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The principle of solidarity and the Convention on the Rights of the Child. A decolonial reading of continuities and responsibility

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Abstract

Il presente lavoro discute la portata e il grado di attuazione del principio di solidarietà, che giustifica l'azione dell'Unione Europea sia all'interno che all'esterno dei propri Stati membri, in relazione alla Convenzione sui Diritti del Fanciullo e alla realtà della violazione di questi diritti in Brasile, come esemplificato dal gran numero di minori privati della libertà nei centri di detenzione socio-educativi. La letteratura sull'argomento viene passata in rassegna per identificare la possibilità legale dell'Unione Europea di operare al di fuori del proprio blocco di Stati membri, allo scopo di proteggere i diritti di questi giovani. I dati secondari sono utilizzati per illustrare la realtà di tali violazioni dei diritti dei giovani, sia quando entrano in conflitto con la legge sia quando sono vittime dell'azione dello Stato, come modo per giustificare una possibile azione dell'Unione Europea in Brasile. I precetti degli studi decoloniali sono utilizzati per esaminare come questa applicazione del "principio di solidarietà" potrebbe essere resa operativa, nella consapevolezza che l'unico modo possibile per raggiungere questo obiettivo comporterebbe l'assunzione di responsabilità per gli investimenti economici nella riduzione delle disuguaglianze.

Parole chiave: Unione Europea, diritti umani, decolonizzazione, sistema giudiziario minorile, giovani privati della libertà.

Abstract

This paper discusses the scope and degree of implementation of the principle of solidarity, which justifies action being taken by the European Union both within and external to its own member states, in relation to the International Convention on the Rights of the Child and the reality of the violation of these rights in Brazil, as exemplified by the large numbers of

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juveniles deprived of liberty in socio-educational detention centers. Literature on the subject is reviewed to identify the legal possibility of the European Union operating outside of its own bloc of member states, for the purpose of protecting the human rights of these young people. Secondary data are employed to illustrate the reality of such violations of the rights of young people, either when they come into conflict with the law or are the victims of state action, as a way of justifying possible European Union action in Brazil. The precepts of decolonial studies are used to examine how this application of the "principle of solidarity" might be operationalized, in the understanding that the only possible way to achieve this would involve taking responsibility for economic investment in reducing inequality.

Keywords: European Union, human rights, decolonialization, juvenile justice system, young people deprived of liberty.

Intoduction

The incarceration of children and young people in conflict with the law is a major concern worldwide. Prison riots, cruel, inhuman and degrading treatment, torture, and poor hygiene conditions are the everyday reality in various juvenile detention centers, especially in the less developed nations of the globe, such as those of Latin America.

The figures for incarceration in socio-educational facilities in Brazil in 2021[1], show that 13,684 young people aged between 12 and 21 years were under full detention in such facilities, 2,610 under pretrial detention, 1,383 under detention with day release, and 155 under detention for failure to comply with a court order; giving a total of 17,832 minors deprived of liberty (FBS, 2022).

By contrast, the statistics section of Italy's *Dipartamento per la Giustizia Minorile e di Comunità* [Department of Juvenile and Community Justice] (Italia, 2021) records that, in Italy in 2021, 835 young people and adolescents aged between 14 and 24 years were admitted to juvenile detention centers.

The grounds for assessing juvenile criminal responsibility differ from one country to another, although the United Nations Convention on the Rights of the Child (UN CRC, 1989) is the international document that is most widely

[1] Article 112 of the Child and Adolescent Statute – ECA establishes that a young person can be held responsible by way of: an official warning, being obliged to make good the damage, probation, community service, detention with day release or full incarceration, in addition to pretrial detention.

followed, having been in effect for more than 25 years. It is believed that "in the field of juvenile justice, violations of children's rights are omnipresent, with some authors suggesting that, in the past decade, not only has progress come to a standstill; a significant regression can be discerned" (Beneitez & Dumortier, 2018).

There are divergences within the countries of Western Europe regarding the rationale underlying juvenile justice (Von Hirsch, 2001), but the present study adopts the concept of maturation, as outlined in the Convention, according to which juvenile delinquency is seen to be transitory, thereby suggesting that the less drastic the extent of state intervention in the lives of young people the more likely they are to mature naturally (Zimiring & Langer, 2015). This understanding derives from developmental psychology, which sees young people as being subjects under construction with lower levels of cognitive capacity, judgment, and self-control than adults, greater sensitivity to punishment and a higher degree of vulnerability to the effects of prison (Couso, 2012).

Irrespective of the specific concept of juvenile justice adopted, the subject is a matter of great interest to the European Union, since the protection of human rights is one of the Union's fundamental values and the process globalization has required significant efforts to be undertaken to address such issues (Piernas, 2017).

The present study thus examines whether the European Union's solidarity clause could be used as a tool to operationalize the objectives of protection, both within and external to the EU's bloc of member-states. In the case of the latter, we also examine whether it would be possible to operate under the circumstances that pertain in Brazil, where data on the juvenile justice system, while scant and out-of-date, suggest a situation of mass incarceration[2], as

[2] The present study adopts the point of view of critical criminology developed by Zaffaroni (2003), to the effect that, since the very earliest years of the emergence of a penal system in Brazil, there have been parallel systems that act as a non-official form of punishment. This means that, alongside the penal system in the strict sense of the term, there is another parallel model, composed of agencies that enjoy less prestige, designed to operate with a punishment considered to be lesser, for which reason it enjoys greater discretionary powers (arbitrariness), one example of this being the system of juvenile justice. We thus need to dispense with euphemisms, since "*[d]erecho penal juvenil es control punitivo-preventivo, y no puede ser otra cosa, de modo que si ha de privilegiarse una intervención verdaderamente educativa y restitutiva de derechos, ello ha de ocurrir fuera del Derecho penal juvenil y lo mejor que puede hacer éste, lejos de "entusiasmarse" con la idea de educación y pretender hacerla suya, es replegarse todo lo posible renunciando al máximo a una sanción, no sólo si es privativa de libertad, sino también si es ambulatoria*" [Juvenile criminal law is punitive preventive control, and cannot be any other thing, in such a way that, if we are to privilege a truly educational and restitutive legal intervention, it would need to occur outside of the juvenile penal justice system and, as far as is possible, far from 'drumming up enthusiasm' regarding the idea of education and intending to make it one's own, would reject and distance itself as much as possible from the idea of a sanction, not only if this involves incarceration, but also in cases involving probation"] (Couso Salas, 1999, p. 97). Thus, when we speak of socio-educational measures involving detention, in legal terms, we are essentially talking about applying the kind of punitive

evidenced by the sheer numbers of juveniles in conflict with the law detained in socio-educational facilities in Brazil. Most of these young people, it should be added, are poor and black, further entrenching and readapting to the modern age the legacy of exploitation and cultural discrimination that have had such a detrimental effect on the most vulnerable people in this country.

Social inequality is thus intimately entwined with criminality (Faleiros, 2021), in such a way that all countries around the world should make it their mission to reduce the yawning gulfs that have held back the development of a whole generation of young people and provide full protection for children as a human right, in the manner laid out in the CRC.

The present study explores these issues through a review of interdisciplinary literature on the subject published in Brazil, the Americas and Europe, with a view to shedding light on the question of whether it might be possible for the European Union, based on the principle of solidarity, to act outside of its own group of member-states. Is the violation of the human rights of children and adolescents deprived of liberty a matter of sufficient concern to the EU that it might act in the name of the principle of solidarity? And how should it go about protecting the rights of children deprived of liberty in situations such as those that commonly pertain in developing countries such as Brazil?

The present study thus takes the real demands regarding the intersecting problems of social inequality, criminal behavior, juvenile detention, and the right of children and young people to a dignified life as a basis for possible partnerships between Latin America and the European Union.

1. The principle of solidarity and the operation of the European Union in the internal and external dimensions

The process of European integration, driven by the phenomenon of globalization has required enormous legal efforts to create tools capable of addressing the global problems that affect member-states (Piernas, 2017).

The Treaty of Lisbon, which outlines the objectives of the European Union, emphatically draws attention, in Article 3[3], to the need to develop solidarity and

incarceration typically employed for adults to the juvenile system.

[3] "…the Union shall uphold and promote its values and interests and contribute to the protection of its citizens. It shall contribute to peace, security, the sustainable development of the Earth, solidarity and mutual respect among peoples, free and fair trade, eradication of poverty and the protection of human rights, in particular the rights of the child..."

protect human rights, based on guarantees regarding liberty, security, social justice, full employment, intergenerational solidarity, territorial cohesion, among other principles, as a central principle of international relations. These objectives are, therefore, not only essential to integration, but also constitute "the most effective approach to the development of solutions to global challenges" (Frassoni, 2017, p. XVI).

The 2007 Treaty of Lisbon (in force since 2009), in amending the Treaty that set up the European Community (EC) – now called the Treaty on the Functioning of the EU – introduced an explicit clause on solidarity (Article 222). This article requires Member States to act together "in a spirit of solidarity".

The basic values of the European Union thus include both legal and social values relating to the full complexity of human society. These principles are encapsulated in the principle of solidarity (Morviducci, 2017).

The European Union should thus play a major role in peace making, respect for the rule of law, and the establishment of global order. It is no coincidence that the solidarity clause has become the object of intense legal debate—regarding its scope, content, and the criteria that would lead to the principle being acted upon within or external to the European Union. A whole "system of solidarity" has been created as a result.

Some authors, starting out from the premise that solidarity is a duty, understand the clause to establish "an obligatory goal of coordinated European Union action in the spirit of solidarity, a concrete obligation on the part of the Union (to mobilize all units) and of member-states to co-operate should they be called upon to do so" (Russo, 2017, p. 8). Both Articles 3(5) and 21 of the Treaty of Lisbon thus guarantee further integration beyond the current borders of the Union, and this has been taken as justification for expanding their effects beyond its current territory. This was the case, for example, of Ruling 2014/415/EU, in which the Council of Europe, despite not specifying what it understood the term 'disaster' to mean, made it clear that a serious situation with abnormal effects, generated by events within or external to the bloc member-states, but which might nevertheless have effects within the territory of these, would entail coordinated action of the European Union, in such a way as to fulfill a responsibility[4] to the world as a whole.

Assistance provided for citizens affected by crises does, in fact, have a direct impact on global social and economic development. Furthermore, the

[4] Extraterritorial intervention on the part of the European Union has, in fact, already occurred, on the occasion of terrorist attacks, flooding, a tsunami, the H1N1 respiratory infection, a volcanic eruption, the Ebola outbreak, among other incidents (Russo, 2017, p. 13)

cooperation of the European Union, in terms of civil protection, dates back to a period before regional integration, in 1985, with more robust mechanisms being introduced subsequent to the September 11th terrorist attack on the United States, in 2001 (Russo, 2017).

A system responsible for cooperative assistance, with tools capable of effectively protecting human rights in cases of natural or man-made disasters, within or external to the European Union, is thus an obligatory clause that can be acted upon by Member States.

In this context, the values contained in the Brazilian Federal Constitution of 1988 are consistent with the content of the Maastricht Treaty, Article 6 (e.g., Article F), Paragraph 2 of which deals with the fundamental rights guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4th November 1950, known as Convention of Rome of 1950. The values of both the European Union and its member-states and Brazil are, after all, based on the Universal Declaration of Human Rights of 1948 and on the CRC and both prioritize promoting the best interests of the child.

This has also led the European Union to be accorded the status of permanent observer at the Organization of American States, and it is thus common for legal developments occurring in the European Union, or in its member-states, to have a direct influence on the rule of law in OAS member-states.

2. Violation of the human rights of children and adolescents and the principle of solidarity: intervention beyond the EU bloc

Starting out from the assumption that investment in future generations is indispensable worldwide and that the rights of children are human rights, every country has an interest in protecting the human rights of this sector of the population. The truth is, however, that the precepts of the CRC have very frequently been violated.

As early as 2007, in an analysis of the reports sent by signatory nations, the United Nations Committee responsible for the first round of implementation of the Convention already noted that reform of juvenile justice was an undesirable, politically marginalized issue, to the point that one response from the United Kingdom to the official UN notice regarding avoiding stigmatization of children in conflict with the law stated that “these are not children, they are mostly criminal undesirables” (Muncie, 2009).

This is a line of reasoning typical of the ideology that held sway in the late 19th and early 20th century, based on a logic of "compassionate repression", and the doctrine of 'irregular status' (García Méndez, 2011). This was a tendency born out of the positivist movement in philosophy, which argued that a situation of abandonment, the failure to uphold the fundamental rights of minors and transgression of legal norms gave rise to a legitimate demand for punishment and protection (Tuardes de González, 1996).

The theory was oriented around social defense and was thus based on punitive prevention, thereby justifying the detention and isolation of individuals as a way of meeting the two concomitant ends of protecting society and treating the offender. As a result, according to this theory, the delinquent was believed to possess physical and psychical anomalies (Alvarez, 1989) – these alone being sufficient to justify their incarceration in correctional facilities (Machado et al., 2019). The US Supreme Court, in a test case that, at the time, brought about a shift to the principle full protection, ruled, in the case of Kent v. United States, that "there are reasonable grounds to believe that the child receives the worst of both worlds, that it gets neither the solicitous care and regenerative treatment postulated for children, nor the protections accorded to adults".

The doctrine of Full Protection, signed by around 194 countries, including all the countries of Europe, was supposed to mark a change of paradigm, in so far as it established that children are subjects with rights and not wards of the state. No such change, however, came about, owing to "weak control mechanisms and the fact that some countries easily provide "lip service to children's rights simply to be granted recognition as a "modern developed state" (Muncie, 2009).

On the one hand, Brazil has taken the lead in Latin America in giving concrete expression to the objectives of the Convention on the Rights of the Child in Brazil's Child and Adolescent Statute - ECA.

Despite the lack of real progress in protecting the rights of children and adolescents, in one way or another, signatory nations are expected, nevertheless, to make efforts to make rights a concrete reality. To achieve this, a legal perspective based on the theory of maturation is indispensable.

According to this view, the kind of retribution and incapacitation typical of the penal system are not able to supply the approaches based on maturation that is the only one capable of striking a fair balance between juvenile responsibility, state intervention, and the specific conditions of national development (Muncie, 2014).

This means that, notwithstanding the various arguments that have been put forward to justify a special form of juvenile justice, going back to the Illinois

Juvenile Court, established in Chicago, in 1899, (including the theory of malleability, which enables more extensive rehabilitation), it is the idea of maturation that should prevail. It is indispensable that juvenile courts acknowledge that the kind of offences committed by juveniles tend to be age-specific and transitory, that damage can be caused during the phase in which young people come of age, and that state intervention should thus be kept to a bare minimum. Punishment and incapacitation should be applied with great caution in this formative phase in the life of the individual, if the aim is to act in the best interests of the child. Muncie (2014, p. 394) concludes that "the biases that are designed into a maturational juvenile court would clash into the just deserts and the incapacitation calculus of the modern criminal courts".

In other words, the model based on development is passive. It does not impose interventions, because it presupposes a natural capacity for development in youth and hence the eventual desistance of criminality.

The theory of maturation thus starts out with the task of balancing the need to foster a sense of responsibility with that of punishing transgressions by way of minimal interventions. This provides a diversity of forms of action that are not only proportionate to the act committed, but also undertaken in a tolerant fashion, so as to ensure that the interests and the well-being of these young people are fully taken into account: "it is better that ten guilty kids who will likely mature naturally go free than one innocent kid who will also mature naturally be unnecessarily convicted. In fact, from this perspective of maturational theory, it does not make sense to convict (almost) any of them" (Zimrigin and Langer, 2015, p. 396).

The CRC thus established the principle of the best interests of the child and respect for the human right to dignity among minority groups and the European Union subsequently issued Directive 2016/800 of 11 May 2016 to the effect that:

> [c]hildren are in a particularly vulnerable position when they are deprived of liberty. Special efforts should therefore be undertaken to avoid deprivation of liberty and, in particular, detention of children at any stage of the proceedings before the final determination by a court of the question whether the child concerned has committed the criminal offence, given the possible risks for their physical, mental and social development, and because deprivation of liberty could lead to difficulties as regards their reintegration into society.

The CRC has also established minimal norms in relation to the due process rights of minors suspected or accused of crimes in the criminal justice system, giving member-states the option of expanding on the rights contained therein by providing a higher level of protection and, in Article 4, 1, b, iii, and Articles 10, 1 and 2, recognizing the principle of the use only under exceptional

circumstances and for short periods of time of socio-educational measures involving incarceration.

The Convention also, in Article 11, underlines the need for member-states to seek alternatives to prison: “Member States shall ensure that, where possible, the competent authorities have recourse to measures alternative to detention (alternative measures),” as reiterated by the Children’s Rights Committee in General Observation nº. 24 (2019).

Since the European Union is permitted to act outside of its own bloc of member-states and protection of the rights of children and adolescents is one of the missions that may justify such action, this raises the question of what should in fact be done. Each situation requires a different approach. We examine here the situation in Brazil.

3. Juvenile responsibility and incarceration rates in Brazil

Here we discuss the situation of adolescents deprived of liberty in a closed facility in Brazil.

First, we should consider the lack of transparency in the data, a difficulty which is now common in the field of public security in Brazil (FBSP, 2016) and even more so in the juvenile justice system, in called socio-educational [correctional] facilities. A recent official survey of the operation of the National Socio-Educational Services System (SINASE) found:

> ...a lack of transparency in the provision of information and an unwillingness [on the part of some state and local managers] to cooperate with a national diagnostic study in a field where lack of information and hence lack of accountability is the norm... (BRASIL, 2020, p 53).

The socio-educational system is constitutionally based on the principle of full protection (Article 227 of the Federal Constitution), whose basic premises include the principle of the best interests of the child and recognition of the child’s specific stage of development[5].

[5] The principle of the best interests of the child foregrounds the need to make concrete the best interests of children and adolescents, with a view to giving concrete form to the precepts laid out in the Convention on the Rights of the Child regarding non-discrimination (Article 2), implementation (Article 4), and stage of development. This forms the ontological grounds for legislation involving children and young people in so far as it establishes the phases of personal redefinition through which an adolescent passes and is the legal reflection of the concept of maturation: “The court should be restrained in its punishments and careful not to interrupt a normal maturation process that is the best hope for the eventual reduction of social risk. In this policy approach, the best cure for youth crime is growing up. This is a juvenile court that aims, at almost all costs, to facilitate a normal maturation” (Zimring and Langer, 2015, p. 392).

Hence the requirement that a specialized system of justice be set up to assure the rights and mediate the formulation of policies related to the development of this sector of the population. All the guidelines contained in the Child and Adolescent Statute (ECA) therefore oppose the model of mass incarceration of young people, which is common in other legislations. From individualization to de-institutionalization, by way of decentralization, the aims of this special legislation are related to the real needs of children and adolescents, as developing individual human beings, subject to rights and given absolute priority within the family.

This should preclude the logic of systematic incarceration typical of the adult criminal system. This has, however, not occurred in recent years, which have seen a sharp increase in the numbers of adolescents deprived of liberty, to the extent that the United Nations Committee on the Rights of the Child has noted that “alternative measures to detention are not applied effectively” in Brazil (2015).

Arruda (2021) reports that, between 1996 and 2016, there was a 523% increase in the numbers of young people and juveniles who have been deprived of liberty or had their liberty restricted, this figure being higher than the 326% increase recorded by prison authorities over the same period.

In September 2019, a Brazilian National Public Prosecution Service Survey reported 18,086 juveniles deprived of liberty for an unspecified period of time, at 330 socio-educational facilities (Brasil, 2019). Over the years, the numbers have increased. “Between 2014 and 2015, there was an increase for both forms of punishment, both in the number of adolescents in custody, from 16,902 to 18,381, and also in the numbers on probation, from 2,173 to 2,348” (Brasil, 2018).

At the height of the COVID-19 pandemic, the National Council of Justice (CNJ) published Recommendation nº 62, of 17 March 2020 (Brasil, 2020), with a view to reducing the numbers under incarceration and thereby avoiding deaths among individuals deprived of liberty and halting the spread of the virus in the penitentiary and correctional/socio-educational systems.

It was also in the middle of the pandemic that Brazil’s Federal Supreme Court made a definitive ruling regarding collective *habeas corpus* 143,988/ES, on 14 August 2020, recognizing the principle of *numerus clausus* (maximum capacity) in the socio-educational detention system "as a management strategy designed to ensure that a place is made available for each new arrival" (Brasil, 2020). It thus established that socio-educational facilities should never exceed 100% capacity.

These developments corroborated, at least on paper, a movement in the juvenile justice system away from the logic of incarceration typical of the adult system, with consequent strengthening of the doctrine of full protection.

In reality, however, no reduction in incarceration occurred. On the contrary, in socio-educational services, the maximum period of pretrial detention was now extended—an unprecedented move in Brazil (Silva, 2020).

This policy of incarceration *per se* provides sufficient indication of the colonization by the modern penal logic of the practice of those in charge of the juvenile justice system (Pires, 2017). This has caused the logic of incarceration to prevail in the socio-educational system, justifying Muncie's critique (2008) and explanation as to why almost no countries around the world have taken steps to combat social and judicial violence against children: namely, the punitive mentality of western nations.

In view of the persistence of what in Europe is commonly called the "punitive turn in juvenile justice", in reference the period when a culture of control first came to be prevalent (Muncie, 2008b), we need also to discuss the fact that, in reality, no such 'turn' ever occurred in Brazil, because such a punitive system has always prevailed.

3.1 The Persistence of the Punitive System in Brazil

The social structure of Brazil was created by a form of organization founded on enslavement and subservience to the global market, with huge social disparities, "generated by the kind of stratification produced by the manner in which the formation of Brazil as a nation occurred" (Ribeiro, 1995). The penal system thus came to serve as an indispensable tool for the establishment of this order, in which the élites, first the Portuguese, then Luso-Brazilians, and finally Brazilians, panicked by the growing numbers of the oppressed classes, used brutal repression to put down any insurgency against the authoritarianism of the central authorities and to force the bodies of others to carry out their wishes[6].

All of this is based on an informal Criminal Law, a non-legal, para-institutional system that effects social control by causing pain and suffering, with no restraints (Castro, 1983). This pattern was evident both on the colonial plantation, in which the Master enjoyed a monopoly of the means to violence, and in the public domain, where

[6] There is no yawning gulf between the official evolutionism of the past and the modern version – "what persists is a methodical punitive continuum, from colonization, mercantilism, and slavery, to global capitalism" (Andrade, 2012, p. 108).

> …on the periphery, the logic of punishment acts in symbiosis with a genocidal logic, and a complex interaction between formal and informal penal control holds sway, between the public and the private system, between the official penal system (the public penalty of imprisonment and the loss of liberty) and the informal underground system (in which the private penalty is death and the loss of life), between a logic of stigmatizing selection and a logic of torture and extermination, which goes beyond the pain of imprisonment and is rooted in the elimination of certain human beings, especially those who 'have no place in the world' (Andrade, 2012, p. 109).

The data clearly expose the latest iteration of this scenario. Brazil's official annual report of public security (2018), based on data for 2017, reported a total of 63,880 intentional homicides in Brazil (a category which includes murder, death occurring in the course of a robbery, death as a result of police intervention, and bodily harm leading to death), signifying an increase of 2.9% on the figure for the previous year. The difference in mortality between African Brazilians and the rest of the population has reached historic highs. Between 2004 and 2014, the number of deaths among African Brazilians increased by 19.8%, while the number of victims among individuals of other races decreased by 13.7% (Cerqueira, 2017).

It can thus be seen that the color of a person's skin is directly correlated with the likelihood of that person being killed and thus, since homicide has become a tragic fact of life in Brazil, the country stands divided by a "racism that kills" (Cerqueira and Coelho, 2017). This constitutes a kind of "epidemic of indifference", of a markedly authoritarian cast, with clear racial overtones and large numbers of deaths among those (black people, poor people, and young people) who have historically been oppressed and invisible and seem not to exist in Brazil, except for the gratification of an oppressive, exclusionary, hedonistic, individualistic society (Ribeiro and Couto, 2017).

It should thus be acknowledged that Latin America entered the modern world exploited and despoiled, forced to adapt to the myth of the superiority of modern civilization, in which, since colonization, everything was justified by a theoretical and ideological apparatus.

It can thus be seen that the state monopoly of the means to violence, established as the legal standard in Brazil since 1980, has evidently been a failure, since, in this system of "socially instituted authoritarianism," violence does not constitute the exception but the rule. Authoritarian governments have served merely to entrench this pattern and, since the return to democratization, there has always been a "parallel state of exception" available as a resource for the maintenance of traditional bases of power (Pinheiro, 1991, p. 46, 50).

There is thus no sense of dysfunction and no change, so long as there is no clear-sighted focus on violence, with no dissimulation regarding the reality of illegal repression. This would mean acknowledging the levels of punitiveness that pertains not only at the highest levels of political power, but also, at the other extreme, in micro-contexts, where concrete interactions between different classes and social groups and their respective interests in fact take place" (Pinheiro, 1991, p. 52).

The years immediately following the publication of the ECA (1990) saw large-scale incarceration, populist punitiveness, a heightened culture of fear, an increase in the numbers of intentional homicides, constant reproduction of crime-related discourse based on concepts of social dangerousness, and a resurgence of the war on drugs, with traffickers being seen as domestic enemies, justifying the use of institutional violence as a weapon necessary for combating this internal evil.

In fact, this pattern of administration of Criminal Justice has persisted to this day. The challenges in this regard mentioned in the plan drawn up during President Fernando Henrique Cardoso's first term of office (1995-1998) included lack of confidence in public institutions, a cycle of growing impunity, systematic violation of human rights, widespread sale and use of narcotics, and the existence of death squads. It also acknowledged the sluggishness of a judicial system beset by long delays. The solution was to launch a stern program of law and order to bring crime back under control (Adorno, 1999).

A complex network of institutional reasons can be adduced to explain this development. These range from the historical prevalence of the private over the public sphere to the fragility of the rule of law, in which a subjective approach to the exercise of public functions has tended to result in arbitrary judgments, even after the permanent attempt to reconstruct the Democratic State. There are still many "traces of the authoritarian past that are resistant to change" (Adorno, 1994).

It is thus fair to raise the question of how the principal of full protection for children and young people might be adapted to modern-day Brazil, in such a way as to incorporate the need for both full protection and a special form of criminal responsibility for minors, in the context of a violent society. While, on the one hand, the authoritarian practices of re-democratization desirous of order at any cost have stubbornly persisted, on the other, we can see that the decades following the establishment of the legal Doctrine of Protection in Brazil provided fertile ground for the emergence of the idea of an untamed lost generation of young people[7].

[7] Recurrent campaigns to reduce the age of majority, feted by the Brazilian media, have been backed up by public opinion campaigns and influenced bills in Congress, this being the clearest

In this context, how did the discourse regarding full protection come to develop and what continuities can be found in relation to holding individuals responsible for transgressions by imposing socio-educational measures involving incarceration?

It can thus be seen that a dichotomy between the individual and the social, in combination with social problems caused by social inequality, has made already vulnerable poor children in Brazil even more vulnerable as a result of state intervention in the name of social justice based on a punitive mentality. This needs to be replaced by the principle of the best interests of the child and all the requirements of full protection, including a special kind of responsibility based on the scientific study of child development.

It is precisely for this reason that widespread solidarity has emerged and a feeling that formal recognition of the rights enshrined in the CRC is insufficient. Considering the rights of the child to be a basic condition for a dignified life for each child in particular and all children in general involves going beyond mere formalities and understanding the underlying inequalities and the ways in which these are reproduced (Carvalho et al., 2021, p. 197).

This interconnection between social inequality and criminality is not only the result of the selective process at work in the juvenile system.

3.2 From criminality to the criminalization of extreme poverty: yet further justification for the introduction of the concept of maturation in courts in Brazil

The criminalization of extreme poverty has a long history in Brazil. With deep ideological roots in Brazilian culture, it compounds the difficulties that poverty puts in the way of living a dignified life by branding poor people as criminals, feared by the Brazilian elites as a stain on their aesthetic ideal.

Alba Zaluar (2004) and Vera Malaguti Batista (2003) have studied the relation between crime and poverty, in particular among young people, and have arrived at the conclusion that this conjunction of criminality and poverty in Brazil is linked to the history of relations between poor people and the police, by way of a kind of “perverse integration”, whereby all actions aiming to effect control and neutralization of perceived threats are deemed legitimate.

This stigmatization of Brazilian youth cancels out the possibilities raised by the singularity and individuality of each individual as a way of building a personal identity, to the detriment of the adolescent’s self-esteem. Such individuals may

consequence of the displeasure caused by the postulates of full protection.

be invisible to social policy, but they are visible to a society that is offended by their very presence.

This invisibility may also be one of the many variables that contribute to crime (Tejedas, 2008) “There is a deeper kind of hunger, more demanding and more voracious than physical hunger, when one hungers for meaning and value, for recognition and acceptance; hungering for being—knowing that one can only *be someone* through the eyes of other people by whom one’s existence is acknowledged and valued” (Soares, 2005, p. 205).

Belonging to a group, carrying a firearm, causing fear, and enjoying a certain power are all means towards acquiring some form of recognition, a kind of (perverse) rite of passage, in which guns are a phallic symbol of the extension of the male body. Alba Zaluar (1993, p. 193) develops this idea further.

> For this reason [guns] are also called ‘shooters’, which could also refer to the male genitalia. The association of signifiers is also clear in the constant use of the verb ‘do’ to refer both to the act of copulation and to the act of killing someone (with a gun). Defeating other men by possessing them is fundamental for a man’s self-affirmation, earning respect among his peers[8].

The creation of this inferior being deprived of all qualities (by racism, poverty, and lack of access to education or the items considered essential for human dignity) in relation to others who are better off, clearly exposes the hierarchical nature of Brazilian society, in which ties of community have been frayed by inequality and degradation. Worse still, the invisibility of these individuals assuages social guilt. Once they are not seen as moral subjects, it no longer seems wrong to deprive them of the rights accorded to all other citizens. “How, then, are we to confront the problem of the young offender without falling into the cynical attitude of ‘hypocritical retribution’ or the consequence of ‘naïve paternalism’?” (Vieira, p. 99).

This individual stripped of any moral or economic worth is then raised by society in such a way as to be fully cognizant of his or her position of inferiority in relation to individuals of a higher class and thus readily submits to arbitrary rule of the public authorities, having no expectation whatsoever that their rights will be respected. More privileged individuals likewise feel no obligation to respect the rights of others. This results in a “state that is at once brutal and arbitrary in its dealings with those who are excluded from morality, and sweet and cordial in relation to more privileged classes, who see themselves as being above the rigors of the law” (Vieira, 103).

[8] [Translator’s Note: the double-entendres involving the colloquial usage of the Portuguese words *ferro* (iron) and *deitar* (lie/lay down) are impossible to replicate here]

Since the very continuation of the human race depends on the well-being of children and adolescents, this situation would seem to require the engagement of all countries around the world. It is true that children are indispensable to global interests, especially those who are negatively impacted by social inequality, since "the more intensive and/or more prolonged the experience of living with any kind of inequality, the more harmful its impact may be" (Carvalho et al., 2021, p. 197).

The democratization of society, after periods of dictatorial rule, should have put an end to this state of affairs and established the due process of law as the main constitutional point of reference, with less pressure on juvenile courts to be punitive. Political agendas, however, have steered the juvenile justice system in the direction of retribution (Muncie, 2015), in clear violation of the principle of the best interests of the child and of the promise that the rights contained in the Convention will be upheld, as is the case in Brazil.

There should, therefore, be a global mission, on the one hand, to find a way of viewing these children not as young offenders or as abandoned children subject to coercive intervention, and to lighten the burden of social inequality that impedes healthy development. This may also help to ensure that a young person matures naturally, leaving behind a life of crime that amounted in fact to no more than *acting out.*

This raises two important questions: a) one should not be so naïvely optimistic as to believe that minor legal measures will be sufficient to resolve the serious problem of the numbers of young people in custody in Brazil, especially given the existence of legal culture of authoritarianism and incarceration, which has a direct effect on the judicial officials involved in the penal system; and b) the data presented above would seem to justify invoking the principle of solidarity as a multilateral global agenda, such as the one developed by the EU-LAC Foundation, to form partnerships to combat extreme inequality.

In relation to these issues, the European Union (EU) should cease to view the Latin America and Caribbean (LAC) region in terms of asymmetrical relations (Van Klaveren, 2004, p. 55), but as a partner that shares problems and solutions in specific areas, including the promotion of human rights, as part of a dialogue between equals, based on international principles, values, and norms (Ayuso et al., 2018).

These regions have compatible visions in relation to the importance of democracy, the validity of international systems, and the role the state should play in development. This alone should be enough to generate interest in finding out more about each other's realities.

Latin America is also the only part of the world, outside of the European Union, to be structured into an effective if fragile regional institution. It is also, however, a region beset by astronomical levels of social inequality, violence, pockets of poverty, and problems relating to governability. The fact, however, that Latin America is not sufficiently prosperous to be able to aspire to "full membership of the European Union", does not mean that it should be treated as an object of charity. Finding a more balanced relationship poses a considerable challenge.
The way forward may involve some of the following steps: a) helping to improve the social cohesiveness of Latin America; b) promoting greater international autonomy for Latin America; c) improving the project external to the European Union in the region; and d) building strategic alliances for a multilateral system of global governance. This will involve the kind of solidarity, autonomy, association, and common interests outlined by Freres and Sanahuja (2006, p. 31).

> The main challenge for the EU if it wants to strengthen relations with Latin America is that of giving the region a more strategic character based on an agenda of common interests, that both meets the real needs of this region and is compatible with the EU's own self-interest. This agenda could be based on four large-scale shared bilateral objectives, some applicable immediately, others requiring a more medium-term approach.

It is in this context that we will now consider the potential relationship with Brazil and the way in which this could be developed. How should the principle of solidarity apply in the case of the protection of the rights of children deprived of liberty in developing countries such as Brazil?

4. Responsibility as a way of operationalizing the principle of solidarity to provide full protection for juveniles in conflict with the law in Brazil

Based on understanding of the possibility of applying the principle of solidarity beyond the borders of the European Union and the urgent need for such action, as included among the principal objectives of the bloc, in providing protection for juveniles in Brazil, we discuss here how this might be brought into effect.

We start out from the epistemological precepts of decolonial theory, since the traditional approach of countries from the global north[9], based on truths that reflect imperialism and the supposed need for neutrality and universality, not only justifies the state being regarded as the epicenter of power but also fails to acknowledge the fact that the "Global North exists only because of the exploitation of the Global South and the expropriation of its lands, labor and

[9] 'North' here is not a geographical term, but is used in a political sense to refer to the production of violence (Souza Santos, 2008)

resources. To talk of the Global South is to enter into a theatre of punishment, oppression and violence" (Blagg and Anthony, 2019, p. 19).

We thus aim to avoid reinforcing the colonial nature of the power the North holds over the South, in the context of a world system (Lander, 2005; Dussel, 2005; Castro–Gómes, 2005; Quijano, 2005), given the mandatory nature of the European Union's mission (Morviducci, 2017).

If, therefore, it is true that there are, as Alcofi puts it (2016, p. 142) "connections with a larger-scale context and history, which may provide just such explanation as to why decolonization has still not been sufficiently achieved in academia", then it should be pointed out that decolonial knowledge indicates that colonial expansion has not only produced hierarchies, but also created global ties and connections, and colonization thus needs to be placed center stage in the debate (Aliverti, et al., 2021).

Achieving a fair balance, without attempting to provide salvation or engage in some kind of civilizing mission, in a manner that goes beyond the provision of charitable aid, clearly poses a considerable challenge.

The universal nature of rights presented by the CRC, in the face of the authoritarian, racist, violent nature of Brazilian society, marred also by social inequality[10], involves developing shared agendas to tackle social inequality.

Public policy can help to reduce social vulnerability in so far as it strengthens the individual. After all, "the condition of vulnerability diminishes the capacity of individuals to act and cope with life's vicissitudes, criminal action being one way of expressing the situation of disadvantage imposed by circumstances beyond the control of young people and their families." (Orth & Bourguignon, 2021, p. 865).

> Among juveniles entering the socio-educational system in São Paulo, 42% reported that their families depended on informal employment, 10% were unemployed, 1% had a formal employment contract, and 7% were receiving state benefits. Seventeen percent of these families were living on less than the minimum wage and 59% would be classified as low-income (Terra and Azavedo, 2018).

This means that "where inequality is combined with a lack of rights, public policy, or inclusion, in areas with high unemployment and the presence of drugs gangs and police/militias, young people are at the same time the victims and the perpetrators of crime" (Faleiros, 2021, p. 11).

[10] Muncie (2008) has rightly pointed out that "[l]ittle attention… has been given to the extent to which the notion of universal rights may itself be grounded in Western notions of individualized justice rather than as facilitating any movement towards global social justice".

It is thus not merely a question of a misapplication of the justice system, and, in this cultural context, any outside intervention based on intellectual colonialism, could well bring about only an exacerbation of state violence in Brazil, especially since Brazil's law-and-order approach to youth justice is not that different from that the rest of the world (Muncie, 2008b)[11]. The emphasis here, therefore, should be elsewhere: on reducing social inequalities.

Any attempts by the Global North to construct a system of justice based on abstract notions of impartiality, neutrality, and penal reform, should, in so far as they have justified a whole pattern of oppression in the past and generated stigma and discrimination, be viewed with suspicion from a postcolonial perspective (Sbraccia, 2018).

It is thus necessary to resist any perspective that reproduces this idealism (Sozzo & Garcia, 2022) and start out instead from the real penal system and its real effects (Zaffaroni, 1984). In this case, marginal criminological realism assumes that it is not possible for there to be any positive modification of the criminal justice system. Any change must take place outside of it. It is proposed here that social inequalities can be reduced by way of promoting responsibility, a concept that involves democratic compliance with established norms and commitments.

In the case of Brazil, the principle of solidarity has an important key role to play in relation to the protection and promotion of peace and democracy, peaceful conflict resolution and cooperation for the sake of human progress. The European Union can thus be held responsible for maintaining stable relations between nations around the world (Santos, 2017).

The development of closer cooperation between the European Union and the Global South, based on transnational responsibility, as a way of ensuring legal assistance and rights has been recognized as a responsibility in official documents of the European People's Party European Parliament group (EPP, 2021).

The COVID-19 pandemic has presented further challenges, including some relating to access to justice, requiring a proactive approach on the part of state authorities to remove obstacles to due legal process and access to the courts (EPP, 2021).

[11] "Comparative analysis may reveal something of a 'globalized' emergent politicization of the 'youth problem', but also the continuance of a diverse range of 'localized' juvenile justice practices based on informal social controls, diversion, education and social protection. These contrary cases can be used as one basis for re-instating and promoting the broad contours of a juvenile justice working in the 'best interests' of the child and through which the excesses and failures of contemporary punitiveness can be exposed and challenged (Muncie, 2008b, p. 119)

The EU-LAC cooperation agenda should be envisaged in terms such as these. There is also good justification to invest in reducing social inequalities[12], given that the universality of rights disguises the real causes of state violence in Brazil and in so far as children and young people have a right to "full protection and a dignified life in society, under the rule of law in a democratic system involving public participation and redistribution of wealth" (Faleiros, 2021, p. 18).

The responsibility of the European Union, in the sense envisioned above, thus implies the application of the principle of solidarity and this is one element in the dialogue concerning the origins of violence.

Concluding remarks

The European Union and Brazil have for a long time been engaged in cooperation based on solidarity and shared values and fundamental principles, such as democracy, human rights, fundamental liberties, and the protection of children and adolescents, as members of a vulnerable minority group.

In the course of this there has been discussion of the possibility of developing partnerships between Brazil and the European Union, based on the principle of solidarity, as a way of increasing investment in the rehabilitation of young people in custody in Brazil.

The underlying assumption is that children and young people represent the future. Concern regarding their welfare is therefore a concern of global scope and dignified development of these individuals should thus be a concern all nations, thereby justifying international cooperation.

On the other hand, we have seen that the situation regarding the incarceration of young people in Brazil is such that the punitive turn, as found in studies of adult incarceration, has not only affected the juvenile system in Brazil but has been a permanent feature of the national culture.

Furthermore, social inequalities are a key cause of crime and the result of the most recent iteration of colonial expropriation and oppression.

A decolonial epistemology shows that it is not sufficient for the mechanisms of cooperation between the European Union and the LAC region to involve merely

[12] Despite the Latin American and Caribbean countries having received less development assistance in the last twenty years, as it went down from 12% in 1995 to 7% in 2016, the EU and its member States were responsible between 1995 and 2000 for 40% of all funds sent to Latin America and the Caribbean while this percentage has increased to 45% over the last five years.

the promotion of certain norms. There is a more pressing need to make an impact on the economic inequality around which Brazilian society is structured and with which the issue of juvenile crime is closely entwined.

Given the historical responsibility of colonizing countries for the developing countries that were once their colonies, such as Brazil, the principle of solidarity further makes the former responsible for ensuring dignified development worldwide. The doctrine of full protection is, moreover, an investment on the part of all nations who are signatories to the CRC. Furthermore, Europe and Latin America have certain similarities in so far as they are both regional blocs with a global interest in ensuring that the best interests of children are served. Since crime is closely connected with social inequality in Brazil, there can be no other form of investment in cooperation than to work towards reducing social inequality.

Given that, in terms of a culture of full protection, Latin America has, as we have seen, nothing to learn from Europe and since Europe is also responsible for the roots of the violent authoritarian practices of colonization, investment in reducing social inequality – which condemns impoverished young black people to a world of crime – is a global responsibility of the utmost urgency.

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