Panor. Braz. law - Year 6 - Numbers 9 and 10 - 2018 - pp. 170 - 198.
ISSN 1075-1343 (print)
ISSN 2318-1516 (online)
DOI: http://dx.doi.org/10.17768/pbl.y6n9-10.p170-198

THE YOUTH IN CONFLICT WITH THE LAW IN RIO DE JANEIRO AND THE ROLE OF THE DEFENSE ON INFRACTIONS[1]

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Received: 2018-08-02. Accepted:2019-06-21

Abstract: The criminalization of juveniles in conflict with the law is a social problem that perpetuates throughout Brazilian history. Thus, it is necessary to reflect on the stigmatizing discourses that affect teenagers in conflict with the law, mainly in the city of Rio de Janeiro, where the state promotes more confinement policies than programs that accelerate the affirmation process of basic rights. At this point, the article brought up the debate about the defense of these adolescents as a guarantee of their fundamental rights, as well as the doctrinal question about the existent branches on the Statute of the Child and Adolescent (SCA), integral protection *versus* guarantees. The article blends theoretical and empirical methodology. Among the results found, stand out the mitigated participation of the defense throughout the processing.

Key-words: Defense; Juvenile Justice; Rights guarantees; Adolescents in conflict with the Law.

INTRODUCTION

The criminalization of juveniles in conflict with the law is a social problem that perpetuates throughout brazilian history. Since the middle of the 21st century, these teenagers, known as juvenile delinquents or

1 Translated by João Pedro Torres de Abreu Machado Sardinha.

abandoned "minors", mostly from the poorest and vulnerable classes of the population, mostly black people, with little or no access to education, inserted in families categorized as typical of "environments of marginalization", considered places of "bad habit" where drug use, prostitution and small crimes are exercised, being constantly targeted by the police and justice

In the 21st century, this conjuncture still hasn't modified yet, as regards the subjects on whom the current norms are applied upon, the process wherewith this happens constitutes a criminal subjection, as according to Misse (1999):

> *[...] given certain patterns of social construction of criminal subjection, there is a constant connection, in social representation, between certain social variables and attributes of individuals incriminated by certain types of crimes. These variables appear either in the social types in which they would fit, or in the explanatory connection between the social meaning attributed to these variables and the motivation that are attributed to the types (or that they would incorporate) to enter socioeconomic, color, nationality or naturalness, age, gender, indicators of affiliation to a regularity of employment and many other dimensions (dressing, way of walking, way of speaking, social expressions of self-control) that serve socially to stratify, differentiate and build stereotypes of social identities are mobilized by social representation to distinguish suspected individuals." (MISSE, 1999)*

Thus, it's necessary to reflect on the stigmatizing discourses that affect teenagers in conflict, specially in Rio de Janeiro, this arcticles' empirical research *locus*. Also, it must be highlighted the criminal policy that has as its foundation the violent repression by the state on the poorer stratum of the population.

Most adolescents, confined in Rio de Janeiro's judicial district, committed crimes similar to drug trafficking and stealing, according to a National Council of Justice's research (2012)[2]. In the period that corresponds to June 2017, as reported by the GDSEA's Coordination of Socio-Educational Measures, in the state's capital alone the institution keeps 2.279 male adolescents in total, in compliance with custodial measures, such as temporary confinement, confinement or semi-freedom, for the commission of infractions. Of this total, 1310 youngsters comply with socio-educational custody measures on GDSEA units, revealing a

2 Report of the National Council of Justice. National Panorama of Implementation of Socio-Educational Measures of Internment. 2012.

prevalence of the custodial measure as the one being selected to be applied by the Childhood and Youth Courts.

Another revealing data, provided by the GDSEA's Coordination of Socio-educational Measures is that most of the boys that are into the socio-educational system at the Capital, in the period corresponding to 2010 to 2016, haven't finished elementary school. Having that in mind, it is possible to realize the extension of this problem and the true emergency of preventive methods, so that it may be possible to stagnate the criminalization process, showing to this "minors" new possibilities outside the world of "crime".

Hence, one may think, the State promotes more confinement policies than programs that accelerate the process of basic rights affirmation (education, health, professionalization, art, culture and recreation). That suggests characteristics of a system, assisted by the judiciary, that abuses of government's punitive power rather than putting away punishment.

At this point, it's interesting to emphasize the doctrinal debates about the existing branches in the SCA, one that aims to the teenagers' integral protection and a second one, that prioritizes their fundamental guarantees. Are they divergent? Both imply distinct implications to young people in conflict with the law, especially in what concerns the application of socio-educational measures, directly influencing the assurance of their fundamental rights, mainly their liberty?

It's known that the retrenchment of rights perpetuates itself within the confinement centers, due to the unavailability of essential care and support services for reeducation, for example, psychologists, doctors, social workers and, above all, attorneys and public defenders. This happens as a result of the confinement system being over crowded, as it suffers from the lack of state investment during the crisis in the State of Rio de Janeiro. According to a National Council of Justice's research (2012):

> *The availability of technicians of the different areas of activity in each of the units per State, it has been that 91% of the establishments provide some type of individual service to the offenders rendered by specialized professionals. However, the availability of these professionals varies considerably in different regions of Brazil. It is observed that psychologists and social workers are the most commonly available professionals in confinement units in all regions, being present in 92% and 90% of establishments, respectively. On the other hand, lawyers and doctors are present in only 32% and*

> *34% of the units, in that order. Thus, it is observed that the basic rights to health and procedural defense are hardly observed, considering the lack of the provision of these services in establishments. The unavailability of these professionals was more significant in the states of the South and North." (CNJ, 2012)*

In a visit, allowed by the GDSEA[3], in May 2017, it could perceive the reality beyond the statistics. With a capacity to 200 teenagers, nowadays the SES accommodates approximately 500 boys within a penitentiary structure, that rely on two sectors A and B, separated by criminal gangs that command the drug trafficking in the state (Red Command and Third Command, respectively[4]). Although this kind of segregation's forbidden, this form of triage is habitually used, so to avoid that the teenagers are exposed to any risk of death inside the confinement units.

Inside the sectors, there's another subdivision, where the space's divided by "solares"[5], each one with 4 cells, while in there I could observe the precarious physical structure that shelters the adolescents. There is no bed for all and even less mattresses, the place's sanitary conditions is also scary, because it has no condition to host any of the teenagers confined there. The lack of structure forces the teenagers to sleep on the ground, something I witnessed while entering in one of the "cells" – two boys sleeping on the ground hugged, once there weren't enough beds for everyone.

Thus, with the maintenance of the juvenile criminal responsibility system and with the lack of access to justice, the presence of procedural/technical defense it's fundamental to secure guarantees and basic rights standardized by the SCA and the CFRB/88. Another data also informed to me, during the visit to DEGASE, is that, unfortunately, these teenagers' defense is also faulty, since the load of judicial processes held by the Public Defense, responsible for the assistance of most of the boys, is very high in comparison to the number of defendant's lawyers, and this consequently impairs the defense and results in a major permanence of these adolescents at the confinement units; private attorneys are the

3 General Department of Socio-Educational Actions of Rio de Janeiro's State

4 Red Command (Comando Vermelho) – one of Brazil's largest criminal organizations. Created in 1979 in Cândido Mendes prison, on Ilha Grande, Angra dos Reis, Rio de Janeiro, as a joint of common prisoners and political ones, militants of armed groups, being the common prisoners members of the known Red Phalanx (Falange Vermelha). Third Command (Terceiro Comando) – known by the initials TC, was a brazilian criminal faction, based on Rio de Janeiro, created to opposed to Red Command after 1994.

5 Open areas that contain cells within the prisons with some space for sunbathing.

minority.

Studies about the history of the Juvenile Justice in Brazil reveal that the lack of lawyers and public defenders has always been a permanent and usual situation. This will be one of the matters developed in this article.

This paper's methodology's mixed, since it is a research both theoretical – in which I sought to exhaust bibliographical references on the subject, both in the area of law and sociology, and empirical – where I went onto the field to GDSEA/RJ and brought also to this work quantitative researches accomplished by government agencies, for example, the National Council of Justice – CNJ, to illustrate the current reality of young people in conflict with the law that are inserted in the socio-educational system.

1. History of the defense's role on Juvenile Justice

This item's proposal is to reconstitute a brief historical of the defense's role on Juvenile Justice in Brazil, starting from laws that comprehend the first Minors Code of 1927 until the SCA, highlighting on each period the existence or not of a defense, as well as analyzing each period's normative characteristics, for example, if these norms had or not the purpose of securing young people's rights.

Thus, we perceived that the issue of childhood and adolescence in conflict with the law hasn't always been treated the same way, mainly due to the new meaning assigned to them during modern age. Therefore, we could identify that nowadays the childhood and adolescence group has a history and it's the product of a social construction.

According to Aries (1981), the idea of the youth category during middle age wasn't the same as the one we know today on modernity, summing up, there wasn't a notion of social necessity on differentiating adults from children or adolescents. The author adds in his work that, only in the 17th century, works of art started portraying children in childlike attitudes, and no longer as adults.

This perception may send us into a temporal breaking of concepts, *id est*, from that moment on, man as individual, starts perceiving the necessity to protect children as to secure one's individual integrity until his adulthood, declaring this category's incapacity before the society. The idea of children's incapacity brought up the indispensability of their socialization, where two great institutions took the lead to discipline them: the school and the family, as bases of macro power.

However, not all children and adolescents managed to be reached by discipline exercised through school, many hadn't access it, others evaded or were expelled from these institutions, which consequently resulted in their differentiation: those who attended school

environment from those who didn't. From that moment on, it began the new category "minor" composed by "delinquents" and "minors in a state of abandonment" which differentiated itself from the category "youth", as according to Méndez (1996) "The origin of the justification of social control over children and young people lie in the differentiated construction of the child and "minor" categories, in both cases subject to incapacity and imposition".

Thus, the "minors" were submitted to other institutions for the application of discipline and correction, Méndez (1996) says that the history of juvenile criminal responsibility consists of three stages: the first phase, at the beginning of the 20th century, in which the juvenile responsibility did not differentiate age groups, with the exception of people under nine years old considered absolutely incapable; the second phase responsible for the specialization of the minors' rights and, by the third phase marked by a disruption on the irregular situation, as the integral protection doctrine was established. Among these approaches only the last two of them will be the object of this article's analysis.

In regard to 20th century's Brazil, immersed in a critical scenario due to the Liberal Republic's political issues, with the development of capitalism a process of massification of poverty and, consequently the rise of the number of impoverished children with problems to be faced by the State began. Hence, due to the questioning of the State's role on the country's social demands, the first Minors Code[6] or "Mello Mattos' Code" was born, created in 1927, from Judge Mello Mattos'[7] experience.

From this period on, the codification was the material representation of the concern with the juvenile criminality, that had already been in need of an exclusive space to deal with the "interests" of children and adolescents.

According to the 1927's Code, the State had legal responsibility over the orphan or abandoned child's guardianship, adopting, for the first time, characteristics of a guardianship model. This type of intervention, exercised by the state apparatus, was the initial milestone for the thinking of the irregular situation's doctrine, which followed the hygienist orientation and also with eugenic characteristics[8], as it tried to sanitize that one Brazilian population's major problem: the "delinquent minor".

Thus, the pedagogy united with childcare and positive Law, attacked the problem with an "assistencialist" and multidisciplinary

6 Federal Decree no. 17.943, from October 12, 1927.

7 Dr. José Cândido de Albuquerque Mello Mattos, born in march 19, 1864 in Salvador/BA, was Brazil's first Juvenile Court's Judge. Designated on february 02, 1924.

8 *Bio*theory that aims at producing a selection over human collectivities, based on genetical laws; eugenism.

approach, turning to the Courts and Assistance Council, which formed a system attributing duties to parents, imposing obligations to the State and punishments to the minors. This norm's main characteristic was the centralization of the power on the hands of the judge, that hadn't any limitation on its legislation power. It's possible to say that the poverty massification arises as a consequence of the judicialization of childhood troubles.

The barriers that prevented unrestrained punishment, in the Minors Code of 1927 were also surpassed, once there were no more difference between an abandoned minor and a delinquent one. That significantly increased the situations of state intervention, mobilizing mainly the judiciary through the Childhood and Youth Courts, resulting in the minors' institutionalization. Thus, there was no distinction between the measures' enforcement, this was in exclusive charge of the judge of minor's decision, which according to Sposato (2011):

> [...] this is, moreover, the cornerstone of the doctrine of the irregular situation, as Emilio Garcia Mendez preaches: the lack of distinction between abandoned and delinquent minors. Such a doctrine means nothing more than legitimizing a potential indiscriminate legal action on children and adolescents in difficult situation". (SPOSATO, 2001)

This way, the judicial actions applied indiscriminately could only criminally account the "minors" that had 14 to 18 years of age, however, this process, because of its characteristics of special nature, evaluated in detail the minor's condition, according to the article 24, 2nd paragraph:

> *if the minor is abandoned, perverted, or in danger of being so, the competent authority shall promote his placement in an asylum, education house, preservation school, or shall entrust him to the right person for all the time necessary for his education, provided not to exceed the age of 21 years.*

It must be highlighted the expression "in danger of being", that allowed the increase of the list of children and adolescents "framed" as delinquent minors, since, from that moment on, the main characteristics to be evaluated were those that lead to a possible criminal identification, that is: skin color, clothing, financial condition, place where one was arrested etc. so it could be analyzed as what today would be called enemy's biotype, this being subordinated to the Code's rules.

This directed and crimeless intervention (BATISTA, 2003),

beginning at the police's hands[9], enticed a guardianship acting by the state with a selective and lombrosian[10] characteristic, which preemptively anticipated the incrimination process that may result in criminal subjection[11]. Only poor, black, miserable, abandoned minors would be targeted by the intervention and institutionalization, susceptible to processes that would be solved in courts and no longer in social environments, such as schools and families, for example.

This type of situation is what we could name negative citizenship, terminology used by the professor Nilo Batista[12], and according to Batista (2003):

> *[...]refers to the conception of negative citizenship, which is restricted to the knowledge and exercises of the formal limits to the coercive intervention of the State. These vulnerable sectors, yesterday slaves, today urban marginal masses, only know the citizenship by its reverse, in the 'self-defensive trench' of the oppression of our penal system's organisms."(BATISTA, 2003)*

This code's novelty was the appearing of a defensive figure for the "minors", which according to Batista (2003) "represents an indicative of a certain level of inexistent guarantee until then and that will be repealed years later in the period of 1942-1962". However, a lawyer's presence wasn't usual, and only "minors" in better financial condition escaped those current profiling patterns: black, poor, with no schooling, and could afford to use the defense as a resource, as approached by Batista (2003).

The limited presence of lawyers, associated to the system's sluggishness, contributed to the expansion of government intervention

9 The exercise of the police power (*Polizeigewalt*) refers to a government entity or agent's use of executing services turned to registry, fiscalization or expedition of some act.

10 In the middle of 1876, The Criminal Man (*L'Uomo Delinquente*), by the italian Cesare Lombroso, was published. Along with this empirical study's disclosure, spread, worldwide, the so-called Theory of the Born Criminal, in which certain physical characteristics found in some human beings, mainly multiracial individuals, would demonstrate one's predisposition towards criminal life.

11 According to (MISSE, 1999): "If we take structure as power (even in the Weberian amorphous sense), then the experience of subjection (in the sense of subjugation, subordination, assujetissement) would also be the process through which subjectivation - the emergence of the subject - becomes active as a counterpoint to structure, as a negating action. The subject, in this sense, is the effect of being put by the structure (power) and emerging as its opposing and reflective being (power)".

12 BATISTA, Nilo. "Fragmentos de um discurso sedicioso", in discursos Sediciosos – crime, direito e sociedade, nº 1. Rio de Janeiro, Relume – Dumará, 1996, p. 71.

with a selective and inquisitive aspect, once that the Code of Minors of 1927, even if allowed the presence of a public defender/private lawyer, limited it to the quantity of only 1 (one) per process instruction, in conformity to SCA's articles 161 and 148.

Interesting to notice, that in the 1927's Code, the word "guarantee(s)" appears meaning only moral guarantees and not in the fundamental rights and guarantees perspective, just as, the word "right(s)" is directed to the parents' ones – mother, father or relatives, and never referring to the "minors". Another observed issue was that the words "protection" and "assistance" appear on the legislation meaning adolescent surveillance.

So, the punitive guardianship characteristic was particular to the 1927's Code, situation that got worse during the '30s and '40s, marked by the emphasis on the assistance, realized primarily within closed institutions. The critics to the model also began to emerge, fact that boosted changing propositions until the '50s, when it happened an increase in the number of charges of overcrowding and mistreatment against MAS – Minor's Assistance Service, an agency of the Ministry of Justice, that worked as a Penitentiary system for the underage population, with a correctional orientation – repressive, typical of the authoritarian period of New State. The system predicted a different treatment to the adolescent responsible for the infraction and to the impoverished and abandoned minor (RIZZINI, 1997).

The first initiatives where those of asylum assistance also with a preventive and punitive nature, where until the middle of 1935 the "minors" were apprehended and taken to screening shelters. Posteriorly, as the 1940's Criminal Code was established, it declared that the age of criminal imputability was 18 years, also endorsing that those under 18 years old would be strictly under the regime defined on the Code of Minors of 1927. So, in 1942, the sheltering assistance evolved into MAS, Minor's Assistance Service, what, to many authors, is a milestone on the public policies for the childhood and adolescence.

MAS's structure was in the form of reformatories, as well as houses of correction for the lawbreakers, and those became precarious due to overcrowding and the sluggishness of investigative processes which, consequently, worsened the condition of these minors' deprivation of liberty. At that time, MAS was denounced by the press for scandals and tortures that the minors had to suffer (MISSE, 2007).

The 1964 military *coup d'état* generated an intense socio-political impact, in a negative way, as authoritarianism strengthened, what consequently was reproduced on the juvenile justice system, starting with the ending of MAS to the creation of NFWM (National Foundation for the Welfare of Minors) and SFWM (State Foundation for Welfare of Minors) in each state of the federation, influenced by the

National Security Doctrine, which militarized the discipline within the reformatories-prison.

The changes went on, as the legislation was profoundly altered with the Law no. 4513/64, about the national minor well-being policy, and Law no. 6697/79, that created the new Code of Minors of 1979 turned to minors in any irregular situation.

At this time the irregular situation was seen as a wide social pathology, according to Migliari (1996), "irregular situation is a metaphor for the impoverished child/adolescent that needs to be under strict ruling of an array of legal norms".

This way, it's not surprising that the new 1979's code hadn't made any mention to child or adolescent's rights, and strengthened the symbolic power at the hands of the Judiciary. Consequently, as explains Batista (2003), there is no defendant's lawyer on the processes concerning lawbreaking adolescents:

> *"The young person in 'irregular situation' is processed and enters the criminal circuit without the appearance of the figure of the lawyer. One of the axes of the minorist process is the non-recognition of the minor as a person, but as someone to be protected (...) The absence of the defender or lawyer demonstrates the lack of guarantees in the judicial proceedings prior to the ACS." (BATISTA, 2003)*

As seen in this article from the Code of Minors of 1979, the figure of the lawyer has a relative *status*, *id est,* allowed during the regular progress of the process and required only at the appealing phase:

> *Art. 93. The parents or guardian may intervene in the procedures dealt with in this Law, through a lawyer with special powers, which will be summoned for all acts, in person, or by official publication, respecting the secrecy of Justice.*
>
> *Single paragraph. It will be mandatory to set up a lawyer to file an appeal.*

According to Veronese (1994) this relative *status* may be explained as follows:

> *"A historical-doctrinal analysis of the participation of the lawyer in the area of childhood and youth reveals the existence of three positions: the first that considers*

> *obligatory and, therefore, indispensable the presence of the lawyer; the second chain that prohibits the action of the defender in this sphere and, lastly, as an example of these advisors to cite the one that empowers their participation. The revoked Code of Minors of 1979 understood to be optional the presence of the defender in the procedures related to the so-called juveniles in an irregular situation". (VERONESE, 1994)*

The 1979's code's exhaustion happened mainly due to its non glimpsing the integrity of the problem of the "lawbreaker" juvenile, as a result of the system's inability at making the child or adolescent be reinserted on the social context.

In this context, in 1986, non-governmental organizations united themselves in favor of defending child and adolescent's rights, also being influenced by the project of the UN's Convention on the Rights of the Child and began a movement towards the insertion of the United Nations' document's contents in the forthcoming CFRB/88 (PAES, 2013).

This convention prioritized the healthy development of the "minors" both on the social sphere as on their individuality, since they're still in a process of construction of their own personalities. During more than one century, poverty and delinquency were the reasons to intervene via social and punitive control on the so-called "minors", that nowadays, by force of SCA and CFRB/88, are called children and adolescents.

Along with redemocratization the "1988's Citizen Constitution" was promulgated, representing meaningful advances on the guarantees of rights of thousands of children and adolescents in Brazil. In this conjuncture SCA's born, in 1989, starting, consequently the institutional reordering, with an attempt to deinstitutionalize young beings and making them subjects of rights[13].

In this way SCA treats the issue through another lens, that being: the doctrine of "integral protection". This integral protection has its foundation in two very important pillars: the child and the adolescent while "subjects of rights" and their "peculiar condition of person in development" – CFRB/88's article 227, §3º, IV (SPOSATO, 2011).

According to Veronese (1998), the new regulatory Law on constitutional precepts, in its first part, lists the children and adolescents' rights; and, in its second, the way of viabilization of those rights. This is, thus, when it is when the lawyer's figure is inserted and becomes relevant.

13 Subjects of rights are all the subjective centres of right or duty, i. e., all that the law says it's able to be a holder of a right or a debtor of an obligation.

On SCA the lawyer's figure is obligatory, yet it doesn't constitute something truly innovative, as the new legislation follows the precepts of the minimal rules of the United Nations for the administration of justice for minors – "The Beijing Rules" [14], from 1984.

Hence, we can see that all throughout the path of the Brazilian legislation there is a small relevance or even absence of the defense and the rights that would be secured to the young beings in conflict with the law. Only after SCA the defense became a right, an obligatory one, on juvenile defense, along with the appearance of the integral protection doctrine. These characteristics are quite worrisome, having in mind the authoritarian and punitive heritage of the Juvenile Justice in Brazil, which hinders the effectiveness on the implementation of public policies, just as it does to teenager resocialization, keeping in mind the persistence of a vision that conceives him as a social enemy.

2. About the juvenile justice's system on SCA

This work's item has as its objective to analyze how the juvenile justice's system works in Brazil, according to what is fixed on SCA and its variations on each state of the federation, always focusing on the state organization of Rio de Janeiro, which is this work's central *locus*. Juvenile Justice in general isn't declared as a special justice, however it has specific particularities on its judiciary organization; its legal formatting derived from SCA, for many times doesn't follows its configuration, exercising a non formal practice, that for many times opposes itself to the established norm, as the 2005's work "NACADC's vision over its concepts and practices, on a Human Rights perspective"[15] explains:

> *"In this sense, it is important to emphasize that the Brazilian Juvenile Justice System has a legal format - the Statute of the Child and Adolescent - and a non-formal practice that, in reality, is against the legal one, often forcing NACADC and CDRAC to the development of diversified discussions and practices - across the continental reach of the country - that respond effectively to the interests of children and adolescents."*

14 Specifically, the rules number 7.1 and 15.1.

15 Link accessed at June 23, 2017, with the complete report on the realization research: http://www.cedecacasarenascer.org/uploads_arquivos/livros/1705181459000000justica_juvenil_a_visao_da_anced_sobre_seus_conceitos_e_praticas_em_uma_perspectiva_dos_direitos_humanos_2007.PDF

This system's inaugurated with the arresting of the teenager which comes at each state's Civil Police precinct houses so an record of occurrence can be made, due to the infraction committed. As the parents appear at the police station, in accordance with SCA's article 174, the minor must be freed by a police authority under a term of commitment and responsibility saying that he must present himself before a Public Ministry's representative at the same day or the immediate next business day. In case of non existing a specific service unit to the adolescent in conflict with the law in the region, he must be immediately transferred to the nearest locality (SCA's article 185, §1[16]). It is important to emphasize that the ECA does not predict the confinement of teenagers in police stations or prisons, that's why the possibility of his immediate liberation must be examined, in case there isn't a specific unit for him to stay.

After being arrested, the competent authorities must be notified, as, for example, the Public Ministry, the Childhood and Youth's Judge and the teenagers' parents in case there are any. In general, this should ease the search by the teenagers' legal responsible for a lawyer or public defender, so that an attorney may go along with them still at the police station, or administrative phase, fact that for many does not happen due to the overload of the Public Defense that assist most of these teenagers.

Nowadays, there are two possibilities to rout those juveniles that committed infractions, the first one is immediate liberation after the signing of a commitment term by the parents and, the second, sending the minors to provisional confinement units, in case of flagrant crimes, so that they wait for their presentation to Public Ministry, which will make the representation – the document that installs the judicial processes at the Juvenile Justice –, the same day or the subsequent one.

At the Rio de Janeiro's judicial district, for example, the Childhood and Youth Jurisdictions work in a system of specialized jurisdictions, counting with only one Childhood and Youth Jurisdiction relative to infractions and three others that take care of general childhood issues. Today, this unique jurisdiction, according to a statistical data provided by the sector of Statistics of Registries of the Court of Justice Rio de Janeiro, counted with, at May 2017, a general collection of 15.319 processes. This number is very expressive if compared to those jurisdictions that haven't the judgements of infractions, which in the

16 Art. 185. Internment decreed or maintained by the judicial authority may not be fulfilled in a prison institution.
Paragraph 1. Should an entity with the characteristics defined in art. 123 not exist in the judicial district, the adolescent should be immediately transferred to the nearest locality.
Paragraph 2. Should immediate transfer be impossible, the adolescent will await removal at a police office, provided that this be done in a section separate from adults and in appropriate facilities and, subject to the penalty of liability, this period can not surpass five days.

same period had general collections about two to three times smaller than the previous one.

This justice's system's legal milestone was oriented by national and international norms, for example, the Federal Constitution of 1988, the Convention on the Rights of the Child, the Standard Minimum Rules for the Administration of Juvenile Justice – Beijing Rules – and the United Nations Rules for the Protection of Juveniles Deprived of their Liberty, respectively. Lastly, brought an enhancement to the integral protection doctrine as well as the appearance of a new set of rights: the Right of the Child and Adolescent, that needs to be effective of the true working of all legal institutes and that them be understood "in a perspective of human rights tranversality, since children are equally entitled to, and with priority, all human rights" (NACADC, 2005).

So, we may see that the SCA resulted in great advances towards the guarantee of juvenile justice's rights, mainly if we consider the history of defense's normative history towards the effectiveness of juveniles in conflict with the law in Brazil as subjects of rights.

These guarantees are also materialized on the juvenile justice system, mostly when it was established, at the Inter-American Court of Human Rights (IACHR Court), Advisory Opinion 17 (OC-17)[17], in which children and adolescents had the right to be heard by a competent Court. In Brazil, it occurred through the operability of a judicial process in the face of the commitment of acts analogous to crimes by children and adolescents, judged by the Childhood and Youth Jurisdictions.

Therefore, these juveniles' procedural guarantees must be verified and respected, mainly having in mind the constitutional principles, for example, the principle of legality, that says that "*nobody shall be obligated to do or not do something unless by virtue of law*". And, for it to be effective, it's required that existence of clear laws in relation to the linguistic part, in a way so that can be legal certainty on the correct application of the law. Even acts that are part of the due process, the broad defense or the contradictory must have effectiveness so that the preservation of juveniles' guarantees and rights may occur.

These guarantees must be initiated even before the representation made by the Public Ministry, after the discovery or flagrant of the infraction by the Police. It's from this path, that the process comes to the

17 "100. Bajo esta misma perspectiva, y específicamente con respecto a determinados procesos judiciales, la Observación General 13 relativa al artículo 14 del Pacto de Derechos Civiles e Políticos de las Naciones Unidas, sobre la igualdad de todas las personas en el derecho a ser oídas públicamente por un tribunal competente, señaló que dicha norma se aplica tanto a tribunales ordinarios como especiales, y determinó que los `menores deben disfrutar por lo menos de las mismas garantías y protección que se reconocen a los adultos en el artículo 14". Condición Jurídica y Derechos Humanos del Niño – Opinión Consultiva OC-17/2002 Corte Interamericana de Derechos Humanos, pág 98.

jurisdictions, places where the processes are sheltered, the responsible judges are allocated and where the offices where the audiences for presentation because of the infraction take place. In accordance to SCA's article 103, it will be evaluated the "conduct described as crime or criminal contravention", *id est,* the facts analogous to the criminal types described on the Brazilian Criminal Code, committed by adolescents of age between 12 to 18 incomplete years, considered unimputable for their acts, as they're still in process of development, according to article 104 of the same statute.

However, that doesn't mean that they aren't responsible for their acts, since they comply with socio-educational measures, sentenced by judgement on merits already in the final stage of the process of first instance's juvenile justice. The statute postulates that the following two binomials should be harmonized: legal-sanctioning and ethical-pedagogical, in a way as to resocialize the adolescents. These measures are presented on SCA's articles 112 and 115, and are chosen by a judge with the help of a technical advice from the *Parquet,* in accordance to the infraction committed.

Among all the measures presented on article 112, the most serious are the ones of semi-freedom and confinement, the latter applied when the infraction committed included a threat or use of violence against a person. It's defined by the deprivation of liberty at the socio-educational institutions, although, as the adolescent is developing himself, this measure must follow the principles of brevity and exceptionality imposed by SCA.

In theory, the judge with the help from state's Public Ministry, via technical advice, inspect the adolescent's conditions and determine the most adequate measure. It's important to say that only in cases of flagrant infraction and, unless there is a strict authority's order, the adolescent could be deprived of his freedom, for no later than 45 days via temporary confinement, until there is a sentence by the judge. The state's Public Defense and Lawyers duly registered in the OAB also aid in this process, providing technical defenses capable of changing the process' course.

However, what is seen, according to what was ascertained during the bibliographical review, is the occurrence of an inadequate tendency on the usage and indication of more severe measures by Judges and Prosecutors, by using measures of deprivation of liberty as a way to take the adolescent out of his environment. This is made, for example, when only the authorship and materiality of the offense are considered, without even justifying the measure's motivation. The insufficient application of the integral protection doctrine, where it occurs the mediation between Defense, Prosecutors and Judiciary, when choosing the best measure, then justifies the movement towards a

Juvenile Criminal Law.

According to Miraglia (2005, p. 96), judges do not use SCA in a homogeneous way, neither it is objective. The variables that condition the measure to be applied are, in fact, linked to the type of offense committed, as recommended by the Statute. However, the presence of the parents of the adolescent in the audience counts as a positive point, besides the bond with the school and the relation level/age also is taken into consideration.

Even though the SCA is objective in relation to its norms, there are gaps that may impair the effectiveness of the fundamental guarantees of children and adolescents, especially when we're talking about the exceptional application of socio-educational measures that are private and restrictive of freedom, that is, confinement and semi-freedom, respectively. This happens due to the vague nature of application of the measures, which in many cases do not have definite deadlines for their application, duration and neither clear criteria, leading to their poor execution and often withdrawing their exceptional character, invoking subjectivities and punitivisms with no reason.

The socio-education of adolescents should have the goal of encouraging their qualities and directing them onto healthy trends, but this is not what seems to happen, since in practice the State only wants to fit them into the models of restriction or deprivation of liberty for the implementation of measures. This fact is directly related to the lack of public policies, consequently causing the loss of the objective of social recovery independent of the infraction.

Social recovery is one of the objectives of the SCA, whose basic principle is the integral protection of children and adolescents, showing that socio-educational measures should have a pedagogical rather than sanctioning character. However, this is not what happens in practice, as will be seen in the development of this work.

In Southeastern Brazil, the socio-educational measure of internment is fulfilled in the so-called socio-educational institutes, for example in Rio de Janeiro, they are under GDSEA's[18] responsibility,

18 Created by the Decretee no. 18.493, from 26/01/93, the General Department of Socio-Educational Actions is a Rio de Janeiro's executive agency, responsible for the execution of socio-educational measures recommended by the Statute of the Child and Adolescent (SCA), applied by the Judiciary on youths in conflict with the law. With the objective being to attend the constitutional precepts and in conformity to what happened to be called Socio-Educational System, during the 1988 Constitution of the Republic, there was a political-administrative decentralization. The creation of the New GDSEA occurred from the interlocution between the state government and the Brazilian Center for Childhood and Adolescence – BCCA (a Federal Government agency from 1991 to 1994), in line with the political-governmental guidelines to promotion, defense and guarantee of rights to legal protection. At this period there was an integral absorption of the teenagers attended by BCCA, the same not occurring with the

created by Decree n. 18.493, of 01/26/93, agency of the Executive Power of the State of Rio de Janeiro, it is responsible for the implementation of socio-educational measures, recommended by the SCA, applied by the Judiciary to juveniles in conflict with the law.

GDSEA currently has eight hospitalization units, for example the Don Bosco and SES unit, responsible for the hospitalization of 1,835[19] boys, as well as fifteen units of CIRAC - Center for Integrated Resources for Adolescent Care, spread throughout the city, which are responsible for the execution of the measures of semi-freedom, imposed by judicial sentence to a total of 444[20] adolescents who at some moment of their lives committed infractions.

These centers, in theory, have the objective of a social education, with reeducation and resocialization and, should provide the adolescents with comprehensive education, activities that propitiate professional qualification as a whole. However, this is not what we see in most of them, who suffer from overcrowding, due to the increase in the adoption of socio-educational measures with sanctions and lack of investment.

During a field visit to one of the GDSEA - ESE detention units, located at the Estrada do Guandú do Sena, in the neighborhood of Bangu, in the city of Rio de Janeiro - RJ, within the complex of adult prisons, I was able to perceive this situation of overcrowding, and consequently the lack of structure capable of meeting the needs of adolescents and their own employees, a situation that directly confronts the human rights of all involved.

3. The problem of SCA's doctrines: protection *versus* guarantees

The new stage of Juvenile Justice was initiated by the doctrine of integral protection, its incorporation elevated children and adolescents to a new paradigm: the condition of subjects of rights, inalienable and specific, and duties (SARAIVA, 2003).

The term integral protection for Fachinetto (2003), means the safeguard to the conditions for the present and future happiness, the integral term is related to the due totality and completeness of the human being, especially in its physical, mental, moral, spiritual and social aspects.

Thus, in order for integrality to be effective, and for its regimental principles to function, doctrine was structured in three systems, according to João Batista Costa Saraiva (2005):

Integral protection in the SCA is structured from

physical installations, which resulted in specific demands on the treatment.

19 Data provided by GDSEA, on June 19, 2017

20 Data provided by GDSEA, on June 19, 2017

> *three guarantee systems: the Primary System, the Secondary System and the Tertiary System. The Primary System deals with public policies for the care of children and adolescents and is foreseen in arts. 4 and 86-88. The Secondary System deals with protection measures directed at children and adolescents in situations of personal or social risk, foreseen in arts. 98 and 101. The Tertiary System addresses the criminal liability of the offending adolescent, through the socio-educational measures provided for in art. 112, which can be applied to adolescents who commit infractions. (SARAIVA, 2005)*

This structure causes the failures to be compensated, that is to say, when the child or adolescent does not benefit from the primary prevention system, the secondary system is activated and the Council of Guardianship is responsible. If the adolescent commits an infraction act, the third prevention system is activated, and socio-educational measures are implemented through the justice system (SARAIVA, 2003). It is in the tertiary system that the discussion between integral protection and juvenile criminal law happens, considering all the implications that surround the application of socio-educational measures.

3.1 The Debate and the Literature Review

The social relevance of the theme of this work stems from the existence since the 19th century from the creation of a law and a specific justice for minors in Brazil and in the world. In Brazil, according to a seminal study that reviews the work on the subject, this specific justice will be created for the control of poor childhood, but not destined to childhood in general. Since then, the "minor" category will be related to poor youth, their color, crime and poverty (ALVIM, VALLADARES, 1986).

Nowadays, these young people are daily prosecuted by the State and led to socio-educational centers due to the commitments of infractions and their processes are governed by the Statute of the Child and Adolescent. Thus, it is necessary to ask: What has been the defense of these adolescents carried out by public defenders or private lawyers, so that one can have legal certainty in the acts carried out in court?

As already mentioned, in the Minors Codes the defense of these young people was totally without strength and even nonexistent. This fact, at least in the new code, changed with the creation of the Statute of the Child and Adolescent (SCA) in 1989, guided by the International

Doctrine of "Integral Protection".

According to Méndez (2006), the treatment and perception of juvenile criminal responsibility in Latin America would have gone through three stages: a) the stage of undifferentiated criminal treatment begins with the emergence of 19th century criminal codes and extends until 1919. This is characterized by treating minors in almost the same way as adults (only with decreasing sentence), with the exception of children under seven years of age considered as absolutely incapable; b) the guardianship phase began with the reformers' movement in the late 19th century in the United States and in 1920 with the approval of specialized legislation (juvenile laws) and the Juvenile Courts in Latin America; c) The third stage would have been marked by the UN's Convention on the Rights of the Child of 1989 and inaugurated in the region by the approval of the SCA.

The SCA is a new and advanced legislation regarding the protection of the rights of children and adolescents in Brazil. However, during the development of this work it was possible to perceive that the Statute has divergent currents that guide the interpretation of the type of response to the infractions. Thus, it was relevant to investigate how the dispute for the most adequate interpretation occurred and its reflexes in the defense activity.

According to Costa (2015), SCA approval represented great advances, especially in relation to the history of childhood legislation in Brazil. Despite the pioneering of legislation, there are inaccuracies in the text of the Law and misunderstandings that allow the broad interpretation and that can mean the absence of instrumentality so that one can apply the spirit of the legislator.

According to Brandão (2002), for the principle of legality to fulfill its function, it is necessary that the legislator formulate clear laws as to its language. In criminal law, the lack of clarity in the formulation of the law means an affront to the guarantees of citizens, who are subject to instability and insecurity. The system of socio-educational measures for the author is clear, but it has gaps and ample space for the discretion in its application and execution, also generating inaccuracy in the guarantee of rights.

According to Méndez (2006), the model inaugurated by the statute would constitute a profound rupture with both the guardianship model and the undifferentiated criminal model. Almeida (2016) emphasizes that the statute would have established the difference in legal treatment based on the age group: children, defined in the law as any human being up to 12 years of age, besides being criminally unimputable, are also criminally irresponsible, only receiving protective measures in cases of acts that violate criminal law. However, adolescents, who are between 12 and 18 years old, are also criminally unimputable, but are criminally

responsible, considering that they are criminally liable (even under special law) for any conduct characterized as crime or offense.

The first interpretation defends the position of Integral Protection of Adolescents in conflict with the law, and the second one approaches the existence of a Juvenile Criminal Law, although the authors position themselves as being the statute an avant-garde legislation when it comes to protection of the adolescents' guarantees in conflict, regardless of their position in the two chains.

According to Almeida (2016), adepts of Juvenile Criminal Law consider it necessary to approach the SCA in the interpretation of its articles of Criminal Law, contributing to the logic of guaranteeism that would have guided the formulation of the SCA. For them, recognizing that the teenager is unpunishable does not mean that he can not be criminally responsible for the practice of criminal acts.

In this way, the Juvenile Criminal Law thesis does not derive from the sense of punishment to juvenile criminality, but rather, as its supporters argue, that this interpretation would lead to a "maximum protection" of guarantees typical of Minimum Penal Law within the SCA, restricting authoritarian punishment from the State, ensuring a fair process, with respect to the principles of legality, presumption of innocence and the right of defense through a lawyer. Besides the right to the double degree of jurisdiction, the right of the adolescent to know the representation made against him by the Public Ministry.

According to Almeida (2016) the "penal guaranteeism", conceives of Criminal Law as a system of guarantees that protects the individual rights of citizens, imposing limits on the State's decisions (MACHADO, 2006; FRASSETO, 2005, 2006; SILVA, 2006; SPOSATO, 2002, 95 2006; MINATEL, 2013, ALMEIDA,2016, COSTA 2005).

According to Frasseto (2006), "in the light of guaranteeism […] the only legitimate function of Criminal Law is the preservation of guarantees. […] The emphasis is less on punishment than on control of punishment". However, for many defenders of juvenile criminal law, the only way to protect the authoritarianism of the state on socio-educational measures, and its disengagement from the minors code, would be to see penalties as "penalties", equal to adult criminal law (MINATEL, 2013, p. 27; SILVA, 2006, p.57; SARAIVA, 2013, p. 9; SARAIVA, 2006, p. 178; BARBOSA, 2009, p.51; SOUZA e BARBOSA, 2010, p. 134; 106 ZAPATA, 2010, p. 45; SPOSATO, 2006, p. 253).

On the other hand, the defenders of integral protection, competing doctrine, criticize the position of juvenile criminal law, since this would detract from the doctrine of integral protection by emphasizing the retributive character of the socioeducative measure (VERONESE, 2008:1, 100, 101, GOMES NETO, s/d: 10; PAULA, 2006:35). This interpretation, which is clearly an opposition to the

Juvenile Criminal Law, is supported by Article 228 of CFRB/88, which states: "Any person under eighteen years of age is criminally unpunishable, being subjected to the rules of special legislation", *id est*, afirms that adolescents won't be submitted to the adult criminal system, but to the SCA (DIGIACOMO, 2006, ROSA, 2006; NICKNISH, 2008; PAULA, 2002).

Veronese (2008) also does not envisage the possibility of the socio-educational measure being seen as a penal sanction:

> *"In this differentiated universe, we understand that Law no. 8.069/90 does not effectively contemplate the socio-educational measure as a penal sanction. It is noteworthy the fact that in art. 100 there is evidence of something innovative: 'In the application of measures, pedagogical needs will be taken into account, preferring those that aim at strengthening family and community ties.' Articles 119, II; 120, § 1; 123, §1, likewise ratify the importance of pedagogical activities, which are obligatory, even in temporary admissions, because what is sought is always the rescue of this human person, criminally unpunishable, who, however, transgressed norms. The Statute believes that the best way to intervene in this adolescent in conflict with the law is to have a positive influence on their education, using the pedagogical process as an effective mechanism to enable the adolescents who are the author of an offense in their community. They therefore aim at such measures, to educate for social life" (VERONESE, 2008, p. 2).*

At this point, we reflect that the juvenile criminal law by these characteristics discussed, makes the figure of the lawyer essential throughout the juvenile justice process. The coercive imposition of reeducation measures demands from the point of view of this guaranteeism, that the respect is privileged, mainly, to the principles: of the contradictory, ample defense and legality.

Constitutional principles that are only guaranteed for the defendant or author of the facts, when their defense is exercised, this usually occurs through lawyers or public defenders, who use the technical defense to guarantee fundamental rights.

For supporters of integral protection, the lawyer, as well as judges and prosecutors appear as mediators, to choose the most appropriate measure for the adolescent, and they do not understand that coercive

measures are imposed, since there is a consensus on the choice of them, summarizing: more specialization and less accountability.

For Veronese (1994), an academic on the subject, the role of the lawyer in the Childhood Court is essential for the administration of justice, especially those who commit themselves politically to the cause of Brazilian childhood and adolescence, adding that, while in Brazil no agency of external control over the Judiciary is established, it seems to be evident that such attribution must be given to lawyers who, as truly social engineers, will be able to act, by themselves and by their class entities, in the supervision of the exercise of the judicial function, mobilizing public opinion and serving as a sounding board for true popular control.

Even though the right to defense is essential to the correct progress of juvenile justice, the procedural reality is different from the norms fixed in the codes, since technical defense is not always effective in responding to the gaps in the law or to the discretion of the operators.

According to Costa (2005), it is frequent to observe the absence of material defense, which ends up corroborating the fact that adolescents are convicted of committing an infraction, in which there is a need to frame their behavior as a typical and culpable act. Costa (2005) also affirms that, even though there is effective defense, the most serious socio-educational measure provided for by statutory law is not being applied, or even it is not common to see a second case annulled for lack of respect for constitutional law defense.

Another important factor addressed by Costa (2005) is the difficulties faced by defense overcoming material issues, revealing what lies behind the tacit acceptance of the absence of defense is the subliminal conception that the active presence of a lawyer would be unnecessary, or even that it would hinder the smooth progress of the process.

FINAL CONSIDERATIONS

This work sought to investigate the role of the defense in Juvenile Justice and its reflexes in the guarantees of the rights of adolescents in conflict with the Law in the city of Rio de Janeiro during the process of incrimination of them.

The study sought to show how, in relation to defense, the difficulties and gaps in childhood and youth legislation go far beyond the legal limits. What we meant by this is that, in Juvenile Justice, there are still obstacles against the understanding of the need for a minor's defense against ministerial representation, and the purpose of it is to, through the obedience to the Law, ensure that the procedural rites are being respected and, therefore, the rights and guarantees are truly being

implemented as the adolescents enter the socio-educational system.

We perceived that Juvenile Justice, even though it is a relatively new legislation, still faces numerous difficulties, not overcome yet. Throughout the article some of these problems have been highlighted, such as: 1-) Gaps in SCA legislation about the need for defense at procedural moments and in specific cases, for example at the moment of remission; 2-) Pre-procedural phase without the effective presence of the defense, the agreements are only made between the adolescent and the Public Prosecutor; 3-) Lack of legal provision in the SCA on what the judge should do if the adolescent appears in court, especially at the presentation hearing, without defense; 4-) Lack of prediction in the SCA of defense in hearing of fact presentation considered of lower gravity; and 5-) Lack of prediction by the SCA of the defense in the regression of measures, due to its non-compliance by adolescents.

So, what we see in practice is still a culturally entrenched justice to the characteristics of the irregular situation, where the role of defense, often for lack of practice or institutional inequality, ends up being manipulated by majoritarian positions imposed as if they were "by mutual consent", over what would be the best for the teenager. In other words, it is often agreed with deprivation of liberty even if there was no technical defense, since there's a popular wisdom within the courts that socio-educational measures of confinement would be better because they would take the teenager off the street or his environment, so that he won't commit anymore "crimes" and thus receive appropriate resocializing treatment.

Unfortunately, this practice adopted by many judges and prosecutors is endowed with a vacuum of knowledge of the current state of the socio-educational system, especially of the part that shelters adolescents who are complying with semi-liberty or confinement.

Characteristics such as these directly affect the work done by the technical defense (advocates and public defenders) of adolescents in conflict with the law in the city of Rio de Janeiro, where I was able to highlight four of the main difficulties encountered in practice, as well as in the quantitative data presented in this work. The first one of greater prominence was the presence of an accusatory guardianship system with strong characteristics of an inquisitorial system, which mitigates the role of defense and its essentiality within the procedural rite, as well as, keeps the thinking of the irregular situation. The second one was related to the great procedural burden of Public Defenders' offices and the performance of a small number of private lawyers specialized in childhood and youth, situations that can lead to deficits in technical defense.

The third was linked to SCA legislation that has gaps in some articles on the obligation to defend at certain moments of the juvenile

justice rite, much seen in the pre-procedural phase and mentioned previously; the fourth was related to the Public Ministry, as well as, and especially to the magistrate himself, as they together hold a leading position, placing the defense in a lower position in relation to the establishment of socio-educational measures, thus revealing the institutional differentiation of defense against the triangular structure of the process.

This institutional differentiation that the defense suffers today, as the analysis of the topic made from the bibliographic revision of item 1 and 4 demonstrates, comes from the Code of Minors of 1927, where it was "common" to exist a mitigation of the professional practice of lawyers and public defenders in the defense of young people in conflict with Law. To this day, even with the creation of the SCA, which made the defense mandatory and part in the process, and with the advent of CFRB/88, which considered children and adolescents as subjects of rights, the situation remains and, still remains, the guardianship position of the judge or its action in block with the Public Prosecutor.

Therefore, we have verified that throughout all trajectory of the Brazilian legislation there is the absence or the little relevance of the defense in juvenile justice, characteristics that justify the trail of punitivism existing in the courts due to the silencing of the defense. As it was possible to perceive, in a general manner, the defense, in the light of its many needs, should seek its equality of action, as well as the technique, through methods provided in the legislation itself, mainly within SCA and CFRB/88, to that will try to establish its institutional parity with the Public Prosecution Service, mainly to preserve the rights and guarantees of young people in conflict with the law.

Thus, the role of the lawyer or public defender that should be primarily technical and essential to the process, preserving the observance of rights and guarantees established in the country's legal system and ratified international conventions, so that those juveniles in conflict with the Law always have their physical, moral and psychological integrity respected, both as subjects of rights and as persons in development, although in practice, it ends differently, since these factors are not respected.

It was also tried to demonstrate that the juvenile justice system brought by the SCA has numerous specific characteristics in its judicial organization, its legal formatting derived from its own statute, which is often not followed by the law's operators, which leads to the realization of informal practices, which often contradict the current norm.

Thus, we see that even with the adoption of an accusatory system where all constitutional and procedural guarantees should be respected, we have an inquisitorial system where the rights of adolescents in conflict are disrespected, starting with their defense.

The defense, in the face of this situation, ends up having its work hampered, since there are still inquisitorial remnants[21], marked by ideals incompatible with a technical defense capable of guaranteeing rights and their effectiveness, for example, when it expands in the pre-procedural phase the powers of the Public Ministry on the deliberations to be taken, without the defense being heard previously on the facts. Here, there is no effective defense.

The inquisitoriality of juvenile justice is confused with the role of the juvenile judge, who at the same time is the one who takes initiative, protagonist in the process, but who is lost in the application of measures that should be protective of the young, that is, adolescents from their "environment" to justify confinement. However, what really lies behind this act is the removal of these young people for having figured as social enemies.

This problem is also related to the distancing of the operators (judge, judge, prosecutor and prosecutor) from the reality faced by these juveniles in conflict with the law. Often, decisions are based on the idea of withdrawing only from the environment in which these young people live and little is heard about their life history, the real situation of their families, facts that could lead to a better application of socio-educational measures, especially those of the open medium [22].

21 According to Kant de Lima, the existence of different systems of production of legal truths (LIMA, 1989). Therefore, the definition of a system as accusatory or inquisitorial also goes through the procedures employed to obtain "truths". The so-called quest for "real truth" is, for example, a key category for measuring the functioning of the arbitrary process dynamics of the Brazilian system. The obsession with truth should not lead to the assumption of a role of investigator on the part of the judge. He must conclude his ambition for truth despite the existence of gaps, which must necessarily imply in the acquittal of the defendant, in accordance with the constitutional principle of presumption of innocence. What often happens, however, is the opposite, as Kant de Lima realized: there are no elements to substantiate the condemnation and the judge distorts the process of incrimination when leaving in search of evidence. Some will say that the judge can also go in search of evidence to save the defendant: this is one of the many illusions that can no longer be sustained. It does not make sense to say that it is necessary to look for elements to absolve: if there is doubt, absolution is an imposition by virtue of in dubio pro reo. (SALAH, 2010)

22 It is in this sense that Kant de Lima›s statement that "in Brazil the defendant must prove in practice his innocence" also awakens other inquiries, because in the Brazilian system, the constitutional provision is an accusatory process, where the ownership of the criminal action belongs exclusively to the Public Prosecutor's Office (except in cases of private initiative); the role of the guarantor of the fundamental rights of the accused in the proceedings is up to the judge - as natural judge. How can there be such a distortion of normativity at the moment of its concrete experience? That is the big question: how to solve the Brazilian problem, which lies in the (in)effectiveness of constitutional forecasts, which tend to be deformed by a set of conservative practices in the preliminary phase and in the procedural phase itself? It is a problem that is clearly beyond any normativity, since it concerns the political and corporate

Another situation raised in this work was the problematic of the doctrines in the SCA, where we did an analysis through the bibliographic review on the integral protection *versus* guarantees, that is, a debate locked in the discussion of the existence or not of a juvenile Criminal Law.

We conclude that from the choice of one of the doctrines this can have a direct influence on the participation of the defense within the processes of juvenile justice infraction, for example, the doctrine of integral protection values by the mediation of argument between the operators of the law, to be the judge, promoter and defense for the choice of the socio-educational measure, being the role of defense without so much emphasis, in the measure that all would seek the protection of the adolescent.

As for juvenile criminal law which values constitutional guarantees, the figure of the lawyer is essential during all stages of the proceedings, the coercive imposition of reeducation measures demands, from the point of view of this guarantor base, that respect for the principles of contradictory, ample defense, and legality, constitutional principles that are only assured for the defendant, when his defense is exercised, this through private lawyers or public defenders, who use technical defense to guarantee fundamental rights.

The difference between the doctrines occurs due to the integral protection understanding that the lawyer as well as judges and prosecutors figure as mediators to choose the most appropriate measure for the adolescent, and not accepting that there is an imposition of measures of coercive form, since there is a consensus on the choice of them, summarizing: more specialization and less accountability.

However, what we see in practice does not apply to integral protection, obtained through mediated understanding, since the judicial decisions of Juvenile Justice are based either on the block action with the Public Prosecutor and without regard to Defense, or on the idea

options of those who work in the penal system. In this sense, Kant de Lima's appreciation can not be considered mistaken. It is not absurd to say that in practice the defendant must prove his innocence. The major problem in this sense arises from the insistence on reading the provisions of the Criminal Procedure Code (dated 1941, in full New State), which has a clear inquisitorial characteristic, without interpreting them in accordance with the constitution. Another great problem is the consideration of the elements of the police inquiry for the purpose of the decision to be taken by the judge in the case, as Kant de Lima himself observed (Kant de Lima, 1989, p. 76). As he points out, "The police justify their 'outlaw' behavior by claiming to be sure that it possesses the testimonial, 'true' knowledge of the facts: it was there. He also claims that on certain occasions it is necessary to 'take justice into his own hands' "(Kant de Lima 1989, 76). Even the very attitude of the police authority in relation to the investigated ones is strong indicative of the precariousness of the "evidence" that is collected in the preliminary stage and, therefore, of the necessity of its disconsideration in the procedural stage. (SALAH, 2010)

of free conviction of the judge, that is, what he thinks about the case. In juvenile court proceedings are not summoned and heard parties, neither are heard in loco the other professionals involved in this process, for example, social workers, psychologists, defense. What we see are guardianship judges uttering sentences based on the processes of incrimination and the construction of social stigmas[23] that result in criminal subjection.

Nonetheless the problem is often not directly related to the choice of one or another doctrine within the SCA, that is, it is not only a problem of the order of the legislative or of the way norms are applied. There is also an issue today in the training of professionals and operators in juvenile justice, since there is no differentiated training for those who will work in juvenile justice. More often than not, what we have today are professionals specialized in the criminal justice of adults who will act in the justice of childhood and youth and who do not have the knowledge and experience necessary to operate in this type of specific area.

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23 Social stigma is a strong disapproval of personal characteristics or beliefs, which go against cultural norms. Social stigmas often lead to marginalization.

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