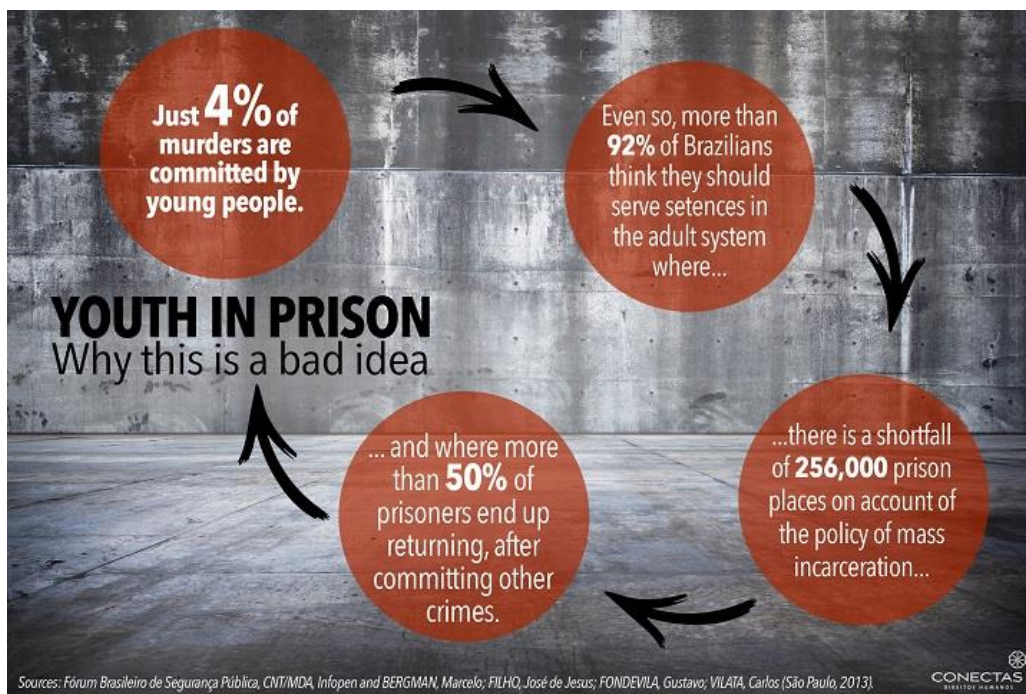


# Undermining Brazilian Juvenile System

## Legislative Bills that Undermine Children's Rights

### Articles 37 to 40 of the Convention on the Rights of the Child



### **Joint Civil Society Report On the occasion of Brazil's Combined Second to Fourth Periodic Reports**

2015

## **Introduction**

The Convention on the Rights of the Child (CRC or Convention) and the Brazilian Statute of the Child and the Adolescent (SCA) are sister instruments. The CRC was ratified and the SCA was enacted soon after the first democratic presidential elections in the early 1990s. Both instruments uphold similar and complementary principles, including the safeguard for adolescents in conflict with the law.

Overall, the dire situation sustained by adolescents in conflict with the law, in particular the ones under internment regime are rather a result of poor observance and implementation of CRC and the SCA, rather than problems in the norms themselves.

Moreover, and mistakenly, much of the high violent crime rates have been attributed to offenses committed by adolescents. In this context, heated discourse by politicians, media and influential individuals and institutions, has favored legislative proposals for curtailing children's rights, such as reducing the age of criminal responsibility and increasing the internment period of adolescents, as an alleged solution to reduce criminality.

## **Current Normative Framework**

The Brazilian Constitution currently sets forth a minimum age of criminal responsibility of 18 years old, as follows:

Article 228:

Minors under eighteen years of age may not be held criminally liable and shall be subject to the rules of the special legislation.

Moreover, the SCA itself set a comprehensive protective system of safeguards for children in conflict with the law, particularly a broad range of measures that are applied with both protective and socio-educative aims, though overall implementation is unsatisfactory.

## **Current Legislative Modifications Threatening Safeguards for Adolescents in Conflict with the Law**

In the wake of recent heated debates and frustration by the population at the poor quality of public services, specially public security, actions of the Brazilian Parliament

and the Executive have been put forward and seriously undermine CRC's safeguards on juvenile justice.

During the Parliamentary debates regarding those bills, discussions surrounding the compatibility and compliance of the relevant proposals with the CRC, under the guidance of relevant General Comment 10, if any, were rather superficial. Despite the fact that the SCA is widely known to have been violated by these proposals, a parliamentary technical opinion dealing with the details of the CRC is not of public knowledge.

**Bill of Constitutional Amendment #171 (Chamber of Deputies number) and #155  
(Senate number)**

As early as in 1993, Bill of Constitutional Amendment #171<sup>1</sup> had originally proposed a general reduction of criminal liability from 18 years old to 16 years old.<sup>2</sup>

Despite this bill's dormant status along the last decades, given the widespread impunity sensation by the population at large and a wave of parliamentary conservatism, this bill has been fast-tracked in the Parliament.

Article 1. Article 228 of the Federal Constitution shall read as follows:

“Art. 228. Minors under eighteen years of age may not be held criminally liable and shall be subject to the rules of the special legislation, save the ones with sixteen years or older, and guaranteeing the service of the sentence in facilities from the individuals over eighteen years old and from the inimputable minors, in cases of heinous crimes, intentional homicide and serious bodily harm.

Article 2. The Union, the States and the Federal District shall establish the facilities referred to in Article 1 of this Constitutional Amendment.

Article 3. This Constitutional Amendment shall enter into force on the date of its publication.

This bill, following the applicable legislative procedure, was approved by the Chamber of Deputies, on a first reading, on 14 July 2015, and on 19 August 2015, on second reading. It has now been referred to the Senate, for final approval on an equal two-readings

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<sup>1</sup> Bill on Constitutional Amendment # 171:  
<http://www.camara.gov.br/proposicoesWeb/fichadetramitacao?idProposicao=14493>

<sup>2</sup> Bill on Constitutional Amendment # 171, original text:  
<http://imagem.camara.gov.br/Imagem/d/pdf/DCD27OUT1993.pdf#page=10>

procedure. In both readings, the Chamber operated procedural maneuvers in order to have the proposal passed. During the first reading, this bill had been rejected by the Chamber of Deputies. However, its President forced next day a new voting on a virtually equal text, which is forbidden by the Constitution itself<sup>3</sup> and the proposal barely reached the minimum votes required. During the debates on the second reading, the respective parliamentary section was completely empty, with only four parliamentarians at the end of the debates. And the voting itself happened in the next day.

The Special Parliamentary Commission, that was designated to decide on a text to be presented at the plenary session, met in closed doors, not allowing public presence. Access to the Chamber's public gallery was restricted especially for those who manifested their opposition to the Bill, by the President during both readings.

This very bill is in clear violation of the letter and spirit of Articles 1 and 40 CRC. It sets forth a separation of adolescents from adults, as if it were the only safeguard required by both CRC and SCA in the context of juvenile justice. Moreover, it shifts the focus from the current socio-educative measures to the ordinary adult sentence servicing style. Thus, this bill, as proposed, treats adolescents as adults as regards criminal matters. General Comment 10 is specific in recommending States Parties that have lowered, even if exceptionally, the applicable ages to 16 or less, to rectify their legislations in order to put national legislation in conformity with the CRC.<sup>4</sup>

Further, the Brazilian Constitution is endowed with a stand-still clause (*cláusula pétreia*), under Article 60 § 4, by which rights and guarantees originally recognized therein, or later recognized, cannot be undermined.<sup>5</sup> Thus, this bill is in contradiction with its own constitutional protection rationale and should not have been discussed in the first place.

### **Senate Bill 333/15 (2517/15 Chamber of Deputies) – Increasing the Internment Period of Adolescents in Conflict with the Law**

Among the package to toughen sanctions against the adolescents in conflict with the law, Bill 333/15<sup>6</sup> was presented this year and proposes an increasing in the internment

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<sup>3</sup> Brazilian Constitution: Article 60, Paragraph 5 - The matter dealt with in a proposal of amendment that is rejected or considered impaired shall not be the subject of another proposal in the same legislative session.

<sup>4</sup> CRC: General Comment 10, para. 38.

<sup>5</sup> Art. 60, § 4 No proposal for amendment will object of discussion, which tends to abolish: [...] the individual rights and guarantees.

<sup>6</sup> Original proposed text (in Portuguese)  
<http://legis.senado.leg.br/diarios/BuscaDiario?tipDiario=1&datDiario=03/06/2015&paginaDireta=00542>

period, from an absolute maximum of 3 years<sup>7</sup> to 10 years. Such increase in the internment measure is applicable to intentional homicide and the so-called violent heinous crimes, as defined by the Law on Heinous Crimes<sup>8</sup>, when committed with violence or grave threat. When an adolescent reaches the age of eighteen, she or he will be then transferred to a separate unit or section from the remaining adolescents.

This bill was voted in an excessively fast manner, on the 14 August, not allowing appropriate public discussions, let alone on its compatibility with the CRC. This bill, agreed between both government and opposition<sup>9</sup>, is seen as a harm reduction solution, in order to appease public clamor and avoid a constitutional amendment for that matter.

Worrisome is that the relevant text provides for that the adolescent shall not receive a less beneficial treatment in relation to adults, but does not ensure the special safeguards of the juvenile justice system, as the current system does. Moreover, remains opaque on how this will be precisely implemented. For instance, under the adult system, a convicted individual is entitled to regime progression, whereas under the adolescent socio-educative system, the release will depend on bi-annual judge evaluations, based on a report of a technical team.

According to specialists on the matter, this represents another legal anomaly, undermining the safeguards already in place in the SCA, particularly because, every six months, the judge will periodically decide on the merits of the case. Hence, the adolescent's release will remain even more difficult. Though the adolescent may participate in professional and social activities, proving her or his rehabilitation, hardly any positive evaluation will yield, given that it will be always linked to the seriousness of the original infraction committed.

### **Legislative Populism at the Costs of Children's Rights**

As mentioned above, these proposed bills are a manifestation of legislative populism, based on the fact that the youth goes unpunished in Brazil due to the lack of adequate legislation. In fact, the SCA provides for a range of options of a protective nature<sup>10</sup> and socio-educative nature<sup>11</sup> that address specifically sanctions for adolescents.

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<sup>7</sup> Para 3, Article 121 of the SCA.

<sup>8</sup> Law # 8,072 of 1990, available in Portuguese at [http://www.planalto.gov.br/CCivil\\_03/Leis/L8072.htm](http://www.planalto.gov.br/CCivil_03/Leis/L8072.htm)

<sup>9</sup> Bill 333/2015 had been proposed by Senator José Serra (PSDB – opposition) and substitutive amendment proposed by Senator José Pimentel (PT – ruling party).

<sup>10</sup> Article 101 SCA: Forwarding to parents or responsible, upon signing of a term of responsibility; temporary orientation and support; registration and frequency at a official fundamental schooling; inclusion at an official and community program to support children and adolescent; request for medical,

There is also a mistaken perception that the participation of adolescents in the overall crimes is high and. This perception contrasts with the fact that, around 20,000 adolescents are subject to the socio-educative measures in Brazil, out of which e.g. only around 10% have committed crimes against life. At the same time, in Brazil - a country that has one of the highest homicide rates in the world - only 4 percent of them were committed by persons under 18 years old currently under these socio-educative measures.<sup>12</sup>

Despite the solid facts above, the high impunity perception felt by the population at large is inflated by large media, politicians themselves and other influential individuals who propose simplistic solutions for the high crime rates in the country through mere toughening on legislation. Thus, adolescents in conflict with the law became stigmatized.

Among the misleading information that has been widespread, it is said that more developed countries set ages as low as 12 or 14, leading one to accept that it consists of the upper-age limit, but that, in fact, it is the the minimum age that the SCA sets for 12 years old, considered relatively low for General Comment 10<sup>13</sup>

Moreover, recent polls showed that 87% is favorable to the reduction of criminal age.<sup>14</sup> This very negative perception on children's rights by the population is a worrying symptom of the poor awareness that the society has on the CRC, putting in question the compliance on the part of Brazil of its obligation to train and raise awareness of the rights enshrined in the Convention.<sup>15</sup>

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psychological or psychiatric under hospital or ambulatory regimes; and inclusion in official or community programs for treatment of alcohol and drug addicts.

<sup>11</sup> Article 112 SCA warning; obligation to repair the damage; community services; assisted liberty; insertion in semi-liberty regime; internment in educational facility.

<sup>12</sup> Brazilian Forum on Public Security, Brazilian Public Security Annual, 2014. P. 98 and subsequent. Available at [http://www.forumseguranca.org.br/storage/download//anuario\\_2014\\_20150309.pdf](http://www.forumseguranca.org.br/storage/download//anuario_2014_20150309.pdf) (in Portuguese)

<sup>13</sup> CRC's General Comment 10, para. 30.

<sup>14</sup> Datafolha polls, conducted on 17 and 18 June, 2015, sampling on 2,840 interviewees in 174 municipalities. Available at <http://datafolha.folha.uol.com.br/opiniaopublica/2015/06/1646200-87-aprovam-reducao-da-maioridade.shtml>

<sup>15</sup> CRC General Comment 10, paras 96-97.

## Victimization of the Poor Youth

Contrariwise, the young black and poor segment of the population is the main target of violence in the country. According to the 2014 Brazil Violence Map report<sup>16</sup>, more than half (nearly 30,000) of the 56,000 people murdered in 2012 were young people aged between 15 and 29, of which 77% were black. Furthermore, between January and December 2014, nearly 151,000 children and adolescents aged up to 17, were reported as victims of mistreatment and aggression, were heard by the “Disque 100” (Dial 100) abuse helpline.<sup>17</sup>

This reveals a serious pattern of discrimination based on age, social background and race, affecting a particularly vulnerable sector.

## Linking Juvenile Justice System to the Law on Heinous Crimes

The Law on Heinous Crimes is incompatible with the entire juvenile justice system philosophy. It provides for harsher sentencing conditions and has no safeguards for adolescents. Moreover, an ever-growing list of crimes has been added to it since its enactment in 1990, as a reaction to periodic public clamors. Consequently, linking juvenile justice to the Heinous Crimes Law listing means risking to steadily shrinking the protective system originally structured by the SCA and growingly treating adolescents as adults on criminal matters. At the same time, even when applied to adults, this law has not reduced the criminality rates of the crimes considered as heinous thereby.

## Aggravation of a Pattern of Overcrowding in the Country, in Detriment to Children’s Rights

The proposed laws aggravate further the overcrowded prisons countrywide<sup>18</sup>, as warned the UN Special Rapporteur on Torture, Juan Méndez, in his recent visit to Brazil,

<sup>16</sup> 2014 Brazilian Violence Map Report, available at [http://www.mapadaviolencia.org.br/pdf2014/Mapa2014\\_JovensBrasil.pdf](http://www.mapadaviolencia.org.br/pdf2014/Mapa2014_JovensBrasil.pdf)

<sup>17</sup> Brazilian Secretariat for Human Rights, data on Dial 100 helpline complaints, available at: <http://www.conectas.org/arquivos/editor/files/Balan%c3%a7o%20Geral%202011%2c%202012%2c%202013%20e%202014%20-%20Crian%c3%a7as%20e%20Adolescentes.xlsx>

<sup>18</sup> Brazil has the fourth largest prison population, after China, United States and Russia. The country’s incarceration rate (prisoner/100,000 persons ratio) to 317,9% from 1992 to 2013. 42,8% of this population is of detainees pending trial. However, the country is not safer, since e.g. the number of homicides grew 24% in the last eight years. See:Conectas: “Map of prisons -New data from Ministry of

in which he demonstrated concerns about the specific issue of reducing the age of criminal responsibility:

“Prosecuting adolescent offenders as adults would violate Brazil’s obligations under the Convention on the Rights of the Child,” the expert said. “In addition, approval of these proposals would worsen the currently already seriously overcrowded penitentiaries throughout Brazil.”<sup>19</sup>

### **Extremely Low Permeability of the Brazilian Parliament to the International Standards and Experts Alerts**

In the wake of the debates of such proposals, a series of international experts have alerted the Brazilian parliament on the incompatibility of the relevant proposals and the international standards. The UNICEF released its warning on 19 March, 2015.<sup>20</sup> The UNODOC, on 15 March 2015, has issued a statement against the reduction of legal age in Brazil.<sup>21</sup> On 27 May, 2015, it asked UNICEF to support the fight against these modifications.<sup>22</sup> On the 19 June, the UN Brazil Permanent Resident, Jorge Chediek, the UNICEF Brazil representative, Gary Stahl, and the Assistant UNFPA Brazil Representative, Fernanda Lopes met in person with the President of the Brazilian Chamber of Deputies, Eduardo Cunha, in order to offer their good offices to address violence and protect children’s rights.<sup>23</sup> Following this trend, on 29 June 2015, the UN Country Office published a technical note on adolescence, youth, and the reduction of penal age, aimed specifically to shed a light into the respective parliamentary process, which regrettably did not echo into the relevant debates.<sup>24</sup> On the part of the OAS, the IACHR’s Rapporteur on the Rights of the Child, Rosa María Ortiz, paid a visit to Brazil during the 1 to the 3<sup>rd</sup> July, with the specific objective to convey the message that the constitutional reform lowering the age of criminal responsibility runs contrary to the Inter-American

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Justice depict a flawed system”, with references to official data. Available in English at: <http://www.conectas.org/en/actions/justice/news/26571-map-of-prisons>

<sup>19</sup> OHCHR, “UN rights expert urges Brazil to address prison overcrowding and implement measures against torture”, press release of his visit, 14 August, 2015: <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=16325&LangID=E>

<sup>20</sup> UNICEF: [http://www.unicef.org/brazil/pt/media\\_29163.htm](http://www.unicef.org/brazil/pt/media_29163.htm). In Portuguese

<sup>21</sup> UNODOC: UNODC is against the reduction of legal age in Brazil. Available in English at: <http://www.unodc.org/lpo-brazil/en/frontpage/2015/03/23-unodc-se-posiciona-contra-a-reducao-da-maioridade-penal-no-brasil.html>

<sup>22</sup> <http://nacoesunidas.org/unesco-apoia-dia-nacional-de-lutas-contra-a-reducao-da-maioridade-penal/>

<sup>23</sup> <http://nacoesunidas.org/colaboracao-para-enfrentamento-da-violencia-e-tema-de-reuniao-entre-onu-e-presidente-da-camara-dos-deputados/>

<sup>24</sup> <http://nacoesunidas.org/onu-publica-artigo-tecnico-sobre-maioridade-penal-no-brasil/>



human rights standards.<sup>25</sup> Lastly, on 14 August, the UN Special Rapporteur on Torture, Juan Mendez, in his mission statement, expressed his concerns over both bills mentioned in this document.

So far, none of these efforts have sensitized the Brazilian authorities in order to discontinue legislative action in both cases, at the disregard of the existence of the international obligations imposed by Brazil by freely consenting to be bound to the Convention on the Rights of the Child. It is hoped that a strong message from the CRC Committee, which is the expert body in charge of monitoring the implementation of this instrument, may provide concrete guidance on juvenile justice system, as a means to correctly comply with Articles 37 to 40 CRC.

#### List of Organizations:

A Associação Juízes para a Democracia – AJD

ANCED

Associação de mães e amigos da criança e adolescente em risco – AMAR RJ

Associação pela Reforma Prisional - ARP

Associação Brasileira de Defesa da Mulher da Infância e da Juventude – ASBRAD

CEDECA - SÉ São Paulo

CEDECA David Arantes – Limeira

CEDECA Rio de Janeiro

CEDECA Rio de Janeiro

CEDECA SAPOPEMBA

CEDECA – DF

Centro Dom Helder Câmara de Estudos e Ação Social - CENDHEC

Circo de Todo Mundo – Belo Horizonte

Coletivo Peso

Comissão especial de Direitos Humanos e Educação do Conselho Estadual de Educação do Rio Grande do Sul

Conectas Direitos Humanos

Conselho Regional de Psicologia de São Paulo - CRP-06

DIACONIA

Fórum dos Direitos da Criança e do Adolescente - Sergipe

Frente de Defesa dos Direitos da Criança e do Adolescente de Minas Gerais - Belo Horizonte/MG

Grupo 10 - Assessoria Jurídica de Adolescentes selecionados pelo Sistema de Justiça Juvenil do Serviço de Assessoria Jurídica da Universidade Federal do Rio Grande do Sul – G10/SAJU/UFRGS

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<sup>25</sup> IACHR: Rapporteur on the Rights of the Child Wraps Up Visit to Brazil and Speaks Out against the Lowering of the Age of Criminal Responsibility. Available in English at: [http://www.oas.org/en/iachr/media\\_center/PReleases/2015/078.asp](http://www.oas.org/en/iachr/media_center/PReleases/2015/078.asp)

Grupo de Pesquisa em Políticas Públicas de Segurança Pública e Administração da  
Justiça Penal da PUCRS – GPESC/PUCRS  
Instituto de Defesa do Direito de Defesa- DDH  
Instituto Terra, Trabalho e Cidadania – ITTC  
Justiça Global  
Movimento Interfóruns de Educação Infantil do Brasil – MIEIB  
Núcleo da infância da Defensoria  
Núcleo de estudos Direitos Infância e Justiça da faculdade de direito da UFC  
Núcleo Especializado da Infância e da Juventude da Defensoria Pública do Estado de São  
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