

# INTRODUCING CONSENSUAL CRIMINAL JUSTICE IN BRAZIL

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**Abstract:** This article of law review makes a comparative study between the criminal systems of Brazil and the USA. Using the functional method focusing on similarities between the criminal legal systems of Brazil and the United States. It first examines the North American system, which is based on popular participation in the administration of justice and the consensual truth. The article reviews the principles of due process and substantive legal process from judicial interpretations of the US Supreme Court. This system has allowed the US 95% of criminal trials are resolved through negotiation between prosecution and defense, which makes the system faster, efficient and democratic, for allowing the accused to participate in the decision on the criminal sanction that will be reckoned. Finally, the author criticizes the Brazilian legislation, which from the Act n. 9099/95 introduced the consensual truth in the Brazilian criminal system to crimes punishable by up to two years in prison. The article proposes the extension of this legal institute for any type of crime.

**Keywords:** Consensual criminal justice. Comparative law. Due process. Substantive due process.

**Summary:** 1 Introduction – 2 Common Law and Civil Law – 3 Procedural due process of law in US criminal justice system – 4 Due process of law in the Brazilian criminal system – 5 Introducing consensus in the Brazilian criminal justice system – 6 Conclusions – References

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## 1 Introduction

*Nothing weakens more a government than it disrespects its own rules.*

(Judge Clark)<sup>1</sup>

Brazil and United States adopt different law family. Brazil is connected to the Roman-Germanic system, which was founded in a tradition that follows the Enlightenment Age thinkers and operates with legal codes legitimated by the Legislature, with emphasis on inquisitive prosecution that measures the real truth or the material one. United States is connected to the common law system – except in Louisiana that follows the Civil Law – focuses on the popular participation on the administration of justice and concentrates the power legitimation on consensual negotiation of truth.

American Constitution is quite synthetic and contains more principles than rules. However, by December 15<sup>th</sup>, 1791, It were approved ten constitutional amendments establishing fundamental rights, well known as the Bill of Rights, and those amendments is considered an actual criminal prosecution code.

This article makes a comparative study between the criminal systems of Brazil and the USA, trying to find similarities between both systems. Using the method of comparative approach and a bibliographical and documentary revision.<sup>2</sup>

This essay intends to expose a brief remarks on Common Law and Civil Law (Roman-Germanic) to compare the procedural due process of law in Brazilian and United States, to identify similarities and peculiarities between the this systems, specifically the introducing of the consensual criminal justice in Brazil.

## 2 Common Law and Civil Law

*The history of the North American freedom is the history of the prosecution.*

(David J. Bodenhamer)<sup>3</sup>

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<sup>1</sup> See SUANNES, Aauto. *Os fundamentos éticos do devido processo penal*. São Paulo: Revista dos Tribunais. 1999, p.123.

<sup>2</sup> See DELGADO. Richard. How to write a Law Review Article *Revista do Programa de Pós-Graduação em Direito da Universidade Federal da Bahia*. v. 24, n. 26, 2014. <<https://portalseer.ufba.br/index.php/rppgd/article/view/11718>>.

<sup>3</sup> ROBERT, G. Mccloskey. *The American Supreme Court*. 2. ed. The University of Chicago Press, 1994, p. 01.

Common Law family is a legal tradition born in England in the XI century, created from precedents of the Westminster Courts, that subordinate directly to the King. We can not say It is English Law, for It is also adopted by Wales, nor It is United Kindom Law, for Scotland adopts the Civil-Law system, nor It is Anglo-Saxon Law, which refers to the customary rights of individuals and tribes of primitive peoples of England before the Norman Conquest in 1066.<sup>4</sup>

Nor can it be confused to Equity, initially applied by the courts of King's Chancellor, in order to temper the rigor of Common Law and addressing the some issues when there was no legal writ to solve some exceptional kind of conflits.<sup>5</sup>

Indeed, the historical origin of common law has roots in roman formulate procedure where distribution of justice was a prerogative which the kings granted to the judges.<sup>6</sup> Common Law means a right created by the court (judge-made-law) through the precedent (cases law), which is opposed to the Statute Law, where the law is created in general by legislators according Constitution.<sup>7</sup>

According to John Orth:

The judges made the common law in their decisions of individual cases. Not only did a decision in one case resolve a specific dispute, but it also provided a rule to guide the decision of other, similar cases.<sup>8</sup>

Initially one must keep in mind that in the U.S., the Federal Government and most of the member States adopt a mixture of Common Law and Civil Law system, with a written and rigid Federal Constitution, with supremacy over any other norm, even though the stare decisis is the main source of law.<sup>9</sup>

The Civil Law, in Its turn, was born in continental Europe from combination of various traditions that have emerged in different periods of history, such as Roman Law, Canon Law, Legal Science and Commercial Law.<sup>10</sup>

Its main features is a supra-legal constitutional text, the judicial review, the division between public and private law, predominance of written law and judicial

<sup>4</sup> DAVID, René. *Os grandes sistemas do direito contemporâneo*. São Paulo: Martins Fontes, 1998, p. 281.

<sup>5</sup> SOARES, Guido Fernando Silva. *Common Law: introdução ao direito dos EUA*. São Paulo: Revista dos Tribunais, 1999, p. 51.

<sup>6</sup> SÉROUSSI, Roland. *Introdução ao direito inglês e norte-americano*. São Paulo: Landy, 2001, p. 21.

<sup>7</sup> According to STRAUSS, David. *The living constitution*. Oxford University press, 2010, p. 33: Pick up a Supreme Court opinion in a constitutional case, at random. Look at how the justices justify the result they reach. Here is a prediction: the text of the Constitution will play, at most, a ceremonial role. Most of the real work will be done by the Court's analysis of its previous decisions".

<sup>8</sup> ORTH, John V. *Due processo of law: a brief history*. Lawrence: University Press of Kansas, 2003, p. 1.

<sup>9</sup> DAVID, René. *Os grandes sistemas do direito contemporâneo*. São Paulo: Martins Fontes, 1998, p. 363.

<sup>10</sup> BARBOSA, Estefânia Maria de Queiroz. *Precedentes judiciais e segurança jurídica: fundamentos e possibilidades para a jurisdição constitucional brasileira*. São Paulo: Saraiva, 2014, p. 67.

power restricted the interpretation and application of the Constitution and laws.<sup>11</sup> Is that while in England, the evolution of the law was given towards the development of rules on procedural actions, so that the absence of a writ for a given situation could result in the inability to say the right, continental Europe was more concerned with the statute law.

### 3 Procedural due process of law in US criminal justice system

In 1215, after the baronial revolt lead John Lackland to led the Magna Carta (*Magna Charta Libertatum Angliae Terrae*), a fundamental statute of English law.

The due process of law was the basic principles of its political and juridical structuring and It can be found in Article 39:

No free man is to be arrested, or imprisoned, or disseized, or outlawed, or exiled, or in any other way ruined, nor will we go against him or send against him, except by the lawful judgment of his peers or by the law of the land.

Unlike the English Law, American judges became increasingly assertive about enforcing due process of law.<sup>12</sup> The most important protection to personal liberty consists in a trial guaranteed to every person accused of committing a crime. The defendant has a presumption of innocence until proven that he is guilty.<sup>13</sup>

According to Justice John M. Harlan in the Case *Hurtado v. California*:

Thus the guarantees of due process, while rooted in the *per legem terrae* of the Magna Carta and regarded as procedural safeguards against the usurpation and tyranny of the executive, have also turned this country into a (real) barrier against arbitrary legislation.

Due process is a legal requirement that the state must respect all legal rights owed to a person. It protects the individual person from the government that shall following the exact course of the law to guarantee fundamental fairness, justice, and liberty.<sup>14</sup>

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<sup>11</sup> DAVID, René. *Os grandes sistemas do Direito Contemporâneo*. São Paulo: Martins Fontes. 1998, p. 93.

<sup>12</sup> According to ORTH, John V. *Due process of law: a brief history*. Lawrence: University Press of Kansas, 2003, p. 30-31: "In England, the land whose law gave content to the phrase 'the law of the land' and the nation where the demand for 'due process of law' was first sounded, the great phases failed to retain their validity".

<sup>13</sup> COOLEY, Thomas M. *A treatise on the constitutional limitations which rest upon the legislative power of the states of the American union*. New Jersey: The Lawbook Exchange. 1999, p. 309.

<sup>14</sup> MACIEL, Adhemar. *Informativo Jurid. da Biblioteca Min. Oscar Saraiva*, v. 6, p. 71-133, jul./dez. 1994, p. 85-86.

In the U.S. every crime is also considered an offense to the State. When it's a felony is charged a sentence of imprisonment to be served in a penitentiary or state prison, and in some cases the death penalty can be applied. But when it's a misdemeanor, is charged a penalty of imprisonment in reformatories or public jails.<sup>15</sup>

The criminal proceedings is regulated by constitutional rules and Federal Statutes edited by Legislature with help of the Executive (*Acts*) and by the Supreme Court through Federal Rules of Criminal Procedures. In member States the main source of criminal procedure are the State Constitutions, followed by the statutes laws, superior courts regulations and precedents.<sup>16</sup>

The rules of criminal law and criminal procedure in U.S. are not uniform. Its vary substantially in each member State, so that we can say that the only rule in criminal proceedings in the national States of the American Federation is the respect to a basic principle of democracy: the due process of law, while a compilation of rules that impose fundamentals rights of life, freedom, free will, locomotion, trial by a jury in serious crimes and respect for individual property.<sup>17</sup>

The roots of due process has origins in the "law of land" clause, inscribed on the *Magna Charta* from 1215. This document is considered one of the most important to the modern constitutionalism and became the main interpretation instruments to the Supreme Court in the U.S.<sup>18</sup>

The first statements of U.S. law occurred in 1776, resulting from the struggle of some colonies against the metropolis, than many authors see the influence of Declaration of the Rights of Man and Citizen declared by the French National Assembly on August 26, 1789.<sup>19</sup>

The first amendment deals with the freedom of religion, speech, press, assembly and petition. The Amendment II takes care of the right to bear arms,<sup>20</sup> the III's right to privacy, while the IV Amendment deals with the inviolability of residence in the face of search and seizure.<sup>21</sup>

<sup>15</sup> GORDILHO, Heron. A justiça penal consensual e as garantias constitucionais no sistema criminal do Brasil e dos Estados Unidos. *Anais do XVIII Congresso Nacional do CONPEDI*. São Paulo, 2009, p. 9424.

<sup>16</sup> *Ibid*.

<sup>17</sup> SOARES, Guido Fernando Silva. *Common Law*: introdução ao direito dos EUA. São Paulo: Revista dos Tribunais, 1999, p. 126

<sup>18</sup> This principle was first established by the I, II, III, IV, V, VI, VII, VIII, IX and X, Amendments, forming the so-called Bill of Rights. According to BARROSO, Luís Roberto. Princípios da razoabilidade e da proporcionalidade. In: SOARES, José Ronald Cavalcante (Org). *Estudos de direito constitucional*: homenagem a Paulo Bonavides. São Paulo: LTr, 2001, p. 320: "The principle of due process in the United States is marked by two major phases: the first, where it has a procedural due process, and a substantive due process, which became the foundation of a creative exercise of constitutional jurisdiction".

<sup>19</sup> BOBBIO, Norberto. *A era dos direitos*. Rio de Janeiro: Campus, 1992, p.113.

<sup>20</sup> In *District of Columbia v. Heller*, 554 U.S. 570 (2008), the U.S. Supreme Court held that the right to bear arms allows individuals to possess a handgun.

<sup>21</sup> Amendment IV – The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable

The Amendment V was the first to refer to due process of law, establishing an indictment of a grand jury in case of serious crimes; the right to a trial by jury in serious crimes, protection against double jeopardy and the right to silence (the impossibility of anyone being prosecuted twice for the same fact); the right to not be compelled to testify against himself and receive a fair compensation in cases of expropriation.<sup>22</sup>

The Amendment VI includes the principles of fair trial, such as: all defendant shall have the rights to a speedy trial by a jury of people living in the scene of crime; shall be informed of the contents of the indictment; shall be assisted by a lawyer; shall have the right to call witnesses and to confront adversarial witnesses.<sup>23</sup>

The VIII Amendment not allow excessive bail or fine or cruel and unusual punishment, while the IX Amendment states that all citizen have right to vote.<sup>24</sup>

In its origin such constitutional principles could only be invoked against federal authorities, but after the Civil War and the slavery abolition by the XIV Amendment , on June 16, 1866,<sup>25</sup> It was ratified by all Member States, on July 23 1868.<sup>26</sup>

Thus, the U.S. due process clause means a principle of interpretation of law and a biding norm, in federal and state levels, in order to guard the fundamental human rights such as protection against unreasonable searches and seizures invasive of privacy, requiring a warrant subject to confirmation of that cause (Amendment IV), the right to a trial by jury in serious crimes, protection against double jeopardy and

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cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

<sup>22</sup> Amendment V – No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

<sup>23</sup> The leading case was *Powell v. Alabama* in 1932, when the Supreme Court, at the request of the National Association for the Advancement of Colored People (NAACP), acquitted a group of black youths convicted of capital punishment for assaulting whites in the city of Scottsboro. At the time all the white defenders appointed to the case refused the charge, except for an inexperienced lawyer of 70 years, who did little for the accused, which is why the Court acknowledged the lack of defense of the defendants.

<sup>24</sup> Amendment XIX – The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of sex. Congress shall have power to enforce this article by appropriate legislation.

<sup>25</sup> Amendment XIV- Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

<sup>26</sup> US Supreme Court began to admit the invocation of due process clause also against state authorities after *Mapp vs Ohio*. *Dollree Mapp* was a lady who had her residence invaded by state police, who had a search warrant for illicit gambling machines, and not finding the machines, seized pornographic material that was unrelated to the motive. See *Mapp v. Ohio*, 367 U.S. 643 (1961).

the right to silence (Amendment V), the right to a speedy trial by jury made of where the event occurred, the right to be informed of the contents of the indictment, the right to be assisted or refuse a lawyer, right to adversarial witnesses and have witnesses on his behalf necessarily conducted (Amendment VI). Indeed, in the U.S. criminal justice system, after the arrest a person must be presented to a Justice official (so-called article III judge) for preliminary examination. This justice do not have the constitutional guarantees of magistrates but he can hear witnesses and gather circumstantial evidence, refuse the accusation (demissal) or fix a bill to preliminary investigations.

In addition, there are the exclusionary rules that can avoid a trial *ab initio* in cases of evidences obtained by invasive acts against personal liberty, unreasonable search and seizure or coerced confession. At the end investigations by the police, the Prosecutor may choose not to promote the prosecution in case of convenience of public interest, for the state should not take care of small things (*minima non curat praetor*).

In the United States, public prosecutors have the discretion to apply criminal laws in particular cases. A prosecutor can properly decide not to hold the prosecution if the offender is an inexperienced young man or family member, or if he repents or cooperates with the police, or if he is unpopular, impossible to enforce, or generally Disobeyed, or if the courts are overcrowded with more important cases, or for dozens of other reasons. This discretion does not mean abuse of liberty – promoters are expected to have good reasons to exercise it.<sup>27</sup>

If the prosecutor start a criminal prosecution, the defendant may take three paths:

a) As the right to trial by Grand Jury is optional, he can prefer to be charged directly by the public prosecutor, which will be able to bargaining the admission of guilty with a lower penalty.

This plea bargaining is essentially a negotiation between the prosecution and defendant, after the preliminary screen It is opens an opportunity for the suspect agree to a plead guilty. Then the judge may fix the date of the sentence.<sup>28</sup>

b) he can refusal the trial claiming for the “plea nolo contendere”, which authorizes a sentence as if he was guilty, but that sentence does not represent an admission of guilt nor serves as proof to other civil or criminal proceedings, due to protection against double jeopardy.

<sup>27</sup> DWORKIN, Ronald. *Levando os direitos a sério*. São Paulo: Martins Fontes, 2002, p. 316.

<sup>28</sup> See Robert E. Scott & William J. Stuntz, *Plea Bargaining as Contract*, 101 Yale L. J. 1909 (1992).

c) pleads innocent or remains silent. In this case occur the installation of a public trial and its procedures, which depending on the Member State deems the judge with or without the participation of the jury.

Since then the process is established by a criminal indictment against the suspect, who depending on the Member State may be made face a Grand Jury, made up of 25 lay judges with powers to hear witnesses and to order investigative measures, b) or directly to a judge, always bearing in mind that among the fundamental human rights that could lead to the annulment of the criminal appellate procedures, is the rights to an impartial Jury.

If the prosecutor presents his case before the Grand Jury, it may accept (indictment) or present a new charge (presentment) without considering the arguments of the prosecutor. The prosecutor can sue a new accusation directly to the judge (information).<sup>29</sup>

In case of indictment, presentation or information the judge shall appoint a trial date that begins with the formation of petit jury, usually formed by 12 lay jurors and its spokesman, to judge questions of fact and rendering a verdict in favor of innocence or guilty of the defendant.<sup>30</sup>

## 4 Due process of law in the brazilian criminal system

*But justice delayed is not justice, but qualified and manifest injustice. Because the illegal delay in the hands of the judge against the right of the parties, and thus the damages in equity, honor and freedom.*

(Rui Barbosa)<sup>31</sup>

In Brazil the principle of due process is provided in Art. 5, LVI of the Federal Constitution:

### Article 5

LIV. No one shall be deprived of liberty or property, without due process.<sup>32</sup>

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<sup>29</sup> CAMPOS, Gabirel S.Q. *Plea bargaining e justiça consensual: entre os ideais de funcionalidade e o garantismo*. *Revista Eletrônica do Ministério Público Federal*. Disponível em: <[http://www.prrj.mpf.mp.br/custoslegis/revista/2012\\_Penal\\_Processo\\_Penal\\_Campos\\_Plea\\_Bargaining.pdf](http://www.prrj.mpf.mp.br/custoslegis/revista/2012_Penal_Processo_Penal_Campos_Plea_Bargaining.pdf)>.

<sup>30</sup> *Ibid.*

<sup>31</sup> BARBOSA, Rui. *Oração aos moços*. São Paulo: Martin Claret, 2003.

<sup>32</sup> BRAZIL. Federal Constitution. 1988.



In fact, in Brazil as well the principle of due process is almost identical with the rule of law, and in a narrow sense is the guarantee that there will be no punishment without trial (*nulla poena sine iudicio*) in the broad sense is a kind of guiding principle of the whole system of judicial processes, as all his others are derived, such as the principles of publicity of procedural acts (inc. LX), the prohibition of evidence obtained by illegal means (inc. LVI), the prosecutor and the judge's natural (inc. LII), the contradictory and full defense (inc. LV), the presumption of innocence (inc. LVII), the right to silence and to be assisted by family and lawyer (inc. LXIII), not to be forced to confess under duress physical or moral (inc. XLIX) and a trial by jury in crimes against life (inc. XXXVIII).<sup>33</sup>

Notwithstanding, although the authors usually claim the origin of the American Institute, the principle of due process in Brazil is different in many aspects of that country, because there the same due process is an option of the accused, who is due state, a certain legal proceedings, including the speedy trial, which is a speedy trial, while in our system is mandatory and the trial of temporality predetermined.<sup>34</sup>

Indeed, while in the U.S. criminal justice system due process is a right available in Brazil dominates the principle of mandatory or compulsory, based on topical delicate manent impunity (crimes must not go unpunished), so that the police authority and the prosecutor are obliged, under penalty of the crime of dereliction of duty, and determination to promote the outbreak of the prosecution of any crime, can only fail so in cases of atypical impunity agent, procedural illegitimacy, immateriality of fact for lack of material proof of authorship or ignored, even so through the application filing or acquittal should be submitted to the judge.

In addition, proposed public criminal action, the prevailing principle of unavailability of the process, and the prosecution can not have it, transacting, giving up or agreeing with the defendant.

Nevertheless, from the force of Federal Act n. 9099/95, these principles have been mitigated cause the law called the special criminal courts allowed the transaction between criminal prosecution and defense in the offensive potential of minor crimes (those whose maximum penalty does not exceed two years imprisonment) for the application of alternative measures of deprivation of rights that eventually extinguish the punishability of the crime, that means no admission of guilt, and it does not determine any impact on the civil sphere, which makes the institute similar to plea nolo contendere.<sup>35</sup>

<sup>33</sup> See SUANNES, Adauto. *Os fundamentos éticos do devido processo penal*. São Paulo: Revista dos Tribunais, 1999.

<sup>34</sup> LIMA, Roberto Kant de. Acesso ao Saber na Cultura Jurídica do Brasil e dos EUA. *Revista da Associação dos Magistrados Brasileiros - Cidadania e Justiça*. n. 6, 1999, p. 122.

<sup>35</sup> GORDILHO, Heron. *Direito ambiental Pós-Moderno*. Curitiba: Juruá, 2010, p. 89.

In fact, this institute will open decriminalization exception, not only to the constitutional principle of due process, but also to the principles of obligation and the unavailability of prosecution, and even the real truth, which for many is the main scope of criminal proceedings, seeking, in the case of the prosecution, the evidence of authorship and materiality of the offense with the absolute certainty of truth, by tracing simulated fact.

Indeed, the principles of obligation and the unavailability of prosecution will be hampered by the principle of discretionary regulations or rules, which allows in cases envisaged by law to make room for the autonomy of the will of the parties under the control of the judiciary.<sup>36</sup>

Important to note that although some authors says special criminal courts Act is unconstitutional, we can not overlook the fact that was the Constitution itself, that allowed, in its art. 98, I, the creation of a special criminal courts and possibility of criminal transaction, so we say on unconstitutional constitutional norm.<sup>37</sup>

In Brazil, after receiving the criminal action by the court, the guarantee of due process grants the defendant the right to adversarial (art. 5, LV FC), so that procedural stage in the prosecution and defense must be in a position to equal, with no difference between them means, time or opportunities, being closed to the judge to perform any procedural act without the knowledge of the opposing party.<sup>38</sup>

At this stage the prevailing procedural principle of publicity, so that all judicial proceedings should be public, except in cases provided in art. 5, LX FC when it becomes necessary to preserve the intimacy of the litigants or when the social interest requires, as in cases where, at the discretion of the Judge, there is a possibility of scandal, danger of civil disturbance or any other major inconvenience (art. 792, §1 of the CPP).<sup>39</sup>

In Brazil, however, although it is guaranteed the right to silence as a fundamental right of the accused, the judges for many this could mean an admission of guilt (silence is consent), since even before the 1988 Constitution, the judge was obliged to warn the defendant that his silence could be used against him.<sup>40</sup>

Is that while the U.S. adopt the system of moral certainty of the truth of the legislature and legal or formal, with disgust inquisitorial aspects, where the judge is a kind of referee, official without impulses in relation to society, represented

<sup>36</sup> *Ibid.*

<sup>37</sup> GORDILHO, Heron. A justiça penal consensual e as garantias constitucionais no sistema criminal do Brasil e dos Estados Unidos. *Anais do XVIII Congresso Nacional do CONPEDI*. São Paulo, 2009, p. 9430.

<sup>38</sup> FERNANDES, Antonio Scarance. *Processo penal constitucional*. São Paulo: Revista dos Tribunais, 2000, p. 57.

<sup>39</sup> *Ibidem*, p. 62.

<sup>40</sup> SUANNES, Adauto. *Os fundamentos éticos do devido processo penal*. São Paulo: Revista dos tribunais, 1999, p. 263.

by the prosecutor and the accused with the law requiring that the principles and establishing the value of each event in Brazil dominates the system of free conviction and the real truth, so *jus puniendi* no limits on shape or on the initiative of the parties, so that Once the criminal proposal, public or private, the procedure depends on the judge's official momentum, which can promote all services deemed necessary to order the process, including modifying qualifying, privileges or the proper classification of the crime.

Moreover, the judge has broad powers to give or not credibility to these tests, whichever is your free and relativity convincing evidence, since there is no evidence prevalent, and even if the prosecutor proposes the acquittal of the accused, the judge may convict it.

Is that while the U.S. control not only the efficient cause and material evidence, but also its final cause and their *modus faciendi*, and the violation of certain evidentiary procedures may give rise to invalidity of the entire process<sup>41</sup> in Brazil follows the principle of the freedom of procedure, the defendant may present any evidence and choose the lawyer that he pleases, so that the accused can and must use all possible resources for their defense, from silence to lie – this is the paradox of our criminal justice system – as the interrogation is not made under oath, why the inquisitorial stage of the suspect and the defendant's procedural step is allowed to present the version that it thinks fit for the facts, it represents any legal risk, while in the U.S. criminal justice system can silence the accused, but resolves to speak as a witness testifies and may not lie under penalty of committing the crime of perjury, that among us is best known for perjury.

In Brazil, has not been settled the question of fruits of the poisonous tree, the communicability of the original illegal evidence against the other evidence thereon, although the most recent decision of the Supreme Court has been in to reaffirm this principle. However, the existence of illegal evidence alone does not determine the invalidity of the process, since there is other evidence that lead and autonomous legal culpability of the defendant.

## **5 Introducing consensus in the brazilian criminal justice system**

In order to understand Law in a complex society like that, Habermas highlights the need of a communicative reason that differs from the classic practical reason

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<sup>41</sup> SOARES, Guido Fernando Silva. *Common Law: introdução ao direito dos EUA*. São Paulo: Revista dos Tribunais, 1999, p. 139.

while instrumental linguistic where the interactions become balanced in seeking to an understand, this would support to a massive background consensus, from the idea of autonomy, where men can act as free subjects, in that conform to standards they themselves have participated in the development, in a process between subjects.<sup>42</sup>

The U.S. criminal justice system, typical of the Anglo-Saxon pragmatic spirit, gives full independence to the Attorney General to negotiate an absolute majority of cases the guilt of the crimes and typicality, then managing to resolve 95% of criminal cases out of court, without the need for an expensive and lengthy criminal proceeding.<sup>43</sup>

The democratic base in the U.S. requires popular participation in the administration of justice, where a large part of prosecutors and state judges are elected, which gives a very strong political dimension to Justice.<sup>44</sup>

On the other hand – despite the distortions inherent in the political and economic system the U.S., such as racism and hedonism – are not included as the process of jury in criminal cases the accused refuses to criminal transaction (bargaining) and requires a speedy trial, it is actually possible to the police, prosecutors and experts an effective dedication to the case.

This certainly gives a high degree of social efficiency in the U.S. criminal Law, not to mention the huge savings in public expenditure and time spent on the trial of the accused, with significant gains for the state, society and also for the accused.

Nevertheless, this system suffers severe criticism, especially by Brazilian authors, trained in the liberal legal tradition, where the principles of culpability and the real truth occupy a prominent place in the theory of criminal law on the grounds of a system like this can occur favor of the more affluent segments of the population, where the poor have less bargaining power, as they lack good and well-paid lawyers, which certainly would cause many miscarriages of justice.

Moreover, many claim that the U.S. criminal justice system in mind the destruction of basic constitutional principles, including the principle of due process, and most notably the presumption of innocence and the real or material truth, as well as the separation of powers, to mean an invasion of prosecutors in the field of responsibilities of judiciary.

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<sup>42</sup> HABERMAS, Jürgen. *Direito e democracia: entre faticidade e validade*. Rio de Janeiro: Tempo Brasileiro, 1997. v. II, p. 189.

<sup>43</sup> DEVERS, Lindsay. *Plea and charge bargaining*. Research summary, 2011. Disponível in: <<https://www.bja.gov/Publications/PleaBargainingResearchSummary>>.

<sup>44</sup> LIMA, Roberto Kant de. Acesso ao saber na cultura jurídica do Brasil e dos EUA. *Revista da Associação dos Magistrados Brasileiros - Cidadania e Justiça*, n. 6, p.113, 1999.

One way or another, however, know that the criminal system in Brazil still rooted to the principles of obligation and the unavailability of prosecution, is in collapse, and perhaps for this reason, from the Act n. 9099/95 has been influence of U.S. criminal justice system, notably by plea *nolo contendere*, while admitting the bargain without due process of conventional criminal.

In fact, the Brazilian law is closer to Italian models (articles 439 and 556 CPP) and Portuguese (articles 392 CPP), that derogations from the principles and requirement of unavailability of prosecution only in cases envisaged by law, where prosecutors must observe certain conditions, including the prohibition of proposing custodial sentences.<sup>45</sup>

This influence can also be seen at the Institute of conditional suspension of the process, very similar to probation in the U.S. criminal justice system, as if the crime has a minimum sentence abstract not exceeding one year, repair any damage and there is the possibility of granting for future probation (suspension of the sentence already imposed) the accused is allowed to suspend the process, without discussing the guilt and upon fulfillment of certain conditions you may see the extinction of the punishment of the crime committed.

These institutes mark the introduction of consensus in brazilian criminal system, allowing a rapid response to crimes of small and medium offensive potential, and to the defendant a quick solution to your case, as well as replacing the deprivation of liberty by deprivation of rights.

Strictly speaking, this law, which may promote a revolution in the criminal system in Brazil, came to oppose the current trend, which inspired the movement called “law and order” proposes a symbolic criminal law, excessively interventionist and preventive measures through repressive extreme severity, such as the on Heinous Crimes Act and Organized crime Act, which not producing the expected effect of decreasing crime.

In Beccaria’s view, swift and certain punishment are the best means of preventing and controlling crime, so that punishment for any other reason is capricious, superfluous, and repressive.<sup>46</sup>

However, the introduction of the plea bargain and probation in Brazil will increase procedural celerity, although these institutes have been introduced very maidenly.

The Preliminary Draft Code of Criminal Procedure in the National Congress (PLS nº 156/2009) intends to introduce a plea negotiation in brazilian criminal

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<sup>45</sup> GIACOMOLLI, Nereu José. *Juizados especiais criminais*. 3. ed. Porto Alegre: Livraria do Advogado, 2009, p. 115.

<sup>46</sup> BECCARIA, C. (1963). *On crimes and punishments*. New York: Macmillan, p. 14. (Original work published 1764).

system, with a introduction of the summary proceedings to allow the anticipation of conviction and limited negotiation to crimes with a maximum sanction not exceeding eight (8) years.<sup>47</sup>

The Prosecutor and the accused may request a immediate application of a sentence, including deprivation of liberty, provided that the Defendant confess his guilt. If there is an agreement, the penalty shall be set at the legal minimum, or even below it.<sup>48</sup>

## 6 Conclusions

The consensual criminal system must be expanded in Brazil to allow the bargain to any types of crimes. Besides, we should introduce in brazilian criminal system the possibility of the defendant to plead guilty and negotiate his penalty with the public prosecutor, replacing deprivation of liberty by deprivation of rights, wherever possible.

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**Resumo:** Este artigo jurídico de revisão faz um estudo comparado entre os sistemas criminais do Brasil e dos EUA. Utilizando o método funcional, analisa as semelhanças entre os sistemas jurídicos criminais do Brasil e dos Estados Unidos. O artigo inicialmente examina o sistema norte-americano, que tem como fundamentos a participação popular na administração da justiça e a verdade consensual. O artigo analisa ainda os princípios do devido processo legal e devido processo legal substantivo a partir de interpretações judiciais da Suprema Corte dos EUA. Este sistema tem permitido que nos EUA 90% dos processos criminais sejam resolvidos através da negociação entre acusação e defesa, o que torna o sistema mais rápido, eficiente e democrático, por permitir ao acusado participar da decisão sobre a sanção criminal que lhe será imputada. Por fim, o autor critica a legislação brasileira, que, a partir da Lei nº 9.099/95, introduziu a verdade consensual no sistema criminal brasileiro para todo e qualquer tipo de crime.

**Palavras-chave:** Justiça criminal consensual. Direito comparado. Devido processo. Devido processo legal substantivo.

**Sumário:** **1** Introdução – **2** Common Law e Civil Law – **3** O devido processo legal Sistema criminal dos EUA – **4** O devido processo legal no sistema criminal brasileiro – **5** Introduzindo a justiça criminal consensual no Brasil – **6** Conclusões – Referências

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<sup>47</sup> BRAZIL. Federal Senate. <<https://www25.senado.leg.br/web/atividade/materias/-/materia/90645>>.

<sup>48</sup> *Ibid.*

## References

- BARBOSA, Estefânia Maria de Queiroz. *Precedentes judiciais e segurança jurídica: fundamentos e possibilidades para a jurisdição constitucional brasileira*. São Paulo: Saraiva. 2014
- BARBOSA, Rui. *Oração aos moços*. São Paulo: Martin Claret, 2003.
- BARROSO, Luís Roberto. *Interpretação e aplicação da Constituição*. São Paulo, Saraiva: 2003.
- BECCARIA, C. (1963). *On crimes and punishments*. New York: Macmillan. (Original work published 1764).
- BOBBIO, Norberto. *A era dos direitos*. Rio de Janeiro: Campus, 1992.
- COOLEY, Thomas M. *A treatise on the constitutional limitations which rest upon the legislative power of the states of the American union*. New Jersey: The Lawbook Exchange. 1999.
- DANTAS, Ivo. *Direito constitucional comparado: introdução, teoria e metodologia*. Rio de janeiro: Renovar, 2000.
- DAVID, René. *Os grandes sistemas do direito contemporâneo: direito comparado*. Td. Hermínio A de Carvalho, Lisboa. Ed: Meridiano, 1978.
- DEVERS, Lindsay. *Plea and charge bargaing*: Research summary. 2011. Disponível em: <<https://www.bja.gov/Publications/PleaBargainingResearchSummary.pdf>>.
- DWORKIN, Ronald. *Levando os direitos a sério*. São Paulo: Martins Fontes. 2002.
- FERNANDES, Antonio Scarance. *Processo penal constitucional*. São Paulo: revista dos Tribunais. 2000.
- GIACOMOLLI, Nereu José. *Juizados Especiais criminais*. 3. ed. Porto Alegre: Livraria do Advogado, 2009, p. 115.
- GORDILHO, Heron. *Direito ambiental pós-moderno*. Curitiba: Juruá. 2010.
- GORDILHO, Heron. A justiça penal consensual e as garantias constitucionais no sistema criminal do Brasil e dos Estados Unidos. *Anais do XVIII Congresso Nacional do CONPEDI*. São Paulo. 2009, p. 9421-9437.
- HABERMAS, Jurgen. *Direito e democracia: entre faticidade e validade*. volume II. Trad. Flávio Beno Siebeneichler. Rio de Janeiro: Tempo Brasileiro. 1997.
- HOLMES, Oliver Wendel. *The Common Law*. New York: Dover Publications, 1991.
- LIMA, Roberto Kant de. Acesso ao saber na cultura jurídica do Brasil e dos EUA. *Revista da Associação dos Magistrados Brasileiros- Cidadania e Justiça*, n. 6, p. 113-133, 1999.
- MACIEL, Adhemar. *Informativo Jurid. da Biblioteca Min. Oscar Saraiva*, v. 6, n. 2, p. 71-133, jul./dez. 1994, p. 81-88.
- ORTH, John V. *Due processo of law: a brief history*. Lawrence: University Press of Kansas, 2003.
- ROBERT, G. McCloskey. *The American Supreme Court*. 2. ed. The University of Chicago Press. 1994.

SÈROUSSI, Roland. *Introdução ao direito inglês e norte-americano*. São Paulo: Landy, 2001.

ZIMMER, Carl. *O livro de ouro da evolução*. Rio de Janeiro: Ediouro, 2003.

SOARES, Guido Fernando Silva. *Common Law: introdução ao Direito dos EUA*. São Paulo: Revista dos Tribunais, 1999.

STRAUSS, David. *The living constitution*. Oxford University press, 2010.

SUANNES, Adauto. *Os fundamentos éticos do devido processo penal*. São Paulo: Revista dos tribunais, 1999.

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