

Scientific Journal of Applied Social and Clinical Science

THE LEGAL GOOD IN CRIMES WITH PASSIVE SUBJECTION OF CHILDREN AND JUVENILES: A RE- READING OF CRIMINAL LEGAL PROPERTY IN LIGHT OF THE GUIDING PRINCIPLES OF CHILDREN AND ADOLESCENTS

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Abstract: For criminal intervention, the idea of legal assets is at the forefront of relevance and constitutes a legitimizing condition for protection, given that criminal law is only authorized to intervene when oriented exclusively to the protection of these legal assets. In the case of crimes involving children and adolescents as passive subjects, a current reading is necessary, in light of the principles informing the rights of children and adolescents, especially when thinking about the principle of proportionality and the purposes of penalties. The present work aims to establish a current reading of criminal legal rights, in light of the principles of full protection, absolute priority and best interests in crimes involving children and adolescents as victims. To this end, bibliographical research with a qualitative data approach was used to achieve the intended objective. At the beginning of the work, there was a brief digression on the evolution of the notion of legal good in light of the purpose of criminal law. Subsequently, the premise was established that the Federal Constitution must be the primary source guiding the fundamental values that deserve effective protection. Subsequently, we sought to bring to debate the issue related to understanding the extent of the criminal legal good protected in crimes involving passive subjection of children and adolescents. From the observation that children and adolescents are people in a peculiar condition of development, it was observed the need to think about the criminal legal good in crimes with this passive subjection through a systematic and teleological interpretation, which took into consideration the principles that inform this area of law so that it could lead to the conclusion of the extent of the

legal interest protected in these crimes, as well as its incidence within the scope of criminal law protecting children and adolescence or repressive criminal law.

Keywords: Children and Adolescents; Criminal Law; Legal good; Victim Protection.

INTRODUCTION

Children and adolescents are victims of crimes every day in Brazil.¹ They are human beings under the age of 18 who are at the receiving end of conduct considered typical, illicit and culpable under criminal law. The vast majority of cases involving this passive subjection do not come to the attention of the majority of the population.² However, when it arrives, it appears to be in an unusual way, causing outrage and indignation.

The Emasculated Boys in Maranhão (1991-2003), the Candelária Massacre (1993), the Cases of João Hélio (2007), Isabella Nardoni (2008), Bernardo Boldrini (2014), Eduarda Shigematsu (2019) and Henry Borel (2021), even because they are blood crimes, they insist on not leaving their memories.

The case of the emasculated boys in Maranhão refers to a series of homicides carried out in the municipalities of *Paço do Lumiar*, São José do Ribamar and São Luiz, located in the State of Maranhão, Brazil, which resulted in boys aged between 4 and 15 years. These boys were kidnapped, mutilated (emasculated) and killed between 1991 and 2003, by Francisco das Chagas Rodrigues de Brito. The perpetrator of the crimes was only arrested in December 2003, but the case generated great public commotion and international repercussions due to the level of violence against children and adolescents.

1. PEREZ, Fabíola. Brazil loses 19 teenagers and children a day to violence. R7: São Paulo, October 22, 2021. Available on the website: <https://noticias.r7.com/sao-paulo/brasil-perde-19-adolescentes-e-criancas-por-dia-para-a-violencia-22102021>. Accessed on: May 30, 2024.

2. About the topic, including the issue of reducing notifications during the COVID-19 pandemic, see LEWANDOWSKI, Mateus Luz et. al. Impact of social distancing on reports of violence against children and adolescents in Rio Grande do Sul, Brazil. *Cadernos de Saúde Pública*, v. 37, n. 1, 2021. p. 2-15.

The episode was taken to the Inter-American Commission on Human Rights (IACHR) and was only closed with the recognition of the omission by the Federal Government of Brazil and the Government of the State of Maranhão, with the consequent imposition of reparation and non-repetition measures, in the form of Report, number: 43/06 of the Inter-American Commission.³

The Candelária massacre involves the murder of 1 child, 5 teenagers and 2 adults, all homeless, while they were sleeping near the Candelária Church, in the city of Rio de Janeiro, State of Rio de Janeiro, Brazil, on 23 July 1993. Investigations pointed to a group of militiamen as the perpetrator. Of the 7 accused, 2 were acquitted and 5 were convicted. Among those convicted, all were released before completing 20 years of their sentences.⁴

The João Hélio case alludes to the crime that occurred on the night of February 7, 2007, in the city of Rio de Janeiro, State of Rio de Janeiro, Brazil, when João Hélio Fernandes Vieites, 6 years old, was murdered during a assault. João Hélio was in the backseat of the car approached by the robbers, which was driven by his mother. After arresting her and forcing her to get out, the bandits took over and drove off with the car without the mother having time to get the boy out. He was dragged through several streets, tied to his seat belt

on the outside of the vehicle. The crime had national and international repercussions.⁵

The Isabella Nardoni case refers to the homicide of the 5-year-old girl Isabella de Oliveira Nardoni, who was asphyxiated and later thrown from the 6th floor of the London Building, located in the city of São Paulo, State of São Paulo, Brazil, on the night of March 29, 2008. Alexandre Nardoni and Anna Carolina Jatobá, the child's father and stepmother respectively, were convicted of the crime of triple homicide.⁶

The case of Menino Bernardo concerns the murder of 11-year-old Bernardo Uglione Boldrini, which occurred on April 4, 2014, through the administration of an overdose of the drug Midazolam, which was given to him by his stepmother, Graciele Ugulini, with participation of father Leandro Boldrini. After the murder, the stepmother, with the help of her friend Edelvânia Wirganovicz and her brother, Evandro Wirganovicz, buried Bernardo's body in a grave in a forest, in the interior of the city of Frederico Westphalen, State of Rio Grande do Sul, Brazil, which was only located on April 14, 2014. Everyone involved was convicted, including the father and stepmother of quadruple homicide.⁷

The Eduarda Shigematsu case concerns the 11-year-old child, who was found dead and buried at the bottom of a house that belongs to her father, Ricardo Seidi Shigematsu. The

3. CIDH. Inter-American Commission on Human Rights. ``*Informes de Solução Amistosa*``. Available on the website: <http://www.oas.org/pt/cidh/decisiones/amistosas.asp?Year=2006&Country=BRA>. Accessed on: May 30, 2024.

4. BOECKEL, Cristina; COELHO, Henrique. Sentenced to at least 200 years in prison, those convicted of the Candelária massacre are out of jail. *G1 Rio*, 23 jul. 2018. Available on the website: <https://g1.globo.com/rj/rio-de-janeiro/noticia/2018/07/23/sentenciados-a-pelo-menos-200-anos-de-prisao-condenados-pela-chacina-da-candelaria-estao-fora-da-cadeia.ghtml>. Accessed on: May 30, 2024.

5. GLOBO NEWS. João Hélio's death marks ten years with an increase in cases of robbery in Rio. *G1*, 7 Feb. 2017. Available on the website: <https://g1.globo.com/rio-de-janeiro/noticia/morte-do-joao-helio-faz-dez-anos-com-aumento-de-casos-de-latrocinius-no-rio.ghtml>. Accessed on: May 30, 2024.

6. D'AGOSTINO, Rosanne. Isabella's father is sentenced to 31 years in prison for killing his own daughter; stepmother catches 26. *UOL Notícias*: São Paulo, March 27, 2010. Available on the website: <https://noticias.uol.com.br/cotidiano/ultimas-noticias/2010/03/27/casal-nardoni-e-condenado.htm>. Accessed on: May 30, 2024.

7. HEURICH, Joyce, Father, stepmother and two other defendants are convicted of the death of the boy Bernardo in Três Passos. *G1 RS*: Três Passos, March 15, 2019. Available on the website: <https://g1.globo.com/rs/rio-grande-do-sul/noticia/2019/03/15/pai-e-madrasta-sao-condenados-pela-morte-do-menino-bernardo-em-tres-passos.ghtml>. Accessed on: May 30, 2024.

body was located on April 28, 2019, in the city of Rolândia, State of Paraná, Brazil. Her father was charged with the crimes of feminicide, concealment of a corpse and ideological falsehood. Eduarda's paternal grandmother, Terezinha de Jesus Guinaia, was also denounced and is going to trial for the crimes of hiding a corpse and misrepresentation.⁸

Finally, the Henry Borel case deals with the murder of the boy Henry Borel Medeiros, aged 4, which occurred on March 8, 2021, in the city of Rio de Janeiro, State of Rio de Janeiro, Brazil. The boy lived with his mother Monique Medeiros and his stepfather, the doctor and councilor Jairo Souza Santos Júnior, better known as Dr. Jairinho. The Public Ministry of the State of Rio de Janeiro (MPRJ) denounced stepfather Jairo Souza Santos Júnior and mother Monique Medeiros with crimes of triple homicide, torture, procedural fraud and coercion during the process.⁹

The fact is that, in addition to these, there are a huge number of children and adolescents who are victims of the most diverse types of crimes and misdemeanors that harm a multitude of legal interests protected by the 1988 Federal Constitution and the Brazilian criminal system. As an example, it is worth mentioning: bodily integrity, honor, heritage, personal freedom, sexual dignity, religious feeling, among others.

It turns out that, in this particular crime, the understanding of the protected criminal legal interest cannot be limited to that which was announced many times with the creation of the incriminating criminal type, especially when it is contemporary in history to the period in which children and adolescents

were not even recognized as subjects of rights. And this is for a clear reason: The Federal Constitution of 1988, by adopting the Doctrine of Comprehensive Protection, in its article 227, imposed special protection to be granted to children and young people.

This special protection arises from the teleological and systematic analysis of the guiding principles of the rights of children and adolescents, namely: integral protection, absolute priority and best interests, which guarantee them the right to integral development, given their peculiar condition of developing people.¹⁰

Therefore, it is worth asking how the criminal legal interest must be understood in crimes involving children and adolescents. In this sense, the present investigation intends to verify, hypothetically, the viability of an interpretation that takes into consideration the aforementioned principles informing the rights of children and adolescents established in the UN Universal Declaration of the Rights of the Child of 1959, in the Federal Constitution of 1988, in the 1989 UN Convention on the Rights of the Child and in Federal Law number: 8,069/1990 (Statute of Children and Adolescents).

Therefore, the general objective of this work is to establish a current reading of criminal legal rights, in light of the principles of full protection, absolute priority and best interests in crimes involving children and adolescents as victims.

To this end, we intend to outline a brief evolution of the notion of criminal legal good, always in light of the protective purpose of criminal law. Next, it is established as a premise

8. G1. STJ decides that Eduarda Shigematsu's father and grandmother will go to the popular jury. RPC Londrina, 9 July. 2021. Available on the website: <https://g1.globo.com/pr/norte-noroeste/noticia/2021/07/09/stj-decide-que-pai-e-avo-de-eduarda-shigematsu-irao-a-juri-popular.ghtml>. Accessed on: May 30, 2024.

9. MPRJ. Public Ministry of the State of Rio de Janeiro. MPRJ denounces Dr. Jairinho e Monique Medeiros for triple homicide. May 6, 2021. Available on the website: https://www.mprj.mp.br/home/-/detalhe-noticia/visualizar/104301?p_p_state=maximized. Accessed on: May 30, 2024.

10. Provided for in the 1959 UN Universal Declaration of the Rights of the Child, the 1988 Federal Constitution, the 1989 UN Convention on the Rights of the Child and Federal Law number: 8,069/1990 (Statute of Children and Adolescents).

that the 1988 Federal Constitution must be the primary source that guides agents of the Criminal Justice System in the analysis of the fundamental values that deserve effective protection.

Subsequently, we seek to bring to debate the issue related to understanding the semantic extension of the criminal legal good protected in crimes involving passive subjection of children and adolescents, as according to the preponderant principle, the semantic content can be more or less broad, which can generate doubt regarding the criminal principles of subsidiarity and fragmentarity.

Among the characteristics of the principles, the underlying¹¹ suffers serious plasticity, due to the interpretative parameter contained in article 6 of the Child and Adolescent Statute, which is that children and adolescents are in a peculiar condition of developing people. Thus, at another point in the work, we face the overlap between the special principles of children and adolescents and the aforementioned hermeneutic rule. More important than knowing whether the special principles of childhood and adolescence affect repressive law is knowing how they affect it, that is, what effects they have on the understanding of the legal good, its semantic content and method of interpretation.

The research is justified by the plural contribution – and in particular to the criminal justice system – that can be made if the search for a certain conformation of the criminal legal good in crimes with passive subjection of children and young people, based on constitutional principles, is fruitful.

informants on children's and adolescents' rights.

To achieve the intended objectives, bibliographical research was carried out, with a qualitative data approach, which will be presented below.

EVOLUTION OF THE NOTION OF CRIMINAL LEGAL GOOD

Based on the ideals brought by the French Revolution (phase of the Enlightenment or Enlightenment), criminal legal dogmatics began to be oriented towards the purpose of this branch of law being protective. Thus, the purpose of criminal law is linked to the protection of the most important and necessary assets for the survival of society.¹²

In this context, Luiz Regis Prado states that “modern legal thought recognizes that the immediate and primordial scope of Criminal Law lies in the protection of legal assets – essential to the individual and the community”.¹³

This way of thinking about criminal law, through its protective purpose of legal assets, began with Johann Michael Franz Birnbaum, in 1834, when opposing the ideas of Paul Johann Anselm Ritter von Feuerbach, for whom Criminal Law would have the aim of protecting rights subjective (of the individual or the State). In Birnbaum's view, the idea of legal good was conceived as a social value susceptible to being harmed.

At the end of the 19th century, Karl Binding was the first author to use the term legal good, arguing that this would be a legally protected interest. The criminal law, therefore,

11. GUASTINI, Ricardo. Le fonti del diritto e l'interpretazione. In: *Trattato di Diritto Privato*. A cura di Giovanni Iudica e Paolo Zatte, Dott. A. Giuffrè Editore, Milano, 1993. p. 448-452.

12. In this sense: AMARAL, Cláudio do Prado. *Despenalização pela reparação de danos: a terceira via*. Leme: J. H. Mizuno, 2005; BITENCOURT, Cezar Roberto. *Tratado de direito penal*. vol. 1. 26. ed. São Paulo: Saraiva Educação, 2020; ESTEFAM, André. *Direito penal: parte geral*. 11. ed. São Paulo: SaraivaJur, 2022; GOMES, Luiz Flávio. *Norma e bem jurídico no direito penal*. São Paulo: Editora Revista dos Tribunais, 2002; GRECO, Rogério. *Curso de direito penal*. Vol. 1. 24. ed. Barueri: Atlas, 2022; JESUS, Damásio de. *Direito penal: parte geral*. vol. 1. 37. ed. São Paulo: Saraiva Educação, 2020; SOUZA, Luciano Anderson. *Direito penal*. vol. 1, 2. ed. São Paulo: Thomson Reuters Brasil, 2021.

13. PRADO, Luiz Regis. *Bem jurídico-penal e constituição*. 8. ed. Rio de Janeiro: Forense, 2019. p. 91.

would be the means to protect legal assets, in the face of the threat of punishment. However, until that moment there was no consensus on the concept of legal good or even on which legal goods could be legitimately protected by criminal law.

At the beginning of the 20th century, seeking to overcome criticism of mere formalism in Binding's definition, Franz von Liszt brought the understanding of legal goods as vital social interests, based on concrete social circumstances. In other words, it would be life that produced legal goods and the legislator would only recognize their protection.

From the 1920s onwards, with neo-Kantist ideas, authors such as Max Ernst Mayer and Richard Honing abandoned the liberal bias of legal good, highlighting its teleological (or axiological) conception, that is, interpreting it from its end, which it is seen in cultural and community values. It began to be argued that the legislator was the one who created legal assets and did so by determining due protection. During this period, however, there was no dogmatic legal concern with the freedom of choice that was placed in the hands of the legislator to edit criminal norms and the autonomy to choose the legal assets to be protected.

Hans Welzel, within the scope of finalism, developed from the 1930s onwards the thesis of the defense of legal assets with greater emphasis on the concern to describe limits to the selective function of the legislator regarding the choice of assets to protect through criminal norms. The legal asset became that with vital social significance for the community or for the individual who is worthy of legal protection.

14. TOLEDO, Francisco de Assis. *Princípios básicos de direito penal*. 5. ed. São Paulo: Saraiva, 1994. p. 16.

15. ROXIN, Claus ¿Es la protección de bienes jurídicos una finalidad del derecho penal? In: HEFENDEHL, Roland (ed.). *La teoría del bien jurídico*. Madrid: Ed. Marcial Pons. 2007. p. 448 (tradução livre).

16. Para um maior aprofundamento sobre o tema, vide: BECHARA, Ana Elisa Liberatore Silva. *Bem jurídico-penal*. São Paulo: Quartier Latin, 2014. p. 117-139; PRADO, Luiz Regis. *Bem jurídico-penal e constituição*. 8. ed. Rio de Janeiro: Forense, 2019. p. 46-62 e SOUZA, Luciano Anderson. *Direito penal*. vol. 1, 2. ed. São Paulo: Thomson Reuters Brasil, 2021. p. 144-147.

In Brazil, on the occasion of finalism, Francisco de Assis Toledo sought to conceptualize legal assets as “ethical-social values that the law selects, with the objective of ensuring social peace, and places under its protection so that they are not exposed to the danger of attack or actual injury”.¹⁴ Thus, in the moment after the two world wars, Welzel's finalist concept had the merit of returning to the idea of the material content of the legal good, so that the core of the value system becomes the human person.

On this occasion, receiving influence from sociological and constitutional concepts, legal assets began to be considered as embodiments of values constitutionally related to fundamental rights. In the words of Claus Roxin, legal goods would then be “realities or ends that are necessary for a free and secure social life which guarantees the human and fundamental rights of the individual, or for the functioning of the state system erected to achieve such end”.¹⁵

Thus, to this day, the predominant doctrine maintains its orientation around the concept that criminal law aims to protect legal assets, although the position of authors such as Günther Stratenwerth, Günther Jakobs, Knut Amelung and Andrew is not unknown. von Hirsch in the sense that the protection of legal interests would not be essential to legitimize criminal intervention.¹⁶

In fact, from everything that has been seen so far, it is clear that there is no precise notion of the concept of legal good in criminal dogmatics, but rather approximations according to different points of view. As Luiz Régis Prado highlights: “Although the postulate that the crime harms or threatens to harm legal assets has the almost total and peaceful agreement

of scholars, the same cannot be said about the concept of legal good¹⁷.

This occurs because the legal good, as with all rights, is not about something static, but rather dynamic, open to social changes and scientific advancement. On the other hand, asserting that the concept of a legal asset is something dynamic has nothing negative, as it recognizes the constant change in the valuation of assets, in order to encourage the movement towards decriminalization or criminalization of conduct and the setting of more severe penalties. mild or more rigorous in tune with the human evolutionary process.

In this context, following the teachings of André Estefam¹⁸, e by Rogério Greco¹⁹, it is highlighted that “it seems that the most important thing is not to conceptualize legal matters or to define whether this is, in fact, the scope of criminal law. The real challenge for the criminalist is to unveil the legislator’s limits for creating criminal norms.” This is the political challenge of criminal law of finding the limits for the protection of legal assets through criminal norms.

When seeking to understand these limits, which the legislator must be aware of when creating a criminal norm, it is possible to find a point of great rapprochement between dogmatics and criminal policy. And here is one of the noble contributions to the study of the theory of legal good, given that, as Santiago Mir Puig well reminds us, not every legal good requires criminal protection and becomes a criminal legal good.²⁰

Not without reason, it is concluded that the notion of criminal legal good assumes unique relevance in the analysis of the valuation of a behavior, whether as a justifying or limiting element of criminal intervention.

17. PRADO, Luiz Regis. *Bem jurídico-penal e constituição*. 8. ed. Rio de Janeiro: Forense, 2019. p. 29-30.

18. ESTEFAM, André. *Direito penal: parte geral*. 11. ed. São Paulo: SaraivaJur, 2022. p. 77.

19. GRECO, Rogério. *Curso de direito penal*. vol. 1. 24. ed. Barueri: Atlas, 2022. p. 43.

20. MIR PUIG, Santiago. Bien jurídico y bien jurídico-penal como limites al *ius puniendi*. *Estudios Penales y criminológicos*, nº XIV, 1991. p. 207.

21. PRADO, Luiz Regis. *Bem jurídico-penal e constituição*. 8. ed. Rio de Janeiro: Forense, 2019. p. 51.

THE FEDERAL CONSTITUTION AS A PRIMARY SOURCE OF PROTECTION OF CRIMINAL LEGAL PROPERTY

As explained above, establishing the selection criteria for society’s fundamental assets is not an easy task, after all it requires an understanding of human values and the construction of paths to protect them in society. Therefore, it is necessary to know, define and choose those legal assets that are subject to priority protection through criminal law, since in order to be protected they must be considered fundamental for the peaceful coexistence of a given society. This only reinforces the incentive for criminal law to enshrine the limits of this protection.

Therefore, in order to find these limits of protection, the starting point must be the Federal Constitution. This is because it is noted that, in a Social and Democratic State of Law, based on human dignity, the delimitation of which values are considered elementary for the coexistence of the community must be outlined in its Charter of Principles.

On the other hand, although sociological theories of legal good present conceptions that seek to identify its content based on systemic arguments or social harm, the understanding, exposed by Luiz Regis Prado, is shared that:

[...] No sociological theory has managed to formulate a material concept of legal good capable of expressing not only what harms criminal conduct, but also convincingly answering why a certain society criminalizes exactly certain behaviors and not others.²¹

In truth, this is the teaching of Claus Roxin, for whom criminal-legal intervention can only result from the function of criminal

law and this consists of guaranteeing citizens a peaceful, free and socially safe existence, “as long as these goals cannot be achieved with other political and social measures that affect the freedom of citizens to a lesser extent”²² Furthermore, it highlights that legal assets are “vital realities whose decline permanently harms society’s income capacity and citizens’ lives”²³

Still in Roxin’s teaching, it is observed that the criminal political guideline to protect legal assets is found in constitutional law, this being – the Constitution – the framework where punishment and harsher criminal intervention find legitimacy and are subject to the democratic controls.²⁴ This way, it is observed that the values of constitutional scope and dignity must serve as a reference for the legislator in the selection of legal assets that will be protected by criminal law.

In this regard, Paulo de Souza Queiroz teaches that the State’s actions are demarcated through the foundations, objectives and basic principles adopted by the Constitution. Thus, it is clear that the externalization of state sovereignty, which includes criminal law, must be in accordance with the legal-political order provided for in the Constitution, obeying the values of human dignity, freedom, justice and equality. This way, the fundamental rights provided for in the Carta Maior will be the source to legitimize themselves and, simultaneously, limit the scope of criminal law and the punishability of crimes.²⁵

The magisterium of Alice Bianchini is no different, when she asserts that the criminally protected legal good derives its legal dignity

from the constitutional order, even if it is so implicitly. It can be said, therefore, that it is impossible to talk about criminal protection of assets that do not find support in the Constitution or that conflict with other values provided for therein, as it is in the constitutional text that the highest values of a society are set out.²⁶

Still in this line of reasoning, Luiz Régis Prado highlights that “the liberal content of the concept of legal good requires that its protection be provided both by criminal law and before criminal law”. It can be said that when the legislative power recognizes that a legal good has value in a given society, this is a material concept of the criminal legal good. This way, it is possible to verify that when a Constitution recognizes certain goods and values, it is proclaiming the material content of those that society already recognizes as those in need of distinct protection. This occurs because it is in the constitutional norm that the guidelines for the incrimination or not of conduct are provided for.²⁷

In fact, it is the constitutional norm that contains the supreme values consecrated by the people, who edited it through the original constituent power, so that the infra-constitutional legislator does not have the prerogative to contradict the axiological framework existing in the Constitution. Therefore, it must be concluded that the delimitation of legal interests must be taken from the Constitution itself.

Following the same line, Ana Luisa Liberatore Bechara, when dealing with the protection of values and interests expressed

22. ROXIN, Claus. *A proteção de bens jurídicos como função do direito penal*. org. e trad. André Luis Callegari, Nereu José Giacomolli. 2. ed. Porto Alegre: Livraria do Advogado, 2018. p. 16-17.

23. ROXIN, Claus. *A proteção de bens jurídicos como função do direito penal*. org. e trad. André Luis Callegari, Nereu José Giacomolli. 2. ed. Porto Alegre: Livraria do Advogado, 2018. p. 18.

24. ROXIN, Claus. *A proteção de bens jurídicos como função do direito penal*. org. e trad. André Luis Callegari, Nereu José Giacomolli. 2. ed. Porto Alegre: Livraria do Advogado, 2018. p. 20-31.

25. QUEIROZ, Paulo de Souza. *Direito penal*. Introdução crítica. São Paulo: Saraiva, 2001. p. 17-18.

26. BIANCHINI, Alice. *Pressupostos materiais mínimos da tutela penal*. São Paulo: Editora Revista dos Tribunais, 2002. p. 43.

27. PRADO, Luiz Regis. *Bem jurídico-penal e constituição*. 8. ed. Rio de Janeiro: Forense, 2019. p. 85.

in the fundamental norm, highlights the importance of the Constitution materializing previous evaluative social consensuses, since it could be the reference in hypotheses of criminalization or decriminalization, legitimizing the limitation or expansion of the incidence of criminal law. This would be the point of rapprochement between criminal law and the Constitution, permeated by criminal policy.²⁸

Using again the precise teaching of Alice Bianchini, whether following the constitutional theories of legal good classified as (a) broad (where the Constitution serves as a parameter for the recognition of legal goods, without being exhaustive), or following (b) restricted (where the constitutional text determines, effectively and exhaustively, which legal assets must be criminally protected), the aim is to reconcile, on the one hand, the rights of the aggressor that will be restricted; and, on the other, the rights of the victim and society.²⁹

If that were not enough, the existing defense role of considering the Constitution as a parameter for measuring legal rights must also be highlighted. Therefore, the use of the Greater Text as a guiding precept implies a logical correlation that prohibits any interpretative or doctrinal construction that is directly or indirectly contrary to fundamental rights. This is because it is in the Federal Constitution that the references are outlined so that legal assets that need to receive criminal protection can be recognized, as well as the guidelines for the incrimination or not of conduct that harms them. Therefore, the application of criminal law, as it restricts rights and freedoms, is only justified when it is intended to protect goods and values established in the Constitution.

CRIMINAL LEGAL LAW IN OWN CRIMES WITH PASSIVE SUBJECTS CHILDREN AND ADOLESCENTS

After having made this brief digression on the evolution of the notion of legal good, analyzing its constitutional basis and recognizing the protective purpose of criminal law, it is now necessary to inquire about the criminal legal good in crimes involving children and adolescents as passive subjects. Therefore, it is necessary to inquire about the real extent of the legal interest protected (or legal interests protected) by criminal law in those offenses committed against children or adolescents.

In this type of crime itself, which has children or adolescents as victims, a literal interpretation or the carrying out of a mere subsumption judgment is not capable of providing efficient criminal protection to these victims. Criminal protection compatible with constitutional requirements must be sufficient and compatible to protect the legal assets enjoyed by children and adolescents, human beings in the formative phase.

Thus, in the example of a crime of homicide (article 121 of the Brazilian Penal Code) committed against a child or adolescent, would it be correct to say that the protected legal interest would be exhausted in human life? Would killing someone mean killing anyone, including a child or teenager?

Based on this question, countless others begin to emerge, all of them undeniably related to the understanding of the semantic extension of the legal-criminal asset(s) protected in crimes involving passive subjection of children and adolescents. Along these lines, one might ask: would qualifiers and causes for increased punishment serve to guarantee the necessary, sufficient and

28. BECHARA, Ana Elisa Liberatore Silva. *Bem jurídico-penal*. São Paulo: Quartier Latin, 2014. p. 52.

29. BIANCHINI, Alice. *Pressupostos materiais mínimos da tutela penal*. São Paulo: Editora Revista dos Tribunais, 2002. p. 47.

proportional protection in crimes against life or sexual dignity?

Would the generic aggravating circumstance of article 61, item II, paragraph h of the Penal Code be enough to exercise the criminal protective function in crimes against honor or property in which children or adolescents are victims?

Or would an interpretation be necessary that took into consideration the principles informing the rights of children and adolescents established in the Federal Constitution and in international Conventions and Treaties on the matter?

In order to answer these questions, it is imperative to recognize that in the case of crimes involving children and adolescents as passive subjects, a current reading is necessary, in light of the principles of full protection, absolute priority and best interests, which may check the real size of the protected asset. Children and adolescents have a distinctive character, which was established at the constitutional level and which is provided for in international human rights law.

In effect, when affecting the legal good of a child or adolescent, one is not affecting any legal good, but the legal good of a person in a peculiar situation of development. In these crimes of passive subjection, the legal good protected, in addition to those expressed in the incriminating norm, is human development itself.

A child or adolescent who is a victim of a criminal offense has their development trajectory intercepted or slowed down due to having been a victim of a crime or misdemeanor. Thus, there is no longer efficient protection for the first years of life and a huge range of socioeconomic implications arise for the child and, furthermore, for the State's own

development, as well as harm to human rights in their expression of the right to development human.

In the case of the development of children and adolescents, article 3 of Federal Law number: 8,069/1990 (Child and Adolescent Statute) guarantees all opportunities and facilities, in order to provide them with physical, mental, moral, spiritual and social development. The sum of all these aspects of development assured is called integral development.

In this context, if human beings already have a development project that can be affected by the externality of being victims of a criminal offense during their lives, what about children and adolescents as developing beings.

Thus, being a victim of a crime unquestionably leaves a mark on the development of any child or adolescent. And if this is so, it cannot be recognized that the criminal legal interest harmed in this type of crime has the same scope and extent as if the victim had been another person.

This reasoning, if it prevailed, would be considered unconventional and unconstitutional, as it would be equating different legal situations, whose discrimination factor had been established at the international level by the UN Convention on the Rights of the Child (1989) and at the domestic level by the Federal Constitution of 1988.

This way, it is necessary to recognize that the legal good protected by criminal law and criminal law itself are influenced by the three major principles that inform childhood and adolescence: absolute priority, full protection and best interests.³⁰, whether in the elaboration or application of the incriminating norm.

These principles affect the repressive

30. Just remembering that there are authors who adopt different classifications of the principles, such as Luciano Alves Rossato, Paulo Eduardo Lépre and Rogério Sanches Cunha, who assert that the best interest would be a normative postulate and the principles of full protection and absolute priority meta-principles. Cf. Statute of children and adolescents: law number 8,069/90 – commented article by article. 11. ed. São Paulo: Saraiva Educação, 2019. p. 95-96 (Emphasis added).

rights of childhood and adolescence, as given the duty to ensure the integral human development of children and adolescents, it is necessary to verify the level of protection established for them by the Constitution of the Republic, under penalty of even talk about insufficient protection.

PRINCIPLES INFORMING THE LAW OF CHILDREN AND ADOLESCENTS

In view of what has been exposed so far, it is observed that to understand the semantic extension of the criminal legal good protected in crimes with passive subjection specific to children and adolescents, it is necessary to re-read the criminal legal good in light of the guiding principles of child and adolescent.

This is because the content of the criminal law may be considered more or less broad in light of the criminal principles of subsidiarity and fragmentarity, depending on the preponderant principle in the specific case. For this reason, it is essential to remember the teachings of Paulo Bonavides who, based on Alberto Trabucchi and Norberto Bobbio, highlights different dimensions – or characteristics – of the principles: the foundational, the interpretative, supplementary, integrative, directive and limiting.³¹

Among these dimensions, the substantiating one stands out, through which the principles, as core commandments of a system, must substantiate the legal order in which they are inserted, so that all legal relations begin to seek foundation in constitutional principles. In Paulo Bonavides' view, principles are,

31. BONAVIDES, Paulo. *Curso de direito constitucional*. 26. ed. São Paulo: Malheiros, 2011. p. 283-284.

32. BONAVIDES, Paulo. *Curso de direito constitucional*. 26. ed. São Paulo: Malheiros, 2011. p. 283.

33. GUASTINI, Ricardo. Le fonti del diritto e l'interpretazione. In: *Trattato di Diritto Privato*. A cura di Giovanni Iudica e Paolo Zatte, Dott. A. Giuffrè Editore, Milano, 1993. p. 448-452.

34. UNITED NATIONS ORGANIZATION (UN). Universal declaration of the rights of the child. 1959. Available on the website: https://bvsm.sau.gov.br/bvs/publicacoes/declaracao_universal_direitos_crianca.pdf. Accessed on: May 30, 2024.

35. UNITED NATIONS ORGANIZATION (UN). Convention on the Rights of the Child. 1989. Available on the website: http://www.planalto.gov.br/ccivil_03/decreto/1990-1994/d99710.htm. Accessed on: May 30, 2024.

therefore, as values, “the touchstone or criterion with which constitutional contents are measured in their highest normative dimension”.³²

Hence why the relevance of understanding, as Ricardo Guastini highlights, the underlying characteristic³³ of principles. In the case of this study, in particular the guiding principles of the rights of children and adolescents, and how these are used to measure the legal-criminal good in crimes in which they are victims, remembering that there is already an interpretative parameter in article 6 of the Law Federal nº 8,069/1990.

Therefore, as it is necessary to analyze the principles that govern the matter relating to the protection of children and adolescents, we now make a brief foray into its three guiding principles, always with the focus of their influence on the criminal legal good in crimes. which have children and adolescents as taxpayers.

PRINCIPLE OF INTEGRAL PROTECTION

The principle of full protection establishes that children and adolescents are subject to rights and must be fully protected. It is linked to the doctrine of the same name, which began to develop internationally after the Universal Declaration of the Rights of the Child of the United Nations (1959)³⁴, establishing, among others, special protection for the physical, mental, moral and spiritual development of children and adolescents.

The UN Convention on the Rights of the Child (1989)³⁵, signed by Brazil in January 1990, approved by the National Congress

through Legislative Decree number 28/1990³⁶ and promulgated by Executive Decree number:99.710/1990³⁷, it only came to consolidate the doctrine of full protection.

This doctrine is based on three pillars: (1) that children and adolescents are subjects of law; (2) the affirmation of their peculiar status as a developing person, entitled to special protection; and (3) absolute priority in guaranteeing their fundamental rights. The principle of full protection, influenced by the studies of the Working Group that prepared the text of the Convention, ended up being included in article 227 of the 1988 Constitution of the Republic, in perfect integration with the fundamental principle of human dignity.

Thus, children and adolescents began to be treated as subjects of rights in their entirety, guaranteeing them the constitution, with an absolute priority clause, fundamental rights to be respected and implemented by the family, society and the State, including the right to human development.

In fact, in accordance with the principle of full protection, exclusive to this branch of law, Guilherme de Souza Nucci highlights that:

[...] In addition to all the rights guaranteed to adults, in addition to all the guarantees made available to those over 18 years of age, children and adolescents will have a plus, symbolized by the complete and unavailable state protection to guarantee them a dignified and prosperous life, at least during the maturation phase.³⁸

This phase of maturation or development is expressly protected by article 3 of Federal Law number: 8,069/1990, which ensures

36. BRAZIL. Legislative Decree nº 28/1990. Approves the text of the Convention on the Rights of the Child, adopted by the United Nations General Assembly on November 20, 1989 and signed by the Brazilian Government on January 26, 1990. Available on the website: <https://legis.senado.leg.br/norma/535984/publicacao/15755759>. Accessed on: May 30, 2024.

37. BRAZIL. Federal Decree Number 99,710/1990. Promulgates the Convention on the Rights of the Child. Brasília, 1990. Available on the website: http://www.planalto.gov.br/ccivil_03/decreto/1990-1994/d99710.htm. Accessed on: May 30, 2024.

38. NUCCI, Guilherme de Souza. *Estatuto da criança e do adolescente comentado*. 4. ed. Rio de Janeiro: Forense, 2018. p. 27.

39. Maintaining the thesis established in Extraordinary Appeal, number: 466.343/SP, where the Federal Supreme Court (STF) recognized the supralegal level of human rights treaties internalized through approval by a simple majority in the National Congress. For further discussion on the topic, see: MAZZUOLI, Valerio de Oliveira. *Public international law course*. 14. ed. Rio de Janeiro: Forense, 2021.

children and adolescents all opportunities and facilities, in order to provide them with physical, mental, moral, spiritual and social development, in conditions of freedom and dignity.

For the purpose of this study, it is important to reinforce that the principle of full protection, in addition to all other areas, also directly affects repressive law, with the purpose of providing an adequate and proportionate sanctioning response to the conduct of adults who violate or place the legal assets of children and adolescents and, consequently, their integral development is at risk.

PRINCIPLE OF ABSOLUTE PRIORITY

The principle of absolute priority is one that establishes primacy in meeting the interests of children and adolescents. This principle arises from the principle of full protection and is also provided for in article 227 of the Constitution of the Republic, being more detailed in article 4, sole paragraph, and in article 100, sole paragraph, item II, of Federal Law number 8,069/1990. Its objective is to give concreteness to the fundamental rights described in the aforementioned provisions and the human rights of children and adolescents provided for in international treaties and agreements to which Brazil is a party.³⁹

The recipients of the principle of absolute priority are all members of entities that protect the rights of children and adolescents, that is, the family, the community, society in general and public authorities.

It is important to highlight that it was the Constituent Power of 1988 that made the choice to give constitutional dignity to this priority, so that there is no room for questions about possible allegations of violation of the principle of equality.

For no other reason, the principle takes into consideration the condition of a developing person, as children and adolescents have the peculiar fragility of a developing person, taking more risks than an adult, for example. Therefore, the interest to be protected first must always be that of children and adolescents.

Now, if there is a primacy in protecting the interests of children and adolescents with a view to safeguarding their right to integral development, the reason for the effectiveness of criminal law applied to cases in which children and adolescents are victims of crimes is much greater.

PRINCIPLE OF BEST INTERESTS

Complementing the triad of principles informing the rights of children and adolescents is the principle of superior interests (also called best interests, best interests⁴⁰, best interests of the child⁴¹, *best interests of the child*⁴², *best interest*⁴³).

The principle of best interests is one that objectively meets the dignity of children and adolescents, as developing people, realizing their fundamental rights to the greatest extent possible.

This principle was not expressly provided for in the Constitution of the Republic or in the original wording of the Child and Adolescent

Statute, but could be found in principle 2 of the UN Universal Declaration of the Rights of the Child (1959), as well as in article 3, item 1 of the Convention on the Rights of the Child (1989).

In 2009, with the changes promoted by Federal Law number: 12,010, article 100, sole paragraph, item IV, of the ECA, when stating the principles that govern the application of protection measures, began to define the best interests of the child and adolescent: “intervention must prioritize the interests and rights of children and adolescents, without prejudice to the consideration that is due to other legitimate interests within the scope of the plurality of interests present in the specific case”.

This way, the principle of best interests gains importance in the analysis of the specific case, and must prevail over all factual and legal circumstances, guaranteeing the fundamental rights of children and adolescents in the broadest possible way.

It is important here to highlight Andrea Rodrigues Amin's opinion:

It is a guiding principle for both the legislator and the enforcer, determining the primacy of the needs of children and adolescents as a criterion for interpreting the law, resolving conflicts, or even for drafting future rules. Thus, in the analysis of the specific case, above all factual and legal circumstances, the principle of superior interests must prevail, as a guarantor of respect for fundamental rights, without subjectivism on the part of the interpreter.⁴⁴

40. BRAZIL. Federal Decree Number 99,710/1990. Promulgates the Convention on the Rights of the Child. Brasília, 1990. Available on the website: http://www.planalto.gov.br/ccivil_03/decreto/1990-1994/d99710.htm. Accessed on: May 30, 2024. (artigos 37, letra c e artigo 40, § 2º, letra b, item III.)

41. BRASIL. Decreto Federal nº 99.710/1990. It promulgates the Convention on the Rights of the Child. Brasília, 1990. Available on the website: http://www.planalto.gov.br/ccivil_03/decreto/1990-1994/d99710.htm. Accessed on: May 30, 2024. (artigo 9, § 3º).

42. UNITED NATIONS ORGANIZATION (UN). Declaration of the Rights of the Child (1959). Nova Iorque, 1959. Available on the website: <https://crianca.mppr.mp.br/pagina-1069.html>. Accessed on: May 30, 2024. (princípio 2)

43. MACIEL, Kátia Regina Ferreira Lobo Andrade. Child and adolescent law course: theoretical and practical aspects. 12. ed. São Paulo: Saraiva Educação, 2019. p. 81.

44. AMIN, Andrea Rodrigues. In: MACIEL, Kátia Regina Ferreira Lobo Andrade (Coord.). Child and adolescent law course:

Therefore, it is safe to say that the principle of best interests also influences the delimitation of criminal legal interests in crimes in which the passive subject is children or adolescents.

CRIMINAL LAW OF PROTECTION OF CHILDHOOD AND ADOLESCENCE OR REPRESSIVE CRIMINAL LAW

After having observed that criminal law has a protective function of legal assets, and that children and adolescents are holders of legal assets on which the guiding principles of child and adolescent law apply, it is necessary to inquire about their sphere of incidence.

The vast majority of doctrine on the subject addresses this issue on two fronts: (a) that related to protective law in the strict sense (associated with the guarantee of the fundamental rights of children and adolescents, protective measures and legal proceedings) and (b) that relating to socio-educational law or infraction law (referring to children and adolescents in conflict with the law).

Thus, there is no shortage of books, lines and teachings when it comes to protecting children and adolescents whose rights are threatened or violated to the extent that they are at risk (article 98 of the ECA), as well as children and adolescents who are active subjects of conduct described as crimes or criminal misdemeanors (perpetrators of infractions as set out in article 103 of the ECA).

But, as occurs in the field of criminal dogmatics, criminology and criminal policy, the role of the victim has so far also been neutralized when the spectrum of incidence concerns crimes in which the passive subject

is a child or adolescent. In other words: the application of the guiding principles of children's rights is forgotten precisely in those cases in which children and adolescents are victims of crimes and are, therefore, in a position of greater vulnerability.

In fact, it is necessary to conclude that the broad debates on criminal legal dogmatics in recent decades have focused on the crime and the fundamental guarantees of the perpetrator, relegating the victim to the background, even if they are special vulnerable victims, such as the hypothesis of children and adolescents. And, if this must not happen, what about cases in which the victims have an absolute priority of care established by the Constituent Power? Violence against children and adolescents is the cause and consequence of human rights violations.

The approach of the Brazilian criminal and criminal procedural systems, reminds us Luciane Pötter, offends "not only the rights of the accused – a common discourse in guarantor theses – but, fundamentally, the rights of the victims, since they are treated as simple objects and not as subjects of rights".⁴⁵ In the same sense is the opinion of Eduardo Saad Diniz, when he asserts about the need for criminal sciences to give visibility to the victim – who was not visible – and to begin a process of reviewing his scientific place.⁴⁶

Therefore, it is imperative to resume the study of criminal law – in this case, with a focus on the extent of the legal interest protected in certain crimes – with the real dimension of the victim's role. At this point, and in the focus of this work, the teaching of Antonio Cezar Lima da Fonseca stands out, when he conceptualizes the Criminal Law for the Protection of Children and Adolescents

theoretical and practical aspects". 12. ed. São Paulo: Saraiva Educação, 2019. p. 82.

45. POTTER, Luciane. *Vitimização secundária infantojuvenil e violência sexual intrafamiliar*. *Por uma política pública de redução de danos*. 3. ed. Salvador: Editora JusPodivm, 2019. p. 37

46. SAAD-DINIZ, Eduardo. *O lugar da vítima nas ciências criminais como estratégia de pesquisa*. In: SAAD-DINIZ, Eduardo (org.). *O lugar da vítima nas ciências criminais*. São Paulo: LiberArs, 2017. p. 13.

as “the set of criminal norms that protect children and adolescents, that is, to the set of criminal provisions that have children and adolescents as victims”.⁴⁷

In the same sense, Claudio do Prado Amaral highlights:

[...] There are criminal and administrative rules that prohibit behavior that harms or endangers children and adolescents. We call this set of norms the repressive law of childhood and youth. Although they are called repressive rules, they are also functionalized by integral protection and, therefore, they are norms that promote positive general prevention, that is, they are used to reaffirm the legal order when it is violated. This is the function of the rules governing criminal and administrative conduct according to the dominant doctrine. Therefore, strictly speaking, not only is it not a primarily repressive function, but it also has preventive intentions.⁴⁸

Whatever the nomenclature used, Criminal Law for the Protection of Children and Adolescents or Repressive Law of Children and Youth, the important thing is that this branch of child and adolescent law is concerned with situations in which they appear as passive subjects of conduct typical, illicit and culpable.

This perspective of protecting children and youth is based on the fact that, in general, children and adolescents are more vulnerable to being victims of illegal acts, that is, crimes are more easily committed against them than against adults and, frequently, are away from the eyes of direct witnesses.

By the way, it is worth the lesson of Emílio Mira y Lopes, when he states that it is impossible for there to be doubts about the

body constitution as a morphological factor that influences the person to the point of determining a feeling of physical superiority or inferiority in the face of a situation and its form to react to it.⁴⁹

Furthermore, an administrative infraction or a crime against children and adolescents can seriously compromise their development, irreversibly or difficult to reverse, with high and compromising social and economic costs for the State and society as a whole. Such infractions always have a child or adolescent as the immediate passive subject and society as the immediate passive subject.

These crimes directly affect the fundamental rights of children and adolescents, their consequences are permanent and put the biopsychosocial balance at risk for the rest of their lives.

The devaluation of the result, therefore, is greater than that which would occur if the crime had been committed against a human being with complete development and its verification and measurement can only be made at a later time and on an individual basis, as each of these victims in their own way condition will suffer the incidence of deviant affectation differently, depending on how they experienced that traumatic experience.

This interpretation is based on the premise that there is no crime without an offense to the legal good, making it possible to apply a criminal sanction proportional to the result. Therefore, it is necessary to investigate the offensive result as objectively harmful to the protected legal interest.

It is also important to note that most of the crimes that children and adolescents are

47. FONSECA, Antonio Cezar Lima da. *Crimes contra a criança e o adolescente*. Porto Alegre: Livraria do Advogado. 2001. p. 18.

48. AMARAL, Cláudio do Prado. *Curso de direito da infância e da adolescência*: bases, direitos fundamentais, políticas públicas e medidas protetivas. São Paulo: Editora da Universidade de São Paulo, 2020. p. 96.

49. MIRA Y LOPES, Emílio. *Manual de psicologia jurídica*. Leme: CL Edijur, 2018. p. 45-46.

victims of occur in the domestic environment.⁵⁰ or familiar⁵¹, where the tendency is to hide the violence perpetrated. Despite the silence and resistance of victims of family violence in not reporting the attacks, contributing to the black figures⁵² or hidden figures and impunity, the rates of intra-family violence are alarming and worry the whole world.⁵³

Thus, for all the above, and already reinforced the importance of the Repressive Law of Children and Youth as a branch of the law of children and adolescents, it is concerned with situations in which they appear as passive subjects of crimes, it is imperative to note that it is in this context that The subject matter of this work deserves to be explored in greater depth, aiming to better understand the real extent of the criminal legal rights of children and adolescents.

A PROPOSAL FOR UNDERSTANDING THE CRIMINAL LEGAL PROPERTY OF CHILDREN AND ADOLESCENTS

According to what has been seen so far, it is observed that for members of the criminal justice system to achieve a complete understanding of the dimension of the criminal legal good protected in crimes with passive subjection specific to children and adolescents, it is necessary to use own legal hermeneutics.

Only the systematic and teleological interpretation of the guiding principles of the rights of children and adolescents in relation

to criminal law leads to the conclusion that the legal good protected in crimes with passive subjection of children and adolescents deserves a distinctive note, as they deal with the protection of human development itself integral.

It is necessary to highlight that the non-recognition of these principles that integrate the rights of children and adolescents in the sphere of criminal legal protection represents, for children and adolescents, a real obstacle to the full development of their personality, and the recognition that the criminal legal good is being only partially protected.

Regarding the topic, it is worth emphasizing that, when the Penal Code was introduced (Decree-Law number: 2,848/1940), few standards were foreseen for the function of criminal protection of subject's subject to crimes represented by children or adolescents. Direct protection can be noted in the wording of articles 245 and 248 and indirect protection in the original wording of articles 217 and 218 or in article 61, item I, paragraph h, which are always insufficient to prevent such crime.

It turns out that, as well pointed out by Mário Luiz Ramidoff and Luísa Munhoz Bürgel Ramidoff, from 1988 onwards, the rights of children and adolescents began to be guided by the new founding epistemological framework of integral protection, which created a new space where these subjects began to be holders of subjectivity in an emancipatory perspective.⁵⁴ In other words, there was a paradigm shift.

50. Federal Law Number 11,340/2006 defined the domestic sphere as a space for permanent coexistence of people, with or without family ties, including those sporadically aggregated (article 5, item I).

51. Federal Law Number 11,340/2006 defined the scope of the family as the community formed by individuals who are or consider themselves related, united by natural ties, by affinity or by express will (article 5, item II).

52. In Sérgio Salomão Schecaira's lesson, the black figures correspond to the difference between the reported cases and the criminal events that actually occurred. Vide: SHECAIRA, Sérgio Salomão. *Criminologia*. 8. ed. São Paulo: Thomson Reuters Brasil, 2020. p. 172.

53. LEAL, César Barros. *A criança e a violência doméstica*. In: LEAL, César Barros; PIEDADE JUNIOR, Heitor (Org.). *Violência e vitimização. A face sombria do cotidiano*. Belo Horizonte: Del Rey, 2001. p. 43.

54. RAMIDOFF, Mário Luiz; RAMIDOFF, Luísa Munhoz Bürgel. *Lições de direito da criança e do adolescente: ato infracional e medidas socioeducativas*. 4. ed. Curitiba: Juruá, 2017. p. 47.

This way, post-1988 criminal dogmatics need to be attentive to adequately dimension the criminal legal good harmed in crimes against children and adolescents in the light of this new reference.

This is because we cannot lose sight of the fact that the legal asset has a political-criminal function that constitutes one of the main criteria for individualizing and delimiting the matter destined to be the object of criminal protection.

The relationship between legal good and penalty operates a symbiosis between the value of the legal good and the function of the penalty: on the one hand, bearing in mind that what in itself has a value must be protected, the framework of the penalty is nothing but a consequence imposed by the valuable condition of the good; on the other hand, and at the same time, the social significance of the good is confirmed precisely because the penalty is established for its protection. In other words, the criminal sanction must be graduated depending on the severity of the injury.

Taking into consideration the principles of full protection, primacy and best interests, as well as the fact that criminal law has a protective function, it is undeniable to conclude that there is deficient protection of the criminal legal interest in crimes with passive subjection of children and adolescents.

When justifying what is stated, observe what happens in the example of a crime of theft (currently provided for in article 157 of the Brazilian Penal Code). If the active subject of the crime steals someone else's movable property through violence against a child or adolescent - the fact being typical, illicit and culpable -, the instruments available to members of the justice system to apply a criminal sanction proportional to the injured legal asset are the generic aggravating circumstance of article 61, item II, paragraph

h, of the same code (if the victim is a child) and the judicial circumstances of article 59.

These instruments, added to the Penal Code through Federal Law number: 7,209/1984 (which reformulated the General Part), were drawn up at a time when Brazil was not even following the doctrine of full protection, and are insufficient to guarantee a criminal sanction proportional to that which freely and consciously chooses to subjugate children or adolescents as victims of robbery, affecting their integral human development.

They are insufficient and generate deficient protection from the Brazilian State also due to the fact that they make it impossible for operators of the criminal justice system to comply with the purpose of individualizing sentences, as these must result in an option for one that guarantees the reprobation and prevention of crime., as provided for in item 50 of the Explanatory Memorandum of the General Part and in article 59 of the Penal Code, and also because they are not capable of allowing the commandment provided for in § 4 of article 227 of the 1988 Constitution to be observed ("The law will severely punish the abuse, violence and sexual exploitation of children and adolescents").

Therefore, for the best interpretation of the constitutional and legal text, one must not stick to its literalness, as it is imperative to carry out a systematic and teleological exegesis of the norm. In fact, the legal system is a logical system with a unitary and articulated internal structure and not a simple combination of normative propositions without any connection between them, as Pontes de Miranda already warned us.

Therefore, according to Eros Grau's lesson, one must not interpret the law in strips, under penalty of carrying out sterile exegesis, detached from the legal system and which will not guide the interpreter to the desired normative meaning.

By the way:

The interpretation of law is the interpretation of the law as a whole, not of isolated texts, detached from the law. Law cannot be interpreted in strips, in pieces. The interpretation of any text of law requires the interpreter, always, in any circumstances, to walk along the path that is projected from it – from the text – to the Constitution. An isolated, detached text of law, detached from the legal system, does not express any normative meaning.⁵⁵

As a corollary, Carlos Maximiliano, when dealing with the topic, highlighted:

Law is an organic whole; therefore, it would not be permissible to appreciate an isolated part, with indifference to the agreement with the others. There is no safe interpreter without a complete culture. The exegete of isolated norms will be a leguleio; only the systematizer deserves the name jurisconsult; and, to systematize, it is essential to be able to encompass, at a glance, the entire complex, to have the breadth of vision of the perfect connoisseur of a science and other disciplines, propaedeutic and complementary.⁵⁶

Alongside systematic interpretation, in addition, one must also investigate the purpose of the guiding principles in question, their reason for existing, thus valuing the real meaning of the text.

After having established these premises, it must be borne in mind that the rights of children and youth are informed by their own principles, notably the principles of full protection, absolute priority and best interests, all extracted directly from the Constitution, the Statute of Children and Adolescents and the International Child and Youth Protection System itself, being considered conditioning factors for the interpretation of legal norms on the matter.

In this context, it is important to note that the adoption of the principles that inform the rights of children and youth as a criterion capable of highlighting the real extent of the criminal legal good harmed in crimes involving children and adolescents as victims is the way in which their rights are best protected. fundamental rights, respecting their peculiar condition as developing people.

FINAL CONSIDERATIONS

When analyzing the way in which the extension of the criminal legal right has been interpreted in crimes involving passive subjection of children and adolescents in Brazil, it is noted that a teleological and systematic interpretation has not yet been made in light of the principles that inform children's rights. and the teenager.

The criminal legal good in these unjust cases has not received, from the agents that make up the criminal justice system, the proper understanding of its extent in order to observe its constitutional and legal dictates. This situation is worrying, especially because it appears to belittle the only area of law that enjoys constitutional priority.

On the other hand, the numbers reveal that more and more children and adolescents have been victims of crimes, and that because they are still human beings in formation, they will have indelible consequences on their integral development.

This scenario only reinforces the need to always keep in mind the fact that children and adolescents are people in a peculiar condition of development and that, for this reason, they must have their criminal legal interests interpreted and evaluated under the principles specific to children and youth law.

This way, it is essential to recognize that the protection system itself provided for by the rights of children and adolescents through

55. GRAU, Eros Roberto. *Ensaio e discurso sobre a interpretação/aplicação do direito*. 5. ed. São Paulo: Malheiros, 2006. p. 44.

56. MAXIMILIANO, Carlos. *Hermenêutica e aplicação do direito*. 21. ed. Rio de Janeiro: Forense, 2017. p. 189.

the 1988 Constitution – and complemented by the Child and Adolescent Statute – already provides sufficient parameters for a critical-reflective analysis capable of enable the real dimension of the property injured in this type of crime.

Therefore, it would be very poor, from the point of view of criminal science, to say that the legal interests protected in these crimes are children and adolescents. Precisely, what is protected criminally is human development.

The opposite would be to subjectify the legal good according to a group of people according to their age, when what seems more correct to us is to objectivize the legal good, giving it a semantic content that is more capable of being measured according to the injury or the danger of injury. present in the specific case. Saying that the protected legal good is human

development in the first years of life allows for this quantitative and qualitative view of the devaluation of the action or result in each case.

Giving due treatment to this legal asset, promoting a criminal response proportionately capable of providing efficient and effective criminal protection to children and adolescents, seems to be a coherent path for Brazil to reduce the alarming numbers of this form of violence.

The evolution seen with the advent of the 1988 Constitution, which adopted the doctrine of full protection, involves the premise that victimized children and adolescents must not only be seen as subjects of rights, as they also need to be effectively considered as developing beings who, therefore, they require differentiated legal and criminal protection.

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