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THE RIGHTS OF THE ADOLESCENTS IN THE BRAZILIAN CONSTITUTIONAL SYSTEM

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> "Se trata ahora de contraponer los conceptos de igualdad y desigualdad. En este nivel abandonamos (…) el esfuerzo tendente a potenciar la igualdad, la cual conceptualmente no se opone a "diferencia", si no la desigualdad. En esta sede ya no hablamos de ausencia de discriminación de las ciudadanas y ciudadanos ante la ley, si no de las diferentes condiciones sociales, económicas y culturales que hacen que unos tengan menos capacidades para actuar que otros."
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> Herrera Flores (2010, p. 116)

ABSTRACT

The constitutionalization oft he rights of Brazilian adolescents,from ahistorical approach, consistsin anormative change which aims to overcome the model of egal treatmentset to thisspecific public, inforce untilthe endof the twentieth century. It is thelegal recognition ofthe peculiar condition of such people, as subjects of rights anddignity. It's the adults: State, family andsociety, in the performance oftheir social roles, which shouldenablethe objective conditionsfor them to growand developpotentialities.Adolescents areholdersof rights andobligationsorresponsibilitiesthat aregradual to their stageof development.Their rights, interdependent, havea horizontal efficacy,becauseit's effectiveness is a dutyfor the familyand for society.Anda vertical efficacy, since the State hasthe duty of installment of public policiesand the duty of omission, ornegative obligation, due to the limitedinterventionin the life andfamilyof people.

KEYWORDS:adolescents, constitution, fundamental rights, recognition.

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OS DIREITOS DOS ADOLESCENTES NO SISTEMA CONSTITUCIONAL BRASILEIRO

RESUMO

A constitucionalização dos direitos dos adolescentes brasileiros, desde um enfoque histórico, consiste em uma mudança normativa, que se propõe à superação do modelo de tratamento jurídico deste público, em vigor até o final do século XX. É o reconhecimento normativo da condição peculiar de tais pessoas, enquanto sujeitos de direitos e de dignidade. São os adultos: Estado, família e sociedade, no desempenho de seus papéis sociais, que devem viabilizar as condições objetivas para que cresçam e desenvolvam potencialidades. Os adolescentes são titulares de direitos e de obrigações, ou responsabilidades, que são graduais ao seu estágio de desenvolvimento. Seus direitos, interdependentes, têm eficácia horizontal, pois é dever da família e da sociedade sua efetivação. E eficácia vertical, visto que cabe ao Estado o dever prestacional de políticas públicas e o dever de omissão, ou de obrigação negativa, frente à limitação de intervenção na vida e na família das pessoas.

PALAVRAS-CHAVE: adolescentes, constituição, direitos fundamentais, reconhecimento.

1. INTRODUCTION

This article presents the normative subsystem of children and adolescents rights[2],having as reference the international normative adopted in the area,especially the United Nations Convention on the Rights of the Child.Furthermore, the subsystem is basedon the very idea of Human Dignity, which makes it coherent and integrated with the Brazilian constitutional system.

[2] It is used the idea of system as a "normative system", or a set of rules that belongs to the state's legal order, integrated to its cluster, which has, among themselves, a proper organizational logic destined to be applied under determined specific circumstances. The constitutional normative system is not closed nor always coherent. It's organized to meet social needs, thereby considered in the historical moment in which it was generated, but, when applied on concrete cases, is subject to interpretation and axiological hierarchization choices made by the interpreter. According to FERRAZ JÚNIOR, "the system is a complex consisting of a structure and a repertoire. […] A legal order as a system has a repertoire and a structure. Normative and non-normative elements that guard a relation among themselves". It's worth clarifying, still, that it's adopted the concept of children and adolescents rights subsystem, not as formerly the nomenclature of subsystem used to designate specific and "independent" towards to the Civil Code subsystems, especially before the 1988 Federal Constitution. The children and adolescent rights subsystem is used here in an integrated manner to the constitutional system and always interpreted from the Federal Constitution. (FERRAZ JÚNIOR, 1991, p. 165).

The notion of Dignity of the Human Person is here understood not only as something intrinsic to the person for the simple fact of being born human. It is a condition assigned to people, in the midst of their recognition process from the social and cultural context in which they are inserted. And, more than a result, it's a process of search, affirmation and conquest. It doesn't depend only on people's own capabilities, but on the objective conditions of attendance to their needs as necessary assets for true effectiveness of their rights. Therefore, the Dignity of the Human Person materializes itself amid the struggle for their own recognition as persons.

People's needs constitute rights content, and both necessities and rights arising therefrom are related to social and cultural valuation or a comprehension that such rights are legitimate to be claimed. The needs are also related to individual and social identity and will be defined in the concrete context in which people live.

Therefore, the possible universalization of needs isa search for development of potentialities. The needs, as grounds of the Dignity of the Human Person, correspond to assumptions capable of developing the human being's potentialities. Adolescents have their dignity respected when they are recognized in their specific nature. And, still, when their difference doesn't mean inferiority or prejudice. So, recognition of dignity requires the overcoming of the social stereotyped place and invisibility. As well as the recognition of the subject in its individuality occurs from a social perspective, the disregard of peculiarities of the subject takes place as a result of social disvalue ascribed to it. The absence of such recognition brings forth humiliation, oppression and violence, affecting the subject's identity construction. Thereby, respect for the adolescent's dignity is a necessary condition to define adequate levels of social acquaintanceship.

The Integral Protection Doctrine, legal basis of international conventions to which Brazil is a party, unfolds a set of rights whose holders are the Brazilian adolescents in their generality and specificity. Considering the normative set described, it is seen that the adolescent's rights placed in the Brazilian legal order don't find many limits to normative effectiveness. On the other hand, the reality of the adolescence in question still doesn't reflect such normativity, Brazil is actually far from fulfilling its programmatic goals towards this matter. So it is clear that the effectivity limit is beyond the rule, it's in the social level. Perhaps this limit is in the field of recognition troubles, especially the peculiar development

condition of the respective subjects, therefore, its specificity and difference regarding to the social collectivity. Thus, this article intends to problematize the normative reality, reflect it and confront it, from a critical view of its social contextualization.

2. INTEGRAL PROTECTION OF CHILDREN AND ADOLESCENTS: SOME ASSUMPTIONS

The Brazilian Federal Constitution, as well as the majority of the constitutions of western countries identified with the contemporary constitutionalism, acknowledges the specificity of distinct subjects of rights. The reduction of social inequality is among its objectives, however, above all, isthe respect of equity or differences that constitute social reality while expression of origin, race, sex, color and age. Thereby, the society project expressed in the Constitution declares the option for a Democratic Rule of Law of horizontal character, with emphasis on reducing inequalities, since the recognition of differences and specificities.

Regarding children and adolescents rights, the constitutional text sought its foundation in the principle of Dignity of the Human Person, but absorbed, as well, the international guidelines of Human Rights, following the path set forth in the drafting of the Convention on the Rights of the Child.

In Latin America, the discussion process of the Convention on the Rights of the Child began to diffuse in the early eighties of last century (1980s). It was particularly noted the role and influence of emerging social movements in drafting legal texts on the area of children's rights. In Brazil, specifically, such movements coincided with the debates prior to the summoning of a National Constituent Assembly and continued throughout the drafting of its Constitution. Therefore, children and adolescent's situation was one of the topics of popular struggles for the sake of ensuring positivation of rights.[3]

All this legislative change can only be understood from a historical perspective, to the extent that it represented the overcoming of a model of legal treatment of childhood and youth that prevailed for nearly a century in most western countries. The previous model consisted of "minor's laws", based on the "irregular situation doctrine" – how it was known in Latin

[3] A popular committee, known as "National Child and Constituent Committee", gathered 1,200,000 signatures for its amendment, which sought the inclusion of article 227 in the Constitution. (PEREIRA, 1998, p. 33).

America –, which was distinguished by legal legitimacy of a discretional state intervention. Between the late nineteenth andalmost the end of the twentieth century, laws founded on these doctrinal precepts were the objective expression of a thought considered to be advanced with respect to the previous situation.[4] Thus, in a period no longer than twenty years, all Latin American laws relating to this subject adopted a tutelary view, having as main objective the "social hijacking" of all those in an "irregular situation", not restricted to but also from a legal perspective.

The referred doctrine's main focus was to turn legitimate the potential legal action, indiscriminately, on children and adolescentsin hardship. By focusing on the "minor in irregular situation", social policies were left unconsidered, opting for individual solutions that favored institutionalization (MÉNDEZ, 1996, p. 88-96). On behalf of this individualistic comprehension, biologistic, the minor's law was applied by the judge from a positive justification, which transited between the dilemma of satisfying a welfare speech and a need for social control.

Based on the contribution of Mary Beloff, one can summarize the characteristics of the "irregular situation doctrine":

> Children and youngsters were considered as object of protection, treated as from their incapability. Laws weren't made for all childhood and adolescence, but for a specific category called "minors". To designate them, wide legal forms were used, such as "minors in irregular situation", in "material or moral peril", "at risk" or "in especially difficult circumstances". The author proceeds, stating that there had been configured, from a normative point of view, a distinction between children and those in "irregular situation", between children and minors, so that eventual issues regarding children were of Family law competence, while the ones regarding minors and those in "irregular situation" were subject to Minor's Special Courts. The conditions in which they were individually encountered converted them from children and adolescents to "minors in irregular situation" and, thus, subject to a coercive state intervention, regarding both them and their families (BELLOFF, 1999, p. 13-15).

With the concept of incapability, the child's opinion was irrelevant and the state's "protection" frequently violated or restricted rights, in so far as it wasn't designed from the perspective of Fundamental Rights. The minor's judge was not an authority who was expected a typical legal action, he should be identified as a "good father", in his tasked State's "patronage" mission upon those "minors at risk or moral or material peril". The result is that

[4] Before the end of the nineteenth century there was no specific legal treatment reserved to childhood and adolescence; some scholars that underlie such historical analysis understand it as the stage of "Children's Rights Prehistory". (MÉNDEZ, 2000, pp. 7-10).

minor's judge was not limited by the law and had unlimited and omnipotent faculties to dispose and to intervene on the family and the child, with wide discretionary power (BELLOFF, 1999, p. 15).

On the other hand, there was no distinction concerning assistance and social policies treatment towards children and adolescents who committed a criminal offense or others in a general poverty situation. It was, as the previously cited author notes, the "hijacking and judicialization of social problems". As a result, all the guarantees recognized by the different legal systems in the Rule of Law were left unknown and the measure adopted by the Minor's Special Courts, par excellence, for both criminal offenders and "victims" or "protected ones", was imprisonment, imposed for an undetermined amount of time, not applied as a result of a legal procedure that respected individual guarantees (BELLOFF, 1999, p. 16).

In summary, it can be said that, according to legislations based on the irregular situation doctrine, theState centralized the decision-making power on the figure of the judge, with unlimited and discretional competence, practically without any legal limitations. In this context, it was sought the judicialization of problems linked toimpoverished childhood and pathologization of social conflicts, therefore, the poverty criminalization (MÉNDEZ, 1996, p. 26).

According to the criteria proposed by Emílio Garcia Méndez, the coming of the Convention on the Rights of the Child marked a new phase to the rights of the child and the adolescent (MÉNDEZ, 2000, pp. 7-10). In the Brazilian case, this new stage was brought by the Federal Constitution and, in 1990, the Statute of the Child and Adolescent, Law 8.069/90, as well as the ratification of the Convention by the National Congress in that same year. It was the consolidation, in international legislation, of the "United Nations Integral Protection Doctrine", with gradual influence on the Constitutions of various countries.

The Integral Protection Doctrine (MACHADO, 2003, pp. 47-54, among other authors) is the evaluative basis which underlies the rights of children and youth. It starts from a normative recognition of a special or peculiar condition of people in a specific age group (zero to 18 years), which must be respected as subject of rights. From then on, children and adolescents, even if only in the normative text, were recognized in their dignity, as people under development that need special protection and assurance of their rights by the adults: State, family and society.

Therefore, it's the adults, in the performance of their social roles, who should enable the objective conditions so that "children" subjects and, particularly – in the case of this book –, "adolescents", can grow completely, in other words, develop their potentialities. Integral protection, in this sense, is nothing more than the adult's accountability for the care[5] and assurance of conditions so that children and adolescents can exercise their citizenship with dignity.

The issue herein is regarding therecognition of the rights holder condition of this portion of the population, whose historic and legislative treatment has always been of indifference,in relation with its peculiarity, or as an object of the adults' power and decisions, with the intent of guardianship or control. Children and adolescents, as rights holders, are considered autonomous individuals, but with limited exercise of their capabilities due to their stage of development. They are holders of rights and also obligations or responsibilities, which are graded as to their stage of development.

It's about recognizing differences that constitute the very identity of certain groups, in relation to the broader context of society. As FlaviaPiovesan states, recognition is a prerequisite for making the necessary conditions of full development of people's potentialities possible:

> The assurance of equality, difference and the recognition of identities are conditions and prerequisites for the right to self-determination, as well as to the right of full development of human potentialities, transitioning from abstract and general equality to a plural concept of concrete dignities (PIOVESAN, 2010, p. 76).

The Integral Protection Doctrine holds in these assumptions its very foundations and is complemented by legal principles set forth in the UN's International Convention and in the Federal Constitution. Among them, stands out: the principle of absolute priority; principle of best interest; principle of brevity and exceptionality; principle of the peculiar condition of the individual undergoing its development process; and the principle of free expression or the right to be heard. All of them will be covered with more depth in the continuation of this work.

[5] The understanding of "care", in a legal quality, has been developed by some authors and is identified with the idea, protected by Brazilian legal order, notably of constitutional inspiration, involving, in addition to material circumstances, the specificity of protection, which means defense, rescue, help, taking care of someone's interests, thus, inserted in immaterial devices, but that can be rationally identified to the extent that its existence becomes evident (COLTRO, OLIVEIRA and TELLE, 2008, p. 112).

This Doctrine is present in the following documents and international treaties: United Nations Convention on the Rights of the Child, 1989; United Nations Standard Minimum Rules for the Administration of Juvenile Justice, the Beijing Rules, 1985; United Nations Rules for the Protection of Juveniles Deprived of their Liberty, 1990; United Nations Guidelines for the Prevention of Juvenile Delinquency, the Riyadh Guidelines, 1990; United Nations Standard Minimum Rules for Non-Custodial Measures, the Tokyo Rules, 1990 also.

The set of international documents surpassed, in the normative scope, the old tutelage conception, giving to children and adolescents the condition of subjects of rights, against the State and society; establishing, for the last ones, obligations and limits to intervention. The consolidation of rights designed to the juvenile population, in line with the doctrinal basis, hasspecial significance in that it broke with the prior legal treatment reserved to this group until then: the "minor's law".

The Doctrine of Integral Protection, thus, has contextual meaning and sense and should be understood as a special protection only for the rights of people under-development, not for the person itself. Otherwise, people would still be treated as objects, which was part of the historical tradition of how children and adolescents were treated by society and the State. "Lo que se protege son precisamente derechos y no directamente a la persona, pues de esta última forma pasa a ser ella el objeto protegido" (MORALES, 2001, p. 19).

In this context, the changes made in international regulations had a strong influence on the national States, particularly in the case of Brazil, and meant a major breakthrough. On the other hand, such historical and contextualized comprehension helpsthe acknowledgment of the reasons why, in the complexity of nowadays, are still observed interventions on children and adolescent's lives, as if it was still in force the "irregular situation doctrine". According to Emílio Garcia Méndez, this can be explained by the predominance of a culture that composes the "ideological epidermis", which pervaded the content of such laws, being surpassed in international and constitutional level of most democratic national States, and that, nevertheless, at least in the Brazilian case, continues to be present in the institutional and legal "epidermis", in many events and circumstances (MÉNDEZ, 2001, p. 42). In this background, subliminal, lies, to some extent, the hardship of recognition, especially towards the adolescents as subjects of rights.

3. CHILDREN AND ADOLESCENT'S RIGHTS IN THE BRAZILIAN CONSTITUTIONAL SYSTEM

In Brazil, a historical coincidence made that the international political moment that led to the United Nations Convention on the Rights of the Child was parallel to the establishment of the first Federal Constitution, after the period of political opening, allowing to be included, in the articles 227 and 228 of the 1988 Constitution,basic principles contained in the UN Convention,even before its approval in 1989.

The Brazilian Constitution establishes, as a maximum guarantees system, individual and social rights, of which all children and adolescents are entitled, regardless of their personal or social situation, or even their conduct. The accomplishment of these rights, securing conditions for full development of those who are on this age group, is a duty not only for the family, but for community, society and the State as well (Federal Constitution, article 227). Therefore, the juvenile population, due to the peculiarities of their stage of development, deserves a special legal treatment.

It is about dealing with the constitutional recognition of a set of rights that belongs to such portion of Brazilian population and which correspond to the values established by the model of Democratic Rule of Law. They are amid the Fundamental Rights observed within the constitutional text, such as, for example, the chapters devoted to education, health, social assistance, among others.

On the report of Ingo Sarlet, Fundamental Rights are those, provided in the national legal order, endowed with sufficient relevance and essentiality, the "material fundamentality". Set out in article 5th of the Federal Constitution or not, they are subject to the direct effectiveness logic (SARLET, 2007, p. 281).

Articles 227 and 288 of the Federal Constitution ascertain, specifically, the special protection of children and adolescents.By establishing those rights, beyond the recognition of their peculiar condition, the constitutional text seeks to realize another social reality for this portion of the population. It's also a strategy to turn effective the constitutional objectives, especially the ones related to diminishing social inequalities, because,if the Brazilian society is able to ensure rights since childhood, the social trend will be to achieve better access to all opportunities, which should contribute to a superior condition of material equality.

As claimed by João Batista da Costa Saraiva, the constitutional system establishes Fundamental Rights designed to children and adolescents in three different levels or guarantees subsystems, all interrelated and part of the constitutionality as whole:

- The first level of guarantees defines as rights of all children and adolescents the Fundamental Rights, such as life, education, health, housing, family and community acquaintanceship, culture, sports, leisure, among others;
- The second level of guarantees is characterized by the right to special protection for all children and adolescents who are victims of violence, negligence and mistreatment;
- The third level of guarantees concerns with accountability and is designated to adolescents who commit offenses (SARAIVA, 2002, p. 50-51).

To each one of these levels of guarantees there is a correspondent public policy offered by the State, on a vertical basis. On the other hand, the responsibility for the accomplishment of these rights is shared also with the family and the society, on a horizontal basis (SARLET, 2007, p. 339).

3.1. Universal rights

Regarding children and adolescents rights, the State must assure its effectiveness through public policies of universal nature. Thereby, all children and adolescents should have universal access to education, health, professionalization, sports, leisure, family and community acquaintanceship, among other rights and its consequences. In this case, it is important to point out the subsidiarity principle[6], which assures that, if the family doesn't have the means to guarantee the effectiveness of such rights, the State must provide the necessary support for them to be achieved. For this, beyond simply providing the respective

[6] Ingo SARLET understands subsidiarity principle as from the interpretation of J. Neuner, that is about people's duty to care for its own livelihood and its family, securing a personal freedom and responsibility space. The authors' comprehension about this principle doesn't forget the State's obligation on fulfilling the Fundamental Rights (SARLET; FIGUEIREDO, 2008, p. 36).

sectorial public policy, there must be made viable the access and permanence conditions of exercising the rights concerning such public policies, when necessary.

In the adolescents' case, it is noteworthy that each of the Fundamental Rights that they hold also requires public policies that meet their specific characteristics and needs. In this direction, stands out the right to professionalization or vocational training as a specificity of the right to education, which must respect aptitudes, ability developing possibilities and professional competences that are adequate to their interests and to the needs of their social context. Also important are the rights to sports and culture, legal interests that gain relevance and specific meaning in this life stage. The right to health, on the other hand, must consider the peculiar features of the physical and psychological changes that occur in this step of life, and the confronting conditions of issues that affect intensively adolescents, such as psychoactive addiction, teenage pregnancy, or sexually transmitted diseases. Moreover, it is important to point the right to family and community acquaintanceship, since families often suffer shocks related to the changes that tend to occur in their contexts because of the adolescence of one of its members, causing shifts on family roles before the problems faced (SUDBRAK, 2009, p. 4).

With these examples, it is sought to draw attention to the fact that the specificity of an age group demands distinguished embodiments of law. An adolescent, in contemporary Brazilian context, not only has the right to education, but to a quality education that includes the necessary professional development of its potentialities. The same can be said towards the rights to culture, sports, health, and family and community acquaintanceship. The rights content, and the State's arising duty to materialize them into public policy, requires attention to the specific characteristics and needs. Otherwise, it would be as if the mere provision of services to the general public was enough, not recognizing the condition of people with specificities due to their life stage and the sociocultural context where they are inserted.

3.2. Special protection rights

The second level of rights dealt here corresponds to special protection networks linked by various public policies, such as health, social care, education and security. In this case, as it is the task of ensuring protection for children and adolescents in situations of rights violation

or risk of rights violation there must be triggered the State's services geared to protective intervention. As a gateway to the complaint and compliance to rights violations, the legislation foresees the actions of Guardianship Councils[7], which, among other functions, have the competence to apply protective measures[8]. Then, when not met the initial goals or in case of worsening the observed violations, other state bodies, such as the Public Ministry and the Judiciary, must act.

Even when contextualized in a wider social sphere, it is well known that most of the specific rights violations suffered by children and adolescents (physical and psychological violence, sexual abuse and negligence) happen within the family, being the perpetrators people with direct relationships with the victims, such as fathers, mothers, stepfathers, uncles, grandparents, older siblings, among others[9]. Being so, the State's protective role ends up constituting, in most cases, an intervention on the family extent. For those situations, the legislation contemplates various stages of intervention such as the protective measures applied by the Guardianship Councils or by judges that preside childhood and juvenile courts, the procedure for removal of parenting capacity and the alternative of placement into foster families' by custody, guardianship or adoption, amongst other complementary actions.

From a historical point of view, the field relating to children and adolescents in difficult circumstances is where one of the greatest traditionsof State action is found. The "minor's law" engaged to authorizing indiscriminate actions of the State on certain families context, especially those where "minors" were put into "irregular situations". Traditionally, this intervention was characterized by institutionalization and removal from social and family context. To this line of thought, Irene Rizzine collaborates by making a historical analysis of the documentation of child care in Brazil, between the nineteenth and twentieth centuries,

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7 Pursuant to article 131 of the Statute of the Child and the Adolescent, Law 8.069/90, the Guardianship Council is a permanent, autonomous organ and non-jurisdictional, entrusted by society with the responsibility of ensuring that the rights of children and adolescents are respected.

8 Having as origin factor the violation, or threat of violation, of rights due to actions or omissions of the State, society or the family, it is up to the Guardianship Council to implement protective measures (article 98, Law 8.069/90), which are arranged in the article 101 of the same Law and, from item I to item VI, are an incumbency of the Guardianship Council. In the case of items VII, VIII and IX thereof, which specifically refer to the protective measures of placement into hosting institution, hosting families and surrogate families, the enforcement jurisdiction lies with the judicial authority, in accordance with paragraph 2nd of article 101 (Law 8.069/90, with the alterations introduced by Law 12.010, 2009).

9 The Ministry of Health states that, according to violence reports obtained by reference services of selected counties about a determined age cycle, during the 2006/2007 period,58% of the cases of violence against children and 50% of the ones against adolescents happened at the place considered home by them (BRASIL, Ministry of Health, 2006/2007, p. 5).

revealing that poor children, in families facing hardships, when seeking support of the State, had a nearly certain fate: institutionalization, as orphans or abandoned (RIZZINI; RIZZINI, 2004, p. 3).

The assertion of the rights to protect physical and psychological integrity also requires the claiming of the contents of these rights. Since the UN Convention, normative documents have been affirming children and adolescents rights to family and community acquaintanceship as fundamental and relevant ones. So, when certain rights starts to collide, such as, for instance, physical integrity and family coexistence, the State's protective assistance must observe general principles like brevity, exceptionality and minimum intervention.

It's about establishing a relation with the family model adopted by the 1988 Federal Constitution. The family that, in a sociocultural standpoint, no longer corresponds to the patriarchal model, unified by marriage as value in itself, starts having more horizontal contours, presenting characteristics such as equality between spouses and children, and the necessary respect to diversity. This new family, sheltered by the constitutional model, isn't protect by national Law as an end in itself, but as a mean, an instrument to the constitution of Human Dignity of each one of its members. In this context lies the limit of adults power over children and adolescents, considering the interpersonal relations within the family, as claimed by Gustavo Tepedino:

> […] although it has expanded its constitutional prestige since the 1988 Federal Constitution, the family ceases to have intrinsic value, as an institution capable of deserving legal protection by the mere fact of existing, and becomes valued in an instrumental way, tutored in that – and only the exact extent that – it constitutes an intermediate core of personality development of children, and protection of human equality (TEPEDINO, 1998, p. 50).

Consequently, the State has limits on family intervention, considering the right to family and community acquaintanceship as limiting parameter; and, on the other hand, family acquaintanceship is not absolute, having no end in itself. It will be preserved to the extent that it is instrumental for the development of the human being, in this case, the adolescents.

When analyzing the openness of the catalog ofFundamental Rights adopted by the Brazilian Constitution, Ingo Sarlet questions the existence of previous definitions of hierarchy of rights that eventually collide. The author notes that, on the contrary of other constitutions observed nowadays, there isn't any constitutional normative criteria regarding the weighting

of Fundamental Rights in the Brazilian constitutional text. Such criteria could relate to the preservation of the essential core of the Fundamental Rights, the principle of proportionality, or restriction of rights linked only to legislative reserve. Since this option was not adopted by the Brazilian Constitution, no right can be considered as absolute in itself, but there are normative rules that allow certain axiological hierarchization, without the need for total exclusion of one or another right. Among these rules is the consideration of the Dignity of the Human Person, guiding principle of the Brazilian society, and the different relations with this principle that each of the Fundamental Rights present in the constitutional text shall have (SARLET, 2007, p. 83-88).

In this sense, one can say that State intervention in the family context finds fundament in the assurance of children and adolescents dignity. On the other hand, such intervention will find its own limits if it doesn't recognize such context as a space of freedom and development of human dignity.

3.3. Accountability rights and duties

The third level of rights and duties refers to the treatment to be accorded by the state to adolescents who commit offenses, or, in their case, infractional act. According to the constitutional rule in force, adolescents must be held accountable and take responsibility for their infractional acts. This responsibility is not imposed as from the common criminal law, but based on rules present in a proper Statute, which determines submission to special criminal sanctions known as social educative measures.

The fact is that Brazil, like most Western countries, has two criminal (or infractional acts) accountability systems in its legal order: the adult criminal system, who aims to held accountable people who are more than eighteen years old; and the juvenile accountability system, that targets adolescents, from twelve to eighteen years of age, holding them for their acts.

Miguel CirelloBuñol, in his doctrinal analysis regarding this issue, sustains that there are two major theories that justify the different treatments, concerning responsibility, between children and adolescents. The "strict sense imputability doctrines", which match the adolescents condition to the mentally ill, basing the exception on the fact that the adolescent

wouldn't have complete faculties to understand the illicit nature of his behavior, acting, therefore, according to their capacity of comprehension; and the "criminal policy doctrines", which understands criminal responsibility age as a barrier to the crime accountability systems, whether the adult or the juvenile system (CIRELLO BUÑOL, 2001, p. 70-71).

According to the author above, the doctrinal conception founded in the idea that criminal responsibility age is a criminal policy option is divided into two other groups: the "protection models", which declares the adolescents criminal unaccountability and earmark them protective and safety measures; and "special accountability models for adolescents", which brings special sanctions and recognize in its recipients a special guilt capacity[10].

This last possibility was the one adopted by the Brazilian Federal Constitution in its article 228. Therefore, an age period that goes until the upper limit of eighteen years is set so that individuals, who are in a different development phase than the adults, respond in a criminal accountability system also different than the adults. This way, they are chargeable against a proper responsibility system. In the Brazilian case, they are attributable before the Statute of Children and Adolescents[11].

The degree of accountability rights and duties provided by the Federal Constitution is regulated in the Statute of Children and Adolescents' text regarding this matter, where social educative measures are set. Such measures have a sanctionative legal nature, they are applied to its recipients because of the commitment of an infractional act (crime or misdemeanor). And also because they are imposed to adolescents, after the ascertainment of their accountability through a judicial proceeding in which the State, via Public Ministry, must prove their guilt and the judge must apply the applicable measure, proportional to the offense made and the involvement of its author.

The comprehensionof the legal nature of the social protective measures, especially during the prosecution that will result in its application, has the goal, or strategy, to establish concrete legal limits to their enforcement by the Judiciary, since sanctions can only be imposed on adolescents on law authorized situations which consider the conditions and limits provided (AMARAL e SILVA, 1998, pp. 263-264). Those are legal limits to the State's

[10] The author of this text has approached this issue with a proper depth in a previous work (COSTA, 2005).
[11] Pursuant to Article 228 of the Federal Constitution, "Are criminally unaccountable minors under eighteen years, subject to the provisions of special legislation".

intervention on the life and liberty of the individuals; in this aspect, they are negative nature rights, which must be respected by the State.

Adolescents who violate the rights of others must be held accountable for such facts according to their stage of development and peculiar situation. However, such situation doesn't exclude theircondition of rights holders in many other levels, in other words, they have the same rights as all children and adolescents, the universal and all the other ones that aim to ensure that they are safe from all forms of violence.

Adolescents' accountability, as rights and duties to be secured by special public policies, must be interconnected with other levels of guarantees previously mentioned. It's as if accountability was in connection with special social protection, to the extent of individual's needs. Both levels should count on universal public policies as background. Thus, an adolescent who commits an infractional act does not cease to hold Fundamental Rights.

4. CONCLUSION

Classify children and adolescents' rights under the Federal Constitution under distinguished levels was a strategy here developed with the means to better explain them. Nevertheless, in concrete situations, to guarantee the effectiveness of these rights, it is necessary to presuppose a comprehension of them on an interdependent form. So, family, State and society, as long as responsible for the respect, protection and promotion (NOVAES, 2010, pp. 257-264) of such rights, even when facing a certain situation, have the specific duty to provide access to each of those level of rights and the effective assurance of them depends on their contextualized comprehension with all the set of rights.

Martha Toledo Machado highlights as a differential aspect of the constitutional provision of childhood and youth's Fundamental Rights its assistive character. The author affirms that the terms "guarantee", "secure" and "put out of harm's way", adopted on the text of Article 227 of the Constitution by the constitutional legislator, establishes a necessarily assistive duty to the State and individuals (MACHADO, 2003, p. 380).

Although being legit the observation presented by the previously mentioned author, it is understood that, even being mainly assistive – since it entails the State to obligations corresponding to offering of public policies, supervision, protection, among others –, some of

the individual Children and Adolescents' Fundamental Rights, as well as the adults', have their defensive share.

As an example, one can refer to the right to family and community acquaintanceship, which establishes obligations to adults who are directly responsible for adolescents and to the State, in the absence of them – in the sense of ensuring referral to a housing institution and placement in a surrogate family. However, on the other hand, the constitutional provision has, in its content, the State's duty to abstain itself from intervening in family relations when the case is related to suspension or loss of parenting capacity due to lack of economic resources to sustain the child, pursuant the specific provision of article 23 of Law 8.069/90.

From another perspective, this same State duty of non-intervention also has its assistive aspect, in so far as the special Law established, for the purpose of assuring the right to family and community acquaintanceship, that the State must give the families an opportunity to be included in social support programs that grant monetary benefits to families in hardship, when necessary and if it's the case. Therefore, the classification herein, assistive or negative nature dimension of rights, has an analytic function and not a function of restraint or isolation of rights and its corresponding duties of assurance.

It is important to reflect on one of the main duties arising from the children and adolescents rights when contextualized in the constitutional project in which they are inserted, which is the negative obligation of not adopting regressive measures. Given the constitutional objectives of reducing inequalities and promoting the well-being of everyone, without discrimination – as put on article 3of the Constitution –, the State's central duty relies on its focus on the social realm, promoting rights, in a manner which the picture of rights violation can be altered progressively.To this matter, Gerardo Pisarello understands that the principle of non-regressivity is directly related to the principle of progressivity, which authorizes the government to develop a public policy destined to satisfy this right gradually, a fact that doesn't mean, on the other hand, to indefinitely postpone the fulfillment of the right in question (PISARELLO, 2007, p. 66). Thus, not regressing is, also, a negative posture that aims on satisfying rights.

The constitutional content of the rights of children and adolescents encompasses the necessary recognition of their Human Dignity, in other words, the recognition of their subject

of rights status[12]. As consequence of this acknowledgement, the State has the duty to provide public services that ensure social and individual rights; the duty of non-interference on children and adolescents' private and family affairs nor in the field of adolescents' freedom.

In other words, being Dignity of the Human Person the guiding and unifying principle of the Federal Constitution and regarding the specific case of children and adolescents' Fundamental Rights effectiveness, the goal should be the achievement of dignity and the promotion of the person condition of such subjects (SARLET, 2004, pp. 84-96). Thus, dividing Fundamental Rights in a normative catalog, as here proposed, or for explanatory reasons, does not allow its application, in a fragmented way, in concrete cases.

Synthesizing, it can be said that the constitutional content of children and adolescents rights entails family, State and society into a responsibility for its effectiveness. The duty to turn effective such rights is interdependent, or of co-responsibility, and the focus of its implementation should be the valuation of the subject in all of its dimensions.

However, Emmanuel Lévinas states that:

> An inter-human perspective may subsist but may also be lost over the city's political order, in which the Law sets out mutual obligations among citizens. The inter-human itself lies in a non-indifference towards one another, a responsibility regarding each other […] (LÉVINAS, 2009, p. 141).

So, beyond the normative perspective of responsibility, rights effectiveness depends on a consideration of such responsibility in an inter-human perspective. It is in the context of interpersonal relations that the proper conditions for recognition of individuals and their social importance are created, to the point that it is in this level that the specific responsibility of rights debtors can gain actual meaning.

Legal recognition of individuals depends on their social acknowledgement; nevertheless, such advancement on rights effectiveness, in a social level, relies upon a dogmatic instrumentality, fostered by a necessary vindication for its interpretation and application.

[12] On the authority of Pontes de Miranda, "The incidence of the legal rule that gives one the power to be subject of rights also creates rights capacity, rights related to personality". And the author continues: "The incidence of the legal rule related to ordinary is indifferent to civil capacity." (PONTES DE MIRANDA, 2000, pp. 271-272).

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