always legitimate, but as a pretext for the systematic violation of human rights.

Edmundo Oliveira (2010, p. 460) cites some human problems of the inmate: insecurity, stultification, loneliness, idleness, abandonment of the family, sexual maladjustment and uncertainty about the free future”. Such feelings, according to the author, are likely to cause him the so-called "prison victimization syndrome" that makes him feel like a "creditor" of society and free to exercise violence, due to the routine violations he suffers in prison, violence that go beyond the deprivation of freedom.

For these reasons, instead of controlling delinquency and reintegrating the convict into the community, the custodial sentence has encouraged exclusion and crime, stigmatizing the convict and serving as an incentive for learning about criminal practice. To survive in this inhospitable environment, the offender assimilates new practices criminal activities in a process of acculturation according to its values and norms (such as violence, corruption and “malandragem”, in the words of Juarez Cirino dos Santos (2013, p. 5). It creates associations and parallel power relations, which reinforce the culture of violence and the generation of future criminal organizations (CRUZ, 2011, p. 62-63).

In Paladino (2010, p.406):

> (...) although the State spends more and more with repression, with the police, with the construction of new prisons, with the edition and application of more incriminating laws with convictions, the response of a fairer and safer society has not yet been is present. In this context, what stands out is the legislative inflation, the overload of the courts, the inefficiency of justice and the ineffectiveness of the classic penalties.

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It is concluded, therefore, that incarceration is costly for the State, does not reintegrate or re-socialize and even turns the prisoner into criminal careers.

**In the distinction between retributive and restorative justice: values, procedures, different results and the reconfiguration of the role of the subjects of the process.**

Using a well-known constructive thought: “Bridges instead of walls”, we can make a correlation between the current retributive system (wall) and the desired restorative system (bridge). In the latter, there is a greater humanistic focus and not what we see today of a corrupted system where the victim is forgotten, the defendant is transformed into a monster, in a corrupted and out-of-control State that in no way manages to reach the true character resocialization of the sentence, resulting in a collapse of the Brazilian penal system.

It is in this bias that Giamberardino (2015, p. 57) clarifies:

> The direct Criminal Procedural revolves around the real victim of a punishable fact. He must be offered more protection, he must be granted more protection, he must be allowed more right of action and participation. She must be freed from her powerless position in the formalized process, where she must observe, without considerable chances of intervention, the discussion 'about her' cause by others and can still be forcibly interrupted by these others due to a collaboration, in which she – in any case this way – has no regular interest. Instead, the victim must be able to take 'his' cause into hands and enter, even under a certain state supervision, into mediation with the suspect of the act, in which both direct participants in the conflict, in a mutual learning process, can bring up to date, both personally and legally, the problem of this punishable fact.

The proposal to be presented is not, as will be seen, about excluding or displacing the State in favor of the private resolution of conflicts, but about being able to humanize the system aiming at the good of all those involved in the process, bringing a peaceful end to the conflict, in order to reduce criminal recidivism.

**The different facets between retributive and restorative justice**

Observing the failures of the punitive system, Rolim (2006, p.90) asks:

> And what if, after all, we were facing a broader phenomenon than the simple malfunctioning of a punitive system? Without there, instead of pragmatic reforms or topical improvements, we would be facing the challenge of reordering the very idea of justice 'Criminal Justice'? Would it be possible to imagine a justice that exists able to face the modern phenomenon of criminality and that, at the same time, produces the integration of the perpetrators into society? Would it be possible to imagine a justice that, acting beyond what is conventionally called of 'restorative practice', did it bring more satisfaction to victims and communities? Proponents of Restorative Justice believe so.

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Using this thought as a starting point, we have that the Restorative Justice model presents itself as a contrasting paradigm to Criminal Justice, indicating solutions to its main flaws and inefficiency, changing the focuses and solutions, as will be indicated.

At first, it is noted that the criminal procedure is specifically focused on the issue of the accused's guilt and, once established, procedural guarantees and fundamental rights are left aside, resulting in less attention to the outcome of the process, as highlights (Zehr, 2008).

Also, when guilt is determined, the focus is on the past, as an attempt is made to "reconstruct" the criminal fact in question. Thus, it is possible to conclude that the focus is not on the damage caused to the victim, the offender and the community, or on the latter's experience in the occurrence of the crime, as Restorative Justice does, but rather on the violation of the law and the determination of fault.

In contrast, the restorative model focuses its attention on the harmful act, on the harm caused to those involved: victim, offender and community, and on possible solutions to the conflict.

After the establishment of guilt, it moves to the determination of punishment. In the words of Zher (2008, p. 64): "Guilt and punishment are the twin fulcrums of the judicial system. People must suffer because of the suffering they cause. Only through pain will the scores be settled [...] The basic objective of the criminal procedure is the determination of guilt, and once established, the administration of pain".

In this way, it is stated that the retributive system only seeks to repay the evil done, without bringing any benefit to the community, or to the offender and, mainly, to the victim. In this sense, Zher (2008, p. 64) asserts that the institutions and methods of law are integral parts of the cycle of violence rather than solutions for it.

Restorative Justice, in turn, expresses a form of justice centered on reparation, representing a true break with the principles of retributive justice, which is based only on punitive sanctions.

In addition, the Criminal Procedure distances the parties actually involved in the conflict. The manifestation of the accused boils down only to his interrogation regarding the criminal facts, without any inquiry as to the reasons that led him to commit the crime, as well as the consequences that this brought in his life.

Victims are replaced by State authority, with minimal participation in the criminal process, acting as a witness or through a prosecution assistant, in crimes prosecuted through unconditional public criminal action. Furthermore, legitimacy is granted to victims in crimes prosecuted through unconditional public criminal action. Furthermore, legitimacy is granted to victims in crimes that are prosecuted through private criminal action and public criminal action conditioned to the representation.

In opposition, Restorative Justice brings the parties to the center of the process, offering them autonomy to expose their feelings and needs, as well as the possibility of listening to the other party, in a balanced discourse.

Possibly the biggest difference between the two models of justice is the definition of crime adopted by each of them that the conventional criminal justice system sees crime primarily as a violation of state interests. In contrast, restorative

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justice goes further, offering decisions on how best to serve those most affected by crime, prioritizing their interests.

Restorative Justice proposes to reconstruct the notion of crime, specifying that it is more than a transgression of a legal norm or a violation against the State; it is also an event that causes damage and consequences. Zehr (2008, p. 171) defines the lens of retributive justice as: “Crime is a violation against the state, defined by disobedience to the law and guilt. Justice determines guilt and inflicts pain in the context of a dispute between offender and State, governed by norms systematic”.

On the other hand, Zher (2008, p. 171) describes how Restorative Justice sees crime: “Crime is a violation of people and relationships. It creates obligation to correct the mistakes. Justice involves the victim, the offender and the community in seeking solutions that promote reparation, reconciliation and security.

Unlike the alternative adopted, Restorative Justice is based on a non-punitive paradigm, which presents solutions to the inefficiencies of the current Criminal Justice system, changing the focus of the criminal process on the establishment of guilt and punishment for the harmful act, its consequences and its consequences. possible solutions.

**Values**

Regarding values, it is possible to observe a dichotomy between justices. One aims at unidisciplinarity and the other at multidisciplinarity, in retributive there is a state monopoly of criminal justice and restorative justice is characterized as participatory criminal justice.

In the words of Slakon, Vitto and Pinto (2005, p. 24) redistributive and restorative justice bring specific elements into their definition:

> Legal normative concept of Crime-act against the society represented by the State-Unisdisciplinarity; primacy of interest
> Public (Society, represented by the State, the Centre)- State monopoly of Criminal Justice; Individual guilt facing the past - Stigmatization; Dogmatic Use of Positive Criminal Law; State indifference to the needs of the offender, victim and affected community-disconnection; Mono-cultural and exclusionary; Dissuasion. Realistic concept of Crime - Act that traumatizes the victim, causing damage. Multidisciplinary; primacy of people's interests
> Stakeholders and Community - Participatory Criminal Justice; Responsibility, for restoration, in a social dimension; Critical and Alternative Use of Law; Commitment to inclusion and Social Justice generating connections; Culturally flexible (respect for difference, tolerance); Persuasion.

It is noticed that in relation to values, Restorative Justice has its basis based on the valuation of the protection of the victim and not only on the condemnation of the accused, as it happens today, thus giving a humanistic focus on its values.

**2.1.1 Procedures**

In relation to the procedural part, there is a reduction in bureaucracy that establishes itself in the sense of demanding a solemn and public ritual, making room

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for a dialogical action in communities with the resumption of value in the subjects involved in the legitimate.

In this sense, Slakon, Vitto and Pinto (2005, p. 25) point out the procedural difference:

> Retributive Justice: Solemn and Public Ritual; Unavailability of Criminal Action; Contentious and contradictory; Language, norms and formal and complex-guarantee procedures; Main actors - authorities (representative of the State) and legal professionals; Decision-making process in charge of authority (Police, Delegate, Prosecutor, Judge and legal professionals) - Unidimensionality.
> Restorative Justice: Community, with the people involved; Opportunity Principle; Voluntary and collaborative; Informal procedure with reliability; Main authors - authorities (representing the State) and legal professionals; Decision-making process shared with the people involved (victim, offender and community) - Multidimensionality.

It is noted that the procedural part of the Restorative Process is governed by the principle of opportunity, so the procedure is informal with confidentiality. There is thus a sharing with the people involved (victim, offender and community). Unlike Retributive Justice with its Unavailability of Criminal Action bringing a great formalism already outdated.

**Results**

The restorative process can achieve several results. The agreement may include the aggressor's referral to damage repair programs, restitution to victims and community services, in order to meet the individual and collective needs and responsibilities of those involved, and to achieve the reintegration of the victim and the aggressor. In the case of serious offenses these measures can be combined with others.

In this sense, Slakmon, Vitto and Pinto (2005, p. 25 and 26):

> Retributive Justice: General and Special Prevention – Focus on the offender to intimidate and punish; Penalization- Penalties depriving liberty and restricting rights, fine Stigmatization and Discrimination; Criminal Protection of Assets and Interests, with the Punishment of Society; Unreasonable and disproportionate sentences in an inhumane, cruel, degrading and criminogenic prison system – or – ineffective alternative sentences (basic basket); Victim and Offender isolated, helpless and disintegrated. Secondary Resocialization; Social Peace with Tension.
> Restorative Justice: Addressing Crime and its Consequences – Focus on relationships between parties, to restore; Apology, Reparation, restitution, provision of community services, reparation of moral trauma and emotional damage - Restoration and Inclusion; Spontaneous liability on the part of the offender results; Proportionality and Reasonability of the Obligations Assumed in the Restorative Agreement; Reinstatement of Priority Offender and Victim; Social Peace with Dignity.

With this, we observe that one of the main points of a restorative process is the participation of those interested, those affected, the community, the victim and the

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aggressor in the development of the process. This makes the solution found in the restorative much more effective since it was built with the participation of all those involved and meets their needs.

**Effects for victim**

The effects are seen as a major difference factor, since part of the analysis of the treatment given to the victim is that he is no longer just someone who has suffered an unfair aggression and becomes the important point in the restorative process. For the purpose of better elucidation, Slakmon, Vitto and Pinto (2005, p. 26) say:

> Retributive Justice: Little or no consideration, occupying a peripheral and alienated place in the process. He has no participation, no protection, he hardly knows what is going on; Virtually no psychological, social, economic or legal assistance from the State; Frustration and Resentment with the system. Restorative Justice: It occupies the center of the process, with a role and an active voice. Participates and has control over what happens; Receives assistance, affection, restitution of material losses and reparation; It has positive gains. The individual and collective needs of the victim are met and community.

From the perspective of Restorative Justice, the victim is placed at the center of the process, providing positive gains, meeting their needs and restoring the trauma suffered, thus removing the negative effects of retribution.

**For the Offender**

The offender, in restorative justice, starts to have a humanitarian focus, ceasing to be someone willing to suffer only, a sanction, to participate in a restoration, thus really being aware of his actions, thereby reducing a possible recurrence. The difference between the effects of each justice is pointed out by Slakmon, Vitto and Pinto (2005, p. 27):

> Retributive Justice: Offender considered in his faults and his bad training; Rarely has participation; Communicates with the system by the lawyer; Is discouraged and even inhibited to dialogue with the victim; Is uninformed and alienated about procedural facts; It becomes untouchable; No needs considered.
>
> Restorative Justice: Offender seen in his potential to be responsible for the damages and consequences of the law; Participate actively and directly; Interacts with the victim and the community; He has the opportunity to apologize by becoming aware of the victim's trauma; Is informed about the facts of the restorative process and contributes to the decision; Is aware of the consequences of the fact for the victim and the community; He is accessible if he is involved in the process; Your needs are met.

After the analysis carried out, it is noted that for the offender, Restorative Justice is effectively positive and beneficial in terms of the care directed at him, allowing him to participate and get involved in the process, from the identification of his

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guilt to the opportunity to apologize, take a stand and even justify what motivated him to commit the criminal act, it is still possible to become aware of the consequences of his acts by supplying thus the offender's needs. What does not happen as Retributive Justice, which focuses on dogmatically punishing, evidencing disadvantages for the offender.

**Factors that enhance and minimize the implementation of restorative justice in Brazil: a brief survey.**

Restorative Justice is applied in several countries around the world. However, it is necessary to have a critical view at the time of its transport to the Brazilian national reality, as each society has its own characteristics. Therefore, this form of justice must be adapted to the national means and forms, because if these elements are not taken into account, there is a tendency to create a system that looks good on paper and is applied null. In the words of (Slakmon, Vitto & Pinto, 2005):

> In this work, we focus on the legal compatibility of restorative justice with the Brazilian Criminal Justice system, and we express some thoughts about its possible implementation in Brazil. We want to emphasize that such compatibility is not only with our Constitution, our legislation and our judicial practices, but also with the sense of justice and the diverse culture of our people. That is why we cannot copy, naively and alienated, foreign models, mainly from countries whose legal tradition differs from ours, as is the case of countries that adopt the common law. We argue that restorative justice is legally sustainable and compatible with our legal system.

With this brief explanation, the possibility and need for the full implementation of restorative justice in Brazil can be seen, which Slakmon, Vitto and Pinto (2015, p. 29) clarify:

> The restorative model is perfectly compatible with the Brazilian legal system, despite the principle of unavailability of public criminal action still prevailing in our criminal procedural law.
> This principle, however, became more flexible with the possibility of the conditional suspension of the process and the criminal transaction, with Law 9099/95. Also in infractions committed by adolescents, with the institute of remission, there is considerable discretion on the part of the Public Prosecutor's Office.
> In common law countries, the system is more receptive to restorative diversion, mainly due to the so-called discretion of the prosecutor and the availability of criminal action (prosecutorial discretion), according to the principle of opportunity. In that system, there is, therefore, a great opening for the referral of cases to alternative, more autonomous programs, unlike ours, which is more restrictive.
> But with the innovations of the 1988 Constitution and the advent, mainly, of Law 9.099/95, a small window opens in the legal system of Brazil, at the principle of opportunity, allowing a certain systemic accommodation of the restorative model in our country, even without legislative change.

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In this bias, with the permissive of the Magna Carta, the bill 7.006/2006 was created that suggests the implementation of Restorative Justice in Brazil. This bill would bring elements to the necessary penal reform and lay the foundations for the effective application of this approach throughout the national territory. Thus, with its enactment, it would have the long-awaited reforming advance in the Brazilian Penal System.

However, after the legislative process, the referred project was considered inapplicable to the Brazilian social context due to a "society's yearning" for the hardening of criminal legislation. Therefore, the non-implementation of the Project was recorded in the final report, which, in turn, was definitively sent to the archive. Thus, there was no direct and immediate insertion of Restorative Justice in the national legal system, for the installation of these essential reforms to the criminal system, in spite of the fact that there are already some laws in force bringing traces of Restorative Justice in their wake.

One can cite as an example article 98, item I, of the Federal Constitution, where it is stated that the Special Courts will be provided by judges who would be those entrusted with the jurisdictional power and with competence to judge crimes submitted to their jurisdiction and judges and lay people, which would be the meeting of the former with lawyers with more than five years of training. At this point, it is proposed the preparation and insertion of these lay judges as facilitators of dialogue, using the process as a foundation in Restorative Justice.

Such lay judges, entering the sphere of facilitators, would not have the competence to judge the fact, but would have the function of promoting the restorative approach. In the same way, it exposes about the conciliators, it is recommended the use of law graduates, who could have the necessary preparation to proceed with the restorative dialogue.

It is proposed that the action be carried out in different spheres: an action by the judiciary in the face of criminal action, acting in the criminal prosecution and another action front, which occurred in a second stage through the facilitators in the Restorative Justice centers.

Subsequently, article 98 of the Federal Constitution declares that lay judges and lay judges are competent for conciliation and transaction. Conciliation and transaction make room for the application of Restorative Justice, and these institutes can be managed based on the new approach. Conciliation would aim not only at agreement, but at restoration through dialogue, in which the transaction would bring about the agreement itself, covering the needs of those involved in the rights and also of the community.

It should be noted, therefore, that there are already some compatibility between Restorative Justice and current criminal legislation, such as Law No. 9,099/2005, which deals with Special Civil and Criminal Courts and foresees alternative penalties to closure with new sanctions. However, the alternative penalties are limited to the payment of food baskets, or equivalent amounts, donated by the offender to charitable institutions in the region of the Court.

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It should be noted that the restorative process is also possible in crimes against the elderly, as observed in article 94 of Law 10741/2003, because the procedure of Law 9099/1995 is applied to crimes whose penalties do not exceed four years old.

In this bias, SICA (2007, p. 89) declares:

> In this way, the restorative justice program can be perfectly compatible in Brazil, being able to use community spaces or even integrated citizenship centers, places where restorative justice centers would be installed, being composed of a coordination and a multidisciplinary council, and dirty structure one would understand restorative chambers where the parties and mediators would group together, with due administrative support and safety.
> Therefore, it is possible to use existing structures to be used as restorative spaces, but provided that the support of government agencies, companies and non-governmental organizations, operating in a network and directing victims and offenders to programs in order to reach an agreement restorative.

In Brazil Restorative Justice has only been implemented in the judicial system on a small scale, which absolutely does not suggest that it will not be able to enter the national legal system very soon. Despite the positivism and the little flexibility of the procedures, it is possible to adapt them to the judicial routine through the acceptance of the parties, even with the moderate removal of the criminal action.

Restorative Justice aims at social restoration; however, its foundations bring several beneficial consequences for society through secondary reflections. It is not intended to reduce recidivism. However, the offender, when faced with restorative methods, often understands that his attitude causes greater damage than the simple crime, and that such damage occurs as a result of his act. So that, understanding the extent of the crime, assuming responsibility for the fact and having the perspective of the future addressed, the offender can, through dialogue with the victim, seek to reestablish the affected order and achieve social balance. And yet, in the face of such awareness, there is a tendency not to relapse.

It is faced with the often unimaginable extent and burden of the offender, who may not understand the depth of the consequences of his actions and, through Restorative Justice, ends up redeeming himself and changing his way of acting.

With regard to the judiciary, there is an ease in the number of processes, since with the beginning of the restorative procedure, it will remain suspended, and may even be archived during the restorative acts and, with its success, total extinction of the deed.

Paul Mccold and Ted Wachtel (2003, p. 3) argue that:

> The restorative justice system aims not only to reduce crime, but also to reduce the impact of crime on citizens. Restorative justice's ability to fulfill these emotional and relationship needs is key to achieving and maintaining a healthy civil society.

There is also the possibility of exchanging custodial sentences for sentences that can be replaced by others. Avoiding the “contamination” of the individual with the prison reality, since this contact fatally deteriorates the sociability of the offender, instead of re-educating him to return to life in society.

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The monetary expenditure presented by Restorative Justice can be equivalent to that represented by Retributive Justice. However, Restorative Justice has better effects on social pacification, reduction of recidivism, acceptability of decisions and participatory citizenship.

Tahinah Albuquerque Martins (2003) also demonstrates some levels of satisfaction regarding the use of Restorative Justice, stating that:

> Excellent results have been noted in the satisfaction index of victims and offenders in relation to this process. Victim satisfaction with the outcome of mediation reaches 90% in the US and 84% in England. The offender, on the other hand, says he is satisfied with the result in 100% of English mediations, against 91% of American ones. It is also observed that the fear of the victim, after mediation, regarding revictimization by the offender, decreased by about 50% in both countries, in relation to victims who did not participate in mediation. In the USA, only 18% of adolescent offenders who participated in mediation programs have committed new offenses. On the other hand, those who did not participate in the programs reached the rate of 27%.

Such data are extremely relevant and show that the results are very positive, emphasizing the possibility of implementing Restorative Justice in Brazil, as its implementation will bring enormous benefits to the Brazilian penal system, making the community more participatory and confident in the system, acting in a directly in the reduction of criminality and including the satisfaction of the needs of the victim.

**The custody hearing: a criminal procedural instrument at the service of restorative justice.**

For Mauro Fonseca Andrade and Pablo Rodrigo Alfen (2016, pp. 15 to 48) the possibility of using the custody hearing as the starting instrument in the restorative process to achieve a humanization in the criminal procedural system, thus bringing a significant advance to the current archaic system, in dealing with those involved in apparent conflicts in the current legal system.

**What is meant by 'custodial hearing'**

The custody hearing is an institute foreseen for decades in international texts protecting human rights, there is a whole culture already formed around the custody hearing, not only coming from the international organizations issuing those texts, but also from the International Courts responsible for the interpretation and applicability of treaties and conventions, when signed by the countries that propose to be signatories to them.

This institute starts from the basic premise, which is the concern for the person who had his freedom restricted in some way by a crime committed.

With this, the custody hearing consists of ensuring that, within 24 hours, the prisoner is presented and interviewed by a judge, in a hearing in which the manifestations of the Public Ministry, the prisoner's lawyer or the Public Defender's Office will also be heard.

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During the hearing, the arrest will be analyzed from the perspective of legality, the need and suitability of continuing the imprisonment or the possible possibility of granting freedom, with or without the imposition of other precautionary measures, in addition to possible occurrences of torture or ill-treatment. dealings, among other irregularities. ( Andrade & Alfen, 2016).

**custody hearing in Brazil : its way to recognition legal**

In Brazil until 2011, little or nothing was known about the Audiencia de Custodia institute. Although Brazil had already ratified the Pact of San José in Costa Rica and the Pact of Civil and Political Rights in 1992, and the legislation already contemplated something similar in laws of a special nature prior to that year, the dedication of the doctrine and contribution of the Jurisprudence was practically nil for a better knowledge of that institute.

Perhaps for this reason, many disagreements began to be committed by groups in favor and against the implementation of the custody hearing in Brazil, sometimes giving it a meaning that it does not have, sometimes invoking inconsistent excuses for its non-realization. For this reason, it was necessary to carry out a study on how that institute is treated internationally, especially based on the guidelines adopted by the UN, a huge collection of decisions already handed down by the International Courts of Human Rights Humans.

After this phase – so to speak – of presenting the custody hearing to legal practitioners in Brazil, a new stage in this study is necessary. Now, the attention will be directed to the approach of some themes that are linked to them to be implanted in Brazil, to the reflexes that its realization can produce in other institutes of equally procedural nature and how it can be better used, in order to provide greater celerity to the criminal prosecution as a all.

Notwithstanding PLS n°554, of 2011, was not the first initiative aimed at implementing the custody hearing in Brazil, there is no denying that it was the driving force behind a huge discussion that took over Brazil. This discussion reached such a point that, as the country institutionalized that act for the entire State, the CNJ, in partnership with the São Paulo Court of Justice and the Ministry of Justice, created, in February 2015, a pilot project to its progressive national expansion.

With this pilot project in mind, two institutions holding enormous political power – namely, CNJ and the Ministry of Justice – made it clear that the custody hearing institute would be a reality from which Brazil could not continue to escape. More than that, a very clear message was given to the various institutions against their full incorporation into the national procedural practice, that is, the custody hearing would, in the short or medium period of time, be integrated into the procedural routine of criminal prosecution, as pilot project was intended to observe the operational problems that it could present in this first moment of implantation, and to correct them gradually, aiming at the definitive insertion of that institute in the national scope. In other words, the creation of that pilot project provoked a curious situation and an apparent discomfort with the Legislative Power: the great merit of PLS nº 554, of 2011, was to

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become dispensable for the beginning of the incorporation of the custody hearing in Brazil .

Even so, it was necessary that certain rules were established so that there was a procedure to be followed, as a way of ensuring respect not only for the judicial presentation of a person arrested or detained, but also for constitutionally provided individual rights and guarantees. That was the reason why the Presidency of the Court of Justice of São Paulo and the Judiciary Office of the same State issued Joint Provision No. 03/2015, taking advantage of several provisions already present in that draft law.

The regulation of the custody hearing through an administrative act was the loophole found for some institutions to attack that institute, precisely because they were the ones that would most strongly feel the impact of its implementation on their work routines and the lack of personnel and structure that has hit them for a long time. The best representation of this attack was the Direct Action of Interconstitutionality filed by ADEPOL (ADI nº 5240), in February 2015, in which the affront of that administrative act to the Federal Constitution was pointed out, under the invocation of four arguments.

First, the custody hearing was created by the provision under attack, which would be the Federal Constitution, since it is only up to the Union to legislate on matters related to procedural law (article 22, item I). This would remain clear, according to the argument presented, due to the absence of an internal law to be regulated by a provision issued by the Judiciary, which would qualify this administrative act as being innovative.

Second, because the ACHR has, according to ADEPOL, constitutional status, it could not have been regulated by an administrative act, but by an ordinary law, as it is proposing in the National Congress with the bills that are being processed in it.

Thirdly, the imposition of conduct on the procedural subjects involved with the custody hearing – read – whether judges, members of the Public Ministry, defenders, Police Chiefs and the arrested or detained subject himself – could only have occurred by legal imposition, and never by administrative act, due to the fact that the Federal Constitution ensures that “no one shall be obliged to do or refrain from doing anything except by virtue of the law” (Article 144, § 6th).

Well then; What caught our attention right from the start was the occurrence of a strategic error made by the Ministry of Justice, in having signed an agreement with a Court that is part of the State Justice. Better explained, if this Ministry was engaged - as, in fact, it was – in the full incorporation of the custody hearing into the practice of criminal prosecution, it could well have signed the same agreement with a Court that is part of the Federal Justice, since it – the Ministry of Justice - would be solely responsible per bear all the costs derived from the lack of structure that could affect the Federal Police. More than that, with the simple edition of an administrative norm, the Ministry of Justice would easily dismiss the argument of disrespect for the separation of powers, because the Federal Police is subordinated to this portfolio. The impression one has is that the Ministry of Justice teamed up with the CNJ and the Judiciary of São Paulo simply to lend its political weight to that pilot project, since a

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large part of the cost - financial, personnel and structural - that resulted from its execution would be borne by the Executive Branch of that State.

With this, the degree of importance that the definition of the constitutionality, or not, of the custody hearing in the country represented for the Federal Supreme Court, the judgment of ADI 5,240 took place about six months after its filing, an opportunity in which they were rejected all the arguments presented in that action. As a result of this judgment, even the most reticent courts ended up accepting the pilot project of the CNJ, and also issued their administrative regulations on the custody hearing that would be implemented in their territorial circumscriptions.

Mauro Fonseca Andrade and Pablo Rodrigo Alfen (2016, p. 111-114) stipulate that during the execution of the pilot project in all states of the Federation, the Federal Supreme Court granted an injunction in ADPF n° 347, ordering the putting into practice the terms of article 7.5 of the ACHR and article 9.3 of the ICCPR, accelerating its national implementation process. It was then that the need arose for a regulation that, uniformly throughout the national territory, would put that judicial decision into practice, hence Resolution No. 213, of December 15, 2015, of the CNJ.

**Procedural**

In the procedural case, the Legislative Power turned its attention to the content of article 7.5 of the ACHR and to article 9.3 of the ICCPR, presenting several bills that aimed, among other objectives, to make clear the need to present all person arrested or detained before a judge. The first of them was derived from the movement that took place in the Federal Senate, with the presentation of PLS n° 554, of 2011. The second was the result of action in the Chamber of Deputies, with the presentation of PL n° 7.871/2014. The third, also originating from the Chamber of Deputies, is the PL 470/2015.

What stands out in all these initiatives is that each one presents a different procedure: sometimes the act of presenting the arrested or detained subject involves only he and the judge; sometimes it involves a prisoner, the judge, the Public Prosecutor's Office and the defender; sometimes it is just an optional measure ( Bourhis, et al., 1997).

Having all these projects presented, the CNJ's pilot project made the multiplicity of administrative regulations come into force in all the States of the Federation, each one with a different formality to put it into practice. Finally, that same Council, motivated by an injunction issued by the Federal Supreme Court, presented its understanding of the procedure to be followed nationally, derogating the local administrative regulations hitherto in force. Mauro Fonseca Andrade and Pablo Rodrigo Alfen (2016, p. 120)

**THE CUSTODY HEARING UNDER THE PRISMA OF JUSTICE RESTORATIVE.**

The restorative procedure would be started in parallel with the criminal procedural procedure, walking together so that they can reach a desired end for all those involved in the generated conflict.

Mauro Fonseca Andrade and Pablo Rodrigo Alfen (2016, p. 111-13-) and Edgar Hrycylo Bianchini (2012, p. 137 to 153) bring the idea that the restorative team would

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be present at the custody hearing itself, a member of the society, and the victim, plus the already mentioned components of the aforementioned hearing, where the restorative process would begin, with an individualized follow-up of the concrete case, this will bring a humanization to the system that will better welcome all those involved in the case, enabling the reinsertion of the offender into society, leading to the victim, the possibility of recovery from the trauma suffered, I try to ease the heavy hand of the State on the Defendant, by allowing the restorative process to be used as a mitigating factor in the course of the criminal procedural process. criminal proceedings, a peaceful resolution being better for the parties than an endless process where no one wins.

**Principle of humanity**

Undoubtedly, it is seen as one of the most important principles in the field of Human Rights, and one that influences the entire legal system. It is included in Article 1, item III of the Magma Carta Patria, as one of the foundations of the Republic.

With the application of the principle of the dignity of the human person, it is clear that the criminal procedure cannot serve as an instrument for imposing punishment at any cost, but on the contrary, it should be seen as an investigative instrument, developed with faithful observance of due legal process, in several respects, which aims to determine the circumstances in which the determined fact with criminal relevance occurred, with a view to pointing out or not the criminal responsibility of the accused, without include practices that expose man to degrading situations, embarrassment or torture.

Thirty years have passed since the promulgation of the Federal Constitution of 1988 and more than twenty years since the incorporation of the prisoner's right to interview with a judicial authority, immediately after his arrest, it is imperative that the Brazilian State fulfills its duty to guarantee the effectiveness of these commandments and make possible the implementation of an instrument with this objective, so that the commandments of the Pact of San José of Costa Rica are faithfully complied with, under penalty of continuous and unacceptable disrespect for the dignity of people fangs.

Thus, guaranteeing personal contact with the judicial authority, the prisoner will be able to expose his social, family and professional situation, being able, at this moment, to demonstrate that he does justice to the right of provisional release or even to the replacement of precautionary arrest by another less burdensome measure, such as those inserted in the system through Law 12403/2011.

The memorable Minister of the Supreme Federal Court Teori Zavascki, as rapporteur for HC: 113611 RJ-STF, thus declared “The prolonged, abusive and unreasonable duration of the defendant’s precautionary detention, without judgment of the cause, offends the postulate of the dignity of the human person and, as such, constitutes an illegal constraint, even if it involves the attribution of a serious crime”.

In the words of Edgar Hycylo Bianchini (2012, p. 111-113):

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This principle, studied in the context of Restorative Justice, argues that the punitive power should not apply sanctions that affect human dignity. It is, therefore, a protection against cruel and infamous punishments and a guideline for the improvement of the penal system. For Restorative Justice, the Principle of Humanity comes to model the focus of action and prevent it from deviating from the purpose of Restorative Justice, which is the restoration and resumption of the shaken social balance. This principle is still a shield against financial reductionism, after all, this new approach does not appear as a simple means of exchanging sanctions for some pecuniary value, but for social restoration. It is stressed that if we forget this end we create a mechanism of impunity for the rich. After all, they will have the necessary resources for the "restoration".
It is still through this principle that the Study loses the character of the main afflicted of the law, to fit in a subsidiary position to the real victim - the one who suffered the crime - who starts to have an active role in the criminal dispute. The victim, as the main member of the dispute, is the element that suffers the greatest damage. They receive aggression from different perspectives, so their role needs to be active in recovering and overcoming the fact.
Aggression is an attack on public order in need of repression; however, maintaining order is not an exclusive need, so that the purposes of Criminal Law must be highlighted, instead of remaining embedded in the model of repression.
For Restorative Justice, the Principle of Humanity comes to model the focus of action and prevent it from deviating from the purpose of Restorative Justice, which is the restoration and resumption of the shaken social balance. This principle is still a shield against financial reductionism, after all, this new approach does not appear as a simple means of exchanging sanctions for some pecuniary value, but for social restoration. It is stressed that if we forget this end we will create a mechanism of impunity for the rich. After all, they will have the necessary resources for "restoration".
It is also through this principle that state action is defended in equipping and providing infrastructure for restorative action for the rehabilitation of the condemned, through social integration, responsibility for understanding the evil inflicted.

**Principle of intervention minimum**

The principle of minimal intervention for Restorative Justice would design the performance of the conventional criminal procedure - deprivation of liberty through incarceration - to the minimum essential for maintaining order. So, when feasible - compliance with the admissibility requirements and the other principles governing Restorative Justice and which will be discussed below - it should be referred to the action of Restorative Justice.

Edgar Hrycylo Bianchini (2012, p. 112-113) says that Criminal Law, through Restorative Justice, should base its action on the *ultima ratio* , that is, the most important goods and the most serious aggressions. That said, less serious aggressions tend to be treated with better results using Restorative Justice.

In this bias, the author Edgar Hrycylo Bianchini (2012, p. 113-114) clarifies that:

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> This principle takes on the character of expanding the role of Restorative Justice and consequently reducing unnecessary incarceration. César Roberto Bitencourt emphasizes that if other forms of sanctions or other means of social control prove to be sufficient for the protection of this good, its criminalization will be inadequate and unnecessary. If civil or administrative measures are sufficient for the re-establishment of the violated legal order, these are the ones that must be used and not the ones criminal.

**Adequacy Principle Social**

This principle of social adequacy represents the molding of the penal system to the social values considered historically relevant and suitable.
In the words of Edgar Hrycylo Bianchini (2012, p. 114-115):

> This principle is one of the pillars for implementing Restorative Justice. So, in occurrence in a fact what if frame in a type penal, this It is, fulfill the requirements of the conduct, result, causal link and typicality, illegality and culpability, the need and possibility of referring the fact to Restorative Justice can be verified. Such criminal fact must be analyzed by the authority and verified if the requirements for the shipment to the approach have been fulfilled, as well as it is essential to ask the interested parties about balance in the relationship.

For Edgar Hrycylo Bianchini (2012, p. 116) society requires harmony in social connections and order, when there is a crime, this stability is shaken, leaving citizens helpless. The State, as holder of punitive power, has the role of restoring social order through the Penal System, so that the good is protected and the balance can be resumed. Whenever there is a less onerous form of response to crime, however adequate for the purposes of Criminal Law, with better results and that brings a balance in relations, this approach should be implemented.

**Principle of proportionality and reasonableness**

Proportionality in criminal matters is a fundamental element for equating the criminal act with the penalty that will be applied. Likewise, when concluding a restorative agreement in Restorative Justice, it is necessary to pay attention to the fact and the objective, seeking to reach a parameter of “sanction” consistent with all parties.

We will exemplify as a crime of a clock: a simple theft that has as penalty the resolution of one to four years. In this crime, it would be completely disproportionate to enter into a “restorative” agreement in which the offender would have to render services to the victim's community within a period of twenty years. Such a dispare agreement represents the exact attention that should guide the restorative approach. In the case in question, there would be almost a slavery agreement if we compare the value of the good to that of the provision of service. After all, the objective of the State is to achieve the restoration of balance with maximum efficiency and with the least possible suffering for the citizens. members.

In the work of Edgar Hrycylo Bianchini (2012, p. 116-117):

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> The principle of reasonableness was developed by the US Supreme Court and means “that which has the ability to achieve the objectives it proposes, without, however, representing any excess”. In this way, the principles of proportionality and reasonableness are not confused: reasonableness represents a controlling force to proportionality; It is through this principle that the adage “an eye for an eye, a tooth for a tooth”, or the law of Talion.
> Such reasonableness-proportionality also does not represent an identity of solutions, as it is up to those involved to negotiate the agreement and discuss the damages and consequences. It is not a matter of proportionality in the sense of equality of the “sanction”, as there are subjective elements that cannot be equated. After all, each human being has a reaction to the crime and this generates differentiating elements for the agreement.

Such reasonableness - proportionality also does not represent an identity of solutions, as it is up to those involved to negotiate the agreement and discuss the damages and consequences. It is not a question of proportionality in the sense of equality of the “sanction”, as there are subjective elements that cannot be equated. After all, every human being has a reaction to a crime and this generates differentiating elements for the agreement. Edgar Hrycylo Bianchini (2012, p. 118-119)

**The principle of *due process of law* : the Custody Hearing as a guarantee.**

The Federal Constitution provides, in article 5, item LIV, that "no one shall be deprived of liberty or of their property without due process of law", giving life to the principle " *due process of law"* with immediate reach both in relation to the legal process and in civil proceedings. From its postulates arises the prohibition of admitting illegal evidence in the process and the very idea of contradictory and ample defense.

The Principle of due process of law also incorporates the idea of "due legal procedure" since it is in its body that it is possible for the defendant to deduce in a more or less extensive way his full defense and his contradictory, which is why, if there is a specific procedure for the type of criminal conduct imputed to the accused, non-compliance may constitute an incurable vice of the judge's principle natural (Dixon, 1994).

Regarding the custody hearing, as it is not regulated and its regulation stems mainly from the Pact of San José, Costa Rica and the International Covenant on Civil and Political Rights, which do not provide for a specific procedure for its realization, I believe that a once the fundamental guarantees of the parties and, particularly, of the collected party are observed, there will be no direct affront to the principle of Due Process of Law. However, the standardization of the procedure, at the national level, via amendment of the Code of Criminal Procedure, is necessary for the definitive introduction of the institute in the national legal system. Mauro Fonseca Andrade and Pablo Rodrigo Alfen (2016, p. 150)

In the words of Daniel Amorim Assumpção Neves (2016, p. 257 and 258):

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It is common ground that due process of law works as a supra principle, a basic principle, guiding all others that must be observed in the process. In addition to the procedural aspect, due process of law is also currently applied as a limiting factor of the Public Administration's power to legislate, as well as to guarantee respect for fundamental rights in legal relationships. private.
As this is a basic principle, as an indeterminate concept, it would be enough for the constituent legislator, with regard to procedural principles, to limit itself to providing for due legal process, that in practice the values essential to the ideal society of fairness would provide sufficient elements for the judge in the concrete case to perceive other principles derived from the due process of law. This was not, however, the option of national law, which, in addition to the provision of the divided legal process, contains provision for several other principles that currently derive from it, such as contradictory, the motivation of decisions, publicity, isonomy, etc. The option should be praised due to the evident difficulty of concretely defining the meaning and scope of the principle of due process of law, but it should be noted that, despite the fact that art. closing, the indeterminate amplitude allows the conclusion that even non-typified requirements can be associated with the ideal of due process cool.
Currently, the principle of due process of law is analyzed from a perspective, speaking of substantive due process ( *substantive due process* ) and due formal legal process ( *procedural due process* ). In a substantial sense, due process of law concerns the field of elaboration and interpretation of legal norms, avoiding abusive and unreasonable legislative activity and dictating a reasonable interpretation regarding the concrete application of legal norms. It is a field for applying the principles - or as you prefer part of the doctrine, the rules - of reasonableness and proportionality, always functioning as a control of the arbitrariness of the Power Public.

## Conclusion

Despite the need to reform the national Penal System and the creation of new effective public policies on crime, it is observed that, throughout history, Criminal Law has always leaned towards the humanization of sanctions. In this regard, in recent decades, several studies and experiences have been undertaken on criminality, seeking to develop more effective and less severe approaches and solutions to crime. In this context, Restorative Justice emerged as a result of new social aspirations not covered by the criminal system.

Restorative Justice, as a new branch of the retributive system, began to develop a new approach to crime, creating new alternatives for dialogue between the entities directly involved with the crime and, also, enabling direct action by “unrelated” characters from the technical world. legal. Such individuals enter the approach and start to have a greater involvement with the victim, with the delinquent and with the social body.

The victim, who until then was segregated from the conventional system and left in a position of simple witness or spectator of the process, starts to have a decisive role in the restoration, which also derives from his performance.

In general, the victim in the standard jurisdiction system does not envisage participatory justice, where there is no consideration for his opinion. The victim does not have the opportunity to dialogue with the offender and help in determining a sanction for the offender, which could be more effective and more humane. Restorative

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Justice offers victims the possibility of meeting their needs through a new criminal process, achieving a more personal and human.

In turn, the community starts to play a decisive role by verifying the real penal response in a direct and effective way. The performance of the social body is also close, and must work to help restore social balance, incorporating dignified solutions to those involved. It encompasses, therefore, a strengthening of social bonds that help in the reduction of conflicts and in the informal social control of the crime.

As a result, given this "informal" control exercised by the State in its formal scope of action, social bonds are solidified, bringing better results in crime control, reducing recidivism rates. Consequently, the State's expenses with the direct control of crime, carried out by means of police officers in judicial action and movement, are reduced, in addition to the reduction of the incarceration.

Therefore, with such a reduction, such funds can be reverted to other forms of more humanized social controls.

In this way, when structuring Restorative Justice through conceptualization, determination of its legal nature and extraction of the principles that govern its action, there are mechanisms that can solidly help to develop this approach in the context of national.

Regarding the Custody Hearing, it is already in force in Brazil and its use as an instrument of Restorative Justice would be fully appropriate, thus ensuring a humanized process from the beginning.

Through such structuring, it is understood that the current legislation is directly able to apply this approach to crime, with procedural adequacy being enough for a more humanized criminal action to exist around the national Penal System.

## References

Andrade, M. F & Alfen, PR (2016). *Custody Hearing in the Brazilian Criminal Procedure* **.** 2nd edition. Porto Alegre: Lawyer's Bookshop, 2016.

Bourhis, RY, Moise, LC, Perreault, S., & Senecal, S. (1997). Towards an interactive acculturation model: A social psychological approach. *International Journal of Psychology* , *32* (6), 369–386. https://doi.org/10.1080/002075997400629

Brazil. (1992). Decree Law nº 592. *International Acts* . International Covenant on Civil and Political Rights. Promulgation. Available: < http://www.planalto.gov.br/ccivil_03/decreto/1990-1994/d0592.htm> Accessed on October 15, 2017.

Cirino, JS (2005). *30 years of watching and punishing* **.** Paper presented at the 11th IBCCRIM international seminar (October 4-7, 2005). São Paulo, 2005.

Comparato, FK (2003). *The historical affirmation of Human Rights* **.** Sao Paulo: Saraiva.

REVISTA COLETA
Científica
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ARK: https://n2t.net/ark:/24285/RCC.v1i1.3 2

Cruz, DS (2011). *Crime Studies* **:** The Chicago School of Sociology. Vitória: Jones dos Santos Neves Institute, 2011.

Dixon, WJ (1994). Democracy and the peaceful settlement of international conflict. *American Political Science Review* , *88* (1), 14–32. https://doi.org/10.2307/2944879

Fauconnier, J., Bénézech, M., Hitier, F., & Le Bihan, P. (2015). L'intime conviction du juge des libertés et de la détention dans les soins psychiatriques sans consentement. *Annales Medico-psychologiques, revue psychiatrique* , *173* (7), 627–628. https://doi.org/10.1016/j.amp.2015.07.009

Fearon, JD (1994). Domestic political audiences and the escalation of international disputes. *American Political Science Review* , *88* (3), 577–592. https://doi.org/10.2307/2944796

Fleury-Steiner, RE, Miller, SL, Maloney, S., & Bonistall Postel, E. (2016). “No contact, except”: Visitation decisions in protection orders for intimate partner abuse. *Feminist Criminology* , *11* (1), 3–22. https://doi.org/10.1177/1557085114554259

Genevois, M. (1992). *Brazilian Civil Procedural Law* **.** 7th edition. Sao Paulo: Saraiva.

Giamberardino, AR (2015). *Criticism of punishment and restorative justice* **:** Censorship beyond punishment. Florianópolis: Emporium of Law.

Gilsen, John. (2003). *Historical Introduction to Law* **.** 4th edition. Lisbon. Calouste Guilbenkian Foundation.

Habermas, J. (2002). *The inclusion of the other* **:** Studies in political theory. Sao Paulo: Loyola.

Karam, ML (2004). *For the abolition of the penal system* **.** In: PASSETTI, Edson (org). Free course on penal abolition. Rio de Janeiro: Revan.

Lake, DA (1992). Powerful pacifists: Democratic states and war. *American Political Science Review* , *86* (1), 24–37. https://doi.org/10.2307/1964013

Maoz, Z., & Russett, B. (1993). Normative and structural causes of democratic peace, 1946–1986. *American Political Science Review* , *87* (3), 624–638. https://doi.org/10.2307/2938740

Mccold, P., & Wachtel, T. (2003). *In search of a paradigm:* A theory of restorative justice. Paper presented at the XIII World Congress of Criminology on August 10. Rio de Janeiro: International Institute for Retroactive Practices, 2003.

REVISTA COLETA
Científica
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DOI: 10.5281/zenodo.4737550
ARK: https://n2t.net/ark:/24285/RCC.v1i1.3 2

Martins, TA (2007). Implementation of restorative justice through special criminal courts. *Magazine of Law Students of the University of Brasilia* , *6* . https://periodicos.unb.br/index.php/redunb/article/view/20428

Mirabete, JF (2005). *Criminal Law Handbook* **.** General part. 22nd edition. Sao Paulo: Atlas.

Oliveira. A. (2000). *Human Rights Course* **.** Rio de Janeiro: Forense.

Paladino, C. de F. (2017). Minimalism, abolitionism or guaranteeism: what is the solution to problems in the criminal sphere?. *Law School Notebooks* , *2* (13).

Paz, SS & Paz, SM (2005). *Restorative Justice:* Collection of articles **.** Brasilia: Ministry of Justice and United Nations Development Program - UNDP.

Queiroz, PS (2007). *Why I support a minimum criminal law* **.** December 5, 2007. Available at: <http://pauloqueiroz.net/por-que-defendo-um-direito-penal-mínimo > Accessed on November 13, 2017.

Ramos, MF (2017). SGHC Accounting Fees. *Revista Coleta Científica* , *1* (1), 01–16.

Slakmon, C., Vitto, RPC & Pinto, RSG (2005). *Restorative Justice* **.** Collection of articles **.** Brasilia: Ministry of Justice and United Nations Development Program-UNDP, 2005.

Sica, L. (2007). *Restorative justice and criminal mediation:* The New Model of Criminal Justice and Crime Management. Rio de Janeiro: Lumen Juris. 2007.

Teles, NM (2004). *Criminal Law:* General part **:** articles 1 to 120.volume 1. São Paulo: Atlas.

Zaffaroni . ER & Pierangeli, JH *Handbook of Criminal Law* **.** General part 3. 3rd edition. São Paulo: Magazine of the courts.

Zehr, H. (2005). *Changing Lenses:* A new focus for crime and justice Scottdale: HeraldPress, 2005.

REVISTA COLETA
Científica
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# The foundation of the metaphysics of the doctrine of right in Kant

## Background of the doctrine metaphysics of law in Kant

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**Abstract**
The theme of this article is: The foundation of the metaphysics of the doctrine of right in Kant. The following problem was investigated: It is considered that the role of the philosopher has fallen into disuse, how can a will be free, while being submissive to the ethical and moral conditions of the norm? The following hypothesis was considered: This freedom defended by the philosopher may depend on the possibility for its existence to be possible, being free if it depends on the determination of compliance with the laws. The general objective of this work is to analyze how the philosopher, faced with contradictions, will develop rational solutions for submission to the ethical and moral conditions of the norm. The Specific Objectives of this work are: to analyze the supreme principle of morality; moral action and the concepts of reason and highlight the metaphysical character of both morality and law, addressed by Kantian works. This work is important from an individual and collective perspective, because in the introduction to the study of Law, Philosophy appears as a foundation and as the years pass within the legal and academic life, the norm goes more and more against custom, entering the individual compass. This is a theoretical qualitative research lasting six months. In concluding the study on the issues that underlie the metaphysics of morals, Kant no longer mentions the anthropological dualism, man as nature and reason, by sustaining the idea that starting from the rational, intelligible world, the human will will be free and overlap over all the influences of sensible nature.

**Keywords:** Moral. Virtue. Right. Metaphysics. Freedom.

**Resumo**
O tema deste artigo é: A fundamentação da metafísica da doutrina do direito em Kant. Investigou-se o seguinte problema: Considera-se que o papel do filósofo caiu em desuso, como uma vontade pode ser livre, sendo ao mesmo tempo submissas as condições éticas e morais da norma? Cogitou-se a seguinte hipótese: Esta liberdade defendida pelo filósofo pode depender da possibilidade para que seja

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possível a sua existência podendo ser livre se depender da determinação da conformidade com as leis. O Objetivo geral deste trabalho é analisar como o filósofo perante as contradições desenvolverá soluções racionais para submissão às condições éticas e morais da norma. Os Objetivos Específicos deste trabalho são: analisar o princípio supremo da moralidade; a ação moral e os conceitos da razão e destacar o caráter metafísico tanto da moral quanto do direito, abordados pelas obras kantianas. Este trabalho é importante em uma perspectiva individual e coletiva, pois na introdução do estudo do Direito a Filosofia aparece como fundamento e ao passar dos anos dentro da vida jurídica e acadêmica a norma vai cada vez mais contra o costume, entrando no compasso individual. Trata-se de uma pesquisa qualitativa teórica com duração de seis meses. Ao concluir o estudo sobre as questões que a fundamentam a metafísica dos costumes, Kant no mais faz menção ao dualismo antropológico, homem como natureza e razão, ao sustentar a ideia que parte do mundo racional, inteligível, a vontade humana será livre e se sobrepõe sobre todas as influências da natureza sensível.

**Palavras-chave:** Moral. Virtude. Direito. Metafísica. Liberdade.

**Introduction.**

The theme of this article is limited to the issue of the foundation of the metaphysics of law developed by the philosophical idea of Immanuel Kant. It becomes the objective to try as much as possible to elaborate the doctrine within the metaphysics of law. These who must arrive at the assumptions of values and morals, for the right. We will understand and consider certain aspects. Elements that are elaborated by the form that make us reflect and question about the essential objections proposed by Kant. That possibly justice may arise, when performed immediately, as long as this action stems from the human being. Therefore, freedom and its historical context as a process of reason must be verified, such as the deep relationship between reason and freedom.

The studies worked by Kant on morality and law are developed in the works elaborated by the philosopher. However, it stems from among the last works published by Kant, referring to the philosophy of development, which is specific to the numerous ideas about law and morals, which formed a theoretical and vast content about what is intended to be addressed (Pereira, 2011).

This article proposes to answer the following problem: It is considered that the role of the philosopher has fallen into disuse, how can a will be free, while being submissive to the ethical and moral conditions of the norm? The transcendental moral for Kant refers to the term of knowledge that is not attributed to objects. Kant uses the adjective transcendental in the sense of attributing a condition for it to be an object of knowledge. This way of transcending the obvious is characterized by the object, and suggested for morality. It is considered that there is the possibility of

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transcending the representation of morality, as Kant realized in his observations and studies ( Kant, 1980).

Analyzing some steps of Kant, which he intends to base the metaphysics of law, in order to reveal the necessary needs that the philosopher had in unraveling the essentials of the philosophy of reason. Initially, it can be said that throughout the chapters it will become clearer, that Kant did not intend only to theorize on the subject, but to develop constructions that reveal the genius behind a philosopher who will discover the man who from his nature possesses his rationality as an ally, participating in phenomena that produce effects far beyond those desired. Conditions that will guarantee the dignity of the positive foundation of the law. For, man has freedom not because he is rational, but because of what he represents for humanity, he has progressed with a positive character if harmoniously led to the universality of his reason, due to his own will to be free. In this way, the role of coercion and its necessity for law will be studied (Kant, 2013).

The hypothesis raised against the problem in question was: The freedom defended by the philosopher may depend on the possibility for its existence to be possible and may be free if it depends on the determination of compliance with the laws. For Kant, the representation of morality should not be based on issues arising from subjective and biased emotions, which dialogue very well with the transformations that will be driven by the senses. Therefore, actions that result from emotions, even if they are noble, such feelings are being interfered with and their moral action will be compromised. This phenomenon in the philosophical conception stems from the fact that morality must be objective and rational, which must be free of any interference so as not to tarnish its validity (Marcondes, 2009).

Its basis and purpose for the philosopher is to seek representations of principles that go beyond conventional moral reality. New foundations must be found that can express morality, which, when new theoretical objections are made, will be able to build a new gravitational axis of that elevated reason that expressed the senses. These that lead you to erroneous solutions, illusions that deceive rational data and let yourself be carried away by them, obstructing the search for true data. Reason in its role must provide truly pure information, which will be necessary for the search for universal truth. Therefore, morality must be seriously imposed (Almeida, 1997, & Nahra, 1995).

The general objective of this work is to analyze how the philosopher, faced with contradictions, will develop rational solutions for submission to the ethical and moral conditions of the norm. The philosopher considers that the action was not practiced either by duty or by inclination, therefore, it only had the selfish intention of the author who had the intention of generating results for himself. The merchant's

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action in acting is immoral in accordance with moral duty, he acted only with duty and not in favor of reason (Kant, 2014).

For Kant, the foundation of the will has freedom as a concept, which without this understanding would not be able to understand freedom. This freedom is caused by the actions of living beings, provided they are rational. Its freedom is considered to be particular to causalities. Therefore, what makes man free is the autonomy that freedom has in relation to his will, which has the power to guide certain determinations endowed by reason. However, it is from the moment that the practical reason that gives freedom to man is submitted to the laws. It is noteworthy that man's freedom arises from the moral law, a fundamental circumstance for the ability to self-legislate (Saunders, et al., 2009).

The Specific Objectives of this work are: to analyze the supreme principle of morality; moral action and the concepts of reason and highlight the metaphysical character of both morality and law, addressed by Kantian works. Kant lurks that even reason is capable of understanding the principle of universality. The philosopher has as his idea the false promise of the man who makes it to take advantage of his own vulgar reason. Supposing that someone is extremely difficult and to overcome them decides to think of a promise, then has the intention of not fulfilling it. He who has promised to act with due prudence, will not make the false promise for fear of future consequences, not very favorable that may arise. Even with all the appropriate information, it cannot be said that the author of the promise was acting out of good morals. However, if the subject intends to get around the situation and wants to be sincere out of duty, for Kant, he states that it is enough for the subject to question himself to arrive at an answer (Kant & Rohden 2015).

According to Kantian thought, his ideas intend to build a moral system based on reason as a human foundation. Man takes reason as an essential substance for his actions, therefore, having as scope the law that becomes morally valid as an elaborate basis of the obligation of the necessity of being. Kant a priori classifies reason, vulgar or not, reason that has such principles in its production is closely linked to knowledge. It is not necessarily based on experience alone, in order to know and acquire pure reason aimed not at the will to act, it is based on the principles of human action, or merely on laws that are validated by morality, reason that has rules generated by morality is given by principles of pure and practical reason. Within the context, this purity is attributed to the rule of practical reason, related to man's action without the real interference of feeling, avoiding his inclinations that can harm pure thinking ( Kant, 1980).

This work is important from an individual and collective perspective, because in the introduction to the study of Law, Philosophy appears as a foundation and as the years pass within the legal and academic life, the norm goes more and more

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against custom, entering the individual compass. The works that will be highlighted by reason, such as what will be given by the supremacy of reason on the sensitive issues of the human being, based on fundamental characteristics constructed by the philosopher's thoughts. The freedom that is also treated as one of Kant's principles, but that is given as a certain condition of morality and law. Referring to the being that was given this condition, and that will be subject to morality and law, which is taken for granted and will be guaranteed by freedom. Therefore, the study will present the importance of philosophy that addresses law as a means of building a metaphysics that can understand the coexistence between the subject and the choices he makes.

For the elaboration of this article, the type of research used was the descriptive bibliographical one, having as research method the treatment of qualitative data of secondary nature, using as research instrument books, doctrines, articles and defended theses originating from the key words: Moral. Virtue, Right, Metaphysics, Freedom. Being made the analysis regarding the Metaphysics of Morals; Metaphysical foundation of morals; The concept of law in the philosophy of Immanuel Kant. This literature review research has an estimated time of six months. In the first and second month, a survey of the theoretical framework was carried out; in the third and fourth month, the literature review; in the fifth and sixth month, the elaboration of the pre-textual and post-textual elements that make up the entire work.

As stated by Gonçalves (2019a), the literature review consists of the perspective of bringing public bibliographic data as an instrument of reflection on a subject that is intended to be debated or dialogued. Qualitative research treats the collected information with analysis of all the nuances allowed in it (Gonçalves, 2019b).

**The foundation of the metaphysics of the doctrine of right in Kant.**

Within the concept of goodwill as pointed out by HEIDEGGER, (1996 p.192), the philosopher thinks of countless associations, which in their first impact can be considered good, but when revisited can be bad, and not strictly good. Both can contain qualities or not. And without a deep understanding of a spirituality, it may affect the ability to judge certain issues, which will influence the courage of the decision and its purpose. Therefore, it can have a detrimental effect on its character of judgment, which will be given by the will of those who made use of these means. The individual will be merely bad character. In certain cases, even those who make use of these superior gifts must be discerned, and cannot be considered good, if by chance they do not have the good will to act ( Kant, 1980).

The action taken on the basis of duty has its moral value, and has not been developed as a purpose of the means to which it should be given. However, it should be given in determining the maxim. Without depending on the object that determines

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who has some purpose, whether this is the real purpose of their action, however, it depends on the principle of wanting the action practiced with good will (Kant, 2013a & Lyra, 1986).

Kant exemplifies that, the cold blood of the criminal not only makes him much more dangerous but also immediately makes him even more abominable in our eyes than we thought he was without it (Kant, 2011).

The need for the duty of an action out of respect for the law, has as its object the effect of the action, which, when proposing its realization, may indeed feel an inclination, but never respect, as it is nothing more than an effect, it is not considered an activity of the will. In this way, respect cannot be subject to any inclination, even if that inclination is in general, whether it be of the being or of another, it may at first approve in the first case, and in the second case love it. Considered as favorable to man's own interest (Saunders, et al., 2009).

The philosopher considers that the action was not practiced either by duty or by inclination, therefore, it only had the selfish intention of the author who had the intention of generating results for himself. The merchant's action in acting is immoral in accordance with moral duty, he acted only with duty and not in favor of reason (Kant, 2014).

Kant (2013b, p.81) when discussing the preservation of life observed the man who, many times when preserving life, preserved according to duty.

It occurs with the emotional state of man, who has been happy to remain attentive to maintain the preservation of life. However, the man who is not happy tends to lose all his enthusiasm, he does not see the meaning in life for being in that situation, but with a lot of effort he tries to act with duty to preserve his life. The man who performs with charity and without benefiting, as long as it is not due to bad intentions, but for the simple satisfaction of finding happiness in doing good, will be considered a man of value, however, his action should not be confused as a duty. This situation is not considered a duty, but a personal characteristic of the need to generate the good deed. However, he who helps the miserable and needy and has no feelings for them, but still acts helping others, without showing feelings. This subject acts for moral duty or for the action that will result in the moral value of the man, even if, without interest, his action is in line with the morality of the human being (Kant, 1980 & Chaui , 2000).

It is understood that to act in order to have value, it must be practiced according to duty and it is not enough to be practiced simply by duty. Man must act for moral value. Even the one influenced by the feeling stems from the pathology. For Kant (2014, p.51), action is only exercised directly by reason, a moral action that depends exclusively on the rational being to be put into practice. The philosopher demonstrates the supremacy of reason through two situations: a patient who can

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freely and spontaneously choose the pleasure of the meal, who can either influence the effects of the symptoms or renounce his own happiness in his favor; the other situation concerns religious love, which commands its unconditionality and even attributes it to its enemies. In the first situation raised by Kant, the existence of having by the individual is defined by an ordering of choice, therefore the individual simply wants to have something to satisfy his desire, regardless of what results, whether negative or positive. The second situation concerning love is for Kant:

> Love as an inclination cannot be ordered, but doing good out of duty, even if we are not led to it by any inclination and even if a natural and invincible aversion is opposed to it, is a practical and not pathological love, which resides in will and not on the tendency of sensibility, on principles of action and not on languid compassion, it is only this love that can be ordered (Kant, 1980).

The definition of freedom has two aspects: one negative, inasmuch as it arises from the natural necessity, or cause of all irrational beings to be determined to be fully influenced by external and extraneous factors; and positive, it follows from this same freedom that, as a concept of causalities, it obtains the laws of pure practical reason. What presupposes freedom is the ability to determine oneself by will and choose or not to obey the laws, which was observed in the freedom that has morality as theft ( Kant, 1980, Kant, 2003).

However, it would be impossible to think rationally with just one's own conscience, even if one could receive a guide from elsewhere that concerns one's own judgment. To whom the subject must assign this faculty of judging, reason, if given to impulse, the subject must consider the author of the decisions he makes, even if influenced by strange factors, which through practical reason must consider himself free of himself. Therefore, such a will is under the light of the idea of freedom, to which Kant suggests that it be attributed in a practical sense, that will that exists in all rational beings (Beckenkamp, 2003).

The will that flows through the capacity to decide is a source of power that is contrary to the law of reason itself. For Kant, the will does not recognize this freedom as true. Now, the action that stems from morality may have had its ability to act without having been led by the sensitive inclinations of nature. It understands that the natural aspects of man are not eliminated, but only left aside, because they are subject to the will. Therefore, human discretion is given by the decision of the will and is a form of power, which can be conducted by pure reason or moral law. Animal discretion, different from man's, results from choices made by certain inclinations ( Lebrun, 2002 & Peres, 1988).

Concepts of autonomy, freedom and will are interconnected when given by Kant. However, these concepts are only constituted when human beings take reason

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by nature. Freedom is presupposed by autonomy, since, to be autonomous, man must transcend the causal determinations of nature so that he can create a subject, with the capacity to produce other types that do not only result from nature. Kant, states that only in this way will it be possible to understand Kantian morality itself (Rohden, 1891).

Doubts that were only remedied with the critique of pure reason, second part, of 1787. The thinker resorts to the division of man, as a phenomenal being, sensitive and of appearance, and as a nominal being, an intelligent being. In the case of the phenomenal being, this is favorable to the causality of the experience susceptible to sensible inclinations. The nominal being, part of reason, where there is the cause of understanding proper to freedom. Now, man is nature and freedom, and when man acts morally, his action is the cause of other causes, that is, he acts as the creator of the law to which he submits, he intends to affirm freedom as morally produced causality (Kant , 2002).

Therefore, the action of the man who creates the legislation, as long as it stems from morality, is absolutely free from any sensible affectation caused by nature. However, freedom is the ability to initiate an action, as long as it overcomes the natural inclinations of man, even if it can also mean the will, since it is the cause of rational beings. It has freedom as a foundation that is subject to morality (Peres, 1988).

Kant in the metaphysics of morals begins the introduction to the doctrine of right. According to the philosopher, the doctrine of right is called the sum of all the laws for which an external legislation is possible (Kant, 2003).

For Kant, regarding external legislation when dealing with the doctrine of law, it will be formed later with positive law. Therefore, it is possible to distinguish between two currents: natural law and positive law. Although it defines law as positive law. The philosopher establishes a positive sense of the legality of the law that is established in written form. But, what defines for the philosopher as the foundation of law is reason, this element is necessary for its determination as a source of law and freedom (Almeida, 2006).

Kant makes it implicit when he states about what is called the doctrine of right, such that, for the right to be able to legislate externally, it must guarantee the freedom of the subjects. The law will only be possible if it supports an external legislation that is based on the coexistence of freedom. For it is possible that laws can be created within an external institution that deeply guarantees freedom. Therefore, the states have the capacity to legislate, and will be called laws of law in order to seek the preservation of the essential of the human being ( Kant, 2003).

For the philosopher, it presents the law as the sum of the laws that will be contextualized in the external legislation. Part of this understanding for some

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concepts of legal science. It states that the jurist is the one who has an understanding of the law and, instructed in the laws, also learns to apply the laws of law, and during its application acquires knowledge that underlies the legal practice. This aspect of law arises and gives rise to the legal prudence of those versed in law, supported by law. This prudent action becomes the means to make the best decision for the well-being of the human being. It emphasizes that from the rational subject, this should have the full capacity to say the right resulting from external legislation (Pavão, 2002).

The subject may be influenced by the freedom he has to act, such choices affected by impulses, even if they are not determined, will not be pure in itself. So it depends on the discipline of rational habit. The decisions of human discretion must be based on rationality and not on natural sensitivity, if it is independent of this discretion, its meaning will be negative in terms of the subject's freedom. The right that presents itself as the possibility of acting by reason obeying the law, or even the subject may transgress them, which does not lead to consider the duty derived from a good will. Negative freedom is the condition that man sought to decide rationally without the proper need to choose out of duty. However, positive freedom is due to an action of the will when it is a kind of cause belonging to a subject who, insofar as they are rational, this freedom is taken as a property of the cause that will make it fully effective, since it is independent of any foreign sensitive influence. This freedom will be autonomous, that is, freedom will have the property to be a law for itself due to the acquired rational habit (Kant, 1995, Kant, 1980).

For the philosopher, freedom is the basis for moral conduct, through motive it is seen as a universal law created by reason, which will serve as a mold to lead the being to act autonomously. This universal law is the categorical imperative, which imposes itself on rational subjects. This use should not be taken to achieve any purpose, it serves to guide the subject through practical reason. Feeling that the philosopher notes that the categorical imperative is expressed is an a priori proposition, or an imposition on the rational subject, its sensory dimension. The essence of the human being is established in morality as an autonomous source of the categorical imperative. According to Kant, the subject's condition of acting here makes use of the aforementioned universal law that would have the possibility of creating the idea of practical reason for himself. In this sense, the internal freedom of the moral subject, and the external freedom of the legal subject are ordered by the possibility that the subject has regarding his action, which must be in accordance with the universal law. Kant says that freedom is independent of coercion carried out by another will, insofar as it coexists with the freedom of all guaranteed by universal law. Originary right that belong to the subject due to its nature ( Kant, 2003).

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Universal law is the a priori support pillar of the morality that succeeds law. However, there is a distinction in terms of morality with regard to the motive of acting morally in reference to the legal motive, both can occur in some cases, since the subject acted for the moral that will be in accordance with the duty, the moral motive must respect the law. It differs from what happens in law, as there is the possibility that a law admits another motive that is not duty. However, legality does not limit the scope of law, even if objectively it is its orientation. Law will indirectly be moral in respect of legal duties, even if these are external, and established internally, such that it implies moral duty within the legal scope (Kant, 2003, Kant, 1980).

The categorical imperative does not prescribe any behavior that determines. Like the formal moral law. Universal law may arise before any empiricism arises. It is like the moral law, but the legal law is independent. You must not confuse the universal law with the positive law, rather the positive law informs you. The positive law is not perfect, based on the empirical nature, but its evolution will depend on the oppositions that arise from experience with the universal law, but even with the existence of these differences, both have something in common. The common law is taken as sources of morality, both follow the same broad sense that the faculty of reason has. Therefore, the existence of the difference between the moral imperative and the subject's internal need, that is, for morality, the law appears through the universal necessity that is present in the will of the moral subject, who will create an internal law for himself, without end or effectiveness. The external and effective legal imperative, the agent's action will be on external reality, the categorical imperative will be only one. Because it should be noted that the moral necessity and the realization of the legal imperative are not distant between them, but rather complement each other (Beckenkamp, 2003).

According to Kant, strict law is what is detached from ethics. Therefore, its external character requires no internal elements, no virtue is needed for it to be effective. It should be noted that there is an awareness on the part of the obligated subjects who are involved in the legal relationship, however, this awareness for it to be effective cannot be endowed with a motive, or it will not fulfill its legal role. However, what makes law effective is its ability to constrain the external. For example, the case of the creditor who fails to demand the right to collect. This will no longer be necessary for the right in the broad sense, for the simple fact that the creditor demands his right in the strict sense. The right follows the same understanding that belongs to the obligation, the subject in front of the right is obliged to comply with respect for the right, which he has as a way of obliging him through coercion. A question that alludes to the transcendental character of law, regarding the concept of reciprocal coercion, which agrees with universal freedom ( Silveira, 2002).

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For the philosopher, the case of this alleged right to equity refers to the fact that there is the possibility of a right without the existence of coercion. A balanced law endowed with a true claim within the law. Kant presents the case of the commercial society, through the terms of the contract they clarify that the profits must be divided in equal parts to the associates, however, if one of the partners works more and consequently generates more profit than the other partners, for the commercial society . the company will suffer setbacks, such that the partner that generated the most profit will also have a greater loss. This partner may, through equity, demand more than was proposed under the terms of the contract, even if this sharing is equal. In accordance with strict law, the claim may be rejected by the judge, who will not have at his disposal the knowledge of the information necessary to decide the value deserved by the partner. Another case would be the servant who received the annual salary, but the currency has devalued, as he no longer has the purchasing power to acquire what was stipulated at the beginning of the contract. The service continues to receive the amount stipulated in the contract, but the currency depreciates. However, if he decides to claim the right to be rewarded, the judge will be unable to grant this right, for the simple reason that the servant continues to receive the same amount stipulated in the contract. However, the value of the currency is no longer the same and none of this was specified in the contract, however, you can even claim compensation for part of the loss, provided that you claim the right of equity as a basis (Kant, 1980).

Kant's work that raises numerous debates among numerous scholars is about the foundation of the right of reason. Treated in the philosopher's Doctrine of Law, work that is based on the concepts and principles of a priori reason should not be questioned. However, what opposes it would be the validity of the normative and obligatory character of the principles that serve non-perfect rational beings. Kant states that within the debate raised by scholars, the fundamental question refers to the possibility or not of Law to seek its own concepts and fundamental principles that can theorize the morality that this was elaborated in its works, foundation of the metaphysics of customs and metaphysics of customs . Such that, it tries to present the foundation of the law in the moral theory – law that presupposes the moral theory and the principles that underlie it, the moral imperative. Since this will be the only way of interpreting the Doctrine of Law, if we do not wish to make the necessary observations and statements that may contradict the subject's own thinking. Any attempt to theorize about Kant's law on principles other than those of the author, based on pure practical reason, whether these principles are of mere understanding, or on principles of reason, will be considered contrary to the efforts that Kant had in elaborating the metaphysics of morals, as for the doctrine of law that will be part of it.

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Therefore, the works were respectively unraveled with the intention of demonstrating the trajectory from morality to law ( Kant, 1980).

In the first study of the work fundament da metaphysics, the supreme principle of morality is grounded, which will serve as a guide so that the subject, at the moment he must practice an action, can act with the intention of seeking a morally correct action. In this work, the formative concepts of the theory of morality are constructed. For Kant, the moral action of those who act out of pure duty will be in accordance with the law. Acting out of greater respect, which is out of duty to whom, the actions of the subject who acts in this way, will not be thought of or intended to be anything other than obeying the a priori law of reason. The law of duty is inherent in all beings endowed with rationality. The duty possessed by the subject must be perceived to be established by the principle of morality, as well as the metaphysical character of the science of morality and law, since what he can understand in relation to duty will result in the transcendental elaboration. In this way, the rational subject, when putting into practice the mechanisms of reason itself, will be able to recognize the moment when he acts morally good.

## Final considerations

In the work fundament da metaphysics of morals, the treated concept of duty underwent an evolution, the philosopher worked on other concepts that formed the moral identity. Concepts also worked on, such as goodwill and the categorical imperative. So that they can be analyzed, it is necessary to elaborate the proper correlation with the principles of autonomy of the will and freedom, these that with the proper understanding will form the architecture of morals in Kant. The perspective about the construction of the present approach will be unviable to not observe the role that the reason is seen on the natural aspects of the human being. Therefore, it will be a condition determined by the foundation of morality, which must be abstracted from its structure, which is independent of the condition and root, of empirical data.

When contemplating pure moral philosophy, which is free of any empirical contingent factor, the philosopher constitutes reason as the absolute source of the moral law, which he sees represented by the idea of duty, and in its last instance provides the presentation of a morally good act. In this context, freedom stands out, since morality is only possible to the extent that reason determines, by itself, unconditionally, what must be obeyed within the circle of human action.

In the moral elaborated by Kant, duty is the need that the subject has in relation to his own action that he has in respect of the moral law, deliberates a priori by reason, an absolutely necessary law and with the due universal character of actions that oblige the subject to act according to a maxim expressed by the will of

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desire to become a law, which has validity for all others. Kant says that every individual who has a good will will be able to arbitrate and choose the best rule for himself and for everyone.

Within this sphere, the conception of the moral law that will insert the categorical imperative, which is different from the other concepts, does not deal with the matter of action, but with the way in which the action takes place. As a result of this, the categorical imperative will be able to find the law that has necessary validity and that does not depend on a condition, an objective law that will serve the scope in general.

In concluding the study on the issues that underlie the metaphysics of morals, Kant no longer mentions the anthropological dualism, man as nature and reason, by sustaining the idea that starting from the rational, intelligible world, the human will will be free and overlap over all the influences of sensible nature. For, it will be able to strengthen the metaphysical character of the Kantian moral.

In another work, he studies the metaphysics of morals, the philosopher refers in particular to the science of law, which has a transcendental character of legal science. The title given to the matter of the metaphysical principles of the doctrine of law will be perceived. Circumstance that legally elaborated this universality since it is necessary, as proposed by Kant, but that this elaboration will only be possible if it respects the rational foundations, a priori. A condition that stems from this science of law that will not be established by the world of nature or empiricism.

So that the subject can understand the law, he must have a full understanding of the concept of will, as a determining factor of the ability to choose. This concept understands that, as well as freedom, it is fundamental for the constitution of the philosopher's rational system. In this way, it must be understood that the metaphysical right that, when constituted, will be able to abstract itself from the natural and sensitive dimension of the subject.

Supported by anthropological dualism, Kant solidifies the interrelationship between the concepts of will, discretion and freedom. In view of this, man will belong to the natural world who will be subject to the various influences, but as long as he is part of the intelligible world he will be able to choose according to what determined his reason, even when the will submits to the laws of reason and will elevate the subject to a duly free being, one who will make his choices because he is actually free. Therefore, the natural elements of man are not eliminated, but will be subjected to the will and arbitrariness of the human being. When the choice is given, the actions will be external and may require only what is in accordance with the law, the subject will act in the field of the norm, however, on the contrary, when the choice is guided by internal issues of the human being, the actions will take place in respect of morals.

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For Kant, with regard to the difference between morality and law, he initially understands the motive of action. In this way, the law will act due to pathological inclinations, while with regard to morality, it will act out of respect for the law. Such that, it will make use of the external elements, for the law and, internal, for the moral, mentioned in the previous paragraph. But, doing one, it is observed that morality can consider both internal and external factors related to what motivated them. In this way, it will be possible to understand that morality, even if it cannot embarrass, the contract must be honored, regardless of time or errors that occur throughout the process.

It is argued that the insufficiency of morality as a factor that enables sociability, precisely because it believes that only the internal elements of human action could be sufficient. They are not. For this reason, limits were given to morality, Kant suggests law and adds coercion to it as an aspect that singles it out from morality. As the concept of freedom is the main element of moral and legal. Law is only possible when it is reconciled with coercion and freedom. Therefore, to be free is to be at the same time submissive to the norm. That for Kant, it will be all that add up to the conditions under which the subject's choice can be inserted into the choice of others, provided they are in accordance with a universal law. Therefore, the law is the simultaneity of the wills of imperfect rational individuals.

Therefore, the law has the coercive power conferred on it and which gives it the status to guarantee life in society. However, for the philosopher, coercibility is only seen as fair when freedom is threatened by the freedom of the other individual. It is understood that coercion will be fair. Finally, it is emphasized that the Law is directly linked to the competence to apply coercion. Therefore, the existence of a power that has legitimacy to exercise such competence is admitted, which will be practiced by civil society.

## References

Almeida, GA de. (2006). On the principle and universal law of right in Kant. *Kriterion: Journal of Philosophy* , *47* (114), 209–222. https://doi.org/10.1590/S0100-512X2006000200002

Andrade, AC (1998). The relationship between morality and law in Kant. *Notebooks of German Philosophy: Criticism and Modernity* , *0* (4), 65. https://doi.org/10.11606/issn.2318-9800.v0i4p65-79

Almeida, GA (1997). *Freedom and morality according to Kant* . Ed. Analytica, *2* (1).

REVISTA COLETA
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(CC BY 4.0) | ISSN 2763-6496
DOI: 10.5281/zenodo.4741021
ARK: https://n2t.net/ark:/24285/RCC.v1i1.3 4

Casey, ES (1997). *The Fate of Place: A Philosophical History* . University of california press.

Caygill, H. (2000). *Kant dictionary* . Translation by Álvaro Cabral. Rio de Janeiro: Jorge Zahar.

Cenci, AV (2000). *Themes on Kant, metaphysics, aesthetics and political philosophy* . Philosophy Collection. Porto Alegre. EDIPUCRS.

Chaui, M. (2000). *Invitation to Philosophy* . Sao Paulo, Attica.

Gonçalves, JR (2019). *Literature Review Article Handbook* **.** Brasilia: Processus.

Gonçalves, JR (2019). *Research Project Handbook* **.** Brasilia: Processus.

Heidegger, M. (1996). *Kant and The Problem of Metaphysics* . Translation by Gred Ibscher Roth. Mexico, Fund for Economic Culture. Second Reprint.

Japiassú H., & Marcondes, D. (2001). *Basic Dictionary of Philosophy* . 3rd Ed revised and expanded. Rio de Janeiro: Jorge Zahar.

Kant, I. (2003). *The Metaphysics of Morals* . Edson Bini translation. Sao Paulo: EDIPRO.

Kant, I. (2002). *Critique of Pure Reason* . Translation and notes by Valerio Rohden. Sao Paulo: Marfins Fontes.

Kant, I. (2013). *Critique of Practical Reason* . Translation Afonso Bertagnoli. Rio de Janeiro: Saraiva.

Kant, I. (2013). *Doctrine of Right* . Translation Edson Bini, 4th Ed. Sao Paulo: Icone.

Kant , I. (1980). *Foundations of the metaphysics of morals* . In: Selected texts. Selection of texts by Marilena de Souza Chauí; translation by Tânia Maria Bernkopf and Paulo Quintela and Rubens Rodrigues Torres Filho. Sao Paulo: Abril Cultural.

Kant, I. (1992). *Logic* . Translation of the original text established by Gottlob Benjamim Jasche by Guido Antônio de Almeida. Rio de Janeiro: Brazilian Weather.

Kant, I. (1995). *The Progress of Metaphysics* . Translation by Artur Mourão. São Paulo, Editions 70.

Kant, I. (2014). *Metaphysical Principles of the Doctrine of Right* . Translation and introduction by Joãosinho Beckenkamp, São Paulo, Martins Fontes.

REVISTA COLETA
Científica
Year 1, Vol. I, n.1, Jan.-Jul., 20 17
(CC BY 4.0) | ISSN 2763-6496
DOI: 10.5281/zenodo.4741021
ARK: https://n2t.net/ark:/24285/RCC.v1i1.3 4

Kant, I & Rohden, V. (2015). *Critique of Practical Reason* , Ed. Martins Fontes, 2nd Ed.

Lebrun, G. (2002). *Kant and the End of Metaphysics* , Ed. Martins Fontes.

Lyra, RF (1986). *Disorder and Process* – Studies on Law in homage to Roberto Lyra Filho. Porto Alegre, Sergio Antonio Fabris Editor.

Marcondes, D. (2009). *Basic Texts of Philosophy* – From Pre-Socratics to Wittgenstein. 6. Ed. Rio de Janeiro: Jorge Zahar.

Merleau-Ponty, M. (2013). *Phenomenology of perception* (0 ed). Routledge. https://doi.org/10.4324/9780203720714

Mosque, JF (2014). *The concept of civil society in Kant* **,** Graduate Program in Philosophy (Master in Philosophy). Faculty of Philosophy and Human Sciences Pontifies Catholic University of Rio Grande do Sul, Porto Alegre, RS.

Nahra, CML (1995). *The categorical imperative and the principle of coexistence of freedoms* **.** Ed. Beginnings, Christmas, (3).

Pereira, VM (2011). *The point of view of freedom* : the Kantian and hermeneutic critique of AUFKLÄRUNG. PPG academic week in philosophy at PUCRS – VIII edition, Porto Alegre, 2011.

Perez, DT (1998). *Categorical imperative and doctrine of law* . German philosophy notebook, 4.

Peacock, A. (2010). Transcendental freedom and practical freedom in the critique of pure reason. *Synthesis: Revista de Psicologia* , *29* (94), 171. https://doi.org/10.20911/21769389v29n94p171-190/2002

Rohden , V. (1891). *Interest of reason and freedom* . Sao Paulo: Attica.

Saunders, C. et al., (2009). *How to Study Philosophy:* Practical Guide for Students, 2009, Ed. Artmed, 1st Ed.

Singer, P. (2005). Ethics and intuitions. *The Journal of Ethics* , *9* (3–4), 331–352. https://doi.org/10.1007/s10892-005-3508-y

Silva, AF (2005) *The concept of law in the philosophy of Immanuel Kant.* 103f. Dissertation (Academic Masters in Philosophy) - Humanities Center, State University of Ceará, Fortaleza.

REVISTA COLETA
Científica
Year 1, Vol. I, n.1, Jan.-Jul., 20 17
(CC BY 4.0) | ISSN 2763-6496
DOI: 10.5281/zenodo.4741021
ARK: https://n2t.net/ark:/24285/RCC.v1i1.3 4

Silveira, FL da. (2002). Kant's theory of knowledge: Transcendental idealism. *Caderno Brasileiro de Ensino de Física* , 28–51. https://periodicos.ufsc.br/index.php/fisica/article/view/10053

Earth, R. (2004). *Kant & the Law* . Rio de Janeiro: Jorge Zahar.

Trevisan, DK (2014). *Meanings of metaphysics in Kant's critical philosophy* .

Zapero, D. (2016). La doctrine kantienne du Faktum de la raison et la justification de la loi morale. *Archiv für Geschichte der Philosophie* , *98* (2), 169–192. https://doi.org/10.1515/agph-2016-0008