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CONSTITUTIONAL VISION ABOUT REDUCING THE AGE OF CRIMINAL MAJORITY

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THE DIGNITY OF THE HUMAN PERSON AND ITS CONSTITUTIONAL UNDERSTANDING

After the Second World War and the Declaration of Universal Rights of the United Nations in 1948, there was a recovery of dignity as an inherent condition of the human person and in 1949, historically, the dignity of the human person began to appear, for the first time, in a constitution, the German one, as a guiding principle of rights: "Article 1st. (protection of human dignity) Human dignity is intangible. Respecting and protecting it is the obligation of all public authorities."

After the inclusion of the dignity of the human person as a constitutional principle in the order of the German Republic in 1949, this principle so fundamental to man began to guide other contemporary constitutions, as Eugênio Pacelli de Oliveira teaches:

> It is after the French Revolution (1789) and the Declaration of the Rights of Man and Citizen, in the same year, that human rights, understood as the ethical minimum necessary for the fulfillment of man, in his human dignity, resume a prominent position. in Western states, also occupying the preamble of several constitutional orders, as is the case, for example, of the Constitutions of Germany (Arts. 1 and 19), of Austria (Arts. 9, which receives the provisions of International Law), of Spain (Article 1, and arts. 15 to 29), of Portugal (Article 2), not to mention the Constitution of France, which incorporates the Declaration of the Rights of Man and the Citizen (OLIVEIRA, 2004, p. 12).

In Brazil, the dignity of the human person is one of the foundations of the Republic, carved out in Article 1, III of the 1988 Constitution of the Republic, binding the entire legal system to its guidance:

> The Federative Republic of Brazil, formed by the indissoluble union of States and Municipalities and the Federal District, constitutes a Democratic State of Law and its foundations are: I - sovereignty; II - citizenship; III - the dignity of the human person; IV - the social values of work and free enterprise; V - political pluralism.[1]

It is important to emphasize, however, that the legal system does not grant dignity to the human person, but only recognizes it as essential to the creation of the legal universe. As a constitutional principle, dignity permeates and guides the legal system that has it as its foundation, but its legal conceptualization is much broader, as new principles are created based on this principle.

For Ingo Wolfgang Sarlet dignity is:

> Intrinsic and distinctive quality of each human being that makes him or her worthy of the same respect and consideration from the State and the community, implying, in this sense, a complex of fundamental rights and duties that ensure the person against any and all acts of a degrading nature and inhumane, as they guarantee the minimum existential conditions for a healthy life, in addition to enabling and promoting their active and co-responsible participation in the destinies of their own existence and life in communion with other human beings (SARLET, 2002, p. 62).

The Principle of Dignity of the Human Person emerges, then, as a foundation for maintaining the Democratic State of Law, since from its conception man can no longer be "objectified", but passes through the understanding that every human person is worthy and that A unique condition makes him the holder of several other fundamental rights that guarantee him protection against the State's arbitrary actions.

In this sense, the Principle of the Dignity of the Human Person guarantees to man, based on another constitutional principle, the

1. BRAZIL. **Constitution of the Federative Republic of Brazil of 1988.** Available on the website: <http://www.planalto.gov.br/ccivil_03/constituicao/constituicao.htm>. Access at: 31/10/2019.

Principle of Equality, unequal treatment to the extent of his inequality, as Alexandre de Moraes rightly considers:

> For normative differentiations to be considered non-discriminatory, it is essential that there is an objective and reasonable justification, in accordance with generally accepted criteria and evaluative judgments, the requirement of which must apply in relation to the purpose and effects of the measure considered, and must Therefore, there must be a reasonable proportional relationship between the means used and the purpose pursued, always in accordance with constitutionally protected rights and guarantees. (MORAES, 2014, p. 35)

Observing, therefore, the lesson of Alexandre de Moraes, it appears that the original constituent power adopted the objective and reasonable criterion of age to establish criminal imputability in accordance with the values of human dignity and therefore the Federal Constitution of 1988, which chooses the Dignity of the Human Person as its foundation, reserved, in its Article 228, for minors under 18 years of age the treatment given by special law, that is, Law 8,069/90.

THE CRIMINAL IMPUTABILITY OF MINORS UNDER 18 YEARS OF AGE

The Federal Constitution of 1988 defined minors under the age of 18 as inescapable, Article 208 in verbis: "Minors under eighteen years of age are not criminally imputable, subject to the rules of special legislation".

However, it is important to distinguish impunity from non-imputability, as the Major Law makes it clear that minors under 18 are subject to special legislation, that is, contrary to what media outlets claim, minors under 18 are responsible for their acts, however, this accountability is not made by the rules of the Penal Code, but by the rules of Law 8,069/90, the Child and Adolescent Statute (ECA).

According to the website ebc.com.br, a survey published by the Institute of Applied Economic Policy (IPEA), on 09/21/2015, juvenile offenders accounted for only 10% of total crimes and in the case of crimes against life the percentage drops to 8%.

Furthermore, according to the website, in previous research produced by the same Institute regarding the age of criminal responsibility, it was found that:

> The June survey by Ipea paints a picture of teenagers who are deprived of their liberty, the type of crime committed, where they are in Brazil. "What we saw is that the profile of teenagers in conflict with the law is one of social exclusion. They are minors who live in very poor families, with up to a quarter of the minimum wage 'per capita' (per inhabitant) and when they committed the crime, they were neither working nor studying, they had not completed primary education." Around 70% of teenagers were between 16 and 18 years old.
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> According to research, this world is predominantly male: almost 85% of these teenagers are boys. When they committed the crime, these boys and girls used drugs, mainly marijuana and crack. Enid reported that when the research was carried out in 2013, there were 23 thousand teenagers serving socio-educational measures of deprivation of liberty in the country, which are closed measures, including hospitalization, semi-freedom or provisional measures in which they are imprisoned for 45 days.
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> Most of the 23 thousand adolescents covered by the research, or corresponding to 75% of the total, were concentrated in the Southeast and Northeast regions. Most of the crimes committed involved theft, robbery and links to drug trafficking. Only 14%, or 3,200, had committed crimes against life, which are homicide, rape and bodily harm. In the technical note, Ipea criticized the myth of impunity and showed that the Statute of Children and Adolescents, when providing for hospitalization measures, highlights

> that the most severe measure, which is hospitalization, must only be applied in the case of a flagrant crime and crimes that threaten life. "If we were to follow this recommendation from the statute, we would not have these 23 thousand teenagers deprived of liberty, complying with the most severe measure, but rather those 14% who committed crimes that threaten life", argued the researcher.[2]

Law 8,069/90 provides for the application of socio-educational measures (Article 112) for the infraction committed by a minor under 18 years of age, and even a person over 12 years of age may be apprehended (Article 110), that is, deprived of their freedom.

Therefore, the idea that reducing the age of criminal responsibility is the solution to reducing crimes involving minors is disenchanted, because those who defend this idea start from the mistaken premise, admittedly, that minors under 18 are held responsible for their actions.

The intention of the Child and Adolescent Statute is to re-educate young offenders with measures compatible with their age. By not attributing a crime and a penalty to the teenager, the legislator offers a second chance, an opportunity for recovery and reintegration into society.

In this sense, the article by Guaraci de Campos Vianna – Judge of the Court of Justice of Rio de Janeiro, brings valuable lessons:

> Holding young people in conflict with the law responsible from the age of 12 and, after due legal process, applying socio-educational measures to them, which may be restrictive of freedom (internment, semi-freedom or assisted freedom) or alternatives to restriction of freedom (provision of services to the community, repairing damage, drug treatment, psychological treatment, among others), all accompanied by education and professionalization, if necessary, with various mechanisms to prevent illicit and abusive interference in the administration of measures, the Child and Adolescent Statute, the despite some criticism, the unfounded majority, who suffer, is enough to repress and educate and its application is not in the illusion of social defense, rather in the service of arbitrary and pure and simple repression, but rather in the service of the restoration of inspired legality in the dignity of man. (VIANNA, 2008, p.15)

Law 8,069/90 is an advanced instrument of humanization in our criminal system, because in light of it, society has the opportunity to recover the adolescent offender with dignified measures compatible with their age instead of handing them over once and for all to crime.

Those who defend the reduction of the age of criminal responsibility due to recidivism of juvenile crime must pay attention to the fact that it was the system that failed to recover such a young person and, therefore, he cannot bear the consequences of this failure alone. Causing a teenager aged 16 (or younger) to be convicted and sent to a prison with criminals of different natures and in a prison system that is increasingly ineffective and incapable of recovering its inmates (another failure) is, without a doubt, Some, fail twice.

In the same vein, the article by Judge Chief Vianna (op.cit.) is cited again, which brings enlightening lessons:

> In effect, since crime is the result of the commission of individual and social factors and the penalty serves to, in theory, only remove the former, little will be done if the latter are not removed. If misery makes a man a thief, what is the educational value of showing them the merits of honesty and returning them to misery in freedom? Recurrence will be very likely. [...]. In this sense, praise must be given to the Statute of Children and Adolescents (Law 8069/90), which, if fulfilled, harmonizes with the social desire to reduce crime, resocialize juvenile criminals and as a result, community

2. EBC. **Minors account for less than 10% of total crimes, says IPEA.** Available on the website: <http://www.ebc.com.br/educacao/2015/09/menores-respondem-por-menos-de-10-do-total-de-delitos-diz-ipea> Access at: 04/10/2019.

security. (VIANNA, 2008, p.14-15)

Therefore, it is not by tightening criminal laws that the reduction in crime will be achieved, but by demanding from the authorities their share in the efficient conduct of the Law and as a society collaborating with the State in maintaining family values, the solid foundation of everything. Society has an important role in reducing crime and cannot ignore and only provoke the State, which alone is incapable of meeting all the public's desires. This is what the Child and Adolescent Statute provides in Article 4:

> It is the duty of the family, the community, society in general and public authorities to ensure, with absolute priority, the realization of rights relating to life, health, food, education, sport, leisure, professionalization, culture, dignity, respect, freedom and family and community coexistence. [3]

The minorist law, if applied in the way it was proposed, is, in itself, an instrument for preventing crime, because as it recovers the minor offender, it tends to prevent him from being a potential criminal in the future.

CRIMINAL MINORITY AS A FUNDAMENTAL INDIVIDUAL GUARANTEE

As expressly provided by the Charter of the Republic in its Article 228, criminal liability is guaranteed to minors under 18 years of age. In this sense, some scholars such as Luiz Alberto David Araújo and Dalmo Dallari understand that the constitutional provision in question is an immutable clause, as it is a fundamental right, being, therefore, covered with the character of immutability, not being subject to amendment aimed at the suppression of its essence by the Reforming Derived Constituent Power.

> The systematic interpretation leads to the inclusion of the rule of article 228 in individual rights and guarantees, as a form of protection. And, as there is a specific chapter for children and adolescents, nothing is more correct than the rule being inserted in its specific chapter, although it constitutes an extension of the rules contained in the fifth article, the object of immutability. We have no doubt, therefore, that the rule in article 228 is an extension of article five. We understand that individual rights and guarantees outside the fifth article are petrified because they are interpretative extensions of the matters guaranteed there (ARAÚJO, 2001, p. 32).

Dalmo Dallari, in an interview with the electronic periodical Revista Forum, spoke about article 228 of the Federal Constitution be considered a definitive Clause and regarding the Proposed Amendment to the Constitution, number: 171/93, he was emphatic:

> There is no doubt that [the criminal liability of minors under 18] is a fundamental right, expressly enshrined in the Constitution, and that's it. So, from this perspective, [article 228] is a permanent clause. [...]
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> The proposal, in addition to not being constitutionally acceptable, is socially harmful for the Brazilian people, because it will force 16-year-old boys to be at the mercy of mature criminals. In my view, it is unconstitutional, because it affects a permanent clause, a constitutional norm, which proclaims and guarantees fundamental human rights. This cannot be the subject of a simple change by constitutional amendment. (we highlighted this excerpt).[4]

According to Article 60 § 4°, V of the Federal

3. BRAZIL. Law Number: 8,069, of July 13, 1990.
Provides for the Child and Adolescent Statute and provides other measures. Available on the website: http://www.planalto.gov.br/ccivil_03/leis/l8069.htm. Accessed on: October 31, 2019.

4. FORUM. **Dalmo Dallari: PEC of reducing the age of criminal responsibility is unconstitutional.** Available on the website <https://revistaforum.com.br/noticias/dalmo-dallari-pec-da-reducao-da-maioridade-penal-e-inconstitucional//>. Accessed on: 04/04/2019.

Constitution: "The proposed amendment to abolish: [...] will not be subject to deliberation; V – Individual rights and guarantees".

In the doctrine, it is common understanding that the immutable clauses are not only found in the list listed in Article 5 of the Federal Constitution, but are spread throughout the Constitution, as per the diction of the article itself. 5th, §2°: "The rights and guarantees expressed in this Constitution do not exclude others arising from the regime and principles adopted by it, or from international treaties to which the Federative Republic of Brazil is a party."

In this sense, they understand:

MACHADO (2003):

> The special constitutional system of protection for the fundamental rights of children and adolescents, which derives especially from the provisions of articles 227, 228, 226 and 229 of the Federal Constitution, in a brief summary, is characterized by: a) affirming exclusive fundamental rights for children and adolescents, including (...) criminal liability (...), in addition to all the fundamental rights recognized for adults. (We highlight this excerpt) (MACHADO, 2003, p.33)

MELLO (2008):

> The catalog of fundamental rights enshrined in the Constitution covers several rights in their various dimensions: right to life, liberty, property, basic social rights, right to an ecologically balanced environment (article 225, of CRFB/88), consumer protection, among others. (We highlighted this excerpt)
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> [...]
>
> It is worth highlighting that the catalog of fundamental rights constitutes in itself a concretization of the fundamental principle of human dignity (article 1, item III, of CRFB/88). (We highlight this excerpt) (MELLO, 2008, p.56)

SARLET (2003):

> Materially open concept of fundamental rights enshrined in article 5th, §2, of the Federal Constitution points to the existence of fundamental rights affirmed in other parts of the constitutional text and even in international treaties, as well as to the express provision of the possibility of recognizing unwritten fundamental rights, implicit in the norms of the Federal Constitution. catalogue, as well as arising from the regime and principles of the Constitution. (We highlighted this excerpt), (SARLET, 2003, p.115)

It appears, therefore, that the Original Constituent Power did not want to establish a criterion for criminal liability considering the adolescent's capacity for discernment, but adopted the biological criterion (age) in appreciation of the dignity of the human person and the protection of minors under 18 years.

Furthermore, by ratifying the United Nations Convention, Brazil obliged itself to give different treatment to children and adolescents.

Thus, Article 1 of the United Nations Convention on the Rights of Children defines a child as: "Any individual under eighteen years of age, with the exception of countries that set the age of criminal responsibility at a different age". And in its article 41: "none of its signatories will be able to make its internal regulations more burdensome in view of the provisions of the treaty".

Therefore, as long as Brazil is a signatory to the International Convention on the Rights of the Child and by virtue of Article 5 §2° of the Federal Constitution, the age of criminal responsibility of 18 years established in Article 228, must not be reduced because it is a right and a fundamental individual guarantee elevated by the Original Constituent Power to the level of the definitive Clause.

And in this sense, the age of criminal responsibility from 18 years of age guaranteed by article 228 of the Major Law is a permanent clause, which reveals the unconstitutionality

of Constitutional Amendment 171/93, which seeks to reduce it to 16 years of age.

REDUCING CRIMINAL MINORITY DOES NOT GUARANTEE A REDUCTION IN CRIME

There is no way to say that the reduction of criminal liability from 18 to 16 years will mean a reduction in crime, as argued by media outlets, now Law No. In itself, it was not capable of reducing the crimes typified in it, nor at least curbing their practice.

The article "The fallacy of reducing the age of criminal responsibility as a solution to the problem of crime" presents the position of Argentine jurist Eugenio Raul Zaffaroni, regarding this speech:

> The new "penal popularism" [...] is a demagoguery that exploits people's feelings of revenge, but, politically speaking, it is a new form of authoritarianism. Violence increases because poverty has increased. The 1990s were the years of the market festival: the poor became poorer and some rich people, not all, richer. The same authors of this policy of polarization of society are those who today call for more repression against vulnerable sectors of the population. [...] In the end, they are not vulnerable to this violence. The "war" they ask for is a "war" between the poor. [...] This policy of so-called social communicators and politicians without a program, who just want more police power, is basically the neutralization of the incorporation of majorities into democracy.[5]

The reduction of criminal minority for the purpose of reducing crime will be ineffective, as the simple fact of the existence of laws does not ensure the reduction of crimes, but rather, the adequate application and execution of them associated with other public policies, such as education and better income distribution, as Miguel Reale Junior (2003, p.114) rightly asserts, "[...] in Brazil we have the bad habit of imagining that reality can be changed by changing the law. The law does not change reality. The reality is that it needs to be changed to adapt to the law that exists there".

With the reduction of the criminal minority, as part of society wishes, several young people will enter the bankrupt Brazilian prison system, which cannot even cope with its current demand and appears to be ineffective in recovering its prisoners, given the outbreak of the crisis in the system Brazilian prison.

As the members of the Public Ministry Luciana Vieira Dallaqua Vinci and Wilson José Vinci Junior argue in their article "Reflections on the age of criminal responsibility in the light of fundamental rights":

> Arguments related to violence and impunity are not capable of removing constitutional protection: they must rather reinforce the need for its improvement, for the effectiveness of education and public security systems. The idea that early incarceration will change this reality is an illusion, just as it is not true that children under 18 years of age are not responsible for their criminal acts (infractional).[6]

In this context, the question arises: And when these young people, already in adulthood, leave prison? Because, in Brazil there is no perpetual sentence, therefore, these individuals, who were still young in a Brazilian prison left to their own devices, will be returned to society.

What will become of this individual, already introduced into society, after having spent his adolescence living with adults, many

5. LEGAL SCOPE. **The fallacy of reducing the age of criminal responsibility as a solution to the problem of crime**. Available on the website: <https://ambitojuridico.com.br/edicoes/revista-120/a-falacia-da-reducao-da-maioridade-penal-como-solucao-para-a-problematica-da-criminalidade/> Accessed on: 10/04/2019.

6. VINCI, Luciana Vieira Dallaqua; VINCI JÚNIOR, Wilson José. Consultor Jurídico [site]. **Reflections on the age of criminal responsibility in the light of fundamental rights.** Available on the website <https://www.conjur.com.br/2015-abr-13/mp-debate-reflexoes-maioridade-penal-luz-direitos-fundamentais> Accessed on 10/04/2019.

of whom are already experienced in the life of crime? Or rather, what will become of this society?

Unfortunately, in Brazil, what we see is the "garbage culture", what is "no longer useful" must be discarded in the easiest way, without any effort, there is no care in recycling in our society, here nothing can be recycled. reuse. The same is done with human beings, if an individual commits a crime he is "discarded" in a penitentiary like trash, where resocialization and recovery actions are minimal or, almost always, non-existent.

It turns out that this individual who was treated like trash returns to society, but now as an even bigger problem, as an individual who was dehumanized by prison, with no prospect of formal employment, no education, no hope, totally vulnerable, returns to life in society. to a system that did not give him opportunities.

Hostage to the state of fear, typical of a society of conflict, the population demands more and more from the rulers who respond, belatedly, with more severe penal policies generating more incarcerations and resulting in an increase in crime, which generates more popular dissatisfaction, thus closing, the vicious cycle.

It is worth pointing out that the enactment of stricter criminal laws, in addition to not being the solution to combating crime, is always a delayed response given by those in power, as it is an act subsequent to the fact that motivated it.

In view of all the above, it appears that reducing the age of criminal responsibility will result in a true social setback and will only serve to punish young people from underprivileged and neglected classes by public authorities. Furthermore, it will not result in a reduction in crime, but, contrary to what is expected, it will produce increasingly younger criminals, who, in the midst of the self-identity phase of their psychosocial development, will be handed over to a bankrupt prison system, incapable of recovering them, resulting in an increase in crime.

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