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HUMAN RIGHTS AND THE RIGHT TO INTEGRAL PROTECTION OF ADOLESCENTS IN CONFLICT WITH LAW

OS DIREITOS HUMANOS E O DIREITO À PROTEÇÃO INTEGRAL AO ADOLESCENTE EM CONFLITO COM A LEI

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RESUMO

Tendo em vista os Direitos Humanos, para além de uma análise da responsabilização do adolescente em conflito com a lei, a partir dos instrumentos normativos e do marco teórico do Direito Penal Juvenil, a proposta deste artigo é refletir sobre a atuação do legislador guiada pelo princípio da proporcionalidade adequada e limitada à proteção aos bens jurídicos fundamentais, bem como da subsidiariedade para a intervenção socioeducativa mínima ao adolescente em conflito com a lei. A atuação repressiva e punitiva desvinculada da medida socioeducativa mínima impõe um caráter sancionatório e pedagógico que não coaduna com o agir proporcional do legislador por desrespeito ao direito à proteção integral, considerando os tratados internacionais dos quais o Brasil é signatário. O artigo apresenta uma pesquisa teórica de cunho fenomenológico que possibilita uma reflexão crítica acerca da atuação do legislador em consonância com os tratados internacionais e com o Estatuto da Criança e do Adolescente aos paradigmas do estado democrático de

direito diante da condição do adolescente como sujeito de direito com prioridade absoluta.

Palavras-Chave: Direitos Humanos. Direito Penal Juvenil. Estatuto da Criança e do Adolescente. Princípio da Proporcionalidade. Princípio da Subsidiariedade.

ABSTRACT

With views on human rights, in addition to an analysis of the responsibility of the adolescent in conflict with the law, from the normative instruments and the theore- tical framework of Juvenile Criminal Law, the proposal of this article is to reflect on the action of the legislator guided by the principle of adequate proportionality and limited to the protection of fundamental legal rights, as well as of the subsidiarity for the minimum socio-educational intervention to the adolescent in conflict with the law. The repressive and punitive action unrelated to the minimum socio-educational measure imposes a sanctioning and pedagogical character that does not fit with the proportional action of the legislator for disrespect to the right to integral protection, considering the international treaties to which Brazil is a signatory. The article presents a theoretical research of a phenomenological nature that allows a critical reflection on the work of the legislator in consonance with the international treaties and the Statute of the Child and the Adolescent to the paradigms of the democratic state of right before the condition of the adolescent like subject of the right with absolute priority.

KEYWORDS: Human rights. Criminal Law. Juvenile Criminal. Statue of the Child and the Adolescent. Principle of Proportionality. Principle of Subsidiarity.

1 INTRODUCTION

Brazil is signatory to two of the main international treaties aimed exclusively at protecting children and adolescents: the Convention on the Rights of the Child and the United Nations Standard Minimum Rules for the Administration of Juvenile Justice, adopted by Resolution No. 40/33, of November 29th, 1985, at the General Assembly of the United Nations Organization, known as the Beijing Rules; and the United Nations Principles for the Prevention of Juvenile Delinquency, United Nations Document No. A/CONF. 157/24 (Part I), 1990, known as the Riyadh Guidelines.

The Beijing Rules and the Riyadh Guidelines recognize deviant behavior as part of the maturation process and advocate the preservation of the "general interest of the young person", based on a criterion of justice and equity, with the adoption of measures capable of reducing the need for state intervention to the criminalization and penalization of conduct. Therefore, any intervention that is not in accordance with the provisions of these international treaties constitutes violence by state agencies against children and adolescents.

In this context, the Brazilian constitutional order recognizes fundamental rights and confers on them the character of objectivity. Law n° 8.069, of July 13th, 1990, which provides for the Statute of the Child and Adolescent (ECA), reaffirms this character of objectivity and is in accordance with international treaties. This Statute establishes the imputability of minors under eighteen years of age (art. 104) and considers as an infraction an adolescent's conduct described as a crime or penal misdemeanor (art. 103). Once the commission of an infraction is verified, the judicial authority can apply social and educational measures to the adolescent (art. 112), and for children who commit infractions there is a provision for the application of protective measures (art. 105). The differences in the treatment of children and adolescents are thus outlined.

This article focuses on the analysis of the treatment given to infractions committed by adolescents and the socio-educational measures as legal guarantees of adolescents' rights. Even when a teenager is brought into the justice system because of his own conduct, due to an infraction typified as a crime or misdemeanor, he has absolute priority.

The protection of fundamental rights from an objective perspective starts from the assumption that it is not only the State that is obliged to observe individual rights in face to the public authorities, but it must also establish mechanisms that ensure the observance of these rights by third parties.

The legislator's actions, in this sense, when defining the protection of fundamental legal goods, must be adequate and limited - adequacy and limit guided by the principle of proportionality. Thus, the proportional action of the legislator presupposes the legitimacy of the means and ends sought, as well as that the means are adequate and necessary to the ends.

Transporting the parameters that guide the legislator's proportional action to the sphere of adolescent liability for conduct characterized as infractional acts - crimes and misdemeanors - requires analysis at two distinct moments. First, it is necessary to verify whether the broad spectrum of offenses - offenses and

misdemeanors - punishes, while providing a legitimate and adequate means of full protection to adolescents due to their conduct that is then classified as deviant. Second, it is necessary to verify whether social and educational measures, as retributive and re-socializing mechanisms, are adequate and necessary means of holding adolescents in conflict with the law accountable and re-socializing them.

The limits of state intervention in the liability and re-socialization of adolescents must be established from a minimal, exceptional and subsidiary state intervention. Any form of violence by state agencies should be seen as disrespect for human rights. This finding urges the identification of mechanisms to minimize socio-educational intervention and to treat the adolescent in an equitable and humanitarian manner, recognizing the condition of the adolescent as a human being with an active and collaborative social role, and not an object of socialization and control measures.

Placing adolescents in the role of offenders for a wide variety of conducts without material content that violate fundamental legal goods, and establishing an liability that is disconnected from its pedagogical character, is not consistent with their condition as subjects of law and absolute priority. The analysis of the normative instruments that regulate the state intervention regarding adolescents in conflict with the law shows the absence of normative instruments that seek to minimize the socio-educational intervention that, many times, can be more severe than that imposed on the non-indicted.

The objective of this article is to reflect on the legislator's actions guided by the principle of adequate and limited proportionality to the protection of fundamental legal goods, as well as on the subsidiarity of punitive intervention as a way to the effectiveness of a minimal socio-educational intervention to adolescents in conflict with the law.

In view of Human Rights, it is fundamental to go beyond an analysis of the liability of adolescents in conflict with the law, from the normative instruments and the theoretical framework of Juvenile Criminal Law, because the repressive action disconnected from the minimum socio-educational measure imposes a sanctioning and pedagogical character that is not consistent with the proportional action of the legislature, especially because it disrespects the right to full protection, considering the international treaties to which Brazil is a signatory. This is a theoretical phenomenological research that enables a critical reflection on the need to make the Child and Adolescent Statute compatible with

the premises outlined by international treaties, the paradigms of the democratic rule of law, and the condition of the adolescent as a subject of law with absolute priority.

The legitimacy of state intervention in the sphere of adolescent liability must be based on normative instruments in the doctrine, making use of analogy and the deductive method in order to demonstrate that the theoretical framework of Juvenile Criminal Law confers viability to the application of the theories of Minimum Criminal Law and subsidiarity of punitive intervention as paths to be followed in the implementation of minimum socio-educational intervention.

2 NORMATIVE PARAMETERS OF JUVENILE CRIMINAL RESPONSIBILITY

The 1988 Federal Constitution brought about a broad change in the legal and conceptual frameworks of childhood and adolescence in Brazil. The irregular situation theory, the basis of the Juvenile Code, was replaced by the Integral Protection Theory, recognizing the fundamental rights of children and adolescents and giving them absolute priority and the condition of rights creditors that must be ensured by the family[1], by society and by the State (art. 227 of the Federal Constitution).

The theory of the irregular situation, in art. 2 of the Juvenile Code, Law no. 6.697, of October 10th, 1979, states the following: Art. 2 For the purposes of this Code, the minor is considered to be in an irregular situation: I - deprived of essential conditions to their subsistence, health and mandatory education, even if eventually, due to: a) lack, action or omission of the parents or guardian; b) manifest impossibility of the parents or guardian to provide them; II - victim of ill-treatment or immoderate punishment imposed by the parents or guardian; III - in moral danger, due to: (a) being habitually in an environment contrary to good morals; (b) exploitation in an activity contrary to good morals; IV - deprived of legal representation or assistance, due to the eventual lack of parents or guardianship; V - with deviation of conduct, due to serious family or community maladjustment; VI - author of a criminal offense.

Diferently, the bold theory of integral protection has its bases in art. 227 of the Federal Constitution, which establishes that "it is the duty of the family, the society and the State to ensure the child, the adolescent and the youth, with absolute priority, the right to life, health, food, education, leisure,

[1] A família é a base fundante da sociedade (art. 226 da Constituição Federal).

professionalization, culture, dignity, respect, freedom and family and community life, besides keeping them safe from all forms of neglect, discrimination, exploitation, violence, cruely and oppression" (art. 227 of the Federal Constitution, 1988, as amended by Constitutional Amendment number 65, 2010). The theory of integral protection is based on the tripod of the recognition of children and adolescents as people of rights; absolute priority in the enforcement of rights and respect for the peculiar condition of the developing person.

Today, it is known that the protective spectrum of adolescents in conflict with the law establishes that minors under eighteen years old are not criminally responsible (art. 228 of the Federal Constitution), subjecting them to the norms of special legislation.

The International Convention on the Rights of the Child, Decree No. 99.710, 1990, advocates comprehensive protection for children and adolescents based on the recognition of their autonomy, while taking into account the limitations of their ability to exercise their rights and their freedom as developing people. In light of this, it confers guarantees of respect for the dignity and value of children and adolescents in conflict with the law, strengthening respect for human rights and fundamental freedom, imposing on the member states the adoption of "measures to deal with these children without recourse to judicial proceedings," respecting human rights and legal guarantees.

The convention allies the progressive concept of freedom of expression and opinion, as well as those of responsibility, not only social, but also penal, considering the degree of maturity (SARAIVA, 2004).

In the area of children and adolescents in conflict with the law, the Beijing Rules advocate, in their general principles, the need to adopt measures capable of mobilizing the family, volunteers and community groups, with the aim of promoting "the minor's well-being and reducing the need for intervention by the law, and treating youth in conflict with the law in an effective, equitable, and humanitarian manner.

The Riyadh Guidelines, in turn, recognize the importance of policies and measures to prevent juvenile delinquency to avoid criminalizing and penalizing conduct that does not cause great harm to development, in addition to limiting state intervention to the preservation of the "general interest of the juvenile" from a criterion of justice and equity. It also warns of the need to recognize that the deviant behavior of adolescents is often part of the maturation process.

Considering the special condition of the adolescent, as a developing person, the Riadh Guidelines also advocate the adoption of community programs and services in the prevention of juvenile delinquency, and confer the character of exceptionality to the intervention of the formal social control bodies.

The conjunction of international norms recognizes the deviant behavior of adolescents, while limiting state intervention to situations that involve personal risk or risk to third parties, and favoring solutions that avoid penalization and criminalization.

Along these lines, the Statute of the Child and Adolescent, reaffirming the lack of responsibility of minors under eighteen years old (art. 104, ECA), considers as an infraction the conduct of an adolescent described as a crime or misdemeanor (art. 103, ECA). Once the infraction has been verified, the adolescent is subject to the application of socioeducational measures by the judicial authority (art. 112, ECA). Children who commit infractions are subject to protective measures (art. 105 ECA).

In the case of adolescents, there are several socio-educational measures. They may consist of a warning (art. 112, clause I, ECA); in the repair of damage (art. 112, clause II, ECA); in restrictions of rights, such as community service and probation (art. 112, clauses III and IV, ECA), or even in deprivation of liberty, in the forms of semiliberty (art. 112, clause III and IV, ECA). 112, clause III and IV, ECA), or even deprivation of liberty, under the forms of semi-freedom (art. 112, clause V, ECA) or internment (art. 112, clause VI, ECA), socio-educational measures, these possible to be applied when the infraction is committed with violence or serious threat to a person (art. 122, ECA).

Although the Statute of the Child and Adolescent has consolidated a new theoretical framework by abandoning the theory of the irregular situation and adopting the theory of integral protection, an analysis of its provisions, in relation to adolescents in conflict with the law, shows traces of the juvenile doctrine by giving a broad spectrum to infractional acts, covering both crime and misdemeanors.

The Statute of the Child and Adolescent recognizes these conducts as deviant, subjecting the adolescents to socioeducation, and must imperatively ensure the due legal process for the imposition of the socioeducational measure to the transgressor adolescent (art. 110, ECA).

Holding adolescents accountable in such a broad way for deviant behavior, considering their peculiar situation as developing and maturing individuals,

distances itself from the guidelines set forth in international standards, especially the Riyadh Guidelines, when it advocates holding youth accountable when their conduct poses personal risks or risks to others, seeking solutions that preserve family and community life, moving away from the stigma of penalization and criminalization.

The absence of a principle framework for the "legal liability of minors under the age of eighteen does not obstruct the incidence of the structure of guarantees provided for criminal offenders", which, by irradiating its spectrum to adolescents in conflict with the law, expands the system of guarantees, limits any form of state intervention of a punitive-sanctioning nature (CARVA-LHO; WEIGERT, 2012, p. 3-4. 3-4) and removes the tutelary character that, imbued with the idea of protecting and benefiting adolescents, ends up legitimizing rights violations.

The constitutional order, when it grants fundamental rights an "objective feature" and "legitimates the idea that the State is obliged not only to observe the rights of any individual in relation to the Public Power, but also to guarantee fundamental rights against aggression from third parties" (MENDES, RE 635659/SP, p. 4). 4), demands an adequacy of the legislator's action when defining the "protection of fundamental legal assets" and limits its action to the principle of proportionality that "presupposes not only the legitimacy of the means used and the ends pursued, but also the adequacy of the means to the attainment of the intended objectives and the necessity of their use" (MENDES, RE 635659/SP, p. 6).

The legislator's proportionality in holding adolescents accountable for conduct characterized as infractional acts - crimes and misdemeanors - requires verification of whether the broad spectrum of infractional acts provides protection to fundamental legal goods and full protection to adolescents due to their deviant conduct, and whether social and educational measures, as a retributive and re-socializing mechanism, are adequate and necessary means to to hold adolescents in conflict with the law accountable and re-socialize them.

3 DECRIMINALIZATION AND MINIMAL AND SUBSIDIARY SOCIO-EDUCATIONAL INTERVENTION

The analysis of state intervention in the sphere of adolescent liability for the practice of infractional acts, as already pointed out, is permeated by a judgment

of proportionality, to be exercised in two stages. In the first moment, one must analyze if the scope of the conducts recognized as deviant - crimes and misdemeanors - establishes protection to fundamental legal goods and if the sanction is necessary in view of the subsidiarity of the punitive intervention and the integral protection of the adolescent.

In a second moment, the analysis must turn to the way adolescents are held accountable through the imposition of socioeducational measures, in order to assess whether they are legitimate means to achieve the retributive, educational, and re-socializing ends, as well as adequate and necessary to the liability and re-socialization of adolescents in conflict with the law.

The guidelines for analysis are recommended in the Riadh Guidelines when it establishes a policy of prevention, the exceptionality of intervention by formal social control agencies, and opts for the adoption of solutions that preserve family and community life, so as not to stigmatize and penalize the adolescent.

The recognition that minors under eighteen years old are not criminally responsible (art. 228 of the Federal Constitution of 1988) rules out the imposition of punishment, but not the responsibility and the imposition of socio-educational measures to adolescents who have committed an infraction. Although the structure of infractional acts establishes a correlation between infractional acts and conduct typified as crimes and misdemeanors, it does not consider whether all such conducts, when committed by adolescents, require the necessary state intervention, nor does it take into account the peculiar situation of the developing person, unaware that deviant behavior is often an integral part of the maturing process. It is certain that the constitutional order establishes protection to fundamental rights with an objective bias and brings a "criminalization warrant directed to the legislator", considering "goods and values that are the object of protection", guaranteeing fundamental rights in face of the actions of the state and third parties (MENDES, RE 635659/SP, p. 4).

In this sense, the origin of the criminal-logical discourse in Brazil is reaffirmed in the current context, permeated by the idea of control to be exercised over the insane, criminals, children and adolescents. In the case of adolescents in conflict with the law, an important part of the doctrine does not recognize in the socioeducational measures a punitive/sanctioning character. On the contrary, it is the open form of choice of mechanism that allows the judge to choose, based on the theory of integral protection, the most adequate socioeducational measure to interfere in the process of development of the adolescent, "aiming at

a better understanding of reality and effective social integration" (MAIOR, 2004, p. 378).

The normatization of deviant conduct by adolescents and their liability cannot be permeated with subjectivity and discretion, nor can it be based on the utopian idea that the socio-educational measures are capable of rescuing the adolescent's condition of citizenship and protagonist and, respecting his condition as a subject of law, reinserting him socially and preparing him for a harmonious collective coexistence. On the contrary, it reinforces the criminological argument of maintenance of order and discipline, as well as the welfare and tutelary character that still pulsates and distances the adolescent from the condition of subject of rights.

It is necessary to recognize that the socio-educational measures that may be applied to adolescents have a sanctioning bias, as they impose limitations on fundamental rights and liberties. In order that the legislator does not incur in these limitations, the adoption of the doctrine of juvenile criminal law is appropriate for densifying constitutional and procedural guarantees for adolescents in conflict with the law, by allowing the irradiation of theories, values, and procedural guarantees assured to those who can be charged, and removing the tutelary nature of liability. It also finds normative justification in the Statute of the Child and Adolescent, when it allows the subsidiary application (art. 152, ECA) of the Code of Criminal Procedure to the norms of the Statute, expanding the rules that guarantee the due legal process and limiting the state sanctioning action.

In the scope of criminal policies in the democratic rule of law, adopted here in view of the equation of infractional acts to crimes and misdemeanors and the theoretical framework of Juvenile Criminal Law, criminalization must adopt a material perspective and can only reach conducts that aim to protect "legal goods that are essential to the peaceful coexistence of men and that cannot be effectively protected in a less burdensome way" (PRADO, 2006, p. 138). The material concept of crime has a pre-legal notion, as follows:

> por conceito material de crime vem-se entendendo, de modo cada vez mais difundido, uma noção pré-legal, com finalidade po- lítico-criminais, daquilo que deve ser punível dentro de um estado social de direito. Com base nele se 'pergunta o que pode ser proibido na nossa atual ordem jurídica e social' [...]. Costuma-se apontar como seu conteúdo uma lesão a bem jurídico, ou um comportamento socialmente danoso, que não possa ser evitado com nenhum outro meio da ordem

> jurídica, tornando-se neces- sário o recurso à ultima ratio, que é o direito penal. (ROXIN, 2008, p. 12).

It is clear from the excerpt that the pre-legal notion of crime can produce the elimination of crime, that is, it can decriminalize conduct typified as not violating social peace and the legal order. In the democratic state of Law behavior that causes self-injury or "self-danger" should not be punished. It is important to emphasize that such conducts do not belong to the field of Criminal Law. Criminal Law "is responsible for preventing harm to others and ensuring the conditions for social coexistence" (ROXIN, 2008, p. 12).

The conception of conducts subject to penalization, from a material character linked to the "pre-legal" idea of what should be recognized as punishable behavior "in the current legal and social order", disconnects the deviant conduct from the subject, while at the same time begins to consider crime as behavior objectively defined by law.

The protection of fundamental rights and individual freedom imposes limitations on the state power to punish. Limitation is established from the purpose of criminal law within the state order. Roxin (2008, p. 32) recognizes the consensus in Western culture and in other parts of the world that the purpose of criminal law is to "guarantee the assumptions of a peaceful, free and egalitarian coexistence among men, to the extent that this is possible through other less onerous measures of socio-political control.

As a limiter of individual liberty, the criminal law cannot establish prohibitions that are unnecessary for free and peaceful coexistence (ROXIN, 2008, p. 32-33) and will only be justified when, by other means, it is not possible to achieve its ends.

The purpose of the criminal law of “subsidiary protection of legal property” largely determines its limits. Thus, the purpose of criminal law is to prevent social damage that cannot be avoided by other, less aggressive means. The protection of legal goods, within the scope of the penalization of conducts, means preventing social harm (ROXIN, 2008, p. 35). Without social damage there can be no limitations on individual freedom.

The conception of crime under the material viewpoint implies decriminalizing conducts that do not cause violation of social peace and the recognition of the subsidiary character of Criminal Law. As an ultimatum that limits individual liberties, the imposition of penalties is only justified when "the elimination of

social disorder cannot be achieved through less onerous extrapenal means" (ROXIN, 2008, p. 13).

According to Cavalcanti (2005, p. 302), minimum intervention overcomes "the fragmentary character of Criminal Law" by protecting "only values that are indispensable to society", and limits the legislator's action because it is not possible to "use criminal law as an instrument to protect all legal goods".

The Statute of the Child and Adolescent (1990), in line with the International Convention on the Rights of the Child, in overcoming the paradigm of incapacity, began to recognize the adolescent as a subject of law, but adopted liability in cases of infraction, imposing the application of socio-educational measures. However, without considering whether the adolescent's conduct recognized as deviant, need control as a way of maintaining social peace, nor whether the behaviors are "socially harmful" when it comes to establishing liability, with the application of sanctions.

In this context, the adolescent in conflict with the law has the recognition of conduct subject to "criminal" sanctions and liability, but should add the aspect of the subject in his peculiar condition as a person in development who deserves special protection, without undermining the character of guardianship. The discretionary subjectivism should be removed and the observance of objective rules of procedural guarantees and due legal process should be inserted.

In the scope of the infractional act - crimes and misdemeanors - Roxin's debate recognizes the material character of deviant conducts and the subsidiarity of punitive intervention, despite the material character, which is perfectly adequate to exclude conduct that does not protect fundamental juridical goods and does not aim at maintaining social peace from the normatization of offenses; as well as to justify the liability of the adolescent as ultimaratio, that is, the imposition of sanctions on the adolescent, applying socio-educational measures, would only be justifiable if the protection of fundamental legal goods could not be conferred by "less burdensome means".

The perspective of regulating the conduct of adolescents recognized as deviant, based on a material concept of infraction, of the subsidiarity of socio-educational intervention, is in line with the need to adapt the legislator's actions to a bias of proportionality when defining "protection of fundamental legal assets", which must be limited to the legitimacy of the means and the ends, as well as to seek the adequacy of the means with a view to the intended ends and the necessity of using these means.

The model foreseen in the Statute of the Child and Adolescent for normatization of infractional conducts and imputation of socio-educational measures/sanctions, with consequent liability of the adolescent, needs to be improved, in order not to violate human rights by the legislator's actions.

Currently, the Child and Adolescent Statute confers to deviant conducts of low offensive potential the possibility of applying restrictive socioeducational measures that are not possible to be applied to criminals; a serious situation that violates the right to full protection by granting more rigorous treatment to adolescents in conflict with the law.

The improvement in the regulation of deviant conduct goes through the adoption of a material concept of infractional act that imposes the reduction of infractional conducts by limiting infractional acts to conducts capable of causing a violation of fundamental legal goods, and the recognition of the subsidiarity of socio-educational intervention that should be limited to the protection of legal goods when there are no more effective means.

To give a material character to the concept of infractional act and to recognize the subsidiarity of the socio-educational intervention is to densify and give concreteness to integral protection and to the international norms to which Brazil is a signatory, notably the Beijing Minimal Rules and the Riyadh Guidelines. The first, when it advocates the well-being and the equitable and humanitarian treatment of the adolescent and the reduction of state intervention; the second, when it proclaims the importance of progressive policies and measures in order to avoid the criminalization and penalization of conducts that are incapable of harming the adolescent's development and the social order.

Having established the bases for normatizing the conduct that can be recognized as an infraction, based on the material concept, and having recognized the subsidiarity of the socio-educational intervention, the analysis now turns to the way in which adolescents are held accountable, its legitimacy, adequacy and necessity.

4 THE LIABILITY OF THE ADOLESCENT

The analysis of state intervention in the sphere of adolescent liability for the practice of infractional acts is permeated by a judgment of proportionality as to the legitimacy, adequacy, and necessity of socioeducational measures in the process of liability and re-socialization of adolescents in conflict with the law.

Once the adolescent liability system is recognized as authentic Juvenile Criminal Law, it becomes necessary to establish the understanding and the framework of the socio-educational measures within the structure of the Child and Adolescent Statute.

The system of guarantees to adolescents structured in the Statute of the Child and Adolescent is based on the principle of absolute priority (art. 227 of the Federal Constitution of 1988, and art. 4 of the Statute of the Child and Adolescent of 1990), which guides the directives of the primary system of guarantees and establishes the directives of public policies with priority for children and adolescents, based on the peculiar situation of developing people (SARAIVA, 2004).

The structuring of the systems of guarantees in the Statute of the Child and Adolescent is made in three major axes: the primary, which represents the basic social policies with universal character; the secondary, which encompasses the policies of special protection, having as its motto the factual condition of the child and the adolescent in the situation of victimization and violation of fundamental rights, from what called risk situation , according to art. 98 of the Child and Adolescent Statute; and the third, the socio-educational measures directed to adolescent offenders.

Juvenile criminal law corresponds to the tertiary or socio-educational system, and the socio-educational measures are put in place as a mechanism to hold adolescents accountable for the practice of infractions, with an undeniable sanctioning bias.

Tonial (2004, p. 45) recognizes a complex legal nature to the socioeducational measures, integrating to the sanctioning character the pedagogical one; and points out three primary issues to the legitimacy, necessity, and adequacy of the socioeducational measures, which are the passage of time, the existence of ongoing socioeducational interventions, and the need for the adolescent's socioeducation.

As the hybrid character of the socio-educational measures, the imputation of the sanction, in face of the practice of the infraction, is only "justified when strictly necessary to a pedagogical activity", that is, it is finalistically directed to a pedagogical proposal (TONIAL, 2004, p. 46).

The proportionality of the adolescent's liability should be guided by the legitimacy, necessity and adequacy of the sanction to its pedagogical purposes. If the pedagogical purposes of the sanction are absent, the application of any kind

of socio-educational measure becomes void of purpose and is not admitted (art. 228 of the Federal Constitution), under the penalty of hurting human rights.

The denaturation of the sanctioning or pedagogical character of the socioeducational measure leads to the phenomenon of disengagement. Proper untying when there is a degradation of the pedagogical content and only the sanctioning character remains; and improper untying, when the sanctioning character does not subsist and the pedagogical intervention is maintained under the argument of being "beneficial" to the adolescent. In any case of withdrawal - proper or improper - it should not be applied, and if it was, it should not be executed (TONIAL, 2004).

The proper disengagement occurs in three situations: by erosion, consumption and substitution. Identified any of the forms of binding, the socioeducational measure, stripped of its pedagogical character, loses its justification (TONIAL, 2004). The disengagement by consunction takes place when the application of a socio-educational measure comes from another that is more comprehensive and limiting. Disengagement by substitution, on the other hand, arises from the penal liability of the youth in compliance with the socio-educational measure. In this case, the punitive intervention takes precedence over the socioeducational one.

The situations of disengagement by consonance and by substitution were recognized to a certain extent in Law 12.594 of 2012, which instituted the Sinase (BRASIL, 2012). The hypothesis of substitution foresees the extinction of the socioeducational measure when a liberty deprivation penalty is applied, to be served in a closed or semi-open regime, in provisional or definitive execution (art. 46, clause III); also enabling the judicial authority to recognize the extinction of the execution of the socioeducational measure when the juvenile, in compliance with the measure, is answering to a criminal process (§ 1° of art. 46).

A situation of disengagement by consonance can be identified when the legislator recognizes the absorption of infractional acts, committed by the adolescent, prior to the application of the juvenile detention program, and prohibits the imputation of a new measure (§ 2 of art. 44).

The disengagement by erosion results from the passage of time between the commission of the infraction and the beginning of the adolescent's liability through the socio-educational intervention. Time is perhaps the main factor that delegitimizes adolescent liability because it denatures the pedagogical finality and only the sanctioning character remains. The effect of time is much more

noticeable in adolescence, as the transformations occur quickly and force us to realize that time in adolescence is different from time as an adult.

The maintenance of the pedagogical character of the socioeducational measure requires the immediacy of the intervention. The absence of a temporal correlation between the infractional act and the imputation of the socioeducational measure often leads to the loss of the pedagogical character, leaving only the sanctioning character, thus delegitimizing the application of the measure as inadequate and unnecessary.

Among the possibilities of extinction of the socio-educational measures contemplated in Sinase (art. 46), there is a provision for declaration of extinction due to fulfillment of its purpose (art. 46, item III). With a complex finalistic character - sanctioning and pedagogical -, if the socio-educational measure does not meet both, the socio-educational pretension should be declared extinct and the adolescent's accountability removed; but if the socio-educational measure is applied, its execution becomes impossible.

The acknowledgment of the loss of finality as a cause for extinction of the socioeducational measure applied or of the socioeducational claim arises not only from the lapse of time, but also from the acknowledgment that socioeducation can occur in the adolescent's life without the need for state intervention. In this vein,

> [...] não devemos crer que apenas o sistema de garantias pro- mova a socioeducação. Esta pode vir a ocorrer pela ação das instâncias informais, e talvez pela própria experiência de vida do adolescente. A socioeducação, repito, não é um privilégio ou uma exclusividade do Poder Judiciário. A socioeducação pode ocorrer na família, na escola, na comunidade, que inegavelmente também possui (ou deve possuir) seus mecanismos de reação à prática de certas condutas indesejáveis. Pensar de modo contrário é atribuir um valor desmesurado à ação estatal, é estabelecer uma presun- ção juris et de jure de imprescindibilidade da providência judicial, o que não é verdade. (TONIAL, 2004, p. 50).

The recognition that plural forms may interact in the process of adolescent's socioeducation allocates the state intervention in its natural place, that is, of exceptionality and subsidiarity of the socioeducational guarantee system in the adolescent's liability.

The exceptional and subsidiary nature of state intervention is based on and justified by international norms - the Beijing Rules and the Riyadh Guidelines -

when it recognizes the role of the family, social actors and the school in the process of socialization and integration; urges the identification of mechanisms to minimize law enforcement that can treat adolescents in an effective, equitable, and humane manner; recognizes the condition of the adolescent as a subject with an active and collaborative social role; and rejects the possibility of being a mere object of socialization and control measures.

It can be concluded that state intervention, regarding the accountability of adolescents in conflict with the law, only preserves proportionality when the socio-educational measure is legitimate, adequate and necessary. Legitimacy, adequacy and necessity are umbilically linked to its final character: sanctioning and pedagogical. Without the adherence of its sanctioning and pedagogical character, the socio-educational measure on the phenomenon of disengagement should be extinguished for no longer justifying liability in face of the extinction of the socio-educational state.

5 FINAL CONSIDERATION

The present study starts from the recognition of the existence of juvenile criminal law to try to delineate parameters for the application of the theories of minimum criminal law and of the subsidiarity of punitive intervention in the scope of the conducts practiced by adolescents and considered as deviant (art. 108, ECA); and also to analyze how the state intervention is legitimized in the sphere of the adolescent's liability for the practice of infractional acts.

The criteria of the analysis were outlined recognizing that the Constitution defines protection of fundamental legal goods and limits the legislator's action to the principle of proportionality, which requires checking whether the broad spectrum of infractional acts confers full protection to the adolescent in the face of the infraction, as well as whether the socio-educational measures, as retributive and re-socializing mechanisms, are adequate and necessary to hold the adolescent responsible and re-socialized.

Having as basic premises that a broad spectrum of conducts that are normatized as deviant - crimes and misdemeanors - and the disconnection of socioeducational measures from their sanctioning and pedagogical character are not in accordance with the legislator's proportional action for not granting full protection, the normative instruments that regulate juvenile criminal responsibility, the principles of minimum criminal law, of the subsidiarity of

punitive intervention, and, under the focus of adolescent responsibility, the limits of state intervention were analyzed.

The analysis allowed us to demonstrate the need to improve the model foreseen in the Child and Adolescent Statute for the normatization of infractional conducts and the imputation of socio-educational measures/sanctions, with consequent accountability of the adolescent, in order to make it compatible with the premises outlined in international norms, with the paradigms of the democratic rule of law and the condition of subject of rights with absolute priority.

The material concept of crime and the subsidiarity of penal intervention, through the processes of decriminalization and diversification, allowed for the possibility of regulating deviant conducts. The analogical application of the material concept of crime made it possible to delineate a material concept of infracional act to recognize the infracional character only to conducts that violate fundamental legal goods.

On the other hand, the subsidiarity of the socio-educational intervention, in a process of diversification, made it possible to infer the limitation to the protection of legal goods, with a sanctioning bias of personal imputation, only when there are no more effective means, giving the socio-educational intervention the character of ultimaratio.

Limiting infractional acts to conducts with the potential to violate fundamental legal goods and conferring a subsidiary character to socio-educational intervention is in line with the need to adapt the legislator's actions to the principle of proportionality. At the same time, it meets the guidelines of international norms - Beijing Rules and Riyadh Guidelines - when they limit state intervention and the penalization and criminalization of conducts that have no repercussions on the adolescent's development and on social order.

The adequacy of the means to achieve the intended objectives and the verification of the need for their use is another aspect of the proportionality principle, which sets the limits of state intervention in the sphere of punitive/socioeducational accountability.

The recognition of social and educational measures of a sanctioning nature provides a basis and justification for the adoption of juvenile criminal law and allows for the analysis of state intervention in the sphere of adolescent liability, when the the practice of transgressive acts by a judgment of proportionality as to the legitimacy, adequacy, and necessity of socioeducational measures in the

process of accountability and re-socialization of adolescents in conflict with the law.

Socio-educational measures have a complex legal nature. To the sanctioning character it adds the pedagogical one. The proportionality of the adolescent's accountability is densified when the legitimacy, necessity and adequacy of the sanction adhere to the pedagogical purposes. In the absence of pedagogical purposes, the application of any socio-educational measure is void of purpose and is not admitted (art. 228, CF). It violates human rights by disregarding the right to full protection.

Thinking about the need to identify mechanisms that allow for a minimal socioeducational intervention, this article seeks to bring doctrinal positions that can subsidize, based on juvenile criminal law, the theory of integral protection, and international norms, the implementation of the exceptional and subsidiary bias of state intervention in adolescent socioeducation.

It can be concluded that the recognition of the legitimacy and adequacy of the types that impute deviant conduct to adolescents must safeguard fundamental rights; the socio-educational intervention is only justified when accountability by another means is not possible; socio-educational intervention as ultimaratio. And, further, that the limits of state intervention in the accountability of adolescents in conflict with the law should be proportional. Proportionality that requires legitimacy, adequacy, and necessity of the socioeducational measure, assessed from its finalistic character: anational and pedagogical.

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