



REDUCING THE AGE OF CRIMINAL MAJORITY IN THE CONTEXT OF PRISON OVERPOPULATION AND ITS IMPLICATIONS

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SUMMARY

This article aims to analyze the reduction of the age of criminal responsibility, a highly controversial topic, given that the number of crimes involving adolescents is increasing, while the prison population is increasing and exceeding the capacity of incarceration. The precarious living conditions in penal institutions, which are increasingly overcrowded and unsanitary, reinforce the thesis that it is the duty of the State to create public policies in order to prevent, for example, school dropouts and the consequent entry of minors into the world of crime. Research was conducted in books by various authors and articles published on the Internet, which argue for and against the thesis of reducing the age of criminal responsibility and its implications. **Keywords:** age of criminal responsibility; crime; adolescents; prison population.

1. Introduction

Crime rates are rising every day, and the levels of violence are also rising. When we hear news of a violent crime with a major impact, we immediately cry out for justice and changes in the law. When these crimes are committed by minors, or when minors are involved, the issue of "lowering the age of criminal responsibility" is once again discussed by the population, who want to see these adolescents brought to justice and punished to the fullest extent of the law.

But at the same time that there is a call for justice and prison, in the case of criminal adolescents, it is known that such a desire clashes with current legislation and the penal system throughout the country, which borders on chaos, since the capacity for incarceration (places in prisons) is increasingly diminishing.

Bibliographic references from several book authors were used, as well as scientific articles, which provided discussions about the reduction of the age of criminal responsibility, viability, constitutionality, ECA (Child and Adolescent Statute), as well as its implications in the current scenario of prison overcrowding in general.

2. The Teenager in Crime

It is well known that children today are not the same as they were decades ago. Today's access to information and the media contribute greatly to shaping the thoughts and attitudes of contemporary adolescents. Children are often "recruited" by criminal organizations, who see them as cheap labor, since the lack of family structure, education, and basic living conditions make these minors see crime as an easy and immediate opportunity for financial gain. Adult criminals, on the other hand, see minors as an "escape valve" from the current criminal law, since it is more difficult to arrest and subsequently imprison them.

The increasing levels of crime, especially violent crimes involving minors, also increase the clamor for a more incisive attitude on the part of public bodies, in order to provide a slightly greater sense of security. Therefore, the solution suggested, sometimes even requires

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led by those who were victims of the criminal infants, would be the reduction of the age of criminal responsibility, making adolescents who are criminally responsible for their actions and not just mere offenders.

In our country, a person is considered to be of legal age when they turn 18 (eighteen). From then on, they become criminally responsible for their actions. Thus, article 228 of the Constitution of the Republic states: "Minors under the age of eighteen are not criminally responsible, subject to the rules of special legislation." (BRAZIL, 2012, P. 73)

As well as article 27 of the Penal Code: "Minors under 18 (eighteen) years of age are not criminally responsible and are subject to the rules established in special legislation". (BRAZIL, 2012, p. 511)

Although these minors are not liable, they are not considered unpunished, since they are subject to

each the special legislation that the ECA – CHILD AND ADOLESCENT STATUTE, law nº 8.069/90 deals with.

As seen, the Constitution guarantees minors specific legislation regarding criminal acts, however, the way to change this understanding is through an amendment to this Constitution, which is not that simple, since the process is difficult, as it requires voting in two rounds in each of the houses.

Even so, they imply divergences in the understanding of the constitutionality of such a project, as some consider that the age of criminal responsibility would be a permanent clause, therefore, it could not be modified, given article 60 §4º:

Art. 60. The Constitution may be amended by means of a proposal: [...]

§ 4º The proposed amendment aimed at abolishing the following shall not be subject to deliberation: I – the federative form of State;

II – direct, universal and periodic secret voting;

III – separation of powers;

IV – individual rights and guarantees. (BRAZIL, 2012, p. 32).

Therefore, some consider that such an amendment would be unconstitutional, as it would infringe on the fundamental rights and guarantees of the individual.

However, for Lenza (2014, p. 1357) the amendment to the Constitution would be possible, without violating the constitutional clause of individual rights and guarantees, as only the age for this would be reduced, but the right to non-imputability would continue to exist.

Costa says that:

As “subjects of rights”, that is, holders of fundamental rights, children and adolescents are no longer treated as passive objects, but become, like adults, holders of guarantees and individual rights, and these are protected by the condition of a permanent clause. (COSTA, 2010, p. 83).

Thus, it is stated that the Magna Carta treats families and young people differently, valuing them as a right and fundamental guarantee.

Taking all this into consideration, there are those who are in favor and those who are against lowering the age of majority criminal.

Those in favor argue that: if a person aged 16 or 17 is considered capable of exercising the right to vote, that is, being responsible for electing a politician, who can change the course of his/her municipality, state, or even the country, transferring responsibilities and delegating powers to him/her, this person can also and should be responsible for his/her own actions.

Always remembering that today's youth is much more advanced than those of the past. Technology provides access to various types of knowledge and learning instantly, so from an early age they already know what is right and wrong.

In this way, this young person is no longer like the one from the beginning of the century. The Internet is knowledge and reaches everyone, especially teenagers. For Nucci:

A minor under 18 is no longer the same person as he was at the beginning of the century, and does not deserve to continue to be treated as a person who has no idea of the illicit nature of what he does or does not do.

without being able to conduct oneself in accordance with this understanding. (NUCCI, 2010, p. 286).

Due to the fact that they have this understanding of the illegality of acts earlier than before, another argument that supports the need to reduce the age of criminal responsibility is the participation of these groups with adults in the commission of crimes. Minors usually go unpunished or almost, since the ECA “protects” them, while adults go free from these crimes, since, in most cases, adolescents take responsibility for their actions.

Therefore, lowering the age of criminal responsibility would be a solution to reducing crimes committed with the help of minors.

For those against lowering the age of criminal responsibility, voting at 16 years of age is a right, not a duty, as it is not mandatory, and therefore would not be a sufficient argument for such a claim. According to Gonçalves:

It is in bad faith or misinformation to preach that the right to vote of adolescents is a justification for criminal liability. It is only and solely a practice that encourages and accelerates active citizenship, never a demonstration of sufficient maturity. for criminal liability. (GONÇALVES, 2012).

Although they learn early on what is right and wrong, the human development of children and adolescents is different from that of adults. "Their internal conflicts and the search for self-affirmation often prevent them from guiding themselves according to such understandings, and they cannot be compared to adults in any way." (SÁ, 2008, p. 29)

The penal system would become even more chaotic, as it would need more places where there are already not enough, given the overcrowding.

It is observed that the child being "in the midst of personal degradation, without education and hygiene conditions, offered in Brazilian prisons, a situation that will certainly occur with the reduction of the age of criminal responsibility, cannot be beneficial to the young person under any circumstances". (SÁ, 2008, p. 42).

This, in itself, would not bring a good individual back into society. It would end up teaching them the world of crime, especially those in vulnerable conditions, poor and black, the predominant profile in the Brazilian prison system.

According to Costa (2010, p. 79), many juvenile offenders have a low level of education and no job training, thus having few prospects. Delinquency arises from the need to survive, and violence is seen as a possible solution.

3. The Fatigue of the Penal System

When we talk about public safety, it is common to refer to the penal system and prison overcrowding. The reality of the country's prisons does not match what is recommended by the LEP, the Penal Execution Law – Law No. 7,210/84.

Article 88 of the LEP states:

"Art. 88. The convicted person will be housed in an individual cell that will contain a bedroom, sanitary equipment and a washbasin.

Sole paragraph. The basic requirements of the cellular unit are:

- a) Healthiness of the environment due to the combination of factors of ventilation, sunlight and thermal conditioning suitable for human existence;
- b) Minimum area of 6m² (six square meters)."

What we often see are prisons with cells holding ten, fifteen, twenty or even more prisoners, living in a degrading and inhumane way. Exactly the opposite of what is listed in the LEP.

Another article that talks about incarceration capacity is 85 when it says: "The penal establishment must have a capacity compatible with its structure and purpose".

What we do know is that Brazilian prisons house more than their capacity. Sometimes more than double.

In this way, the precept of individualization of the penalty is compromised when articles 84 and 102 of the LEP are not observed, which state:

"Art. 84. A provisional prisoner shall be separated from a person convicted by a final judgment. § 1 A first-time prisoner shall serve his sentence in a section separate from that reserved for repeat offenders. [...]"

"Art. 102. The public prison is intended for the holding of provisional prisoners."

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We can see that overcrowding ends up mixing pre-trial detainees with convicted prisoners, who are often repeat offenders. The LEP provides for separate penal establishments for each category of inmate, but what we know is exactly the opposite. Imagine, then, teenagers being held among prisoners with these different profiles. It would be like a school for crime.

As well as recidivism, other factors contribute to overcrowding in prisons, such as: the exodus to large cities, unemployment, lack of education and teaching, since the average prisoner in Brazil is poor, male, between 21 and 29 years old, with little education and no formal work.

Beccaria (1997) cites the importance of education saying that "finally, the safest, yet most

The most difficult thing to do to prevent crimes is to improve education.” (BECCARIA, 1997, p. 136)

Social inequality also contributes to the inclusion of people in the world of crime, since the favelas are where the deficiency and even the absence of public services are evident, making these people excluded and marginalized. Of course, poverty does not imply criminal behavior, but it does make the situation worse.

Another factor linked to prisoner overcrowding is the little or almost no investment by the State in the construction of new penal establishments, as well as in the hiring of professionals to perform functions in these facilities.

Silva comments on the subject of overcrowding as follows:

There is talk of the need for more than 50,000 (fifty thousand) vacancies and that there are approximately 2.5 prisoners per vacancy currently distributed in prisons, public jails and establishments for juvenile offenders. (SILVA, 2012).

A person held in the prison system loses his right to freedom, however, he does not cease to be a citizen, just because he is imprisoned, but his dignity must be maintained, a principle defended in the Brazilian Constitution.

Article 1, paragraph III, and Article 5, paragraph III, provide that no one shall be subjected to inhuman or degrading treatment.

However, it is known that prisoners suffer from a lack of hygiene, medical care, and the precarious structure of the establishments. Sometimes, they even suffer from insufficient food.

Therefore, the prisoner not only loses his freedom, but also his dignity, without achieving the main objective of the sentence, which is resocialization.

Rehabilitation aims to bring the inmate back into society, in a better situation than when he entered the penal system, allowing him to enjoy all his rights. But this is not what is perceived.

The problem is not exclusive to the prison population, but to the entire population that lives in minimum conditions of dignity. How can we rehabilitate a prisoner who has never lived in such conditions in society?

According to SILVA (2012), imprisonment is a necessary measure; however, there are other solutions to prison overcrowding when the crime does not require imprisonment. In the short term: streamlining trials, adopting effective ways of executing sentences, and improving penitentiary policy. In the medium term: building new spaces and new prisons that comply with the provisions of the LEP – Penal Enforcement Law.

4. Final considerations

Brazilians are affected daily by all types of violence, with violence perpetrated by minors causing the greatest impact, and it is a challenge for all of us, families, government and society, to change this scenario.

We realize that there is a major impasse regarding the legality or otherwise of reducing the age of criminal responsibility through an amendment to the constitution, with some favorable comments being presented and others not so much.

In addition to comments, we saw arguments for and against reducing the age of criminal responsibility, when we were told the entire history of children's and adolescents' rights.

A major advance in legislation supporting minors was, without a doubt, the creation of the ECA – Statute of Children and Adolescents, which makes us believe that, before thinking about reducing the age of criminal responsibility, access to education, employment and leisure must be improved, thus preventing young people from entering the world of crime due to lack of opportunity.

The issue of prison overcrowding in the country, the resulting difficult resocialization and the chaos of the penal system were addressed.

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We present economic, social, legal and political factors that create difficulties for resocialization and increase prison overcrowding.

As presented in the problem, it is proven that the objective of resocialization is far from being considered adequate, since overcrowding itself prevents it.

Therefore, the best result does not involve reducing the age of criminal responsibility; on the contrary, it will only increase prison overcrowding, a major ongoing problem in our country.

Overcrowded, unhealthy prisons, many without observing the individualization of punishment (different types of criminals living together), would end up involving investment from the public authorities, in order to generate

vacancies and meet a greater demand for prisoners.

The best thing to do would be to create effective public policies for the inclusion of minors and adolescents, so that they can attend school and, from an early age, learn a trade and enter the job market in the future.

Finally, we emphasize that the objective of this work is not to show solutions to the problem of child crime, nor to the overcrowding of prisons and their institutional crisis. On the contrary, results come from the study and involvement of the State and civil society on the issues raised here.

REFERENCES

BECCARIA, Cesare. **Of Crimes and Punishments**. New York: Routledge, 1997.

BRAZIL, Constitution (1988). Constitution of the Federative Republic of Brazil. Vade Mecun Saraiva. 14th ed. São Paulo: Saraiva, 2012.

BRAZIL, Decree-Law No. 2848, of December 7, 1940. Penal Code. Vade Mecun Saraiva. 14th ed. São Paulo: Saraiva, 2012.

BRAZIL, Law No. 8,069, of July 13, 1990. Statute of the Child and Adolescent. Vade Mecun Saraiva. 14th ed. São Paulo: Saraiva, 2012.

COSTA, Marli Marlene Moraes da & STURZA, Janaina Machado & CASSOL, Sabrina. *Law, Citizenship and Public Policies*. Curitiba: Multideia, 2010.

_____. **Decree-Law No. 2,848 of December 7, 1940**. Available at: http://www.planalto.gov.br/ccivil_03/decreto-lei/del2848.htm >

DESTRUCTION, Dyandra Celico. *The Age of Criminal Responsibility and its Implications*. Jus Nagegandi, 2015. Available at: < <http://jus.com.br/artigos/43259/a-maioridade-penal-e-suas-implicacoes> >

GONCALVES, Juliana de Assis Aires. *Reducing the age of criminal responsibility as a factor incapable of reducing violence*. Available at: <http://www.wambitojuridico.com.br/site/?n_link=revista_artigos_leitura&artigo_id=12036&revista_caderno=3>.

LENZA, Peter. *Constitutional Law Outlined*. 18th ed. New York: Routledge, 2014.

NUCCI, William de Souza. *Annotated Penal Code*. 10th ed. New York: Courts Review, 2010.

SÁ, Alvino Augusto de & SCHECAIRA, Sergio Solomon. *Criminology and Current Problems*. New York, 2008.

SA, Arthur Luiz Carvalho de. *The Socio-Educational Measures of the ECA and the recidivism of juvenile delinquency*. Legal Content, July 7, 2009. Available at: <<http://www.conteudojuridico.com.br/?artigos&ver=1055.24348&seo=1>>

SILVA, Darlucia Palafoz. **Article 5 of the CF/88 in conflict with the Brazilian prison system**. Available level in: <http://jus.com.br/artigos/21053/o-art-5-iii-da-cf-88-em-confronto-com-o-sistema-carcerario-brasil> silversmith.