Juvenile criminal sanctions in Brazilian jurisprudence: socio-legal semantics and idea systems

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"*Each case is other, each decision is different and requires an absolutely unique interpretation, which no existing, coded rule can or ought to guarantee absolutely. At least, if the rule guarantees it in no uncertain terms, so that the judge is a calculating machine – which happens – we will not say that he is just, free and responsible. But we also won't say if he does not refer to any law, to any rule or if, because he does not take any rule for granted beyond his own interpretation, he suspends his decision, stops short before the undecidable or if he improvises and leaves aside all rules, all principles*."

Jacques Derrida.

ABSTRACT

This dissertation concerns an empirical research focused on observing the case law of the Appellate Court of Justice of Minas Gerais, Brazil, about sanctioning young offenders. I identify socially available ideas, senses, and thoughts that become incorporated as standard-settings to the discourse of State Appellate judges. The online empirical data (www.tjmg.jus.br). covers a period from 03.08.2010 until 01.12.2016, composed of approximately one thousand decisions. Keywords connected to the juridical language routinely employed in young offenders' records guided the further process of gathering seventy-seven sampling dossiers.

The decisions herein studied typically contain summaries of main reasons and judicially assessed evidence to prove the accusation; and also rationales, reasoning patterns, beliefs, and other motives the judges consider to ruling the concrete case. Therefore, the research places particular emphasis on describing, characterizing, and understanding the influences of many idea systems and, in addition, of the current way of thinking the Adult Criminal Law Justice in the Juvenile Criminal Justice decisions. So, the research question is: "How have Appellate judges mobilized socio-legal semantics and idea systems to make sense of criminal sanctions imposed on young offenders?" This research adopted the theory of Modern Penal Rationality to characterize one of the idea systems identified in this investigation and construct some elements of its knowledge problem that address the epistemological obstacles to the evolution of the juvenile criminal justice subsystem in criminal matters.

Due to my professional background and empirical observations of some dossiers, I contend that at least three idea systems influence the Appellate judges' decisions, in the social context of the Juvenile Criminal Law subsystem, as follows: 1) "Modern Penal Rationality" (as described by Pires and conceived for adults in the criminal justice system); 2) "Doctrine of Irregular Situation" (as provided by the revoked Brazilian "Code of Minors"); and 3) "Doctrine of Integral Protection" (as established in the 1988 Brazilian Constitution and in the 1990 Child and Adolescent Statute).

Thus, the analysis shows how the decision-making process by the Court of Appeal - trying to proceed with an accommodation account of presumably conflicting values - selects idea systems linked to old theories of punishment to shape the logical structure of juvenile sanctions. I demonstrate that "common legal sense" and "taken for granted" statements apply to induce "severe" sanctions imposed without considering the specificity of the case by the rules of Juvenile Criminal Justice. As a result, I reveal that punitive reasoning prevails in juvenile delinquency judgments rather than child and youth protection, and I also describe the social-legal practice of the language of Juvenile Criminal Law in the Court of Appeal's environment.

Keywords: Sociology of Law – Brazilian Jurisprudence – Juvenile Justice - Modern Penal Rationality – Idea systems mobilized.

RESUMO

A tese refere-se a uma pesquisa empírica voltada para a observação da jurisprudência do Tribunal de Justiça de Minas Gerais envolvendo sanções impostas a jovens infratores. Pretendo identificar ideias, sentidos e pensamentos socialmente disponíveis que possivelmente se incorporem como padrões ao discurso dos desembargadores estaduais. Os dados empíricos constam online do site do Tribunal (http://www.tjmg.jus.br). Abrangem um período de 03.08.2010 até 01.12.2016 e são compostos de aproximadamente mil decisões. Depois, as palavras-chave ligadas à linguagem jurídica rotineiramente empregada nos registros dos jovens infratores orientaram o processo de coleta de setenta e sete dossiês de amostragem.

As decisões estudadas contêm resumos das razões principais e das provas avaliadas judicialmente para confirmar a acusação; além de racionalidades, padrões de raciocínio, crenças e outros motivos que os juízes consideram para reger o caso concreto. Por isso, a pesquisa coloca especial ênfase na descrição, caracterização e compreensão das influências de muitos sistemas de ideias e, também, da maneira atual de pensar a Justiça do Direito Penal de Adultos nas decisões de Justiça Criminal Juvenil. Assim, a questão da pesquisa é: "Como os desembargadores mobilizam a semântica sociojurídica e os sistemas de ideias para dar sentido às sanções criminais impostas aos jovens infratores?" Devido à minha experiência profissional passada, aliada às observações empíricas de alguns dossiês, posso antecipar que, pelo menos, três sistemas de ideias influenciam as decisões dos Juízes de Apelação, no contexto social do subsistema de Direito Penal Juvenil. São eles: 1) a "Racionalidade Penal Moderna" (descrita por Pires e concebida para adultos no sistema de justiça criminal); 2) a "Doutrina da Situação Irregular" (conforme previsto no Código de Menores brasileiro revogado); e 3) a "Doutrina da Proteção Integral à Criança" (estabelecida na Constituição Brasileira de 1988 e no Estatuto da Criança e do Adolescente de 1990). Esta pesquisa adotou a teoria da racionalidade penal moderna para caracterizar um dos sistemas de ideias identificados nesta investigação e para construir alguns elementos de seu problema de conhecimento que abordam os obstáculos epistemológicos à evolução do subsistema de justiça criminal juvenil em matéria penal.

Assim, a análise mostra como o processo de tomada de decisão do Tribunal de Apelação - tentando proceder à acomodação de valores presumivelmente conflitantes - seleciona sistemas de ideias ligados a velhas teorias de punição para moldar a estrutura lógica de sanções juvenis. Demonstro que as afirmações de "senso legal comum" e "tomadas como certas" induzem sanções "severas" impostas sem considerar a especificidade do caso pelas regras da Justiça Criminal Juvenil. Como resultado, eu revelo que o raciocínio punitivo prevalece nos julgamentos sobre delinquência juvenil, e não a proteção de crianças e jovens, além de descrever a prática sócio-legal da linguagem do Direito Juvenil no ambiente do Tribunal de Apelação.

Palavras-chave: Sociologia do Direito - Jurisprudência Brasileira - Semântica Socio-jurídica - Racionalidade Penal Moderna - Sistemas de ideias mobilizadas.

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Contents

LIST OF ACRONYMS

DIS – Doctrine of Irregular Situation

DIP – Doctrine of Integral Protection

MPR – Modern Penal Rationality

TJMG – Tribunal de Justiça de Minas Gerais (Appeal Court of the State of Minas Gerais)

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Introduction

This study examines the impact of some general concepts of law and theories of punishment on the meaning of the jurisprudence of the Appellate Court of Justice of Minas Gerais, Brazil, in the cases of young offenders. I focused specifically on understanding the pattern configurations for imposing juvenile sanctions (socio-educational measures), analyzing case law to describe, understand and then discover some standards of reasoning that appellate judges tend to choose to decide.

Initially, I skeptically assumed that the philosophy of the Doctrine of Integral Protection, established in the 1989 UN Convention on the Rights of the Child (CRC), and replicated in the 1990 Brazilian Statute of Child and Adolescent, should be the primary influence on the jurisprudence concerning young offenders. Both legal texts recognize children and adolescents as people in development, with the right to integral protection, and have created special rules, different from the traditional system of adult punishment. The new paradigm, instead of just "rehabilitative" ideas [mainly applied in total institutions], set at international and domestic levels special legislative rules to protect children and adolescents in conflict with the law, without relying on prison as *the* essential or primary sanction.

However, in developing my research, I observed a possible paradox in the content of the reasons used by appellate judges to decide. In fact, despite the jurisprudence recognizing the importance of protecting young people, I continued to observe in the logic of decisions an understanding that the protection of the whole society should not dispense the imposition of imprisonment on young offenders, justified with a logical structure [of thinking] similar to those routinely applied to adult criminals.

So, afterwards, I realized perhaps a potential research problem in decision-making operations. I found curious to use ideas concerning punishment in the sense of Adult Criminal Law in the context of a trial legislative program created at first sight to protect young offenders (according to the new paradigm of the Youth Justice Law) and not exclude them. Consequently, I wondered what happened to the meaning of socio-educational measures (criminal penalties of juvenile criminal law).

Then, I sought a synthesis of legal thinking, considering the practical applying of the statutes above. I then decided to build my research problem around the following question: what are the systems of thought or the ideas that the Court of Appeal is putting in place to decide on sanctions

against young offenders? This research adopted the theory of Modern Penal Rationality to characterize one of the idea systems identified in this investigation and construct some elements of its knowledge problem that address the epistemological obstacles to the evolution of the juvenile criminal justice subsystem in criminal matters.

In this research, I worked on the assumption that the jurisprudence could help me to describe the broad meaning that appellate judges attributed to juvenile sanction, perhaps sometimes without adopting [explicitly the] general classical objectives of punishment [that is, without talking clearly about deterrence, retribution, etc.]. So, I asked the following research question on the subject that intrigues me:

> "How have appellate judges mobilized socio-legal semantics and idea systems to make sense of criminal sanctions imposed on young offenders?"

This question refers to a research problem that can be summed up at a gallop as follows. Retroactively, we can say that juvenile justice in Brazil, as elsewhere, has gone through two significant phases of evolution in its philosophies of legislative intervention. The first phase was described in Brazil with the name "Doctrine of the Irregular Situation." It was the name given to the system of ideas or to the rationality that Anthony Platt (1977) metaphorically called the "child savers" rationality. Brazil implemented this doctrine (also called "tutelary") gradually from 1921. Its most achieved and coherent version was only put in place in 1979 with the "Code of Minors" and will remain in place until 1990. We can describe the second and last phase in Brazil with the name "Doctrine of Integral Protection", implemented by the 1990 Statute of Child and Adolescent. This new philosophy of intervention would be centred on at least two central axes: (i) giving young people more rights and (ii) reducing the use of prison sanctions as much as possible.

So, regarding trial courts, the Brazilian Juvenile Justice distinguished itself from the Adult Criminal Justice early in the twentieth century, and since that time it has experienced different legislative programs in four periods of time, namely: from 1921 to 1943; from 1943 to 1979; from 1979 to 1990; and, finally, from 1990 until present. All these programs showed some important peculiarities in the intervention philosophy itself. Nevertheless, the last rationale provided by the Federal Law n. 8069/1990 diverge integrally from the others. The 1990 Statute of Child and Adolescent belongs to what may be called a "second generation", a "new paradigm" or a "new frame of analysis" (Goffman) of legislative programs on criminal justice for young people. The intervention philosophy of the latter

program is considered in Brazil as a result of the full legal acceptance of the United Nations' Integral Protection Doctrine, world widely known after the enactment of the UN Conventions on the Rights of the Child.

As a consequence, the first part of my research problem is similar to the one addressed in the USA by Edwin Lemert (1967): what happened to this 1990 reform in the appellate court level in Brazil? I can summarize the second part of my research problem as follows: in Brazil, as in other jurisdictions, the jurisprudence I studied did not come from an appellate court specialized in juvenile justice rationality. Besides, as a general rule, the appellate court did not have specialized training in the new intervention philosophy implemented by the 1990 Statute of Child and Adolescent. This result complicates the previous question as follows: does the criminal rationality of the adult justice system concerning the punishment influence in any way the decisions about sanctions for young offenders?

To address my research problem, I decided first to analyze some of the appellate court's decisions to get an idea of what I could find and then develop a strategy to build my body of empirical data. In this first stage, I realized, although it was still not clear, that there were at least three distinct idea systems influencing the meaning of the decisions. So, I elaborated a typical typology for the three types of rationality that appear possible to be present in the decisions to be analyzed. They are:

1) "Modern Penal Rationality" (or MPR as described by Pires and conceived for adults in the criminal justice system);
2) "Doctrine of Irregular Situation" (as provided by the revoked Brazilian "Code of Minors"); and
3) "Doctrine of Integral Protection" (as established in the 1988 Brazilian Constitution and in the 1990 Child and Adolescent Statute).

During this stage, I became aware of some difficulties in clearly identifying the presence and the articulation between these three justifications in the jurisprudence. After this first stage, I decided to make a quantitative and qualitative analysis of the case-law of the appellate court of the State of Minas Gerais between 03.08.2010 until 01.12.2016. The quantitative analysis seemed necessary so that I could assess with sufficient precision the extent of the presence of these three "rationalities" or "reasons for deciding." Qualitative analysis was essential to characterize these rationalities, to understand the forms of articulation between them, and to observe specific cognitive obstacles to

innovation. The methodological chapter will provide more information about the choices we have made.

Thus, the discovery and identification of epistemological obstacles (Bachelard) for the innovation of the entire Criminal Law System guide the theoretical perspective of this research. In the specific case of criminal justice for young people, the 1990 legislative reform in Brazil represents an innovation at the legislative and political level and an invitation or stimulus to innovation at the law system level. This is the case because it diverge at the same time from the Modern Penal Rationality for adults and the old rationality of justice for young people (the Doctrine of Irregular Situation). Therefore, it is not just a question of “evaluating” the 1990 reform, but also of identifying ideas and attitudes that may prevent innovation from occurring at the level of the juvenile justice sanctioning rules.

In developing my research, I identified a strong co-influence of the old theories of punishment created and designed for Adult Criminal Justice and the “child savers rationality”. Consequently, I wondered if the confluence between the philosophy of criminal intervention for adults and the doctrine of the irregular situation (tutelary) would result in a particular way of dealing with young offenders. Could these "combined ideas" really undermine the logical framework of legal reasoning adopted by the newest legislative program on Juvenile Justice?

As we can see, our theoretical perspective and the guiding question do not fit into traditional sentencing research, despite several points of intersection where each of these more usual research trend has the potential to collaborate with my research problem. In this research, questions related to the problems of discrimination, to the disparity of sentences, and to the extralegal criteria that affect the judges' decisions fall into the blind spot of our approach and theoretical perspective. Within the framework adopted, the main objective is to describe the ideas that are put in place for favouring the use of imprisonment sentences, not only hindering the emergence of a new rationality in criminal matters but also on ideas that do not tend to innovate the "right to punish." Therefore, the correct “legal” way to treat young offenders within institutions is not part of this thesis, even if some references to the subject occur.

My interest in this topic arose in part from my previous professional experience as a Judge of First Instance of the Juvenile Justice System, between January 2011 and July 2014, in the capital of the state of Minas Gerais, Brazil. At that time, I started to realize that the Court of Appeal was facing difficulties with the new intervention philosophy established by the 1990 Statute of Child and

Adolescent. At this time, without to be sure, I had the perception that the Juvenile Justice System was maybe replying the same problems observed in the Criminal Law System for adults.

During a trip to Canada, as part of a visit activity by the Association of Brazilian Magistrates, I learned about the research program of the Canadian Chair of Legal Traditions and Penal Rationality, and particularly on the problems of innovation in criminal justice for adults. So, I wondered if the way of thinking linked to the Adult Criminal Law justice was also influencing judicial decisions in matters of juvenile justice. When I submitted the first idea of my research project, Professor Pires thought, in principle, that I had not quite understood the meaning of the theory that the Canadian Laboratory was developing and testing. He also found it unlikely that the Appellate Court could be distancing itself considerably from the 1990 Statute of Child and Adolescent. However, Pires asked me to begin to separately analyze some decisions in which I believed I had observed the presence of the MPR system of ideas. This preliminary exploratory examination was considered sufficient for Pires to convince himself that it was worth doing doctoral research to find out what was happening in the field of ideas related to juvenile justice.

At the theoretical level, in a possible contribution to the development of knowledge, this research will demonstrate an intriguing result. We observe that the innovative criminal legislation on the sanctioning rules depends on the adherence of the top organs of the pyramid of the Criminal Law System. Thus, it is necessary to involve the Courts of Appeal in the process of self-transforming the identity vision they have about themselves, to achieve the expected consequences of changing the Law. It should be noted that this dissertation is part of a broader research program aimed at thinking and reflecting on the conditions that could favour the reform of ideas that fall within the criminal law of modern society, including those that are specifically designed to deal with the judgment of Juvenile Justice.

The theoretical, empirical and methodological contribution of this research seems to me to be the following.

First, empirically, it is very difficult to find an analytical context where it is possible to simultaneously observe and describe the presence (at least virtual) of at least three opposing systems of ideas referring to punishment in criminal matters. The “interaction” of these systems can then be observed for the first time and we are now able to observe at least one of the possible configuration. These three systems of rationality have had - or still have - a legislative configuration, and even if they do not necessarily refer to the same judicial practices.

Second, from a theoretical point of view, this research observes a situation of law reform which, at first glance, is anomalous. Usually, we believed that to transform the law practices, it was necessary to carry out a legislative reform. However, in our case, as we will see, we have a profound and innovative legislative reform without almost any innovative resonance in the practice of the (appellate) courts. This result has profound implications on how sociology and criminology conceived the law reform and even how social sciences usually describe the relationship between the political system and the legal system. Obviously, I will not be able to explore all these deep implications here, but it can be developed later by other researchers or by myself in a future work. My results condense and help to develop the framework of Modern Penal Rationality theory. In this regard, my research is somewhat complementary to that of Veronica Piñero who has focused on legislative changes and trial court decisions for young offenders in Canada. Third, from a methodological point of view, this research shows that it is possible to construct a relevant qualitative sample within a sample that was designed primarily for a quantitative approach. We think that this type of academic investigation can be done, depending on the research object and on the questions we are looking for answering. At the epistemological level, we have also two objectives. To show (1) that we do not need to oppose constructivism to realism to characterize our epistemological position. To demonstrate (2) that the choice of the appropriate type of sampling (qualitative/quantitative) depends on the research guiding question.

This research also had a pragmatic motivation: to contribute to a process of self-transformation of youth justice. I am going to indicate the cognitive problems to be overcome and some possible ways of self-transformation already present in the judicial practices, but insufficiently explored (the Restorative Justice ideas and the current 1990 Statute of Child and Adolescent). Also, this study can be seen as a valid option for people interested in learning more about Brazilian Juvenile Justice System. Even in the specialized literature, I have not seen mentions to soft law or other documents guiding the interpretation of Juvenile Justice legislation. This study fills an important gap in the Brazilian literature on juvenile justice, as there is an almost complete absence of socio-legal studies on the rationality of sentences in juvenile justice. It also aims to broaden current knowledge about the influence of different systems of “acceptable” ideas (intervention philosophies) on legal operations of the juvenile court.

Another possible social contribution is the support for reconstructing and consolidating a form of intervention in criminal matters that is better adjusted to the fundamental rights in the field of decisions and sanctions, so as to reduce “dialogue without exchange” (GARCIA, 2011, p. 417) between jurists

and sociologists. This discussion, with the necessary adaptations, can serve as a foundation for the application of new intervention philosophies for adults as well, more connected to the International Human Rights Law.

Following this introduction, in the first chapter, I am going to clarify my research object, by placing it within the framework of its research tradition, as well as situating it in the contemporary political context, and displaying a brief overview of some research on juvenile justice. Further, I will address my research object and the global conjuncture in which my investigations occurred. Also, I think it is relevant to explain the meaning of using the words minor or child in specific contexts and the current Brazilian context of "penal populism." At the end of this chapter, I am going to present some studies on Juvenile Justice, mainly regarding the Brazilian background.

Chapter Two presents theoretical and conceptual perspectives used in this dissertation. I begin by summarizing the Systemic Theory of the Modern Penal Rationality and its influences on the Brazilian Juvenile Justice System. I present the main lines of the concepts in this dissertation, found in the Illinois Program and the origin of the Juvenile Justice System. I will also synthesize the main features of the Irregular Situation Doctrine since the revoked 1979 "Codes of Minors". I introduce a glimpse of the idea system of the Doctrine of Integral Protection, and show how the 1990 Statute contributes to the judicial determination of socio-educational measures.

The methodological chapter is the third one. In it, I present the *ad-hoc* method chosen to elaborate the research, besides its central ethical questions. I characterize the investigation and the constitution form of the empirical corpus and delineate its spatial-temporal location. I explain the data collection method, which is about documentary research, in addition to the sampling mode.

I divide the empirical analysis into two chapters to critically explain the influence of three idea systems combined in the decisions studied, leading to systemic corruption of the adjudicative system of Juvenile Justice. I start with a more general analysis, progressing in the descriptive activity to achieve more complexity.

So, my explanation in Chapter Four begins with a quantitative approach, followed by an interpretation linking the research problem to the empirical material. In Chapter four I am going to present the main figures I developed to display my research findings. The empirical material I have obtained is composed of case law that externalizes, in writing, the observations of the Criminal Appellate judges on the application of the Juvenile Justice Law.

Chapter Five provides a qualitative analysis of our empirical body of data. I indicate the semantic components of the meaning of judicial decisions and explain the organizational processes of the judicial construction of the sense of juvenile offences. Then, I address the organizational aspects that frame the meaning of sanctions in the cognitive context of the Court of Appeal. Later, I explain how appeal judges make the systemic representation of the "abstract" gravity of juvenile delinquency in Brazil. I also focus on the observation of discursive structures and reveal idea systems in operation. I will show that judges have observed juvenile criminality under the lenses of the revoked "Codes of Minors" and the conservative reading of the old theories of punishment for adults. I indicate the way of observing young offences doing reference to the illicit drugs and demonstrate the combination of the systems of ideas of the Modern Penal Rationality with the Irregular Situation Doctrine, abolished in Brazil since the 1990 Statute.

In the concluding phase, I reveal an update of the rationality that prevails in judgments and also describe the practice of Juvenile Criminal Law in the environment of the Court of Appeal. Again, it is possible to disclose if and why the judges have abandoned the way of deciding according to the Doctrine of Integral Protection. Another result is to show how Modern Penal Rationality is currently a cognitive obstacle to receiving the newest intervention philosophy in the field of Juvenile Criminal Justice.

Chapter 1 - Research object, global conjuncture, and studies on juvenile justice.

My goals in this first chapter are: (1) To clarify my research object, by placing it in relation to others approaches and research traditions; (2) to situate my object of knowledge rapidly in the contemporary political context (between 1990 and 2017); and (3) to display a brief overview of some research on juvenile justice, carried out mainly in Brazil, with no intention of exhausting the subject. Two basic criteria were adopted for the choice of studies selected for inclusion in this chapter.

The first part of this chapter presents five research studies in more detail. Here I applied the sampling procedure commonly referred to as "theoretical sampling". In the specific context of qualitative research, this procedure was particularly stimulated by the work of Glaser and Strauss (1967) in the late 1960s. However, it should be remembered that this language is also used in quantitative or mixed research (BEAUD, 1984). This selection is mainly aimed at the first two objectives indicated in the previous paragraph.

In my case, operationalizing the notion of theoretical sampling was done as follows. The first three studies aimed at preventing misunderstandings concerning my object of investigation and the research program within which I fit. I then selected three major studies, each with an object close to mine and within a research program close to, but diverse from, mine. The fourth study is part of the same research program (theory of modern criminal rationality) in the same field of research (juvenile justice) but with a different object than mine. Finally, the fifth study is part of a diverse research program but is about the same field of study (juvenile justice) and contributes in terms of convergent knowledge with some of my contributions. In addition, because of its focus and methodology, this latter research offers a good deal of additional information that is useful in giving the reader a broader view of the problem of criminal justice evolution, and this information enriches my own research findings.

This chapter also reviews some research on the treatment of youth in Brazilian juvenile justice. This second part of our review of studies has adopted another criterion of operationalization. The aim here was, on the one hand, to show the originality of my contribution in relation to what had already been done in the field of research on juvenile criminal sentences and, on the other hand, to add useful complementary information for the reader coming from research on other aspects of institutional intervention with criminalized youth.

1.1. Contextualizing my research problem and my theoretical work.

Let us clarify from the start in the negative sense that the objective of this first review of studies is not that of making an overview of research in the field of juvenile justice in general. In this research context, this project seems to me to add both an unnecessary and inevitably superficial task. Indeed, there is a huge amount of studies and that would lead us to quick and irrelevant remarks on each selected study.

Positively speaking, my objective here is to select, according to their theoretical relevance for this task, a small number of studies allowing me to "frame" my research in such a way as to prevent misunderstandings about its research problem and its theoretical program.

To this end, I selected (adopting the criteria of theoretical sampling) five studies: a) Aaron V. Cicourel (1968); b) Rasmus H. Wandall (2008); c) Anthony Platt (1969); d) Veronica Piñero (2013); e) and Edwin Lemert (1967).

The first three studies are part of research programs that are in the neighbourhood of mine, but only loosely attached to the type of theoretical and empirical contribution that I am trying to make. On the other hand, the last two researches are, in different ways, strictly attached to my investigation. We can say that there is, in spite of some major differences, a sort of interpenetration in the respective contributions.

a) Aaron Cicourel and the ethnomethodological research program: *The Social organization of Juvenile Justice* (1968).

Empirical research on Juvenile Justice professionals is not a new topic for sociology or criminology. Perhaps one of the best-known studies is that of Cicourel (1967), made in the USA context. In this research, the author views how some agencies (the police, probation departments, courts, etc.) contribute to various kinds of transformations of the original events that led to the creation of criminal justice official statistics and records” and the nurturing of histories concerning the juveniles. Perhaps it can be said that he starts from events to observe how they are received and transformed by the youth criminal justice system.

To compare my approach with that of Cicourel, I would say that I have observed how the appellate courts received an attempt to transform their "usual rationality" through legislation substantially. So, Cicourel starts from the events to observe the creation of statistics and youth

files, and I start from a transformation in the legislation to see how the courts will recreate the jurisprudence from this new stimulus. While this research focuses mainly, but not exclusively, on the ideas mobilized by the appeal judges to shape the meaning of the legal statutes and events in the texts of the judgments, Cicourel observed another type of activity. The central focus of his research was to know how police and probation officers come to recognize juvenile activities as relevant to their circumstances of work, how these officials become oriented to a course of action, and how they organized the behaviour in a way that was assumed to be consistent with an imagined appropriate course of action that others in law enforcement and the courts can recognize as meaningful.

This means that the results of this research by Cicourel and mine do not compete: my results do not implicate those of Cicourel and vice versa. These are two studies exploring different forms of institutional construction of social reality. Cicourel investigates the institutional construction of "juvenile delinquency," and I study the case law's institutional construction on sentencing in the juvenile justice context.

In the language of Searle (1995), it is about the construction of two diverse institutional facts: events (Cicourel) and jurisprudence as rationality and form of the intervention for sentencing in youth criminalized events (my project).

b) Rasmus H. Wandall and the social-legal research tradition: *Decisions to Imprison. Court Decision-Making Inside and Outside the Law* (2008).

It also seems important to me to contrast my research with that of Wandall (2008) even if this one does not relate to juvenile justice. I selected this research for two mainly reasons. The first is because it allows me to distinguish my theoretical problem, which relates in part to obstacles to innovation in sentencing, from the theoretical problem of researches that aimed at understanding the factors and influences that affect the process of decision-making on sentencing. The second reason is that this research is probably the first empirical research in the tradition of socio-legal studies which has adopted certain elements of Niklas Luhmann's theory of social systems. My research is as well based mainly on the use of a systemic theory also elaborated with elements of Luhman's theory: the Systemic Theory of Modern Penal Rationality - MPR, constructed for the Adult Criminal Law system by Pires with the help of his research team (In chapter 2, I am going to present the MPR). But this theoretical approach looks for

“epistemological obstacles” (BACHELARD, 1938) to the social evolution of criminal law system, what is a quite different research problem. These epistemological obstacles are defined as ideas that a social system accepts and still considers "good" that obstruct the construction of better pre-decision structures in the system itself. The theory of MPR is not concerned with concrete and specific decisions as such, but with the identification and discovery of ideas and "rationalities" which prevent a self-transformation of the system.

As I said, Wandal's research is one of the few empirical studies on criminal justice theoretically inspired by Niklas Luhmann's social systems theory dealing with sentencing in the courts. It is also quantitative and qualitative, and builds in a good manner the two methodological approaches.

Wandall (2008) began his analysis stressing the gravity of imprisonment outcomes, therefore, whether it is for a long or short term, it effectively excludes an offender from public life and subjects him or her to physical, social and economic hardship and stigmatization. So, he examined how Danish Courts sentence criminal to imprisonment, stating that the Penal Code stipulates limits and relevant sentencing criteria, and Appellate Court practice guides the sentencing by providing examples of how cases are typically sanctioned. The severity of the crime, the prior criminal record, the age and the social circumstances of the defendant are examples of factors that the court are supposed to take into consideration when deciding to imprison. It is through this formal legal framework of sentencing that students, practitioners and scholars alike are taught about sentences for imprisonment and where political discussions of sentencing and imprisonment take place (WANDALL, 2008, p. 1)

The author's first aim was to capture the contemporary normative and ideological structures of decisions that lead to custodial sanctions in actual decision-making in Danish County Courts. And his work engaged in legal and sociological questions about the relationship between the law system and its context. Another goal of Wandall (2008) was investigating how court decision-making organized itself to allow the sentencing process to be open to other influences than its formal legal framework, while at the same time keeping the sentencing within the boundaries of law and legal validity (WANDALL, 2008, 3).

The first question Wandall (2008) asked regards which *sentencing factors condition decisions to incarcerate* in Danish County Courts, and the second one concerned how decisions to imprison are *socially constructed* in the everyday *operations of a county court*. This second question was planned to describe the social structures through which decisions to incarcerate are

constructed in every decision-making of a county court and how the decision-making is managed to construct decisions both as legally valid and as sensitive to the context in which they are reached. His book concerns the description of the common use of the prison as a penal sanction for adults. His work is not concerned by the wider use of incarceration as a form of control nor the use of pretrial custody of the incarceration of defendants of a mental handicap or a psychiatric diagnosis.

The author stated that traditional empirical socio-legal studies of sentencing decision-making describe actual decision-making as something distinctly different from written or dogmatized law. So, there is a distinction between law in books and law in action. In these 'gap-studies,' law is usually conceptualized as a form of social control or rule of conduct, customs of institutionalized behaviour. Well-known examples are those studies dividing decision-making into legal and extra-legal factors, *i.e*., we can define offense severity and prior criminal record as legal factors and factors such as a race and sex as extra-legal factors (WANDALL, 2008, p. 10).

My research will not adopt either this perspective of observing the difference between law in books and law in action or even the perspective adopted by Wandal himself.

Wandall (2008, 23) presented the main sentencing criteria used by Danish Courts. The first central criterion relates to the criminal offense. Except in extraordinary circumstances, the tariff is to sentence the most severe crimes to immediate imprisonment. Among others, this concerns crimes of murder and rape. For the more numerous statutory crime categories of more ordinary violence and property crimes, decisions to imprison are the product of more nuanced considerations of the character and its severity. The second main sentencing criterion in decisions to imprison relates to the prior criminal record of the offender. And the third main sentencing criterion relates to the personal and social circumstances of the offender. (WANDALL, 2008, ps. 28/29). These are some of the generalized and condensed results in the socio-legal research tradition. For MPR theory, the question it poses is based in part on this result as one of its starting points: why does this happen? What are the ideas that strictly tie the severity of the offense (or even the offender's prior criminal record) to the "energy" of inflicting suffering through punishment?

The criteria identified by Wandall are a clear manifestation of the idea systems of the MPR in adult courts. However, as we can see, our research goal is not to identify the criteria (within this system of ideas) which lead to imprisonment. Instead, we aim at identifying the idea system (rationalities) the Court of Law adopts to determine the sanction for young offenders. Of course,

the appellate court I studied also refers to the social circumstances of young offenders, and they do that in a precisely hostile way, pointing them out as incapable of being the protagonists of their respective destiny. These are clearly “ideological elements” in the decision-making processes. So the results of these researches and our research overlap in part, but their theoretical interests are not the same. As will be best explored in the empirical analyzes, often the lack of schooling, medical care or institutional and family support for the young is understood additionally as a justification for incarceration, as if the 'prison-state', abstractly, could do the job that the "Welfare State" should do.

Another confluence I find between my research and that of Wandall is that I have also observed old theories of punishment influencing the application of penalties.

c) Anthony Platt research on the construction of the Juvenile Courts: *The Child Savers. The Invention of Delinquency* (1968/1977).

This book was originally Tony Platt's doctoral thesis and most of it was written between 1965-66. The 1969 edition was seen as part of the theoretical tradition of symbolic interactionism or labelling school (Platt, 1977, xi). Subsequently, in the expanded 1977 edition, Platt makes a Marxian critique of his own work using an "introduction to the second edition" and an "afterword." The body of the work has remained unchanged. This later edition gives us a marxist reading of this social reform movement that led to the creation of the juvenile court in Chicago, Illinois, in 1899.

In a working paper on this book, Pires invite the reader to pay attention to the subtitle of this book: *The Invention of Delinquency*. He wrote:

> “At that time, the term “delinquency” was coined to refer exclusively to young people who committed offenses and a distinction is made between the word *delinquency* and the words “*criminal offender”*. A youth offender was *not yet* a criminal offender even though he/she behaviour was similar. A young person who violates a criminal law should not be observed, in principle, as a criminal, but rather as a delinquent. […] Today, the two terms have become practically interchangeable and we often employ the expression "business delinquency" which are crimes that can only be practiced by adults. At the turn of the 20th century, the term "delinquency" sought to be much less morally charged than the term “criminal offender” and was also intended to “rescue” young people from the grip of the rationality of intervention that

> prevailed in adult criminal justice, the system of ideas of the modern penal rationality (PIRES, 2016, 1).

The object of this research is the social movement of "child savers" in the United States in the "Progressive Era" and particularly in Chicago, in the state of Illinois, where it was created the first youth courts in 1899. In the introduction to the second edition of his book, and therefore retroactively, Platt reconstructs his subject as follows:

> "*The Child Savers* is similarly a critique of the reformers who helped to construct the juvenile court system. By implications at least, it suggests that the child savers were alone responsible for the disastrous consequences of the juvenile court system and that a better system could be constructed by more enlightened reforms" (PLATT, 1977, xiii).

I am not sure that this kind of implication can be so easily drawn, but, despite this, Platt is arguably right that a better system could have been built. The presentation he did in both editions let us to see clearly that his object of study is related to *the ideas put forward by this social reform movement itself* and not to the creation of the courts as such and even less to their mode of functioning. The creation of specific jurisdictions for youth was an implication and one of the claims of this movement. So, this work allows me to know the starting ideas that will later have an influence on the elaboration of the "Doctrine of the irregular Situation" in the Brazilian context and also one of the possible rationalities still present in my empirical material.

The empirical data made available by Platt allows us to observe the two ideological sides of this movement and its ambivalences, as well as the cleavage of orientations that it gave rise to at this time. On the one hand, the movement has clearly expressed its project to free young offenders from the grip of punishment theories that form the hard core of the MPR's idea systems: retributivism, deterrence and denunciation. These ideas were favourable to the infliction of suffering and indifferent to social inclusion, gave their support to the death penalty, life sentence, minimum prison terms, consecutive terms of imprisonment, public stigmatization and denunciation of the offenders, etc. This movement aspect was described in Platt's study but less emphasized by him in his analyses of the movement.

On the other hand, this social movement will considerably broaden the scope of the State's intervention with regard to young people and their families (especially those from disadvantaged social classes). By wanting to "save young people" from mistreatment and certain situations of

exploitation or immorality, the reform project considerably reduced the legal protection of young people and their families with regard to the State. The latter was represented as having to be a "mother" or a "father" who would become the guardian of the young person in danger and of the young delinquent (but not a criminal).

The focus of Platt's attention will be on the second aspect of this reform movement. Indeed, on the other hand, this social movement will considerably broaden the scope of the State's intervention with regard to young people and their families (especially – if not exclusively – those from disadvantaged social classes). By wanting to "help and save young people" at the same time from sentencing in adult criminal justice and from mistreatment and certain situations of exploitation or immorality, the reform project considerably reduced the legal protection of young people and their families with regard to the State. The latter was represented as having to be a "mother" or a "father" who should become the guardian of the young person in danger and of the young delinquent (but not a criminal). This naturally highlighted the confinement in an institution or school of reform which, according to the wish of the reformers, should be of "good quality".

As Pires (2016) points out, this Platt's research allows us to see that the formation of a criminal justice court for young offenders fits in and bifurcates the movement to install a penitentiary rehabilitation project for all offenders (youth and adults) during the 19th century[1]. Indeed, as Pires wrote, Platt shows that in the face of the repeated failure of their attempts to improve the general conditions of the prison system for everybody (the general and well-known criticisms directed at the prison), the reformers in Illinois would shift their interests in the 1880s to the reform on particular groups, especially children. This means that their special reform attention will (from this point on) focus and concentrate on these groups, due to the feeling of failure in the face of a more ambitious and general project. The reformers will then portray children and young people as a group of people who "need special care and attention" (Platt, 1977, 121). The core message of the reformers became: “Youths in delinquency are still in a state of development of their personality and are the citizens of the future or the budding citizens” (PIRES, 2016).

One of the reformers' mainstays is therefore a critique of the *adult* prison as a "school of vices and crime":

[1] See Platt, 1977 (indirectly chap. 5, pp. 117-123 and particularly pp. 119-123).

> “This state of affairs already seemed to them impossible to change. It also emerges from Platt's study that this criticism of adult prison as a “school for crime” is also accompanied by a criticism of the lack of classification among inmates according to several criteria: age, sex, seriousness of the crime, etc. So, a closer reading of Platt's work lets us see that the movement of "savers of young people" was not at all against the *reclusion* of young people in (new) institutions of confinement (or in a kind of "reform boarding schools"). On the contrary, they observed these institutions as being "the solution" to the problem of ill-treatment and delinquency (Platt, 1977, 127), provided, of course, that these care institutions were well conceived and maintained (according to the parameters of the time).” (PIRES, 2016).

As we will see later, this historical re-reading of the first reform movement leading to the creation of the juvenile court is very important to shed additional light on my empirical results. Indeed, I will show further that this old ideology sustaining the “reform boarding schools” (imprisonment) will make a kind of surprising alliance with retributivism, the finality of general deterrence and the finality of denunciation in the jurisprudence analyzed. This result is surprising in two respects. First of all, the courts, unlike the reformers, are no longer interested in the “good” state of the institutions to which they send young people. It's the simple confinement that counts. Secondly, one merge the discourse on rehabilitation with the criteria and the purposes that fall within the theories of punishment criticized by the original reformers. This can be understood by the fact that the "localization" of the speech has changed. It is no longer the original reform movement that holds the speech, but the actors of a court of second instance in criminal matters socialized within the criteria of adult criminal justice and "reacting" to a new legislative philosophy of intervention which they have not fully understood or with which they do not (yet) agree.

Coming back to Platt's text, it is also interesting to point out that when 'reform philanthropic schools' (of the private sector of society) for neglected, ill-treated and delinquent youth emerge, one sees almost immediately a criticism of the part of the reformers themselves (addressed to these juvenile institutions) that is very similar to the criticism addressed to the prisons for adults with only some peculiarities (for example, the criticism of the religious sectarianism of these private schools for reform). It is at this point, it seems, that the project of separating young people from adults in prison will then, so to speak, "migrate" to the courts and will sometimes also include the police stations[2] (*but not the appellate courts of law*).

[2] Platt (1977, 124) relates that in 1893, the *Chicago Women Club* worked to set up a police station for the exclusive use of women and youth. In the same year, a school of public reform for young delinquent girls was established (p. 125).

During this period John P. Altgeld was appointed governor and he was particularly interested in the welfare of minority groups, including criminals (youth and adults) (Platt, 1977, 124-125). As Platt (1977) points out, he saw criminals as people who needed guidance more than repression. For Altgeld, according to Platt, "the penitentiaries, reform schools and jails [...] were filled with 'erring-fellow-beings', while the 'real criminals' were corrupt industrialists and officials politically immune to it. criminal prosecution" (p. 125). It is interesting to note here the fact that the person / non-person distinction was applied explicitly or implicitly to criminals, hence the felt need to remove (at least) some young criminals from the category of criminals, which has been tried to using the delinquent / criminals distinction.

Now, perhaps the main ambivalence of this reform movement was with regard to the most serious crimes, such as homicide, and/or with regard to the criminologist distinction between people that can be rehabilitated and people that can not. This distinction will be part of the presuppositions of certain reformers and will be applied to the case of young delinquents. Indeed, Platt (1977, 32) lets us see that at least since 1884, we find certain reformers who will support the idea that there are young people who can be redeemed and young people that we can do without them or that we can sacrifice. The distinction used is between children *redeemable/expendable* (in Portuguese: "crianças resgatáveis/dispensáveis"). So, inside the same reform movement, we have a very important internal cleavage. In one pole, we find reformers like Altgeld that do not use this distinction to build a project of legal reform and that consider that all criminals, adults or young people, should be treated as if they could be guided, helped or rehabilitated. And, in the other pole, some reformers who introduce from the outset in their reform claims the presupposition that some young people can be sacrificed to the adult criminal justice.

Pires (2016) thinks that this ambivalence of the reform movement, and the reception of this distinction among the reformers, may have had a capital importance on the different reform models that will be built subsequently on the national and international scene for the youth criminal justice. Certain legislative reforms will exclude certain crimes (e.g., homicide) from the jurisdiction of juvenile courts or will include all crimes *but* will give to the youth court the authorization to transfer certain young people to adult criminal justice. Canada is one of the jurisdictions that constructed this model (Piñero, 2013). Other legislative reforms, on the contrary, will include (i) all crimes *and* (ii) will *not allow* the transfers of young people to the adult court. Nevertheless, this direction of the reform will not, of course, prevent the introduction of decision criteria inspired by retributivist ideas or by the purpose of general deterrence,

denunciation, etc. (for instance, the adoption of minimum prison sentences for young people)[3]. Brazil will oscillate inside this second direction of reform. Sutherland (1947, chap. 7, “The Juvenile Court”) draws our attention to the great variation in these models, which prevents us from presupposing the existence of a homogeneous model of the functioning of the courts for both youth and adults.

How we can see to some extent, this work of Tony Platt allows me to know the starting ideas and ambivalences of the “Doctrine of the irregular Situation” that characterized the previous legislation in Brazil concerning the youth and also one of the possible rationalities that could be (and will be effectively) present in my empirical material.

d) Veronica Piñero and the modern penal rationality research program: *Transformations in the Canadian Youth Justice System. Creation of Statutes and the Judicial Waiver in Quebec* (2013).

Also grounded on the theory of MPR, Piñero has conducted two complementary research studies on juvenile justice in Canada (2006 and 2013). The first research explored juvenile criminal law promulgated by the Canadian federal government showing that the youth criminal law legislative program shifted from the notion of "child protection" to the notion of "protecting society." This second medium began to give more space to the purposes of deterrence, retribution (proportionality) and denunciation (social reprobation) in juvenile justice. Thus, she has already examined the influence of MPR ideas on second-generation legislative programs but focused on the case of Canada. Their study showed that the Canadian political system while increasing "juvenile rights" in procedural and jurisdictional issues (separating cases of delinquency from abused and abused children) began to introduce MPR-inspired reforms to more severe sanctions for more serious crimes. So, the notion of "protection of society" influenced by the prevalence of deterrence, retribution and denunciation theories started to penetrate into juvenile justice, assuming part of the space previously occupied by the notion of "youth protection" (against crime, abandonment, and immorality, and also against retributive and dissuasive punishment) focused exclusively on the first theory of rehabilitation in “reformative institutions”.

This Piñero's study (2006) has points in common with this thesis: both rely on the same theory of MPR and exploring its use for understanding problems in the field of juvenile justice.

[3] See Sutherland (1947, chap. 17) for an overview of the variations in the constructions.

Its purpose also included a legislative comparison between the first and second generation programs. Our two studies are inscribed in the Research Laboratory on Modern Penal Rationality at the University of Ottawa under the direction of Pires. The points that differentiate my research from Piñero's are the following.

Piñero's research looks at parliamentary debates in Canada and the operations of the political system in creating laws. His research shows a kind of regression in the legislative agenda for young people: the political system tries to bring the practice of intervention with young people closer to that of adults in the case of the most serious crimes. My research explores what happens in case law from a reverse starting point: the Brazilian political system has granted more rights to young people while further accentuating the difference between the two systems of ideas in legislation (RPM and protection for young people).

In contrast, my research also allows observing the joint presence and relationship between three systems of distinct ideas within the juvenile criminal justice subsystem, namely: the idea system of the first and second generation juvenile justice programs and the ideas system of MPR (adult criminal justice);

Piñero's research is part of the field of legislative history ; mine is part of the analysis of the present (contemporary situation) in the judicial system and covers the cognitive context of an appellate court no specialized for juvenile justice cases.

Piñero’s doctoral thesis (2013) deals mainly with judicial history research (process files) centered on the observation and analysis of a "legislative mechanism" created by the Canadian political system since the first juvenile justice program in Canada (1908). The mechanism studied, which also exists in other juvenile programs of the first generation, is called a "transference mechanism of jurisdiction." This mechanism allowed the youth court to decide a question of jurisdiction: whether the young person would be processed and sentenced within the youth justice system, or whether the young person would be sent to the adult court for him to be dealt with and sentenced therein, if the court deems such an operation was relevant or "necessary" for some reason. The existence of this mechanism visualizes the ambivalence of the Canadian political system with regard to the establishment of a new system of ideas opposed to that of MPR for young people.

Piñero studied the motivations given by the Juvenile Court in Montreal (Québec state) to operate these transfers and found, among other motives, the influence of MPR's idea systems in these operations. She also found that MPR influence varied over time. In the first instance, before

the Montreal juvenile court was able to create a "proper culture of sanctions" independent of MPR, the influence of this idea system was more considerable and more intensive, sometimes associated merely with the seriousness of the juvenile offenses.

In a second moment, after the formation of a sanctioning theory independent from MPR, the influence of this idea system has reduced considerably. In this second phase, she found that transfers from the courts often came from probation officers and social workers operating in detention centers for juvenile justice. It was they who told the courts that it was better to transfer the young offender not responding well to attempts to rehabilitate the center. Piñero also found the constitution of a legal culture centered on a theory of rehabilitation outside MPR; the juvenile court also began to reject the first attempts of the political system to introduce the influence of theories of deterrence and retribution in the field of that justice. My research has the following points in common with this second Piñero's research:

1. Both studies have looked at the influence and relevance of the MPR theory to understand some evolutionary issues in juvenile justice cases.

2. The two investigations observed the process of understanding and interpretation of statutes by the judicial system, but Piñero concentrates on the operations of a trial court and on a mechanism that does not exist in Brazil, while I focus the entire case-law of an appeal court.

3. From the methodological point of view, our two surveys adopted a quantitative form for selecting the sample before proceeding to the qualitative analysis of the dossiers;

In addition to the points indicated above, the main difference of my research from Piñero's study is as follows. In the case of 2013 Piñero's research, the confrontation between juvenile justice and MPR idea systems takes place in the first instance, focusing exclusively on the specific mechanism of transference. This mechanism does not allow a clear distinction between the first- and second-generation juvenile justice programs.

My research offers an unprecedented opportunity. I have the possibility of examining simultaneously and globally (set of decisions on sanctions) the relationship established between three systems of ideas:

1. First, an idea system foreigner to juvenile justice (MPR), but inserted into case-law due to judicial construction.

2. Secondly, an idea system regarding first juvenile justice features repealed by legislative practice.

3. Thirdly, a new juvenile justice legislative program that finds (greater) reception difficulties at the level of the appeals court influenced by MPR.

e) Edwin Lemert: *Legislative Change in the Juvenile Court* (1967)

To conclude this section, designed to display in detail the object of my study, I present the contribution of the American sociologist Edwin Lemert (1967) to the sociological observation of the impact of the legislative reform in the juvenile court.[4] In this article, he will observe a legislative change that took place in the formal standards of the Youth Court on Crime and Child Welfare in the State of California in 1961 ("California Juvenile Court Law"). He will describe, as Pires (2015) writes, "what happens in the internal dynamics of a well-established" Y "(*juvenile court*) organization system, with its own internal dynamics, when another organization system "X" (*parliament*), external to the first organization, produces a relatively substantial modification of the formal rules of *procedure* and *jurisdiction* that are used by the organization "y" to structure and organize its own mode of operation".

It is possible to see already at this point a certain approximation, still superficial, of Lemert's research with mine: in a general way, both examine the implications, the impact, or the result of legislative reform on the court's practice affected by this reform. However, even if it is still too early to see it clearly, there is also a major point of difference (but not *divergence*) between the concrete form of our two objects. Lemert's review focuses on *procedural standards* and *norms of a judicial organization* that deals with the distinction between criminal law transgressions and other youth matters ("*unfit homes*," etc.). This California reform will make one of the first attempts to separate hearings referring to "delinquency" from other cases of youth protection. In this respect, Lemert concluded that the method adopted by the legislator to produce

[4]To make this presentation, I relied, of course, on my own reading of this text, but also on a working non-published document prepared by Pires (2015) which relates more generally to the contribution of this research by Lemert to the sociology of legislative reforms.

this result raised a great number of organizational difficulties and would not fully work (at the time of the research): "Despite the change in the law, formal adjudication at hearings remains a marginal function of the California juvenile court." (LEMERT, 1967, 438)

In his research, Lemert will focus his attention on the formal and official introduction of the "*legal role of the lawyer*" in the functioning of the juvenile court. He then looks at what is going on regarding the *interactions* between trial operators, trying to see what the lawyer's introduction succeeds or not to do concerning guaranteeing rights for young people and their families and how the Juvenile court will adapt to this new character, therefore, *public and private lawyers*. His attention focuses - if I can say so - on the adaptation of the "behavioural system" of the operators (judges, probation officers, prosecutors, and attorneys) to this reform.

In my case, my attention will focus on another point. On the one hand, because of the reform that I am examining, which goes further than the one examined by Lemert, I decided to focus my attention on sanction rules that introduce a new idea system (cognitive plan/behavioural plan) in determining criminal sanctions. These rules of sanction are, in the case of the Brazilian reform of 1990, the "mechanism of mediation" (Pires 2015) through which the Parliament will propose a system of original and innovative ideas to the juvenile court. On the other hand, my choice to observe these sanctions was stimulated and guided by my theoretical problem, in this case the theory of Modern Penal Rationality. Indeed, historical and empirical research on the program of this theory has shown that these theories of punishment play a major role of cognitive or "epistemological obstacle" (BACHELARD, 1938) to the overall reconstruction of the penal system (see Chapter 2).

However, I do not observe then, as Lemert did, the possible changes in behavioural dynamics among trial participants (youth, parents, social workers, police, prosecution, defense, judicial). In fact, I observe how a specific group of social operators (the appellate court judges) receive, understand (good or bad), accept/reject and adapt to this innovative system of ideas about rules of sanctioning, based on their previous experience and legal knowledge. In the foreground, my point of view is cognitive and communicative: the case-law produced by this group of legal actors. Recalling that members of the judicial system compose the only group of professionals that can operationally devise the case law that refers to the criminal court of young people (Juvenile Justice).

Of course, this choice does not negate the importance of other topics of study. But this remark is reciprocal: the choice of other objects of knowledge does not deny the importance of

the choice of my object (according to my *theoretical problem*). For example, even within the framework of the theory of Modern Penal Rationality that I adopt, it is very important to know *also* how prosecutors and defence lawyers (public/private) have received this new idea systems and their respective roles in the juvenile court. Do they see a difference with the "adversary system" of adult criminal justice or not? Do they understand the concept of "integral protection of *youth rights*" or continue to act in a manner equivalent to what they do in adult criminal justice? But all these questions would require *further research with another type of empirical material*. And regarding case-law, I can only foresee very little about these two other groups of operators and always through the *reconstruction* of the judiciary. As Pires wrote, in taking up the remarks of Bourdieu, Chamboredon and Passeron in *Le métier de sociologue*, the social scientist must not underestimate or neglect "the" *search for specific rigours* "[Bourdieu et al.] at each subject of study or to each specific theoretical problem "(Pires, 1987: 91).

According to Pires (2015), Lemert examines in his article the first - or one of the first - legislative reforms in North America that will introduce what Pires calls "the second generation of legislative programs" dealing with juvenile criminal courts. According to Pires (2015), "This second generation of programs will soon find it extremely difficult to both grants more civic rights to young people and remain in the innovative register for sanctions (and even of procedure)." Pires distinguishes between two generations of legislative programs in juvenile justice:

> "The first generation emerged in the United States in the late nineteenth century with the formation of" hybrid "(criminal/civil) youth courts. These courts have jurisdiction in criminal and non-criminal matters and, in criminal cases, also have specific standards of sanctioning and procedure. They have the peculiarity of not distinguishing clearly, in their own functioning operations, the two matters (civil/crime). The second generation emerges and develops little by little (and with difficulty) from the second half of the twentieth century and is primarily motivated initially by the purpose of granting more *civil rights* to young people and their families (especially those of disadvantaged social background). This generation can be empirically characterized in its broad outlines as follows:
>
> 1. It starts from the observation of a *civil rights deficit* about young people and their families and will be globally motivated from the outside by the purpose of granting these rights to young people and their families.
>
> 2. In the beginning, the reform will combine two main normative goals: (i) to allow procedural guarantees for young people and their families before the courts of the State [*problem of procedural standards*] and (ii) to separate the jurisdiction or criminal matter of the court or civil matter. This purpose seeks to mark a more explicit border between the mode of intervention with young offenders (cases of "transgression of criminal laws") of the mode of

> intervention with young people (a) *abandoned*, (b) in a situation of *moral peril* or and (c) young *victims* of parental maltreatment (*problem of jurisdiction and norms of judicial organization*).
>
> 3. Thereafter, this generation will add a third purpose: that of introducing an innovative system of ideas in terms of sanctioning standards to further reduce the use of confinement and take more distance from the first modern theory rehabilitation centred on confinement without returning to retributive theories and deterrence (*problem of theories of punishment and norms of punishment*)" (PIRES, 2015, 4).

Pires (2015) adds that, regarding Lemert's discussion paper, this second generation of criminal court juvenile justice programs will also characterize by a series of devising or design issues. For urgent questions will remain "un-thought" (PIRES). One of these questions will be: "How to properly introduce more legal guarantees for young offenders without introducing at the same time the adversarial system's procedural standards and traditional theories of punishment (retribution, deterrence, etc.)?" (PIRES, 2015). In this regard, there will be a well-settled disagreement among advocates for rights reform for young people themselves:

> "Proponents of reform to boost youth rights will not agree on how to strengthen the rights of young offenders while agreeing with the need of doing it. A difference of "method" that I presume can be attributed to the complexity of the problem, the enormous cultural influence of adult criminal law and semantic misunderstandings between them. We find, in one pole, the supporters (mostly jurists) of the adult criminal justice model in an "attenuated" format. This method of reform then includes both the procedural norms of the adversarial system and the theories of retribution, deterrence and social disapproval. Unfortunately, this will cause a series of obstacles to innovative thinking since the model is already known (it is not innovative) and we know that it does not work well in adult justice concerning a valorization of confinement. On the other hand, we find another group of reformers (lawyers and non-lawyers) who rely more on the emerging model of "restorative justice" in its more innovative form and opposed to traditional theories of punishment. Unfortunately, this group is not going to develop any clear alternative to the adversarial system for juvenile justice (how does the prosecution, the defense, the judiciary and other stakeholders have to conceive of their role in this new justice?) and will get caught up in an unresolved semantic battle with the first group over the meaning of the legal response to youth criminal law violations. Does punishment necessarily mean always an intended infliction of suffering? The socio-educational measure can be at the same time a punishment? Is the socio-educational measure "retributivist" and, if so, what does it mean precisely? Can this measure be seen as "retributivist" in a specific sense while being of a qualitatively different nature from the retributive theory of adult justice? Etc. (PIRES, 2015: 7).

I highlight that the 1990 Statute will introduce an innovative idea system regarding sanctions. And this law will not allow any form of transfer of youth criminal -files to adult justice (as in the United States, Belgium, and Canada) nor any adoption of the way or “ends” to punish adults to justice for youth (current regression of the legislative youth Canadian System)[5]. In this sense, the Brazilian reform is much more innovative than that of California in 1961 and goes more “in deep” in the perspective of social inclusion *with rights* than a large number of current second-generation legislative programs. Due to a series of misunderstandings, I also point out that this new idea systems on sanctioning *is not that of the old juvenile justice* (the "doctrine of irregular status" or the "old theory of rehabilitation in prison"), *nor that in force in criminal justice for adults* (the system of ideas of modern criminal rationality"). It can be considered as a *third idea system*, differentiated from the other two. This is one of the original "conceptual clarifications" proposed by this work.

Having said this, I present, in numerical sequence, several specific points and results that intertwine Lemert’s research (1967) with mine.

1. Lemert (p. 440, 24) described the 1961 reform as popularly observed by introducing a "*Civil Rights for Juveniles*" or a "*Little Bill of Rights for Juveniles*." In particular, it will seek to increase "procedural legal safeguards" for young people and their families by formally introducing the character of the *lawyer* (public and private) with a role similar to that played in the ordinary subsystems of civil and criminal law. Until Lemert's study, criminology and sociology had focused on the first generation of juvenile justice legislative programs[6]. In the early 1950s, the first legislative programs for young people of the first generation began to be seen as a kind of "administrative justice" that does not grant enough *civil rights*[7]. The concept of "youth protection" in this first generation of programs allowed the state to remove children from their parents or caregivers and/or to easily place them in detention in an institution without "reasonable or sufficient reason". The Wisconsin Law Review abstract summarizes Lemert's article as follows:

> “This article studies a comprehensive change in the California Juvenile Court Law that was enacted in 1961. It inquires into the possibility of changing behaviour patterns by legislation. Focusing on the role of counsel, Professor

[5] See Piñero, V. (2005), “Modern penal rationality: the case of the Youth criminal Justice Act”, Master, University of Ottawa, Ottawa (traduction espagnole, “Protección del menor vs. protección de la sociedad. La racionalidad penal moderna en la justicia de menores”, Buenos Aires, Ad-Hoc, 2007).

[6] For instance, Sutherland (1944) et Platt (1969).

[7] I wonder if there is any similarity here between these early juvenile justice programs and the "administrative" type legislative program adopted by immigration control tribunals. See, Vieira V, João G. (2014).

> Lemert found that the change gave attorneys formal entry into the juvenile court. However, this gave rise to new adaptations among the participants in the juvenile court process, adaptations that could defeat the intent of the proponents of the change. He concludes that while formal structures are changeable in anticipated directions, the form taken by the new roles in the modified structure is less subject to directed change." (LEMERT, 1967, 421)

The second sentence of this abstract is central to my remarks here: Lemert "*inquires into the possibility of changing behaviour patterns by legislation.*" My research, which adopts the theory of Modern Penal Rationality, focusing its attention on cognitive-epistemological problems (systems of ideas). I then wonder about the possibility of c*hanging decision patterns and then building up the jurisprudence on sanctions* (the judges of the Court of Appeal) through a legislative change produced by another system (Parliament). In his research, Lemert shows that the reform will succeed in producing or provoking certain actual changes, but also that these changes "gave rise to new adaptations among the participants in the juvenile court process, adaptations that could defeat the intent of the proponents of the change". Without going further for the moment, I will also find in my research a result that is broadly equivalent: the legislative reform of juvenile justice in Brazil in 1990 will produce effective transformations, but these will also give new forms of adaptation between the operators who will defeat the purpose of the reform. The last sentence of this abstract is also important to me. Lemert "concludes that while formal structures are changeable in anticipated directions, the form taken by the new roles in the modified structure is less subject to directed change". This sentence is in the conclusion of his article. The full paragraph is as follows:

> "This article has been less concerned with resolving the social and legal issues of the juvenile court than with the possibility of changing it by legislation. It concludes that formal structure and procedures can be changed in anticipated directions, but the form that new roles take in the modified structure is less subject to directed change. Furthermore, while means may be changed, old ends persist and continue to be satisfied." (LEMERT, 1967, 447).

In my case, I can also show that some of my results overlap in part with those of Lemert. For example, my research shows, like his, *the great limits of a simple legislative reform* to change the way courts deal with juvenile delinquency. My results also indicate, like his, that the formal structures are modifiable in the intended direction (and in my case have even produced some practical results in this direction), but that they are helpless by themselves to produce a

transformation in the way of communicating and deciding the operators of a system *without an autonomous participation from them going in the direction of the new system of ideas introduced by the formal reform*. I also observe the presence of traditional theories of punishment (adult justice) in the Juvenile Court of Appeal. But as these theories offer "old ends" to the legal operators, I can also conclude like Lemert: "*while means may be changed* [for example, there is no minimum prison sentence, there is no of cumulative penalties, the maximum penalty for all crimes can not exceed three years, etc.], *old ends persist and continues to be satisfied*".

2. Lemert (1967, p.423) presents this 1961 California legislative reform as follows:

> "While the changes cast into law dealt mainly with jurisdiction and procedures, their legislative history reveals the underlying aims to have been the guarantee of greater justice or a fuller measure of civil rights for juveniles and their parents. In essence, the new statutes restricted the power of police and the juvenile court to intervene in parent-child relationships, forbade unnecessary detention and separation of children from their parents (without "reasonable cause"), and specified the form of hearings to detain, declare wardship, and make case dispositions."

This same "spirit of reform" is found in the Brazilian legislation of 1990. In principle, it was also supposed to change the form of intervention of the police and youth courts and reduce the power of the police and courts in unnecessary detention. But the great difficulty on the cognitive level is that both the police and the courts have a precognition of what is or is not "necessary". Concerning the appeal court decisions analyzed in this research, what is or is not "necessary" will be constructed mainly by a prior reception of traditional theories of punishment, primarily deterrence and retributive theories. However, the deterrence theory emphasizes (i) the choice of an afflictive sanction, (ii) the certainty of the sentence and (iii) the fact that the suffering to be inflicted on the guilty party must be greater than the harm that he caused (PIRES, 1998, 2004). If an operator agrees with this theory, the infliction of a painful sentence becomes easily "necessary", and confinement appears to be the "appropriate response". This answer seems all the more appropriate as the prison can be justified at the same time by the theory of deterrence and prison rehabilitation.

The theory of retribution takes up almost the same message: it maintains that (i) the sanction must seek to produce or communicate suffering, (ii) that this afflictive sanction is *obligatory* and (iii) that this suffering must be *proportional* to crime sickness. If the system operator adheres to this theory, he may fall into the trap of looking only at the "formal gravity" of

an offense and wanting to give harsher punishment for that reason (for example, "drug trafficking," "Robbery," etc.). The prison sentence also appears to be "necessary" and all the more easily as the operator can add that it will help "rehabilitate the young" (system of ideas of modern criminal rationality, see Pires, 1998, 2017).

3. Lemert draws attention very quickly to the limits of California's reform. This one was directed exclusively to the courts:

> “The new law promptly generated large modifications in the structures of the juvenile court, lesser ones in adjacent agencies, such as juvenile bureaus of police departments and public defender's offices. More persons were given official status within the court, including private attorneys, public defenders, referees, traffic hearing officers, clerks, bailiffs, and court reporters. The result has been to make the juvenile court more like a court and less like an administrative agent or agency”. (LEMERT, 1967, 423)

In my case, some of the limitations of the 1990 reform are also visible. For example, the 1990 reform did not produce any substantial change in the way the police intervened or in the way it reconstructed the event (problem situations) in writing. Also, it had almost no impact at the appellate level (see Chapters 4 and 5 as well as Minahim and Sposato, 2011 and Sposato, 2015). But I presume that it has had an impact in the courts of the first instance, mainly when the operators are specialized in juvenile matters. It can also be said that the 1990 reform did not lead to training courses in juvenile justice (neither for law students nor legal professionals). And the legal literature on juvenile justice still reproduces the conventional theories of punishment. Under these conditions, it is not difficult to anticipate that an innovative stabilization in the innovative system of ideas remains possible but highly improbable.

4. Lemert (1967, pp. 423-424) also points out that these reforms often produce a new administrative burden for the courts and other organizations concerned. However, this new burden calls for new material resources and (differently) qualified personnel. If these resources are not filled, a series of new problems of adaptation, management, and uneven functioning appear in the various counties of a State (large/small towns, etc.). In our case, this also happens for the whole of the 1990 reform on the national territory: it is applied unequally by the political system concerning resources. And this becomes visible even in my data. For example, the 1990 reform set a maximum period of 2 months for appeal judgments to be concluded, after 45 days in the first degree. This new period for judging requires resources and an administrative priority.

However, none of the appeals we examined met this legal timetable (Chapter 4). The Appeals Chambers have not established any particular procedure to prioritize these cases in juvenile matters. As Lemert points out, here we are in front of a case where the implementation of the reform becomes a case of "*substandard*" (Carr, quoted by Lemert, 1967, p.424): the operation will be done in a lower way established standards. Of course, youth detention centres are often also in poor material conditions, and the training of designated staff leaves much to be desired. Another obvious and even more important case of substandard. However, under the conditions that these institutions of detention are in, it is even more surprising to see the jurisprudence of the Court of Appeal so casually speak of the "beneficence" or the "necessity" of imprisonment for the right young. Lemert writes in this connection:

> "The new legal demands became defined as problems or as burdensome not only because judges, probation officers, and law enforcement people lacked means to comply, but because they also struck directly at informal and sometimes extralegal usages long followed and for the most part held to be satisfactory". (LEMERT, 1967, 424)

With regard to the lack of adequate material and professional resources in small towns in California, the North American sociologist Cooley (1909), who worked early on the theme of "social organization," had already observed the fact that that some reforms introduce "*too much mechanism in society*" for these regions. Lemert (1967, 425), who cites this passage from Cooley, then adds this observation concerning the reform he examined: "*Compliance has been partial and inconsistent, with minimal psychic commitment or conviction that the changes were necessary*". As this problem of material and professional resources is also important in my case, but this is not part of my data, I quote a longer passage from Lemert where he reports on the different forms of adaptation of the courts to the California reform of 1961. I do not think that a researcher would have difficulty in finding exactly the equivalent of all these forms in the case of the 1990 Brazilian reform. Lemert gives the example of detention hearings as an example:

> "Detention hearings are a case in point. Prior to 1961 only twenty-two counties regularly held such hearings. Counties with official referees most easily solved the problem, for they could, within the letter and spirit of the law, assign the task to them. Courts in other counties, however, were pushed to such expedients as delegating detention hearings to probation officers, to the superintendent of the juvenile hall, or even in a few counties to the local justice court official. Under critical circumstances court officials in a few counties have omitted detention

> hearings or postponed them beyond the forty-eight hour limit. In one county, the judge signs blank forms for use by the probation officer in his absence. Such actions have been undertaken less in a spirit of defiance than as calculated risks, for now there is always the possibility that parents may protest or that an attorney may turn a jaundiced eye on the court and make an issue of such expedients". (LEMERT, 1967, 425)

When a change of this magnitude happens in the formal structure of the operating norms of an organization, it is not at all surprising to see some kinds of resistance to new standards emerging from professionals. And this "resistance" may later take the form of psychic inconvenience among the operators themselves. Lemert also observed this phenomenon:

> "Judges and probation officers in a number of these counties originally had resisted changing the law, and the attendant controversy left many with residual hostility or resentment, especially over the implication that they had been disregarding rights of juveniles". (LEMERT, 1967, 424)

There are also some similarities and differences between Lemert's study and my research. As in the case of Lemert, I demonstrate in Chapters four and five that the Appeal Court did not adopt the new intervention philosophy of the 1990 Youth Justice Act. But I'm not sure that the term "resistance" is the appropriate term in my case. First, Lemert's research was made closer to legislative reform than mine. Lemert's published his results six years after the legal change. It is usual that a substantial reform that upsets an organization's way of doing things will, at least in the short term, generate some resistance from its operators, especially if the resources to put it into practice are lacking. As for me, my data is for the period between 2010-2016, that is, twenty years after the 1990 reform. And these data cover an additional seven years. Is it (yet) just "resistance"? In the specific case of the two-month legal deadline for deciding an appeal when the first instance sentence is detention, it seems possible to speak of a form of "administrative resistance." But what *term* should we use to refer to the fact that *appeal court judges*, often without any experience or training in this ground-breaking legislative program of 1990, are still implementing the idea system that predominates in criminal justice for adults? Resistance? Cognitive habits or "mores" acquired and rooted? Difficulties in understanding the new intervention philosophy? Lack of training in this new philosophy? Belief in the theory of deterrence? Adherence to retributive ideas? My data only allow me to see that the appeal judges use the theories of deterrence and retribution and that they take the place of the new philosophy of the Doctrine of Integral Protection of the rights of young people. To designate a problem of

this magnitude, present even in the national and international legal doctrine, the theory of Modern Penal Rationality chose the more encompassing term of *epistemological (or cognitive) obstacles* (Pires, in Gisi, Tonche, Alvarez, Oliveira, 2017) instead. This approach does not exclude "resistance," but also indicates the presence of a much more complicated cultural problem.

Indeed, my data does not allow me to know what *motivates each operator* to update the current idea system for adults. I reviewed excerpts of written communications (case law) without the opportunity to question the participating individuals. So, for example, I cannot even know if operators still believe in "magical" or "global" capacity in the deterrent effect produced by harsh sentences. Or if they only use these motives because it is inscribed historically and institutionally in legal practices as a "valid reason" for selecting and justifying a severe sentence that may have been imposed politically by lawmakers. On this point, I cannot make elaborate working hypotheses. Recalling Campenhoudt and Quivy (2006, 127), that in science we often call "working hypothesis" one that which is already "based on a theoretical reflection and preparatory knowledge of the phenomenon studied." In this sense, the notion of working hypothesis differs from the idea of conjecture and spontaneous opinion. My data collection method gives me no answer to some questions.

5. Lemert's research focuses on the introduction of the lawyer (public and private) in the first programs of the second generation. It then shows in *passing* the enormous difficulty that there was, under the plan of the interactions between the various operators of the justice, the entry on the scene of this new character. And this, particularly, in the case of the offenses "without gravity" or offenses where the young person does not dispute his guilt. In the latter case, if the lawyer has not understood that his task is then to help the court to choose the most appropriate sanction and, if the young person does not pose a high risk of physically violent behaviour, the least oriented to detention, it will annoy everyone. Because then he remains focused on the task of condemning/acquitting the young person, causing everyone to waste time with what is not disputed by the accused himself. Lemert writes in a section of his article on *Role Confusion and Role Conflict*:

> “A great deal of underlying confusion and uncertainty arises in California juvenile court hearings due to lack of clarity and to structured conflict in the roles of attorneys, probation officers, and judges. This is most painfully apparent in the actions of private attorneys without previous juvenile court experience”. (LEMERT, 1967, 430)

One of these private lawyers without experience in this type of court will express to Lemert after an audience his dismay: "What can you do in this kind of a Court? Downtown [in adult courts] I know what the rules are and what I can do you like it here, and hope for the best. " (LEMERT, 1967, 430). From the point of view of a lawyer who is used to the adversary system, this juvenile court is a UFO, an "unidentified flying object."[8]. Lemert emphasizes that one of the problems lies in the fact that he will try to exploit a field where there is nothing to do, instead of focusing on what are the possibilities regarding the choice of sanction:

> "Apart from lacking ideas about how to exploit the court to their clients' advantage, attorneys often confront cases in which there is literally nothing that can be done. Their inactivity may confirm the skepticism of judges who believe they have no place in the court. One such judge sarcastically observed: "They sit there like bumps on logs. They take the client's money and do nothing." (LEMERT, 1967, pp. 430-431).

I recall that Lemert examined a court of the first instance. Lemert will then add this remark on this difficulty in the interaction systems between the operators:

> "Attorneys undoubtedly feel pressure to do something for their clients, but if they become contentious in true adversary style they slow down the proceedings. Insisting on the right to cross-examine witnesses adds greatly to the work of the probation officer. He, as well as the witnesses and even the judge, may 'become irritated, particularly if he regards the case as open-and-shut and the intended disposition as lenient." (LEMERT, 1967, 431).

In this passage, we can see inter the lines the problem that poses the integral reproduction of the *adversary system* in juvenile justice: the gloom and an additional number of useless steps that will take the place of the relevant actions (which also require time). Further, Lemert returns to this situation where the defence lawyer becomes "unnecessarily more."

> "If he [attorney] pursues an aggressive line of action he may alienate the probation people and do his client more harm than good. An illustrative case is summarized by a probation officer:
>
> > The case was a return from camp for another hearing and new disposition, and the attorney really raised hell with us. He [the attorney] insisted on cross-examining all of the witnesses, which meant that we had to bring about ten people fifty miles in from camp. One woman, a cook, was so

[8] This is an expression used by Pires in another context and borrowed from another sociological researcher, Pierre Lascoumes, who is also his friend.

> upset by the attorney's cross-examination that she said she would bring in her own attorney if she had to come again. Everyone was sore, and now the people out at camp are going to get the boy dead to the right. They'll watch him like a hawk and make it so unpleasant he can't help doing something which will get him out of there" [probation officer] (LEMERT, 1967, p. 437).

6. Despite free public counsel after the California law reform, not all cases in court will have a lawyer. The family could seek public counsel from the judge or appoint a private lawyer. This will lead Lemert to examine the cases where the accused will or will not have a lawyer to accompany them. This is the problem of the *lawyer's allowance*. Lemert (1967: 428) begins by presenting the following fact: "They are lacking for proof, at least half and probably the great majority of councils in California are those assigned by the courts". I will limit myself to presenting the results which seem to me more relevant for my remarks.

First, in my opinion, this is an empirical indicator of the more disadvantaged social status of youth (and their families) called to appear in youth court. I presume that better-educated, wealthier families would not hesitate to take a lawyer if their children went to court for a criminal offense. Lemert is not explicit about his methodological criteria for determining the social level of families. However, among the families presented before the court, the middle layer is less represented by lawyers (LEMERT, 1967, 428). Second, Lemert will ask how lawyers are awarded by the court. His overall answer is:

> "More active factors in decisions to assign or engage counsel lie in the type of case jurisdiction and the seriousness of the problem or offense it presents. The attitudes and values of judges, probation officers, and referees and the nature of their social interaction with youths and parents, are equally significant" (LEMERT, 1967, 428).

The two situations where there is a higher likelihood of receiving a lawyer are the "cases of so-called" "*unfit homes*" " and the more serious cases of criminal offenses (LEMERT, 1967: 428). The cases of "*unfit homes*" are observed by the judges as being difficult to decide because the statements will either blame the parents or blame the young person.

In the case of more serious criminal offenses, the assignment of counsel appears to be guided, on the one hand, by the fact that the consequences of a conviction may be more critical to the young person. Indeed, even in cases where the young person does not contest his guilt and the evidence on the record has several elements of corroboration, the lawyer is seen in these cases as

being able to help the court to select the appropriate sanction less restrictive and more respectful of the young person's rights. On the other hand, the fact of *not assigning a lawyer for less severe offenses* is due to two factors of a different nature. In some courts, especially in small towns, judges are still "in private" simply against the presence of a lawyer whom they see as disrupting the dynamics of his course. On the other hand, in other courts, judges are not against the presence of a lawyer, but they find that they are not necessary when it is an offense "without gravity" and that the sanction planned will be anyway "benign" (and not prison). In other words, if the offense is not found to be serious and the anticipated penalty is observed to be "benign," the court's likelihood of being assigned a lawyer is very low.

I open a parenthesis here. California law firms referred to non-serious-factual offenses as "*mickey mouse*" offenses. The opposite of these offenses was the "serious misdoing" or the "real delinquency" (LEMERT, 1967: 430). In Brazil, this distinction between operators also exists, but it receives another name: "bagatelle crimes/serious crimes" (or "real crimes"). Obviously, depending on the context and the interactions between the participants, there may be differences in the definition of the situation: certain behaviours can be defined as *mickey mouse* offense by some observers and as "*serious misdoing*" by others. Simply looking at formal-technical gravity or, on the contrary, internal facts, makes a significant difference in this respect. But even in the case where the observer observes the "concrete behaviour," there may be different ways of defining the situation. We will soon see an illustration given by Lemert where the young person breaks into a bar and steals a box of beer, what may be a *mickey mouse* offense depending on the lens of observing, but others may see the situation with a little more "gravity" because of the break-in.

In Brazil, as we will see in our data when a drug offense receives the legal label of "trafficking or drug dealing," the definition of the situation as "*serious misdoing*" is almost automatic for some legal operators. This qualification will largely depend on an observation which remains exclusively formal and “technical”. But grounded on the facts, it is easy to define the majority of these offenses as *mickey mouse* offenses. Curiously, in Brazil, this formal and automatic judgment was stimulated by the legislator and passively accepted by the courts (and by some of the legal doctrine!). Indeed, the legislature has stated that, in his view, all "drug dealing" offenses are, at the other extreme, "heinous crimes" for adult criminal justice. Making resonance to this stimulus, some prosecutors and some courts automatically accept this definition of the situation for adults and, also, they transpose it to cases of juvenile justice. A double problem of

factual blindness and error of attribution of responsibility: for the adults and, consequently, for the young people. As this issue of *mickey mouse* offenses appears clearly in my data and attracts regular attention from the legal debate on juvenile delinquency, it is important to me. I now close the parenthesis.

Although lawyers are mostly allocated according to the gravity of the offenses, this does not mean that the offenses defined as *mickey mouse* offenses will remain without any legal "defence". Indeed, Lemert emphasizes that, in the juvenile court, *the judge who understands his role* does not see it as being similar to the one he would have in adult justice. As he puts it, "[...] the judge may feel that he and the probation officer can properly defend the interests of the child even though the parents are engaged in attorney" (LEMERT, 1967, 435). And I think I can generalize these remarks to the roles of *prosecutors*, lawyers and all the other advisers of the court even if Lemert will present this problem especially from the perspective of the judge.

Indeed, in the philosophical-juridical framework of the 1990 Statute in Brazil, all these operators or actors are supposed to consider the integral protection of the rights of the young people. The "interest of society" takes into account here at the same time the interest and rights of the young person. Each of these interests and rights (society/individual) are not abstractly opposed to the other as in criminal rationality for adults still today[9]. However, as Lemert notes, some judges will develop professional art to play this "double role", that of an actor who must question everyone, including in the presence of a lawyer, to take into account all the elements and interests at stake and that of an actor who must make an appropriate final decision for the case before him, which includes both the acquittal/conviction and the choice of the less restrictive sanction possible. Lemert writes:

> “In contested cases and in those involving serious issues, experienced juvenile court judges are likely to alternate between a managerial role, in which they attempt to ensure that all interests will be represented, and a hearing role, in which they seek to actualize the interplay of these interests” (LEMERT, 1967, 435).

I add, without betraying the results of Lemert, that the defense attorney with experience in a juvenile court can play his role in two different moments and on two separate matters in the case of a *mickey mouse* offense that would come up to court[10] : the lawyer can either request a

[9] See in this regard, Pires (1998, Chapter 1).

[10] As part of this new philosophy of intervention, neither police nor prosecution are obligated or expected to bring these cases to court. Other forms of conflict resolution are possible.

stay of proceedings to avoid any conviction (diversion) or even ask for verbal reprobation or a pedagogical warning. It may be surprising to say this, but in juvenile justice (with no criminal record and presence of juridical protection of the personal identification of the youth), these two paths are rendered almost equivalent. We will see in Chapter 5 that some lawyers who adopt the new idea system of integral youth protection will not necessarily ask for a case involving a *mickey mouse offense* to be archived. They may opt for a simple oral reprimand. Indeed, in this juvenile court and when all operators act by adopting the new system of ideas, acquittal is not the only "good solution" for *mickey mouse* offenses. In these cases, the "legal guarantees" encompass the entire institutional intervention and do not need only the acquittal to be actualized. That said, the particular problem of youth is that operators must be careful not to "inflate" the severity of behaviour and, subsequently, do not "inflate" automatically the penalty. If the operators have understood the meaning and the foundation of this justice, this reflex can be self-controlled.

7. To show the complexity of what I mentioned, I will resume here an illustration that Lemert gives on a lawyer's behaviour. On the one hand, this case serves to show that the lawyer does not yet seem to have understood his role in this court because he accepts, without apparent factual necessity, even the possibility of a sanction of detention. On the other hand, this illustration also serves to show that even a lawyer can abdicate, *at least in the case of youth, the task of always seeking acquittal when the offense is not serious and when there is not sufficient evidence for the conviction, but he knows, on the other hand that the young person has committed transgression*. This lawyer used to operate in the adversarial system of adult justice. He is now in juvenile court, and the youth has privately acknowledged his transgressive behaviour. He sees clearly that the probability of acquittal, in this case, is high because the evidence is largely deficient. But he does not find it appropriate to make efforts to acquit the young person because he does not want to give him signs of having understood or accepted his behaviour. He then decides to persuade the young person to admit his guilt in court. As we will see from his speech, this lawyer is not yet able to get out of the culture of imprisonment. This is an empirical sign of adherence to the system of ideas of Modern Penal Rationality and a sign of adherence to the theory of rehabilitation of the first generation of juvenile justice programs. This theory of rehabilitation did not yet see the problems of confinement. And as we will see, the young man had the sense of replication. Here is the speech of the public defender quoted by Lemert:

> “Ordinarily I stipulate that the probation officer's report is acceptable in the jurisdictional hearings. Otherwise he would have to bring in witnesses. In many such cases, perhaps most, the evidence would not support the judgment, but I hate to see a young kid get the idea that he can get away with something. One fifteen year old boy who broke into a bar and took a case of beer told me in-an interview that his problem was that he got caught. I became indignant and asked him if he wasn't too young to drink. The boy said, "No, only too young to buy." I decided he needed to be jolted – maybe with a stay in detention – so I encouraged him to admit his guilt in court. No *corpus delecti* needed to be established. If it had been an adult case, I would have taken the position that the D.A. could not prove his case because the beer was never found and not even reported until a month after it disappeared” (Public Attorney, quoted in LEMERT, 1967, 431)

8. The courts had different ways of avoiding the presence of a lawyer. Lemert says some parents of children will subtly consult some probation officers or judges about the need or the implications (good/bad) of having a lawyer to defend their children. In some courts, the presence of the lawyer will be discouraged for "non-serious" causes:

> “There is little doubt that the mien and tone of a probation officer or judge can discourage the hiring of an attorney by implying that there is no need for one, that it may pose problems, or that it may alienate the judge. This is most apt to occur in counties where judges privately are still opposed to having counsel in court or where a sharp distinction is drawn between trivial, "mickey mouse" offenses and serious misdoing-"real delinquency." If the revised law were followed fully, many of the former would be dismissed at intake. Furthermore, if an attorney were present and turned them into contests or adversary hearings, many would have to be dismissed for lack of evidence” (LEMERT, 1967, 430).

These results of Lemert then visualize the enormous difficulty that exists, and on different levels, *for transforming the legal practice of the courts exclusively by legislative action*. My research, done at another time and in another conjuncture, will show the same thing again. However, it does not seem useless to recall once again that, in the case of my research, I will focus my attention on the difficulties of "understanding" *in terms of the intervention philosophy regarding sanctions*, leaving the other types of difficulties in the shadows or only marginally or indirectly pointed as in this presentation I'm doing about Lemert's research.

9. To underline the complexity of the legislative reforms imposed from outside a social system, Lemert also shows that sometimes, in some courts and thanks to the decision of some judges, the purpose of the reform will be respected, but not necessarily by the reasons wanted in the reform. The way change, but the way of thinking does not evolve. In a court examined by Lemert, the judge will almost always appoint a lawyer for young people. But in the illustration

given, the judge does not do this to guarantee the rights of the young person. What motivates the massive integration of the lawyer in the procedure are, in this case, reasons strictly related to a redistribution of the workload:

> "In contrast to these tendencies [previous quotation], a judge in one county assigns the public defender in ninety to ninety-five percent of all the juvenile cases. Although neither the probation officer nor the public defender fully approves, the judge justifies his high rate of assigned counsel on grounds that he is busy and must make his decisions strictly on the basis of what is presented in court hearings. One result has been to magnify role problems for the public defender as well as for the probation officer" (LEMERT, 1967, p.430).

10. To conclude, I draw attention to the fact that, despite the points of overlap, convergence, and complementary between Lemert's research and mine, the two types of research are not part of the same theoretical perspective. And do not construct their respective objects in the same way. My research will adopt the theory of Modern Penal Rationality to observe if and how old theories of punishment of adult justice play the role of a cognitive obstacle to Criminal Law innovation.

On the other hand, Lemert wants to know if and to what extent fundamental legislative reform is capable of producing a change in another social system that has its well-established functioning. In his case, this other social system is the youth court of the first instance in California after the 1961 reform. The difference in the problematic theoretic and the construction of the object explains the difference in our research's methodological operationalization (see Chapter 3) and, of course, in our theoretical and empirical results. Despite these differences, I can make a loose attachment between the results of both types of research.

1.2. The international and national political conjuncture in the research context.

In this section, I would like to briefly describe the global and national conjunctions in which my research is inscribed. I have a narrow goal here, which should be well understood. I will limit myself to presenting the general "political climate" in criminal justice. I believe this climate somehow affects the way some legal system operators think and then decide. Many of them may have reduced the operational capacity to distinguish between policy (politics?) and law, as well as having a reduced capacity to understand the limits of what criminal law sanctions can achieve. I will do this with no intention of erasing the contours of my research object, but

also by not only dismissing clues that have brought my research to this day. I emphasize that mentioning the external context of this study is not to say that judicial mentalities inextricably intertwine with all the ideas observed in their environment, precisely because I have identified the prevailing intervention philosophies.

However, there is always a risk of blindness when looking directly at a highly bright spot - in my thesis from idea systems mobilized together - as well as the fear of ignoring significant observational data placed in shaded spaces. Thus, I decided to cite factors I saw situated before the appeal court decisions, even if they do not integrate the focal point of my research problem.

Hence, I argue that my research data display the presence of some environmental influences, as I will explain below in the case of the Brazilian law of "heinous crimes." However, it should be clear that I am not doing any direct linear causal analysis between this conjuncture in which we are and all of my research results. The reader should not read this section as if I were saying the following: "*At another political juncture, I would have found other results*." If someone understand this, it is because I have not been able to convey either the main content of this thesis or what I am trying to communicate with this section.

Furthermost, the criminal law ideas system has a strong and continuous long-term presence that goes far beyond what began to happen between the years 1980-90 until today. To sum, in this section, I am not making any causal attribution[11] between the current political context and the set of my results. Indeed, this kind of attribution would nullify or deny my research results. I also remember that a simple correlation of this kind (global social conjuncture → my results set) is not yet a sufficient proof of causality.

Political and legal sociology, criminology and even criminal law studies point to the intensification of repressive criminal policies from the 1980s and 1990s. As Pires (2013, 134) reminds us of Daems's work, the terms used to refer to this intensification of criminal repression are diverse: "*punitive turn* (Young; Frost), *new culture of crime control* (Garland), *rise of penal state* or *new culture of intolerance* (Pratt), *la pénalisation de la pauvreté* (Wacquant), *penal regressions* (Radzinowicz), *kriminalpolitische Wende* e *Renaissance des Strafrechets* (Sack), *Neue Lust auf Strafen* (Hassemer), *la republique pénalisée* (Garapon e Salas), *la pénalisation du social* (Mary), *new penology* (Feeley e Simon), *Gulags western style* (Christie), *populismo*

[11] For more details regarding this issue, see Pires, Cellard e Pelletier (2001), Machado, Pires, Parent, Matsuda, Ferreira, Luz (2010), Pires (2010; 2013a; 2013b). For a historic vision, in the moments of differentiation a criminal law creation, see Berman (1983).

punitivo (Aranda Ocaña, Chaves Castillo, Moreno, Aldea e Posada Segura), *neopunitivismo* (Pastor), etc.”.

Pires, however, draws our attention to the fact that these terms do not have exactly the same meaning because they do not describe or explain this intensification of criminal repression in the same way. For example, Garland observing the short-term criminal culture sees the birth of a "new culture of crime control" while Radzinowicz who views criminal culture on a broader historical scale sees this intensification as simply the expression of "regression "In the way of thinking criminal law and the capacity of sentences to solve social problems (PIRES, 2010, 157). The position of the German sociologist Fritz Sack approaches Radzinowicz's description: "change in criminal policy" and "rebirth of criminal law".

Imposing stricter sanctions on adolescents has also been claimed by influences of the public opinion on the Political System, under the pretense of improving protection to the population against the performance of allegedly dangerous criminals. Tufts and Roberts (2002, 46) outline juvenile justice systems of most Western nations as under considerable pressure to impose harsher penalties on juvenile offenders. According to them, much of this pressure has come from politicians who argue that public and juvenile courts are out of reality, with the latter being more lenient than the public desire.

So, many members of the public court believe that lax sentencing in youth courts is itself a cause of, rather than an effective response to, juvenile crime. Hence, concerns about sentencing in juvenile courts are fuelled in part by the perception that juvenile crime trends are escalating out of control. Garland (2001, p. 167-192) analyzed the criminal justice systems in the USA and the UK since the 1970s stating that problem-solving actions by Law enforcement agencies address a multiplicity of different offices, practices, and discourses, being characterized by a variety of policies and procedures, some of which are quite contradictory.

The author states that:

> “In the area of sentencing, the legal and administrative arrangements now in discretionary review of offender’s. There is, as Nils Christie might put it, a more streamlined system of pain-delivery, with fewer intervening obstacles between the political process and the allocation of individual punishments. Public demands for greater punishments are now more easily and instantly translated into increased sentences and longer jail terms.” (GARLAND, 2001, p. 172).

To Loïc Wacquant (2003) Brazilians often view North-American countries as examples of efficiency when it comes to dealing with crime:

> "Like many countries of the Second World caught in the throes of post-Fordism before they could reap the full benefits of Fordist-style development, Brazil is tempted to import the US-style discourse and policy of 'zero tolerance' because, enshrouded in the aura emanating from America as the world's sole symbolic superpower and global Mecca of crime control, they appear cutting edge, effective and efficient; and because they are the indispensable order-maintenance counterpart to policies of economic deregulation and fiscal austerity adopted by Latin American countries under the press of international financial agencies. But in Brazil, as in neighbouring nations, this borrowing promises to produce a social catastrophe of historic proportions because the depth and scale of urban poverty are much greater, violent crime is more prevalent and more entrenched in the history and economy of the country, and because the Brazilian police is not a remedy against violence but a major source of violence in its own right. Moreover, Brazil does not possess a rationalized court system capable of ensuring minimal protection of constitutional rights and its prisons are plagued by fantastic overcrowding, gross lack of access to food, hygiene and health and inordinately high levels of brutality, akin to concentration camps for the disruptive fractions of the (sub) proletariat*."* (WACQUANT, 2003, p. 197).

Maybe in Latin American countries the so-called "penal populism" has found a place to develop itself almost freely. In Brazil, while creating the 1990 Law to protect the rights of young people fully, criminal laws for adults were reversed: they increased sentences often even legally grossly and indiscriminately. Thus, the so-called Law of the Heinous Crimes (*Lei dos Crimes Hediondos*) was enacted (Federal Law 8072, from 1990) and has yet been surprisingly welcomed by some representatives of legal doctrine and the courts.

Hence, addressing the prison rebirth in Latin America, Hathazy and Müller (2016, p. 118) say that, in Brazil, **Governors** were initially dominant in determining penal policies, controlling police and prisons, but also in passing more punitive laws in a true criminal populist fashion. Since the 1990s, this constellation contributed to the passing of legislation that excluded pardons and the reduction of prison time, as well as to heavy investments in the expansion of police and judicial bureaucracies. They also affirmed that such state policies were facilitated by the consolidation of national security plans by the **federal presidential governments** of Fernando Henrique (1995/2003) and Luis Inacio "Lula" da Silva (2003/2011), who also passed highly punitive policies. The heinous crimes law will then aggravate all juvenile offenses categorized as "drug trafficking," even the sale of a small amount of marijuana. And the Brazilian judiciary sometimes creates its social organization to deal with drug trafficking offenses concentrating on the legal definition of the problematic situation.

So, I will mention a journalistic interview publishes by the newspaper Folha de São Paulo on 12.03.2018[12]. The comptroller judge (*juíza corregedora*) is in charge of the Investigative Police Department of São Paulo (Dipo), an institution body that accounts for custody hearings that all prisoners in "*flagrante delicto*" crimes pass within 24 hours.

She said:

> "Every drug trafficker should be treated with rigour, respecting the benefits that the law itself grants to those who meet certain requirements. Every trafficker, however small, works, directly or indirectly, for the PCC[13], since all the drug sold in the state is distributed by the criminal organization. Without it, a whole criminal structure would cease to exist. And situations like the one we see in Rio (*Rio de Janeiro*) today will be avoided. It is not true that the police only arrest small traffickers. What happens is that the little ones are those who expose themselves, selling the drugs in public and, therefore, the police have more access to them. Also, having little drug does not mean it is small. No drug dealer carries all the drugs he's going to sell. In practice, we see that he keeps with him a small amount, precisely because of the benefits that this will bring him if he is arrested, and leaves the rest in an unknown place of the police."

Report of the newspaper *O Globo* (The Globe) on 02/14/2018 informs that a newborn baby was taken with his mother to the cell of a police station in São Paulo on February 13. The mother, at the age of twenty-four, was arrested by police for drug trafficking on 10.02.2018. In her custody hearing the judge decided to keep the arrest, and she had to return to the police station with a child after she was discharged from the hospital.

According to the report, police took four portions of marijuana hidden in her bra and another twenty-three portions that military police said fell to the ground before approaching. In the same incident, police arrested the victim's mate with four pieces of marijuana in his shorts, another thirty-seven packs of the drug were in his house and also forty doses of cocaine, as well as empty bottles of perfume lance. Two rifles and eight ammunition were also seized in his home.

The judge ruled:

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[12]Available at https://www1.folha.uol.com.br/cotidiano/2018/03/todo-traficante-mesmo-o-menor-trabalha-para-o-pcc-diz-juiza-corregedora.shtml, last access in 18.03.2018.

[13]To explain to the foreigner reader what PCC means: "The First Capital Command (Primeiro Comando da Capital – PCC) was inspired by the Red Command (Comando Vermelho). Both criminal organizations were formed by prisoners as self-protection groups in Brazil's brutal prison system. The PCC arose in São Paulo in the 1990s and has forged a bloody path to dominance throughout the country." available at https://www.insightcrime.org/brazil-organized-crime-news/first-capital-command-pcc-profile/, last access in 18.03.2018. Adorno and Salla (2007) addressed the advent of organized crime in Brazilian prisons, especially in the state of São Paulo, under the light of determined axes: the international scenario and the Brazilian context, the historical antecedents, the taking root of crime in society and the role of penitentiary public policies.

"It is clear that the great amount and diversity of drugs found is evidence of being the ones with personality with a high degree of dangerousness. Furthermost, they do not demonstrate exercising any licit activity."

Picture 1 – Newborn is in a cell with a mother who was arrested shortly before giving birth in São Paulo, Brazil Source: The Globo website.[14]

I think the photo above may portray the juridical discourse some members of the judiciary write to represent socially dangerous individuals and even censor young members of the most impoverished families. The extralegal arguments used to justify the arrest are not consistent with the factual situation of a woman with four pieces of marijuana in her bra, let alone serve to lock a *newborn inside a cell at a police station*. According to the reasons for the incarceration, since there was no demonstration of legal occupation developed, it is possible to assume that the detained person sells drugs "commercially." Thus, the social reactions triggered by the problematic situation link more with social exclusion together with the imposition of suffering instead of connecting to any action for the inclusion of offenders in welfare systems.

[14]Available at, https://g1.globo.com/sp/sao-paulo/noticia/recem-nascido-fica-em-cela-com-mae-que-foi-presa-pouco-antes-de-dar-a-luz-em-sp.ghtml, last access in 18.03.2018.

As we will see in Chapters 4 and 5 of this thesis, this Heinous Crimes law for adults will have an impact on juvenile justice at the initiative of the criminal courts of appeal, compounding discursive structures of juvenile justice case-law. This result was also obtained in the research carried out by Sposato (2013, 124-125) in the jurisprudence of the State of São Paulo in matters of juvenile justice. Perhaps this legally surprising slip of a law made for adults to sanctioning decisions directed at young people can be attributed to a judicial accession to the new repressive climate of our time.

Considering broadly the legislative plan, an analysis of legislative proposals in criminal matters in the Chamber of Deputies in Brazil between 1988 and 2006 displays that the theories conveyed in the justifications of the bills limit themselves "almost exclusively to theories of the first modernity that strongly favor the use of prison as primary form of state response "(Machado et al., 2010, 66). The theory of deterrence is, by the way, "the punishment theory that appears most frequently" in these justifications (Machado et al., 2010, 65). And the authors add: "none of the 123 justifications analyzed here (...) even made mention of the theory of rehabilitation formulated from the 1960s on, which emphasizes the insertion of the individual through non-prison sanctions" (Machado et al., 2010 66). And throughout this period in Brazil (1988-2006), "legislative production in criminal matters focuses heavily on creating sanctioning rules" (57%). And the authors conclude this empirical study of the bills in Brazil during this period:

> "Finally, it is possible to say that, in the course of this study, we find very rare propositions that stand against the" more crimes "and" more penalties "initiatives. Only one of the 873 sanctioning standards processed proposes a cause of reduced penalty. Only two of the 579 behavioural norms studied propose the reduction [of the behavioural field] of an existing crime. No standard of behaviour suggests decriminalization. No standard of behaviour proposes decriminalization). Non-prison sanctions are marginal [...]. It is precisely among the few procedural norms (4% of the total standards analyzed) that we find the only two propositions that can be seen as efforts to innovate in criminal law ... "(MACHADO et al., 2010, 66).

At the same time, in a legislative, judicial and administrative plan, the research made by Ferreira (2011) of the Law School of the State of São Paulo (Fundação Getulio Vargas) on the execution of the custodial sentence from 1984 to 2011 also reached results going in the same direction. She points out the following:

> "Among the most relevant discoveries [of this study] is finding that legislative production in criminal matters reflects characteristic features of Modern Penal Rationality, especially the use of prison sentences and the

> motivation of criminal theories to justify incarceration. These elements constitute obstacles to think of alternatives to prison sanction, almost nonexistent in the analyzed empirical material "(FERREIRA, 2011, 136).

In fact, the overload of criminal cases has increased the number of prisoners at such a level that it has been difficult to draw attention to Brazilian reality. Gangs are living behind bars, but operating criminal activities away from overcrowded, degraded prisons and internment facilities. One cannot disregard, in addition, the absence and the inefficiency of existing rehabilitation programs under the actual circumstances, high recidivism rates, budget limits, and the consequences of labeling.

I address criticisms to Criminal Law to display my point of not transferring old theories of punishment to Juvenile Justice rationale. In fact, I see through my database an underlying logical structure of legal language dominating the daily application of ancient theories of punishment, indifferent to the social inclusion of young offenders, and entirely disregarding the illegality and conditions of imprisonment. Or, in other words, without concerns about the results produced by the operations of Criminal Law. But it is not possible to lose sight of the absolute collapse of the Brazilian penitentiary system, which affects the Juvenile Justice System logic as well. And the constant threat of aggravating sanctions imposed on adolescents may function as an illustration regarding the resistance to the application of the 1990 Statute. There are many propositions that try to connect the rationale of Adult Criminal Law with the Juvenile Criminal Law thinking.

Furthermore, a robust political movement is perceived to treat some young offenders in the same manner as in the adult penitentiaries. Some politicians want to reduce the minimum age for young people to respond criminally for illicit acts, from eighteen to sixteen years of age[15]. In terms of the volume of the prison population and prison conditions, the state of the situation in Brazil is objectively catastrophic and very well known. The National Council of Justice itself published a report with photographs called *Mutirão Carcerário, X-ray of the Brazilian Penitentiary System* (2012), where it presents this situation as "a perverse reality" (p.1). The thesis defended by Wacquant is sadly confirmed even by the images of the prison population presented in this report: it is massively a penalization of poverty.

[15]See, in this regard, the book *A maioridade penal nos debates parlamentares. Motivos do controle e figuras do perigo* The age of criminal responsibility in parliamentary debates. Control reasons and danger figures. Cappi (2017) analyzed almost twenty years of Brazilian parliamentary debates on reducing the age of criminal accountability. The author used methodology to unveil the models of response to criminalized behaviour of young people.

The catastrophic conditions of the current penitentiary system are not new to Brazilian professionals who study, work daily with or simply deal indirectly with prisons. In order to highlight the juridical dimension of the incarceration problem in Brazil, it is important to quote a decision enacted by the Brazilian Supreme Court in 09.09.2015[16]. There is no purpose of doing any deeper analysis on it, mostly because its reasoning connects to the Adult Criminal system. But it surely helps to clarify how fair querying the consequences of blindly welcoming juveniles onto the current penitentiary conditions is. The Brazilian Supreme Court declared that:

> (when) "(...) a massive and persistent violation of the fundamental rights framework presents itself, due to structural failure and public policy bankruptcy, and whose modification depends on comprehensive regulatory, administrative and budgetary measures, should the National prison system be characterized as "state of unconstitutional affairs."

Picture 2 – Crowding conditions of prisons in Brazil. Source: National Council of Justice website[17]

[16]Medida Cautelar na Arguição de Descumprimento de Preceito Fundamental 347, available at https://jurisprudencia.stf.jus.br/pages/search/sjur339101/false last access in 12.01.2021.

[17] Available a https://www.cnj.jus.br/wp-content/uploads/2011/10/mutirao_carcerario.pdf, last acces in 12.01.2021.

To reinforce my point, I can say that the 2017 World Report made by the nongovernmental organization Human Rights Watch[18] asserted that chronic human rights problems plague Brazil's criminal justice system, including unlawful police killings, prison overcrowding, torture and ill-treatment of detainees. Some recent reform efforts aim to address these problems, but other suggested moves would exacerbate them. Many Brazilian prisons and jails are severely overcrowded and violent. The number of adults behind bars increased 85 percent from 2004 to 2014 and exceeded 622,000 people, 67 percent more than prisons were built to hold, according to the latest Ministry of Justice figures.

With regard to children's rights, the same report affirmed that Brazil's Senate is examining a Constitutional amendment—a version of which was approved by the Chamber of Deputies in 2015—that would allow 16 and 17-year-olds accused of serious crimes to be tried and punished as adults. If enacted, such law would violate international norms enshrined in human rights treaties that Brazil has ratified, which state that people under 18 should not be prosecuted as adults. Again, the Chamber of Deputies is considering a separate bill, which the Senate has already approved, to raise the maximum time of internment for children from 3 to 10 years. If enacted, the bill would aggravate overcrowding in the juvenile detention system, which was built to hold about 18,000 juveniles but held close to 22,000 in 2014, according to the latest data published by the National Council of the Prosecutor's Office.

On 06.06.2014, the National Council of Justice found adolescents inside prisons with adults in Minas Gerais, according to its news portal[19], which I am going to partially copy and translate into English, because of its relevance to this thesis:

> "The prison system of Minas Gerais has about 70 youths imprisoned in prison and public jails, along with adults, contrary to the Statute of the Child and Adolescent. (...) Adolescents in conflict with the law should be in a proper unit to carry out socio-educational measures, but in the absence of vacancies, they are incarcerated.
> (...)"By placing these young prisoners in ordinary cells, the state of Minas Gerais is reducing the age of the criminal without the legislation having done so. These young people do not study or carry out any activity aimed at their recovery, as determined by the legislation in force, "said the judge.

The list of young people in common cells in Minas Gerais was passed on by the state government itself, as soon as it was requested by the DMF / CNJ. All are imprisoned with the

[18] Available at https://www.hrw.org/world-report/2017/country-chapters/brazil#c007ac , last access in 19.01.2017.
[19] Available at https://www.cnj.jus.br/cnj-encontra-adolescentes-encarcerados-em-presidios-com-adultos-em-minas-gerais/ , last access in 26.05.2017.

proper knowledge of the Judiciary, as well as the Public Prosecutor's Office (MP) of the state, which caused concern to the CNJ.

> "Those responsible for the Trial Courts, the Public Prosecutor's Office, the Defender, all the actors in the process, it seems, are aware of where these boys are imprisoned. The impression is that there is a gentlemen agreement because there is no news of any lawsuit proposed to favouring teenagers individually. It is decided to withdraw their freedom, without the State being prepared to guarantee them what the law determines, even if they are in a completely inappropriate place.".

According to the DMF/CNJ representative, in a conversation with local police authorities, in some cities in the interior of Minas Gerais, because of the lack of places to accommodate juveniles in conflict with the law, the police have chosen to only draw *flagrante delicto* cases crimes such as robbery, murder, and rape. Cases such as trafficking, theft without a firearm or aggression would not have been flagrantly worked out.

> "We are seeing a complete distortion of police obligations as a result of a structural problem. To try to solve a problem, another one is created that can be even bigger", said the judge."

So, passively taking for granted the monotony of arguments for incarcerating as the primary reference to Juvenile Criminal Law subsystem could lead to a dead-end.

Hence, according to Machado and Machado (2013, p. 351) it is not possible to debate Criminal Law and punishment currently without facing the real implications provoked by the functioning of the Criminal Law System. It is important to know **who** is being arrested and in **what conditions**, otherwise increasing violence and exacerbating processes of **social exclusion** may increase. On the other hand, it seems innocuous to observe this reality without looking at the **System of Law operations** and unravelling **its internal mechanisms**, to find the possible areas that reproduce violence and require changes in their current organization.

As we will better see between the lines of the database in Chapters 4 and 5, what is more surprising is the unjustified faith that the courts place in the "pedagogical" relevance of juvenile incarceration, even knowing - or should at least suspect - the impoverished living and care conditions in most of these institutions for young people. Operators do not seek to inform themselves about *de facto* status of these institutions before presenting them as appropriate for an adequate social insertion of the (juveniles?) youngsters. The general presumption in the

jurisprudence that I have analyzed is that "detention will do good for the young person." It is this contrast between the knowledge of the precariousness of these institutions and the valuation of incarceration that presents itself as an enigma. Without the mediation of the penal theories justifying imprisonment, the unfounded nature of these decisions would be even more evident.

Hence, the definition that a particular problem situation fits into the legal concept of crime requires the strict scrutiny of facts with professionally set values to the case. So, crime is not a “thing”, but a concept applied to a certain social situation in which it is possible and in the interests of one or several parties. We can create crime by creating systems that ask for the word (CHRISTIE, 1981, 1974).

Cicourel (1995, p. 27-28) states that the meaning of the Law depends on a model which breaks down successive transformations and alleged deviations from general rules, as imputed to juveniles by community members or by police officers and described by community members and law-enforcement officials, being recognized, and acted upon, so that the legal system is activated. The subsequent oral and written reports, as well as hearings, continually simplify or evade information; they are abstract and they reinterpret the original event or act so that it “fits” the kind of logic used by legally-oriented members accustomed to standardized recipes for explaining relationships between legal rules and conduct. Legal thinking and a legal view of social reality remove the contingent features of everyday life in the course of successive transformations over time from the original event or act to final adjudication. The net result is an “obvious” and “clear” figure of causality and “what happened”. Legal reasoning formalizes the premises of commonsensical thinking about the world as taken for granted and they are shared by “everyone” and understood by “anyone”, filled with ambiguities that create a two-valued logic as a means of making decisions and arguing the validity of concrete events in terms of taken-for-granted assumptions of everyday life.

Typically, when reading the judicial decisions studied, one notes that written police reports are the primary sources of knowledge judges rely on, after having confirmed their contents along the hearing procedures. Most often based on pieces of information furnished by the military police, prosecutors assess whether young people’s behaviours are lawful or not, and finally, they file charges or dismiss the case. In the Brazilian Juvenile Criminal Justice police documents are physically attached to the main dossiers and usually follow the criminal complaint. Thus, the upcoming examination of selection and distinction operations indicates the legal arguments used to represent the juvenile offenders in a particular written form. Also, Law enforcement officers

write their reports with the intention of translating the facts that appear on streets in a significant “Criminal Law language”, aiming at subsequent judicial validation of documents oriented by a specific code. In fact, they develop their skills to successfully present problematic situations considered relevant to the Juvenile Justice System.

Although this is not part of my empirical demonstration neither of my specific study object in this research, there is research in Brazil indicating the poorly filtered influence of the police and, particularly, of the military police, in selecting actions to somehow guide decisions of the trial courts towards imprisonment. It is clear that the revocation of a first instance conviction in the appellate courts is a rare phenomenon for traditional crimes of homicide, robbery, physical or drug abuse committed by representatives of poor social classes. In my data (case law analyzed), police reports are "pasted and copied" repeatedly in the factual summaries of events, without the slightest doubt as to the truthfulness of these reports. Since I did not analyze the proceedings at first instance, nor did consider the grounds of convictions as an object, but rather the basis of sanctions, this point does not stand out in my empirical observational data..

But I believe I can say, even by my professional experience as a first instance judge, that the evidence for a conviction is often limited to a police officer's statement to the first-degree judge because in most cases they are the only witnesses heard. In the particular case of the Brazilian police, which is far from having acquired a good professional reputation, this fact is disturbing. But on the other hand, from a sociology of professions, we can not ignore the fact that it is complicated for a professional category - in this case, prosecutors and judges - to merely accept testimonies exclusively from the police. The task of filtering can be much better, but if the police do not change their way of intervening, it is impossible for the courts to control all abuses. In a chain of operations involving multiple organizations, none of them can correct all the errors of the others. Of course, this does not mean that you should "close your eyes" for all cases. And even less that one must respond to the condemnations that are made with prison sentences (and moreover severe!).

Therefore, after formatting the judicial position in favour of a conviction, it is difficult to see appellate judges taking a distance of the empirical fact, and then employing thoughtful efforts to devise discursive structures embracing alternatives to imprisonment, mainly in severe juvenile offenses. Usually, I do not observe the appeal judges distinguishing between two types of rules: condemnation and sanctioning. And we must consider that, in the vast majority of dossiers, there

are no multidisciplinary or inter-professional reports and almost all shred of information, in fact, consist police-gathered evidence.

Among the relevant studies in this field, we would like to mention some works. Initially, Paixão (1985, p. 188) highlighted the problematic feature of the interactions between the police and the public in Brazil, once much of the police work does not involve interaction with criminals - but rather with populations socially defined as potential focus of recalcitrance. In this sense, many Brazilian empirical researches show that, grounded on a *system of beliefs that confuses legality with middle-class moral values*, the police turns itself to the surveillance of environments where, supposedly, such values are scarce, for instance, "*favelas*", ethnic minorities, "*zonas*" (low price brothels) and young people.

Paixão states, in addition, that the definition of "suspicious situations" by the police is the product of the application, in concrete contexts, of a set of social indicators defined as correlates of "crime" or "delinquency" - "good" or "bad" borders between socially heterogeneous neighbourhoods. Again, according to him, empirical research shows how the solution to the **law and order** dilemma happens at the practical level: legality for citizens defined as law-abiding and an authoritarian imposition of order on the social and cultural periphery that has reacted in consolidated democracies, or organized actions to defend citizenship. In Brazil, few studies indicate the generality of the **order versus law** model, aggravated by the historical persistence of imposing a pattern of public order that opposes the **good people police** to the **brat police**, whose instrument is the whip (the distinction is from an anonymous pamphlet of 1825).

Misse (1999, 2010) developed the stereotype of Brazilian criminals, as portrayed by the concept of "criminal subjection" (*sujeição criminal*), displaying how professionals of the police apparatus see offenders. Misse (quoted by Marinho, 2012, p. 22) said that "incrimination" results in a legal "criminal charge" when an official criminal proceeding starts. Considering that the object of the process is not only law transgression, but also the transgressor, there is a "criminal subjection", that is, a "social construction of the agent of criminal practices" as a "criminal subjection". And, again, in agreement with Misse, what makes the notion of criminal subjection more important and elucidating is the fact that it can be – and it is generally - amplified "as a potentiality of all individuals possessing attributes close to or related to the accused social type". (MARINHO, 2012, p. 22).

Again, Misse (2014) further explains that criminal subjection refers to a social process through which negative expectations about individuals and groups are widely disseminated. The

significance of such expectations seems to determine deviant behaviour. It refers to an institutionalized set named the “Penal Code,” historically built and administered as a state monopoly, and this activity is entirely confused with the modern criminalization process. Thus, discrimination underlies the difference between criminal subjects and other social subjects is not due to the arbitrary stereotypes or prejudices that precede it. On the contrary, her explanation is supported by the shared belief that crime is within some individuals, the criminals, and more general social types. The best known of these types in Brazil is labelled a “*bandit*,” the criminal subject produced by police intervention, public morality and criminal laws. The “bandit” is not an incriminated subject, but a so-called “special” subject, a disqualified one, whose death or disappearance can be widely desired. He/she is an agent of criminal practices to which the most repulsive moral feelings are attributed, the subject who deserves the strongest moral reaction and, therefore, the hardest punishment: be it the desire for his permanent disability and physical death or the ideal of his/her re-conversion to the moral and to the society that accuses him. The euphemism of "re-socialization" or "social reintegration" accuses the "autonomy" of this "subject" and, paradoxically, his "non-subjection" to the rules of society.(MISSE, 2010, p.17).

1.3. The social organization of the Juvenile Justice System in Brazil.

The purpose of this section is to present, in general terms, the contemporary organizational form of the Juvenile Justice System in Brazil. In addition to some global information valid throughout the Brazilian jurisdiction (in traditional terms, “national territory”), this overview will consider the State of Minas Gerais, whose capital is Belo Horizonte, the city in which I have had experience in deciding cases involving young offenders.

“Juvenile Justice System” refers to an internal process of differentiation where the juvenile justice stands out from an undifferentiated criminal justice for everyone. During the course of the aforementioned historical process, in diverse manners and times, according to the specificity of each jurisdiction, “Juvenile Justice” was being kept apart from the ordinary criminal justice in charge of judging, at the same time and way, adult men and women.

I chose the term “organizational forms” instead of “organizational structure” because I want to draw the reader’s attention and focus on the problem of “organizational boundaries” between juvenile and adult justices. As I shall display, this organizational form is sociologically characterized by the “porosity” (Luhmann) of juvenile justice in its relation to adult justice. Such

porosity - the guiding hypothesis of our work - favors the permeability of the influences of the adult justice model in the way of acting and conceiving the intervention of the criminal justice system for youngsters.

As the State of Minas Gerais will serve as the background for this research, we will attempt to show the “porosity” of the boundaries between juvenile justice and adult justice in Brazil, starting from some general information about this state. I must say immediately that the State of Minas Gerais has nothing “exceptional” in relation to other states, concerning the points reported in this study.

Located in Southeast Brazil, only at the city of Belo Horizonte, the state capital, there are first-degree judges with exclusive jurisdiction to deal solely with juvenile offenders. It was in this First Instance Court that I had the opportunity to work at, from January 2011 until August 2014.

With regard to the normal procedure, I can say that ordinary appeals (*apelações*) may be filed against the sentences of first-degree judges (*sentenças*), with the initial appeal for the State Court of Appeal. The Superior Courts are located in Brasilia, the capital of Brazil. If there are alleged literal violations of federal law, the Superior Court of Justice (*Superior Tribunal de Justiça*) may hear of a special appeal (*recurso especial*). In case a direct offense is alleged against the Brazilian Constitution, the Federal Supreme Court (*Supremo Tribunal Federal*) may be called upon to rule on an extraordinary appeal (*recurso extraordinário*).

1.4. Some studies on juvenile justice in Brazil.

Pires (2016) reminds us, as a starting point, that "any review of studies relevant to a research is constrained to a voluntary (impossibility of reporting all that has been read) and involuntary (linguistic limits, abundance of material in certain subjects, lack of knowledge of certain works which may be important, etc.) selection". As he says, "the overview is always and necessarily a partial view" (Pires, 2016). I made the methodological option of presenting the literature review before the methodological chapter, to introduce the issue to the reader’s, but from a singular point of view.

Initially, starting from a broad historical perspective, ranging from the Brazilian colonial era to the present day, Irma Rizzini (2009) does a relevant analysis of Brazilian policies on childhood. She discusses the trajectory and relates them to the interventions philosophies of Juvenile Justice Institutions. The relevance, for my thesis, flows from the author’s description of

a historical process of generic selection of the juvenile population sent to juvenile justice. Through the old binary code *minor* x *child*, one can continue seeing a typical "social contempt" projected in the form as law operators approach the issue of youth in conflict with the law. Her study seeks to understand how the Brazilian children were - and still are - seen from the most distant times. Rizzini's work supports that there is still a dichotomy presenting the Brazilian adolescent offender as a case of national security (police-legal problem) and not subject to integral (welfare and law) protection.

Thus, according to Irma Rizzini's analysis, the police would have a duty to "clean the streets", collecting for the police stations the elements considered undesirable for society. These individuals are said to be poor children who live in poor neighbourhoods. The stigma of the incompetence of the families of the impoverished classes to raise their children is still very much in evidence, provoking reactions by the repressive apparatus of the State to "ensure that the growing mass of abandoned children does not transform into an easy prey of consumerism and drugs, associated to demoralization and submission.*"* Irma Rizzini further shows that, despite several rights recognized to young people, they have not yet been translated into (institutionalized?) practices of reception towards these subjects, since a history of non-recognition and non-acceptance of differences does not finish with the simple act of promulgation of a Law. However, it is also able to offer instruments to be used for a possible change.

Hence, Rizzini (200) recalls that a question that can not be forgotten and that represents a landmark, or rather, a deep split in social assistance, was the constitution of two categories that assumed independent characteristics: the "*minor*" and the "*child*". The former identifies the "poor youngsters", at the majority of times "black kids of single mothers" involved with problematic situation practices; and the latter links to those juveniles who need public support. Two categories that will be targets of diverse policies, a situation that became more clear in the President Vargas era (former President of Brazil in the first half of the 20th century), with the creation of the "*Minor*" Care Service (*Serviço de Assistência a Menores*) and the National "*Child*" Department (*Departamento Nacional da Criança*), inaugurating the protection policy to children, adolescents and mothers, later reinforced by the work of the Brazilian Legion of Assistance. The term "*minor*" remains in the police-legal sphere, under the control of the Ministry of Justice, whereas the "*child*" is exclusive to the medical-educational sphere, whose actions are coordinated by the Ministry of Education and Health.

So, according to the author, in spite of the time that has elapsed and the many changes, one can perceive, in **the present**, ideas and practices whose inheritance comes from very far, which gives strong indications that the **texts presented** in the book **deal with the past**, **but not in the past**. This assertion is because, although living in the new paradigm marked by protection and acceptance of the youngsters, **contemporary Brazilian social institutions still preserves** many confinement spaces for these young subjects, especially the poorest on big cities.

In another Irene Rizzini'' study (2011), she somewhat complemented the early work when she explained that, in Brazil, the Portuguese term *menor* ("minor") includes, along with the notion of a young person, the sense of a child or young person who is seen as a threat to public safety. So the term carries some of the same stigma attached in English to the terms "abandoned" and/or "delinquent" children. The term in Portuguese implies, moreover, that these children should be subject to some kind of official intervention. The phrase *De menor a cidadão* ("from minor to citizen") was often used in Brazil in the 1990s, particularly by advocates, to mark the struggle to recognize that all children, including the poor ones, had rights as citizens (RIZZINI, 2011, p. 67). To Rizzini, one consequence of the new legal language and rhetoric was that the distinction between children and *menores* ("minors") became unacceptable in a short period, at least in the public discourse. Indeed, the word *menores* ("minors") and the phrase "minor in irregular situations" became politically incorrect. Rizzini later concluded that:

> The legal existence of rights and the lack of implementation of the rights of child citizens, particularly poor children, exist together. The former should be and is the essential foundation for the latter. The latter has yet to be built. (RIZZINI, 2011, p.78).

Confirming the results presented by Rizzini's analysis, Riofotis et all (2016) presented the result of ethnographic researches conducted in six care institutions for "youth in conflict with the law", in Santa Catarina state, Brazil. They began by recognizing the significant increase in decriminalization, mediation, and citizen ("restorative") movements, but that criminal prosecution continues to be valued as a form of social regulation. The researchers also noted that "subject of rights" is a central figure in the law field, understood as an autonomous and rational individual, but also featured in a negative sense of being incapable and unprotected. It is a notion crossed by the moral and political dimension and not just legal. Thus, with the support of previous work, they argue that there are strong indications that "subject of rights" comes

transforming themselves into "rights of the subject". That process means an excessive judicialization of social relations, according to Rifiotis' research trajectory.

For my research, I would like to emphasize how they discussed "configurations of persons as subjects," flowing from the judicialization processes of the social relations addressing these young offenders. This analysis requires a certain previous knowledge of diverse moralities regimes. So, they studied many youth's discourses and practices as a means to identify how they understand and evaluate trajectories of "youth in conflict with the law." It called my attention how they observed a judge's speech approaching the details of a young man's life. The magistrate made a statement discussing the teenager's "deplorable state," accompanied by a drunken father, concluding that because his family was not "accountable," internment was the solution. Moreover, the judge talked about the "role of parents" in the lives of juvenile offenders, making it clear that the cause of imprisonment was lack of time close to family, coupled with lack of dialogue and caring, as well as "de-structured family" and "poverty." Thus, some law enforcement officials have embraced these elements to interpret young offenders' "life trajectory," using them to justify imposing juvenile sanctions.

In what is perhaps (one of) the most crucial academic study regarding the history of Juvenile Justice in Brazil, in his master degree thesis Alvarez (1989) examined discursive transformations that fostered the emergence of legislation for juveniles' assistance and protection, the so-called 1927 Brazilian "Code of Minors," of a "tutelary" nature. The question posed by Alvarez as part of his research problem regards aspects of an underestimated issue: the emergence of the first Code of Minors in 1927.

The author mentioned that many previous works affirmed that was the moment in which the Brazilian State officially assumed the subject of the child. They do not wonder, however, how and why this happens. Hence, Alvarez developed his thesis by studying aspects of the subjection (domination?) mechanisms that led to the constitution of the minor as a category of legal discourse and institutional practices, or, in other words, he sought to study the minor as an effect of certain power practices. To do so, he used Foucault's concept that discourse practice is articulated to power and knowledge relations, emphasizing the internal specificity of discourse with its elaboration conditions. Thus, discourse has specificity, and presents itself as exterior, positivist, but at the same time, it refers to the set of historical conditions that constituted it. Therefore, it is not only a question of what indicates a thing, a mere representation, but of the fact that discourse has a peculiar existence. Alvarez presented discourses as historical practices taken

as pieces of power mechanisms within society, dealing with an analysis of domination mechanisms from discourses.

In a mention to Ataulpho de Paiva, Alvarez argued that, in early twentieth-century Brazil, there used to prevail an understanding that simple repression was not enough to solve juvenile criminality. It was necessary to combat the causes that led to delinquency, through an authentic "social prophylaxis*".* Therefore, it was justified to reduce penal repression, turning aside to combat "social degeneracy" causes. With the 1927 "Code of Minors", the institutional object becomes broad and totally abstract, as required by the institutional process: it becomes the protection of a minor's life, health, and morality. Such institutional object, or rather, its lack of abandoned or delinquent minors and its appropriation by institutions, will define the protection relationship of the State concerning this segment of the population.

The discourse on childcare and protection and the 1927 "Code of Minors" defined a new legal and institutional project focused on minority issues. In this project, a special juvenile justice - non-punitive, recovering, disciplinary, guardian, and paternal - will be articulated to reorganizing assistance - more comprehensively, systematically, preventively, scientifically organized by the State. Juvenile courts will be the key link between the new justice system and new forms of care. Alvarez cites Platt's lesson to maintain that the creation of such juvenile courts did not contribute to humanizing the criminal treatment of children and adolescents. On the contrary, by instituting child reform in a far more significant institutional reform movement to meet the capitalist system needs, Platt shows that the action of the child's saviors created new instances of social control and helped to diversify and centralize the power of the state. To Alvarez, both juridical and institutional treatments of minors, protected by excellence, will transform them into subjects who are targeted by disciplinary and normative mechanisms. The hybrid character of juvenile justice, its shame of punishment, its support in scientific, philosophical, and moral propositions, all set between norm and law, articulate these two levels in a complex power device. The points that differentiate my research from Alvarez's are the following:

- ✓ Alvarez's research looks at parliamentary debates in Brazil in a time in which the first Brazilian juvenile justice law emerged, at the beginning of the twenty century. My research analyzes the case-law on how the court of appeal mobilize idea systems and socio-legal semantics to elaborate juvenile sanctions (socio-educational measures);

- ✓ My research deals with three idea systems applied by the appeal court contemporaneously, while Alvarez's research is part of the field of legislative history;

  But although Alvarez refers to the emergence of legislation in the early twentieth century, I believe his study is truly important for my thesis, as following.

- ✓ Alvarez's work and mine shed different kinds of light on how the comprehension and interpretation of legal discourse impacts on the contemporary construction of idea systems governing the intervention by institutional actors;

- ✓ Alvarez identified how the tutelary model subjected young people to a dominant interference to be chosen by commanding institutional actors, under the guise of a supposed aid to people who are less favored. So, the decision-making process built from the standpoint of the jurisdiction holders molded a particular category of “legal discourse of prevailing morality”, whose signs one easily perceives as present to this day;

- ✓ Furthermore, Alvarez’s work is beneficial to show that criminal law reform, in the face of the public and prison failure, demands much more than an intervention directed at shaping a younger and weaker people to serve the interests of the most economically and legally powerful groups;

- ✓ Moreover, the empirical data I obtained reveal that it cannot be said that the work of “child savers” has been definitively erased from the memory of the institutional actors at the Brazilian Juvenile Justice System, which displays the relevance of Alvarez’s thesis to this days.

In the book resulting from the 2006 Project "*Updating and Integrating Law Enforcement: Strengthening the Axis of Defense and Social Control in Guaranteeing Adolescent Rights in Conflict with the Law,*" edited jointly by the Special Secretariat for Human Rights of the Presidency of the Republic (SEDH), the Brazilian Association of Child and Youth Magistrates and Promoters (ABMP) and the United Nations Latin American Institute for the Prevention of Crime and Treatment of Offenders (ILANUD), several articles have been published. For the

editors, the book would offer a representative contribution to the central discussions after editing the 1990 Statute, a legal document that shed new light on the treatment of adolescents in conflict with the law, but which would not yet have been fully assimilated by working professionals in the area of childhood and youth.

In the first chapter, opening the whole book, Méndez (2006) presented how he understood the historical evolution of children's rights in the Brazilian context, stating that the emblematic theme of criminal responsibility of juveniles went through three main stages. He named one of them as an undifferentiated criminal treatment, which is characterized by considering youths the same way as adults, with the sole exception of children under seven years of age, who were found entirely incapable. The only differentiation for children younger than 7 to 18 years was usually a one-third reduction in sentence compared to adults. A second stage is "tutelar", and has its origin in the late nineteenth century in the USA, led by the project of the Reformers. The dominant culture of social "hijackers", that is, the culture according to which each social "pathology" must correspond to a specialized approaching, has only changed in one aspect: promiscuity, since it proposed the separation between young people and adults. The third and current stage is the criminal responsibility of adolescents, inaugurated with the Statute of 1990, the first substantial innovation in Latin America in relation to the tutelary model of 1919. The common point of Mendez's work with the present research is: the 1990 Statute constitutes a profound rupture, both with the tutelary model and the undifferentiated criminal model, representing the model of justice and guarantees. The new paradigm broke entirely with the previous two, that is, with the undifferentiated application of old theories of punishment and tutelary reasoning as well.

Costa and Goldani (2015) published the research they made in thirty-eight decisions by the Appellate Court of Justice of the State of Rio Grande do Sul, Brazil. They aimed at ascertaining, by using a qualitative analysis of jurisprudence, if the *family status* of an adolescent accused of committing an offense is considered, by the Judiciary, as a relevant factor in the decision of the socio-educational measure to be applied. Therefore, their goal was to examine the influence of the social representation of the family in the penal treatment of adolescents, bearing in mind the prejudices regarding family structure representations that exist in contemporary societies and the traditional presence of interventionist practices in Brazil’s public policies.

According to them, although the current Juvenile Justice System adopts a paradigm in which the adolescent is individually and criminally liable before a system specifically designed for this age group, it is observed that the effective implantation of such model faces difficulties in

Brazil. Consequently, this leads to the endurance of old practices that are in discordance with the current doctrine, such as basing the treatment directed at children and adolescents upon their social and family conditions. They explain that the concept of a "normal" family would be related to historical, social, ethnic and cultural circumstances, being characterized as a social construction that varies according to context and not exactly to factual reality. Such idealization is strongly present in social life and, consequently, in legislation and public policy. So, the common ways of understanding the research problem are:

- ✓ Both works look at the jurisprudence on sanctions (socio-educational measures) for young people, but in different courts of appeal in Brazil, and also analyze qualitatively the operations of the legal system;

- ✓ There is other coincident point between the researchers and the present work: the recognition that there is still common in Brazil to apply socio-educational measures aimed at juvenile criminal responsibility in the format of former abstract "tutelary measures";

- ✓ My thesis and the work of Costa and Goldani conceptualized judicial interventions as interference of some external organ, focused on maintaining accepted moral standards. Or, imposing these moral standards on families who do not adopt them would function as part of the domination strategy by the ruling classes over the poor;

- ✓ The Juvenile Justice System has shown to be a promoter of social control through the criminalization of poverty, provoking the judicialization of social issues that should be solved by public policies;

- ✓ The accountability of families reveals a fallacy created over decades to justify the absence of the welfare state and the controlling interference in the private lives of popular classes, according to the first generation of programs of interventions in young offenders' lives.

- ✓ Socio-educational measures of deprivation of liberty are often justified as a form of protecting youths due to the practice of juvenile offenses. Consequently, both works sustain that the adoption of such reasoning links the Brazilian Judiciary to the old ideas of

the Codes of Minors and the Doctrine of Irregular Situation, manifested in consideration of the family situation of young offenders when defining their socio-educational measures.

Finally, Costa and Goldani have revealed how, to this day, there is a pejorative way of looking at the most impoverished families, i.e., without economic and social resources, as incapable of raising their children properly. Once again, institutional juridical discourse follows the meaning that there is a need to forge the temperament of young people from the peripheries to fit the optimal model and serve correctly as an employee in the labor market.

Costa and Goldani observe the influence of old theories of punishment when courts found the socio-educational measures against young offenders in the category of "normal families", while my work shows the reluctance of courts of appeal to leave the system of ideas of RPM and also the doctrine of the irregular situation. Perhaps it is possible to say that the category of "normal families" constitutes a strengthening mechanism to stabilize the courts in a two old systems of ideas (RPM and the doctrine of the irregular situation).

Minahim and Sposato (2011) qualitatively analyzed decisions by the Appeal Courts of the states of São Paulo, Pernambuco, Rio Grande do Sul, Rio de Janeiro, Paraná and Bahia, and the Superior Court of Justice, regarding the socio-educational measure of internment applied between January 2008 and July 2009 and, later, the observation of cases in the Trial Court of Salvador.

They argued that the 1990 Statute is criticized in public debates. A primary challenge is identifying the significant gaps in legislation that allow arbitrariness and extrajudicial arguments to solve cases by judges. In their view, the false perception that the fully-custodial measure [of three years of imprisonment] constitutes a “gift” and has a protective character distances from its true penal nature. Consequently, allegedly abuses in the exercise of discretionary-sanctioning power come from not observing legal boundaries to the power of punishing. The implementation of sentences embedded with punitive meaning shows a lack of juridical grounding, revealing marked presences of extra-juridical and ideological arguments in the decisions’ content. Common points of my thesis and the paper presented by Minahim and Sposato (2011):

- ✓ Both studies made a qualitative analyze of the jurisprudence. My study refers to a single court of appeal in an extended period of time; their research involves several courts of

appeal and included one superior court, from Brasília, and one trial court. However, some results overlap and reinforce each other: imposing socio-educational measures in the spirit of the new legislation requires integrating and observing all the constituent principles of this new legislative philosophy.

- ✓ Both researches see the correlation of severe infraction practices and thus show a stereotyped view of accused and sentenced adolescents;

- ✓ My research and theirs also mention that the personal conditions of the adolescent appear as an impediment to the fulfillment of non-custodial socio-educational measures;

- ✓ I agree with the approach sustained by them, in the sense that judges must refer to legal texts to be applied.

The problem that I observe in the above-mentioned work is that the juvenile criminal liability, in way they suggested by Minahim and Sposato, would assimilate obligatorily and exclusionary punishment, because they align the criminal liability with the old *definition* of punishment and the old theories of punishment, and that does not automatically amount to a system of educational features or based on positive values of the new paradigm of the 1990 Statute. In the perspective presented in my work, punitive social reaction, within its old meanings, would be a "cognitive trap" and not necessarily be sufficient to promote the integration of young people into the comprehensive social systems and public equipment already existing in Brazil.

I also mention the research of Cappi (2014a) devoted to the investigation of "ways of thinking" about social control of crime and about criminal justice. To the author, his research is part of an international context, characterized by the multiplication of studies and discussions on the evolution of criminal control, that illustrate and analyze both the increase of punitive solutions aimed at the "intentional imposition of pain" (Christie) and the emergence ? of less punitive proposals. His analysis, grounded on the observation of nothing less than impressive thirty-seven Brazilian Constitutional Amendment Proposals, aimed at reducing criminal majority, currently set at 18 (eighteen) years in Brazil, and the parliamentary discourses that refer to them, between 1993 and 2010.

I understand that Cappi's work is in line with the theoretical perspective of my research because both studies start from the standpoint that one can observe problematic situations involving adolescents through the lenses of different idea systems.

Thus, he state the object of his research as follows: what are the observable "ways of thinking" of social control and criminal justice in the speeches by Brazilian parliamentarians, when they take position about the reduction or maintenance of criminal majority? The research carried out intended to identify the various ways of viewing and (re) constructing social reality, as well as responses to juvenile delinquency. Each Constitutional Amendment proposal was then considered as a unit of discourse. To the author, it was possible to elaborate four standard discourses, understood as narrative lines that offer a synthesis, of the highest theoretical density, of the positions expressed in the set of analyzed material.

The first discourse refers to "absolute punishment" for juvenile delinquency, considering the widespread insecurity and fear that affect Brazilian society as a whole, exposed to high levels of crime. In fact, because public opinion demands solutions in the form of severe punitive measures, young "delinquents" are considered dangerous and responsible for increasing insecurity, thus justifying a type of punishment oriented by retributive or dissuasive responses. It is an authoritative discourse, with powerful emotional tones, based on the idea of fear, viewing teenagers as monsters.

The second standard discourse is the so-called "punishment according to a fair trial" (*Garantismo*)[20], which supports the reduction of criminal majority by the gradual, or conditional, reduction of the use of "socio-educational measures" for the benefit of adult criminal punishment. The focus is on the need to punish ("inflict deliberate suffering to") young offenders as adults, given the alleged ineffectiveness of the socio-educational measures provided for by current law,

[20] I believe that I must clarify to the English-speaking reader the term "garantismo", which is not at all common in English literature. So, I found the following description: "The term *garantismo* does not translate into English smoothly. However, a brief definition can be attempted which may also help identify the philosophical and political tradition to which Ferrajoli belongs. *Garantismo* (guaranteeism?) has little in common with mere legalism or with legal and procedural formalism. Rather, it is synonymous with the defense and the promotion of fundamental rights: the right to life and individual freedom, the right to civil and political liberties, and the right to social means of existence. These non-alienable rights are by no means guaranteed by contemporary states, although they constitute the core values whose protection and promotion justify the very existence of the 'artifice' that we call State. *Garantismo* also entails the rights of the vulnerable against the rights of the powerful, and alludes to the certainty of law as opposed to arbitrariness. It implies a distinction between morality and the law, a distinction that confines the legitimacy of state intervention to a very limited terrain. For all these reasons, *garantismo* is not merely to be identified with the rule of law, as it prefigures what is known in Italy as *diritto penale minimo* (minimal penal law), a strategy that surpasses overzealous, moralistic, English realism, while hinting at an original variant, albeit very critical, of Scandinavian abolicionism". (RUGGIERO, 1994, cf. Bibliography).

extending punitive-afflictive responses to the younger group of the Brazilian population, considering them entirely liable for their actions. Finally, this discourse is part of the rule of law perspective, which focuses mostly on the punitive (MPR) content of the state response, not excluding other complementary intervention forms.

The protection discourse, the third standard discourse identified by Cappi (2014a), supports the maintenance of criminal majority in a perspective of conservation of the juvenile justice system established by the Child and Adolescent Statute. The Brazilian reality of accentuated social and economic inequality is especially considered, reducing the hostility to the young, recognized as subjects of rights. However, punitive approach is not absent from this discourse, especially its deterrent function, because it values the distressing aspect of socio-educational measures, considered similar to that of criminal justice responses. Finally, he says that this discourse supports a view of "protection" according to the tradition of juvenile justice systems developed in Western countries during the twentieth century, not excluding the reference to legally regulated punitive responses of grievous character. The Statute is interpreted as a punitive and punitive instrument for adolescents.

The fourth discourse type is called "emancipating protagonist", which supports the maintenance of criminal majority in the current terms and describes violence and insecurity concerning the structural dimension of the problem. There is a need for an in-depth examination of the different violent manifestations in society in order to engender radical political transformations that can reduce inequalities and minimize the dynamics of exclusion. It proposes a "non-hostile" view of adolescent offenders and invests in potentialities, characterizing an openly critical reading of the punitive perspective. Educational proposals that depart clearly from authoritarian and paternalistic positions are valued. Priority is given to building autonomy of young individuals, to be gradually implemented by socio-educational intervention and to be conducted in an open environment. Finally, even if only outlined, this approach is open to intervention methods based on the idea of "restorative justice" as a conflict resolution process, because the fourth type considers a non-distressing response and some other way out of the problem of juvenile offenses.

Cappi (2014a) also identifies the punitive intervention philosophy as present in three of the four standard discourses, using the concept of Modern Penal Rationality, developed by Pires to designate an idea system that, since the eighteenth century, has established theoretical and ideological support for criminal law and its intervention forms. For sure, I am going to develop

the theory of Pires in the next chapter. For now, I can say that Cappi mentioned that Pires relied on Bachelard (1938) and argued that Modern Penal Rationality constitutes an “epistemological obstacle” to the transformation of criminal responses, insofar as it imposes the obligation of distressful answers to crime, being deprivation of liberty (imprisonment) its most expression feature. Also, the appreciation (?) of the intentional infliction of suffering covers obligatory afflictive responses, excluding alternative measures of responses to crime and of conceiving the word “punishment”, maintaining the hostile conceptions of offenders. Moreover, it reproduces old theories (“finalities”) of punishment, which enjoy recognized authority in the criminal field and, in a more expressive way, among modern Western culture. To Cappi, it is not surprising to note that Modern Penal Rationality occurs, in no small extent, in discourses favoring reduction of the penal age. It is, therefore, a way of thinking that propagates the protection of society through punitive responses, based on the obligation to inflict deliberate suffering, as well as on deprivation of liberty- to the detriment of innovative forms of intervention - in the face of juvenile delinquency.

But what I believe to be crucial to my work is the identification of the punitive intervention philosophy not only within parliamentary debates, but also within judicial decisions’ content as well. However, although not provided for in the current 1990 Statute, I examine whether a strictly repressive style discourse linked to Modern Penal Rationality shapes the meaning of a significant number of Court of Appeals decisions on juvenile offenses.

I will now present five studies on juvenile justice in Brazil that, among other information directly or indirectly pertinent to my topic, allow me to visualize that the specific problem addressed in my project, that is, the negative influence of the central thought system of criminal justice for adults (RPM) on the "non-transformation" of juvenile justice after the implementation of the 1990 Child and Adolescent Statute has remained a blind spot in socio-legal research until now. This observation should not be seen as a criticism of the previous studies, but as merely indicating the fact that I am opening here another way - and pointing out the coexistence of another problem - to explore the question of the fundamental non-evolution of legal practices in juvenile justice in Brazil. These five studies are:

1) Gonçalves (2020) who reviews the studies in the Brazilian sociological literature on Juvenile ustice between 1970 et 2019.

2) Cifali, Chies-Santos and Alvarez (2020) who, relying on research already conducted separately by the authors as well as other national and international studies seek to reflect on the theme of possible continuities and ruptures throughout the history of juvenile justice in Brazil.

3) Oliveira (2018) who does a research on the specific application of the socio-educational measure of internment in the first instance courts of juvenile justice in the state of São Paulo.

4) Miraglia (2005) who conducts an ethnographic research of the hearings with children and adolescents in the special courts of juvenile justice also in the state of São Paulo.

5) Águido, Cacham and Fazzi (2013) who are interested in the social representations of juvenile court judges in the application of the sanction of deprivation of liberty in the state of Minas Gerais where I conducted my research.

Gonçalves (2020) organizes the studies into three groups: (i) studies describing the sociodemographic profile of adolescents in conflict with the law, (ii) studies observing a loose articulation among the organizations responsible for the assistance of adolescents in conflict with the law and, on the contrary, (iii) studies observing a strict articulation among the organizations that give themselves as operational objective the efficiency.

What the author intends to show here is the distance between the normative level of the 1990 legislation and the operational level of the courts and other organizations that function within the framework of the new statute. He presents his own goal as being to show the "gap that exists between the theoretical plan and the practices." It seems to me that it is better to say that he seeks to show, in the case of juvenile justice, the difference that exists between two levels of complex practices that are connected and interpenetrated in some way: on the one hand, a governmental practice of creating legislation that, in the case of the 1990 Statute, was innovative; and, on the other hand, a legal practice and other administrative and professional practices that are going to adopt or not adopt in different degrees the system of ideas that is integrated into the legislation (in this case, an innovative system of ideas).

However, the author will not focus his attention on the relationship between the system of ideas of the MPR and the two other systems of ideas that have been developed in the field of

juvenile justice. This is perfectly understandable, and even expected, because the studies conducted have not dealt directly with this topic. The author will then focus his attention, among other things, on the "selectivity" of the legal system. The term "selectivity" here refers to the fact that the *internment measure* will fall mostly on young males, with black skin color, low income and education, and coming from families that are observed by operators as "families without authority," "disorganized," "unstructured," "apathetic," or "powerless". Citing other research, he also shows that adolescent drug users who neither worked nor studied were more likely to be referred to internment. We will see later how this practice is justified with the help of the system of ideas of MPR (justice for adults).

This review of studies allows us to see, then, that there are discriminatory forms of legitimizing internment that persist after the creation of the new Statute of 1990. But it also allows us to see, in a complementary way to my research, that these discriminatory forms of legitimation and stigmatization are much more easily articulated with the system of ideas of the MPR and the DIS than with the system of ideas of the DIP that was integrated into the legislation.

It also emerges from the examination made by the authors that the central preoccupation of this literature revolves around the theme of "subjects of rights" and that the path for the solution of the problem is often observed in terms of legal guarantees of procedural nature. These questions are obviously important, but I want to examine the problems that are posed by the way of conceiving and defining the way of intervening in a conflict in criminal matters.

The study by Cifali, Chies-Santos, and Alvarez (2020), as I said, will look at the theme of ruptures and continuities in the history of juvenile justice in Brazil. In the same way as several other studies mentioned by the authors, the 1990 Statute will be observed as a legislative opportunity of "rupture" that did not come to fruition in the practice of juvenile courts in criminal matters. However, it is important to emphasize that the theme of continuities/ruptures will be observed here in a manner analogous to the study by Gonçalves (2020). This means that the authors will also privilege the results that make reference to the "selectivity" of juvenile justice regarding the use of the detention measure and the problem of the defense of the rights of children and youth in the country. The authors note that the legislative rupture between, on the one hand, the two Juvenile Codes of 1927 and 1979 and, on the other hand, the Statute of 1990 is patent. But at the same time, they point out the insufficiency of this rupture to succeed in modifying the practice of the courts and organizations operating within the framework of the new legislation. In other words: the discontinuity at the level of the legal philosophy of intervention

incorporated in the 1990 legislation did not produce a discontinuity at the level of stigmatization and discriminatory selectivity in the organizational practices.

In my research, if I use the continuity/rupture distinction, it would consist of examining the situation between, on the one hand, the core system of ideas in adult justice (MPR) and the old juvenile justice system of ideas (DISI) and, on the other hand, the innovative system of ideas of the 1990 statute (DIP) in the organizational practice of the courts of appeal in Brazil. Adopting these terms, I would also arrive - as we shall see below - at a curious finding of "continuity": the new 1990 legislation failed to introduce in a predominant way its innovative system of ideas into the production of juvenile jurisprudence regarding socioeducational measures. Naturally, to our knowledge, everything indicates that the upper level of three years of internment has been respected as a general rule, but not the recourse to internment in a global manner.

Oliveira's study (2018) looks at the mechanisms of judicial decisions that apply the socioeducational measure of detention in juvenile justice in Brazil. He combined two research strategies, but one of them was a representative sample of institutional reports from the "Complexo do Tatuapé" in the state of São Paulo between 1990 and 2006. As we can see, he also does a documentary analysis, but his place of observation (state and non-jurisprudential reports) is distinct, as is his period of observation (1990-2006/2010-2016). Despite these differences in the configuration of the two researches, one of his central results will corroborate with one of our central empirical findings. Indeed, Oliveira's results indicate that the standard mechanism of decisions leading to internment involves decisions "creating a proportionality between the seriousness of the offense and the severity of the measure applied." This result is an infallible indicator of the presence of the RPM (adult justice) system of ideas in detention decisions for youths in conflict with the law. On this particular aspect, both researches are factually connected and are even complementary in the temporal dimension: together, they show that the dominant idea system of adult justice has been in continuity at least since the legislative change of 1990, and that this result can be generalized to all the states in Brazil. In short: the transformation in the rationality of the legislation has not succeeded in producing a transformation in the way of thinking about penal intervention in juvenile justice, and this probably includes the courts of first instance.

Oliveira's (2018) research also shows that the old, obsolete distinction between recoverable/irrecoverable offenders that was integrated within both the system of ideas of MPR and the first system of ideas of juvenile justice (DIS) continues to be reproduced by various

justice operators and professionals. This distinction, and other equivalent ones, continue to be used to selectionalize the internment measure.

Oliveira also highlights the fact that adolescent drug users have a 45% increased chance of internment compared to non-users. As we will see in our research, this is also mediated by the notion of "heinous crimes" that was created for adult justice in Brazilian legislation. Furthermore, adolescents who neither study nor work increase their chances of internment by 66% over those who only study. This is a sign of the presence of two old systems of thought: that of the RPM and that of the DSI. Of course, this favors structural discrimination in terms of social classes. And Oliveira also indicates that adolescents with white skin color decrease their chances of internment by 69% in comparison to non-white adolescents. We can observe once again the "alliance" between certain systems of thought regarding the manner of punishment (MPR and DIS) and the structural discriminatory effects.

The blind spot of Oliveira's research (2018) consists in not seeing the implications of transposing the rationality of adult justice to juvenile justice, but his results help us to shed additional light on this side of the problem.

Miraglia's (2005) research consists of observing first instance hearings of some juvenile justice courts in a neighborhood of the city of São Paulo. She is also concerned with assessing the difference between the legislative norms of the 1990 Statute and the legal practice of the (first instance) courts. Because of a quote she makes from a passage by Lévi-Strauss in Tristes Tropiques, she seems to equate this difference with the help of the justice/injustice distinction. "Justice" would be in the law and "injustice" in the inadequate application of the laws, in the impurities of this application. I will not adopt these schemes because I cannot exclude the inverse relationship: an "injustice" or "problem" located in the laws, and a "justice" or innovation located in an eventual judicial practice of the courts more adjusted to the fundamental human rights. Just imagine, for example, a collective and organized judicial practice consisting in abolishing minimum sentences of incarceration and successive accumulation of prison sentences. In Brazil, as elsewhere, this legislative arithmetic way of assigning sentences produces results that are both "rational" (mathematical calculations) and absurd (sentences exceeding the life expectancy of the convicted) (Pires, 2012; Umaña and Pires, 2016). However, in the case she is dealing with, the problem is effectively found in judicial practice that has remained indifferent to the new system of ideas implemented by the legislation and this despite its better legal adjustment to fundamental human rights.

It is interesting to note that Miraglia's research implicitly shows how different research methods and empirical material can reach certain compatible results when the gaze of the researcher is oriented in a direction that, without having the same focus, translates a concern for equivalent social transformation. For example, in the presentation of one of the cases, one can clearly observe how the prosecutor "automatically thinks" (without reflection adjusted to the IPR system of ideas) in the internment measure according to the formal category of the crime in the criminal justice for adults: aggravated assault involving two boys aged 13 and 15 in company with a youth of legal age who was referred to the adult justice system. The prosecutor clearly "navigated" in the system of ideas of the adult justice system (MPR), but the judge's case is more complex and the data do not allow for the elimination of conjectures incompatible with each other. He did not grant internment, opting instead for a measure of probation. In the case of the judge, with the data presented, it is impossible to know if he actualized in a more lenient way the system of ideas of the MPR or the system of ideas of the DIS (or both). However, from the judge's manner of addressing both to the parents of the boys at the hearing as well as to the boys, one can tell that he did not adopt - or understand - the system of ideas of the DIP (1990 legislation). Moreover, Miraglia (2005) states that some variables, such as the severity of the offense, function as predictors of the type of socioeducational measure. This is one of the signs of the presence of MPR. So, I can also see in her data the great influence of the two systems of ideas: MPR and DIS. However, unlike Miraglia, we do not attribute the problems she describes to fomality/informality in the way hearings are conducted. The same problem subsists in adult criminal justice despite the observance of formalities.

The object of the research of Águido, Cacham and Fazzi (2013) consisted in the content analysis of the discourse of the sentences handed down by judges who are members of the juvenile system. The investigation sought to determine whether the legal practices in the field of juvenile law were still based on the tutelary-repressive conceptions of the doctrine of the irregular situation (DIS). Despite the appearances of closeness, their topic is significantly more distant from mine. The intention of the researchers was to determine if the argumentation of the judges was permeated by traditional and stereotypical social representations in relation to the adolescent, the family, gender roles, and the deprivation of liberty. The authors did not focus their attention on the MPR system of ideas. So it was impossible for them to distinguish between the two connected systems of ideas : that of MPR and that of DIS. They then had a propensity to overestimate the presence of DIS.

Nevertheless, from our theoretical research interests, they were able to show that the innovative Legislation of 1990 was little known (or misunderstood) and also "stigmatized." This stigmatization of the legislation (mainly done by politicians and criminal justice operators themselves), observed from our theoretical glasses, was conducted based on the beliefs nurtured by the system of ideas of the modern penal rationality. For example, the 1990 Legislation was stigmatized as contributing to producing the "impunity of the authors of crimes." This idea is the driving motive of the deliberate infliction of suffering both in the 18th century "Doctrine of maximum severity" (RADZINOWICZ) and in the modern theory of dissuasion after Beccaria (PIRES, 1998): punishment that deliberately seeks to inflict suffering is the only form of punishment that ends with the " impunity" and, consequently, with the crime[21].

Like the other studies above, the authors further state that the sentences label the families as "without authority", "disorganized", "unstructured", "apathetic", "impotent". These remarks are not used to strengthen a supportive relationship, but as a "vocabulary of motives" (Wrigth Mills) for measures of internment. And this vocabulary of motives is also found in the reports produced by social workers in juvenile detention centers or in the technical sectors of the juvenile justice system. Once again, it is possible to see an easy relationship between these semantic practices and the idea systems of the MPR and the DIS.

To conclude this review of studies, let me point out the following. With regard to criminal justice, it is not easy for us - anthropologists, criminologists, jurists or sociologists - to remain coherently and systematically outside the system of ideas of the RPM. For, in order to do so, we need to have already identified with a little more confidence where the boundaries of this system of ideas that has contributed to our own self-socialization lie. So, we often leave that system through a "door" and re-enter it through a "window" as a blind spot, especially when we are looking for a solution to help the criminal justice system rebuild its structures or programs of intervention.

[21] On the topic of impunity, see Umana's PhD thesis (2017).

Chapter 2 - Theoretical and conceptual perspectives

The central theoretical hypothesis of this research recognizes the existence of a socio-legal semantics somehow favoring the attribution of repressive meaning to socio-educational measures, which have followed criminal law patterns of judgment established by the members of the Court of Appeal. But, in fact, I observed idea systems organized in a sense forged by old theories of punishment, and later mobilized by appellate judges, precluding the development of alternative ways of looking at the issue discussed, and then do not distinguishing "adult x juvenile" rationale. Thus, my conceptual perspective is that the legal-institutional decision processes occurring within the cognitive context of the Court of Appeal reproduce a "generic Criminal Law" involving at least three systems of ideas. Indeed, the reasoning that has undoubtedly prevailed links to the old theories of punishment. But the tutelary justification, related to the revoked 1979 Brazilian Code of Minors, was not entirely erased from the memoirs of appellate judges, who did not yet fully adopt the philosophy of intervention of integral protection of the child. It is worth noting that this research has a qualitative orientation, although it uses quantitative data to present its findings.

The idea systems I identified are: (1) The “Modern Penal Rationality” (as described by Pires and conceived for adults in the criminal justice system, linked to the Adults' Criminal Law); (2) The “Doctrine of Irregular Situation” (as provided by the first generation of theories of intervention in juvenile delinquency, and stressed by the revoked Brazilian 1979 “Code of Minors”, identified with the rehabilitative “*parens patriae*” reasoning); and (3) The “Doctrine of Integral Protection” (as established by the 1988 Brazilian Constitution and regulated in the 1990 Child and Adolescent Statute, inspired by the UN Convention on the Rights of the Child).

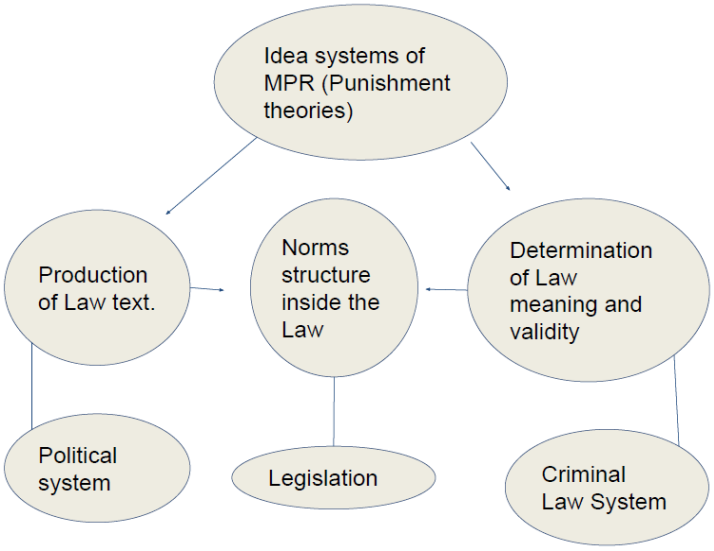
As we said in the introduction, this research adopted the systemic Theory of Modern Penal Rationality to characterize one of the idea systems identified in this investigation and construct some elements of its knowledge problem that address the epistemological obstacles to the evolution of the juvenile criminal justice subsystem in criminal matters. So I want to present, with the support of Pires (2017), Raupp (2015), Dubé et al. (2013) Machado (2011), and Garcia (2009), how I approached my research problem theoretically. I used the Modern Penal Rationality, and the theories of punishment which composes it, to sustain I have seen a consistent applying of adult criminal law within juvenile delinquency cases.

2.1. The Systemic Theory of Modern Penal Rationality (MPR).

To begin with, I would like to briefly explain why I fit my study into the research structure of Modern Penal Rationality, certainly after starting to develop my thoughts at the School of Sociology of the Federal University of Minas Gerais, Brazil. My initial ideas for researching the prevalence of punitive meaning in supposedly "protective" language of Juvenile Justice occurred in Brazil, due to a suggestion made by Professor Dr. Cláudio Beato, from the Federal University of Minas Gerais. Afterward I got to know the research style of the Canadian Research Chair in Legal Traditions and Penal Rationality, founded in 2001, led by Pires and composed of other researchers working on an orderly reflection on the foundations and characteristics of the cognitive structures of the modern system of criminal law. In particular, in the role and influence of the MPR in guiding the operations of the Criminal Law system, and in determining its possibilities of modification and transformation. (Dubé, 2013)

One of the Chair's research themes encompasses the MPR redundancy in jurisprudence concerning problems of identity evolution at the level of sanctioning rules. This view of criminal law function and identity is inspired by Niklas Luhmann's theory of socially differentiated systems, allowing sociological observation to consider the contingency of “choices” *made by the system itself* in institutionalizing its foundations. (Dubé, 2013, 17).

Figure 1: Structural and cognitive coupling between two social systems. (PIRES, 2016)



To continue, I am aware that legal knowledge and the social sciences define crime and even the criminal system by the exclusive presence of the imposition of social exclusion and suffering, within the coercive criminal penalty. (PIRES, 2004, 42) So, I emphasize the MPR is influencing the criminal appeal judges thinking (the criminal law system in the figure above), at the very time of designing the written discursive structures to justify decisions. So, appeal judges do in fact define and construct the differentiated function and systemic identity of criminal law, then "drawing a distinction" from all other fields of law.

Thus, my research style focuses on describing, understanding, and criticizing legal communications, then identifying idea systems mobilized by argumentative actions to determine "punishment" for adolescents. Therefore, constructed by judges of appeal during a mental process aimed at sanctioning juvenile delinquency. More specifically, I investigate whether legal communications derived from criminal jurisprudence depend on MPR's ideas to frame, neutralize, devalue or, even that, in some cases, vehemently disprove the potentially innovative scope of the 1990 Statute in punitive-like operations tied to past judicial practices. (*See* Dubé, 2013, 26) So, it is possible to present some of MPR research questions as enigmas:

> 1 - The enigma of human rights in punishment: How could it be that the criminal law system presents itself as “humanistic” and “respectful of human rights” since the 18th century despite its valorization of the death penalty, life imprisonment and long-term incarceration (10, 15, 25, 30 years…)? Why are human rights often mobilized to increase or maintain punishment severity?
> 2 - The enigma of the unsuccessful critique of prison: Why repeated critiques of prison (Foucault, Rothman, etc.) have not resulted in a general reduction of the use of imprisonment and of the scale of punishments?
> 3 - The enigma of the difficulty of legitimating non-custodial sentences: Why law reform commissions elsewhere in western countries have faced so many difficulties justifying non-custodial sentences?

The usage of MPR cognitive tools in this analysis process is helpful because, as Garcia (2013, 37) says, it is a theory that asks questions because it is a theory that "observes." Moreover, a theory proposing answers, by ordaining a set of empirical and theoretical data coherently. In short, a theory that interprets, because it elaborates a "scheme of intelligibility." Garcia stated:

> "The MPR theory was built progressively to respond to a specific research problem: the obstacles related to the practical and institutional reform of the modern criminal law. In particular the recurrent character of prison criticism, the observation of the existence of a huge difficulty in legitimizing, generalize and restore sanctions that are not intentionally (or in the foreground) to inflict pain on the guilty, debate on the concept of crime and the frontiers of criminal law as addressed by the social sciences, doctrine and law theory, the history of the sentences of modern criminal law and the ideas that served to support them." (GARCIA, 2013, 41).

The MPR has been developed through using two starting points, therefore, historical-empirical observations and theoretical elaborations, and has two main stages. Between 1990 and 2001, under the influence Michel Foucault and Yves Barel. From 2001 to 2002, Pires began using Luhmann's conceptual tools to reformulate MPR. Framed by the theory of systems, MPR appears as a falsifiable theory, which has an empirical scope and a critical aim: it is empirically constructed, constructivist, systemic but non-functionalist, and with a critical range, says Pires (GARCIA, 2013, 42).

And MPR has two parts, one descriptive, addressing the founding theories of punishment of modern criminal law: retribution, deterrence, and rehabilitation in prison. The theories I referred played a decisive role in the processes of identity reproduction of the criminal law system by answering the following questions: *Why punish? Who to punish? How to punish? How far to punish*? Different answers then were provided, according to the coming draft: we must punish to rehabilitate the offender (HOWARD), to reward evil with evil (KANT), to prevent criminals and other citizens from committing crimes (BENTHAM) and, finally, to denounce a behaviour (STEPHEN). This last theory is not so relevant to my research context. These theories, deeply rooted in the Western criminal and legal culture, would be both the oldest and most used in the criminal justice system. Despite the various reasons to punish, none of the theories of punishment have criticized the afflictive sentence, and they have all emphasized, in the foreground, the social exclusion of the offender. The second part of MPR is both descriptive and explanatory, concerning evolution problems of the criminal law and conditions of emergence, selection, and stabilization of innovative ideas. MPR starts from the guiding hypothesis that the systems of ideas constituted by modern theories of punishment represent an *epistemological or cognitive obstacle* to receiving non-prison sanctions in criminal law, and do not favor the reduction of the use of imprisonment (duration and frequency). (GARCIA, 2013, 43) I am going to develop these assertions further when presenting more about punishment theories central to my research.

Indeed, these theories offer guiding ideas for decision-making and indicate to authorities available possibilities. They helped to justify penalties in the most robust sense and to block alternative measures and intervention philosophies that did not require mandatory punishment. Criminal law self-observes and self-describes itself through legal communication as a system radically different from other systems of conflict resolution (legal and non-legal), as well as postulates a difference of nature between criminal (public) and civil (private) wrongdoing. Thus, the criminal law presents itself as the only mechanism of control that can, ultimately, protect the fundamental values of society adequately. Moreover, it claims a specific social function, the protection of society, identifying itself as the only institutional entity sufficiently stable and trustworthy able to do so. From the mid-nineteenth century, this system of ideas stabilized in the West and, despite the transformations of the last decades, Pires's research concludes that the criminal law system has not qualitatively changed its dominant system of ideas or its primary forms of intervention. From the above, as the present thesis uses MPR theory as an idea system, I quote Garcia:

> "Modern Penal Rationality suggests that ideas forming punishment theories can only produce convergent divergence: they present themselves in their difference (divergence of motives) to produce and reproduce redundancy (convergence of practices)." (GARCIA, 2013, 54)

So, all punishment theories have reasons that vary from one theory to another, lead to viewing *prison* as the *essential form of punishmen*t (Foucalt, 1975, 36, apud GARCIA, 2013, 60).

After making this initial draft, aiming at basically introducing a small sketch of MPR idea system, based mainly on social exclusion, and suffering, I understand enlightening to mention that MPR focuses on the conditions of evolution (and non-evolution) of the criminal law. Pires (2017a) explains that, in the 1960s and 1970s, the social sciences criticized abuses of punitive imprisonment in the West. So, he thought in building up new criminal rationality and completely revising the normative structure of criminal law. From 1974-75, the fundamental reflections of Michel Foucault, on the one hand, and Louk Hulsman, on the other hand, influenced his desire to know and understand better founding ideas regarding the right to punish. Pires said:

> "More remarkably, we were trying to build a new image of criminal law and change the direction of its relationship with human rights. In the legal system, criminal law had (and still has) an image reminiscent of procedural law. Indeed, it is seen as a kind of second-class right, a (more vigorous) right of protection of the law, whose primary purpose would be to protect the entire law against certain designated attacks, thus helping to

> maintain order but without contributing directly and positively to the configuration of social peace and the rights themselves. This image of criminal law creates a sort of paradox in the face of human rights. The former will usually be represented as a (negative) law of protection of the second. And it must take into account human rights only regarding its legality and certain general principles of its procedure. It is as if he could not both defend human rights and express concretely and immediately those rights contributing to his configuration. In this sense, human rights are partially neutralized as principles of humanistic reform of the criminal law itself, since it is the function of the latter to protect the rights of the individual and not "weaken" their own protection by humanizing the criminal law. The humanization of the criminal law is represented then as a sign of weakness, of softness, at the most of indulgence, but not of justice." (PIRES, 2017a, 4).

Pires perceived (2017a) in the work of reformists enormous difficulties in reducing recourse and length of prison sentences, as well as legitimizing non-custodial sanctions, and such obstacles are attached to specific political conjunctures, but the fundamental ones seem to be regarding *ideas*, both for the legal system and for the political system. Each system, in their own way, has the *same basic ideas*, and draw their justifications from the same pool of religious, philosophical, and legal thoughts. He attributed significant evolution difficulties (epistemological obstacles) to the formation of idea systems (in the 18th and 19th centuries) composed of three major theories of punishment. They are the retributive theory (whose philosophical-theological matrix dates back to the 11th century), the theory of deterrence and the theory of prison rehabilitation (late 18th and 19th century). Pires affirmed:

> "By 'idea system' we mean a social system of a special type (a bit like a 'theory'). (...) By 'theory of punishment' we mean a set of statements (and not just the purposes of the sanction) that will be used to ground the differentiation between criminal law and, on the other hand, the civil and administrative law. To refer to this idea system (or 'thinking'), I have adopted the expression 'Modern Penal Rationality' (now also MPR). From here also came the name of this theory of the evolution of the criminal law system: theory of the MPR." (PIRES, 2017a, 9).

The MPR will show, in a conceptual and empirically historical way, that the three main theories of punishment (retributive theories, deterrence and rehabilitation in prison) form a hermetic mode of thinking. They differ from others by not classifying as real alternatives to each other. In fact, they do not collide or produce distinctly for the reconstruction of criminal law. These theories have much more in common than divergence, and are probably more theories-accomplices than antinomies, although initially establishing internal differences by distinguishing peculiar foundations for the punishment. An illustration in Canadian jurisprudence:

> "The true function of criminal law in regard to punishment is in a wise blending of the **deterrent** and **reformative**, with **retribution** not entirely disregarded, and with a constant appreciation that the matter not merely **concerns the Court** and the **offender** but also the **public and society** as a going concern. [R. v. Willaert (1953), 105 C.C.C. 172 at 176 (Ont. C.A.)]" (apud PIRES, 2016)

So, punishment theories communicate its general goals in a condensed manner, namely: to inflict suffering proportional to the wrong caused, to inflict dissuasive suffering, to inflict denouncing or repressive suffering, and to exclude from society, by imprisonment, and then to include socially further. Just to recapitulate, reinforcing the circularity, Pires stated:

> "I would say today that the theory of the MPR is a systemic sociological theory that, first, describes the emergence of a system of ideas formed by (modern) theories of punishment that have been institutionalized; and, secondly, theory presents this system of ideas (or these theories) as an epistemological obstacle (Bachelard) to reconstruction - to a "threshold evolution (Sismondon) - of the criminal law system as it was differentiated and built in Europe and the Americas." (PIRES, 2017a, 11).

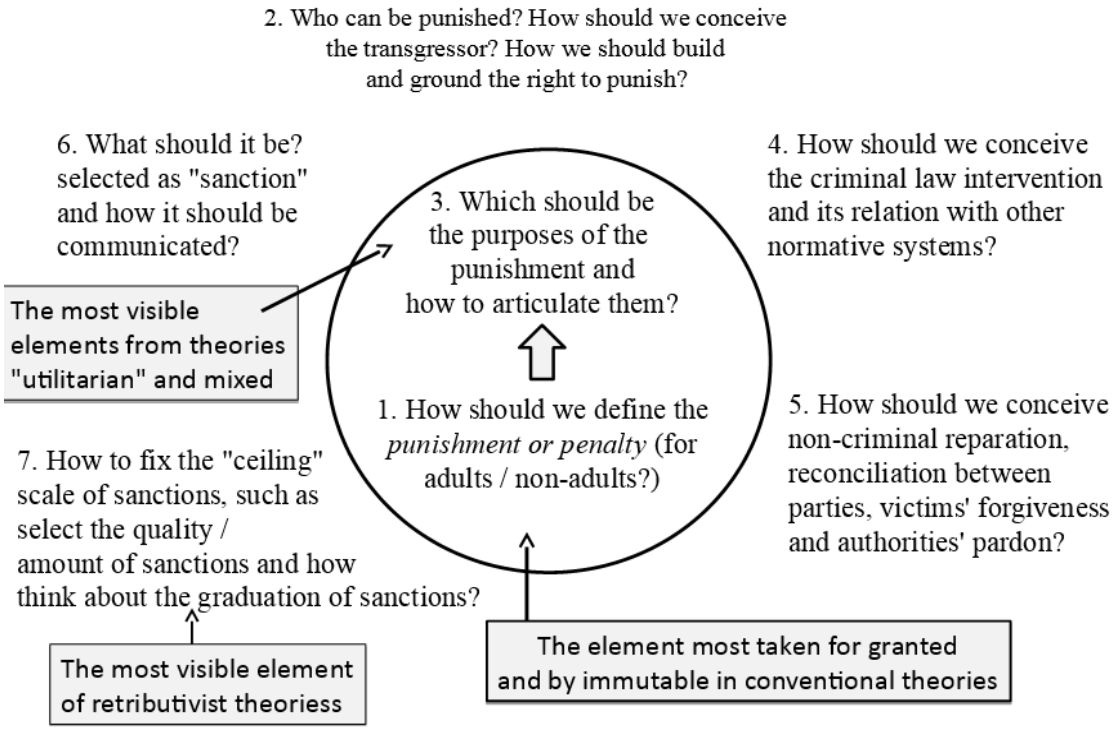
Pires (2017a) presents the main features of his theory of "evolution" on the MPR:

- ✓ It articulates the conceptual apparatus of systems theory (particularly Luhmann) with some contributions by Foucault.
- ✓ It views the criminal law system as a self-referential subsystem of the legal system. Luhmann's theory of the legal system has not explored this path, but it offers the tools to do it. Luhmann has also glimpsed this possibility and such is being developed.
- ✓ It observes the social systems as being able (or not) to realize a progressive evolution. The MPR theory, under the influence of Luhmann, will observe social systems as having, themselves, a role to play in their own evolution because they are self-referential systems. This means that they can either hinder their own internal evolution or promote it by producing new ideas.
- ✓ The subject of the theory focuses less on the actual (social-historical) transformations of the criminal law system than on the identification of ideas valued by the system itself and which hinder its reconstruction (threshold evolution).
- ✓ The theory takes into account the criminal law system environment but does not directly explain its reconstruction difficulties by a linear causality that comes exclusively from the environment. To the MPR the criminal law system is not a dependent and neutral variable.

On this point, it comes into conflict with other explanations that do not take into account the functional and communicational differentiation between the systems.

- ✓ The theory also focuses on the relationship between the political system and the criminal law sub-system because the RPM system of ideas (modern theories of punishment) cognitively and structurally couple the operations of the two systems in criminal matters and this will pose a particular problem for the criminal law system. It will find it very difficult to protect his field of fundamental prerogatives in sentencing political intervention so as to be able to effectively protect fundamental rights in this area.
- ✓ From the methodological point of view, the theory grounds on the theory of observation, on the notion of epistemological obstacles and the model of negative explanations. These last two approaches complement each other very harmoniously. The epistemological obstacle approach is rare in research on punishment. As for the negative explanations, Pires does not know other research adopting it in the sociology of punishment. He says he accidentally found himself within this model, probably because when he was working with the notion of an epistemological obstacle.

Figure 2: Constitutive questions of conventional punishment theories.



2.2. Presenting punishment theories central to this research.

I am not to going to describe the MPR theoretical framework broadly, but quoting central parts of the most representatives punishment theories I perceived in the empirical data, only for this thesis purposes.

2.2.1. Theory of retribution.

-Finality prescribed: to inflict proportional suffering to the harm caused to "do justice."

The origin of the theory of retribution goes back to a theory of the justice of God of Saint Alselm (*Cur Deus Homo*, 1100, apud PIRES, 1998). In its modern and secular version, one often refers to Kant (1797) and Hegel (1820) (apud PIRES, 1998, and RAUPP, 2015). To start, I can also mention that Pires quoted a precedent of jurisprudence (R. v. Sweeney (1992), 11 C.R. (4th) 1] (apud PIRES, 2016), to present the condensed formula of the theory of retribution:

> "Retribution, as an objective of sentencing, represents nothing more than the hallowed principle that *criminal punishment*, in addition to advancing utilitarian considerations related to deterrence and rehabilitation, should also *be imposed to the moral culpability* of the offender". (apud PIRES, 2106)

The consensual principle of proportionality between the (evil of) crime and the (suffering of) punishment is, in its current understanding by the system of criminal law and the political system, an epistemological obstacle to the evolution of the system of criminal law and the political system in criminal law (especially for adults). This idea-principle of proportionality between crime and punishment is frequently observed by philosophers, jurists, and sociologists exclusively in its positive face, precisely the most precarious to the point of being a kind of transcendental cultural illusion (and unnatural). This principle is seen as not instrumentalizing the human being when he justifies the death penalty and the perpetual sentence to render justice, restore the law or the rights, and limit the abuses. In contrast, it is, above all, a fruitful source of abuse of fundamental rights (PIRES, 2017a, 11).

The retributive theory associates with the work of Emmanuel Kant, who considers the right to punish regarding obligation: "the criminal law is a categorical imperative" (KANT, 1797: 178). The power to punish implies not only the right-permission to punish, but the right-duty to punish. The imperative is moral because the non-application of punishment means "corrupting an entire people." The crime is represented as an offense directed against Morality or an ideal of Supreme Justice. Only the public authority of the state, as a worthy representative and defender of this morality, is legitimately invested with the power to punish. And the evil of crime requires a corresponding evil administered by the sentence, not accepting other modes of conflict resolution (GARCIA, 2009, 116).

The retributivist theory contributes to constructing Criminal Law identity, separating it from Civil Law categorically: in case of transgression of certain criminal laws, the authority must "punish". The "purpose" of the punishment is the punishment itself (PIRES, 1998, 68).

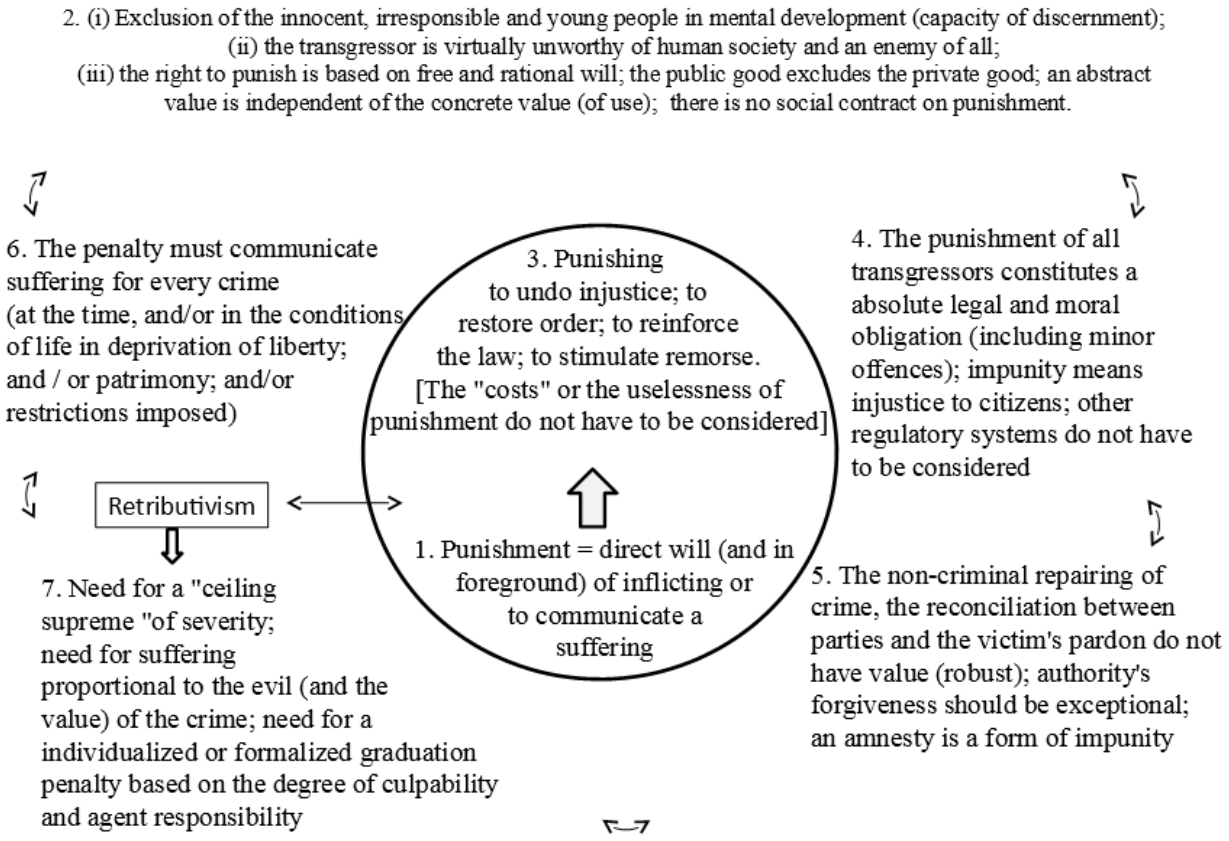
Its "purpose" is not in the future (dissuade, rehabilitate) but "inflicting" suffering through, for example, a prison sentence, and its "effectiveness" will never be into question. It is the only punishment theory doing what it claims to do: inflict (proportional) suffering on the culprit. This assertion can help us understand, for example, the central role this theory played in Brazil. (RAUPP, 2015, 38).

According to Raupp:

> “Kant gives a significant example to demonstrate the normative obligation to punish. This is the example of the island (Pires, 1998: 179-180). In this passage, what must be remembered for our argument is, first, that the theory of retribution argues that the only way to "do justice" is to punish (to reward evil with evil), and, second, that the sentence is self-sustaining and, therefore, must be applied in all situations, even if it is unnecessary, as in the case of the isolated island:
>
> But if the criminal has committed murder, he must die. There is no commutation of sentence that can satisfy justice ... Even if civil society were to dissolve with the consent of all its members (if for example, a people living on an island decided to separate and disperse in the whole world) the last murderer in prison should be executed beforehand, so that everyone may feel the value of his deeds, and that the shed blood will not fall on the people who would not have wanted this punishment, because it could then to be considered complicit in this violation of public justice (Kant, 1797a, 2P, 1S, E: 216) (cited in Pires, 1998, pp. 179-180).” (RAUPP, 2015).

So, see the following figure:

Figure 3: Structure of the statements of modern retributivist theories



2.2.2. Theory of deterrence.

-Finality: inflicting suffering to divert other individuals and the culprit from the crime (or to "inhibit their psychic system")

Another essential theory compounding the Systemic theory of Modern Penal Rationality is deterrence. In its modern version, it is mainly represented by the works of Cesare de Beccaria (1738-1794) and those of Jeremy Bentham (1748-1832) (apud RAUPP, 2015, 43).

Beccaria denounced tortures for their barbarity and proposes custodial sentence as an alternative sanction (at that time), which seems to him not only more humane and more respectful, but also more effective or more useful regarding deterrence.

According to Beccaria, to deter, punishment must be certain, and any form of uncertainty goes against deterrence and thus compromises society protection. Thus, conflict resolution methods which do not meet deterrence requirements will, therefore, be subject to impunity and will receive enough social credit (GARCIA, 2009). The condensed formula of deterrence theory means that the purpose of intentionally inflicting suffering on the guilty defines the penalty or punishment. Thus, criminals must receive a sentence severe enough to deter them, that is, the communication made is: "do something bad, and you will be punished so much."

This theory takes on a commercial aspect by proposing that "every crime has its price" regarding infliction of suffering. Therefore, in committing various crimes, you must be punished by each of them. The theory of deterrence conceives punishment as inflicting suffering upon the culprit by authority due to disobedience of the law, justifying the usefulness of the sentence by its factual ability to dissuade. So, punishment must intimidate the guilty person to prevent him from recurring, and also prevent potential criminals from committing the crime (specific deterrence and general deterrence are respectively represented here). (RAUPP, 2015)

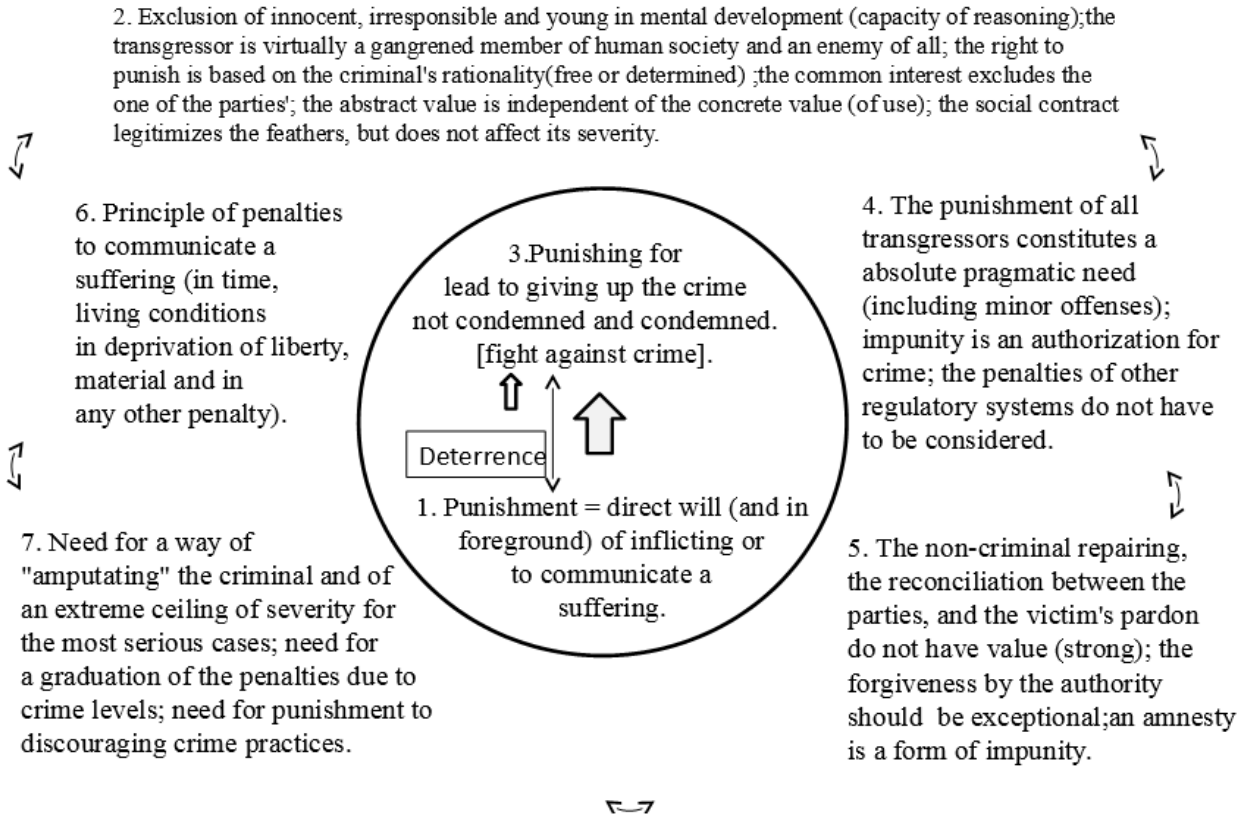
The principle of proportionality between crime and punishment is intrinsic to the dissuasion theory but mobilized differently. Hence, proportionality grounds on a global scale idea of crime severity, therefore, the more severe the crime, the more severe the punishment. In the case of less serious crimes, even if the sentences are less harsh, they must always be punished with a penalty capable of expressing the surplus capable of surpassing the benefits of the crime.

The theory of deterrence uses the semantics of "protection of society", but by deterring the virtual transgressor and the actual transgressor through the suffering of the culprit. The "infliction" of suffering on the guilty is seen as a means of protecting society with no regard to the transgressor, conceiving the protection of society through adversity.

Hence, society is against the transgressor as if the offender were not part of society. The representation thus consecrated is that the party - the transgressor - is negligible compared to the whole. The transgressor, having committed a crime, is no longer part of society. Society protects itself against the transgressor by causing it suffering or socially excluding it, especially in prison or, even today in some Western jurisdictions, by the death penalty. (RAUPP, 2015).

The following figure will resume the recommendations given by the theory of deterrence:

Figure 4: Structure of the statements of the modern theory of deterrence



2.2.3. Theory of rehabilitation in prison.

-Finality: exclude in a closed environment, without adding additional suffering, to instruct the delinquency and make viable live in society.

-The term "rehabilitation" (or equivalent) is also used by different theories.

Criminal law communications sometimes observe and attribute meaning to the "rehabilitation" medium aligned with health-care, psychology, education, and so on. And legal doctrine can then view "rehabilitation" as something not entirely or only tangentially related to criminal law, as is the case of the Brazilian legal doctrine, for which "rehabilitation" has little to

do with criminal law; it is more a question of administration, penitentiary policy, and human sciences. Thus, criminal law intervention is considered a social and moral obligation: the individual needs another environment (which is not insalubrious, immoral or harmful) to get rid of bad influences and habits of his background that he has contracted. But the rehabilitation justification was part of the penitentiary institution project, and thus linked to the idea that a change of mode of thought (state of consciousness) or of behaviour, through a program of intervention "positive" organized in an environment closed, is possible.

To Pires (2008), this discourse has no strong reference text that could function as an equivalent of Beccaria's writings on the theory of deterrence or Kant's on the theory of retribution. (RAUPP, 2015)

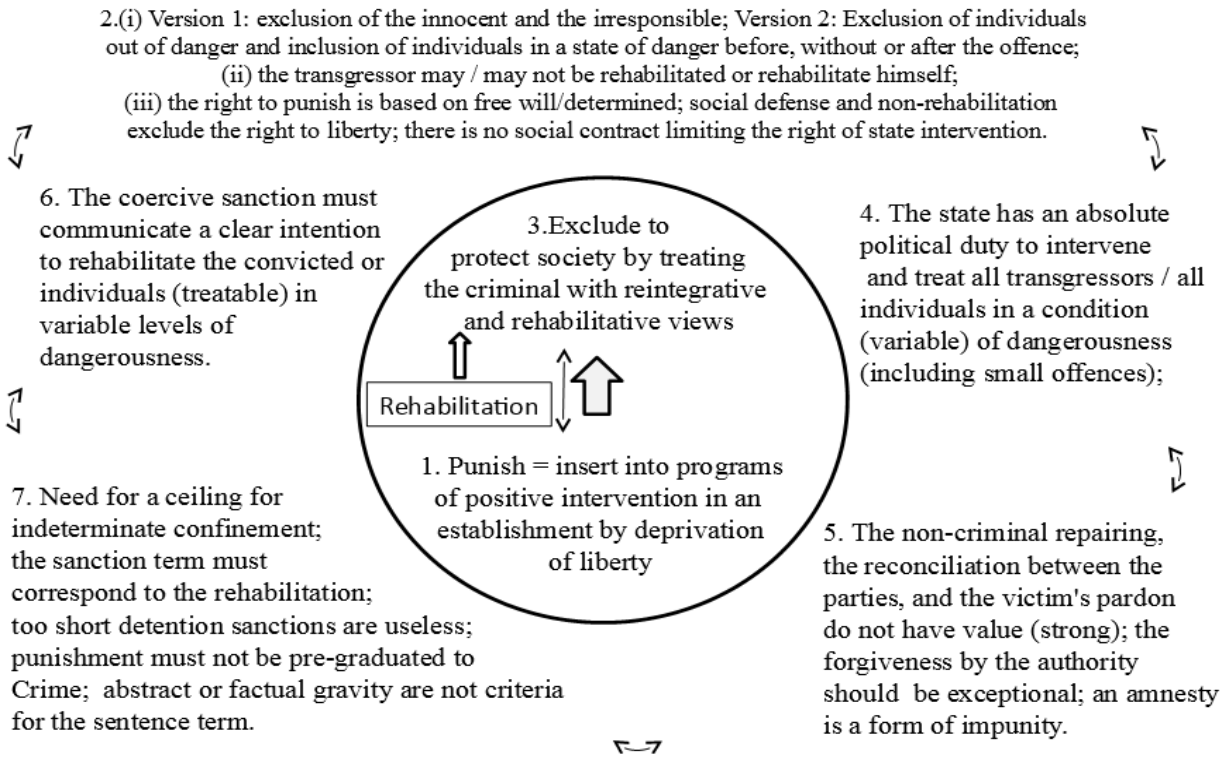
Hence, the theory of rehabilitation, or prison rehabilitation, has the aim of excluding in a closed environment, without adding additional suffering, to teach *abandoning delinquency* and make viable offenders. The term “rehabilitation” (or equivalent) is common in different theories. The theory of rehabilitation in prison conceives social reactions both focused on exclusion and social inclusion, aiming at acting on the *conscience* of the convict, by discipline, in a closed environment.

To some, rehabilitation is the best way to protect society by recovering individuals. In fact, this theory insists not so much on obligatory punishment, but on *mandatory interventions*. However, intervention through treatment rather than punishment loses its *peculiarity* concretely by not taking into account the *human suffering involved in choosing prisons* as places of treatment. Considering the *indifference to pain*, coupled with *social exclusion* as a necessary condition for the goal of rehabilitation, allow concluding that the latter theory shares the same prescriptions of the other and can go beyond reinforcing them. (GARCIA, 2013)

Raupp mentioned that Foucault indicated that we are witnessing, from the beginning of the 19th century, a process of not focusing only on the phenomenon crime, but rather emergence and incorporation of the notion of dangerousness in criminal law:

> “In large part, the evolution, if not of the penal systems, at least of the day to day penal practice in many countries, is determined by the gradual emergence in the course of the 19th century of this additional character. At first a pale phantom, used to adjust the penalty determined by the judge for the crime, this character becomes gradually more substantial, more solid and more real, until finally it is the crime which seems nothing but a shadow hovering about the criminal, a shadow which must be drawn aside in order to reveal the only thing which is now of importance, the criminal (Foucault, 1978, p. 2) (apud RAUPP, 2015, 69).”

Figure 5: Statement Structure of Prison Rehabilitation Theory (Pires, 2017).



Pires (2017a) also says that MPR goes so far as to suggest the need to build a new (relational) theory of legal-criminal intervention. From a pragmatic point of view, the theory also contributes to a better articulation between criminal sanctions and human rights. For Pires (2017b), one must sustain alternatives to incarceration by examining what preclude their adoption further, by identifying rationality and reasons preventing the more significant use of other possibilities than imprisonment. The most recent theoretical proposes regarding rehabilitation theory are even outside MPR; then I decided to describe part of them in Chapter 6 of this work, trying to build up links with Juvenile Justice systematic framework and Restorative Justice, in an accommodation account.

2.3. MPR main features.

Modern Penal Rationality, therefore, fosters a hostile, abstract, negative and atomistic form of justice. In Pires' (2001, p. 79) words, it is *hostile* because it represents the offender as an

enemy of the entire group and because it seeks to establish some sort of necessary (or ontological) equivalence between the value of the object protected by law and the level of suffering produced by the offender.

Abstract, because suffering (concrete) caused by punishment is recognized but conceived as likely to cause intangible moral good (restore justice by suffering, "strengthen the morality of honest people", etc.) or even invisible and future practical good (the deterrence).

Negative, since these theories exclude any other sanction aiming to reaffirm the Law by positive action (as compensation) and stipulate that only concrete and immediate harm caused to the offender may produce welfare for the group or reaffirm the Law.

And finally, *atomistic*, because punishment – in the best case – is conceived not to be concerned about concrete social links between people, except in a very secondary and incidental way.

Specifically, Garcia describes the four main components of MPR: the right to *punish as an obligation*; the valuation of the *punishments afflicting* or leading to *social exclusion*; over-valorization of the *custodial sentence*; finally, the corollary, the *devaluation of alternative sanctions*. (GARCIA, 2013).

To Pires, Modern Penal Rationality theory will provide sufficiently necessary support to leave the idea system formed by modern theories of punishment. And everything else needed to replace this idea system with a new approach to the intervention of the Criminal Law system (or another idea system).

2.4. The Illinois program and the origin of the Juvenile Justice System in the West.

In the United States, in the late nineteenth century, the social movement of the so-called "child savers" implemented the first specialized youth court in the state of Illinois. It called for the creation of a differentiated organizational network for young people, starting with specialized police stations up to the "re-education houses" going through courts with specialized operators. As far as I am concerned, this idealized project has not been implemented in a systematic and widespread way, which is probably due to lack of investment regarding financial and human resources (staff training and specialization).

So, specialized scholars generally consider this legislative event as a landmark of Juvenile Justice in the United States and probably in Western countries. This is the Chicago adoption and

implementation of the 1899 Illinois Court Act (SUTHERLAND, 1939, p. 303, PLATT, 1969, p. 77). In fact, that law created new rules for the intervention of all young people under the age of sixteen who, among other things, had committed a breach of the law. From that point on it may be observed, in the state of Illinois, that young people have been simultaneously excluded from the adult criminal justice program and included in another state intervention program, whose nature will remain obscure and will be the subject of opposing opinions.

The new responses to youth crime focused more on treatment, reeducation, or rehabilitation on the welfare of young offenders - rather than on determining appropriate punishment for offences. First, children and adolescents were viewed as less able to understand the wrongfulness of their acts, which reduced their guilt. Second, offending by children and adolescents was seen as an indication of adverse socialization, which could be corrected. Children and adolescents were seen as more malleable by treatment or reeducation, and such opportunities had to be taken. The main function of the juvenile justice system should be the social integration of offenders (WALGRAVE, 2004, p.545).

The Youth Court of Illinois, followed by other Youth Courts that have emerged on the world scenario, were conceived within the framework of a doctrine or philosophy called *parens patriae*. This doctrine observes the State as the entity to assume the function of a supplementary relative who is in charge of taking care of abandoned or deviant youths in many ways.

> *First*, the State should protect young people regarding subsistence needs (basic protection).
>
> *Second*, it must protect them from abuses, assaults, or negligence by their family or those who live around them (victimization-related protection).
>
> *Third*, the state must protect infants from the virtual "moral peril" of a range of activities deemed inappropriate to the continuous development and education (protection against "moral peril").
>
> *Fourth*, the State should also protect the juvenile from delinquency and prevent them from later becoming adult criminals (protection against criminal offences).
>
> *Fifth*, the most active international Human Rights Law movements for the benefit of children and adolescents sustain the need to protect young people against the punitive rationality inherent to Adult Criminal Law, whose term is "protection of young people". This fifth sense is indeed included in the doctrine of *parens patriae*. As a matter of fact,

such meaning is not explicit in the Statutes, but derives from the interpretation of legal norms under the sense of protecting children and adolescents. And my research findings show combined idea systems in the content of the decisions by the Court of Appeal on juvenile delinquency.

2.5. The Doctrine of Irregular Situation

The legislative programs from the Juvenile Criminal Justice that were into practice in Brazil before 1979 followed the overall philosophy of the first generation of youth criminal justice in Western countries.

I contemplate the "Irregular Situation Doctrine", expressed in the 1979 "Code of Minors", as the immediate expression of the old legislative first generation of youth criminal justice programs. This methodological decision seems fully justified by the fact that I am doing my empirical research in the current Brazilian context, as a Sociology of the present, and such legislative program shares striking resemblance with the appellate court judges who work at the Court of Appeal.

The revoked statute contained the Doctrine of Irregular Situation, the last one into force before the changes provided by the 1990 Statute. The replaced doctrine empowered judges with excessive discretion to decide how to intervene in the lives of young people who, in their eyes, needed to be protected or morally controlled by the institutional intervention of the State. But the main problem remained: the prevalence of punitive idea systems.

Besides, this doctrine is based on the idea of the "materially and morally abandoned" youths, which erases the current distinction between juvenile offence (analogous to adult crime) vs. no juvenile offence. There are certain kinds of behaviours that can be included but they are reasonably excluded from juvenile offence because they could be viewed as "trifles".

For example, in a heated argument, an individual pushes another one, who falls to the ground and rises unhurt. According to the 1990 Statute, the same selection criterion applies to young people: what is or can be observed as insignificant should not be the subject of a selection procedure for young people. As Garcia Méndez (2004, p.7) says, in a nutshell, the irregular status doctrine aims at legitimizing an indiscriminate lawsuit against children and adolescents in stressful situations.

In historical perspective, in 1927, Brazil was the first country in Latin America to create a separated Trial Court to judge juvenile offenders (Federal Decree No. 17.043), based on the

Irregular Situation Doctrine. The first reform projects date back to 1921 (Law No. 4,242 - January 5, 1921) and 1922 (Decree No. 4,547 - May 25, 1922), which regulate assistance and protection of abandoned children and delinquents until the creation of the specialized judge of Juveniles and Juvenile Court, both in Brazil and Latin America in 1923 (Decree No. 16,272 - December 20, 1923). All these texts had a single author: José Cândido de Albuquerque Mello Mattos. He was the first juvenile judge in Latin America. The jurisdiction of the juvenile court was also established to decide cases of abandonment, mental illness, as well as civil and administrative matters concerning children. The first article at the first chapter of the 1927 Code of Minors was written as follows: "The minor of both sexes, abandoned or delinquent, under 18 years of age, shall be submitted by competent authority to assistance and protection measures envisaged by this text." (RIZZINI, 2011, p. 132). It may be seen that the law had, as its presupposition and action principle, an extent of confusion between infraction and deviance, despite its aim to protect. (MARINHO, 2012, p.200-201).

In the turn of the nineteenth century to the twentieth, jurists defended the idea of a "New Law" at international conferences, with an active participation of members from Europe, the United States, and Latin America (RIZZINI, 2011, p. 22). They talked about a more human justice, which emphasized re-education to the detriment of punishment. New ideas were soon transposed in the case of minors partly because, in criminal terms, childhood and youth deserved attention (increased crime among minors was documented in several countries at the time). And partly because, influenced by Medicine and Psychology, new possibilities for child upbringing could be seen. In Brazil in the 1920s, the "Justice and Assistance for vicious and delinquent minors" formula was consolidated. These youths were subject to supervision by the Juvenile Court and the Police, classified according to their origin and family history and they were usually referred to correctional houses or correctional colonies, where they should remain in a separate section from adults, a resolution which was not always obeyed. This fact caused indignation among the defenders of minors' re-education, who proposed the creation of special institutions for this population segment, aiming to re-educate it through professional education - the so-called reform schools, which began to be created around this period, by determination of the Code of Minors.

Nevertheless, the revoked 1979 "Code of Minors" already provided somewhat 'light' restrictions to this doctrine. It stated that the freedom of young offenders would be restricted unless alternative measures were not viable or if they failed. Prior to 1990, when the intervention

philosophy changed, internment institutions could legally host adolescents with misconduct or those who committed criminal offences. Depending on the nature of the case, the Judge may request technical advice and, after hearing the prosecution, determine the cessation of internment.

So, it was considered in irregular situation any youngster who fit the following criteria:

> I - deprived of essential conditions of subsistence, health and compulsory education, although possibly due to: a) missing action, action or omission by parents or guardians; b) manifesting inability of the parents or guardians to provide them;
>
> II - victim of abuse or immoderate punishment by parents or guardians;
>
> III - in moral danger due to: a) being placed, in a usual manner, into an environment contrary to morality; b) being exposed to an exploitative activity contrary to morality;
>
> IV – be deprived of representation or legal assistance, due to absence of parents or guardians;
>
> V - with misconduct, because of a serious family or community unsuitability;
>
> VI - author of a juvenile offence. (BRASIL, Lei nº 6.697, de 10 de outubro de 1979).

The old guiding rationale established that states had the obligation to intervene in children lives when their parents provided inadequate care or supervision. This means that the *parens patriae* philosophy openly suggested that the courts had the authorization to ‘help’ or ‘protect’ (in the old meaning) the youth who committed crimes, trifles, or who clearly needed help.

2.6. The Doctrine of Integral Protection.

> *Do you want to thoroughly reform the right to punish and leave the culture of incarceration? Well, if you really want that, then you must replace or redefine the concept of punishment, abandoning current theories of punishment (retribution, deterrence, social reprobation, and prison rehabilitation) and build a new theory of criminal law intervention. (*PIRES, 2017b, p.16*).*

The United Nations adopted the Convention on the Rights of the Child in 1989, which has law effects worldwide since 1990. This Convention has established the Doctrine of Integral Protection on an international basis, suggesting that a child means every human being below the age of eighteen unless, according to the law applicable to the child, the majority is reached earlier. This Convention stands out as the international human rights treaty with the highest number of ratifications: 194 (one hundred and ninety-four). It presents a new perspective on young offenders by embracing the concept of integral development of the child, recognized as a true subject of the law and a person who requires special priority protection. (PIOVESAN, 2008, p. 206-207).

Article 40 (3) of the Convention on the Rights of the Child provides:

> Article 40
> 1. States Parties recognize the right of every child alleged as, accused of, or recognized as having infringed the penal law to be treated in a manner consistent with the promotion of the child's sense of dignity and worth, which reinforces the child's respect for the human rights and fundamental freedoms of others and which takes into account the child's age and the desirability of promoting **the child's reintegration** and the child's assuming a constructive role in society (…)
> 3. States Parties shall seek to promote the establishment of laws, procedures, authorities and institutions **specifically applicable to children** alleged as, accused of, or recognized as having infringed the penal law, and, in particular (…)
> (b) Whenever appropriate and desirable, measures for dealing with such children **without resorting to judicial proceedings**, providing that human rights and legal safeguards are fully respected.
> 4. A variety of dispositions, such as care, guidance and supervision orders; counseling; probation; foster care; education and vocational training programs and other **alternatives to institutional care** shall be available to ensure that children are dealt with in a manner appropriate to their well-being and proportionate both to their circumstances and the offence. (Emphases added). (UN, 1989)

To Van Bueren, as a means of fulfilling the aims of child criminal justice enshrined in international law, Article 40 (3) of the Convention on the Rights of the Child (UN, 1989), States Parties should be under the duty "to promote the establishment of specific procedures and institutions dealing separately with children" (VAN BUEREN, 2006, p. 25-26). Regardless of

whether Law enforcement officials are in specific child institutions or not, Rule 10 (3) of the Beijing Rules (UN, 1985) recommends that all law officials who come into contact with children, should "avoid harm to her or him with due regard to the circumstances of the case."[22] In defining the avoidance of harm, the Beijing Commentary specifically cites as examples "the use of harsh language, physical violence or exposure to the environment".

Nevertheless, it could be argued that the sophistication of universal legislation would not recommend it to be applied in countries of South America, such as Brazil. But the American Convention on Human Rights (OAS, 1969) establishes that minors, while subject to criminal proceedings, shall be *separated from adults and brought before specialized tribunals*, as readily as possible. And that juveniles may be treated in accordance with their status as minors, whose punishments consisting of deprivation of liberty shall have as essential aim the reform and social re-adaptation of prisoners.

Indeed, to some jurists, the 1988 Brazilian Constitution anticipates the condensed formula of the Doctrine of Integral Protection:

> Article 227. It is the duty of the family, society, and the State to ensure children, adolescents, and young people, with absolute priority, the right to life, health, nourishment, education, leisure, professional training, culture, dignity, respect, freedom, and family and community life, **as well as to guard them from all forms of negligence, discrimination, exploitation, violence, cruelty, and oppression.** According to Constitutional Amendment No. 65, 2010. (BRASIL – *Constituição da República Federal*, 1988, Art. 227 - Emphasis added).

In agreement with the Convention, the current Brazilian Juvenile Justice statute came into force in the country as a consequence of Art. 228 of the 1988 Constitution, which establishes that juveniles under eighteen years of age may not be held criminally liable and shall be subject to the rules of the special legislation. Hence, the peculiar need of treating persons less than eighteen years in a juridical manner different than adults' acquires constitutional stature in Brazil. The 1990 Statute affirms in Article 1: "This Law provides integral protection of children and adolescents". Of course it is possible to understand the expression "integral protection" with different senses, and the word "protection" has a burdensome, institutionalized meaning in the Adult Criminal Justice. The theories of retribution, deterrence and social disapproval

[22]Cf. United Nations, General Assembly Resolution, RES/40/33, 29 November 1985, 96th plenary meeting: United Nations Standard Minimum Rules for the Administration of Juvenile Justice ("The Beijing Rules").

(denunciation) seem to guide a kind of institutionalized sense. But in order to render proper meaning to the word "protection" in the 1990 Statute, the reader needs to drop this expression from the context of the Statute, so as to give it a new form.

The 1990 Statute adopted the expression juvenile offence (*ato infracional*) to refer to what criminal codes define in Brazil as "crime" or "misdemeanour". In this paper I adopt the notion of juvenile offence (*ato infracional*) in a more general sense, to include both crime and misdemeanour in the same meaning. The decision to use a new word to refer to "crimes" in general stems from the historical effort in Western countries, since the late nineteenth century and mainly in the early twentieth century, to "extract the behaviour of adolescents" from the punitive rationality of modern Criminal Law.

The rule of behaviour for juveniles is the same as that of Adult Criminal Law, but it is "legislatively" well segregated from the rules of sanction and from the definitions engendered for persons considered to be entirely responsible. However, the meaning of institutional interventions, that ought to be adopted after a juvenile criminal offence, may generate the occurrence of ambiguous interpretation. The problem becomes evident when the Court of Appeal puts the term "punishment" into force and, depending on the means of definition, is presented by both judges (juvenile/adult).

As already stated, criteria defining juvenile offence in the newest legislation are the same used to define adult crime. But maybe its sense somehow favours the occurrence of ambiguities and epistemological obstacles to full dissemination of the Social-educational Criminal Law reasoning. Nonetheless, as the juvenile rule of behaviour is the same as the Criminal Law for adults, found within the Penal Code, the new word "*ato infracional*" (juvenile offence) has little resonance in practice, and it does not seem to be sufficient to bring judges to keep a clear-cut distance from the adult Criminal Law rationality when they are deciding about sanctions. That is only one side of the problem.

But I would also like to point out that, from another point of view, this specific terminology of juvenile justice could help appellate judges to establish a marked cleavage between the criminal philosophy of adults and that of young people when it comes to reading the problematic situation and intervention. The expression juvenile offence (*ato infracional*) used instead of the word "crime", attempts to introduce a new semantics in the youth Criminal Law system, to say the least. The other side is that this new semantics of youth criminal justice also tries to keep distance from the medium "punishment", as defined by Adult Criminal Law justice

and its current philosophy. That is the case because the dominant definition of punishment in the adult Criminal Law system also has strong links with retribution and deterrence theories (see PIRES, 2015).

So perhaps to avoid using old theories of punishment within juvenile criminal justice, the authors of the new legislative program have proposed naming the sanctions as "social-educational measures." In addition, possibly trying to evade the project of inflicting direct and intentional suffering on the accused, the interventions and decisions did not plan inflicting suffering and social exclusion, but rather more inclusive educational ideas aimed at protecting young people from punishment reasoning linked to Adult Criminal Law theories.

Nonetheless, the semantic distinction has not prevented cognitive and decision shifts from the adult intervention philosophy to the theory that should shape youth criminal justice. It was, historically speaking, the way chosen to separate the two justices and to prevent the influence of adult theories of punishment on juvenile justice intervention. Also, it is imperative to stress that the 1990 Statute seeks to leave behind an excessive discretionary power conferred to the oldest model of Juvenile Criminal Judge by the Irregular Situation Doctrine, one that is closely linked to the first intervention philosophy named *parens patriae*.

Thus, Brazilian statutes objectively distinguish the conduct that may be the subject of intervention by the childcare apparatus, while borrowing, from the Adult Penal Code, the description of behaviors that authorize such response. Generally speaking, professionals who work in the justice apparatus are familiar with the boundaries of this narrative, because experts have to know the criteria for inclusion/exclusion of selected conduct in the adult criminal system, being able to adopt the same standards in Juvenile Criminal Justice. But will they do that? My earlier observation of the data shows that it is not yet evident, at least for young people coming from underprivileged social classes.

2.7. General comment on the Convention on the Rights of the Child

This section indicates the comments produced by the UN body that has the function of carrying out the authentic interpretation of the International Law of Juvenile Justice. To recall, the Brazilian 1990 Statute governing juvenile delinquency cases has its origins in the International Human Rights Law, with a particular emphasis in the Convention on the Rights of the Child. This international document sets out the basic guidelines to be followed by legislative

programs. It determines which body of the United Nations would be responsible for leading the various principles in the said convention through a functional approach.

According to the Convention on the Rights of the Child (Article 42) (UN, 1989), States Parties undertake to make the principles and provisions of the Convention widely known, by appropriate and active means, to adults and children alike. Also, for the purpose of examining the progress made by States Parties in achieving the accomplishment of the obligations undertaken in the mentioned convention, there shall be established a Committee on the Rights of the Child, which shall carry out the functions provided in the international convention (Article 43) (UN, 1989). Among its many attributions, the Committee also publishes its interpretation of the content of human rights provisions, known as general comments on thematic issues, and organizes general discussion venues. So, I emphasize the existence of a specific organ of the United Nations in charge of publishing authoritative interpretation regarding the Convention on the Rights of the Child.

General Comment n. 24 (UN, 2019) of the mentioned committee regards children's rights in the child justice system. It replaced general comment n. 10 (2007) on children's rights in juvenile justice. Also, it reflects the developments that have occurred since 2007 as a result of the promulgation of international and regional standards, the Committee's jurisprudence, new knowledge about child and adolescent development, and evidence of effective practices, including those relating to restorative justice.

According to it, given to their difference to adults, children need a *separate judicial system with a differentiated, individualized approach*. Exposure to the criminal justice system has been demonstrated to cause harm to children, limiting their chances of becoming responsible adults. Thus, it is observed that there is a formal recommendation for the theories of punishment applied in the cases of adults to be replaced.

With regard to dispositions by the child justice court (a juvenile sentence that order a social-educational measure), the general comment states that the laws should contain a wide variety of non-custodial measures and should expressly prioritize the use of such measures to ensure that deprivation of liberty is used only as a measure of last resort and for the shortest appropriate period of time. Moreover, a wide range of experience with the use and implementation of non-custodial measures exists. States parties should benefit from this

experience, and develop and implement such measures by adjusting them to their own culture and tradition. (emphases added). The general comment also states in its item 112:

> "It is essential for the quality of the administration of child justice that all the professionals involved receive appropriate multidisciplinary training on the content and meaning of the Convention. The training should be systematic and continuous and should not be limited to information on the relevant national and international legal provisions. It should include established and emerging information from a variety of fields on, inter alia, the social and other causes of crime, the social and psychological development of children, including current neuroscience findings, disparities that may amount to discrimination against certain marginalized groups such as children belonging to minorities or indigenous peoples, the culture and the trends in the world of young people, the dynamics of group activities and the available diversion measures and non-custodial sentences, in particular measures that avoid resorting to judicial proceedings. Consideration should also be given to the possible use of new technologies such as video "court appearances", while noting the risks of others, such as DNA profiling. There should be a constant reappraisal of what works." (UN, 2019)

2.8. Incorporating the new paradigm into the Brazilian Juvenile Justice System

The Brazilian legislation defined the social-educational system as concerned with the reparation of the victims' damages, with the centrality of their position, as well as the rehabilitation of the offender, who must participate in the process. Also invited are family members, the community, as well as responsible for the three spheres of government. Furthermore, after the publication of Federal Law n. 12.594/2012, there is no doubt that the social-educational measures referred to by the 1990 Statute have the following objectives:

> I - the accountability of the adolescent regarding the harmful consequences of the juvenile offence, whenever possible, encouraging their redress;
>
> II - the social integration of adolescents and the guarantee of their individual and social rights, through the fulfillment of their individual plan of care;
>
> III - disapproval of the juvenile offence, enforcing the provisions of the sentence as the maximum parameter of deprivation of liberty or restriction of rights, subject to the limits established by Law. (BRASIL, 2012)

Again, Article 35 of the same Federal Law n. 12.594/2012, provides that:

> Art. 35. The enforcement of social-educational measures shall be governed by the following principles:

> I – legality: adolescents cannot receive more burdensome treatment than that given to the adults;
>
> II - **exceptionality of judicial intervention and imposition of measures favoring means of self-determination of conflicts**;
>
> III - **prioritizing practices or measures that are restorative** and, where possible, meet the needs of victims;
>
> IV - proportionality in relation to the offence committed;
>
> V - **brevity of the measure in response to the act committed**, in particular, the respect to the provisions of art. 122 of Law No. 8,069, of July 13, 1990 (Statute of the Child and Adolescent);
>
> VI - **individualization**, considering the adolescent's age, abilities, and personal circumstances;
>
> VII - **minimal intervention, restricted to what is necessary to achieve the objectives of the measure**;
>
> VIII - non-discrimination of adolescents, mainly on the basis of ethnicity, gender, nationality, social class, religious, political or sexual orientation, or association or belonging to any minority or status;
>
> IX - **strengthening family and community ties in the social-educational process**. (BRASIL, 2012).

Finally, article 46, paragraph II, of the Federal Law n. 12.594/2012, establishes that the social-educational measure will be declared extinct by accomplishing its purpose (BRASIL, 2012). Hence, it is quite difficult to accommodate, without creating a logical problem of consistency in applying the Law, old theories of punishment from the core of Modern Penal Rationality with the latest paradigm that comes into force after enacting the new legislative framework. Moreover, the latest intervention philosophy in the youngest criminal behaviour has no similarity with the adult Criminal Law's, where the "paraphernalia of hostile procedures" still exists (Mead 1918).

Articles 100 and 113 of the 1990 Statute stipulate that the application of social-educational measures shall take pedagogical needs into account, mainly those aimed at strengthening family and community ties.

An in-depth reading of the 1990 Statute provisions reveals that, in the institutional environment, there is also the concern with the reparation of the victim's damage. In addition, the

Law institutionalized the involvement of those who can help solve the problematic situation (including the Government, families, and community), and the offender's re-socialization, among other duties.

2.9. Outlining how to determine social-educational measures

The purpose of this section is to describe, in general terms, how the process of punishing young people in conflict with the law occurs, noting that the focus of my work is on the mobilization of ideas rather than on procedural steps taken at any judicial level.

But it is worth pointing out that, usually, in Brazil, juvenile criminal proceedings only begin after detentions by the military police, and not due to previous investigations initiated by the civil police. Everyone who has minimum contact with the field of Juvenile Criminal Justice knows that, virtually, all sanctions evolving juvenile offenders result from arrests in situations of "*flagrante delicto*."

Typically, the military police (in Brazil, the first repressive apparatus to make personal contact with the offenders) assess the problematic situation shortly after being called to appear on the scenario, gathering evidence necessary for reconstructing the case later to the Prosecutor, who then will pass on to the Judiciary.

Empirical evidence also reveals that pieces of factual information that reach the Court of Appeal are consistent with the way in which Appeal Judges are updated on adult criminal behavior. The first organization in charge of collecting the data is *the same police that also acts in adult crimes*. And I have not seen in many dossiers I analyzed elements originating from reports or studies elaborated by social workers or psychologists.

But according to Digiácomo, the ultimate goal of the juvenile legislative program is not (as in the case of criminal proceedings instituted against adults), the imposition of a mandatory "penalty", or even of any sanction to the adolescent. Preferably, the objective is to discover the causes of the follow-up, orientation and possible treatment of adolescents, according to their specific pedagogical needs, to provide the integral protection promised by the Law and the Federal Constitution. Thus, the logic used is not exactly the same as that used in the Adult Penal Code (DIGIÁCOMO, 2006, 212).

According to original version of the Statute 1990, when a juvenile offence happens, the competent authority can apply to the adolescent the following measures:

I – warning;

II - obligation to repair the damage;

III - provision of services to the community;

IV - assisted freedom;

V - semi-custodial insertion;

VI - internment in an educational establishment (fully-custodial).

The measure applied to the adolescent shall take into account his or her ability to comply with it, the circumstances and the seriousness of the infraction.

On August 03, 2009, Brazilian Federal Law n. 12.010 was enacted, adding the single paragraph of Article 100 of the 1990 Statute, a series of guiding principles of idea systems to be applied to the sanctions imposed on young people, whose “legal title” is social-educational measures. Those principles also compose the current rules for observing the decisions made by judges; therefore, the 1990 Statute serves to officially guide the imposition of social-educational measures, as discourse toward Juvenile Judges, even in the second-degree level.

So, the application of social-educational measures shall take pedagogical needs into account, mainly those that aim at strengthening family and community ties. Therefore, when facing juvenile dossiers, judges should observe the *status of children and adolescents as subjects of rights*: children and adolescents are the holders of the rights foreseen in this and other laws, as well as in the Federal Constitution.

And the 1990 Statute objectively defines the meaning that integral protection and priority must assume within legal propositions expressed in the cognitive context of judgment: the interpretation and application of any and all provisions of this law should address the integral protection of children's rights and adolescents.

Moreover, it is established primary, and joint responsibility of the public power: the full realization of the rights guaranteed to children and adolescents by this law and by the Federal

Constitution, except in the expressly reserved cases, is the primary and joint responsibility of the three (3) government spheres, without prejudice to the municipalization of care and the possibility of implementing programs by non-governmental entities.

The superior interest of children and adolescents means, in concrete argumentative activities, that all interventions must take priority attention to the interests and rights of children and adolescents, without prejudice to the consideration that is due to other legitimate interests in the scope of the plurality of interests in the concrete case. And there other important mediuns, like early intervention, determining that competent authorities must act as soon as the danger situation is known. And minimum intervention: intervention must be carried out exclusively by authorities and institutions whose action is indispensable to the effective promotion of rights and protection of children and adolescents.

Also, there is the right to privacy: promoting rights and protection of children and adolescents must be carried out in respect for their intimacy, their right to image and reserve of their private lives.

Perhaps one of the most relevant dispositions is the one which determines proportionality and timeliness: intervention must be necessary and appropriate to the peril situation that the children or adolescents face at the moment the decision is made. To finish, I would like to quote the following ones:

Parental responsibility: intervention must be carried out so that parents take over their duties towards children and adolescents.

Family prevalence: concerning the promotion of rights and the protection of children and adolescents, prevalence should be given to measures that maintain or reintegrate them into their natural or extended family or, in their absence, to promote their integration into a surrogate family.

The obligation of information: children and adolescents, given their development stage and their ability to understand, should have their parents or guardian informed of their rights, the reasons that determined the intervention and the way in which it takes place.

Obligatory attendance and participation: children and adolescents, separately or in the company of parents, guardian or person appointed by them, have the right to be heard and to participate in the acts and definitions of the measure for promotion of rights and protection, and their opinion is duly considered by competent judicial authorities.

2.9.1. The non-custodial rehabilitation and the Juvenile Justice System

This section will focus on how we can observe juvenile delinquency through the lens of non-custodial rehabilitation theory. This is because appellate judges often refer to the need for rehabilitation in detention centres, making comparisons with the situation of adults. As a methodological option, I considered it essential to oppose this idea because the new paradigm prioritizes non-custodial measures expressly. In addition, I often observe that the purpose of resocialization outside the prison is present in the Brazilian legislative program and even in the content of the research samples. Also, juvenile justice legislation has explicitly defined that *under no circumstances shall internment be applied if there can be any other appropriate measure*. So, it is imperative prioritizing non-custodial rehabilitation logic. Thus, it is relevant to present a critical analysis relating the inconsistency between the theory of non-custodial resocialization and the systems of ideas of Modern Penal Rationality, predominant in the empirical decisions I selected.

The new theory of rehabilitation (Rotman, 1990) states that non-custodial treatment is preferable than custodial. So, the enrichment of the notion of justice (as opposed to the notion of retributive justice), the understanding of the prison as a last resort, the detachment of rehabilitation outside the prison and, above all, the knowledge of rehabilitation as a constitutional right of the accused are some examples of the arguments put forward by the Rotman in his analysis.

Rehabilitation focuses on the social inclusion of the culprit. This intervention is not to exclude to include, as suggested by prison rehabilitation but to avoid exclusion to include. Rotman defends the principle of "least restrictive intrusion," "least restrictive sanction" and "least restrictive sentence." In the words of the author: "according to the rights model of rehabilitation, the sentencing authority has an obligation, derived from the basic right to freedom, of choosing the least-restrictive sanction applicable" (apud RAUPP, 2015)

In the exceptional case of imposing a custodial criminal sanction, the theory also defends the presence of the rehabilitative purpose within the prison as a counterweight not to crush the sentenced person. Then, "humanistic rehabilitation coexists with imprisonment and institutional discipline while counteracting its harmful effects "(Rotman, 1990, pp. 155, apud RAUPP, 2015).

Rehabilitation should be, according to him, a constitutional right of the individual, which would limit under certain conditions, the intervention to what is least restrictive. Thus, "The recognition of a right to rehabilitation of the use of the least restrictive setting, minimal intrusion, and the least drastic methods by which legislation can be achieved. "(ROTMAN, 1990, p 155, apud RAUPP, 2015). In this way, rehabilitation is not presented as permitting an unlimited form of intervention, but, on the contrary, as a "self-limited" form of intervention. Rotman summarized his theory:

> "Rehabilitation, according to modern standards, can be defined tentatively and broadly as a right to an opportunity to return to (or remain in) society with an improved chance of being a useful citizen and staying out of prison; the term may also be used to denote the actions of the state or private institutions in extending this opportunity. The definition thus embraces both the offender's rights and the government's policies. Rehabilitation in prisons comprises educational opportunities; vocational training; justly remunerated work; medical, psychological, and psychiatric treatment in an adequate environment; maintenance of family and community links; a safe, fair, and healthy prison environment; post release support; elimination of hindrances to reinstatement in the community; and the various services directed to meeting the imprisoned offender's physical, intellectual, social, and spiritual needs, as compatible with incarceration. As this list suggests, a broad concept of rehabilitation is not limited to specific programs but includes an adequate prison environment. Alternatively rehabilitation may take place in non institutional settings, allowing the offender to remain in society. In fact, rehabilitation is most fully realized in the community" (ROTMAN, 1990, p. 3).

More than one hundred years ago Mead (1918) already warned us about the Psychology of Punitive Justice. He said it is in the juvenile court that we reach and understand the causes of social and individual breakdown, to possibly mend defective situations and reinstate individuals at fault. This is not attended with any weakening of the sense of the values that are at stake, but a great part of hostile procedure is absent. So, in centering interest upon reinstatement, the sense of forward-looking moral responsibility is not weakened but, rather, strengthened, for the court undertakes to determine what the child must do and be to take up normal social relations again. Once responsibility rests upon others, this can be brought out in much greater detail and with greater effect since it is not defined under abstract legal categories and the aim in determining responsibility is not to place punishment but to obtain future results. Out of this arises a much fuller presentation of the facts that are essential for dealing with the problem, in comparison with a criminal court procedure that aims to simply establish responsibility for a legally defined offence with the purpose of inflicting punishment. Other factors of far greater importance are family relation values, schools and training of all sorts, work opportunities, and other elements that are worthy in the life of a child or an adult. Before the juvenile court, all these factors can be

presented and considered prior to deciding which action is to be taken. These are the things that are worthy. They are the ends that should determine conducts. It is impossible to discover their real importance unless they can all be brought into relationship with each other (MEAD, 1918).

Concluding, jurisprudence does not need to be indifferent to paradigm-shifting or to keep itself uncritically tied to the cognitive nodes peculiar to traditional punitive theories. As we see, different outcomes are possible whether the jurisprudence considers shifting its reasoning patterns towards the Juvenile Justice program in force.

2.9.2. Chapter summary.

In conclusion, this chapter 2 described the conceptual and theoretical perspectives used to develop the central argument of the thesis. Thus, I displayed the existence of socio-legal semantics and idea systems used by legal practitioners to shape the meaning of the jurisprudence produced in cases of juvenile offenses. They are: (1) “Modern Criminal Rationality,” (2) The “Irregular Status Doctrine” and (3) The “Doctrine of Comprehensive Protection,” as described through this chapter.

I also explained why I framed my study within the research structure of MPR, seeking an orderly reflection on the role and influence of the MPR in defining the meaning of the functioning of the Criminal Law system and blocking its possibilities for modification and evolution.

Continuing, the first part of this chapter clarifies how I use the MPR theory to characterize one of the idea systems identified by academic research. Moreover, the MPR theory was also helpful in developing some elements of its knowledge problem because it allows the description of the epistemological obstacles observed in the cases studied that block the identity evolution of the juvenile criminal justice subsystem in criminal matters.

Furthermore, in the first sections of this chapter 2, I described that the three main theories of punishment (retributive, deterrence, and prison rehabilitation) form a hermetic way of thinking. They do not collide and have much more in common than disagreements, although different internal nuances to justify punishment. I clarified that the MPR theory describes the nucleic matrix of the MPR idea system (retribution, deterrence, denunciation) as a hostile, abstract, negative, and atomistic form of justice. There is an emphasis on the right to punish as an

obligation, the use of suffering punishment and social exclusion, an overvaluation of custodial sentences, and a devaluation of alternative sanctions.

The literature review chapter provided an account of the history of juvenile justice in Brazil, shedding light on the emergence of the *child savers* movement and highlighting robust academic works on the subject. And this Chapter 2 not only complemented the description of the origin of DIS in Brazil but also provided insights into the broader context of juvenile justice in the country. I discussed the 1979 Brazilian "Juvenile Code," which described the DIS as an immediate expression of the former legislative first generation of juvenile criminal justice programs. However, this gave judges excessive discretion to decide how to intervene in the lives of young people, which led to confusion between juvenile offending (similar to adult crime) and juvenile non-offending. The notion of "materially and morally abandoned" youth further blurred this distinction. The logic underlying the DIS established state intervention if parents did not provide the necessary care for their children. Then, the courts would be authorized to “help” or “protect” juvenile offenders.

Chapter 2 delves into the DIP, established by the 1989 United Nations Convention on the Rights of the Child and adopted in both the 1989 Brazilian Constitution and the 1990 Child and Adolescent Statute. The chapter describes critical aspects of the DIP and explains why adopting this new paradigm of Juvenile Justice is crucial. Chapter 2 lays down a crucial aspect of the Juvenile Justice system that is often overlooked. It brings to light the distinct legal framework governing the Juvenile Justice system, which is not the same as the one that regulates the Adult Criminal Law System. Legal professionals must be mindful of these differences and draft their operations accordingly; neglecting them can lead to ambiguities. The Chapter provides insights from the United Nations and Brazilian legislation on the meaning of Juvenile Justice operations and how adolescent offenders are held accountable.

Chapter 3 – Methodology

This empirical research mobilizes an unusual methodological approach, as both the MPR theory used as a background and my object of knowledge lead us to articulate, to a certain extent, a qualitative analysis with a previously constructed quantitative data collection strategy.

Then, the objective of this chapter is to present the overall epistemological and methodological strategies that we adopted in the context of this empirical research. First, let us recall that the two research questions that guided our choices were the following: (1) What is the legal philosophy of intervention (or idea system) that predominated in the sanctioning decisions of the Court of Appeals of Minas Gerais in juvenile justice between 2010 and 2016? (2) How did the decisions update these legal philosophies or systems of ideas (if any at all)? The fundamental theoretical interest of these questions lies in the fact that previous research developing and testing the MPR theory has demonstrated that the system of ideas about punishment in adult justice constitutes a fundamental epistemological obstacle to the internal evolution of the criminal law system. So, what happened in Brazil after the fundamentally innovative 1990 legislative reform of criminal sanctions for young offenders?

In the case of my object of study, I cannot exclude another fundamental theoretical question: what role (if any at all) does the old idea system regarding juvenile justice play on the evolution of criminal justice for young people after the 1990 reform? Does this idea system currently play a role in favour of or against the evolution of juvenile justice? The legislative history of juvenile justice in Brazil since 1990 offers an original and favourable context for the eventual observation of three systems of ideas simultaneously: (1) that of the MPR (adult justice), (2) that of the DIS (the founding system of ideas of juvenile justice) and that of the DIP introduced by the 1990 legislation. Therefore, this is not a simple empirical curiosity but a fundamental question in the social sciences about the evolution of criminal justice.

In this chapter, I will first (3.1.) make some general epistemological and methodological considerations. Then (3.2.), I will indicate my method of data collection. Third (3.3.), I will present my overall sampling procedure. Fourth (3.4.), I will show how I proceeded to be able to identify and analyze the three systems of ideas that were likely to be present in the decisions. Fifth, I reveal the order the magnitude concerning the MPR dominance by color-coding the samples, and, finally, (3.5.) I will conclude with some ethical considerations.

3.1. General epistemological and methodological considerations

To the best of my knowledge, the MPR theory is the only sociological theory currently available that addresses the difficulties of the evolution of the criminal law system in terms of the ideas constructed around punishment. This theory, then, has directed our attention to idea systems about "punishment" and the possible role of these systems on the evolution/non-evolution of the criminal law system. This means that we have no other "rival theory" with the same degree of proximity to our object of knowledge. So, I do not have here a problem of choosing between different theories, in the sense given by Kuhn (1973). For, to be able to choose between theories, one must have more than one theory built in relation to the same object of knowledge. However, nothing prevents us from borrowing concepts from other theoretical perspectives and/or paying attention to our empirical data to develop, rectify or abandon a theory.

Because of my former experience as a trial judge in a juvenile justice court in the state of Minas Gerais, aligned with my training in sociology and my knowledge of the MPR theory, I first conjectured its idea systems were present in at least some of the decisions of the Appeal Court. Of course, this conjecture was quite rudimentary and even seemingly absurd. How can this be possible in the context of the new legislation of 1990, which differs markedly from the MPR system of ideas? Nevertheless, despite this apparent absurdity, this conjecture served as an initial stimulus for constructing my object of knowledge. This confirms epistemological reflections that emphasize both the role of individual scientists' experience and the role of theories in the development of research projects (KUHN, 1973; BOURDIEU, CHAMBOREDON, & PASSERON, 1973; WEBER, 1919; PIRES, 2022, etc.). It was in this context that I was able to determine the three theoretical-empirical objectives for this research. It was to see, with the help of conceptual and empirical indicators, whether or not these three systems of ideas (MPR, DSI, DPI) were in operation within the framework of the State Appellate Court of Minas. My main theoretical-empirical challenge was to be able to identify the "outlines" of each of these three idea systems in the collective decisions and to see, subsequently, how they would relate to each other.

3.1.1. Deductive or inductive research?

As it can be seen, my research adopted both a "deductive" and an "inductive" approach (or an approach of "discovery"). Indeed, it is about discovering what is happening (and what is not

visible at first sight) in the decisions about sanctions in the Court of Appeal between 2010-2016. But the adoption of this double approach is not easy to be justified in the current state of social science knowledge. Indeed, as Bateson (2000, xxvii) reminds us, "many investigators, especially in the behavioural sciences, seem to believe that scientific advance is predominantly inductive and should be inductive." After emphasizing that "the ultimate goal of science is the increase of fundamental knowledge" (ibidem), Bateson offers an interesting metaphor to show that there is a certain type of research that articulates theory ("deductive approach") with an inductive or discovery approach. This type of research, as is the case with mine, has "two beginnings, each of which has its own kind of authority: the observations cannot be denied, and the fundamentals must be fitted. You must achieve a sort of pincer manoeuvre" (BATESON, 2000, xxviii). This is then how I characterize this research, as it adopts a pincer approach: one beginning is given by the theory of MPR and the other beginning by my empirical observations that must not be ignored. Let us recall that the theory of the RPM also has a particular characteristic: it was built rather inductively, but very quickly taking the form of a research in “the form of a pincer” (PIRES, 2020). Indeed, it is a theory favouring new inductions concerning its object of knowledge to develop and self-correct itself (PIRES, 2020).

3.1.2. Quantitative or qualitative research?

In the social sciences, it is not always possible to characterize research using the qualitative/quantitative divide. This is the case with this research. One of the blind spots of this distinction consists precisely in the fact that it does not allow observers to see research adopting a mixed methodology (DUCHASTEL & LABERGE, 2014). This difficulty of observation is less visible in the case of the survey or in situ observation (in the local), because the first approach is naturally constructed as quantitative research and the second as qualitative research. However, in the case of document analysis, "mixed" research has become frequent and highly probable.

Indeed, Duchastel et Laberge (2014) showed that “discourse analysis is not a discipline, but a field that lies at the confluence of a set of national and disciplinary traditions”, and they “propose to abandon the sharp opposition between qualitative and quantitative approaches to the benefit of mixed methods”. In their view, “not only does research show that there can be no mutual exclusion between different methodological approaches, but that all methods refer to a common pattern of knowledge involving shared research operations”. After that they show that

“explanation and understanding are not contradictory processes, and that scientific interpretation cannot stand independently of some explanatory operation”. And “any scientific process, qualitative or quantitative, is based on a common ground mobilizing research operations for the identification of units, their description and their analysis”. Then, even if “the analytical paradigms differ on their epistemological and methodological assumptions, they are facing the same problem of reducing and restoring complexity”. They will even conclude that “the issues of causality and measurement arise in all scientific reasoning, whatever their nature, qualitative or quantitative”.

As the reader will realize, I have favoured a mixed approach in this research. In effect, my primary purpose was to estimate a reliable order of magnitude as a starting point in order to understand if one system of thought prevailed over others. I was not looking for a numerical data grounded on statistical accuracy to establish a "mathematical supremacy" of a system of ideas. And we made this through understanding and subsequently gauging empirical indicators portraying the content of the three different judgment programs. Therefore, selecting one of the two sides of the quantitative/qualitative distinction is reckless. In order to identify three systems of thought concerning sanctions, I found essential a combination of research strategies. The qualitative approach was necessary because I could not accurately predict all the empirical indicators that might allow me to discover the "outlines" of these three systems in case law decisions (see section 3.4.). And the quantitative approach was required to construct at least one of my two samples probabilistically. I felt this was desirable to estimate the potential quantitative dominance of at least one of these three idea systems more accurately. This methodological option allowed me to conduct what Raymond Boudon (1976, 44-47) called a "contextual survey," but one that focused on documents, as opposed to an atomistic survey (constructed using questionnaires).

As Duchastel and Laberge (2014) argue for the social sciences, accuracy is obviously not exclusively a matter of quantitative measurement but also qualitative. And both types of research aim to produce knowledge beyond their samples (SJOBERG and NETT, 1968, 129-130; ROSE, 1982, 56; PIRES, 2008/1997). In my case, I decided to strengthen the qualitative inference by combining it with a quantitative inference constructed using a representative systematic sample. As we will see, with the help of this procedure, only a negligible number of judges in the appellate court of Minas Gerais (during the selected period), if any, could not be selected.

So, this mixed methodological approach of sampling and description “abandon the sharp opposition between qualitative and quantitative approaches to the benefit of mixed methods” (DUCHASTEL and LABERGE, 2014, 166) and try to show that a convergence between them is possible and can be even an advantage for some objects of knowledge. This mixed methodological approach is an integral part of the originality of this research.

To conclude this section, I recall that the discussion concerning the characterization of this research as qualitative and/or quantitative is not essential for the evaluation of its contributions to the advance of knowledge. An eventual disagreement on this point can be left out because different scientists may differ in the characterization of this research. So, the pluralism of points of view is admissible. What we need to assess is the methodological credibility of the results. Comeau (1994, 9) says that the criterion of credibility leads us to estimate globally whether the object of knowledge "has been well identified" and "well described" and also if the results are admissible. As for validation, for him it means "that the results obtained are congruent with the data collected" (Comeau, 1994, 10)[23].

3.1.3. A constructivist or realist epistemology?

In the social sciences, many scientists still use this distinction (constructivism/realism) - or a functionally equivalent one - to characterize their perspective at the epistemological level. Following Pires' reflections since 2014, this distinction is no longer a necessary alternative for researchers. Indeed, on the one hand, it is possible to show that all (social-scientific) knowledge is a construction. On the other hand, all empirical research in the social sciences wants to describe what happens in reality without questioning the existence of a structured social environment. What is more, he has shown that today, in the social sciences, a new epistemic framework where this opposition (realism vs. constructivism) is no longer relevant. It is not the aim of this research to repeat this demonstration here, but I think it is important to underline that, in our case, there are as many constructivist elements as realists. For example, the three systems of ideas have been theoretically and conceptually constructed. Still, these constructions have the pretension of describing three systems of ideas that really exist and are eventually really in operation in the Court of Appeal of Minas Gerais. Obviously, it is our responsibility to show how we can assert what we assert. In this regard, we must not lose sight of the fact that "the world of

[23]It was the research of Labonté (2019) that drew our attention to the study by Comeau (1994).

any observer always includes only objects that are observer's dependent" (ESPOSITO, 1992, p. 22, quoted by PIRES, 2016). Of course, this does not prevent these objects from really existing or from being an illusion. Each observer affects and constructs what he or she observes (KUHN, 1990/1973; 1990/1974), regardless of whether it agrees (at least in some respects) with social reality.

Moreover, already at the end of the last century, Pires (2008/1997, 62) drew attention to the drawbacks of this constructivism/realism distinction, as scientists always seek the best approximation of reality in their empirical research:

> "The use of the term "constructivism" in the social sciences has led to some confusion, since there is a strong tendency to consider the objects of science as constructed objects, whether or not one evokes a constructivist perspective. The confusion also results from the fact that the object of the social sciences, the human world, is recognized as constructed as it is by humans, whether one says it is constructivist or not, again. Thus, stating that "science constructs its object" or that "social reality is produced by humans," is not enough to qualify a viewpoint in the social sciences as constructivist. In my opinion, Comte, Marx, Durkheim and Weber would not hesitate to align themselves with these two statements. What does it mean, then, to be 'constructivist' in the social sciences?"

3.2. The research method: documentary analysis

There are different ways of categorizing data collection methods in the social sciences, and all these variations can be justified on different grounds. For my purposes, I will list, roughly, six major groups of methods, giving them a more abstract meaning: (1) documentary analysis, (2) questionnaire surveys, (3) interviews, (4) in situ (place-based) observations, (5) image or photographic analysis, and (6) simulations, exercises, or experiments (Pires)[24]. The choice of one of these methods may depend on several factors. For example, the skills and preferences of the scientists, the availability of certain types of data, access to the data, the object of knowledge, etc. Some forms of sampling will also depend on the method chosen. For example, in agricultural research, when a probabilistic technique is to be applied, an area survey may be preferred to a

[24] I am referring here to a document (Power Point) by Pires prepared for a doctoral seminar in methodology (2021).

questionnaire survey. If a literature review is conducted using a probabilistic technique, the sampling technique may be different from that of a survey in the general population, etc. And the choice of on-site observation at an institution does not usually require a probabilistic technique for selecting that institution. All these methods can produce data in a quantitative and/or qualitative form.

To build our object of knowledge, we have chosen the documentary analysis. The expression "documentary analysis" does not mean here "library research" or "literature review." The expression adopted aims to avoid the debate between two traditions of documentary analysis that are no longer clearly distinguishable from each other: content analysis and discourse analysis (DUCHASTEL and LABERGE, 2014). Documentary analysis means here the analysis of the content of communications as we can see them in documents. In documentary analysis, one selects documents and not individuals.

The notion of "document" can also have different meanings. Indeed, academic disciplines introduce other distinctions. For example, historians sometimes distinguish between documents/publications. According to this distinction, case law is a "document" and a book of criminal doctrine is a "publication". When this distinction is used, novels and autobiographies are not observed as documents, but as "publications," and using this distinction, an observer may value one side of the distinction more than the other (e.g., preferring documents to publications). While this debate is not relevant to my case, I will give an encompassing meaning to the term "document".

Pires (2019) borrows the definition of document "as medium" that was given by Boell and Hoof (2015). This gives a sufficiently open and abstract scope to this notion that it can be applied to different forms of methodological treatment and by different disciplines. Now, according to Boell and Hoof (2015, 3), "documents as medium" have four characteristics: (1) they "are vehicles of discourse", (2) they "exist differently for different actors"; (3) they "have readers and authors", and (4) they "are flexible and adaptable to different contexts".

The corpus of documents analyzed contains jurisprudence rulings of the Court of Appeal of Minas Gerais between 2010-2016 regarding how appellate judges determine the criminal sanction for young offenders. So, (1) they are "vehicles" of communication (or discourse), (2) that will have different meanings for different observers (e.g., among law operators, the public, researchers, politicians, the media, etc.), (3) they have different meanings for different observers (e.g., the public, the media, etc.), (4) they have authors (the judges and the appellate court

organization), and they are likely to have different readers (other legal operators, me, the readers of this work, etc.), and (5) they are adaptable to different contexts (e.g., that of the courts and that of scientific investigation). We can take up Prior's remarks (2003, 12, cited by LABONTÉ, 2019, 100) and say that "documents are essentially social products. They are constructed in accordance with rules, they express a structure, they are nested within a specific discourse...".

In Brazil, each decision generally includes information elements that depict, to a certain degree, a small briefing of facts, a short description about the allegation made against the young defendant, quotations from reports made about the adolescents' social profiles, references to family relationships, possible misbehaviour, vices, and addictions. They also embrace summaries of main reasons, judicially assessed evidence, rationales, reasoning models, beliefs, and other motives that judges have taken into consideration while imposing educational measures to rule the case.

Unlike in Canada, these case law reports are remarkably short, even in the case of decisions by three or five judges in juvenile justice matters where they have full discretion not to use the sanction of confinement. The short nature of these reports obviously poses an additional difficulty for the scientific reader to understand, as he or she must be able to grasp the legal "latency" or "undertones" of these documents. If the scientific observer does not have the knowledge to grasp these meanings, his or her reading may remain "excessively free" or "in surface" and have only a very loose connection to the internal meanings of these documents for the legal system.

In our case, these documents are producers and reproducers of ideas and structures in the decision-making operations of the legal system. Both the reproduction of a past system of ideas and the creation or adoption of a new system of ideas depend on a very large extent on these documents, as they will form part of the "systemic memory". The analysis that we propose to make will aim at identifying which ideas and systems of ideas are reproduced/produced by these documents and what are the implications both for the development of the internal quality of the legal system and for the biography of the young people who are the object of these decisions.

Of course, the implications for the biographical dimension of the young people will remain implied, as these documents do not give us access to their biographies. The only implication we can point to is the one about the decision to lock/unlock a young person in an institution whose internal quality of functioning is a black box for many of the decision makers. They don't know what's inside. On the poor internal conditions of these institutions in Brazil, the reader should

refer to another research on this topic (Chapter 1). He/she should also keep in mind that most of these young people come from disadvantaged social classes, which can increase the likelihood of incarceration. Some characteristics of these documents are the following.

First, as opposed to a scientific research questionnaire where one seeks information on individuals, these documents are decisions made by the organization-observed itself with the help of operators who have received a relatively homogeneous professional training. These operators decide on behalf of their organization and not as individuals. There is here a kind of relative double homogenization of the operators. They belong to the same social class fraction and they have all gone through a secondary training process in a law school and they find themselves, afterwards, in an environment of equivalent work relations in certain respects. We also have an equivalent internal "power relationship" of an organizational nature: the higher levels of courts exert pressure on the lower levels, but with unequal chances of success in the final decision.

Second, unlike research with questionnaires addressed to individuals, all decisions in the appellate court here are collective. In the first sample, each decision was made by three judges; in the second sample, each decision was made by five judges, *i.e.*, all the judges who make up one of the seven "bench units" of the court of appeal. This is therefore organizational research as opposed to survey research. Somewhat like urban and organizational sociology, we will then construct a "map" of the Court of Appeal to design and visualize our sampling plan.

Third, in our case, the relative double homogeneity of the legal operators (and this includes, of course, prosecutors and lawyers as well) is also characterized by the same "generalized gap": they have not received mandatory law school training in juvenile criminal justice legislative programs. The three idea systems are those mentioned in the Brazilian literature on Juvenile Justice. Each of the above portrays a particular legislative program that succeeded the previous one through time, aiming at the legal approach to juvenile crime according to new parameters.

The system of ideas of the Doctrine of Irregular Situation (DIS), which dates in Brazil to the first half of the 20th century, has been learned probably by the weight of its institutional history since 1921-1927 and by a "field experience". And this history remains ambivalent and ambiguous because the Brazilian juvenile legislation incorporates, between 1921 and 1943, very clear traces and vestiges of the MPR idea system (for example, minimum sentences of three years of imprisonment). But what is the situation of the DIP idea system? On the one hand, this system is much more recent, dating back to 1990, and on the other hand, despite its clearly innovative

character in terms of its sanctioning philosophy, it has also remained almost marginalized in legal education in law schools until today. So, judges usually take decisions based either on "spontaneous knowledge" of statutory texts and on previous judicial decisions of other judges in the same condition. Moreover, most judges - if not all - have no direct past professional experience of adjudicating in specialized Youth Trial Courts. And when training courses take place, legal professionals have institutionally received guidance to share knowledge called in Brazilian literature "Juvenile Criminal Law," thus proposing to erase the logical boundaries between adult and youth judgment programs. Furthermore, concerning the formal organization of the functioning of non-specialized trial courts, the State Judiciary, as a rule, assigns the jurisdiction to judge adolescents to trial courts that day-to-day deliberate on generic Criminal Law. Finally, law books touching the topic of sentencing decision-making in juvenile courts barely give pertinent information about how to decide under the new philosophy of intervention. And often, these books make claims in favour of the MPR system of thought: many authors believe in the virtues of the proportionality principle in the sense of the retributivist theory of punishment, which attaches this principle to the *voluntary infliction of punishment (in the form of internment)*. Concretely, this means that in the legal training of the law operators, they have never received a stimulus to compare and critically confront the differences between these two systems of thought: the MPR and the DIP. These factors help explain why legal professionals do not refrain from applying the logic of Adult Criminal Law, thus ignoring judgment rules created especially for young offenders.

3.3. Collecting observation data

In this section, I will (3.3.1.) introduce two typical research structures, (3.3.2.) discuss the concepts of 'sample' and 'population', (3.3.3.) justify the choice of the appellate court, (3.3.4.) present an organizational mapping of the appellate court, (3.3.5.) show how I composed the database (the 'population') for this study, and (3.3.6.) describe the overall sample design.

3.3.1. Two typical research structures

Pires (2008/1997, 158) draws our attention to the fact that "a quick examination of a number of researches leads us to find that some analysts employ the notion of sample and others

do not" and indicates that "this difference in language is indicative of two standard structures of empirical research". In general, the term 'empirical research' is used to refer to "any research involving the collection of new [or specific] data" (ROSE, 1982, 306) for the purposes of the study. In his 1997 study, Pires calls the first type "closed or conventional structure" and the second "open or paradoxical structure". Later, he will abandon these names and speak only of research with three or two structural empirical levels (PIRES, 2021; see also, PIRES, 1997/2008, 159 and 161). The meaning of the terms sample and population changes according to these two types of empirical structures.

As he describes it, "in a research with three empirical levels, the researcher starts from a previously constructed 'list' or corpus of units of the same nature and “technically” extracts (in a way or another) from this list a number of units to be observed and analyzed" (PIRES, 2021). In this framework, the overall list of units is called a 'population' and the empirical units extracted and analyzed are called a 'sample' (in the strict sense). And in "a research with two empirical levels, the researcher chooses one or several units without having technically taken them from a prior and well distinguished corpus of observational data. His choice here is not intended to represent a prior or specific set of data, but rather to refer directly to the problem he is dealing with" (*ibid.*). Pires (2021) adds:

> "In other words, in a search with a three-level structure, you initially perform two well-distinguished sampling operations: (1) you build-select a database and (2) you pick-and-choose a certain number. And in a research with a two-level structure, your first two operations are simultaneous, coupled or merged because your special attention is directly oriented to some empirical aspects (of your object of knowledge) to explore, test and/or demonstrate. The medium "choosing" the units of analysis then takes on two different meanings that often go unnoticed. This is the difference between *pick-and-choose* (three-level structures) and *choose directly* (two-level structures). Neither of these research structures are exclusively quantitative or qualitative. Both forms of observational data processing apply to both structures."

To illustrate the structure of research (qualitative or quantitative) with two levels, Pires (2021) refers to some empirical research, the majority of which had already been mentioned in his 1997 study. Thus, the research of Shaw (1930), Sutherland (1937), White (1943), Goffman

(1961), (Blau, 1960) are examples of (qualitative and quantitative) research where the researcher does not select a sample from a *population of units* of the same nature. Shaw (1930) studies the biography of an offender; Sutherland (1937) shows the existence of a professional organization of offenders from the life history of one of its members; White (1943) studies a street gang; Blau (1960) demonstrates the existence of structural effects from what happens with social workers in public agencies; Goffman (1961) characterizes 'total institutions' and make an analysis of one institutional way of life in the St. Elizabeth's Hospital in Washington. Goffman (1974) analyses the "organization of experience – something that an individual actor can take into his mind" (p. 13) – and uses a wide variety of documents that have not been represented by the author as a 'technical' sample (in the strict sense) of a previously built or existing set of documents (pp. 14-16). For my case specifically, it is important to remember and develop another example of a two-level structure research given by Pires (1997/2008, 160; 2021). Pires (2021) presents Portefield and Gibbs' research (1960) as follows. These researchers analyzed 955 people whose suicide was officially recognized in New Zealand between 1946 and 1951. They expose their object of knowledge in this way:

> "Our foremost concern is with the dynamics of suicide, not static conditions surrounding the suicide at the time of his death, and we shall concentrate on his social situation from birth to death. A great deal of information has been secured on the social history of the 955 persons who committed suicide in New Zealand between 1946 and 1951" (PORTERFIELD and GIBBS, 1960, 147).

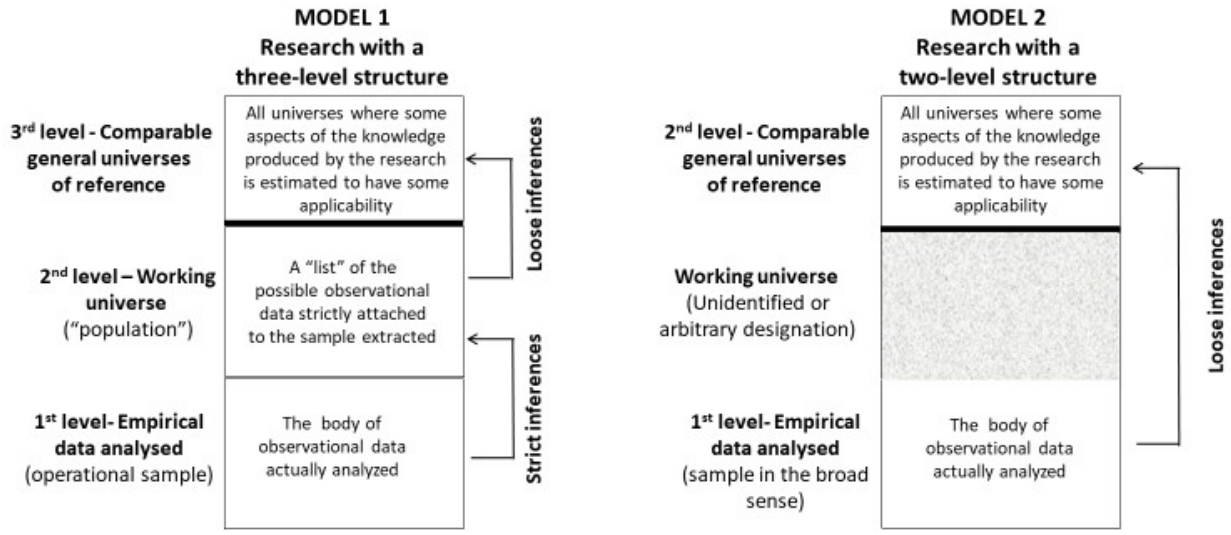
Regarding the 955 suicide files analyzed, the researchers do not speak of sampling (in the strict sense of the word) or even of a "population" in the sense of a set of all the cases existing in a database during a given period. However, the concept of population is obviously implicit in the description they give of the steps they followed to constitute the corpus of data that will actually be analyzed empirically. For they write that they have retained all the cases (in a working universe). In the following passage we can see how Porterfield and Gibbs describe their corpus of suicide cases as including *all files* during the period between 1946-1951:

> Data on each case were gathered in several steps: (1) Suicides were identified by inspecting *all* coroner's reports on deaths in the dominion in the six-year period. (2) There

was *an attempt* in each case to record *all* relevant testimony included in the coroner's report. (3) *All* demographic and social characteristics reported on death certificates were recorded […] (PORTERFIELD and GIBBS,1960, 147; my emphasis).

As Pires (2021) wrote, "what Porterfield and Gibbs can describe then are exclusively the *steps* they took *to gather their empirical observational data* (as opposed to a procedure of picking and choosing a sample)". And because they gathered the totality of files of suicide during a period, their research is observed by Rose (1982, 58) as having dealt with "the whole population" of (known) cases during that period (5 years). As we will see, I have composed two sets of observational data. Now, one of these sets (empirical corpus #2) was formed in the same way as Porterfied and Gibbs' empirical corpus: I selected the entire 'population' of files over a 6-year period (2010-2016). Concerning corpus N°2, the statistical representativeness for the context and the whole period is evident.

Figure 6: Models of typical sampling structures in empirical research in social sciences



Pires underlines the fact that the "working universe" in model 2 usually remains latent and poorly or not identified. It can then easily be given several different names which nevertheless remain functionally equivalent. These names may depend not only on the object and method of

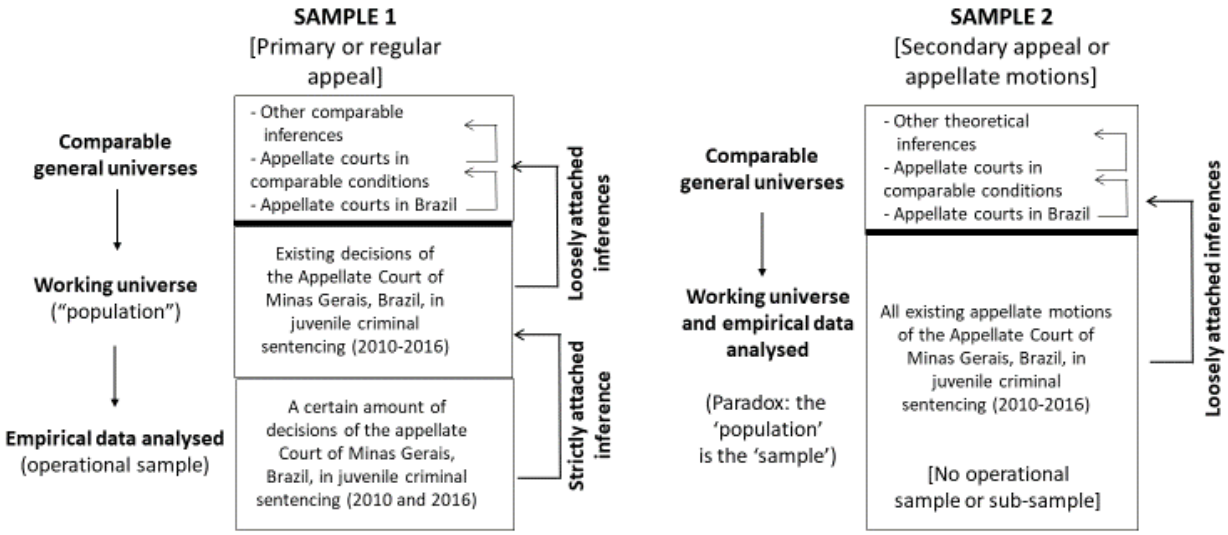
the research but also on the preferences of the scientist. For example, in a research project that uses a database where the units of analysis have already been constituted, the term 'population' can easily be used when the researcher analyses all the data in this corpus. But nothing prevents him from also using the term 'sample' in the broad sense. The observer may also simply say that he/she has analyzed "all the data" available or refer to his/her "empirical corpus. If the observer made a direct observation in an institution, he/she may state what he/she observed and what he/she did not observed from his/her working universe. If he/she is doing research from an individual biographical account, as Shaw (1930) or Sutherland (1937) did, he/she indicates the theme, time and the form that his/her survey took in his/her universe of work, which here is the historiography and the lived experience of his/her informant. Pires (2021) points out that when the scientist explicitly or implicitly generalizes from his or her data to his or her universe of work (whatever that is), he/she is also making an inference that remains strictly attached to his/her observational data as in Model 1. These inferences to the working universe in Model 2 are readily accepted, but they often go unnoticed. For example, Shaw's inferences to her informant's life history are more readily accepted than inferences loosely attached to the life histories of other juvenile offenders (Pires, 2021).

According to Pires (2021), the organizing concept of "working universe" proposed by Sjoberg and Nett (1968) has then the advantage of visualizing the point of convergence of all these appellations or empirical references strictly attached to the data. These names are arbitrary, but they are equally well founded. Pires (2008/1997, 163; 2021) also draws attention to the fact that the concepts of population and sample take on a paradoxical form in all research where the scientist is aware that he or she has analyzed all the observational data available in his or her corpus of data. This happens, for example, when the scientist analyzes all the records of an organization during a certain period. In these cases, the population is the sample and vice versa.

In conclusion, I note that Pires made some major conceptual revisions in his 1997 essay. I have already indicated one of these changes: he replaced the distinction between "conventional or closed structure/open or paradoxical structure" with the distinction "structure with three levels/two levels" (or tiers). Another major revision was that he replaced the distinction between empirical generalization and analytic-theoretical generalization with the distinction between inferences strictly attached and loosely attached to the corpus of data being analyzed. His figure reproduced above has incorporated this new conceptual apparatus. In his view, these revisions are both clearer and more abstract, making it easier to describe different types of empirical research.

Now, I can clearly describe the two sampling models adopted by my research project. My sample No. 1 adopted the Model 1 described above. As for my Sample No. 2, the one equivalent to the model adopted by Porterfield and Gibbs (1960), it took the form of Model 2, because I analyzed the entire available "population" of relevant files from the Court of Appeals of Minas Gerais between 2010 and 2016. So, my corpus of observation data actually analyzed constitutes my entire working universe. In Sample No. 2, there may be errors in analysis, but there is no possible error in representativeness or strict inference. The meaning of some of the terms used in this figure (e.g., 'appellate motions') will be clarified later.

Figure 7: Description of the two samples (broad sense) of this research



3.3.2. The choice of the Appellate Court of Minas Gerais

My first choice concerning the sample was the selection of the appellate court of the state of Minas Gerais in Brazil. This choice was made for «social-practical reasons» (Rose, 1982, 57): (a) convenience (my work town), (b) easy availability of data, (c) my previous knowledge of the field, and (d) the facility to obtain additional information in case of necessity. This choice was not random even if it was possible to dress a "list" of all the appellate courts in Brazil and select randomly one of them. Nevertheless, my theoretical and descriptive presupposition is that it is

possible to make loosely attached inferences from my results to other appellate courts in comparable universes, particularly in Brazil.

I operate as trial court judge in the capital of this state (the city of Belo Horizonte) and I had many years of experience in the unique tribunal specialized in juvenile criminal trials in this state. I had already read a lot of decisions of this court of appeal, but these readings were done from a strictly professional point of view. I was not at all familiar with the theory of MPR and I had not yet received training in sociology at the Federal University of Minas Gerais. Moreover, I had no research interest in reading this case law.

But why an Appeal Court and not the trial courts? The reason for choosing the Court of Appeal (second instance) emerges *partially* from the fact that, concerning Juvenile Criminal Justice, appellate courts potentially constitute, in Brazil, an organizational place of vulnerability or of a "philosophical-legal fragility" of Juvenile Criminal Justice. This is possibly because an overwhelming majority of judges - if not all - have no direct past professional experience of adjudicating exclusively in specialized Youth Trial Courts. In addition, most of these judges do not typically attend training courses or seminars on the philosophy of the legislative program for young people. Therefore, they usually take decisions based either on "spontaneous knowledge" of statutory texts or on previous judicial decisions by the same court (without specific experience). I am, therefore, interested to know how this second instance Court "understood" or positioned itself about the 1990 legislation. One should remember that this legislative program has established a radically different approach to intervention in comparison to MPR and in comparison with all previous youth programs in conflict with the Criminal Law in Brazil.

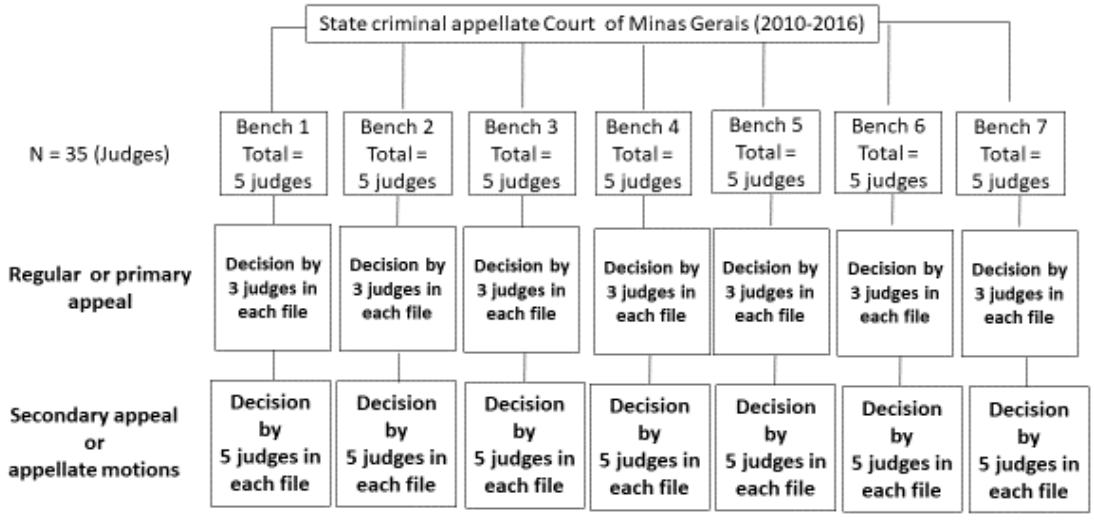
The choice of Brazil was also, of course, for convenience, but this choice gave me a great *theoretical opportunity*. The legislative change of 1990 in Brazil for juveniles in conflict with the criminal law is the most innovative change in this matter that I took acquaintance. For instance, there is no possibility of transfer of files between youth and adult criminal court and no possibility to give adult sentences to youth. Deterrence, retribution and denunciation are not intermediary or praxeological finalities authorized by this legislation in relation to youth sentencing. In this legislation, the maximum detention period is limited to three years for all crimes, including homicide. The 1990 Statute also requires a review of the internment decision every six months and authorizes all interveners (including the head of the institution where the young person is) to claim for the release of the youth at any time. The legislation considers that internment should be a rarely and exceptionally applicable measure. The *threshold of three years*

for maximum detention period will be largely followed by the Courts, but what happens with the practices of detention under these three years? And fundamental questions can also be raised: is the criminal law system taking care of the development of its own juridical values or trying to improve them in the judicial practices of punishment? Are they thinking of how "to combat criminality" with the use of internment or are they worried about how to improve the quality of the law system intervention?

3.3.4. The cartography of the Appellate Court of Minas Gerais (2010-2016)

To better understand our overall sample design (two samples), it is crucial to have a basic understanding of the mapping of the Court of Appeal of Minas Gerais. It had seven organizational sub-units (benches) composed of five judges. Thus, the court had thirty-five active judges (N=35) during the data collection period. Also, within the Court, two levels of appeal are possible. For ease of understanding, I will name them (1) primary or regular appeal; and (2) secondary appeal or appellate motions.[25]. All decisions are collective (as opposed to individual).

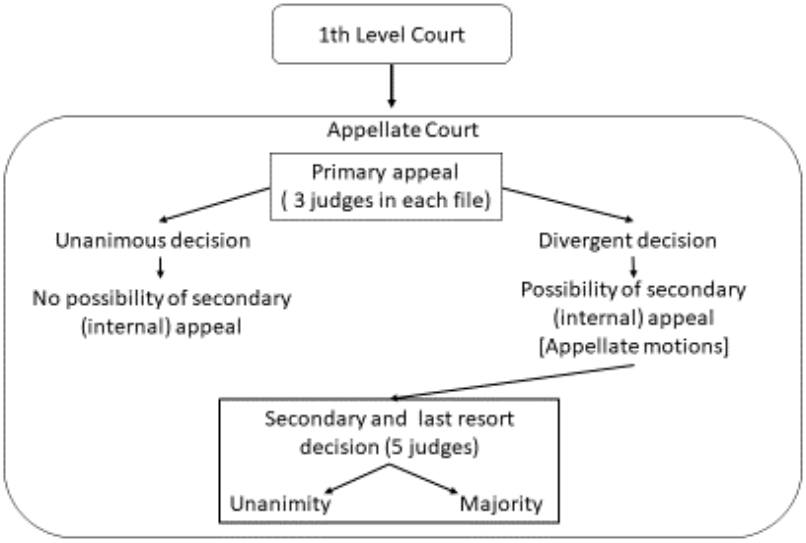
Figure 8: Description of the cartography of the State Appellate Court
(the organizational structure)



[25] In Portuguese, the technical term is «*embargos infringentes*».

As it can be seen, the first decision (regular appeals) is made jointly by three (of the five) judges belonging to the same bench. The Court selects these three judges at random. When this first decision is unanimous, there is no possibility of making a secondary appeal. The decision then becomes final. If the decision is not unanimous (2 vs 1), the defense and/or the prosecution can make a secondary appeal (appellate motion). This second and final decision is made by all five judges on each bench. Three results are then possible: 5 vs 0; 4 vs 1; 3 vs 2.

Figure 9: Showing the elementary description of the organizational decisions procedure



The overall sampling design we have developed will consider this dual structure of the appeal process. It can be seen from now on that any simple probability sample would be unable to adequately account for these two levels of appeal. Nor does it help in identifying cases where the divergence in decisions between judges is certain to be localized and includes all judges on each bench (the secondary appeal).

In effect, all secondary appeal decisions are divergent, and when all five judges on a bench make the final decision, there is the possibility of up to two divergent opinions in a single case. Since our object of knowledge is to discover the eventual confrontation between "idea systems," divergent records have a particular theoretical value. The "zone of divergence" has a strategic value for exploring and analyzing the idea systems operating in the court. On the other hand, it is impossible to know in advance whether or not there were divergences in all the benches during the selected period and, if there were, whether or not the defence or prosecution made an appeal. So, in order to have both a representation of all the benches and to maximize the examination of divergences, a double sampling procedure appeared to me to be ideal.

3.3.5. The constitution of the initial data corpus (population or working universe)

My first job was building the court's population of relevant records of criminal sanctions for young offenders between 2010 and 2016 (my working universe). This will form my initial database. I plan to select my records (jurisprudence) at the computer database website of the Court of Appeal of the State of Minas Gerais, Brazil. This database has been in operation since 1998 and displays all court decisions in criminal, civil and administrative matter of the state. The access to this database is open and accessible to anyone interested (www.tjmg.jus.br). It is how judges officially communicate their decisions to the public in accordance with Article 126 V of the Rules of Court Procedures. The first step was to select the intervals of time.

3.3.5.1. The selection of the period

The year of 2010 was chosen as the starting point of the sample because an important legislative change took place in 2009. The objective of this legislative change was to strengthen the philosophy of the new 1990 legislation. So, starting in 2010, the Court has had sufficient time to familiarize itself with the new provisions. The closing year of 2016 was chosen for timing and practical considerations: six years was presupposed to be enough for my object of study and I also need to consider other requirements of my PhD Program.

3.3.5.2. Determining the relevant records (“population”)

The next step was to find the keywords for the thematically identification of the relevant judgments. In the “Free research” option of the website (“Pesquisa livre”), I wrote some keywords I knew would be effective for that purpose.

Initially, I cumulatively used words that are recognizably applied within Juvenile Criminal Law decisions, such as: “criminal”, “estatuto”, “criança”, “adolescente”, “ato”, “infracional”, “medida”, and “socioeducativa”. In English these terms correspond, respectively, to “criminal”, “statute”, “child”, “adolescent”, “act”, “infraction”, “measure”, and “socio-educational”. For instance, the goal of using “criminal” was to choose files related to the imposition of criminal sanctions, and to avoid selecting cases regarding administrative or civil matters.

The intention of using the words “adolescente” (“adolescent”), cumulatively with the expression “ato infracional” (“act of infraction”) was to avoid compiling Adult Criminal Law cases. Normally, the use of both words in the same decision occurs to distinguish criminal sanctions that are specifically designed to young offenders.

The term “ato infracional” (“act of infraction”) is exclusively used to describe juvenile offence, and it was employed to find decisions that embrace assessments of teenagers’ acts of delinquency and to replace the word crime, that could be technically used in a juridical sense only when connecting an adult to an illicit behaviour. I decided to use the first word of the Statute title that governs Juvenile Justice in Brazil: “Estatuto da Criança e do Adolescente” (“Child and Adolescent Statute”). The title is commonly quoted within the content of the decisions that are relevant to our research.

Using the term “medida socioeducativa” (“socio-educational measure”) allows us more possibilities to find decisions in which the selection of the socio-educational measure is part of the judicial debate, once decisions that concern strictly procedural issues frequently do not fit the set criteria. And the word “internação” (“internment”) was cumulatively used to select the most important representations of gravity of youngsters’ offences.

Despite the fact that the case was considered grave or not, if the word “internação” (“internment”) is quoted, it increases the possibility of finding the representation of a most severe act of juvenile delinquency. However, I later decided to look for decisions that are not representing abstractly grave cases, and for such reason I excluded the word “internação” (“internment”).

The result of this procedure to constitute my *working universe* (“population”) was the identification of 765 relevant collective judgments for this period.

3.3.5.3. The sample n° 1: regular appeals (“operational sample”)

From this total number of decisions (N = 765), I decided to constitute *two subsets* (or samples) of data. This section deals exclusively with sample No 1.

The methodological literature in the social sciences (BEAUD, 1984;) sometimes subdivides forms of sampling into two broad categories, non-probability sampling and probability sampling. It then identifies, within each of these two categories, various internal modalities. The accounts for these modalities may vary according to the authors. Pires

(2008/1997) considers that the researcher often makes an implicit prior choice about the form of processing the observational data that he/she will adopt (quantitative or qualitative processing). It is from here that the scientist faces another set of possible choices regarding the form of the sample. As for me, I wanted to give a quantitative and qualitative treatment to my observation data. My two samples will be suitable for both types of data processing.

Due to the organizational form of the Court of Appeal and our research questions, I opted for a systematic representative sample in the case of my sample #1 (regular appeals). This choice allowed me to explore the collective decisions of *each bench* at *regular intervals* during the *entire period* (03/08/2010 and 01/12/2016). This choice allows me to 'control' the occurrence and implications of the different criminal benches, even if a possible difference in philosophy due to court composition remains less relevant to my object of knowledge in this research. It would not prevent me from identifying the dominant idea system in my working universe (the 'population'). The difference in the philosophical composition of the benches has effects on the professional practice of lawyers and prosecutors, but not on an investigation that considers all the benches.

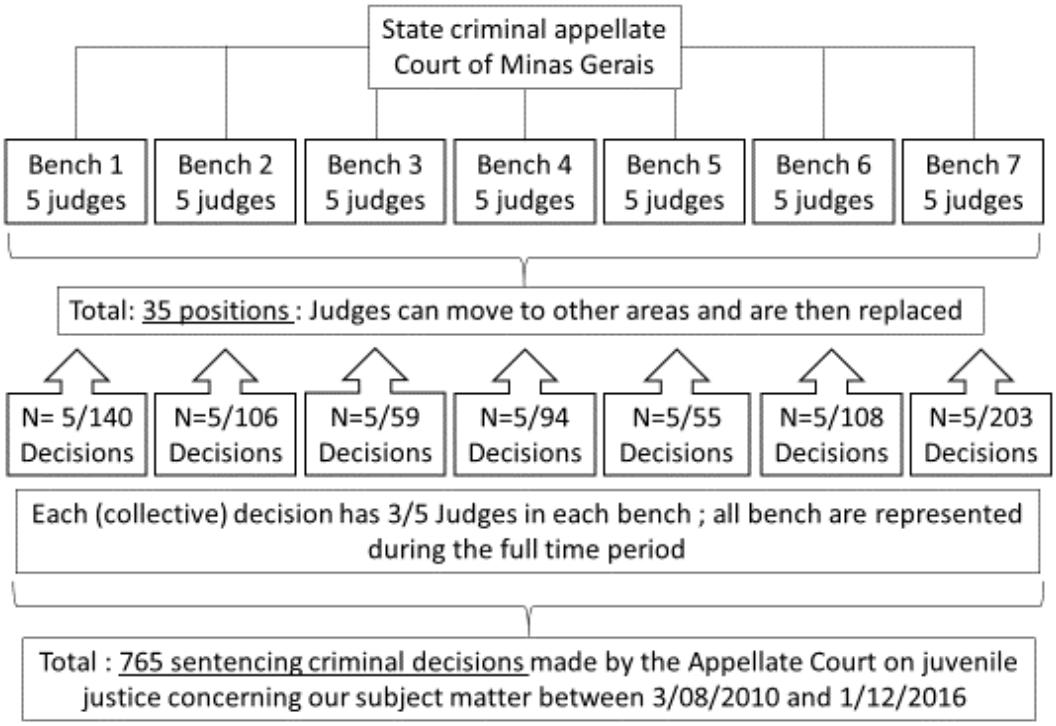
Let me illustrate this point with an example. I know that in the São Paulo Court of Appeal for adults there has been, for some years, a criminal bench made up of three judges concerned with the rights of offenders. Some prosecutors were not happy when their records went to that bench. And the opposite was true for defense lawyers. In spite of this "clean culture" emphasizing the control of criminalization and legal guarantees, a well-constructed survey on all the rooms would not have indicated the protectionist orientation of this bench as being predominant. Regardless of these considerations, I nevertheless decided, in a prudent way, to be able to identify the presence of this kind of configuration.

As it was said, the State Appellate Court of Justice has seven benches of appellate judges, each of them integrated by five members (N= 35 judge's positions). Since the collective decisions we are interested in are randomly distributed among these benches in conjunction with all other civil, administrative, and criminal cases, these seven chambers receive the unequal and unpredictable number of 765 files belonging to our (previously determined) population. I then constructed a model of these files (my 'population') according to the seven chambers for the period between 2010 and 2016. I obtained one hundred forty (140) at the first panel; one hundred six (106) at the second; fifty-nine (59) at the third; ninety-four (94) at the fourth; fifty-five (55) at the fifth; one hundred eight (108) at the sixth; and two hundred two (203) at the seventh.

Then, ***I obtained the files randomly***, but the selection followed a systematizing criterion, in order to have at least 5 files for each room. In order to be able to estimate when each of these five files was picked up in the whole time dimension period and the time interval between them, I divided the actual number of files received by each chamber by five (5). In this way, the five files in each chamber were distributed in the time scale in proportion to the number of files processed. This allowed me to avoid having a concentration of cases in a short period of time. Each of these files therefore had the role of a probe distributed in time.

Considering that each collective decision randomly includes 3 of the five judges per bench, this number was considered more than sufficient to have a fairly accurate representation of each bench at the time of sampling. If an anomaly had become visible at the time of the analysis, corrective measures could have been taken (for example, increasing the number of cases in a specific room). It should also be kept in mind that all these files are distributed in a contingent manner in each room and that all the benches are equal represented in the sample regardless of the number of cases treated by each. We will see in the analysis all the information we were able to obtain with this first systematic sample.

Figure 10: Composition of Sample 1



3.3.5.4. The sample n° 2: appellate motions (“the totality of files”)

As it was also said, there is, in the Appellate Courts of Brazil, a type of internal appeal for reviewing the decision of the Court of Appeal itself, called “*Embargos Infringentes*” (appellate motions of reconsideration). This application for review requests the full bench to reconsider its own decision.

Three judges usually make the first decision of the bench, but when there is an “appellate motion” the final decision requires the presence of five judges. These decisions are very interesting to our research because they deal with the most controversial cases and require the participation of all judges of the bench. Within the researched period I was able to find a total of 40 decisions for all benches (N = 40/765). I decided to select all of these internal motions for reconsideration given their potential interest in my research.

Like ordinary appeals, the chambers do not distribute these "internal appeals" because they depend on the initiative of the parties in each case. During our research period, the two chambers (No. 3 and No. 4) with the smallest number of cases did not experience any type of internal appeal. Recall, however, that these two benches were still represented in the first sample. On the other hand, the two chambers (No. 1 and No. 7) with the highest volume of cases also had the highest number of appellate motions (internal appeals).

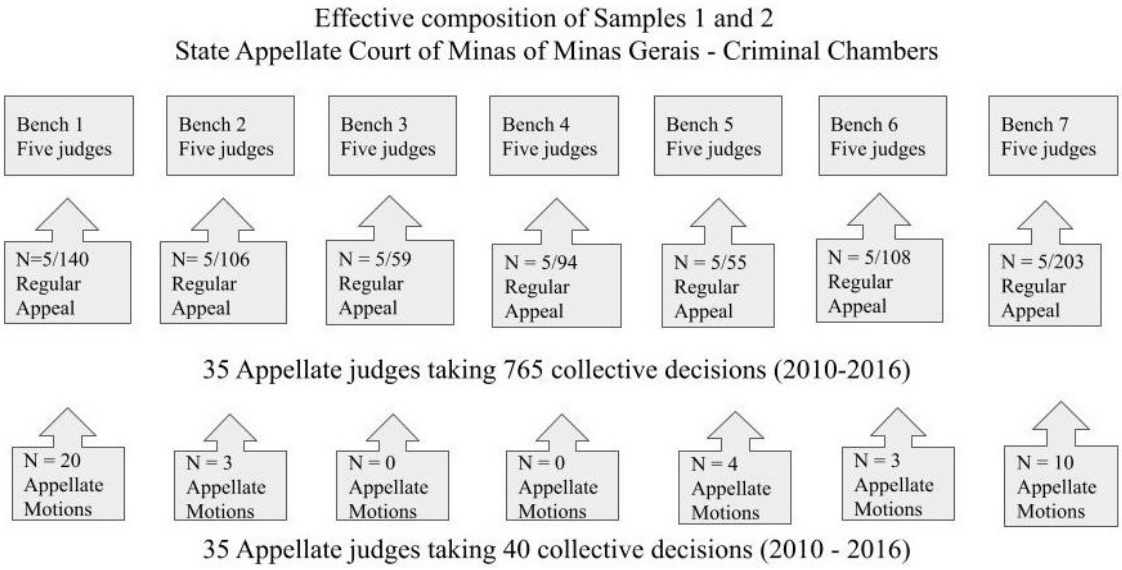
So for bench 1, which received 140 cases during my period, I analyzed a total of 25 cases. Five files are in the first sample and include three of the five judges; 20 files are in the second sample and include all five judges. For bench 7, which received 203 cases during this same period, I analyzed a total of 15 cases. Five files (with three judges each) are also found in the first sample, and 10 files with all five judges in the second sample. Cumulatively, I, therefore, analyzed a total of 40 collective decisions (from 3 to 5 judges) just for these two benches for the entire period.

I initially thought of considering only "appellate motions for reconsideration" (N = 40) for my project, but then realized that two criminal benches would remain entirely excluded from the sample. By taking "two steps" (E-1 and E-2), I am more reassured that I have a jump on the topic at hand in this research.

The figure below gives an overview of the two samples. The reader should keep in mind that the judges from the first sample can be found - and are mostly found - in the second sample as well. It is therefore not a total of 70 different judges (35 + 35). For reasons of confidentiality,

we decided not to indicate the names and not to add any other information that could lead to identification. On the whole, I will have examined 75 collective decisions, including 3 to 5 judges each, covering all Criminal Chambers of the Minas Gerais Court of Appeal during a period of six years (2010-2016). As it can be seen, and as far as it is possible to assess, my overall sample was statistically representative of the judges and decisions during this period.

Figure 11: Effective composition of Samples 1 and 2



Finally, I emphasize that it is neither necessary nor relevant to make an individual, "judge by judge" observation in relation to our subject matter. On the one hand, some judges may sit only for a very short period in one of these criminal benches before being replaced. On the other hand, I am interested in "collective decisions" and "predominant cultures" of the Appellate Court regarding criminal sanctions for young people. It is not within my scope to set the place or role of individual characteristics of judges in the specific determination of the sentence. This would require another type of research.

3.4. Criteria (distinctions) for data analysis (idea systems)

The major methodological problem of my research consisted in establishing a set of conceptual and empirical indicators to be able to observe the presence or absence of these three

systems of ideas: (1) the 'Modern penal rationality' (MPR), (2) the 'Doctrine of irregular situation' (DIS) and (3) the 'Doctrine of integral protection' (DIP). Systems of ideas are not like physical objects with visible boundaries that may facilitate their specific observation and identification. And we know that even in the case of physical objects such as animals, a language problem can also exist (see Kuhn, 1990/1974).

The four key interrelated cognitive barriers that an observer (including myself) may encounter in observing the presence/absence of these three idea systems can be summarily displayed as follows.

Initially, the observer needs specific distinctions to be able to locate the boundaries of these idea systems and to be able to identify their respective contents, i.e. the ideas that belong to each idea system. It is to be expected that this is not always possible because some ideas may be exhibited in more than one idea system and because the information available to clarify this alternative is not present. Pires (2021) adopting a distinction proposed by Dan Kaminski refers to this problem with the term "the need for *ad hoc* concepts" and not just organizing and/or encompassing concepts.

Secondly, in order to capture the way of thinking of each of these systems of ideas, the conceptual indicators previously provided by a theory may prove insufficient in the available empirical material. This can happen for different reasons. In this situation, the analyst must then pay special attention to his/her empirical material to see if he/she is able to find empirical sub-indicators that can be attached to one or other of the idea systems. These are latent empirical indicators, as opposed to explicit conceptual indicators (Pires, 2021). This operation requires the analyst to go back and forth between the expected theoretical elements and the indirect theoretical elements that are "camouflaged" in the empirical observational data (Pires, 2021). The analyst must then go from the already constituted concepts to the empirical material and from the content of the empirical material to the constituted concepts to be able to observe and locate the boundaries of each system of ideas. In addition, the analyst must look for a way to show to other observers how he/she could observe what he/she observed. In some cases, the demonstration is easy. For example, if the operator is using the aggravating/mitigating distinction, he/she is using a by-product of the MPR idea system. On the other hand, if the operator says that the offence committed (for example, possession of marijuana for sale) is equivalent to a "hate crime", the reader should know that it is the Brazilian criminal legislation based on the MPR system of ideas

that has created this kind of (absurd) equivalence. If the analyst ignores this fact, it is very difficult for him to attribute the decision to the MPR's idea system.

Thirdly, other difficulty is particularly attached to our object of knowledge. One of the systems of ideas, that of the Doctrine of the Irregular Situation (juvenile criminal justice), is partially nested in the system of ideas of Modern Penal Rationality (adult criminal justice). The central point of overlap between the two systems of ideas is found in the appreciation of internment (prison and reform schools) as a means to rehabilitate individuals in conflict with the criminal legislation. This interlocking can blur, in certain enunciation contexts, the border between the two systems of ideas. In these particular cases, both readings remain equally convincing. On the other hand, as we will try to show, the idea system of the Doctrine of Integral Protection is so diverse from the other two that it does not pose any difficulty to be observed. Even a reader with no specific knowledge of these three systems of ideas is able to see that the operators of the system have adopted a different ‘logic’ (rationality) of practical intervention.

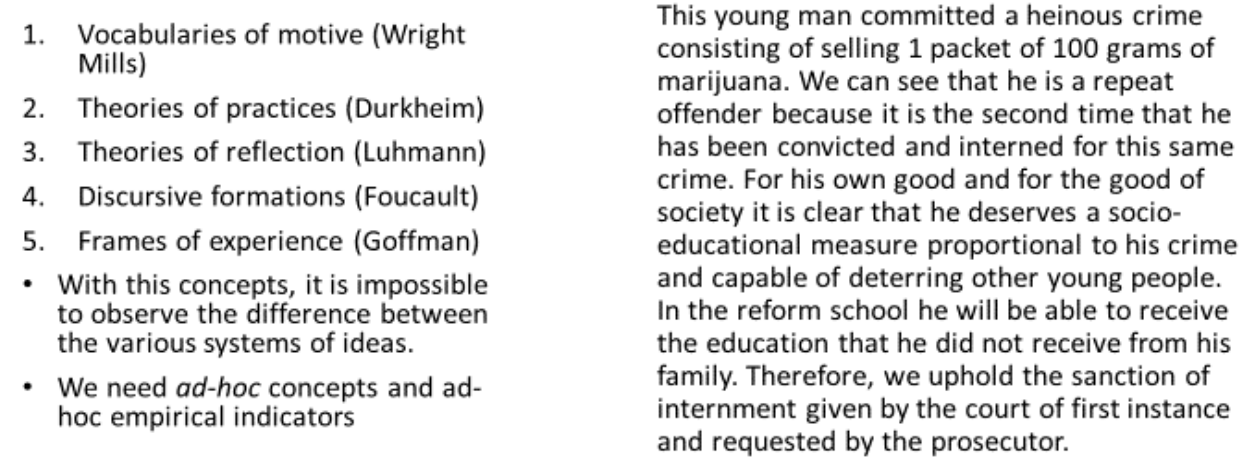
Finally, the last difficulty is of a semantic nature and is also strictly attached to our object of knowledge and to the insights achieved by the theory of MPR. The media 'punishment', ‘to punish', 'punitive measure', 'penal measure' and other equivalents have taken in the context of the juridical-criminal discourse the meaning of voluntary infliction of suffering. The infliction of suffering on the other has become a means that some observers (in this case, some legal practitioners) believe is amenable to producing "jump results". For them, if you voluntarily inflict suffering on the wrongdoer you will get beneficial results of a different quality. “Certainly, it is possible to punish without wanting to inflict (an act of will) - or without seeking to inflict - in the first place and by itself a suffering to the wrongdoer. However, this other possible meaning of the term 'punish' is absent - and has been excluded - from the dominant discourse of criminal law” (Pires, 2019, Power Point). In the case of youth criminal justice, these mediums have been formally replaced by other mediums (mainly 'socio-educational measures'). However, when a legal operator thinks within the MPR system of ideas but is deciding in the field of youth criminal justice, he will use the medium 'socio-educational measures' in the sense given by the MPR system of ideas. Therefore, the analyst cannot rely exclusively on the medium employed, and it is absolutely necessary to pay attention to the meaning that has been updated. It is the way of justifying imprisonment that will play a central role in identifying this meaning. For example, if the operator writes, "this offence is serious (or abstractly serious) and in itself deserves internment," we can say that he/she is deciding within the MPR idea system.

3.4.1. The need of ad hoc concepts

The first condition of possibility for finding one or more idea systems in this excerpt is that I must have a set of ad hoc concepts referring to the idea systems I expect to be able to find. If the concepts are too encompassing, I have no chance of identifying the ideas in this excerpt as a form of expression and actualization of those idea systems. The figure below illustrates this problem. The first condition of possibility for finding one or more idea systems in the case law is that I must have a set of ad hoc concepts referring to the idea systems I expect to be able to find. If the concepts are too encompassing, I have no chance of identifying the ideas expressed in the case law as a form of expression and actualization of those idea systems. The figure below illustrates this problem with the help of an excerpt I constructed for this demonstration.

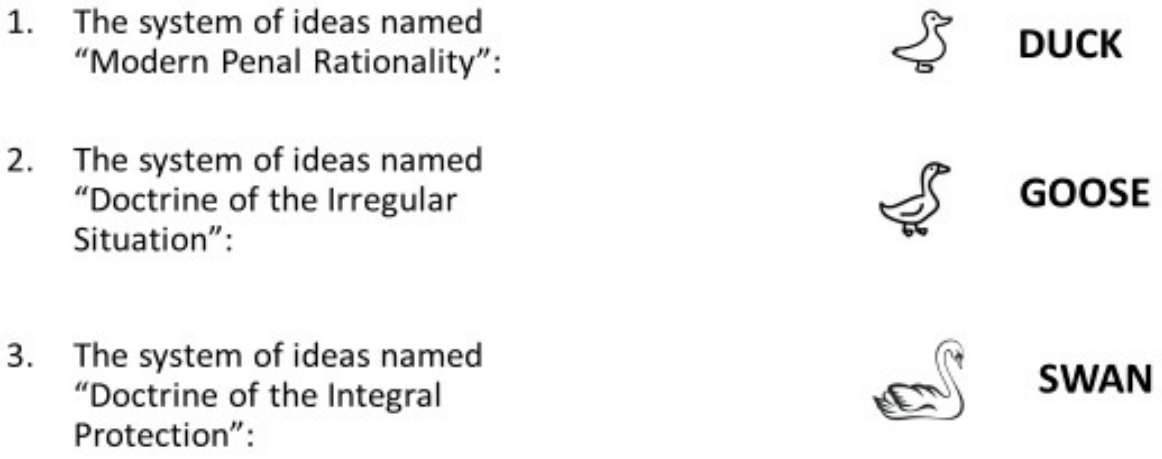
I have selected from previous works five encompassing sociological concepts that are all applicable to the excerpt presented. The reader can see, first, that none of these concepts will allow him to characterize in a precise way the systems of ideas contained in this excerpt. And, conversely, he will also see that the excerpt itself will not allow him to select one of the five concepts as being more suited than the others to his empirical material. Conclusion: I need ad hoc concepts (Dan Kaminski) to be able to observe certain ideas as being the empirical sign of the actualization of a system of ideas.

Figure 12: Some organizational concepts available in social sciences



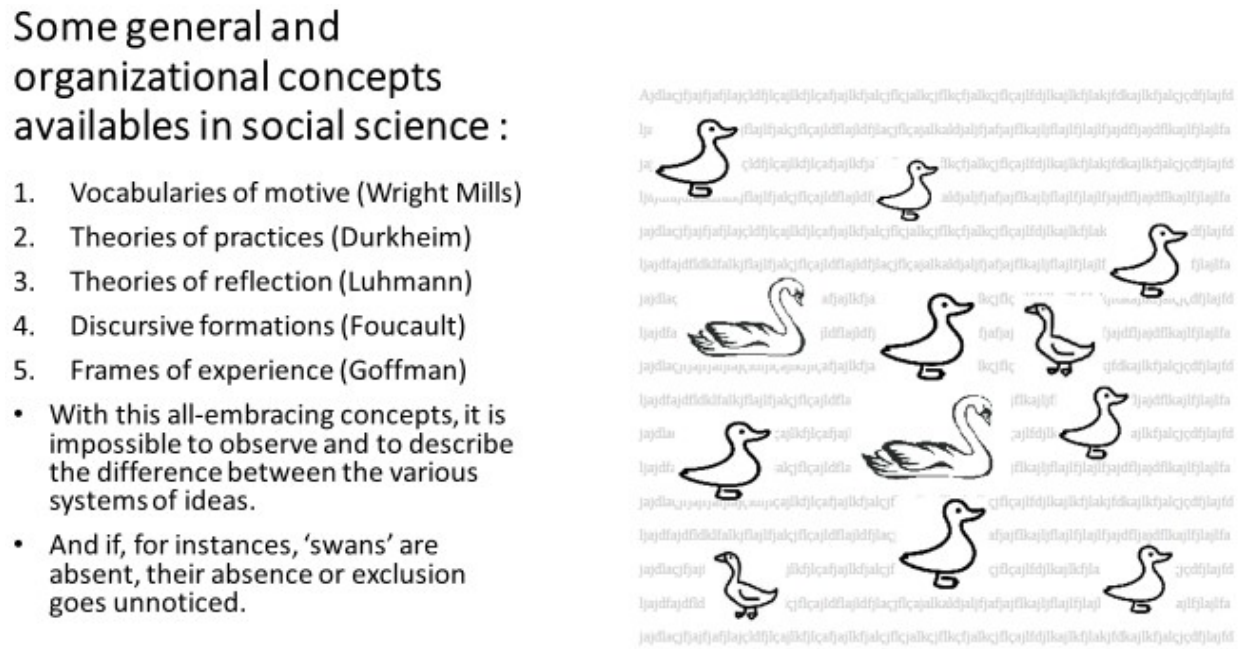
The demonstration that now follows was proposed to me by Pires (2021) who was inspired (as I was later) by the work of Kuhn (1990/1974). Keep in mind what has already been said before. Different from Kuhn's study, we are working here with systems of ideas and not with physical realities with visible boundaries. I will nevertheless transpose, in a metaphorical way, the three images used by Kuhn because they lend themselves well to also illustrate certain aspects of my object of knowledge. These three images are those of a duck, a goose and a swan, and each of the terms (duck, goose and swan) are intended to refer to different systems of ideas. The figure below represents these equivalences.

Figure 13: Some ad-hoc concepts for this study



As in our case, if you only have the term "birds", all three objects (duck, goose, swan) will be observed as birds. It will be impossible to specifically observe three organic systems differentiated from one another. This is a problem analogous to the one we saw with our five sociological concepts. In the case of systems of ideas, the absence of an ad hoc concept also prevents us from seeing the absence of one of these systems when it is not in the discourse. The figure below illustrates this possibility.

Figure 14: Organizational concepts do not distinguish ad hoc idea systems (Pires, 2021)



These encompassing concepts remain very important for other operations of observation, description and analysis, but they do not lend themselves to the precise description of our object of knowledge. I consider this first conceptual problem to have been resolved in some part before the analysis began. The ad hoc concepts of MPR, DIS, and DIP were already available in the sociological and legal literature. My main problem will be: How do I observe these systems of ideas in my empirical material?

3.4.2. An illustration of the ranking problem

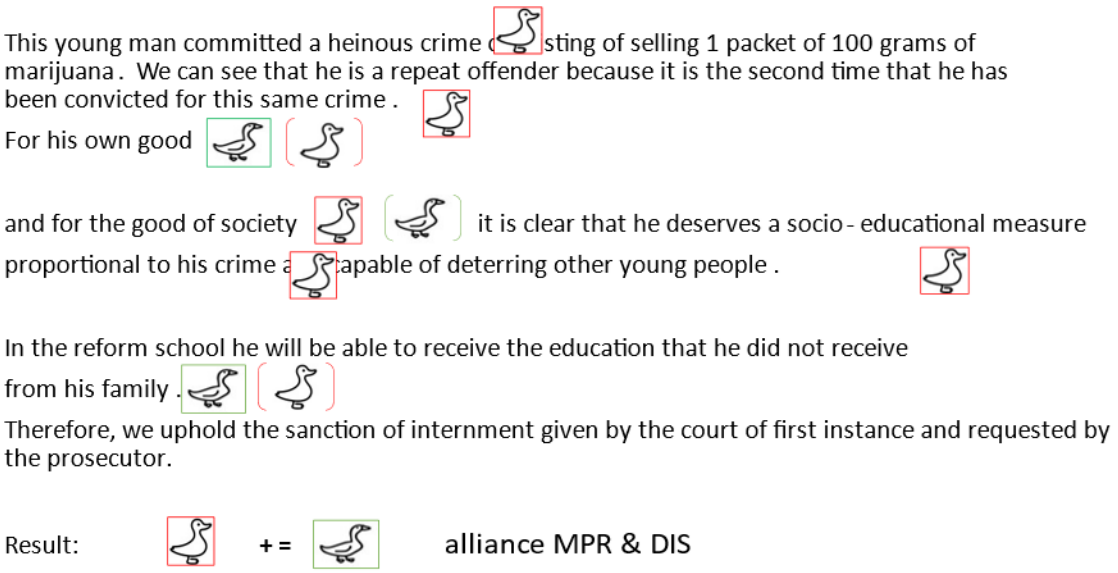
To show the reader some difficulties I face when reading these case law rulings, I will exemplify. I will attempt to apply the three symbols representing each idea system (duck, goose, and swan) to a fictional excerpt which is a very good representation of what we find in these decisions. Suppose you found the following story:

"This young man committed a heinous crime consisting of selling 1 packet of 100 grams of marijuana. We can see that he is a repeat offender because it is the second time that he has been convicted and interned for this same crime. For his own good and for the good of society it is clear that he deserves a socio-educational measure proportional to his crime and capable of deterring other young people. In the reform school he will be able to receive the education that he did not receive from his family. Therefore, we uphold the sanction of internment given by the court of first instance and requested by the prosecutor" (fictional excerpt).

The central question for me here seems to be: how can I find my object of knowledge (systems of ideas) in this extract? Does this extract actualize at least one system of ideas? And, if so, which one(s) and how do I know?

Now, I will add the relevant symbols (duck, goose, and swan) after each sentence (or sentence segment) where I believe the presence of at least one of these idea systems can be observed. If more than one symbol can be applied, I will place them in descending order of estimation (the first symbol being more adjusted than the next). Here is the result of this exercise:

Figure 15: The procedure for identifying the presence/absence of the three idea systems



The justifications for these observations are as follows. (1) The reference to a "heinous crime" in Brazilian juvenile justice given as justification for internment indicates the presence of a latent criterion closely attached to MPR (adult justice). (2) Recidivism used as a simple, stand-alone, automatic criterion for using imprisonment or increasing a sanction is a latent sub-indicator of MPR. (3) The segment "for his or her own good" in the context of a sentence that selects internment has a higher probability of being derived from the DIS. Theories of retribution, deterrence, and denunciation (through the infliction of suffering) are indifferent to the rehabilitation of the sentenced person. If rehabilitation happens, so much the better, but the decision to inflict suffering does not have to take into account this praxeological purpose. However, the theory of rehabilitation in prison embedded in the MPR idea system also makes it possible to attribute this segment to MPR. So, I inserted two symbols (goose and duck) in descending order of priority (because we are in the context of juvenile justice). (4) The segment "for the good of society" poses the opposite problem. On its own, this segment is more of an expression of a way of thinking closely attached to MPR; in conjunction with the earlier segment, it can also express DIS ideas. The two symbols were then placed in reverse descending order. (5) The use of the legal principle of proportionality closely tied to a definition of punishment constructed with the praxeological goal of deliberately inflicting suffering is an explicit criterion (and conceptual indicator) of MPR. (6) The same applies to the goal of general deterrence. (7) The segment valuing the reformatory school (internment) as the preferred place to rehabilitate offenders is a product of both the MPR system of ideas from the 19th century onward and also of the DIS from the last quarter of the 19th century onward (EUA). Since this is a sentence referring to young offenders, I reasoned that the goose symbol (DIS) should precede the duck symbol (MPR).

The most explicit result of this analysis is the following: both the MPR and DIS idea systems are possibly actualized in this decision and the DIP system of idea is absent. MPR has formed an "alliance" with DIS. This is a decision made "in the name of juvenile justice," but the *adult* justice idea system (the MPR) has a stronger, more visible, even more "decisive" presence in this decision.

A few additional comments seem important to me. This is a surprising result. First, as far as I can see, there are three ‘correct’, though different, ways to classify this judgment. Second, there are also only three empirically wrong - counterfactual - ways to classify this decision.

I start with the three mistakes, because they are the easiest to show and see. The first and most obvious mistake would be to see the ideas of the DIP in this decision. These ideas are neither explicitly nor implicitly displayed. The presence of the medium "socio-educational measure" does not indicate the presence of an DIP idea, but simply the use of a term favored by that idea system. In the example we gave, this term was picked up by other idea systems (MPR and DIS). The second mistake would be to say that the MPR idea system is missing. This statement would be frankly counterfactual. Moreover, the DIP idea system is entirely different from the MPR idea system. The two idea systems do not have any common ground to combine without producing a paradoxical contradiction. Their ideas of "punishment" and "accountability of the wrongdoer" are not the same and DIP strongly devalues the use of imprisonment while MPR idealizes the use of prison. The third and last mistake would be to say that this decision was made entirely within the DIS system of ideas. The principle that there must be proportionality between the seriousness of the crime and the suffering to be voluntarily inflicted on the wrongdoer is incompatible with the DIS.

Finally, I had to deal with other troubles. In research work, we sometimes assume (incorrectly) that there is only one correct answer to a problem. However, in this case, three rankings on my part would have been all three "correct". I have experienced this as disturbing. By 'correct' here, I mean 'not contradicted by my data'. Here are these three rankings that would be empirically admissible:

1. This ruling could have been classified as MPR. The reader can easily see this if he/she deletes all the ‘geese’ from the exercise and leaves the ‘ducks’ exactly where they are. The ducks will automatically take the place of the missing geese. It is enough not to think that the same idea (element) can be present in two relatively different systems of ideas to see only one of these two systems. But an idea does not constitute a system of ideas. However, here is the asymmetric nature of this situation. If I observe only the MPR idea system, my ranking remains correct, but if I observe only the DIS system of ideas, my ranking is wrong, as we have seen. Because, in this case, another observer can show me that this other ranking is counterfactual: I did not see what I could have seen (the empirical indicators of MPR).

2. This judgment can obviously be classified as a mixed judgment (MPR and DIS). This does not require further clarification.

3. This ruling can also be classified as a mixed ruling with a preponderant or dominant presence of the MPR idea system.

With the information available, none of these descriptions is empirically wrong. For all three descriptions stand up to empirical testing when we carefully read what is written in the decision. For myself, I decided to classify all similar decisions as a "mixed decision" (answer #2 above) mobilizing both the MPR and DIS idea systems. But the reader should know that in the totality of my mixed rankings (MPR and DIS), the MPR idea system predominated.

3.4.3. Some latent or 'indirect' empirical indicators

One of the greatest difficulties of empirical research on systems of ideas or ways of thinking is that the scientist fails in anticipating all the forms of manifestation or expression of these systems of ideas and, when he does indeed succeed in doing so, he has no means of being sure of having done it. Certainly, especially in complex situations, he/she has no method or procedure to provide evidence of exhaustiveness of his/her empirical indicators. According to Pires (2021),

> " It is for this reason that, when the methodology adopted and the raw empirical material allows it, it is appropriate for the scientist to pay attention to the presence of latent, indirect, or unanticipated empirical indicators at the outset of the project that may eventually be found in the forms of communication collected and analyzed. As individuals have an operationally autonomous way of formulating the ideas that they will use to elaborate their 'message', the external observer cannot know in advance all the forms of actualization of a system of ideas socially available to other individuals in the same social role".

This was to be expected in my case because my research was in the field of juvenile justice and because the 1990 legislation had attempted to completely transform the conception of "punishment" in comparison with the way constructed by the MPR system of ideas. Thus, I could not expect to find exclusively the empirical indicators already indicated by MPR theory. To

account for this situation, Pires (2021) tentatively introduced the distinction between two types of empirical indicators in a broad sense: "conceptual indicators and empirical indicators (in the strict sense)". He presents this distinction as follows:

> “The former indicators are already proposed by a theory or by prior conceptualization work and the latter are discovered in the observational data by the observer. In a sense, it is sometimes possible to characterize empirical indicators in the strict sense as latent indicators or sub-indicators of conceptual indicators that are discovered during the research activity" (Pires, 2021).

In my empirical material, I have found both types of indicators: those that the MPR theory taught me to identify and those that I myself was able to identify with knowledge of the theory. Pires (2021) adds that:

> Moreover, empirical research shows that many of these formulations of ideas that are empirically identified as being a form of manifestation of an idea system are stabilized in the same chain of communications. Yet, in the case of the MPR system of ideas, these repetitive formulas indicate the presence of a collective organizational structure in the manner of punishing and the presence of a collective experience of punishing or with punishment (compare Goffman, 1974, 13-14). The operators who use these formulas have learned to punish in a certain way, have learned to pay attention to certain aspects of the situation and to exclude others, and have also learned to privilege certain distinctions as a basis for their way of punishing. Inspired by Goffman (1974, 13-14), I would call this a collective organizational structure of the experience of punishing. Now, we know that there are various such structures and that they can be replaced by others. It is an illusion to believe that there is only one way to conceive punishment and to punish. Put another way, there are experiences of punishment that are divergent and incompatible with each other. For example, if you have learned to value the voluntary infliction of suffering highly, you are going in one direction; if you have learned to self-monitor so that you can let your own positive values shine through in the act of punishing and in the way you hold the other person accountable, you

> are going in another direction. And we also know that individuals can internalize different ways of punishing and form their own experience of punishing. Each individual has virtual power to alter their own experience. And the same individual can have two divergent experiences in the way of conceiving and punishing according to two different social roles. He may have an individual organizational structure of punishing in the family and an individual (and collective) organizational structure of punishing as an operator of criminal law. Through this virtual power over one's own experience, some innovation and reconstruction in the way and experience of punishing individually and collectively becomes possible. (Pires, 2021)

In this section 3.4.3, I will deal mainly with empirical indicators (in the strict sense) discovered during my research activity using the case law itself. The reader will understand that this exposition will not be exhaustive. That would be too long and boring. I will limit myself to a few cases. My methodological purpose here is threefold: (i) to (continue) visualize how I proceeded to identify latent or indirect empirical indicators to classify the judgments on the basis of what is written in the sentences; (ii) to (continue to) show the criteria I have adopted for ranking the cases; and (iii) that of showing the existence of cases where the choice of confinement *does not depend on the actualization of any of the three systems of ideas*. This can happen when all three idea systems would 'agree' to decide in favor of prison regardless of how they eventually justify confinement.

3.4.3.1. Current professional involvement in the MPR idea system

There is nothing sociologically surprising in the fact that professional criminal law operators (prosecutors, judges and lawyers) come to organize their individual sentencing experiences around the MPR idea system. This system has predominated in Europe and the Americas for several centuries in adult criminal justice. They have become professionally self-socialized in this system of ideas. This was also my own case at the beginning. What happens then when they have to "punish" young offenders with another cognitive and normative framework for organizing their experiences? Will they adjust themselves to the diverse and alternative framework that is now available (1990 legislation) to organize their (our) experience

of "punishment" in other terms or will they continue their individual engagement with the MPR idea system? Recall that the majority of these operators have no individual experience in juvenile criminal justice and/or have not received reflective training to focus their attention on the difference between MPR and DIP.

I will draw attention here to *three key latent empirical indicators* of MPR that I discovered while analyzing my data in the field of juvenile criminal justice. They are all three different forms of configuration of the same problem. This all-encompassing problem is to reflect and reason in terms of an analogy with adult justice and to transpose its criteria to cases that should be dealt with under the legal philosophy of intervention offered by the 1990 legislation. I wrote by 'adult justice analogy', but this is an imprecise shortcut. Rather, it is a matter of thinking and reasoning by analogy with the MPR system of ideas (which is prevalent in adult criminal justice). When the medium "analogy" is explicit in the sentence, it simply provides a connecting "bridge" or "tunnel" for the observer to apply to juvenile justice what does not apply without explicitly canceling the distinction produced by the 1990 Legislation. The observer will not say "this legislation does not apply to the case I am dealing with" but shows himself to be obliged to make some "equivalence". In short, the 1990 legislation is not adopted, but neither is it directly challenged.

It can also be said that these three indicators suggest that the observer has not moved out of the MPR system of ideas and moved into the DIP system of ideas. These three indicators are recurrent in my data and can be found together in the same decision because they express and reinforce the same way of thinking, and they overlap to some degree. However, it is important to report them separately for ease of identification and because they refer to different legal ideas that run in the background. I have hesitated in relation to how to call them, and I am not sure yet that I have found the most appropriate name for each. But I can present these indicators from the point of view of the observer as follows:

1. The observer observes an '*abstract danger*' or an 'abstract gravity' in the behavior.

2. The observer focuses on the legal nature of the offending act rather than on how best to intervene to hold the person accountable for his or her conduct and to stimulate legally acceptable conduct.

3. The observer takes on the task of fighting (the overall) criminality and impunity in society instead of individualizing his intervention and trying to see what can be done for the person in front of him.

When one becomes clearly aware of the MPR system of ideas, it becomes relatively easy to realize that these three 'indicators' are a by-product of the conventional theories of punishment that form this system of ideas. For all these indicators are strictly attached to the idea of measuring the amount of suffering that must be voluntarily inflicted on the wrongdoer.

The relevant point of blindness in the sentencing then seems to be this: the decision is established under cover of the legal philosophy of the 1990 legislation, but it accomplishes this operation without otherwise leaving the analytical framework of the legal philosophy of the MPR. The sentence message shows no sign of replacing decisional analytical frameworks or explicitly preferring one framework over another. For example, the sentence will simply introduce the aggravating/mitigating distinction that is a fruit of retributivist theory to "calculate" the intensity of suffering considered "just." This distinction is entirely absent from the analytical framework of the 1990 legislation. We can find another example in the excerpts below: factually, the youth was an instrument and employee of the illicit drug market and was convicted of participation in drug trafficking. In the concrete case, it was a certain amount of marijuana. The sentence will observe this violation of the norm as a "hate crime" or as representing an "abstract danger" or one that should promote a philosophy based on the intentional infliction of suffering to combat crime and/or impunity in society.

Note that this (non-hate) crime is observed as hateful simply because a law in Brazil has ruled that *all drug trafficking crimes* must be regarded as heinous. The prosecutor is not required to prove the existence of intent legally characterized as hateful, and the facts described in the trial need not suggest hateful conduct. In adult justice, this offense is heinous by the force of the law and by the fact that the operators of the legal system voluntarily accept this political disposition without invalidating it. Yet, this legislative, legal qualification, which is absurd for adult criminal justice, does not apply in the context of youth criminal justice legislation. The transposition of this criterion to juvenile justice is then doubly problematic: the legislative presupposition is juridically absurd in the first place, and its voluntary or unconscious transposition to juvenile justice is contrary to the law or a legal error.

Put it in another way: when legal practitioners fail or refuse to disengage from their MPR sentencing experiences, they fail to stabilize a new conception of "punishment" in youth justice jurisprudence. As a result, innovation and incremental change in the legislative youth justice program are not accomplished.

Here are now three excerpts which demonstrate the presence of those latent or indirect empirical indicators that I have attributed exclusively to the idea system of the MPR. I have underlined the significant passages and I have included annotations to clarify my way of observing.

No	Extracts with indirect or latent indicators and a few notes	Ranking
1	Practicing a juvenile offense analogous to a crime of robbery, aggravated by the presence of more people, allows setting a custodial socio-educational measure due to the severe threat that characterizes the act. A juvenile offense analogous to a serious drug dealing crime is enough for imposing a custodial social-educational measure. Note: automatic move to confinement.	**MPR**

No	Extracts with indirect or latent indicators and a few notes	Ranking
2	There is no possibility of acquitting a juvenile offense analogous to the use of narcotics when the teenager confesses under the supervision of the Public Prosecutor's Office, corroborated by other evidence in the legal dossier. Furthermore, the principle of insignificance does not apply to drug-related crimes, considering that, along with being a crime of abstract danger, the punishment [i.e., the voluntary infliction of suffering] of the agent is justified by the social danger that its commission [but not facts] shows. Note: The principle of factual insignificance of conduct is used to avoid the conviction of crimes considered to be "trivial". Here, it is the drug legislation in adult justice that blocks the use of this principle, which is tolerated by the MPR. This same principle of triviality would also have been cancelled by an application of the DIS. However, the use of the DIS would have been redundant here.	**MPR**

No	Extracts with indirect or latent indicators and a few notes	Ranking
3	Duly proven the authorship and materiality of the juvenile offense analogous to the delict of first-degree murder attributed to the young offender, as demonstrated within the judicial records, it is appropriate to impose a socio-educational measure [of confinement]. It is clear the disproportion between the victim's action, consisting of insults directed at the teenager, and the execution of blows with the intention of killing. In that case, the aggravating by the futile motive will be configured. Since there is no proof the victim was attacked while sleeping, it is impossible to maintain the aggravating of using resources that reduced the victim's possibilities to defend himself. If the nature of the infraction, committed with violence to the person, indicates that if the young man is not removed from social life for a certain time, the juvenile offender will not be affected by a sufficient pedagogical or therapeutic measure. Then, it is possible to impose internment, especially considering the reiteration of serious infractions. Notes: 1) The observation of the legal nature of the offence and the automatic shift to internment. 2) The use of the aggravating/mitigating factors distinction. 3) The meaning given to "sufficient educational or therapeutic measure" here refers to the presupposition that it is necessary to voluntarily inflict a certain amount of suffering that would be absent without the youth's internment.	**MPR**

3.4.3.2. Current professional involvement in the MPR and DIS idea systems

The following four excerpts of indirect indicators were categorized as updating both the MPR and DIS idea systems. This subset is particularly interesting because (i) it includes cases that are difficult to classify into only one of the idea systems and because (ii) the analyst can

carefully observe the forms of connection and alliance between the MPR and the DIS. The difficulty arises from the fact that confinement can easily be justified by the goal of rehabilitation or specific deterrence in these two systems of ideas.

Indeed, in the presence of a finding of recidivism, both idea systems (MPR and DIS) automatically justify the use of confinement. If the observer chooses "it did not deter," he/she explicitly adopts MPR (specific deterrence), but if he/she chooses "it did not rehabilitate," both idea systems apply equally to the observed fact. The preference for one or the other formula is rarely factually justified.

However, the reader should keep in mind that an error in attribution on my part between the MPR idea system and the DIS does not logically affect an eventual overall result asserting that the DIP is largely ignored by appellate courts in Brazil. Because the empirical basis for this result lies not in the difference between the MPR and DIS idea systems, but between these two idea systems and the DIP idea system.

Despite this, all potential misclassification errors must be minimized in order to estimate the relationship between the MPR and DIS idea systems. This research also attempts to evaluate this relationship.

A single underline indicates MPR; a double underline indicates the co-presence of both idea systems (MPR and DIS) and a bold type indicates the presence of DIS.

No	Extracts with indirect or latent indicators and a few notes	Ranking
4	At the time of the fact, the thirteen-year-old adolescent took two cell phones and a sweatshirt from the victim for himself, along with another teenager and an adult man, using a knife <u>to exercise a severe threat</u>. The social-educational measure of <u>internment is proportional to the offense committed</u> through violence against the person (robbery), <u>proving even more appropriate if the adolescent has a criminal history</u> and **lives in a severe personal and social risk situation**. <u>Notes:</u> See quotation No 5 below.	**MPR** + **DIS**

No	Extracts with indirect or latent indicators and a few notes	Ranking
5	It would not make any sense to impose a non-custodial measure as a form to rehabilitate a teenager who commits a juvenile offense analogous to a heinous crime that, after all, only admits specific custodial sanctions. From a pedagogical point of view, the only possible measure is internment in the event of drug dealing, even **as a means of removing the offender from the terrible influences of drug dealers**. They have used children and adolescents as a means of impunity, making clear the need **to increase the minor's protection**. Notes: This quotation can be seen as a splendid demonstration of the completely intertwined and unexpected connections between these two systems of thought (MPR and DIS) in the field of youth justice in Brazil today. One possible explanation would be as follows: 1) the legal operators operate from a form of structural organization of their experience (individual and collective) produced with the ideas of the MPR idea system, but realize to some extent that they are dealing with youth justice cases; 2) the legal ideas in the 1990 legislation are entirely incompatible with the MPR system of ideas; 3) to mention in the sentence ideas exclusively about youth that are compatible with the MPR, the only other available source of stabilized legal ideas is in the old doctrine of irregular situation.	**MPR + DIS**

No	Extracts with indirect or latent indicators and a few notes	Ranking
6	Minors under 18 need to understand that they cannot go around attacking society, committing crimes, and nothing can be done [in terms of severe voluntary infliction of suffering] because they are teens. The adolescent's reiteration demands a more austere intervention in the youngster's educational process, who are unable to comply with non-custodial measures. The practice of serious infractions [focus on the legal nature of	**MPR + DIS**

	the act] by adolescents has often increased due to the sense of impunity that prevails among them [a single-factor causal conjecture justifying the adoption of the MPR system of ideas] which creates unrest in the social environment [another single-factor causal conjecture, this time explaining a collective feeling of insecurity. The answer to this insecurity lies in the application of the MPR system of ideas], which imposes the application of more severe socio-educational measures to guarantee the public order and the effective reinsertion of these marginalized individuals in society. Adolescents reveal their dangerousness, and the need for rehabilitation recommends their removal from the social sphere that distorted them. Notes: In this quote, unlike in quote 5, all the connections to the two systems of ideas become entangled and it is impossible for the analyst to isolate one thought system from the other.	

No	Extracts with indirect or latent indicators and a few notes	Ranking
7	Since it is proven in the records that the adolescent does not show himself deterred from practicing juvenile crimes and persists in committing them, **combined with a lack of parental control**, there are sufficient justifications for the application of a social-educational measure even more severe than rendering services to the community. Appeal denied due to the principle of *non reformatio in pejus*. Notes: 1) In this case, only the defence appealed against a community service order. The judges on appeal would have been in favour of internment, but they decided not to change the trial sentence because the prosecution was satisfied with this measure. 2) In law, *a reformatio in peius* (literally: "change for the worse") occurs when, as the result of an appeal, the appellant is put in a worse position than if they had not appealed. For example, an appellant in a criminal case might receive a more severe sentence on appeal than in their original trial.	**MPR** **+** **DIS**

3.4.3.3. Current professional involvement exclusively in the DIS idea system

As we will see when discussing the data, the individual and collective engagement of legal operators in the court of appeals exclusively in the ancient DIS system of ideas is a highly unlikely event. Currently, when they place themselves outside of the DIP system of ideas, they engage either in the MPR system of thought or a combination of that system with the DIS system. A more in-depth study of what produces this exceptional result has yet to be conducted. What my data let me see is that this exclusive engagement with the revoked DIS happens when two conditions are (simultaneously) present: (1) the factual dimension of the transgression is trivial and (2) even the logic of the MPR idea system would no longer support the internment measure today (in the 21st century). To opt for internment, the only ideas available to support this decision are the outdated or obsolete ones of the DIS alone.

No	Extracts with indirect or latent indicators and a few notes	Ranking
8	The lawmaker [of the former youth legislations that were revoked by the 1990 legislature] **only aimed at reintegrating the juvenile to a safer social life by removing him from the conditions that provided or provoked the conduct framed as a juvenile offense**. The evidence presented in the records, including the teenager's confession, demonstrated that **the young person is in a straightforward process of marginalization. This requires a more effective response from the State, and it is not efficient to try to apply a measure milder than internment** since it is known in advance that **it will be ineffective in the context and profile of the adolescent.** For these reasons, **the internment measure is necessary so that the adolescent can receive guidance and treatment from the State to get rid of the harmful influence of the environment in which they live.**	**DIS**

Quotation #9 below is both intriguing and interesting. It is intriguing because I am not entirely assured of the absence of a commitment also to the MPR thought system. If the analyst attributes the discourse of dangerousness in this text to the fact that legal professionals in Brazil consider petty drug trafficking to be a 'hate crime' or an 'abstract danger', the analyst obtains the

empirical conditions for observing the presence of an engagement in MPR. And if he/she recalls that the attribution of dangerousness to offenders in the early formulations of the MPR system of ideas was very loose or extensive, he/she will further strengthen his conviction. However, even without being able to refute this hypothesis of the presence of the MPR, I have decided to classify this decision as exclusively within the purview of the DIS for the following reasons:

1. The 'hate crime' and/or 'abstract danger' rhetoric is not explicit in this ruling (and I have not done an in-depth analysis of the court record to explore the existence of other clues).

2. The judgment refers to an examination by social workers and holds that the examination assessed a risk to the youth associated with his or her environment.

3. Finally, there is also a reference to the condition of his family, which is socially disadvantaged and would be in a state of inability to help the youth out of the situation he is in. The DIS then appeared to me to be a little closer to what I could see explicitly in my data. But I can't rule out the possibility of an unidentified attribution error.

This decision is also interesting because of two questions it has led me to ask. Can we exclude the possibility that this decision was also made exclusively within the framework of the DIP idea system? And can we exclude the possibility that, in the face of such a situation, both systems of thought may come to favor the same decision of internment?

My answer to the first question is similar to that given for the presence or absence of MPR. I can't entirely rule this out either, but I have even stronger reasons to believe that this decision was not made in the DIP. I excluded this possibility of classification because I did not find a more developed reasoned development drawing attention to the fact that the internment decision was made within this system of ideas. As this system is still exceptional in the jurisprudence and against the grain of the way of thinking about punishment in criminal matters, the operators working within the DIP are pushed by the circumstances not to take for granted the understanding and acceptance of this new philosophy.

My answer to the second question is clearly negative: dealing with such a situation, it cannot be excluded that both systems of ideas (DIS and DIP) come to a decision in favor of internment. It is not easy to clarify this answer. To begin with, I would like to note that, unlike the

MPR system of ideas, the DIP does not decide in favor of internment based on any estimate of the greater or lesser degree of gravity (abstract or actual) of the act. The DIP starts, on the one hand, from an overall assessment of the social situation in which the young offender finds himself and, on the other hand, from a careful consideration of the disadvantages of internment for the case at hand. It is not difficult to imagine then, eventually adding other factual elements to the description we have in this judgment, that internment could be promoted by DIP.

Secondly, it should be remembered that the DIP is not dogmatically opposed to internment in its entirety and that the danger of physically violent recidivism on the part of the young offender is not the only reason that could give rise to internment under this new legal philosophy of intervention.

No	Extracts with indirect or latent indicators and a few notes	Ranking
9	Due to his **evident dangerousness and need for rehabilitation, the juvenile offender should stay away from the social sphere that distorted him.** The social worker's report affirms that the young person finds himself **at risk due to concrete circumstances of the place in which he lives**. There are also reports that the young man does not study and act as a little drug dealer in the neighborhood. Still, according to the Social Worker, **the youngster's mother has been chemically dependent for several years.** She makes immoderate use of alcoholic beverages, and the maternal grandmother has always been responsible for taking care of the teenager due to her daughter's vulnerability. There are also **reports that the young person spends most of his days on street corners and does not obey the rules of the house since he has no positive reference in the family context,** as **other members are involved in illegal acts**. **This context is harmful to healthy adolescent development**. Furthermore, as can be inferred from the testimonies of the military police, the young man is already well known by police officers because of his frequent involvement in conduct similar to crimes.	**DIS**

My final illustration of exclusive use of the DIS presents a picture that is in some respects similar to Case 9. However, here we have much less factual information about the youth's actions and overall social situation, except for a lack of interest from his family in his future. And this information came from the speakers at the Detention Center and not from the social workers at the trial. Under these observation conditions, I was only able to observe one intervention made within the DIS philosophy.

No	Extracts with indirect or latent indicators and a few notes [New translation]	Ranking
10	**The relatives of the juvenile offender also show no interest in assisting him in his re-socialization process.** The report elaborated by the technicians of the detention center clarifies that during the period in which the adolescent was in custody he did not receive a visitation, although they had contacted the genitor. One realizes that the father is not present in his life either. The genitor also failed to attend the hearings held in the course of the judicial process. **As it turns out, the family itself seems to have already abandoned the young man to his fate.** This is also confirmed by the fact that he himself admitted that he even lived on the streets for a period of six months due to conflicts with his family members.	**DIS**

3.4.3.4. Current professional involvement exclusively in the DIP idea system

I will conclude my analytical comments with three illustrations of exclusive observer engagement in the legal philosophy of DIP intervention. The passages to which I want to draw the reader's attention are in italics and underlined by intermittent lines.

It is very important for the reader to take note from the outset that this system of ideas still has a serious semantic problem. For reasons we cannot go into here, it employs inadequate mediums in terms of the receptivity of these terms by the operators of the criminal law system. For example, the DIP discards the use of the medium "punishment" because this medium has been monopolized by the philosophy of MPR to mean "the punishing authority must seek to

deliberately inflict suffering on the wrongdoer" for this or that reason. To date, the DIP has not, to my knowledge, made any effort to redefine the definition of punishment constructed by the MPR. On the contrary, in order to avoid any form of "contamination" of the punitive philosophy specific to the MPR, the DIP regularly suggests that the socio-educational measure is not a punishment. As we will see, only the legal operator in the quotation No. 12 managed to almost avoid this problem completely.

A communication problem can then be seen to emerge: on the other hand, as Pires has repeatedly pointed out, the criminal law system constructs its identity self-portraits through the medium of "punishment". It is true that the definition and meaning of this term in criminal matters has been given by the MPR, but there is nothing to prevent another definition being developed. When the operators engaged in the DIP affirm or imply that the socio-educational measure in criminal matters is not a punishment, they stimulate the production of misunderstandings. For these measures may well be observed, both factually and semantically, as a diverse (of MPR's) way of punishing in the context of the criminal law system. But it is a form of punishment conceived and constructed in a diverse way, a way of punishment that seeks to make the offender accountable and to offer him conditions for reorienting his conduct while preserving as much as possible the fundamental right to freedom.

The difference between 'punishment' as constructed by MPR and 'punishment' as constructed by DIP (and explicitly named 'socio-educational measure') is not, therefore, that the former is, by force of a law of nature, a 'punishment' and the latter is not (because of another law of nature). Rather, the difference lies in the fact that the two systems of thought adopt a diverse logic to guide the activity of the authorities in punishing anyone who transgresses a criminal law norm of conduct.

To understand this semantic misunderstanding, we can ask ourselves the following questions. How could a socio-educational measure coercively imposed by the criminal law system be anything other than a punishment? If the family can punish its children without seeking to deliberately and primarily inflict on them an overall, substantial and extremely long-lasting loss of freedom, why couldn't the socio-educational measures be observed and described as another way to punish?

In my notes accompanying the three illustrations, I will try to overcome these semantic difficulties by adding clarifications in square brackets.

No	Extracts with indirect or latent indicators and a few notes	Ranking
11	As is well known [it seems to be a presupposition that the author presents as obvious to give some weight to his own perspective], *a socio-educational measure does not subject itself to the objective criteria provided for setting the Criminal Law punishment* [this formulation is interesting because it does not say that the socio-educational measure is not a punishment, but afterwards we see that the author does not seem to be aware of this]. It is unanimous that the young offender's law *has no punishment* [deliberate infliction of suffering] *goal but rehabilitating aims*. Furthermore, the Child and Adolescent Statute recognizes that minors have the peculiar condition of a developing person, reasons for which the judge, when analyzing the situation of an adolescent in conflict with the law, *must weigh his conduct under the aspect of social adequacy and then apply a measure*. Therefore, *the judge in the case should not only consider the seriousness of the offense*, as if it had been committed by an adult, so that the measure does not become a punishment [in the same way as in the approach of the MPR].	**DIP**

No	Extracts with indirect or latent indicators and a few notes **[Tradução modificada para ficar mais clara]**	Ranking
12	The main goal of social-educational measures of the Child and Adolescent Statute *is to re-educate minors to promote their reintegration into society and not their "punishment" due to juvenile offenses committed* [the word punishment is placed in quotation marks, which seems to indicate that the difference is in the way of punishment]. Therefore, *the socio-educational measure does not have a repressive character* [that consisting in valuing the deliberate infliction of suffering by itself], and *no analogy should be made with the conventional way of conceiving punishment.* Thus, even though both criminal punishment and social-educational measures *have some common points, namely retributive and re-*	**DIP**

	educational, the intensity of such elements is distributed differently among the institutes. While the criminal penalty has a more significant retributive burden, the pedagogical intention is preponderant when applied to juvenile offenders. Note: In this quote, the notion of "retributive burden" refers primarily to the direct and deliberate intent to seek to inflict suffering on the wrongder.	

No	Extracts with indirect or latent indicators and a few notes [Tradução modificada para ficar mais clara]	Ranking
13	To promote the choice of the socio-educational measure to be applied to the young offender, *it is not possible to consider only the seriousness of the fact.* It is necessary *to analyze all the circumstances surrounding the specific case and the reality experienced by the adolescent.* Thus, considering all aspects and proving that the adolescent is well inserted in the social context, studying and working, and the event reported is the only one in which he was involved, *it is possible to apply a warning, even if the adolescent has been accused of practicing a juvenile offense analogous to drug dealing.* Notes: 1) It is clear that, for the DIP, the visible or invisible gravity of the conduct is not a criterion for choosing the type of sanction or the form of punishment (see also quote #11). 2) It can also be seen that the reasoning based on the analogy with the manner of intervention promoted by the MPR does not apply in the context of the DIP.	**DIP**

This set of case law excerpts suggests a basic factual finding: that DIP is a diverse system of ideas from and incompatible with MPR and DSI, while DSI can harmonize with MPR in some respects and vice versa.

3.5. Measuring the dominance by colour-coding the excerpts

The conclusions obtained after following the research methodology above-mentioned generated observations and notes that allowed for colour-coding my research sheets, thus getting a reliable order of magnitude regarding the prevalence of MPR over other idea systems. So, I was able to read each section related to the variables identified and colour-coded them as follows:

Table 1 – Color-coding the samplings

Red refers to Modern Penal Rationality
Yellow refers to the Doctrine of Irregular Situation
Blue refers to UN Doctrine of Integral Protection

Table 2 - Juridical terms and propositions to identify the reasoning aligned with the MPR

Juridical terms and propositions to identify the reasoning links to MPR: • Legal language representing juvenile delinquency as analogous to a specific crime provided by the Penal Code; • Discursive structures accepting analogy to heinous crimes: the social illusion of gravity; • Punish: 1) to rehabilitate the offender; 2) to reward evil with evil; 3) to prevent criminals and other citizens from committing crimes; and 4) to denounce a behavior.

On the other hand, when the decisions studied contain discursive structures mentioning the legal concepts of the table below, I can identify them with the DIS (table 3):

Table 3 - Legal reasoning linking the appeal judges' logic to the DIS

Legal reasoning linking the appeal judges' logic to the DIS:
Legal discourse constituting the poor young people in conflict with the law as a singular subject. Dominant interference by commanding institutional actors, under the guise of a supposed aid to less favored people. Punish to: • protect regarding subsistence needs; • protect from abuses, assaults or negligence; • protect from moral peril • protect from being juvenile delinquents.
DIS is commonly used to justify punishment for "Mickey Mouse" offences (bagatelle).

And, finally, judicial decisions that do not always prescribe deprivation of liberty as the only solution, but instead favors alternatives to imprisonment, connect to the DIP (table 4):

Table 4 - Juridical terms and propositions to identify the reasoning aligned with the DIP

The decision aligns with the DIP when the causes of juvenile offence are relevant, highlighted within the decision content, and deprivation of liberty is the last resource. Punish, as soon as the danger situation is known, to the effective promotion of rights and protection of children and adolescents, to: • follow-up, orientation and possible treatment of adolescents; • provide the integral protection according to their specific pedagogical needs; • strengthening family and community ties; • take priority attention to the interests and rights of children and adolescents; • finish the peril situation that the children or adolescents face at the moment the decision is made.

The operationalized proposition is, therefore, an assertion of a relationship between the conceptual indicators used and the inferences obtained at the end.

I found the MPR as a majoritarian system of thinking and, as minorities, the idea systems of DIS and DIP. Thus, the preference of the judges drew my attention to the fact that they selected, filtered, and then fostered old punitive theories about the new framework represented by the 1990's Juvenile Justice Law program. And perhaps, by focusing on the mental process of choosing the prevailing reasoning, I can understand their impacts on precluding the identity evolution of sanctioning norms.

3.6. Ethical considerations

The main task I set for myself was to analyze the content of selected decisions, which are available on the public website of the Court of Justice of Minas Gerais (www.tjmg.jus.br). This is how judges officially communicate their decisions to the general public in accordance with Article 126 V of the Rules of Court Procedures. Therefore, there was no possibility of violating any secret or causing any harm in the light of the content of the argumentative activity developed, because I dealt only with public information available on the internet.

Moreover, I would like to accommodate the investigation I am presenting with the Brazilian Organic Law of National Magistracy. According to its article 36, III, magistrates are forbidden to express, by any means of communication, their opinion on any pending trial, or to depreciate decisions, votes or judgments, made by other judicial bodies. Nonetheless, the Law expressly authorizes criticisms in academic works or in the exercise of teaching. This exception fits exactly the case of this research, because I work as a state judge in Brazil.

It follows that I will not disclose appeal numbers and the names of the judges who participated in the observed judicial decisions. As mentioned earlier, the content of the database analyzed in this dissertation is available to the general public on the website of the Court of Appeals of the State of Minas Gerais and there is no difficulty in obtaining the knowledge I have mentioned. This is a methodological decision taken for the presentation of the current research, with the intention of focusing critical investigation on the discursive structures systematically reproduced in the jurisprudence of the Court of Appeal. It is not my intention to present pejorative or positive criticisms against any particular meaning of isolated decisions or judgment styles by a peculiar panel of judges.

Chapter 4 – Presenting socio-legal semantics and idea systems in the research data

I do not intend to take a strictly quantitative approach to research data, but rather to produce a qualitative analysis, although using formats linked to quantitative methods exclusively to present socio-legal semantics and idea systems that I observed in the database. This first empirical chapter will present quantitative features about the database for the period between 2010 and 2016. But it is in the following section that I will make a qualitative study of the same data. This quantitative description's central objective is to answer the next question: *How does the State Court of Appeal justify its decisions on sanctions in the field of juvenile justice?*

The word "how" in the above question refers, in this research, uniquely to the philosophies of intervention that the State Court of Appeal adopts to grounds its decisions. Recalling that this is not the typical research question usually made in traditional sentencing studies[26]. The question's originality is due in part to the fact that I am dealing with the second generation of legislative programs in the field of juvenile justice and, partly, because I have adopted the Systemic Theory of Modern Penal Rationality (PIRES et al.) to support my remarks. This theory focuses its attention on the idea systems operating in the Criminal law system and, indeed, today's juvenile justice offers a fruitful and untapped ground to the observation of confrontations between different ideas systems. In the case of Brazil, three idea systems now "battle" against each other to prevail within this justice branch, disputing significant dominance in the cognitive context of the Court. They are:

> (i) The Doctrine of Irregular Situation - DIS idea system (first generation of the legislative juvenile justice programs in the Americas and Europe);
> (ii) The Doctrine of Integral Protection - DIP idea system (second generation of the juvenile justice legal programs in the Americas and Europe); and
> (iii) The Modern Penal Rationality - MPR idea system (adult Criminal law justice).

The latter is currently liable to infiltrate into juvenile justice, particularly at the level of appeals. As I have seen in study reviews, the research made by American sociologist Edwin Lemert (1967) is the one sharing more similarities with my own, even if Lemert did not formulate

[26]For an overview of the most usual questions see, as examples, Wandal (2008), Pires and Landreville (1985), and Pires (1985). As I can observe from comparing these works, the initial questions of this research tradition relived by Wandal, Pires and Landreville have not changed substantially to this day. Wandal's research extends this tradition by modifying the theoretical framework.

his object regarding a comparison between different ways of grounding a decision (conflict/collaboration between idea systems).

In the methodological chapter of my research, I grounded its elaboration on two samplings. Sampling I globally depicted all the regular appeals (jurisprudence) held in the Appellate Court regarding sanctions in the field of juvenile justice between 2010 and 2016. This result is a statistically representative sample of relevant case law produced during that period. The sample consisted of 35 (thirty-five) dossiers ("cases") out of a total of 765 (seven hundred, sixty-five) regular appeal cases, which were relevant to my research. As each case in regular appeal requires the participation of three judges to produce jurisprudence, there were 105 individualized decisions, all in all.

Sampling II is constituted by the appeals made within the Court of Appeal of Minas Gerais itself. Informally speaking, these last appeals are within the same court. In Brazil, it is possible to understand these appeals as motions for reconsideration (MR), or *embargos infringentes,* in Portuguese. In these appeals, the court of law reassesses the case in which decision was not unanimous. This second sample included all such appeals (MR) in the observed period (2010-2016). In these specific cases, the final collective decision is composed of five judges, that is, all the judges who hold one of the seven chambers of the Court of Appeal in criminal matters. During the examined period I found a total of 40 motions for reconsideration (MR). As I said, all were selected, read and analyzed. The two samples together allow us to observe a total of 75 (seventy-five) cases (or processes) implying a total of 305 (three hundred five) individualized decisions along the period ranging from 2010 to 2016 at the State Court of Appeals on matters of sanctions in the field of juvenile justice.

4.1. Quantitative presentation of Sampling I.

Table 5 present is elementary but reveals relatively surprising results. In all sample cases (35/35) there is unanimity. Of course, this does not mean that, throughout the period under review, all decisions have been unanimous, but it shows that divergence is a sporadic event in the regular appeals to the court of appeal, having as basis the decisions herein studied. Such factual result suggests judges can be quick to reach agreement among themselves in the event of a conflict between idea systems. The result also suggests the hypothesis that one of the idea

systems must occupy at least one highly preponderant place to facilitate this arrangement. I am going to discuss this issue further in this chapter.

Table 5 – Unanimous vs. Divergent Decisions
(State Court of Appeal of Minas Gerais, 2010-2016)

Total of dossiers in the sampling	35
Collective decisions by unanimity (N = 3 judges)	35
Collective decisions with divergence	0
Total decisions by unanimous vote (3 judges x 35 unanimous decisions)	105

In analyzing this sample of 35 (thirty-five) cases (or files), I efficiently found the three systems mentioned, which had a major or absolute role in the reasoning of some decisions. This conclusion means that they have "made jurisprudence" and may influence future cases, including in the First Instance Court. What is the statistical distribution of the preponderant role of each of these three systems in my overall sample? The following table answers this question:

Table 6 – Distribution of the major role of the three unique idea systems identified
(State Court of Appeal of Minas Gerais, 2010-2016)

Idea Systems	Absolute number of dossiers	Percentage
Doctrine of Integral Protection (DIP) (Collective decisions by unanimity; 3 judges)	N = 5 [15 individual decisions]	14%
Doctrine of Irregular Situation (DIS) (Collective decisions by unanimity; 3 judges)	N = 1 [3 individual decisions]	3%
Modern Penal Rationality (MPR) (adults) (Collective decisions by unanimity; 3 judges)	N = 29 [87 individual decisions]	83%
Total:	35	100%

This table presents a surprising, second overall result: the chief role of juvenile jurisprudence is not being pursued by any of the juvenile justice intervention philosophies but, rather, by the prevailing philosophy of intervention in adult justice, i.e., the MPR (modern penal rationality) idea system. MPR's superiority is enormous, comprising 83% of the cases in the general sample. It must be taken into account that these decisions taken by three judges are unanimous. These findings lead us to maintain that unanimity is being built around the MPR.

This table also shows that the Doctrine of Irregular Situation seems to be disappearing, at least as a predominant idea system in the courts of appeal. In fact, it is severely weakened, to say the least, accounting for only 3% of "winning" decisions or as playing a predominant role. Curiously, it may be noticed that it was not replaced in its eventual predominant role by the new Doctrine of Integral Protection (1990 Statute, altered in 2009), but by MPR.

Concerning "substitution" I assume - my data do not allow me to affirm that empirically - DIS has already had a dominant role in the past (in the 1950s, 1960s, 1970s, etc.). Without further research on these periods, I cannot exclude the hypothesis that MPR has always predominated at the appeal level. Anyway, what I can see is MPR is currently playing the role of the "Trojan Horse", so to speak, in the field of juvenile justice: at its best, MPR blocked the acknowledgment of the Doctrine of Integral Protection. In the next chapter, a qualitative presentation of data will try to show how it performed such "task".

Only 14% of the winning decisions have been grounded on the DIP. The occurrence or acknowledgment of this system of legislative ideas in the State Court of Appeal along the years 2010-2016 can be considered extremely weak.

Before going further in analyzing the data, I provide a first picture, however superficial, of jurisprudence sampling regarding two traditional variables of law and Social Sciences: formal or abstract infractions and the broad categories of sanctions. In fact, the table 7 below shows, on the one hand, the distribution of the "formal infractions" that are appealing and, on the other hand, the distribution of the broad categories of sanction that are attributed.

"Juvenile offences" in legislative texts are "vehicles to/for incrimination". The conduct by young people must be inscribed in a norm of behaviour of the Criminal Code so that the case can fulfill the social-legal selection for generating a process. I recall that criminal offences have been originally constructed in function of Adult criminal Justice. In Brazil, at least, there is no such a thing as a juvenile criminal code, understood as a peculiar adjudicatory program containing an

exhaustive list of the behaviours prohibited by law and, subsequently, the respective sanctions applicable by organs in charge of imposing legal consequences.

Some authors (*See* Saraiva, 2006, 2013; Méndez, 2006; Sposato, 2013) argue that equating adolescent criminal behaviour to adult definitions of crime would protect young people from lack of settled criteria by law-enforcement professionals. But the main empirical fact observed in the case of Brazil concerns, as a matter of fact, an institutional mentality that creates cognitive links between juvenile justice criteria for sanctions with the rationale criteria for sanctions of the Brazilian Criminal Code for adults. This logical connection has some critical implications that affect the reception of the new philosophy of intervention for juveniles (DIP). One is that behavioural definitions of crime are often employed to express the formal seriousness of behaviour and to encourage or impose penalties based on the abstract gravity of crimes. For example, in legislative practice, the misconduct of "appropriating on other people's property illegally" is usually subdivided into "various ways of doing so" within predetermined formal subcategories of illegal conduct, depending on the severity of the penalty that the system wants to assign (theft, robbery, fraud, etc.). In fact, the actual legislative program of juvenile justice in Brazil would not need such subdivisions in the rules of conduct, because the intervention philosophy of the 1990 Statute, as amended by law 12.210/09, did not adopt the old theories of punishment (retribution, deterrence, and rehabilitation in prison, preferably). In other words, in the current Brazilian juvenile justice legislative program, offences committed by youth do not have official previous prices of severity. Hence, the absence of unique rules of behaviour for youth, formulated in a manner consistent with the current philosophy of intervention, acts as the source of misunderstandings, efficiently shifting law operators' thinking towards the theory of intervention of adult justice.

Another important implication is: "formally serious" norms of adult justice lead to concealment or camouflage, even for law interpreters, of the fact that they are internally heterogeneous regarding gravity. From the strictly formal point of view (without looking at facts and without individualizing observation through rigorous scrutiny), everything within the Adult Criminal Code "seems to be extremely grave". Such logic implies that, even from the technical and precise point of view of retributive theory, it is an error of evaluation to concentrate exclusively or mainly on formal gravity. Why? The reason I point out is: establishing the formal seriousness of misbehaviour can overshadow the thinking of law professionals, neither allowing rigorous scrutiny of problematic situations nor taking into account the different degrees of guilt

of perpetrators. The problem is that the theory of deterrence - which integrates the MPR idea system and retributive theory - formally accepts the "juvenile grave infraction" category as a criterion for greater or lesser severity of punishment.

It is, therefore, difficult to categorize as wholly grounded those juvenile justice decisions that do not contain legal discursive structures that necessarily address the elements of consideration strictly foreseen by the 1990 Statute as indispensable. In the construction of their reasoning, judges are required to decide not only by deliberating and trying to balance the type of sanction with the needs of the young, emphasizing the pedagogical means instead of punitive, but also avoiding abuses, as well as deciding on the protection of the collectivity. This being said, it may be inferred that detailed observations allow the elaboration of a peculiar reasoning, based on concrete and abstract reasons, referring to factual circumstances of the given case. Thus, the lack of observable parameters blocks the elaboration of more complex and, therefore, less general social reaction.

Operators then "slide" from one theory to another, either because they do not distinguish between theories or because they accept both. Pires (1987) drew attention to this fact, stating that the 1987 Canadian Commission on Sentencing itself clearly pointed to the internal heterogeneity of several formally serious offenses. The Commission, which adopted the MPR idea system favoring retributive orientation, recommended a diversified internal treatment based on the factual gravity of each case. For that reason, among others, the Commission also proposed the elimination of mandatory minimum sentences (failing to pronounce only in three cases that escaped his official mandate). The Commission (1987, p. 589) names these infraction acts as "infractions to/with? varying degrees".

As for my study object, two "varying degree" offenses are particularly important as we will see next, in Chapter 5: robbery and drug trafficking[27]. The aforementioned Canadian Commission on Sentencing illustrated this problem in robbery offences. In fact, we may here find cases ranging from an armed bank robbery to the theft of a phone pulled from someone's hand on the street. "Drug dealing" includes both poor young people, who take drugs from one place to another, and leaders or owners of drug organizations often implicated also in other serious crimes. I will return to this point in the next chapter. For now, it suffices to raise awareness of this serious problem of formal gravity as one of the "poles of attraction" of MPR. Thus, retributive

[27] On this last infraction, it is worth checking Pires' interventions in the interview conducted by Bruna Gisi, Juliana Tonche, Marcos Cesar Alvarez and Thiago Oliveira in the *Plural* Review of the University of São Paulo (2017, p. 137-138).

theory, even when correctly interpreted from the philosophical and juridical points of view, keeps a certain distance from formal gravity, and such separation is greater within the idea system of DIP. Regarding penalties, the next table (n° 7) retained only three broad legislative categories:

- (i) Non-custodial sanctions;
- (ii) Semi-custodial sanctions; and
- (iii) Internment or custodial sanctions.

For this type of research, oriented substantially to the foundation or justification of sentencing practices through different ideas systems, this tripartite classification is substantially sufficient. I am not looking for the individual preference of judges for one or another specific type of sanction, but rather the general philosophy of intervention that prevails in the Appeal Court's communication, as well as its implications on how to choose (or not) and devise custodial sentences.

Non-custodial sanctions embrace (i) community service and (ii) assisted freedom. According to Article 117 of the 1990 Statute, community services consist in performing gratuitous tasks of general interest, for a period not exceeding six months, with assistance to entities, hospitals, schools and other similar establishments, as well as to community or governmental programs. Tasks will be assigned according to the adolescent's skills, and must be fulfilled during a maximum time of eight hours a week, on Saturdays, Sundays, holidays or working days, so as not to impair attendance at school or regular working hours.

Articles 118 and 119 of the same law establish that *assisted freedom* will be adopted whenever it appears to be the adequate measure to escort, aid, and guide the adolescent. The authority will nominate someone qualified to follow the case, who may be recommended by an entity or program of assistance. This type of socio-educational measure shall be fixed for a minimum period of six months and may be extended, revoked or replaced by another measure at any time, after consulting the counselor, the Public Prosecutor's Office and the lawyer. It is incumbent upon the adviser, with the support and supervision of competent authorities, to perform the following charges, among other things:

- I - socially promoting adolescents and their families, providing guidance and inserting them, if necessary, in an official or community program of social assistance;
- II - supervising adolescents' school attendance, promoting, if necessary, their enrollment;

- III - working towards the professionalization of adolescents and their insertion in the labor market;
- IV - presenting a case report.

The second category is semi-custodial sanctions. Courts can determine the semi-custodial socio-educational measure from the beginning of the term defined by the judge, or as a means of transition to the non-custodial regime, allowing youngsters to carry out external activities, regardless of judicial authorization. Schooling and professionalization are compulsory, and, whenever possible, they may include the use of existing resources in the community. This type of measure does not include a fixed term, and dispositions related to internment apply in a subsidiary way. Juveniles regularly carry out external academic and professional activities and return to the overnight stay, remaining in the facility on Sundays and holidays.

The third and last category of sanction is *internment*. In this legislative program, this is a deprivation of liberty subject to the principles of *brevity*, *exceptionality*, and *respect for the peculiar conditions of the person in development*. Under no circumstances shall it be applied if there can be any other appropriate measure. Formal gravity of the offence is not a valid criterion and Courts are not supposed to look willingly for the infliction of suffering for retribution, denunciation or deterrence. Internment should be carried out in an exclusive institution for adolescents, in a place different from the one destined to sheltering, obeying strict separation by criteria such as age, physique, and offence gravity. During the internment period – which cannot exceed three years – provisional and pedagogical activities will be compulsory. Freeing young people from mandatory compliance will happen at the age of twenty-one. From this legislative program point of view, "*custodial*" measures can only be applied when:

- I - it is a juvenile offence committed by a serious threat or violence against the person;
- II - for reiteration in the event of other [factual] serious juvenile offences;
- III - for repeated and unjustifiable failure to comply with the previously imposed socio-educational measures.

External activities may be carried out, at the discretion of the institution's technical team, unless the judge expressly establishes otherwise. "Custodial" measures do not include a fixed period, and its maintenance must be reassessed, by means of a reasoned decision, every six months at most. Many juvenile justice operators (institution directors, social workers, public defenders, etc.) may request, at any time, the end of the internment period or to transform it into

another type of sanction (semi-custodial or non-custodial), and such is the legislative principle of the "actuality of sanction". So, they favor the reintegration of young people in the community as soon as it seems possible by qualitatively changing the type of sanction or completely interrupting the juvenile intervention. In any event, declaring the end of internment will be preceded by judicial authorization, after hearing the Public Prosecution Service. From the conceptual point of view, it is important to stress that this is not what has been called "indeterminate punishment" in adult justice during the 19th century and the first half of the 20th century. Let me quickly elucidate this issue in accordance with Pires (2017, 153 et seq.). The danger here lies in confusing the provisions of sanctions in the 1990 Statue with the notion of "indeterminate punishment" that prevailed in this historical period. One must avoid "at a time semantic confusion and sociological inaccuracies of observation and description" of indeterminate punishment has the following features:

> (1) It refers to a sanction of incarceration prescribed in the legislation and not to other sanctions;
> (2) It is unlimited on the legislative level (the political system does not stipulate a "maximum" reference);
> (3) It remains unlimited in the judgment of the Court in the concrete case (it does not stipulate a term);
> (4) The specific determination of the internment length is delegated to a committee of professionals whose final decision includes the participation of professionals in the humanities;
> (5) The trial Court no longer intervenes in the case and there is no "correctional judge" (juiz de execução de penas) designed for this task. (PIRES, 2017, p. 154-155).

As we can see, the principles adopted by the 1990 Statute (DIP) are different, even from the point of view of the general philosophy of intervention. Indeed, as Pires has pointed out,

> (1) In the 1990 Statute, the reference is not exclusive to the socio-educational measure of internment (any sanction can be modified or declared terminated at any given moment: the principle of the actuality of the measure);
> (2) The punishment of internment (when given) is limited in law;
> (3) The sentence of internment is also limited in the judicial decision (three years);
> (4) The Juvenile Trial Court does not delegate the decision (to release or keep in prison) to correctional professionals;
> (5) The First Instance Judge who determined the admission shall periodically review the socio-educational measure of internment every six months at most.
> (6) The punishment of detention for up to three years should only be assigned (if the philosophy of law is respected) in exceptional cases implying community safety;
> (7) The sentence limited to three years does not value internment (mainly if the conditions of the place of custody are dreadful. (PIRES, op. cit., p. 157).

I may now presenting table n° 7, describing the infractions and sanctions attributed:

Table 7 – Juvenile Offences and three categories of sanctions
(State Court of Appeal of Minas Gerais, 2010-2016)

Juvenile Offences	Great category of sanctions			Total (Cases)
	Custodial	Semi-custodial	Non-custodial	
1. Murder (and attempting)	6	-	-	6 (17%)
2. Robbery	13	3	-	16 (46%)
3. Drug dealing	3	2	2	7 (20%)
4. Theft	2	-	2	4 (11%)
4. Cannabis use	-	-	1	1 (3%)
5. Unlicensed driving	-	-	1	1 (3%)
Total	24 (69%)	5 (14%)	6 (17%)	35 (100%)

It is important to keep in mind that the quantitative data in the above table (n° 7) are valid only for the court of appeal within the given period, not for first instance courts. It is also important to keep in mind that 83% of the *appeals* are in the "multi-degree" crime category (homicide, robbery, drug dealing). I remember that, form the point of view of this legislative program, this category requires that the court takes knowledge of the facts such as technical reports by non-legal professionals (social workers, psychologists, psychiatrists, etc.).

4.1.1. Judgments based on the Doctrine of Integral Protection (DIP)

The ensuing table n° 8 focuses on judgments based on the DIP at the level of the Appellate Court.

At first, I note as relevant information that the two infractions of varying degrees that are formally more serious (murder and robbery) have not based on the DIP idea system. These two infractions represent 63% of the cases between 2010 and 2016 in the Court of Appeal (respectively, 17% and 46%).

I can also see that the DIP idea system comprises only 7% (2/29) of the acts with varying degrees. In my sample, infractions with differing degrees account for 83% of the cases (29/35).

Secondly, three out of five cases that adopted integral protection idea system (RA-4, RA-14, and RA-11) were trifle offences and the first instance court has also kept this same idea system. Having that in mind, one can ask: why was there appeal? In these cases, the defense lawyer pleaded for a different socio-educational measure or for acquittal. In the RA-11 case, the defense lawyer asked for simple remission, simple warning, reparation of damage or assisted freedom; in the other two cases, RA-4 and RA-14, for a simple acquittal of the young person.

Thirdly, one can see in the third column that the DIP idea system *does not form alliances* with either MPR or DIS idea systems. This element means that, as rule, law professionals, when grounding juridical decisions on the DIP, do not combine two systems of distinct ideas, one having a prevalent role and the other a reinforcing or supportive one. I will return to this very important point in section 4.1.3.

Fourth, one can see in the table 8 below that in the case RA-15 (1/5) the trial court judge grounded his/her decision on the MPR idea system and asked for a custodial sanction. Although this is not the object of the present research, I view this as an empirical indication that first instance courts are also activating, at least occasionally, the MPR. Soon I will have more data on that.

For now, it is interesting to see that this was a rare case in which the appeal court reversed the idea system of RPM in favor of the DIP idea system. In this case, the modification in the idea system occurred together with a change in the category of sanction (from custodial in the first degree to a less severe semi-custodial at the appeal level).

Table 8 – Dossiers in which the DIP prevailed in Sampling I

(All decisions by unanimity – 3 Appeal Judges)
(State Court of Appeal of Minas Gerais, 2010-2016)

Cases	Prevailing idea system	Combined idea system	Juvenile Offence	Trial Court Sanction	Alternative required (Idea system)	Sanction imposed on the appeal level (Idea system)
RA-15	DIP	*Nil*	Drug dealing	Custodial (MPR)	Non-custodial (DIP) lawyer	Non-custodial (DIP)
RA-21	DIP	*Nil*	Drug dealing	Non-custodial (DIP)	Custodial (MPR) Prosecutor	Non-custodial (DIP)
RA-4	DIP	*Nil*	Theft	Non-custodial (DIP)	Non-custodial (DIP) lawyer	Non-custodial (DIP)
RA-14	DIP	*Nil*	Theft	Non-custodial (DIP)	Non-custodial (DIP) lawyer	Non-custodial (DIP)
RA-11	DIP	*Nil*	Unlicensed Driving	Non-custodial (DIP)	Non-custodial (DIP) lawyer	Non-custodial (DIP)
Total 5/35 (14%)						

Secondly, 3/5 cases adopted a rationale grounded on the DIP (RA-4, RA-14, and RA-11) as trifle offences, and the first instance court has also kept this idea system. Having that in mind, I can ask myself: why was there appeal? In these cases, the defense lawyer pleaded for a different

socio-educational measure (RA-11: simple remission, simple warning, reparation of damage or assisted freedom, or the simple acquittal of the young person, RA-4 and RA-14).

4.1.2. Judgments based on the Doctrine of Irregular Situation (DIS).

As we have already seen, DIS prevailed as an idea system in only one case of my sampling (3%). The decision found will be described and analyzed in the next chapter. The first factual hypothesis that one can raise here without additional information is that this preponderant role of DIS is nowadays a rare phenomenon in the Court of Appeal of Minas Gerais. The second hypothesis is that this idea system has a chance to prevail only in the cases concerning "really" trifle offences, to the point that one can even consider this offence as criminally insignificant, a behaviour that should not be selected by the criminal law system even if it "fits" the legal definition. Legal operators in Brazil often use the term "bagatelle" ("*bagatela,"* in Portuguese) to refer to these cases that do not even merit Criminal law intervention. The third hypothesis I can suggest from this data it is that this predominant role of DIS in cases of low significance ("mike-mouse offenses") only occurs when the youth comes from a socially or economically disadvantaged social classes. If this hypothesis is correct, it would mean that today, when DIS prevails, we also have a clear case of systemic class discrimination. Data from other surveys have already pointed to this fact[28], but my research object does not allow us to have a more in-deep factual demonstration.

Another implicit (virtually interesting) indication in the table 9 is the following. In the field of juvenile justice, applicable to offenders under the age of eighteen, the MPR's idea system does not seem to act as an effective brake on using custodial sanctions. In the above-mentioned case (table 8), only DIP reacted against the custodial sanctions of the first instance. In the present table 9 (RA-30), the RPM idea system is also not mobilized against the internment by the appeal court. In sample II, I found a dossier, MR 22, in which an appeal judge employed the MPR to *acquit* the young man against DIS but it was a single case among all others in my two samples. In any case, this indication is not yet empirically conclusive.

The results of the table n° 9 below do not allow us to conclude that the DIS is disappearing from the field of juvenile justice, not even at the level of the state court of appeal.

[28] It is worth mentioning the research by Marcos Cesar Alvarez (1989), which presents several studies indicating this phenomenon of social class discrimination.

From one side, the previous table 10 indicates that the DIS is still current in juvenile trial courts. From the other side, as we will see in the next section, this idea system with "tutelary" essence further appears as a kind of secondary idea system that it is useful to inserts the MPR logic into the juvenile justice. It may also be noted that the previous table also indicates that the DIS is still current in juvenile trial courts.

Table 9 – Dossiers in which DIS predominated in Sampling I

(All decisions by unanimity - 3 judges)
(State Court of Appeal of Minas Gerais, 2010-2016)

Cases	Prevailing idea system	Combined idea system	Juvenile Offence	Trial Court Sanction	Alternative Required (Idea system)	Sanction imposed on the appeal level (Idea system)
RA-30	DIS	---	Theft	Custodial (DIS)	Non-custodial (DIP) Defence lawyer	Custodial (DIS)
Total: 1/35 (3%)						

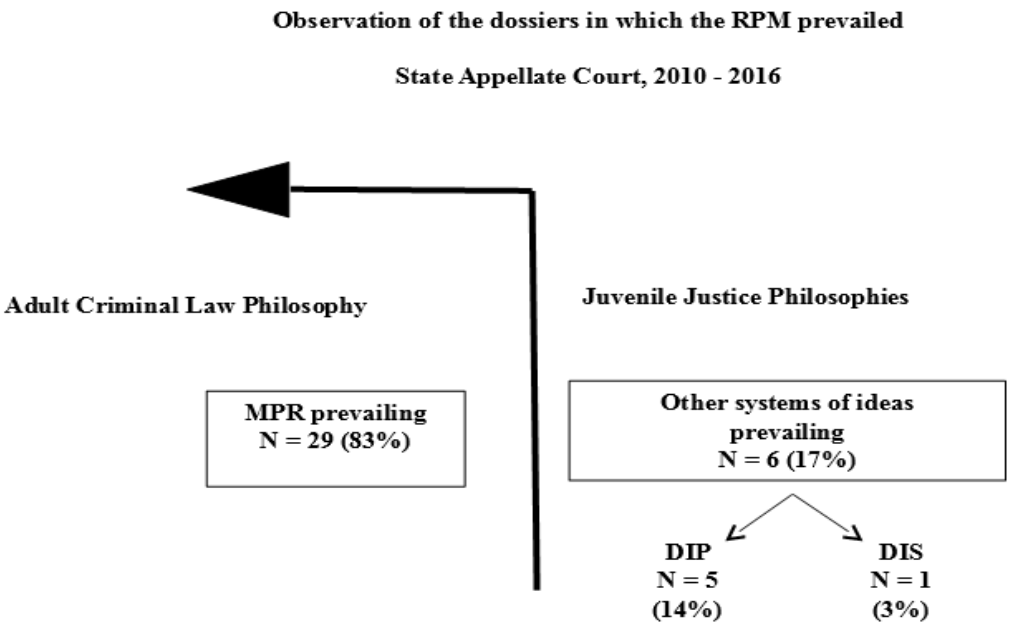
4.1.3. Judgments based on Modern Penal Rationality (MPR)

Now I am going to present a quantitative analysis focused on twenty-nine decisions in which the MPR idea system predominated (83%) in my general sample of case law. As all analyzes have unquestionable qualitative elements, the expression "quantitative analysis" refers here to the fact that I am using numbers and percentages when showing results (Pires, 1987)[29]. The following figure below indicates where I will be "located" at next in order to analyze the remaining cases of Sampling I. This figure draws also our attention to the fact that the vast

[29] See PIRES, A. P. «Deux thèses erronées sur les lettres et les chiffres», *Cahiers de recherche sociologique, 5,* (2), p. 85-105, 1987.

majority of jurisprudence on criminal sanctions in the field of juvenile justice in the Court of Appeal of Minas Gerais has been based on the philosophy of intervention in adult criminal justice (MPR). This assertion means that, currently, the Court of Appeal rejects - or fails to integrate - the philosophy of intervention of the DIP that was made available to the Courts by the 1990 Statute, in the form of an amendment made by law n. 2010/2009. The following figure 1 also clearly indicates that the old philosophy of juvenile justice (DIS), alone, does not play currently a dominant role in the justification of sanctions (3%).

Figure 16: Observing the dossiers in which the RPM prevailed



The dominant presence of justifications grounded on the philosophy of punishment of the adult criminal law system inside the criminal juvenile system renders possible the identification of a specific problem. What is it that leads the court of appeal to decide in harmony with the philosophy of punishment for adults and not in line with the philosophy of the new legislation in juvenile matters? Is it because operators do not see what they are doing clearly ("blind spot")? Is it because they are refusing the new philosophy of youth law? Are the two things combined? Are they thinking that the new idea system of DiP is not a way of "punishing"? My data are obviously

not appropriated to answer these questions directly and precisely. However, they succeed in showing the attractiveness of adult philosophy within juvenile justice and to reinforce that this massive occurrence of MPR constitutes a fundamental cognitive obstacle to the evolution of normative structures in Brazil's juvenile justice.

Although what seems to be more evident, from a traditional perspective, is the incompatibility of the case law with the legislation in force, this is not contemplated as the focus of my research. Such incongruity is a well-known phenomenon on the part of Juridical Sociology whose main study object is the relation between the political system (Legislator) and the legal system (Courts of law). This kind of inharmonious relationship can be "good" or "bad" depending on what is involved in each decision. For example, if the law is, by itself, racist, and the Court denies this Statute entirely, rejects it partially, or does not enforce it, in the name of law, it is difficult to argue that the Court should "obey the racist law", for example. What my results reveals is that innovative ideas regarding criminal intervention find great difficulty to be received even in the field of juvenile justice (and not exclusively by adult justice). I observe here a problem in the content of the decisions. And this content problem concerns a factual confrontation between a philosophy of criminal intervention that values and mobilizes the influx of suffering and incarceration (MPR) *versus* an intervention philosophy that values neither intentional infliction of suffering nor incarceration (DIP).

From a sociological point of view, I can say that the massive adoption of the MPR idea system results in an internal bifurcation within the juvenile justice system. In fact, since MPR is a philosophy of intervention of the adult criminal system, the introduction of this philosophy inside juvenile justice by the appeal court prevent the unification of the philosophy of intervention for youth. This statement reveals a kind of paradox: juvenile criminal justice asserts its difference from the adult criminal justice denying what constitutes the difference between the two "justices" or the two philosophies of intervention.

I will now draw the reader's attention to one of my most interesting and intriguing quantitative results in Sampling I: the *alliance* between the adult justice system (MPR) and the old juvenile justice idea system, the Doctrine of Irregular Situation (DIS). This result is especially important because a large part of Brazilian legal and sociological literature persistently view adult

criminal law philosophy as a "remedy" for some problems that have been observed in the past (and which are still observed today) in juvenile justice.

As far as I know concerning the international scenario, the first legislative programs of juvenile justice adopted the DIS's philosophy of intervention as their main idea system (PLATT, 1969; TRÉPANIER & TULKENS, 1995; PIÑERO, 2005; 2012; PIRES, 2006)[30]. From the 1960s, this DIS philosophy began to be heavily criticized for easily accepting youngsters' internment and for other problems. This criticism has stimulated the progressive emergence and development of the second generation of youth legislative programs. As we saw, the American sociologist Edwin Lemert (1967) evaluates one of these pioneering reforms in California in the early 1960s. This program was one of the first legislative manifestations of DIP to be adopted. The 1990 Brazilian Statute, changed by law n. 2010/2009, is a far more advanced version of this second generation legislative programs, but the application of this program seems quite precarious.

From the 1960s onwards, a large number of juvenile justice observers has begun to summarily compare some aspects of juvenile justice that they considered as "negative" with some aspects of adult justice that they regarded as "positive." From this summary comparison, they jump to the conclusion that juvenile justice could be improved if its reform comprised the structural characteristics of adult justice, including its old theories of punishment: retribution, deterrence, and rehabilitation behind bars. Adult justice, which continues to cause serious problems in Brazil with abuses in the utilization of imprisonment, has begun to serve as a "reform model" for juvenile justice. More specifically, MPR's idea system began to be seen as a possible solution to DIS abuses. Now, the empirical results of my research do not sustain this generalized perception, indeed going in the opposite direction. On the one hand, my results shows that MPR is easily cognitively coupled with DIS in the field of juvenile justice. On the other hand, the research findings indicate that MPR, even within the field of juvenile justice, does not change its main features and continues to stimulate the instrumentalization of suffering and the intensive use of internment. When one observer mobilize the MPR idea system, he renounce to learn how to valorize the non-custodial sanctions first. He also increase the probability of observe the problematic situation through the abstract lens of the articles of the Criminal Code ("homicide", "theft", "trafficking", etc.). So, if we aim at reconstructing criminal law (for both young and old

[30] See PIÑERO, V. *Modern penal rationality: the case of the Youth criminal Justice Act*. 2005. Master's degree in Law. University of Ottawa, Canada; PIÑERO, V. B. *Transformations in the Canadian Youth Justice System. Creation of Statutes and the Judicial Waiver in Quebec.* 2012. P.h.D. thesis University of Ottawa, Canada.

citizens), we are surely in the opposite direction if we persist in overvaluing retributive theory, deterrence, and rehabilitation in prison.

The following table (n° 10) clearly shows that, in the vast majority of cases in which the judges select the MPR as the predominant idea system when ruling, they also actualized the DIS (72%). From one side, this last idea system is giving support to MPR's foundation and, from another side, the DIS is playing here an important role, because this idea system is useful for adapting RPM's justifications to the new legislation. *Thus, when one makes a distinction between custodial/non-custodial measures, it may be observed that 97% of the submissions with MPR, alone, and also allied with DIS, were in favor of custodial measures*. *Both idea system are prison-oriented*.

This assertion means that only in 3% of cases (1/29) these two idea systems supported a non-custodial sanction. One example concerns an infraction related to "cannabis use" caused by subtle odor found in clothing. Thus, perhaps an acquittal was possible, due to evidence insignificance, or insufficiency. I shall return to the real exam in the qualitative analysis.

Table 10 – Alliance between MPR and DIS in favor of custodial sanctions in general (State Court of Appeal of Minas Gerais, 2010-2016)

Idea System	Custodial sanction	Semi-custodial sanction	Non-custodial sanction	Total
MPR and DIS allied	17 (59%)	3 (10%)	1 (3%)	21 (72%)
MPR alone	6 (21%)	2 (7%)	0 (0%)	8 (28%)
TOTAL	23 (80%)	5 (17%)	1 (3%)	29 (100%)

As it may be observed, MPR and DIS show great difficulty in moving away from all custodial sanctions, favoring those fully custodial (80% of cases in which MPR predominated). In short, MPR's idea system finds no difficulty in appropriating and reinforcing itself with the justifications offered by the DIS. These two rationalities, when they are within the field of juvenile justice, do not counter each other when MPR predominates. This portrait displays a

scenario in similarity to that of adult justice: retribution and deterrence theories do not oppose prison rehabilitation theory when the first two predominate (GARCIA, 2013, PIRES, 2013, 2015, GISI, TONCHE, ALVAREZ & OLIVEIRA, 2017). I can also say that the two idea systems (MPR and DIS) are complementary regarding acting as "tolerant" *vis-à-vis* internment: deprivation of liberty is not a problem for these idea systems when recognizing criminalized conducts.

The next table (n° 11) distinguishes between two categories of juvenile offences: (i) grave or with varying degrees of severity; and (ii) juvenile offences of low or insignificant gravity. The first category attracts 93% of rationale built with MPR alone (27.5%) or in alliance with DIS (65.5%). I can then see that these two idea systems (RPM and DIS) are making together obstruction to the DIP in the most important criminal cases, in which the Appeal Court almost automatically updates custodial and semi-custody sanctions. The given table also indicates that MPR is present even in juvenile offences of weak or insignificant gravity. That means that even in these cases of weak gravity, the RPM idea system is preventing the DIP system of idea to occupy entirely its place in the decision making process.

Table 11 – MPR & DIS idea system: two categories of infractions
(State Court of Appeal of Minas Gerais, 2010-2016)

Idea systems	Grave juvenile offences or with varying degrees of gravity	Juvenile offences of insignificant or low gravity	Total
MPR and DIS allied	19 (65,5%)	2 (7%)	21 (72%)
MPR alone	8 (27,5%)	Nil	8 (28%)
TOTAL	27 (93%)	2 (7%)	29 (100%)

Table 12 provides a more detailed view of MPR's occurrence among specific types of juvenile offences. One can also see the distribution and articulation between MPR and DIS around these problematic situations. Murder, assault, and drug trafficking accounted for 93% of the justifications grounded in the MPR. I have added, in the same table, the three main categories of privileged sanctions to provide an overview to the reader. An analysis of these twenty-nine cases shows that DIS has not yet disappeared from the Court of Appeal's statement of reasons, even if it no longer has a 'leading' role. MPR now plays this role. As I said before, such relation of co-presence and co-foundations reinforce the hypothesis that, in the vast majority of cases, MPR "uses" DIS to justify his presence in the field of juvenile justice. Moreover, these two idea systems seem to gather forces for using internment in the sense of old theories of punishment.

Table 12 – Violent acts and sanctions in which MPR prevailed
State Court of Appeal of Minas Gerais (2010-2016)

Juvenile offences	Idea system		Great categories of sanctions			Total (Cases)
	MPR (sole)	MPR (allied to DIS)	Custodial	Semi-custodial	Non-custodial	
1. Murder (and attempting)	4 (14%)	2 (7%)	6	Nil	Nil	6 (21%)
2. Robbery	3 (10%)	13 (45%)	12	4	Nil	16 (55%)
3. Drug dealing	1 (3%)	4 (14%)	4	1	Nil	5 (17%)
4. Theft		1 (3%)	1	Nil	Nil	1 (3%)
4. Cannabis use		1 (3%)	Nil	Nil	1	1 (3%)
Total	8	21				29

(28%)	(72%)	(100)

The upcoming table 13 concern the time spend by the process in the appeal court. The legislation of childhood and youth provides that the State Court of Appeal has to observe the deadline of 60 (sixty) days to judge a dossier against juvenile delinquency, after the arrival of the dossier to the second degree. As one can see in Table 15, *any judgment* took the time required by the legislation and all judgments have taken a lot longer to happen than the period that was legally stipulated. Moreover, 69% of cases were making appeal of a custodial sentence (N=24) and 14% (N=6) of a semi-custodial sentence. This topic (the duration of the process in the appeal court) is not directly related to my research. Nevertheless, I found important to bring the attention of the reader to this point for three mainly reasons. First, it is possible to see in these data an indirect indication of the weak reception of the new legislative philosophy of intervention for youth. Also, as it is well known, sometimes the bureaucratic organization of the tribunals may not take into account legislative requirements of time. Second, and maybe the more important consideration: one can see here that the mainly concern in the appeals is with the task of *formulating jurisprudence for future judgments* and not with taking into account the concrete "state of affairs" in the juridical situation of individuals. The third reason is pragmatic. This results shows that the State Court of Appeal of Minas Gerais is not yet socially organized to judge regular appeals filed in cases related to juvenile delinquency differently from the manner established to judge adult criminality.

The legislation of childhood and youth, which provides that, *in cases involving incarcerated adolescents*, the trial court judge in charge has to decide the case within the maximum period of 45 (forty-five) days. The State Court of Appeal of Minas Gerais, by law, has to observe the deadline of 60 (sixty) days to judge a dossier against juvenile delinquency. But judgments made the Judiciary Power of Minas Gerais have taken a lot longer to happen than the period that was initially estimated. So, the sum of the term for the first-degree judge to decide (forty-five days) with the time provided by law for the court of appeal (sixty days) results in three months and fifteen days. However, I did not locate in the database any judgment that occurred within four months from the date of the infraction until the day of the trial session in the second degree. So, the empirical conclusion stemming from the analysis of the time spent in conducting the trial is that there is no differentiation between the absence of a deadline for the court of appeal

to make a judgment related to adult criminality. There is no fixed time limit for the trial of Motions for Reconsideration in the legislation under observation in this thesis.

Table 13 – Time elapsed for judgment (from the offence date until the Court decision)

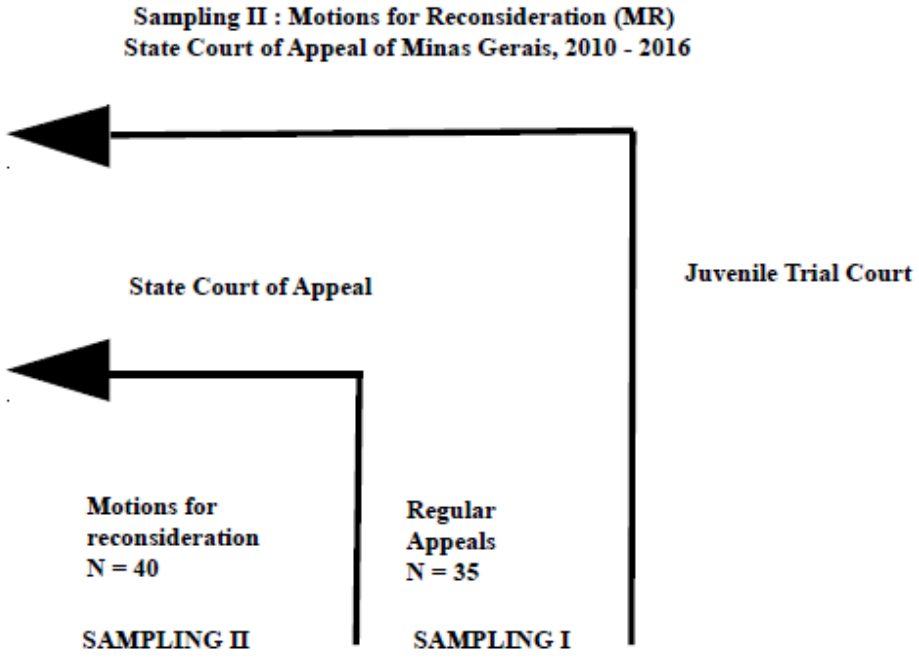
State Court of Appeal of Minas Gerais (2010-2016)

No more than 4 months	4 months to 1 year	More than 1 year to 2 years	More than 2 years to 3 years	More than 3 years to 4 years	More than 4 years	Total
0	12	13	7	1	2	**35**

4.2. Quantitative presentation of Sampling II

I will now focus my attention on the quantitative analysis of the motions for reconsideration that occurred in the Court of Appeal of Minas Gerais regarding criminal sanctions for youth between 2010 and 2016.

Figure 17: Observing Motions for Reconsideration in Sampling II



When appeal judges decide unanimously on regular appeals, which occur quite usually (as in all cases of Sampling I), there is no possibility of an internal appeal. Thus, a motion for reconsideration (MR) for the same Court of Appeal will depend on any previous divergence among the three judges who have adjudicated a regular appeal, as regards the imposed penalty. This means that the "score" of the appellate judgment must have been two judges against one.

Under these conditions, Defense Attorneys or Public Prosecutors may request the MR for a more substantial number of judges, increasing the panel composition from three to five. For example, two appellate judges in favor of custody and one in favor of a non-custodial socio-educational measure; two in favor of a semi-custodial socio-educational measure and one in favor of an acquittal, etc.

The main motivation for Sampling II was theoretical and empirical: it allows us to observe cases in which there was divergence in the decision-making process. Sampling II also favored the observation of some grounds used by judges for the effect of adopting more repressive measure or, in the opposite sense, a type of justifications that seems to be more aligned with the 1990 Statute. In the case of motions for reconsideration, the five judges of a chamber will now observe what three of them had already decided. It is clear that three judges may now re-examine their own decisions in the regular appeal. As I look at the various ways of founding decisions and confronting idea systems (or "rationalities"), sampling II is central to my research. The second motivation is the fact it served to reassert the results of sampling I, to a certain extent. For example, the expectation here is that MPR's idea system will continue to play a leading role and that the DIP will continue to represent a small number of cases among the winning votes.

Retrospectively, Sampling II also reinforces something that was not initially thought: it will allow us to observe what happens when MPR's idea system struggles with itself in a decision made by a complete panel of five judges. To put it simply, when a more repressive MPR orientation fights against a less punitive or "*garantista*" version of individual rights within the MPR itself. Sampling II allowed us to considerably enriched the qualitative data analysis in the next chapter. As we can see in the next table 16, concerning the appellate motions for reconsideration cases, Modern Penal Rationality dominates as the most employed idea system, with the Doctrine of Integral Protection ranked as the second one, followed by the Doctrine of Irregular Situation in the third position. Again, MPR prevails as the most widely used system of

ideas, while the explanation for the prevalence of DIP as the second most cited, prevailing over DIS, will be made later, but still in this section.

Table 14 – Distribution of the three idea systems identified within Sampling II
State Court of Appeal of Minas Gerais (2010-2016)

Idea systems	Number of "cases"	Percentage
Doctrine of Integral Protection (DIP)	N = 5	12,5%
Doctrine of Irregular Situation (DIS)	N = 2	5,0%
Modern Penal Rationality (MPR) (adults)	N = 33	82,5 %
Total	40	100,0%

The next table intends to establish a relationship between the adoption by the judges of idea systems to prevail in the judgment and the sanction resulting from the general application of the intervention model to define the type of socio-educational measure imposed. This table confirms the one explained in Table 7 since it reveals the preference of the judges in choosing the MPR as the central idea system to govern the application of the socio-educational measures. The relevance for this research stems from the demonstration that, also in the cases of Sampling II, in which five judges are called to decide, once again, a dossier previously examined by three of them, in which the decision was not unanimous, in 88% of the files custodial sanctions are imposed. The preponderant thinking to substantiate this kind of socio-educational measure comes mainly from MPR. I selected two attempted murders, nineteen among forty decisions that address juvenile offences against patrimony (theft plus robbery), and twenty out of forty decisions relating to drug dealing. Incarcerating culture predominated in thirty-five decisions out of forty. In five among forty decisions, alternatives to imprisonment triumphed.

Table 15 – Juvenile offences and prevailing sanctions in Sampling II
State Court of Appeal of Minas Gerais (2010-2016)

Juvenile Offences	Great category of sanctions			Total (cases)
	Custodial	Semi-custodial	Non-custodial	
1. Attempted murder	2	0	0	2 (5%)
2. Robbery	14	3	1	18 (44%)
3. Drug dealing	8	8	4	20 (49%)

4. Theft	1	0	0	1 (2%)
Total	25 (61%)	11 (27%)	5 (12%)	41* (100%)

* One case embraces drug dealing + robbery

Now, I intend to understand if the elaboration of written discursive structures oriented by the DIP has redundancy in the identity evolution of effective rules of sanctioning. In four cases, the DIP prevailed by three favorable votes against two opposites, and in one case the majority reasoning was formed with four votes favorable to the DIP and another in the opposite direction. Hence, applying DIP's terms did change the punitive substance of the applied sanctions, and did orient the construction of alternatives of punishing guided towards pedagogical objectives.

I interpret the finding confirming that DIP, in minority decisions, revealed enough legal effects to efficiently change the kind of punishment decided, truly altering the identity of the rule of sanction. In the MR-9 DIP acted to maintain the initial non-custodial measure; in MR-2 and MR 39 the custodial sanctions were modified to non-custodial; due to DIP reasons, in MR-38 a custodial measure become non-custodial and in MR-1 the semi-custodial measure was attenuated.

Table 16 – Dossiers in which DIP predominated in Sampling II - (5 judges per case)
State Court of Appeal of Minas Gerais (2010-2016)

Cases	Prevailing idea system (Score)	Combined idea systems	Juvenile offence	Sanction imposed on regular appeal	Pleading grounded on minority vote	Sanction imposed on the motion for reconsideration
MR-9	DIP (3 x 2)	Nil	Robbery	Non-custodial (DIP)	Semi-custodial (MPR)	Non-custodial (DIP)
MR-38	DIP (3 x 2)	Nil	Robbery	Custodial (MPR)	Semi-custodial (DIP)	Semi-custodial (DIP)
MR-1	DIP (4 x 1)	Nil	Drug dealing	Semi-custodial (MPR)	Non-custodial (DIP)	Non-custodial (DIP)
MR-2	DIP (3 x 2)	Nil	Drug dealing	Custodial (MPR)	Non-custodial (DIP)	Non-custodial (DIP)
MR-39	DIP (3 x 2)	Nil	Drug dealing	Custodial (MPR)	Non-custodial (DIP)	Non-custodial (DIP)
Total:						

5/40 (12,5%)						

Table 17 below refers to the cases in which DIS prevailed, including over the MPR's reasoning. The description of the facts of the dossiers and the application of the law by the court of appeal allowed me to obtain information that in these two cases, even if they were "*mickey-mouse*" offences, the court considered essential to apply a socio-educational measure for adolescents. Also, DIS appears quantitatively in cases where the problematic situation revealed by the description of the empirical facts would not necessarily fall within the concept of crime, because identified with trifles offences. I would add that, with regard to the expectation of reducing possibilities of incarceration, the conclusion is different to that obtained in the analysis of the immediately preceding table. The decision to impose a custodial measure prevailed, from the first-degree judge, passed by the judges who judged the regular appeal, and remained in the majority view assimilated by the panel of five judges responsible for deciding the motion for reconsideration. Thus, the mention of the words contained in the 1979 revoked Brazilian Code of Minors did not contribute to the elaboration of discursive structures to allow the emergence of alternatives to incarceration, did not result in the disqualification of the practice practiced for another less severe, much less facilitated the strengthening of the new intervention paradigm in youth behaviour predicted in the 1990 Statue.

Table 17 – Dossiers in which DIS predominated in Sampling II - (5 judges per case) State Court of Appeal of Minas Gerais (2010-2016)

Cases	Prevailing idea system (Score)	Combined idea systems	Juvenile offence	Sanction imposed on regular appeal	Pleading grounded on minority vote	Sanction imposed on the motion for reconsideration
MR-22	DIS (4 x 1)	Nil	Robbery	Custodial (DIS)	Acquittal* (MPR)	Custodial (DIS)
MR-29	DIS (3 x 2)	MPR	Drug dealing	Custodial (DIS)	Non-custodial (DIP)	Custodial (DIS)
Total:						

2/40 (5%)						

Table 18 below establishes a connection with Table 10, which refers to how DIS is updated when used in conjunction with MPR to support socio-educational sanctions. The relevance of this table to this research is that it serves to corroborate the claim that DIS and MPR function in the same cognitive context in a harmonic way, without any kind of logical inconsistency or incongruity. The following table also reveals that the elaboration of discursive structures oriented by MPR and DIS simultaneously results in a 99% index of custodial socio-educational measures. I understand that the following table corroborates all the statements made to table 10.

Table 18 – Dossiers in which the MPR prevailed in Sampling II
State Court of Appeal of Minas Gerais (2010-2016)

Idea system	Custodial Sanction	Semi-custodial Sanction	Non-custodial Sanction	Total
MPR and DIS allied	17 (50%)	7 (20%)	1 (1%)	24 (71%)
MPR alone	6 (19%)	3 (10%)	0	10 (29%)
TOTAL	23 (69%)	10 (30%)	1 (1%)	34 (100%)

The next table 19 confirms the results obtained with the elaboration of table n° 11, when we continue to adopt the distinction between grave or with varying degrees of severity and juvenile offences of low or insignificant gravity, but with even more incisiveness. Regarding the Motions for Reconsideration, the more severe offences attracts 97% of rationale built with MPR alone (29.5%) or coupled with DIS (67.5%). It is possible to see then these two idea systems

(RPM and DIS) act to obstruct DIP. The next table recognizes MPR's presence in less severe offences, and I can adopt herein the same remarks made regarding table 11.

Table 19 – MPR with/or without DIS in Sampling II
State Court of Appeal of Minas Gerais (2010-2016)

Idea system	Grave juvenile offences or with varying degrees of gravity	Juvenile offences of insignificant or low gravity	Total
MPR and DIS allied	23 (67,5%)	1 (3%)	24 (70,5%)
MPR sole	10 (29,5%)	0	10 (29,5%)
TOTAL	33 (97%)	1 (3%)	34 (100%)

The following table refers to information regarding the specific analysis of grounds used individually by appellate judges, but when "seated" on the panel of judges. The objective was to try to understand the internal communication mechanism of dominant thinking, finding out what happens when the MPR faces other theories and even itself during a debate among five judges. I intend to verify the system of ideas that remains preponderant whenever all the judges of a chamber, in a single moment, together re-evaluate a previous observation.

Table 20 – Mention of the three idea systems identified in Sampling II in individual votes
State Court of Appeal of Minas Gerais (2010-2016)

Idea systems	Number of votes	Percentage
Doctrine of Integral Protection (DIP)	N = 40	20,0%
Doctrine of Irregular Situation (DIS)	N = 03	1,5%
Modern Penal Rationality (MPR adults)	N = 157	78,5%

Total	N=200	100,0%

The table below clarifies and complements the previous ones by establishing a relationship between the individual decisions of each judge appeal and the whole set of decisions of the panels of appeal judges (composed of five decision-makers). I understand this table as relevant to this research because it intends to clarify, in detail, the way in which the social practice of legal language resulting in the institutional externalization of the judicial reasoning of the court of appeal is given. I also understand it essential to divide the justification of this table into the three paragraphs below.

First of all, the set of isolated decisions to compose the final result of the trial court's judgment results initially from the manifestation of the individual will of the five judges of the chamber. Thus, there is a chronological order for each of the members to present their legal standing on the empirical facts observed under the lenses of the rules of judgments agreed as applicable. Subsequently, externally written understandings are analyzed individually, so that convergent and divergent points are apprehended. It is only after forming the set that communicates the majority legal content of the panel decisions that it is possible to identify the meaning given to the discursive structures used at the time of writing the decision. In the language of systems theory, the mediums employed by the judges form propositions of meanings, beginning with the peculiar understanding of each one of those responsible for the judgment in a collective way. Afterward, the result of the application of the judicial reasoning done by the collegiality of the judges is verified, at which point the identification of the sanction with some of the three systems of ideas already mentioned is ascertained.

Secondly, I consider it essential to identify the "*place of the text,*" that is, the indication of the moment of mentioning the line of argument of each judge. That is to say, if the elaboration of the discursive structures of idea system occurs, for example, at the beginning of the decision, in presenting its “reasons for deciding,” or at the moment of determining the socio-educational measure, in which the judges invoke the thinking mentioned in this research.

Thirdly, in legal language are known the Latin jargons *obiter dictum* and *ratio decidendi*. *Obiter dictum*: "it is what is said during a trial or is contained in a decision without reference to the case or that concerns the case, but is not a necessary proposition for its solution." *Ratio*

decidendi (the reasons for deciding): are decisive foundations of the decision. "Constitutes a generalization of the reasons adopted as necessary and sufficient steps to decide a case or the issues of a case by the judge. In a language proper to the Roman-canonical tradition, we could say that the *ratio decidendi* must be formulated by abstractions made from the justification of the judicial decision"[31]. Furthermore, to the common-law tradition, *obiter dictum* is a judicial comment made while delivering a judicial opinion, but one that is unnecessary to the decision in the case and therefore not precedential (although it may be considered persuasive). And *ratio decidendi* is the principle or the rule of law on which a court's decision is founded.[32]

The critical analysis is that DIP is used much more as a reference without relevant legal effects in the configuration of the identity, or the type and useful content of the ordered socio-educational intervention. That is to say, the legal meaning of DIP in the context of the court of appeal is perhaps being much more connected to its particular use as *obiter dictum* than as *ratio decidendi*: there was no legal and practical impact on the characterization of criminal sanctions only due the fact DIP is foreseen at the 1990 Statute.

Thus, in the cognitive context of confrontation between the DPI and the MPR, the latter almost always prevails, which acts as a real epistemological obstacle to preventing the reform of the essence of criminal sanction. Therefore, by judicial construction, ancient goals foreseen in the old theories of punishment are being reached, also by not receiving the meaning of the new means proposed by the most recent paradigm of the juvenile justice program contained in the 1990 Statute.

With the support of the Systemic Theory of MPR, one of the innovative discoveries of the present research is the confirmation of the non-redundancy of the DIP in promoting the quantitative and identity evolution of the rules of sanctioning determined by the appeal judges. And such flows from observing the results ordered by the panel of decision-makers since most do not accept to apply the paradigm shift provided for the 1990 Statute.

Further, the information obtained through the elaboration of Sampling II confirmed the data collected with the construction of Sampling I. All assertions I made regarding Picture 12 are true concerning Picture 20. Mainly about the claim that the DIS shares a cognitive space without contradicting the MPR.

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[31] MARINONI, Luiz Guilherme; et. al.. Novo código de processo civil comentado. 1.ed. São Paulo: RT, 2015

[32] Black's Law Dictionary, eight edition, 2004.

Again, DIP did not prevail, even concerning trifle offences. Hence, DIP did not act in the majority of cases, given the epistemological obstacle created by the prevalence of two theories that seem to be refractory to the philosophy of criminal intervention determined by the 1990 Statute. The occurrence of both MPR and DIS coincides with the dossiers in which appeal judges imposed custodial and semi-custodial sanctions.

Table 21 – Presence of the three idea systems as *ratio decidendi*
State Court of Appeal of Minas Gerais (2010-2016)

Idea systems	Number of votes	As *ratio decidendi*
Doctrine of Integral Protection (DIP)	N = 16	10%
Doctrine of Irregular Situation (DIS)	N = 07	5%
Modern Penal Rationality (MPR adults)	N = 143	85%
Total	N= 166	100%

The next table shows that, even when it does not prevail, in the "battle of legal arguments" MPR is mentioned in almost 30% of minority decisions. The purpose of this table is to show the cognitive dominance exercised by the old theories of the sentence on judge's reasoning. Therefore, even if it is to be overcome and not to elaborate a discursive structure to impact on the configuration of the socio-educational measure, the judges of appeal prefer to adopt an individual style of writing identified with the reasoning architecture based on MPR's logic.

The relevance for this research is to demonstrate the need to persuade the interpreter to not take long distance from the meaning of the legislative text when intending to effectively apply the innovations stemming from the new paradigm Legislation contained in the 1990 Statute. On the other hand, the table also shows a preponderance of the DIP as obiter dictum, which is admittedly insufficient for the logic of socio-educational law to communicate the content of the new legislative paradigm of childhood and youth.

Table 22 - Presence of the three idea systems as *obiter dictum*
State Court of Appeal of Minas Gerais (2010-2016)

Idea systems	Number of votes	As *obiter dictum*
Doctrine of Integral Protection (DIP)	N = 24	70,5%
Doctrine of Irregular Situation (DIS)	N = 0	0%
Modern Penal Rationality (MPR adults)	N = 10	29,5%
Total	34	100%

The last table in this chapter, when analyzed in the context of this research, reveals the currently punitive/repressive position in the Court of Appeal. The qualitative analysis made it possible to verify that the court of appeal has a punitive vein and, in most cases, the sanction is constituted by a more punitive style than pedagogical.

The objective of the last table is to describe that, in three cases related to robbery (MR-12, MR-23 and MR-27), nine cases in which drug dealing MR-19, MR-36 and MR-37), in addition to a case in which the judicial debate will be about theft (MR-35), always the most severe reasoning prevailed. As it may be often observed, when the most severe MPR faced with moderate MPR the former (77%) beat the latter (23%).

These numbers confirm the non-acceptance of the intervention philosophy foreseen in the Statute of 1990 by the Court of Appeal of the State of Minas Gerais.

Table 23 - Severe vs. Less severe MPR
State Court of Appeal of Minas Gerais (2010-2016)

Juvenile offence	Cases	MPR custodial	MPR semi-custodial	MPR Non-custodial	Total
Robbery	12, 23, 27	3	0	0	3
Drug dealing	4, 5, 6, 7, 11, 15, 19, 36, 37	6	3	0	9
Theft	35	1	0	0	1
Total		10 (77%)	3 (23%)	0 (0%)	13

4.3. Chapter summary

In conclusion, Chapter 4 frames legal language as a narrative that creates meaning in the realm of Juvenile Justice. The quantitative approach was required to construct a systematic representative sample, thus allowing us to assess the relative magnitude of each system of ideas in case law. Furthermore, to facilitate the inference of our results, we initially proceeded with a quantitative analysis exclusively to present socio-legal semantics and idea systems that I observed in the database. Our sample selection was representative and descriptive, allowing us to perform a qualitative content analysis in Chapter 5 to complement our analysis.

The conclusion of this chapter is that the divergence between judges in regular appeals is rare. We have observed that there seems to be an institutional way of deciding that ends up amply subordinating the legal norms of sanctioning of juvenile justice to the punitive-afflictive logic of justice for adults.

The quantitative analyses also reveal that the DIS seems to be disappearing, and only a minority of decisions have been grounded on the DIP, an idea system which does not form alliances with either MPR or DIS idea systems. MPR's idea system finds no difficulty in appropriating and reinforcing itself with the justifications offered by the DIS in the filed of Juvenile Justice. However, the data disclosed alliances between the adult justice system (MPR) and the DIS, somehow favouring the prevalence of custodial sanctions instead of non-custodial ones. The application of MPR in juvenile justice does not change its main characteristics and encourages the instrumentalization of suffering and the intensive use of internment. When an observer mobilizes the MPR idea system, he forgoes first learning how to value non-custodial sanctions.

I highlight this result, because a significant part of Brazilian legal and sociological literature frames the adult criminal law philosophy as a "remedy" for some problems that have been observed in the past (and still observed today) in juvenile justice. The philosophy of intervention in adult justice also prevails in juvenile jurisprudence with a predominance of the MPR, blocking the application of the DIP by covering 83% of cases. This massive occurrence of MPR constitutes a fundamental cognitive obstacle to the evolution of normative structures in Brazil's juvenile justice.

Chapter 5 – Constructing the meaning of the juvenile sanctions in the Appeal Court.

5.1. Overview.

In this chapter, I will make a qualitative presentation of the data obtained to clarify the decision-making process developed by appellate judges on juvenile delinquency. It is my plan to present analytical variables that I considered towards a better understanding of the discursive construction of socio-educational measures. I then outlined some ideas for this empirical chapter, addressed organizational characteristics of the court of appeal, and described some influences on argumentative and interpretative actions, which I believe drive the meaning of systemic discursive structures. The description begins with a general exposition to gradually attain complexity, progressively unveiling the minutiae of Court rulings. Such way of presenting the research findings will help me illustrate how some appeal judges decide to use some ideas systems (MPR + DIS) instead of another (DIP). In this regard, it is my intention to represent jurisprudence standards, not the point of view of a single judge.

I would like to start by pointing out that the appeal court refers juvenile delinquency issues to criminal law chambers, not to civil panels. But that does not mean that criminal judges cannot decide cases of juvenile delinquency because that would be an inappropriate statement, in my opinion. Indeed, my approach to the research problem concerns the social practice of legal language within criminal chambers employing both Modern Penal Rationality and Doctrine of Irregular Situation idea systems, coupled with the lack of cognitive ties to observe juvenile delinquency in its particular principles, in other words, according to the Doctrine of Integral Protection. I believe in the importance of describing the broad process framing the reasons for such decisions so as to facilitate understanding the question under investigation.

I will continually develop the concept of socio-legal semantics through argumentative activity, perhaps because a more precise sense of jurisprudence is not merely revealed by the contents that are peculiar to the database. I believe in describing: (i) social organization formats; (ii) how the Court routinely judges; and (iii) how appeal judges internally establish objectives to judge problematic situations as crimes; therefore, the systemic factors that influence the sense constructed by jurisprudence in order to frame juvenile delinquency trials. But I going to develop my remarks with the support of Luhmann's usage (apud MOELLER, 2006, p. 51) of the notion of semantics as the *socially available sense that is generalized on a higher level, relatively*

independent of specific situations. At the end of this chapter, I intend to present sufficient reasons to justify my analysis of the need to formulate the identity of sanctioning rules by the philosophy of intervention contained in the new paradigm proposed by the 1990 Statute.

I suppose that appellate judges who integrate a professional milieu strictly related to the application of adult criminal law may tend to use the same socially available sense to decide their cases. To reiterate the approach I set for this dissertation, Wandall (2008, p. 149) affirmed that, when studying how courts in action divert from a legal ideal, we should not look for the ways formal organizations lack or the existing manners in formal organizations. We should, rather, be looking for ways in which legally valid decision-making encourages contextually open decisions. Thus, in this section, I will first address how semantics identified with adult criminal law guides the decision-making of the appellate court concerning delinquency at youth. Next, I will indicate the internal mechanisms of the juridical operations performed by the judges, at the moment of the elaboration of the discursive structures that compose juvenile justice decisions, but with repressive, dissuasive and retributive meanings. I shall begin with the so-called analogy procedure and then examine the assimilation, by the discursive activity, of gravity prescribed "by law" (not by observing empirical facts) for alleged heinous crimes. In the process of critically describing and reviewing the dossiers, I will address the main "mediums" and "forms" referred to in the 1990 Statute, and explain those propositions obtained as a result of the peculiar social practice of legal language, in the context of the appellate court. Subsequently, I will indicate the main analytical categories that allow the identification of decisions with the three idea systems mobilized by the appeal judges, namely: the Doctrine of Integral Protection, the Doctrine of Irregular Situation and Modern Penal Rationality.

At first, the juvenile delinquency dossiers are decided with a very similar pattern of reasoning and with almost standard language. Initially, law enforcement officers establish the so-called materiality (*materialidade*, in Portuguese, the demonstration that the offence happened) of the problematic situation legally defined as a juvenile offence. After it is ascertained on the authorship (*autoria*, in Portuguese) of the illicit, that is to say, if the young person accused was the subject author of the conduct contrary to the established in the law. Subsequently, it is presented the reasons why the socio-educational measure should be applied, which would serve to justify the degree of severity of the sanction determined to the concrete case.

Hence, I can affirm, based on my previous professional experience, corroborated by the empirical research conducted between Brazil and Canada in the years 2013 to 2018, that there is a

clear standard agreed upon among judges to adjudicate juvenile justice cases. Thus, at the outset, the adolescent is caught up in the military police network, with a repressive and punitive orientation, and then the young man is "indicted" by the civil police through the analogy procedure between the infraction and the Brazilian Penal Code for Adults. This way, through the social practice of legal language, the young man passes to the condition of a person subject to labels and institutional consequences of being the author of unlawful criminal acts. Continuously, the prosecutor offers the representation and requires the application of the socio-educational measure, requiring a penalty proportional to the abstract severity of the conduct practiced.

Usually, the judge of the first instance grounds the conviction on the number of times the young man was apprehended, in the lack of family structure, and on the title (or article number) of the accusation made to the young man. Therefore, the case comes to the court of appeal already decided with the lenses of the MPR, often allied to DIS, instead of DIP. Frequently, the judgments adopt, almost unanimously, patterns of reasons for deciding tied to MPR, once I have not seen observation of the 1990 Statute as *ratio decidendi*, but much more as *obiter dictum*. In other words, the application of the juvenile legislative program does not have a visible impact when the sanctioning rules are drawn up, and this result allows the conclusion that appellate judges discursively have notoriously denied any possibility of "identity evolution" at the stage of determining socio-educational measures. On the contrary, what I have observed is the robust redundancy of MPR over the rules of sanction ordered by juvenile justice judges, who decided to act argumentatively in MPR reasons. In fact, rational decision-making is the matter of selecting means that will enable us to achieve our ends. The ends are entirely the matter of what we desire. We come to the decision-making situation with a prior inventory of desired ends, and rationality is altogether the matter of figuring out the means to our ends. Reasons are chosen and acted on, thus becoming effective. That is to say, a reason for action is as effective as one makes it (See, SEARLE, 2001).

5.2. Describing the socio-legal semantics of judicial decisions.

In different places or countries, we can see that Courts of Appeal are organized in distinct ways to decide the various types of dossiers submitted for consideration. For example, in a given country, appellate judges may have combined jurisdiction to judge all the general issues in a session without any specialization. In other places, the decision-making authority of the court

may divide the matter, for example, in Civil or Criminal Law, Administrative or Private Affairs, etc. As for the State of Minas Gerais, the second scenario prevails, with a procedural decision determined by the internal regulation that separates criminal appeals from civil ones in differentiated chambers. But the distinctive organization and legal culture of the local court can foster distinctive substantive rationalities that shape the nature of sentencing decisions (ULMER and JOHNSON, 2004, p. 137). The daily handling of criminal cases leads to the emergence of independent routine and value systems in processing and sentencing cases that are distinct from the formal organization of decision-making (WANDALL, 2008, p. 2).

For instance, the Juvenile Trial Courts of the State of Minas Gerais do not have, as a rule, jurisdiction to deal exclusively with juvenile delinquency. Usually, I can say that, in the countryside, judges on charges of deciding adult crimes also decide juvenile delinquency. So, the state court of appeal, whose jurisprudence is the object of investigation in this doctoral dissertation, opted to reproduce the pattern seen in the whole State of Minas Gerais at the second instance. Therefore, appellate judges who work at the second-degree are not required to specialize in judging acts committed by adolescents in conflict with the Law.

Nonetheless, pieces of information collected at Sampling I and II show us that the retributive rationale chosen to prevail in the professional language of criminal appeal judges have projected their hierarchical relevance into the process of rational decision-making about youth delinquency, thus taking primacy over the jurisdictional function of shaping the sense-making of juvenile criminal sanctions. Therefore, if a group of judges, almost by majority, chooses a punitive pattern with roots firmly tied to old theories of punishment to govern juvenile delinquency cases, regardless of the formal jurisdiction division (Civil vs. Criminal, or Adult Criminal Law vs. Juvenile Justice, for example), such an approach is likely to create all the conditions needed to overrule the new paradigm of the 1990 Statute.

Thus, the conventional logic traditionally related to criminal law chambers should affect, at a broader level, the decision-making process in the whole state juvenile justice system. Therefore, some “common legal sense” acts as a kind of semantics adopted by criminal judges to draw limits as they decide on juvenile delinquency. Thus, judges have had difficulties in observing jurisdictional boundaries between “Civil vs. Criminal” and “Juvenile vs. Adult” (Criminal Law). These formal and legislative divisions alone did not reveal the expected effect of undoing the cognitive knot in the communicative ties between Juvenile Justice System and MPR.

Processes of young offenders remain under punitive logic, practiced by the criminal chambers of adult criminal law as well.

Hence, the web of rationale starts to unravel. Juvenile criminal sanctions also take on a punitive meaning given the agreed rules that the members of criminal chambers at the court have chosen, based on their daily experiences in trials of general criminal cases, in a broad sense. Therefore, some "criminal common sense" helps to constitute the socio-legal semantics of the adult/tutelary approach adopted by appellate judges to delineate their boundaries in deciding juvenile delinquency.

I see no favorable point in observing undifferentiated competence or, in other words, lack of specialization (Adult Criminal Law vs. Juvenile Justice) as though it helped to improve the observation of empirical facts, or blocked the transfer of MPR's idea system to cases governed by the 1990 Statute. Otherwise, there would not exist a perceived porosity in the social practice of legal language by judges of criminal chambers. So, the rationale usually seen in the decisions seems to reflect a more complete and also formal adherence to a hermetic "rationality package" (MPR + DIS), typically at hand in appellate criminal law chambers. As a pattern, there is no distinction between specific sanctioning standards such as the 1990 Statute (DIP), which aims at favoring young people by granting them their most fundamental rights. But the general criminal law sense does not mean protecting anyone against the punitive rationality inherent in the old theories of punishment. Hence, due to lack of distinguishing, the court "blindly" observes the adolescent-like someone owing "debts" to society, because of the legal effects of standardized social practices by juvenile justice law. And the legal position of the adolescent in the process seems exactly the same one as an adult accused, who must passively suffer the intervention of the repressive apparatus, rather than considering the youngster as a typical "beneficiary" of childcare services.

Legal programs are communicated in a variety of ways at the courtroom and carry with them some meanings that are observable only in the context of courtroom communication. Thus, they may become accustomed to following the general meaning provided by the old theories of Criminal Law. Such view held by the majority does not realize that juvenile offenders should also benefit from the legal concept of integral protection. Another logical gap is the Court's insistence on obtaining, over adolescents, the same results from MPR (thought for adults), even if the defendant is not an adult, but an adolescent in conflict with the Law. I have not noticed the court "drawing a distinction" between adult and juvenile rules of sanctioning. Again, I suppose

legal words produce the same legal outcome (exclusion and social suffering), especially when endorsing criminal law as the leading cognitive reference, rather than juvenile justice (integral protection of youth). So, one may ask:

> *"How does the social organization of the Court of Appeal contribute to framing judges' ideas in setting patterns of punishments for Juvenile Justice?"*

The issue of the jurisdiction to decide in specific panels was previously debated among appellate judges of Minas Gerais, when the Court upgraded its rules of procedure, in 2012, so far in force. Since then, there have been few changes but they did not alter the essence of the rules. The fundamental separation of jurisdiction resulted in two broad groups of judges: Civil and Criminal. By the time of the amendment of internal rules, committees were formed by appeal judges to prepare a draft before submitting the current regulation to the approval of all members of the Court of Appeal. One judge of appeal, Wagner Wilson, elected to the Second Vice-Presidency of the Court for the 2016-2018 term, joined one of these committees. He suggested, before initiating proceedings in the panel in charge of discussing the jurisdiction of juvenile delinquents, that it should be expressly written that civil appeal judges should adjudicate all cases regarding Juvenile Justice System.

Judge Wagner Wilson wanted to submit juvenile sanctions to the authority of the civil judge panel, but the working group did not accept his proposal. In the opening phase, the committee denied discussing the suggestion and then decided, preliminary, not to reject the authority of Criminal appeal judges. But there is no rule stating that juvenile criminal proceedings must remain under the jurisdiction of Criminal judges of appeal. On the contrary, internal rules provide that civil appeal judges shall have authority over decisions by the Juvenile Judge of First Instance Court[33].

A group of appeal judges, formed by members of the Special Organ, further received the task of resolving a conflict of jurisdiction. In fact, the following dossier I am going to mention is not part of the database, and its purpose does not cover a decision in a specific case, linked to a problematic situation. It is a relevant case to the current research because the Court described its jurisdiction by determining the boundaries and judgment rules to be observed by the chambers of

[33] In Portuguese: [Art. 36. Ressalvada a competência do Órgão Especial, os feitos cíveis serão julgados: I - nas Primeira à Oitava Câmaras Cíveis nos casos de: (...) b) decisão proferida por juiz da infância e da juventude.]

appellate judges in charge of juvenile delinquency matters. Consequently, the Court defined which type of panel should adjudicate an appeal offered against a trial court judgment.

In the records, it is not clear whether the debate regards the fact that the young man, who lives in the city of Contagem, had to go to the city of Governador Valadares, far away from his district, to comply with a semi-custodial socio-educational measure, or else if the insurgency was mainly against the content of the imposed socio-educational measure. However, I understand that this doubt does not compromise the understanding of the reasoning that governs judges' thinking on the subject at stake.

Initially, a civil appeal judge received the dossier and considered himself unable to judge it, stating that a Criminal appeal judge should assess the case, as a result of its nature and juridical consequences of sanctioning. Thus, the file in question set the dispute, i.e., whether the issue had more cognitive links with Civil or Criminal Law.

This initial procedure was considered necessary by appeal judges because the rules for judging are not the same, and the focus of each kind of process is not coincident. At first, the former judge-rapporteur decided that, once the case was originated in a Juvenile Trial Court, usually responsible for protecting children and adolescents, a panel of civil appellate judges should judge the matter. The former rapporteur stated: "In the present case, considering that a Juvenile Trial Court Judge pronounced the appealed decision, the jurisdiction to review that decision belongs to one of the Civil Chambers of Public Law (...)." (TJMG, 2010-2016)

The judicial discussion addressed the extension of the trial of an appeal involving the enforcement of a socio-educational measure to a juvenile delinquent. One of the appeal judges pointed out that the exclusive juvenile delinquency program is far more detailed and does not have affinities with the Adult Criminal Law judgment rules. Basing decisions upon the 1990 Statute requires judges to ground the content of their decisions lawfully and, later, they should elaborate a socio-educational measure to fit precisely into each case with strict scrutiny. He also stated that the juvenile justice sanctioning rule differs from ordinary criminal punishment because the thinking of Juvenile Youth, established in the Brazilian framework and international standards, is unique and much more specialized. He further argued that the failure to apply specific rules would cause a logical problem of validating the existing Law, rather than absence of regulations. About this subject, he said the following words, in line with the former rapporteur:

In line with this "neo-minoring" trend, here is the careful consideration by Murilo Digiácomo: talking about "Juvenile Criminal Law" is the same as to **go back to**

> **the time** before the Statute of the Child and the Adolescent and to the Doctrine of Integral Protection to the Child and the Adolescent that, according to art. 227 of the Federal Constitution of 1988, which inspired the Statute, **completely disregards all regulations - including international ones - created precisely to allow adolescents accused of the practice of a juvenile offence to receive a treatment different from that traditionally intended for adults accused of crimes of EXTRAPENAL nature**, [...]. Thus, no matter how noble the aims sought by the defenders of "Juvenile Criminal Law", adopting it as a means to avoid abuses committed is undoubtedly not the best option, especially the elementary observation that it is **not the lack of regulation, but rather the lack of application of the procedural rules already provided for in the legal system and the principles ruling the** application and implementation of socio-educational measures which are the determining cause of the aforementioned distortions and arbitrariness.*(...)* (emphases added). (TJMG, 2010-2016)

He also stated as follows:

> I have always defended, albeit as a minority voice, that socio-educational measures applied against infractions committed by adolescents **do not have a legal nature of punishment, but rather a pedagogical character**. However, with due regard to contrary understandings, **applying Criminal Law principles and rules to the special procedure of imposing socio-educational measures removes the contents of the Doctrine of Integral Protection**, foreseen in art. 227 of the Federal Constitution enacted in 1988 and implemented in the legal system by the 1990 Statute of the Child and Adolescent. (emphases added). (TJMG, 2010-2016)

To the minority position, on the one hand, young people should act as protagonists of their destinies in the process scenarios, becoming centrally involved in interventions ordained to favor them with the help of family members, communities and government officials, thus benefiting from the DIP logic. The Court ruled by majority, on the other hand, that a panel of Criminal appeal judges should decide on juvenile delinquency matters. The appellate judge who remained as the rapporteur of the majority decision presented his motives for deciding, as follows:

> (...) **This case does not deal with protective measures in benefit of a juvenile**, by reason of action or omission of the persons accountable for him or her, or third person, or of the State. What we have, in this case, **is a dossier of clear "criminal" content**, in which the adolescent received a **socio-educational measure to comply with**, because of a conduct considered as **delinquent**. It refers to a problematic situation involving a **juvenile offender**. It is **clearly a criminal process** so it is **not reasonable** to consider the Civil Courts of Public Law as competent to assess the appeals presented therein. (emphases added). (TJMG, 2010-2016)

It was finally decided that Criminal Chambers should deal with juvenile offences, and the main justification is their legal expertise in imposing painful burdens on accused persons, as Criminal Law usually does.

5.3. Analogy procedure: transferring MPR idea system to juvenile justice discursively.

In almost every juvenile court decision, I see the social practice of legal language representing juvenile delinquency as an unlawful act committed by an adolescent, but **analogous** to a specific crime provided by the Penal Code, which abstractly regulates the adult rules of behaviour and sanctioning. This social representation would explain the existence of discursive structures very similar to the decisions about social reactions or sanctioning rules, regardless of whether an adult or young man practiced the conduct.

As a rule, the header of decisions compounding the database under appreciation contains the written case number, the name of the judge-rapporteur, as well as the dates of judgment and online publication. Occasionally, the name of the adolescent in conflict with the law is not entirely mentioned at the beginning of the court decision, under the allegation of ensuring mandatory privacy as well as procedure secrecy. However, during my research, I often saw teenager names in headers.

Written texts, once taken into the context of meaningful communication, that is, when they are read, written, or quoted, etc., open up and organize references to possible meanings (LUHMANN, 2004, p. 242). After the linguistic signals and numerals used to identify the case, juvenile criminal decisions taken by the court of appeal usually begin with a summary of the facts, showing how the case reached the lower court of first instance. From the outset, it is assigned a number to identify, at least abstractly, the nature or gravity of the case, which implies that the article of the Brazilian Criminal Code was allegedly breached.

I observe that robbery crimes, for instance, are generally treated as cases fitting Art. 157 of the Brazilian Penal Code. I argue that socially representing juvenile delinquency as an act **analogous** to crime carries out normative criminal values and pejorative labels, overstepping the cognitive context of adjudicating delinquency at youth in the appeal level. In fact, in my research findings, I see legal professionals, without exception, making use of language in order to present facts of juvenile offences as characterized by extremely dangerous meaning.

In one hundred percent of the samples obtained, which confirms my previous professional experience in the Juvenile Justice Trial Court of Belo Horizonte, Minas Gerais, problematic

situations are presented as a juvenile offence **analogous** to a type of individual crime, depending on the characterization of the facts. This way of socially representing problematic situations attracts MPR idea system to the judicial debate.

However, particularly in criminal law, the word analogy can cause serious logical problems and epistemological difficulties to consistently apply judgment rules. The term analogy runs off from strict legality and does not contain such conceptual accuracy, nor is it strong enough to preclude communicative misunderstandings. Therefore, the characterization of facts under legal analysis as a previously established sense shapes the intellectual properties of the social reactions arising from the act framed as illicit.

Thus, the generic reasoning linked to the old theories of punishment, by direct comparison, or even through subtle assimilation of another mindset, can easily penetrate into the rational process of decision-making regarding juvenile delinquency, without producing perceptible interpretive noises. It follows that the justifications for decisions comprise a common axis of meanings that allows similar applications of common sense to various legal terms of the Ordinary Justice of Adults, however **within** the Juvenile Justice.

For now, it suffices to keep in mind that the current analysis not only helps us to broaden our understanding of the philosophy of the Doctrine of Integral Protection, but also makes an essential empirical contribution. It will reveal – and allow us to name - one of the communicative procedures that are used to introduce MPR idea systems within juvenile justice sanctioning decisions, routinely taking the place of the DIP. I am going to name it the *analogy procedure.*

It must be kept in mind that, as language device, analogies can be more sophisticated and far-reaching than metaphors or similes, once ideas or things are compared to other entities that are quite different from them. Analogies rely on the ‘familiarity’ principle, either comparing or explaining new ideas to something that is familiar. From a rhetorical perspective, analogies are drawn to link unknown, unfamiliar ideas to known, familiar instances. It may be inferred that some idea systems may be more or less familiar to certain courts and the ‘analogy principle’ may be used so as to organize the idea systems that courts are more or less familiar with.

Thus, I believe that, due to this discursive, institutional pattern, the analogy procedure introduces, in juvenile justice, "reasons for deciding" rooted in old theories of punishment. And such argumentative performance by law-makers is generally regarded as objective information, an absolute presumption, observed abstractly "by law" and not contemplated by the facts of the case.

Hence, juvenile court decisions that classify any offence as "serious," even only "ideally tying" the dossier to the Brazilian Adult Penal Code, then impose socio-educational measures as a direct and compelling consequence of their abstract characterization. The link observed with the MPR system of ideas is intuitive, since juvenile punishment, due to this analogy procedure, becomes not only authorized but also obligatory. Typically, by adopting the analogy procedure, judges cloud their views not to observe the DIP as the legal program to be applied. Thus, they do not change their thinking to see juvenile offenders as young people to be rehabilitated, but rather as dangerous individuals to be neutralized by incarceration, as suggested by the crucial sanction of the prevailing MPR idea system.

The selection of legal arguments presented by appellate judges revealed the development of an argumentative activity that imposes retributive punishments, based on an analogy to criminal law, to justify the imprisonment of the juvenile for up to three years. Samplings I and II reveal how judgments can sometimes happen only by linking the dossier to the systemic representation of the seriousness, abstractly speaking, of the problematic situation, even if the alleged gravity of the empirical fact has not been observed. In fact, judges take their decisions grounded on the general assumption that the description of the article of the Brazilian Penal Code represented severe juvenile delinquency, in which the problematic situation could fit, according to the narrative of the sentence. So, the judges decided to drive the meaning to their decision towards a specific sense.

To Moeller (2006), social systems (like the Legal System) and psychic systems do not only share language as a common medium, they also share the “universal medium sense”. Society and minds are continuously “making sense”—they are “sense-constituting systems”. Minds make sense of the world and themselves, and so do social systems. Sense (and sense horizon) is the “product of the operations that use sense—and by no means a quality of the world on account of creation, donation, or origin” (MOELLER, 2006, p. 65-69). It would be similar to a ship that finds its position and direction by locating itself within the sea horizon. This horizon changes certainly and continuously. Through its motion, the ship continuously relocates itself within a horizon and thus has the horizon change with it. Sense is therefore technically defined by Luhmann as the “unity of difference between the actual and the possible”. Our minds and communications operate within a sense-horizon like a ship operates on a body of water. So, after observing facts and interpreting them, one can describe the observations and the sense making of communication systems as “cognition.” Observing is to produce cognition, and producing

cognition means constructing reality. Observing reality is constructing it, and observation is performed as the making of a distinction. Observation is performed as the drawing of a distinction—a distinction between what is observed and the "unmarked space" of what is not.

But it is tough to accept that such a punitive rationality can share the same decision-making space with the non-custodial rehabilitation theory. The focus of juvenile justice is the young person's need, not the imposition of suffering by sanctions which are supposedly embedded in pedagogical features, hardly seen in Brazilian socio-educational internment centers. The adoption of a rationality linked to the mindset that regulates Adult Criminal Law does not facilitate the emergence of the rationale established by the Brazilian legislator while editing the 1990 Statute.

Furthermore, I could not see, among the analyzed decisions composing Sampling I and II, how merely restricting adolescents' freedom could contribute, in itself, to improve their socialization process. The Court of Appeal notes the problem situation by contending that the repressive apparatus must deal with moral formation and recovery of the youth in conflict with the Law. Nonetheless, statements for the realization of young people's accountability describe an abstract and imaginary scenario. A kind of total institution in which the youth would ideally be very well treated and could become citizens who would not violate Criminal Law ever again. In addition, I have not been able to find any decision that describes a peculiar facility recognized by the excellence of its rehabilitation services, in which the actual incarceration circumstances would contribute to improving the level of inclusion of young people in social systems.

Undoubtedly, offence gravity must be taken into account while selecting the penalty, and the socio-educational measure applied to adolescents should also consider their ability to fulfill it, not to mention the circumstances involved. Indeed, I think the lack of consistency reveals itself entirely as the discursive structure of judicial decisions does not set a distinct legislative program for teenagers in conflict with the Law. In fact, there are thirteen other principles or decision guidelines foreseen in the single paragraph and its subsections of Article 100 of the 1990 Statute, as it was mentioned earlier. For instance, by Law, the best interest of children and adolescents should prevail, without prejudice to consideration due to other legitimate interests in the plurality of interests present in the particular case. I cannot perceive any kind of logical consistency in decisions reducing the way of observing juvenile delinquency, which will result in equaling the common rationale governing social reactions to juvenile offences that are quite similar to adult crimes.

So, when observers employ this procedure, they draw an analogy between what is done or what should be done through and around the framework of MPR and the concrete case before them, concerning juvenile justice. In thus proceeding, they "import" the logic of determining penalties from one program (Adult Criminal Law) into another (Juvenile Justice), or the philosophy of one external program within another. Such procedure essentially states the following message:

> "*Whatever is valid for this or that context, as juridical effect of the legal category of crime, is also valid for that or that other context."*

I have identified the presence of this analogy procedure in a number of cases as qualified robbery and drug offences, in which some rapporteurs automatically apply this process to what criminal law defines as heinous crimes in Brazil. I remember that, in our general sample, drug crimes committed by 18-year-olds linked to drug trafficking accounted for 20% of the appeals. In the same samples, by combining the three crimes (homicide, 17%; qualified theft, 20% and drug dealing, 20%), cases in which it is tempting to use the analogy procedure, the result comprises a total of 57% of appeal cases.

In Sampling II (Motions for Reconsideration), in which all five judges of a Criminal Chamber are called to decide again on a decision previously made by three appellate judges in the same case, drug-dealing charges accounted for 49% of the appeals. It must be considered that gravity is usually abstract, not based on factual information, and the police prefer to update these incriminations because they are likely to provoke a more coercive response from the repressive apparatus. So, mutual reinforcement may be found among the results of our analysis of the qualitative data, thus revealing the occurrence of analogy mechanisms, whereas the quantitative study shows the appeal judges exposed to this cognitive trap. To avoid it, they must take relevant cognitive measures not to divert their attention, and if they insist on focusing on old ways of observation, they will betray the legislative program grounded on the Doctrine of Integral Protection.

As we shall see, merely updating the analogy procedure in discursive structures does not mean the judge agrees with the idea systems of the 1990 Statute, and will not change the way of viewing and deciding. In the end, a legal position can win or lose but it will maintain its legal concepts. However, by updating this analogy procedure, because one sees the difference between

an illegal act committed by an adolescent and that committed by an adult, judicial decisions may eventually change once that blind spot becomes enlightened (*language game*) by a new vision.

Thinking patterns may have cognitive links with Article 103 of the 1990 Statute, which considers as juvenile offence the behaviour described as a crime or misdemeanor. So, I noticed the transposition of combined idea systems combined to juvenile justice such as the use, by the court of appeal, of arguments that are not allowed by the parliament, in argumentative and interpretative judicial actions. Appeal judges may recognize no boundaries when justifying their reasons for deciding on juvenile delinquency sanctioning rules. Thus, conventional legal mentalities may indeed corrupt DIP reasoning, overcoming logical gaps, establishing discursive structures that encompass MPR + DIS, ultimately characterizing juvenile criminal sanctions by using new terms to form propositions with punitive/tutelary meanings.

The complexities of this discursive structure style do not mean that two idea systems (MPR + DIS) initially combine and then disappear without any clue, hiding their features in the final text. It follows that the social practice of legal language employs the peculiarities of MPR and DIS intervention philosophies, forming a cognitive coupling featured primarily by overestimating the need to impose socio-educational measures in almost all cases. Therefore, a type of general Criminal Law for all, based on MPR, with the support of the DIS, prevails over the special Criminal Law of young people. Next, I will deepen the examination of these propositions.

Making decisions without the rigorous examination of the factual information, excluding considerations about the time in which the judgment happened, will possibly establish abstract links to gravity, which may not be related to a contemporary need of the given adolescent. Also, adolescents do not need incarceration to obtain the opportunity to study and become professionally capable of entering the labor market.

In reading the empirical material of my research, I have often identified the justification for imposing penalties as based on the argument that punishment would be compulsory due to the rules approved by the parliament. However, automatic punishment reasoning does not legitimize, by itself, the judging activity of determining social exclusion by suffering. What is more, appeal judges did not normally present any comment regarding the knowingly adverse conditions of Brazilian internment facilities. Consequently, the type of orientation under analysis is closer to Modern Penal Rationality theory than to that of integral protection. This thinking typically develops without observing the mechanisms of reproducing violence caused by the

"*paraphernalia of hostile procedure*" (Mead, 1918) that defines the routine application of Criminal Law, in addition to not identifying those in charge of providing the necessary equipment to the success of socio-educational measures.

I did not find, in any sample, a detailed analysis based on Arts. 100 and 112 of the Statute of the Child and Adolescent (as described in the introduction of this dissertation). That is to say, there was no appreciation of the problem situation as it was guided by legal provisions inspired by adopting the Doctrine of Integral Protection, let alone the observation of the case based on positive values of the system incident to juvenile criminal files.

If legal reasoning does not use discursive structures based on the necessary support provided by the Law, there will never be debate about alternatives to imprisonment. Thus, without a social practice of legal language, I cannot see any real possibility for legally discussing the functionality of the Juvenile Justice System.

As a consequence, the conventional legal reasoning contained in judicial interpretations reveals how some groups of appellate judges naturalize the meaning used in argumentative actions, objectively showing the discursive organizational practice that prevailed. And the punitive sense given to the Juvenile Justice System by the Court of Appeal indicates the intervention style that materializes reflexively in the lives of those who receive the transcendent effects of the Legal System.

After having made my remarks, I believe the case of the adolescent André provides empirical elements for characterizing the observed aspects in the reasoning of the Criminal Judges of the Court of Appeal. The Public Prosecutor's Office charged André and he was convicted, by the First Instance Juvenile judge, to comply with a custodial socio-educational measure for the practice of attempted murder. The quote below clearly shows that the judge with the minority standing discovered the perverse effects of this analogy mechanism with adults. He tried to warn his colleagues of the implications of its use: it sabotages or neutralizes the philosophy of youth legislative program and replaces it by the philosophy of Modern Penal Rationality:

> "Therefore, the abstract severity of the offence as analogous to the crime of attempted murder, along with the lack of an interdisciplinary report waving more severe intervention, is not a suitable ground for delimiting the socio-educational measure of internment. In so doing, one would be viewing the juvenile's conduct as if it had been practiced by an adult, leaving aside the overriding essence outlined by the current Statute of the Child and Adolescent, which is to recover

> any misrepresented behaviour of the youth in conflict with the law." (TJMG, 2010-2016)

It is also possible to see, later in this decision, that the appeal judge clearly realized one of the enormous gaps and cognitive traps of the mentioned text. In that case, the trap consists in not seeing the necessity to enlist the reasons why non-custodial socio-educational measures would not be equally valid for the given youngster. The observer does not see it that way. And he neither observes nor considers eventually negative consequences of internment. In conclusion, there is a double-blind spot of observation with fundamental implications on the quality of the decision.

In order to observe and evaluate possible positive implications of socio-educational measures, rapporteurs need to have access to reports made by experts or social workers who have professional experience in this field of knowledge. But one has to be aware of knowledge boundaries, for they may pose additional problems at the level of a Court of Appeal.

First, appellate judges do not interact with experts as lower court judges do.

Secondly, the lack of direct experience in the area should lead them to be more cautious and less risky about an opposition. However, if the case needs a more thorough examination than the one that was made in the lower court decision, it is crucial to consult or request these reports before one decides. The quality of a court decision does take time.

The other side of the problem is also important: judges also have to take into account that internment is not a solution without side effects: custodial socio-educational measures have their own risks, and that is why the new legislative program uses them within a logic other than the MPR's. The logic in practical decisions often carries with it key relevant shortcomings. The method requires caution in its usage and self-critical awareness, as it may be seen in the following excerpt:

> "One also notes that, in the present procedure, there is nothing to indicate that other socio-educational measures, different than internment, would not reflect regarding the necessary efficacy for the recovery of the adolescent offender." (TJMG, 2010-2016)

Finally, in this decision, the Judge will emphasize the fact that the gap between institutional practices and adult justice habits eventually produces another perverse effect: it redirects the observer's attention. In the case we are studying, it alters the main point: rapporteurs do not focus on DIP philosophy, but on another theory. In this passage, for example, this other theory is Modern Penal Rationality:

> "One cannot lose the focus on the 1990 Statute, which treats the adolescent in conflict with the Law as a person in constant development and, in this condition, offers young offenders a high probability of remodeling their character, nature, thereby facilitating the re-dimension of the treacherous path of crime." (TJMG, 2010-2016)

There is a legal possibility of applying socio-educational measures until the age of twenty-one, in case of grave problematic situations, like attempted murder. But this does not allow the discursive construction of the punitive features found in socio-educational measures, not without creating a problem of lack of logical consistency. So, I did not see intervention philosophies that meant to re-write adolescents' lives, based on positive system values, or lawsuits that would benefit the socialization process of young people, according to the provision in the 1990 Statute. In the case under scrutiny, the socially constructed meaning of sanction equals retribution, owing to the abstract gravity of the juvenile offence.

To empirically reinforce my point, I am going to describe the case of Wesley, an adolescent condemned to comply with a socio-educational measure of internment for up to three years, ascribed to the practice of an infraction analogous to the crime foreseen in Art. 157, §2º, I and II, of the Penal Code (Qualified robbery). But Wesley's lawyer appealed to the Second Degree Court pleading for a less severe sanction than that applied in the Trial Court.

After reading the Court decision, I realized that appellate judges did not make any comment on the evidence, factual information, or on how the ruling by the first-degree Judge framed the conduct in question as robbery-like. They only wrote that, in a case of a juvenile offence "analogous to the crime of qualified robbery," as determined in the Article 157 of the Brazilian Penal Code, due to the involvement of more than one person and the use of gunfire, the custodial socio-educational measure of internment is imperative.

The judges in question affirmed the impossibility of dismissing the socio-educational measure of internment imposed on Wesley, merely by the assumed seriousness of the accusation made. They made a direct link between the sanction and the disposition of the Penal Code, as a consequence of fitting the case within a particular provision, not because of the facts in the dossier. The language used by the rapporteur grounds on the words "necessary" and "sufficient",

precisely the ones provided for in the article of the Brazilian Penal Code[34] to measure the punishment of adults. The rapporteur stated:

> "Thus, when the practice of a juvenile offence is verified, the judge must apply the **necessary** and **sufficient** measure to the reintegration and re-socialization of the adolescent, always in the light of the factual context brought to analysis. It does not suffice to be **a juvenile offence analogous to the grave crime of robbery, qualified** by the use of weapons and by involving more than one person; if a crime is terrorizing the population of large urban centers the personal conditions of the juvenile indicate that **the most serious measure is the only one recommended**." (emphases added). (TJMG, 2010-2016)

According to Pires:

> "Many reformers of juvenile justice, to solve problems observed in this justice (the internment of young people of poor social environment for crimes of trifle or less severe), will seek the "remedy" in the principle of proportionality of adult criminal law (retributivist theory) without examining the problems which this criterion places on the law of adults. Here we have a **blind spot** with dangerous implications from the point of view of an increase in the severity of feathers. Applying juvenile justice a principle that produces severe penalties in adult justice is exactly the equivalent of not learning from mistakes. This principle is a true "Trojan horse." This illusion comes precisely from the fact that if a crime is effectively observed as non-serious, the principle may limit exaggerated interventions. However, it is enough for the observer to believe that the crime is serious for any reason, that the hospitalization solution appears to be the "adequate" measure." (PIRES, 2017b, 137-138)

5.4. Analogy to heinous crimes: the social illusion of gravity.

This qualitative analysis is developed based on the empirical observation of Brazilian legislation and case-law on youth delinquency. I would sustain that another way of reinforcing the analogy procedure occurs when there is an abstract reference to the Brazilian Criminal Law concept of **heinous crimes** in the decision's contents. In these cases, there are semi-automatic practices of imposing tougher educational measures for juvenile offences that would be characterized as heinous crimes, as if adults had committed them. At first, I believe it is relevant to clarify some Brazilian Criminal Law concepts, before explaining my analysis of the database. According to the Brazilian Constitution:

[34] Determining the punishment. Art. 59 - "The judge, considering the culpability, antecedents, social conduct, the personality of the agent, the reasons, the circumstances and consequences of the crime, as well as the behaviour of the victim, will establish, as ***necessary*** and ***sufficient*** for disapproval and prevention of crime."

> "The practice of torture, the illicit traffic of narcotics and related drugs, as well as terrorism, **and crimes defined as heinous crimes shall be considered by law** as non-bailable and not subject to grace or amnesty, and their principals, agents, and those who omit themselves while being able to avoid such crimes shall be held liable". (emphasis added). (BRASIL, Constituição da República de 1988, Art. 5, item XLIII)

The political system elaborated a Constitution containing an order directed to the infra-constitutional legislator. Then the so-called Law of the Heinous Crimes (*Lei dos Crimes Hediondos*) was enacted (Federal Law 8072, from 1990). The exposition of the motives of such Law revealed that parliamentarians considered as mandatory to punish such types of crime more severely, as an immediate result of their legislative appointment as heinous. That reason would characterize a kind of intervention of the political system in the judges' attribution to determine the amount and the type of sanction to be applied, through a careful analysis of the concrete case, after debates between prosecutors and lawyers.

The justification for the project was to curb - by legislative activity - the most harmful criminal activities, which were daily increased in quality and quantity, according to the exposition I read. Among the reasons presented, they explained their intention to convey a punitive message, linked to retributive and deterrence idea systems, as described by Modern Penal Rationality.

To the author who exposed the motives, there was a kind of nightmare in several countries caused by the rampant increase in crime rates. The parliamentarian said that measures should be taken to restrain this vigorously emerging scenario. The impossibility of prescribing penalties to offences classified as heinous would be justified by the permanent interest, nurtured both by the state and society, in the punishment of such crimes. Besides, increasing penalties would, most certainly, be used to discourage eventual offenders. According to the law rapporteur, "the limit of thirty years established by the Penal Code ends up acting as a stimulus for criminals. Therefore, after reaching the limit of 30 years in past convictions, criminals will be indifferent to committing other crimes."[35]

As it may be seen in the international entry site of the Brazilian Supreme Court, according to the Brazilian legal system, qualifying crimes as heinous does not mean that they necessarily result in severe bodily enjoyment or death. Rather, it entails more serious penalties and bars the granting of pardon and sentence reduction of a felon convicted of such crimes[36].

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[35]See http://www2.camara.leg.br/legin/fed/lei/1990/lei-8072-25-julho-1990-372192-exposicaodemotivos-150379-pl.html, last access in 24.05.2017.

[36]See http://www2.stf.jus.br/portalStfInternacional/cms/verConteudo.php?sigla=portalStfJurisprudencia_en-_us&idConteudo=159922 , last access in 24.05.2017.

After clarifying some Brazilian legal concepts, it is now possible to affirm that criminal judges cite the expression “heinous crimes” and such use implies that they avoid careful analysis of the concrete case.

I will use the next two cases as examples of using the term heinous crimes to justify custodial and semi-custodial measures. To explain, I say that I have identified a pattern of elaboration of discursive structures widely used by judges *without any modesty* when it is intended to label a case as quite serious, that is, they claim that it is a juvenile offense analogous to a heinous crime. Lucio's dossier reveals standards commonly established by the court to, based on the concept of proportionality derived from old theories of punishment, determine a severe socio-educational measure for a young person. Thus, raising its "seriousness" to the category of "heinous crime," jurisprudence on juvenile justice addresses some problematic situations, such as "heinous juvenile crimes," a judicial construction not provided for in the juvenile law.

The Public Prosecutor’s Office accused the young man, named (by me as) Lúcio, of gun possession and drug dealing. In the judgment of the Motion for Reconsideration, there was no consensus in determining the socio-educational measure. The Defense Lawyer called for the imposition of a less severe measure, without challenging the evidence in the case, however insinuating against the determination of the maximum penalty for a teenager. Thus, the divergence was limited due to the non-unanimity of the criteria for fixing socio-educational measures for Lúcio.

But the request for the appeal was, indeed, precisely in the sense of making close observation of the peculiar characteristics in the given case. Lawyers believed that the development of an argumentative activity, in a complex enough manner to clarify some points in the process that were initially and generically addressed, could benefit Lúcio. The appreciation of a large number of relevant information, which could help change the way of observation and shift the judgment rules that affected the problematic situation, generated a tendency to qualify the sanction, as a direct consequence of the incidence of the constitutional principle of punishment individualization. However, the decision was headed in the opposite direction to that desired by defense lawyers. Appeal judges considered it sufficient to mention the seriousness of an abstract conduct as well as the adolescent’s involvement with the marginalization process.

Indeed, the 1990 Statute differs from others acts, precisely by requiring more argumentative efforts in developing any judicial writing activity to substantiate juvenile sanctions. This legislation requires the courts - when developing the argumentative process of

showing grounds to justify the juvenile criminal sanction – to observe far more elements of consideration than the judicial circumstances that are routinely examined in Adult Criminal Law cases.

Costa et al. (2011) explain that the psycho-social report that is sent to the judge, regarding the conduct of the adolescent in conflict with the law, can be an instrument to enrich the legal process with factual information and to broaden the view of judiciary actors about the youth's development phase. But these reports contain mainly psycho-pathological assessments, with "obscure definitions" and prognoses about juvenile offences, ignoring that adolescence is a transitory life stage. To the authors, it is not enough to know about infractions. It is necessary to enter the motivations that come from adolescents' life stories, their social-cultural and community reality, as well as the family conflicts that surround them. The evaluation decentralizes the process of the juvenile offence and focuses on the youth and his/her story, rendering visibility to adolescents in their transition phase and inherent complexities. It must be done before the sentence so as to subsidize the guidelines and interventions to be determined by the socio-educational measure as a social reaction. This complicated process ought to have, in fact, socio-educational features, regarding the social reality of each adolescent, aimed at improving his/her level of inclusion into social systems.

Moreover, the constitutional principle of punishment individualization also prescribes many important elements to judges' attention. Digiácomo (2006, p. 219) explains that the adolescent in conflict with the Law has the right to individualization of the socio-educational measure, according to the parameters outlined in the legislation (Article 5, XLVI, of the Federal Constitution and arts.112, §1 and 113, 99 and 100 of Law No. 8,069 / 90). The so-called "principle of individualization of punishment," provided in Art. 5, item XLVI, of the Brazilian Federal Constitution is entirely applicable to the investigation procedure of a juvenile offence committed by adolescents. Digiácomo (*idem*) also highlights that there are many reasons to do so, for, contrarily to what happens in criminal matters, there is no previous correlation between the juvenile offence practiced and the socio-educational measure to be applied, nor is there any strict obligation to apply socio-educational measures. It is essential, therefore, even under penalty of absolute nullity of the judgment, that adolescents who are accused of juvenile offence have their individual situation considered, receiving the measure that is most appropriate to their condition in particular.

So, without observing the particular judgment standards of the juvenile justice program, judges may lead to the non-validation of the new program and, consequently, to the absence of discursive structures that address alternatives to incarceration. Thus, the categorization of a juvenile criminal offence as heinous emerges from the very act of framing the type of crime as heinous. Such reasoning does not necessarily require a thorough examination of the facts of the juvenile conduct in question since the definition of gravity, in an abstract manner, would be a legal imperative that the Court nevertheless accepts in juvenile matters.

Samplings I and II shows that the generic severity of the juvenile offence, coupled with pieces of information regarding lack of schooling and professional training, drug or alcohol use, as well as the absence of family and community ties, are often powerful determinants for sentencing outcomes concerning juvenile offenders. I have noticed discursive structures in which judges express their concerns with the lack of health care system for young people in conflict with the Law, as well as their beliefs, such as they cannot leave them the youth on streets. In many cases, judges stated that they could not close their eyes to the reality of adolescents, let alone abandoning them to their fate.

Therefore, the formal “heinous crime” label, ascribed to juvenile offences described in the indictment, raises logical problems of a not so simple nature. After characterizing juvenile offences as analogous to heinous crimes, I usually notice the paralysis of the rational decision-making process in broadening the examination of factual information to determine the type and duration of juvenile sanction that best fit the case. It seems that declaring a juvenile offence as analogous to a heinous crime seems sufficient to justify any socio-educational measure of deprivation of liberty. Law operators may have departed from the facts before them and from the concrete problematic situation, constructing a gravity unrelated to the limits of conduct, “behaviour and consciousness of the agent”. (PIRES, 2017b, p.15).

As judges use this type of argument they self-immunize from the obligation to carefully scrutinize empirical facts in the dossier under the lenses of the 1990 Statute. Thus, the omission in drawing a distinction between two different rules of sanctioning, with conflicting goals, results in applying old theories of punishment connected to MPR and in corrupting the new juvenile paradigm. So, the imposition of a more meaningful penalty, merely as the direct and immediate result of gravity in theory of the conduct under analysis, is undoubtedly related to retributive theory but does not necessarily exclude deterrence and prison rehabilitation theories.

By introducing, into the discursive structure, a claim that the juvenile offence in question is analogous to a heinous crime, the legal communication made by the content of the court decision requires the seemingly inexorable juvenile sanction. It also establishes imperative requirements of social exclusion to offenders through the imposition of suffering. I am going to expand this argument further in this chapter.

However, the judge who presented the minority decision in Lúcio's case-file expressed his dissatisfaction with the course of the trial, asserting, "It is not possible to impose a socio-educational measure of internment on the young person based solely on the abstract gravity of the offence". (TJMG, 2010-2016) So, as for the isolated position, the single act of setting a socio-educational sanction cannot have a reasoning structure that resembles the determination of an adult Criminal Law penalty, for two reasons: first, because the legal requirements governing the reasoning action of a juvenile verdict are entirely different; second, because the objectives of the two systems collide. Again, I insist on reminding that: "Based on the contention that these youths need supervision which is supposed to come from the family or school amounts to using detention for the purposes of child welfare." (VARNA apud SPROTT, 2015, p. 29). Thus said the Judge whose standing did not prevail:

> "The aim of socio-educational measures, as included in the Statute of the Child and the Adolescent, is the re-education of the juvenile, so as to promote their reintegration into society, not their "**punishment**" for the offence committed. The measures do not have repressive character and **they do not accept an analogy to the system related to punishment**.
> Thus, although both the penalty and the socio-educational measure have some points in common, which are retributive and re-educational, the intensity of these elements is differently distributed among the institutes. While the penalty has a more significant retributive burden, the aim of re-education is preponderant when applied to juvenile offenders." (emphases added). (TJMG, 2010-2016)

I quote part of the decision in which the given judges employed the expression "heinous crime" in order to justify imposing socio-educational measures:

> "If the adolescent is accused of having committed a **juvenile offence analogous to a heinous crime** (drug dealing) and receives only verbal admonition as retaliation for such a serious act (remission/ socio-educational measure of warning), **this benefit represents true impunity for the adolescent**, confirming the insufficiency of the socio-educational measure adopted." (emphases added). (TJMG, 2010-2016)

Kim's case reveals quite similarities with the previous one, serving to corroborate a pattern of reasoning commonly observed in juvenile offences regarding drug dealing. In the dossier under analysis, the judges did not mention the amount of drug seized with the girl, nor where she exercised the illicit sale of drugs, much less where and when the girl was arrested. Again, I have not seen the description of the empirical facts.

Thus, all the observations and criticisms made in Lucio's case are also valid to examine this file, because I have identified a standard agreed upon by the judges to justify juvenile detention decisions. For appellate judges, just mentioning "heinous crime" has sufficient legal effect to impose a semi-custodial measure to Kim. In the case, gravity is elaborated around the sense of the term “heinous crimes”. So I quote two other reasons for deciding, uncovering how the appeal court develops its logic, to avoid unnecessary repetition. The judge-rapporteur states that:

> “It would not make any sense to impose the non-custodial milieu as a form of re-education of the minor who commits **an offence that is treated as a heinous crime**, which, after all, only allows precise execution in closed establishments. **Internment in the hypothesis of trafficking**, **even as a means of** removing the offender from the terrible influence of drug dealers, who have used children and adolescents to reach impunity, stresses the need for **increasing the protection of the child**.” (emphases added). (TJMG, 2010-2016)

In the same document, he affirmed as follows:

> “In the present case, **the infraction committed** by the offender **is serious** because it is **considered analogous to a heinous crime**. As it may be seen from the records on pages 19-20, the youngster is involved in juvenile offences of the same nature, which makes it justifiable to maintain, given the singularities of the concrete case, **the application of the most burdensome measure, that is, internment**. It follows that I believe that the adolescent needs full assistance in his process of re-socialization, with great zeal and proximity by the state educational apparatus.” (emphases added). (TJMG, 2010-2016)

5.5. Qualitative description of dossiers.

I assume that using legal language in conformity with the logic of the 1990 Statute (i.e., protecting society by protecting youths - DIP) shall produce less severe decisions and, on the contrary, the use of punitive or tutelary criteria (that is, protecting society by imposing suffering and social exclusion, even from the youth’s family – MPR + DIS) should result in more severe

sanctions. Moreover, punitive socio-legal semantics observed in the Brazilian Juvenile Justice's apparatus shape both the meaning and the judicial discussion of Juvenile Justice cases, making sense of the socio-educational measures imposed on young offenders.

Nevertheless, I initially presented how I conducted my analysis by covering specific minutiae as research variables, to later extract the sense conveyed by discursive structures of legal discourse. I want to demonstrate that the singular meaning of each decision observes a well-organized, social pattern of elaboration and also relates to how appeal judges previously establish the way to make sense of agreed rules in juvenile sanctioning.

5.5.1. The main *mediums* according to the 1990 Statute

Pires (2015, p. 235-238) presents a conceptual and methodological tool adopted by Systems Theory that seems valuable to guide (and render accuracy) whenever observing a process of adopting ideas: the distinction between medium and form. To Pires, the observed unit - identified exactly by the difference between the object of observation and the remaining whole - allows us to say, even when narrowing our focus, that we see objects along with the milieu in which they are. The search method based on medium/form scheme is useful to explain phenomena such as language and the meaning of the words in a professional use context.

Besides, within the scope of this distinction, vocabulary words, proverbs, etc. function as mediums (vehicles, means) and form refers to selecting and updating propositions with a specific meaning. For example, the word "equality" is a medium and the proposition "all individuals are equal before the law," which means, "the law must be the same for all strata of society," is a form.

In accordance with his explanation, grounded on Systems Theory concepts, Pires (ibidem) clarifies that without a medium, there is no form, and with no form, there is no medium. Hence, I need the medium to build forms, and forms (propositions) to use the medium. Such distinction also has the epistemological advantage of reminding observers about who is observing (whether this observation is good or bad).

Systems Theory thus presents both sides of this distinction, the medium and the form, as taking place in the observer's system and presupposing a particular reference to this system. The distinction is, therefore, internal to the system. It prevents us from assuming that a "sense" is transmitted to us entirely (as if we were physical objects) by another psychic system and that we

are neutral “inboxes”. Medium/form distinction is a unique service to perceiving organization. The theory thus invites researchers to turn their attention to what is going on in the internal face of each system, that is, in the above-mentioned distinctions.

5.5.2. Using mediums to form multi-sense propositions in a single cognitive context

Appellate judges use three mediums (proportionality, early and minimum intervention, and timelessness) in multi-sense propositions aimed at conveying meaning to decisions about young offenders, grounded on the cognitive context of the Appeal Court of Law. I think it is important to understand the combined ideas within a context of application connected to a peculiar meaning. This clarification is valuable to my dissertation, because these words are still foreseen in the Legal System as a whole.

The time lapse spent in trials is an important variable of analysis to my research, once the database reveals how it dramatically affects the achieved result and shapes the meaning of imposed sanctions, as I will demonstrate in this study. Thus, the time elapsed between the occurrence of the juvenile offence and the second-degree decision restrains the possibility of adopting some discursive structures at each trial. In addition, time impacts on defining the nature and incisiveness of the sanction to be selected if a criminal philosophy intervention is necessary to the conduct of the juvenile offender.

As already explained in the section concerning the Doctrine of Integral Protection, the 1990 Statute contains its internal rules of observing problem situations that emerged before judges. Having in mind that, by Law, rational decision-making regarding socio-educational measures should concentrate on pedagogical needs, preferably those aiming at strengthening family and community ties. Children and adolescents are entitled to rights, whose application must focus on their integral and priority protection as the primary and joint responsibility of the three (3) government spheres. By strictly observing the rights of privacy, mandatory information, respect for the juvenile’s opinion, parental responsibility and family prevalence, if early and minimum interventions occur, they must be necessary and appropriate to the peril situation in which the child or adolescent is by the moment the decision is made.

Indeed, the 1990 Statute establishes that intervention by competent authorities must be carried out as soon as the danger situation is known (early intervention). In addition, it must be carried out exclusively by authorities and institutions whose actions are indispensable to the

effective promotion of rights and protection to children and adolescents (minimum intervention). Furthermore, the concepts of proportionality and timeliness are crucial to Juvenile Justice: intervention must be necessary and appropriate to the peril situation in which the child or adolescent is by the moment the decision is made.

Also, according to the 1990 Statute, judges at the First Instance Court have 45 (forty-five) days to file decisions when teenagers are under provisional arrest. Also, appeals related to Juvenile Justice, including those relating to the execution of socio-educational measures, have preference for judgment and do not require a reviewer. Before sending records to the Court of Appeal, judicial authorities shall issue a reasoned order maintaining or reforming the decision within five days. In keeping with the decision, the Registry of the Court of First Instance must refer the case or instrument to the Higher Instance within twenty-four hours, regardless of the applicant's new claim.

If any change happens, the delivery of the records will depend on the express request by the interested party or the Public Prosecutor, within five days, counted from the summoning. The appeal judge-rapporteur shall submit the case to trial within a maximum period of sixty (60) days from its conclusion date, and the Public Prosecutor's Office shall be summoned from the moment of the trial and, if necessary, present orally at the session. The Public Prosecution Service may request procedures to determine liability if it finds that provisions and deadlines described in previous articles are not applied.

It is very difficult to ensure that a second-instance court ruling, issued years after the juvenile offence occurrence, is still able to fit the three mediums (early and minimum intervention, proportionality and timeliness) according to the propositions within the 1990 Statute. Actually, ALL second instance judgments studied in the database were carried out well beyond the period of sixty days provided by the legislation into force. After doing my research and classifying the online database, I could not perceive any systematic organization to allow observance of the norms about setting the timing for adopting decisions at the Appellate Court level. It follows that the distribution of cases to rapporteurs, related to adolescents, does not appear to have any difference from those regarding adults convicted of committing crimes.

Thus, it is a crucial issue to reveal the internal mechanism of the 1990 Statute that contributes to reproducing violence inherently to the obligatory punitiveness of ordinary Criminal Law, found within the discursive structure of each judicial decision. I thought about doing so by

successively analyzing the decisions that uphold DIP, DIS, and then MPR, alone, and/or coupled with DIS.

Again, it must be considered that non-observance of fixed terms by law is a characteristic of all judgments as a standard trait, without exception. So, I throw lights at the blind spot (*language game*) pattern of not paying attention to the time set by law and, to that end, I selected the dossier I considered as the most representative, respecting the saturation principle.

So, I am going to present how the appeal court forms punitive propositions by the applying of the mediums proportionality and timeless in a retributive vein. The following precedent is quite representative of the difficulty raised by the court of appeal, to itself, because it was not organized to decide an appeal within the sixty-day period outlined by law. In late judgments, it is virtually impossible for judges to make internal references to the current needs of the adolescent in question because they just do not have any other pieces of information regarding the present necessities of the youngster. As a consequence, the natural course of time impacts by driving judge's thinking to old theories of punishment, and merely turning old and obsolete any social-work diagnosis made at the time of the first-degree court decision. Then, due to the no-observance of "timeless", by its 1990 Statute sense, it is cut the logical connection of meaning which previously existed and precludes any possibility of applying DIP's rationale. Hence, they will not be able to develop the social practice of a legal discourse capable of respecting the sense provided for by the particular Law. I add that the reasoning ruling each case will eventually be shifted according to how proportionality makes sense of the propositions formed to repress crimes committed by adults.

I am going to present the case of Elias, a young man accused of practicing a juvenile offence similar to robbery, by the time he carried a pocketknife in the company of his younger sister, who, indeed, used a knife to claim the victim’s belongings. I insist: it is clear that there was not physical contact, and the young man was close to the real juvenile offender, as well as just gave support to her, but he did not act. So, when analyzing the case of Elias, the Appeal Court decided to aggravate the penalty of providing community services to semi-custodial incarceration, one and a half year after the occurrence of the problematic situation. And there was no information about Elias’ needs at the time of the second-degree decision. To justify the penalty aggravation, appellate judges stated that the adolescent should not have been condemned "*only*" to provide community services.

The judges decided to aggravate the socio-educational measure of community service imposed by the First Instance Court and expressly stated an absolute lack of confidence in alternatives to incarceration, in addition to showing confidence that Elias should receive exemplary punishment in a retributive vein. It is essential to note how often the Court of Appeal punishes adolescents as an obligation to impose painful and exclusionary penalties. I believe we must assess not only the level of confidence with which some judges impose socio-educational measures to imprisonment but also whether judges of appeal rely on such alternatives. They can be measures such as provision of services, community services, assisted freedom, compulsory attendance to training courses, etc.

In a traditional perspective, medium proportionality connects with the notion that gravest crimes automatically imply harsher punishments, requiring time-fixed criteria over which type of punishment fits the seriousness of the crime. Conversely, a simpler offence would not necessarily require strong counter-reaction from the repressive apparatus, that is, the official response should be tantamount to the harm caused by the crime. Besides, retributive theory requires sanctions that impose suffering by automatic and mandatory judicial punishment, due to the violation of Criminal Law.

It may be possible to identify traditional retribution theory as indifferent to the adverse consequences of imposing severe punishment upon crime convicts. In the section in which I examined the theories of punishment that compound the thought process called Modern Penal Rationality, I argued that retribution theory is indifferent to the evils imposed on detainees. I refer the reader to that part of this dissertation, in which I approached this question with greater intensity.

So, when the decision-making process in the appeal court follows the ideas of retributive theory, even in the Juvenile Justice System, ignoring factual conditions of Brazilian correctional system as a whole, medium proportionality composes a proposition that may be identified as Modern Penal Rationality. I am going to exam this issue later in this section. Therefore, when the retributive idea system ranks first, any other consideration not relating to crime severity would be left out. A system that allows itself to be directed solely by the gravity of the act in no way contributes to a satisfactory set of standards concerning moral values in society (CHRISTIE, 1981, p. 45).

Nonetheless, the meanings of early and minimum intervention, proportionality and timeliness, according to the 1990 Statute, do not have much in common with traditional Criminal

senses. In addition, I believe they should not be reduced to their old senses, let alone allow us to accommodate a purpose that shares similarities with their typical usage in the context applied by Adult Criminal Law. Otherwise, a logical problem could arise that would substantially undermine the comprehension of the current paradigm designed for interventions on juvenile delinquency. If we accept the traditional senses of proportionality and timeliness then the newest meaning will not prevail, avoiding the decision-making process to employ an idea system connected to the Doctrine of Integral Protection.

Sometimes it can be said that punitive sense prevails when considering the punishment is seen as more relevant to the young person than ensuring their rights, with the ultimate goal of protecting society. To further explain the prevalence of MPR, the analysis addresses the effects on the meaning of those decisions directly related to the term between the year of the infraction and the date of the respective final resolution, at the level of the Court of Appeal.

The form of the internal proposition at the Juvenile Justice System can be as follows: instead of punishing relating to the gravity of the criminal infraction, either reducing or increasing it, the guiding Law provides criteria of adjudication to the adoption of a contemporary socio-educational measure for protecting the adolescent. It should take place as soon as possible, within reasonable time for organizing the social reaction by professionals in charge of it.

Moreover, the 1990 Statute explained these fundamental principles and linked them to the youth's needs, once it established that intervention must be necessary and appropriate to the dangerous situation in which the child or teenager is by the time the Court achieves decision. But it is a principle of difficult observance at the level of the Court of Appeal.

Thus, observing proportionality and timeliness – in accordance with the sense of the 1990 Statute, is tough to verify, because their using is not in agreement with the proposition allowing them to emerge. The professional context of Law enforcement does make a clear cleavage between young offenders and adults. I emphasize that imposing socio-educational measures of internment should be viewed as inadequate, since the dissertation does not intend to discuss the fairness of the studied rulings. In fact, this research is meant to emphasize that other judgment rules could and should have been observed. Nevertheless, in most of the analyzed decisions, it may be seen that juvenile sanctions can be more closely connected with the possible severity of the offence committed than the rigorous observation of the case under the guidance of the latest legislative program.

The judicial operation of automatic selecting punitive reasons directly connects judges' thinking with the type of rationality that is not included in the Juvenile Justice philosophy. On the one hand, the 1990 Statute refers to proportionality in order to make sense of the amount of socio-educational intervention needed to help young people get rid of problematic situations, other than merely increasing punishment. Professional activities, driven to achieve a fair socio-educational measure for each case, involve many actors working in the juvenile legal setting. Although socio-educational measures have retributive dimension (because they are institutional social reactions destined to adolescents in conflict with the law), they do not share the same rules of rationality with the system that prescribes penalties for adults. There is no pre-authorized anticipated punishment for a particular type of problematic situation, and the discovery of an adequate socio-educational solution requires entirely different reasoning and fundamentals than those used in imposing sentences on adults and have differentiated rules and principles (see DIGIÁCOMO, 2006, p. 226). On the other hand, I did not notice, in the database, the contemporaneousness of psychosocial accounts with the moment when second-degree decisions occurred. Thus, appellate judges rely on past reports, elaborated when the problematic situation happened, which creates challenges to maintain reasoning's logical coherence. And it is somewhat complicated to consistently accommodate decision time with the Doctrine of Integral Protection because there can always be scope for increasing punishment just by referring to the gravity of the case as a result of a violation of the Criminal Code

Decisions pronounced more than one year after the occurrence of the problem-situation under analysis are not able to discuss the current needs of the young person in conflict with the law, just in the time settled by the legislative program. Nor do they cover the rational properties concerning the peril situations in which the adolescent is if the judicial pronouncement is done in a manner that is absolutely out-of-season. As already stated in chapter four, perhaps the court of appeal is acting more to form principles which shall govern other future cases than by legally analyzing, under the 1990 Statute lenses, the empirical facts of the dossier under examination.

Therefore, to the appeal judges, he deserved a more severe sanction, because of the situation in which he involved himself. I observed a blind spot in the motives of the decision. When comparing to others in the database, the problem situation was not so grave, under the lens of the Doctrine of Integral Protection. The appeal judges affirmed:

> "The adolescent, in possession of a pocketknife, "covered" his companion and his teenage sister, approached the victims, threatened them with a knife and took two

> cell phones and a pair of jeans shorts away from them. (...) **Attention must be paid to the fact that the appellee is currently 19 years old (he committed the infraction on the day before he had reached majority), and this case is not an isolated event in his life. The young adult has a long history of infractions, and there are reports of his involvement in several other similar events** (...) I believe that semi-custodial will be able to achieve the objectives of the Statute of the Child and Adolescent because, with obligatory activities of schooling and professionalization, the offender can concretely have a new life perspective, with closer monitoring by the State." (emphases added). (TJMG, 2010-2016)

The following passage was stated in addition, according to the reasoning by the appellate judges:

> "Experience in the judgment of similar cases reveals that socio-educational measures of providing community services should be directed to cases where idleness is identified as the preponderant factor in the infraction. In these cases, this measure proves to be very useful in the re-socialization process, mainly because through the provision of community services, adolescents become aware of their role in society, assimilating the values of honest work and respect for the patrimony of others with their family support, granting them with new perspectives on life." (2010-2016).

Also, they considered the option of providing community services as unsuitable for the given case and stated that the sanction imposed by the First Instance Court was not sufficient, as follows:

> "As for the objective element of the seriousness of the offence committed by him (armed robbery), **I do not see** how to apply any measure other than that of insertion under semi-custodial. (Emphasis was added to highlight the auto-declared blind-spot)" (TJMG, 2010-2016).

5.6. Analyzing dossiers in which DIP predominated.

In this part of the study, I will make a systemic analysis of the primary rationale I saw in ***dossiers in which DIP predominated***. It would not be possible to fully describe all files and, based on the saturation principle, I decided to examine the selected cases below, identifying them by fictitious names, to present my remarks. The following qualitative analyzes adopt the selection pattern of the dossiers made in the previous chapter. The ideas mobilized by the judges to present the respective "reasons for deciding" were separated and then indicated based on the meaning of the discursive structures repeated in a standardized way in the texts.

I am going to start with the case of Antônio. The description of the facts contained in the selected decision is that, on December 24, 2014, around 01:45, at the address mentioned, the young accused of practicing a juvenile offence, who was already known by a nickname, was seized by military personnel in flagrante delicto. According to charge presented by the Public Prosecutor, the young man had six (6) crack stones for dealing purposes, as well as two (2) kinds of intact 38-caliber ammunition, and four (4) used cases of the same numbering, all without authorization and in disagreement with legal or regulatory determination.

According to the database, during preventive patrolling, military police officers described Antônio's attitude as very suspicious. So, because he was already known for his active involvement in past juvenile offences, the police concluded they should approach him. Police officers found the previously mentioned narcotic substances and ammunition in the pockets of his shorts and, consequently, the first instance judge condemned Antônio to comply with up to three years of internment. To appeal judges, the incriminating evidence was robust, whether by the testimonial evidence or by the quantity or nature of the drug, namely 0.45g (forty-five centigrams) of cocaine, contained in six (6) plastic bags. But the type of the socio-educational measure changed from custodial to non-custodial.

The small amount of drug found in the boy's possession, the ammunition seized and the youngster's reputation before the police served as "reasons for deciding" the arrest of the adolescent, all of them connected to MPR. According to the records, Antonio even complained to the magistrate against the stalking stance of one of the policemen, who participated in his capture, revealing at least a kind of "animosity" between the young man and the law enforcement officer.

In fact, there was no violence, no threat, no characterization of a dangerous trafficker, who the police surprised with a small amount of drugs, objective factors usually mentioned to justify a custodial socio-educational measure. On the contrary, the way in which the social practice of language has occurred is the observable phenomenon which has constructed the idea, for this dossier, of a severe offence tantamount to a problematic situation that deserved, proportionately, more severe repression. But the Trial Court followed the MPR reasoning pattern. It is worth pointing out, I believe that an acquittal or a non-custodial sanction were both possible by the first-degree court.

Nonetheless, as the Judge-Rapporteur stated in interpreting the evidence that the socio-educational measures provided by the 1990 Statute aim at reintegrating young people into society. For a given judge, when choosing socio-educational measures, pedagogical needs should

be taken into account, with preference to strengthen family and community ties. Thus, the choice of socio-educational measures depends on the free conviction of the judge and must be related to the severity of the fact and the psycho-social conditions of the juvenile delinquent. The choice of each measure should include not only the conditions, but also the young person's ability to comply with the sanction, along with the seriousness of the fact. Also, juvenile sanctions have a pedagogical and non-punitive character, exclusively seeking re-education and reintegration in the certainty that, when applied, the judge must analyze, besides the seriousness of the infraction, the social conduct and the personality of the adolescent. Consequently, by carefully investigating all relevant circumstances (severity of the act, offender's history, and social condition), appellate judges did not consider the juvenile as a repeat offender. They decided that the most appropriate socio-educational measure for the case was the provision of community services, together with the freedom of care, and Antonio also had to fulfill the obligation of schooling and professionalization, which could be of great value, thus enabling his reintegration into society.

Antonio's first-degree conviction for serving up to three years of internment for possessing two types of intact ammunition and four deflated cases, plus 0.5 g of cocaine, has been transformed into a non-custodial measure at the second-degree level. This change was possible because the judges in question elaborated discursive structures that did not value the abstract gravity of possessing a minimal quantity of illicit products and refused to label him as a person dangerous to the community, just because he is known to the police.

Furthermore, appeal judges developed discursive structures in line with the 1990 Statute, attempting to link Antonio with positive society vales, such as schooling and professionalization. They considered the main objectives of the Youth Law and such way of developing the social practice of legal language generated a result that fits the purposes of the Doctrine of Integral Protection. I observe discursive structures based on rehabilitation theory acting as a kind of positive institutional response or antidote against the framing of the case in a punitive thinking, in addition to avoiding adverse effects resulting from certain labels imposed on Antonio's personality. The judge-rapporteur stated:

> "It should be noted that socio-educational measures have a pedagogical and non-punitive character, exclusively seeking the re-education and re-socialization of the minor, being sure that the Judge, when applying, must analyze, besides the seriousness of the infraction, social conduct, background and the personality of the adolescent.
>
> In this sense, it is stressed that art. 100, of Law 8.069 / 90, applicable to the situation, according to the provisions of art. 113, states that, when choosing the

> measures, account should be taken to the pedagogical needs, preferring those aimed at strengthening family and community ties. (…)
>
> "The most appropriate socio-educational measure to this case is the provision of service to the community, combined with assisted freedom, because they impose on the youngster the obligation of schooling and professionalization, which can be of great value, providing adequate reintegration into society."

Further, Leandro's case deserves to be presented, since it is one of the few I selected to consider the "medium" proportionality according to the meaning of the 1990 Statute. And I believe it is appropriate to reinforce and actually complement my empirical analyzes of the first case I mentioned.

This case of Leandro, one of the most exciting cases, reveals the results of applying the DIP intervention philosophy. The prosecutor accused teenager Leandro of drug trafficking. But only following the Court's decision does not permit a closer observation of the empirical fact, since I did not perceive a minutiae description of the juvenile offence committed by the juvenile. Nevertheless, the reasons discussed and the way in which the judges of appeals have shaped their reasoning are elucidating to me.

According to the records, Leandro received a conviction for providing community services, and the prosecutor filed an appeal, requesting that the Court aggravate the sanction by semi-custodial. The decision of the majority focused on the needs of the young person, referring to the alternative penalty of providing community services as the most appropriate measure for the integral protection of the adolescent.

Initially, I noted that the rapporteur was not impressed by the harsh accusation, nor did he treat the application of the socio-educational measure as imperative, only because of the allegation of drug trafficking. The decision in question was based on the rule of judgment established in the 1990 Statute. The appellate court did not devise discursive structures based on old theories of punishment, much less on the Irregular Situation Doctrine, thus providing an idea system reflecting a socio-educational measure that seems to be efficiently pedagogical and re-socializing. Moreover, the judges understood the sanction as authorized and not mandatory, emphasizing that the mere identification of punishment would not exempt the examination of the factual situation and the needs of the adolescent. The appraisal of a case, through the elaboration of discursive structures for propositions based on the meaning of the 1990 Statute, contributes not to allow the adoption of a merely retributive purpose for the socio-educational measure. The empirical analysis also addressed, albeit more obliquely, the question of understanding the need of currently characterizing a socio-educational measure by DIP's sense. The rapporteur

elaborated the discursive structure of the majority decision, copying part of the judgment of the Court of First Instance as follows:

> "Regardless of the infraction history of (the juvenile), the case in question does not authorize the application of exceptional semi-custodial or internment measures, which, by depriving the liberty of a young man with a personality in development, should always be used as '**ultima ratio**'" (emphasis added). (TJMG, 2010-2016)
> "It must be taken into consideration that, according to criminal records, the last juvenile offence practiced by (the adolescent) was in 2012. For more than a year, therefore, (the adolescent) does not have any other record at the Juvenile Trial Court, which indicates the feasibility of non-custodial measures.
> Given the nature of the act and the personal conditions of the person, applying a new measure to provide services to the community is considered as adequate and possible for the moment". (TJMG, 2010-2016)

In this case, appeal judges assessed Leandro's present record by the time the trial court judge decided, observing the temporal aspect to frame the intervention according to the youngster's needs - in a given period, not in a broad sense. Thus, the judge-rapporteur continued to deliver his reasons, as follows:

> "The measure will aid the person to become responsible for the act, as well as to move away from criminality, providing him with help in pursuing other paths. It is an intervention with a strong pedagogical and socializing character since it consists in the accomplishment of tasks assigned according to the aptitude of the youth. Showing him the social disapproval that weighs on the illegal act practiced, as well as lending prominence to the importance of being useful to society, will surely be relevant in his training. As is evident from the above passage, selecting a socio-educational measure of community service is duly based on specific elements of the case. The magistrate reported both the personal and social conditions of the adolescent, noting that, for more than a year, he has not had any record for justifying the feasibility of the measure applied. If, on the one hand, the juvenile offence is extremely serious (drug dealing) - which, in itself, does not lead to choosing a more severe socio-educational measure - on the other hand, the adolescent has plausible conditions for healthy reintegration into society. Applying semi-custodial socio-educational measures, without granting the possibility of being re-educated in a more lenient way, certainly proves to be an unnecessarily severe measure." (TJMG, 2010-2016)

5.6.1. Analyzing dossiers in which the DIP ranks as minority standing

In this section, I plan to present my analyzes regarding some dossiers in which the DIP ranks as minority standing. I believe that preparing Sampling II was essential to confirm the results of Sampling I, as well as to demonstrate that the divergence is based much more on

argumentative rhetoric than on the consistent application of specific idea systems to the cases under analysis. My methodological decision flows from observing DIP ranking as majority in very few cases, but some minority decisions should be mentioned in this research. Hence, I believe in describing at least some rationale, in an attempt to pass on my research results. In the minority decisions one may notice the intention to observe cases of juvenile delinquency under the judgment rules created by the most recent legislative program of Juvenile Justice.

I would like to quote the type of divergence I could observe in the appellate motions for reconsideration. Usually, decisions follow the previously explained pattern of presenting rhetorical arguments to change or uphold the judgment of the Trial Court, but **through** the idea system, rather than **by** and **around** the empirical facts. That concerns mainly the way of determining the juvenile criminal sanction, as it will be shown in the following case.

I present the case involving two teenagers, whom I am going to name Robert and Gary. According to the records, the motion for reconsideration court maintained the decision made at the time of the regular appeal, which was filed by the Public Prosecution Service. At the time of the second court decision, the three-judge panel aggravated, by majority vote, the socio-educational measure imposed by the Court of First Instance, which applied community services. The "reasons for deciding" argued are that Gary had committed a juvenile offence analogous to the crime of robbery and analogous to a crime of drug trafficking. Robert, for his part, had committed a juvenile offence analogous to the crime of drug trafficking.

Furthermore, about the adolescent Robert, the decision emphasized that the multi-professional team found that he did not show regret for what he had done, as well as pointed out that another socio-educational measure of assisted freedom was applied to the adolescent examined, but not fulfilled. The judges also emphasized his previous condition as a drug user, who had previously trafficked cocaine before the events and had already been punished for committing an offence analogous to the crime of qualified robbery, by using firearms. The Judge-Rapporteur pointed out that the adolescent lived with his mother, who complained of not having an ascendancy over him.

Concerning Gary, the Judge-Rapporteur noted that, in addition to the severe infractions that have now been imputed to him, he has already been represented by practicing other violations, and three additional measures have been applied, which apparently did not have much effect. Thus, considering that he committed two serious infractions, one of them through violence

and serious threat to the person, with the use of firearms, the socio-educational measure of hospitalization should be applied.

The judge-rapporteur vote, accompanied by three judges, invokes reasons for deciding linked to MPR. Usually, the censorship of the behaviour of young persons who are not the protagonist of their destinies probably may contain reasons more connected to the conventional morality and Adult Criminal Law than to the technical content of Juvenile Justice Law.

But according to the judge who issued the minority vote at the motion for reconsideration, despite the seriousness of the acts performed by offenders, there is no doubt that custodial measures should be applied exceptionally, when they are not feasible or if they fail to implement others. It is noted that other socio-educational measures can replace internment and semi-custodial, besides other forms of ensuring youth's insertion into society, that magistrates could apply as did the pondered judge of the first degree. Regarding internment, the appeal judge who delivered the single vote emphasized its necessity for cases in which not only the nature of the offence but also the offender's psycho-social conditions allow to conclude that, if not removed from the social life for a specified time, the youngster will not be reached by therapeutic and pedagogical measures to the extent of posing risks to society, which does not fit the present case. , as it may be seen in the following passage:

> "The simple allusion to the seriousness of the fact and to the argument that the segregation of the juvenile aimed at his personal security are not enough to motivate the total deprivation of his freedom, even by the very exceptionality of the socio-educational measure, after having characterized the affront to the objectives of the system (...) In fact, given the existence of other available means for the offenders' recovery, I think it is necessary to proceed in a way that aligns with the pedagogical and disciplinary character, as proposed by the Statute of the Child and Adolescent. Consequently, the measures adopted by the magistrate do not come as a "reward" for the acts practiced, nor do they provide stimulus to impunity. Rather, they are the most appropriate ones for the present case, whose appreciation requires more accurate sensibility, all with the aim of avoiding the permanent entry of the young offenders into criminality, for this is not the objective of the 1990 Statute." (TJMG, 2010-2016)

Now I am going to describe the case of the adolescent Paul, accused by the Prosecutor of drug dealing practice. Again, there is no description of the empirical fact in the decision under analysis, as is the standard. The Trial Court imposed a socio-educational measure of insertion in a semi-custodial regime, which was confirmed, by a majority of two votes against one, in the judgment of the regular appeal. The defense then offered the motion for reconsideration, postulating for assisted freedom. Based on the understanding of the minority vote in Paul's case,

the lawyer argued that there was no impediment to the application of the non-custodial sanction, and found it more appropriate to the present situation.

The majority votes, in Paul's case, adopted the understanding that the measure of semi-freedom, although governed by the principle of exceptionality, is applied when necessary to accompany the adolescent in his freedom, with the aim of giving him life in community, maintaining, however, the closest State in its surveillance and guardianship. It is, therefore, an adequate measure to the case, to correct and protect the adolescent, providing a reassessment of their actions and, therefore, their adaptation to the habits and customs traditionally accepted in social life. For appellate judges, in the case of those who are proven the inability of the adolescent to remain free without risk to himself and society. The testimonies and the report together show the growing commitment of the teenager to infractions, especially with drug trafficking. In fact, only a more rigorous socio-educational measure would discourage him from remaining in the wicked world of crime, introducing some values of citizenship necessary for his social reintegration, and for this to be kept closer to the specialized state apparatuses.

Again what I observed in the discursive structures is a kind of language directed to guide hypothetical cases for the future. There is no discernible analysis of the needs of the adolescent Paul. However, the minority decision elaborated an emphasis language on the need to observe the case under the lens of the youth legislative program, specific to the file. The judge criticized the adoption of a language pattern that does not appreciate the devices determined by law to ensure the possibility of re-socialization of the accused. Moreover, the presented his view of deciding the issue and firmly reproved the observation of the problematic situation with general "reasons for deciding." The minority vote viewed the issue under the following lenses:

> “(...) The applied socio-educational measure should be slowed down, from the regime of semi-custodial to that of assisted freedom. I understand, therefore, that there are no obstacles to the application of assisted freedom, which is consistent with a less severe measure, and I understand that its use is imperative. The recovery of individuals who are in an age of forming their character guides the 1990 Statute, so that the more beneficial the socio-educational measure imposed, the higher the likelihood of re-socialization. In this sense, I believe that assisted freedom, which aims to provide the adolescent with accompaniment, help, and guidance, is the measure that best fits the peculiarities brought by the present case. Above all, because I understand that full and uninterrupted living in the family sphere will contribute more efficiently to the measure success”. (TJMG, 2010-2016)

To conclude this section, I affirm that reading the decisions does not allow us to state whether the examined cases were severe enough to justify incarceration, reinforcing the known hypothesis of the selectivity of Brazilian criminal justice. Moreover, the lack of close observation of empirical facts did not contribute to the quality of the judicial decision, let alone unleashed the cognitive knot that links Juvenile Justice to tutelary idea systems that share a resemblance with old theories of punishment.

5.7. Analyzing dossiers in which DIS predominated

I would like to sustain, at first, how Jonathan's case reveals traces of tutelary thinking still present in the memory of juvenile justice operators. And the mentioned rationale is quite similar to essential features of the theory of social disapproval, which integrates the Systemic Theory of Modern Penal Rationality. Indeed, both of them have links with *moral reasons* employed as "taken for granted" and "common juridical sense" to justify custodial punishment.

In the problematic situation we are going to discuss, the public prosecutor accused Jonathan of attempted theft, an unlawful act of shallow gravity. Reading the decision allows understanding that Jonathan tried to take, by breaking a gate, objects that were inside a residential property, to obtain money to buy drugs. However, Jonathan's attempt did not consummate by circumstances beyond his control, and the Trial Court Judge imposed a severe socio-educational measure of internment up to three years, especially when one considers there were no violence, physical contact, neither serious threat against no one.

In disagreement, the Defense Lawyer appealed and pleaded for an acquittal, or for substituting the socio-educational measure of internment for more lenient ones, namely, assisted freedom and community services. However, appeal judges decided to maintain the custodial measure, asserting that imposing the most serious measure was necessary, due to Jonathan's reiteration in prior juvenile offences.

Indeed, the young man had already received two previous judicial orders to fulfill the socio-educational measure of assisted freedom for committing the same infraction, analogous to theft. But in the dossier was not clear why he did not accomplished successfully the measures. And to the appeal judges, this would suffice to characterize the juvenile infraction reiteration, allowing a quasi-automatic conclusion that non-custodial socio-educational measures would not fulfill the goals of prevention and recovery of adolescents in conflict with the law.

Actually, this decision reveals how a type of tutelary thought somehow still produces signs of its presence in the memory of the socio-educational law operators. The minimal gravity of the criminal claiming against Jonathan consisted in a mere attempt to commit a crime of exclusively patrimonial content, without any violence and serious threat. Therefore, even the imposition of a socio-educational measure could be questioned legally, and the custodial sanction applied was indeed severe. Otherwise, it seems that the primary motivation for imposing the custodial measure of internment was not linked to the practice of attempted theft, exclusively. According to the grounds set out by the first-degree judge, given the content of the various letters issued by the Guardianship Council and the Reference Center for Social Assistance, it was essential to look at Jonathan's vulnerability state.

In fact, even if more interventions were needed to preserve Jonathan's physical integrity, it is difficult to accept how the arrest of a young man, by itself, will contribute to protecting his health because this is not according to the new paradigm of the juvenile justice law program. In fact, ensuring health is the primary function of the public welfare system and not of the socio-educational system. They have different identities that should not reduce to each other, under the penalty of, deliberately, not allowing the emergence of the 1990 Statute logic, and genuinely creating epistemological obstacles to avoid achieving the new goals determined by law. Mainly within the known conditions of current degradation of youth reinsertion centers in Brazil.

However, the Trial Court Judge stressed that, given Jonathan's past involvement in the drug underworld, he received toxicological treatment inside hospitals. Jonathan discontinued treatment and fled to reside with his father, who has no parental responsibility, resulting in drug abuse and drug theft practices, thus describing the need to effect toxicological treatment in the closed mode. The judge-rapporteur made his point by transcribing a statement from Jonathan's mother, affirming that the offender did not attend school. Also, he had the habit of wandering the streets, did not continue the toxicological treatment, and had issues with authority figures, besides committing thefts.

What is more, the court's appeal decision presented a standardized rationale and discussed generalities of the juvenile justice program in Brazil. For instance, the Judge-Rapporteur stated that he knew that the socio-educational measures provided for in the Statute of the Child and Adolescent do not mean punishing in the sense of serving a sentence, as in the case of a conviction, for a crime perpetrated by an offender. He further stated that the purpose of the law is to reintegrate the minor into a safe social living, away from the conditions that led to or led to the

practice of unlawful conduct. So, the decision has a kind of connection with the theory of social disapproval and also reveals moral reasons for not recognizing in the young person the ability to be the protagonist of his destiny.

The revoked Brazilian 1979 Code of Minors, with deep roots in the Illinois Juvenile Court, contained an old guiding rationale which established that States had the obligation to intervene in children's lives when their parents provided inadequate care or supervision. It means that the *parens patriae* philosophy suggested that courts had the authorization to 'help' or 'protect' (in the old meaning) the youth who committed crimes, trifle crimes, or who apparently needed help.

And I sustain the judges did not base themselves only in the theory of social disapproval, because the same grounds will never be admitted in an Adult Criminal Appeal Court of Law. In other words, the young man received a criminal order more severe than an adult criminal could suffer in the present days in Brazil. That is, in the above case, instead of the current "offender/non-offender" code, which is presently in force, the ancient "regular-situation/non-irregular-situation" code would be ultra-active back then. Thus, in the given case, the way of observing the adolescent's conduct reveals the use of the lens of the Doctrine of Irregular Situation as rules of sanctioning. The case serves as an example but, in many others, I noticed traces of the Doctrine of Irregular Situation, which considered as appropriate the social exclusion of a young man accused of having violated Criminal Law, besides being deprived of good moral guidance, parental control, and community or family ties. Finally, the judge-rapporteur thus justified the application of custodial measure as a result of Jonathan's conduct:

> "It is worth mentioning that **internment** is necessary in those cases in which the nature of the infraction and the type of **psycho-social conditions** of the adolescent imply that, without temporary withdrawal from the social life to which he is accustomed, he will not be reached by any therapeutic or pedagogical measure and may also pose a risk to other people in the community. In this case, internment is justified for the adolescent because, even though he had already received other socio-educational measures, he failed to comply with them and committed new offences, demonstrating with his conduct that the previously imposed measures were insufficient to recover and reintegrate him into society." (emphases added) (TJMG, 2010-2016)

In another case, the prosecutor accused the teenager Wellington of carrying 01 (one) plastic bag containing cocaine, a narcotic substance that causes dependence, without authorization or in disagreement with legal or regulatory determination. In accordance with the decision text, Wellington was approached by a police officer, who seized the young offender with

the drug, as well as the amount of R$ 152.00 and a cell phone. The sentence imposed on the adolescent a custodial sanction of internment for up to three years.

But the defense lawyer appealed, sustaining that Wellington was carrying the drug for his use. Appeal judges understood that the young man's attitude at the time of arrest, the location of the approach, the quantity and distribution of seized money (in small bills and in many pockets), as well as his previous convictions (there were previous judicial proceedings to comply with socio-educational measures for the same offence for three times) somehow "authorized" the conclusion that this was not a simple use, but destined for dealing. Also, appeal judges copied part of the Trial Court Judge's ruling, stating that the fact that a small amount of drug was found in the hands of the defendant does not exempt him of accountability for the practice of drug dealing, although police officers have not seen any act of dealing on the part of the adolescent.

Appeal judges stated that non-custodial socio-educational measures (assisted freedom and treatment) were insufficient, grounding on the alleged situation of risk and lack of commitment to recovery. Thus, they found it necessary to apply a measure that was capable of protecting him and, at the same time, removing him from crime. Hence internment seemed to be the most appropriate socio-educational measure for the specific case.

The judge-rapporteur elaborated a text with a discursive structure aimed at not portraying the young offender as the protagonist of his fate. This means he discursively constituted the teenager as a person who insists on the practice of juvenile offences and so on ought to be excluded from social contact, through the adoption of a more severe socio-educational measure of internment. In fact, the application of a non-custodial measure could be possible in the present case. However, there is nothing in the text of the juvenile justice program to authorize the deprivation of liberty of the young man, but just the punitive lens used to judge him. To the appeal judges, the juvenile who repeatedly commits serious infractions, equivalent to the crimes of increased robbery, theft and possession of narcotic substances, can be incarcerated, and there is no illegal embarrassment in their internment. Thus, the severity of the behaviour is linked much more to the labels produced judicially than to the strict legal text. In fact, theft and possession of drugs are not juvenile offences severe enough to justify juvenile internment.

To clarify the reasoning, the case of Jean and Rose is crucial to reveal that the social construction of tutelary labels can be more harmful than the application of adult criminal law. The two youngsters were accused of committing an offence analogous to the crime of attempted theft, after having purloined 14 bottles of shampoo.

The minority vote was for recognizing the principle of insignificance, given the atypical material conduct and the fact that the goods had relatively insignificant value, thus proving the offence insignificant. According to the judge who wrote the minority decision, there is no obstacle to the recognition of the insignificance principle in the case of juvenile delinquents, in harmony with the jurisprudence of superior courts in Brazil. The insignificance principle has as vectors the minimum offensiveness of the agent's conduct and the absence of social danger of the action. Combining both factors may reduce the level of behaviour disapproval and state the irrelevancy of the legal damage provoked.

The judicial majority opinion was based on the fact that the low value of the stolen objects does not authorize the application of the insignificance principle. And the decree of acquittal, since the socio-educational measures of the Statute of the Child and the Adolescent are eminently preventive and educational (i.e., aimed at raising awareness and warning minors about the reprobation of their misconduct, so as to avoid new infractions), deprived of punitive purposes.

The reasoning seems to be right for supporters of the juvenile criminal law theory, who argue that the abuse of judicial discretion would justify the adoption of old theories of punishment in the motivation of decisions on juvenile delinquency. In this case, and in this case only, MPR ideas were more beneficial, by allowing the acquittal of young people, who will never receive conviction in an Adult Criminal Court, according to the insignificance principle.

However, the term "risk situation", also present in the military service portfolio mentioned earlier in this dissertation, was part of the revoked 1979 Code of Minors. The current legislation does not use these words to characterize a child who needs protection from the welfare apparatus. As already mentioned, a child in a **peril situation** should have the support of the State health care system. Hence, the judge-rapporteur based his decision on the need to incarcerate a young person in need of care, failing to present grounds to restrict the freedom of the youth according to the observation rules provided by the 1990 Statute. There was no discussion regarding the practice of a juvenile offence characterized by violence or serious threat.

Taking into consideration the lack of welfare policies, which affects the reality of many young Brazilians, including the poor young people who do not face problems with the repressive apparatus, it is hard to understand how prison rehabilitation could indeed contribute to the socializing process. So, in the ruling examined I can see inconsistency with the Doctrine of Integral Protection, which assimilates the logic of non-custodial rehabilitation, whenever possible, by applying internment in cases to which there is another proper measure. Therefore,

based on the lack of welfare services, incarceration is often considered as a solution, but the real problem may be the lack of health-care support. The punishment of status-types infractions or the imposition of penalties because of failures to fulfill bailing conditions are inconsistent with the 1990 Statute and more related to old theories of punishment and tutelary approach.

I affirm that, in Brazil, there is particular difficulty in perceiving the characterization of a socio-educational measure as a juvenile punishment. Incarceration may be seen as the only penalty considered serious enough in response to the practice of a criminal attitude. But sometimes the sanction ordered by the Trial Court Judge resembles the acting of the health apparatus, somehow clouding the message communicated by the judicial decision, which may not be assimilated as an appropriate response to the adolescent's conduct.

Some objective factors will be relevant to describe the understanding of the social-historical contexts taken into account while I was writing this dissertation. In the case of a country that has been a slave-owning society, with its many social inequalities and a majority of needy people, many cases are often brought to the attention of the Judiciary because there is a feeling regarding "no other available solution".

I have often seen, in my previous professional experience at the Juvenile Trial Court in Belo Horizonte, that adolescents in conflict with the law may be denied the access to school enrollment, medical consultation, hospital care and other available services before a court decision that guarantees them. This impression reveals that, sometimes, Legal System operations to provide access to public systems must go through the organized system of decision-making represented by the courts, as well as the fact that the Judiciary acts, even if it is not necessary, to solve controversial problems.

Vilas Bôas Filho (2009) analyzed the Legal System according to the Brazilian reality, in the light of Niklas Luhmann's Systems Theory. He underscored the specificity of two constituent aspects in the modernization process of Brazilian society, which imposed an overload on the Legal System. To the above author, it is important to emphasize the absence of an autonomous moral sphere comparable to that which developed in the center or the "old periphery" (axial societies), which makes paternalistic characteristics, personal domination and violence as a form of social mediation. Also, the recent slavery past, which, together with the existence of a portion of free and poor men moving along the edges of the productive system, generates a large contingent of urban and rural marginals that are now excluded from the various functional systems that compound modern Brazilian society.

Thus, Brazil faces severe problems regarding social inequalities and the lack of a “welfare state filter”, which does not reduce the selection of the majority of cases by the formal state apparatus. There is a feeling that the submission of numerous dossiers to First Instance Court judges, far more than the amount that they could accurately judge, includes in the judicial debate some relevant issues that should and could be resolved in a consensual manner, before submitting them to appellate judges.

Abuse of the discretionary power conferred to appeal judges when grounding their decisions, implying that young individuals are in risk situation due to their conducts, connects to the revoked 1979 Code of Minors and has no relation to the 1990 Statute. The old Doctrine of Irregular Situation selected an alleged social pathology to justify deprivation of liberty to adolescents in conflict with the Law. The judicial definition according to which a young person is in a risk situation emerged from the practice of juvenile offences, allied to the moralistic verification of factors such as: family circumstances; schooling; vocational training, and the neighborhood in which the youth lived. The former reasoning intentionally intended to mitigate the formal demand for evidence “beyond a reasonable doubt” of a juvenile offence, thus legitimizing the intervention of repressive apparatus, instead of maximizing welfare state. The central figure in this former model of intervention and criminal control over children and adolescents in irregular situation is the “father-judge.” This institutional role could socially represent a logical entity in charge of intervening in the lives of young offenders, with the possibility of not considering the lack of criminal evidence against young persons and not valuing procedural safeguards of formal legal defense. The “father-judge” has expanded the amalgamation of abandoned childhood and delinquent youth; of deviations, offences, and delinquency, as legitimized in subsequent legislation, judicial processes, and correctional institutions practices (RIZZINI apud MARINHO, 2012, p. 200).

Thus, decisions to incarcerate adolescents in risk situations, who would, in fact, need the support of public health-care equipment, link the judge’s reasoning to the old systems of punishment, such as prison rehabilitation and social disapproval theories, both assimilated in the obsolete 1979 Code of Minors, also described by the Systemic Theory of Modern Criminal Rationality. This reasoning happens when appeal judges interpret the young person’s life history as a status-type violation, thus making room for a socio-educational measure of internment, exacerbating non-violent but serious conduct, with the aim of imposing sanctions stricter than those currently authorized by the 1990 Statute.

5.8. Analyzing dossiers in which MPR predominated coupled with DIS.

Low gravity situations are not immune from being analyzed through the lens of the MPR ideas system. Among many options, I decided to present the case of Gabriel. The sample refers to a charge of cannabis possession for self-use that resulted in the conviction to provide community services. The event occurred on 09/24/2009, and the second-degree trial took place on 05/09/2012, revealing, once more, that priority, proportionality, and timeless were not observed through the lens of the 1990 Statute, as already affirmed.

The Public Prosecutor accused Gabriel of wearing a coat in which small remnants of a greenish substance, similar to cannabis, were found. The Public Lawyer asked for the acquittal of the young man, understanding the shreds of evidence concerning the problematic situation as insufficient to impose a condemnatory decree, as well as sustaining the application of the insignificance principle, given the small amount seized. The judge-rapporteur then adopted the sense that compulsory conviction arises from the seizure of a minimum amount of drugs, for the use of illicit psychoactive substances deserves serious social disapproval, not recognizing non-custodial sanctions as efficient to handle the case at stake. This is possibly due to moralistic reasons because currently, it is juridically impossible to arrest anyone in Brazil concerning drug use. The judge-rapporteur justified not imposing deprivation of liberty merely because there was no appeal from the Public Prosecutor, thus revealing how they sharply criticized the problematic situation under analysis. Therefore, one can infer that the socio-educational measure of internment would automatically result from the risk situation in which the young person lives because he does not have family support in the first place.

Consequently, it may be inferred that the above reasoning is inconsistent with the 1990 Statute, because within this decision there is no discursive structure or argumentative action on adolescent protection by means of inclusion in public services and social systems. The adopted thinking covers elements of Modern Penal Rationality coupled with those of Doctrine of Irregular Situation, in the retributive sense of alienating the youths from the social milieu, even from their families, as a necessary consequence of using drugs. So, the confidence that many justice professionals have in punishing exclusively by restricting liberty seems unbeatable. But it is not easy to passively accept it without any empirical evidence of successful application, mainly in today's Brazil, where recidivism rates skyrocket, imprisonment conditions are known as horrible and utterly colonized by gangs acting behind bars.

The hypothesis is that appellate judges also ground their decisions in a manner somehow oriented by the Modern Penal Rationality logic, with the support of Art. 112, §1º, of the 1990 Statute. It states that the measure to be applied to the adolescent shall take into account his or her ability to comply with it, the circumstances, and the seriousness of the infraction. I already read some decisions in which judges have sustained the need of a sanction connected to the *parens patriae* philosophy of intervention when interpreting part of the new legislative program which deals with the enforcement of the fundamental rights of children and adolescents:

> Art. 98. Measures to protect children and adolescents are applicable whenever the rights recognized in this Law are threatened or violated:
> I - by action or omission of the company or the State;
> II - by lack, omission or abuse by parents or guardian;
> III - because of their conduct. (BRASIL, Lei n. 8.069/90, Art. 98, itens I, II, III).

I believe the law has to be interpreted consistently for protecting adolescents in a broad sense, neither subjecting them to tutelary reasoning nor reinforcing prison rehabilitation. As a rule, the 1990 Statute does not assimilate forming punitive and repressive propositions with its mediums. But the judge-rapporteur asserted that:

> "Regarding the application of the insignificance principle, it is virtually inapplicable to the crime provided in the Article 28 of Federal Law 11.343 / 06 (drug possession), insofar as the legal objectivity protected by the norm is the social danger that the conduct represents. So it is characterized as a crime of abstract peril, in which the injury is presumed, provided the **totally irrelevant amount of drug** seized or its general circumstances (...) (There is) a particular condition for authorizing the measure imposed as a means of attempting to achieve the restoration of the appellant's psychological and social integrity. **A situation of high social risk** leads to the degradation of values for the juvenile is involved with drugs, indicating the **necessity** of the socio-educational measure of **internment**, once the **family lost control** of the child's living conditions. The young man also confessed that his involvement in criminality is a way to sustain his addiction to narcotics. Regardless of defense considerations, changing the provision of community services by the time of events would be the same as to **close the eyes to reality**, sending the adolescent in conflict with the Law back to his destination, and State protection is expected to prevent reiteration, as in the case in appreciation. The mere fact of the **consecutive juvenile offences**, as reported by the Certificate of Past Involvement, **would justify** or impose an even more effective action from the State, providing sufficient reason to the **adoption of the segregation measure**. However, since it is the exclusive remedy of the defense, the provision of community services must be maintained, in accordance with the prohibition of **reformatio in pejus**." (emphases added) (TJMG, 2010-2016)

In this part of the dissertation, I return to the case of Elias, mentioned earlier in this chapter. To remember, on April 18, 2009, one day before turning eighteen, Elias was carrying a pocketknife in the company of his sister, who was the person who approached the victim and demanded, using threats, the handing over of belongings. It is essential to keep in mind that Elias' conviction to render community services occurred on February 24, 2010.

In the second-degree trial, held on 10/7/2010, that is, a year and a half after the facts, the appellate court decided to aggravate the socio-educational measure for semi-custody. The discursive structures of the judicial decision fully align with the Doctrine of the Irregular Situation. Such logic recommends the withdrawal of the youth from an adverse milieu to the formation of his character, in detriment of the home he lives in. One cannot disregard the lousy reputation ascribed by judges to the adolescent's family. In addition, the decision censors the young person who declares to be a drug addict and a school dropout.

The sequence of reasoning shows us that the social practice of legal language has resolved to combine DIS with MPR, mainly when it comes to mentioning the abstract gravity of the conduct and the need for rehabilitation in a semi-custodial facility. However, it remains unclear why the adolescent **must be arrested** in order to attend regular classes, or to develop his professional skills, except by adopting the old theories of punishment. Mainly because, as repeatedly stated in this study, the places where adolescents are subjected to deprivation of liberty in Brazil, although in part, have not been recognized for their excellence in rehabilitation, schooling or professionalization of incarcerated youths. I interpret this decision as the use of old mediums of MPR and DIS theories in an attempt to form propositions with pedagogical and rehabilitative meaning. In fact, it amounts to using the ideas of the 1990 Statute to construct old, tutelary, repressive, and punitive schemes, as one decides to examine the meaning produced in the cognitive context strictly. According to the appellate judge's observation standards, when adolescents do not abstain from delinquency and persist in their deviant behaviour, the continued attempt to commit juvenile offences implies the existence of precarious conditions for coexistence in family and society. Along this line of thinking, the socio-educational measure of internment should function as temporary protection that favors the safety of young offenders.

I have not seen many appeal judges observing previous formal convictions. Most appellate judges merely interpret the existence of other (unfinished) procedures of the juvenile before the Juvenile Justice of Criminal Law as a label that works against the adolescent to socially construct a complicated young person, regarding compliance with the Law. The way through which

appellate judges censor juvenile behaviour has connections to the revoked 1979 Code of Minors, in the section that establishes that deviant youth with misconduct or moral hazard may be subject to incarceration, depending on the judge's view. Appeal judges used the most fundamental principles relating to the Doctrine of Irregular Situation, as follows:

> "In fact, the **family** itself seems to have **abandoned the young man** to his own destiny, which is confirmed by the fact that he admitted to having lived on the streets for six months because of conflicts with his relatives. This fact becomes even more severe when one realizes that the young man also admits that he has interrupted **his studies**, in addition to **using cocaine** since the age of 13. Before this alarming scenario, it is worth asking: how useful is the provision of community services, if it is already known in advance that, during the period in which he is complying with the measure, he will **not have family support**, provided that he is inserted in a **milieu** that **encourages him to commit a crime**? Now, waiting for him to commit new serious crimes (bearing in mind that he has reached majority age) to apply the well-known state "response" can definitively mean **losing him to crime world**, rather than applying an effective socio-educational measure while there still is time left for so doing." (emphases added) (TJMG, 2010-2016)

> "Thus, **combining** the **subjective aspects unfavorable** to the objective element of the **seriousness of the infraction** committed by him (armed robbery), I do not see how to apply a measure other than of insertion in a semi-custodial regime (...).
> I believe that semi-custodial will be able to **achieve the objectives of the Statute of the Child and Adolescent**, because, with compulsory activities of schooling and professionalization, the offender can concretely have a new life perspective, with closer monitoring by the State." (emphases added). (TJMG, 2010-2016)

5.9. Analyzing dossiers in which MPR predominated alone.

Hypothetically speaking, there seems to be no possibility of generically and automatically transferring traditional theories of punishment to the activity of adjudicating cases about juveniles in conflict with the Law. Moreover, although the key code to observe illicit features concerning juvenile behaviour is given by the interpretation on statutes that contain Criminal Law dispositions, the statutorily programmed responses to be institutionally triggered when young offenders behave against the Criminal Law – so as to fulfill the norms that allow the intervention of the official apparatus – have nothing in common with the institutional reactions that should be adopted when a crime is committed. And for me, the most surprising result is the strong confidence built by the appeal judges to use the rationale of adult criminal law to resolve cases

involving juvenile delinquency. I could not realize even traces of hesitation, revealing the redundancy of MPR over the judge's thinking.

First, I have checked the standard construction of the discursive text structures based on the so-called analogy procedure, which invests juvenile offences (unfamiliar/unknown idea system) with socio-legal features analogous to crimes (familiar/'long-known' idea system). I highlight that this way of representing socially juvenile delinquency endows the process of determining the judicially sanctioning rule with the same logic of adult criminal law. The analyzed data show us that systemic representation of gravity generically occurs by attaching the cases to specific numbers of the Brazilian Criminal Code. Thus, abstract gravity also transfers itself automatically to illegal juvenile conduct. The situation then ranks as a severe crime, albeit through the standard type provided by law, not through detailed examination of empirical facts.

Another important fact is that the argument of *garantismo* loses ground, as pointed out by Carvalho and Pires, mentioned earlier in this dissertation. Therefore, when judges say that the first type of punishment does not work, this thought cognitively opens the path to raising the level of the newly imposed penalty, however without a different reason to objectively justify such hardening in strict connection to empirical facts.

However, as I checked the minority decision on the early mentioned case of Leandro, who received a conviction to provide community services, mentioned in the presented dossiers in which DIP predominated, I readily identified the MPR idea system, as it may be seen in the following passage:

> "In the present case, it was not enough to be a juvenile offence **analogous** to the **very serious crime of drug dealing**, which by its very nature would already **authorize** the imposition of a **socio-educational measure of internment** - consonant with the provisions of art. 122, I, of Law No. 8,069 / 90. I see records showing previous procedures that extend up to the present time, not to mention that the juvenile offender has already been applied the measure of providing community services, which demonstrates the insufficiency of a non-custodial measure. (emphases added). (TJMG, 2010-2016)

The court's ruling immediately and almost automatically sets decision grounds that relate to the theories of deterrence and social disapproval. Given the explicit statement, the Court of Appeal sends a strong message to all adolescents, according to which they must understand that punishment will be exemplary for those who intend to commit crimes. This rationale shows us that a juvenile committed an offence and the Court considered him as dangerous like an adult,

which reveals that the judges did decide not to observe neither to construct, argumentatively, the legal difference established by Law between the sanctioning rule of juveniles and adults. The minority vote also asserted that:

> "The adolescent must understand that **he cannot go out there attacking society**, committing crimes without anything being done by the minority. Thus, I sustain that the reiteration of the **adolescent demands a more austere intervention** in the educational process of the youth, who, in my opinion, does not meet the conditions to comply with a non-custodial measure. It should also be noted that the practice of serious offences by adolescents has been increasing, which is often due to the **feeling of impunity that prevails among them**. That creates uneasiness in the social atmosphere, a reason that **imposes the application of more severe socio-educational measures**, so as to ensure public order and the **effective reintegration** of these marginalized individuals in society (emphases added) (TJMG, 2010-2016)

I now present the case of Alex, accused by the Public Prosecutor of attempted murder practice. The appellate judge did not describe the empirical facts at trial, following the pattern set for the decisions studied. Hence, just given the seriousness of events, coupled with the failure of earlier non-custodial measures, he affirmed the impossibility to discuss replacing the applied socio-educational measure. The judge-rapporteur limited himself to consider the internment as necessary to the re-education of the given adolescent. The first part emphasizes that juvenile delinquency characterized by violence automatically results in incarcerating. Thus, according to the cited decision, an attempted murder-like juvenile offence should never result merely in a non-custodial sanction. It seems evident that the logic adopted by the judges is linked to the theory of retribution, described by the Systemic Theory of Modern Penal Rationality. As for the second part of the reasoning, it reveals that increasing the degree of a judicial order has the effect of generating an idea system that is aligned with the MPR. The judge-rapporteur summarized the reasons used in the decision process as follows:

> "(...) Besides being a juvenile offence **analogous** to the **grave crime** of attempted qualified murder, I find that other non-custodial socio-educational measures - assisted freedom and the protective measure of compulsory school enrollment and attendance - were **not sufficient for the re-education** of the offender, who persisted to commit crimes." (emphases added) (TJMG, 2010-2016)

To reinforce, I quote the sampling of Alan, a case of qualified robbery committed by an adolescent having no prior criminal record. The panel of criminal judges of the Court of Appeal referred to the need for in-depth examination of the dossier but also stated that juvenile offences

that share similarities with serious crimes require incisive disapproval. It follows that the judges decided to keep Alan in a police station, after his conviction, once there was no available room in internment facilities.

In the case of Alan, the judges valued the inherent gravity of the juvenile offence practiced by him as having superior grounds. That is, the rationale that guides the most severe punishment for hypothetically more serious crimes is the one that prevailed. However, this implies not observing the lenses of judgment provided for in the 1990 Statute. For that reason, the robbery-like juvenile offence must receive imprisonment sanctions by the state apparatus, given its seriousness, even though the conditions of the deprivation of liberty clearly do not fit the law program for young people. Between two possible options, therefore, a non-custodial socio-educational measure or keeping the adolescent in a place that, admittedly, does not meet the requirements defined by law, the appellate judges chose the latter. It may be seen that MPR idea systems (obligation to punish, combined with prison rehabilitation, along with retributive theories) governed the mindset of appeal judges. They chose not to construct an alternative to the sanctioning rule, rather than elaborating the reasoning that would establish a socio-educational measure other than integral custody.

The lack of adequate conditions in specially designated juvenile facilities did not undermine the judge's conviction on the maintenance of punitive meaning. Once they select retributive motives to justify mandatory punishment over juvenile delinquency, in an undifferentiated sense, they will likely block all remaining legal criteria to allow the enforcement of peculiar Juvenile Justice rules. Thus, when appellate judges do not differentiate juvenile law from the Brazilian Penal Code and, conversely, support the MPR idea system, it can be seen that the DIP becomes invalidated. So they are socially building idea systems that link to the former (familiar/'long-known' idea system), not the latter (unfamiliar/unknown idea system). However, the law expressly prohibits keeping adolescents inside police stations for more than five days. But institutional practices sometimes fail to observe this deadline, which confirmed the systemic punitive characteristic spread throughout the state of Minas Gerais, also revealing an institutional problem in applying the latest Law.

The decision under scrutiny broadly reflected the conventional mindset routinely adopted to deal with juvenile delinquency in the state of Minas Gerais and, therefore, the lack of alternative solutions to the culture of inexorable deprivation of liberty. In practice, old ideas

systems described by Modern Penal Rationality have been overvalued, thus naturalizing the triumph of retributive thinking, as a punishment with criminal features over young people.

What is more, the allegation that the youngster could attend external activities to comply with the philosophy of intervention established by the 1990 Statute did not come with an objective analysis, indicating the existence of concrete and prior structure in the Police Department to do so, and I do not observe Law enforcement officers as possessing recognizable skills for doing pedagogic interventions.

Problem situations that merit judicial interventions equate juvenile behaviours to crimes (limited to the conduct), by legislative decisions that impose severe legal restrictions on the institutional reaction from the State repressive apparatus. But the cases mentioned in this section address the Systemic Theory of the Modern Penal Rationality regarding sanctioning rules, and it is not the same as to say that there is generalized disorganization in the social practice of legal language.

In fact, decisions showed a well-organized discourse, albeit designed to fit, analogously, the sense of Adult Criminal law. Besides, the "analogy principle", as it has been identified in the studied cases, reinforces the notion that appeal judges often choose old, familiar, 'old-known' idea systems over new, unfamiliar, unknown ones.

Observers do not reveal a clear-cut distance to observe the case under the specific judgment rule regarding Juvenile Justice. So, after the understanding of the case as a Criminal Law violation, I did not see a kind of "step forward" to bettering observations, because I could not realize the specific rules of sanctioning of the Juvenile Justice in the discursive structure of the highlighted decisions.

Consequently, the intensity of judicial results (sanctioning rules) may be said to be less related to the gravity of empirical facts (the actually practiced juvenile offence) and more linked to forms, semantics, and ideas that are constantly mobilized and constructed so as to produce selected and previously standardized meanings. Some criminal appeal judges found that old goals could still be accomplished by new means. So they (re) acted against the radical change in the philosophy of intervention by linking Modern Penal Rationality and the Doctrine of Irregular Situation to the discursive structures of their decisions. And the decision-making style reveals, due to my functionalist socio-legal analysis, a deliberate judicial resistance against the change of the institutional social reaction defined by the parliament. This type of legal thinking prevents the

evolution of the identity of the sanctioning rules established by the 1990 Statute by not "drawing a clear distinction" between adult Criminal law from juvenile justice discursive structures.

To ground the decision, they ruled as follows:

> "One must take into account the **seriousness of the infraction**, a factor that deserves to be vigorously reprimanded, even before the adolescent's primary condition, now appellant. (...) In the case of committing **severe acts**, **the segregation of the adolescent is necessary** to establish a **correct pedagogical approach** recognizing the limits that are **imposed on him** by his **coexistence with society**." (emphases added). (TJMG, 2010-2016)

Additionally, the appeal judges provided the following solution to the argument that there were no suitable places for young people in internment institutions:

> "Finally, it should be pointed out that the absence of vacancies, in the State of Minas Gerais, at an establishment proper to the fulfillment of the socio-educational measure of semi-custodial, is notorious. Rather, this fact **does not authorize** the judge to **place the youth in a non-custodial regime**, provided that the **juvenile offence** is considered to be of **serious nature**, under penalty of **absolute disregard** by the Judiciary to meet the **purposes of re-socialization** recommended in the 1990 Statute. (emphases added). (TJMG, 2010-2016)

5.10. Chapter summary.

To conclude, in Chapter 5, I have presented a qualitative analysis of the data obtained to understand, describe and criticize the decision-making process of appellate judges on juvenile delinquency cases and the construction of a particular meaning of jurisprudence in these cases. The chapter begins by describing how socio-legal semantics in delinquency cases are constituted by alignment to judgments in Adult Criminal Law. Also, I discussed some "common legal sense" and routine practices observable in the context of the courtroom that facilitate the adherence of Appeal Judges to the general meaning provided by old theories of Criminal Law.

My findings show that a form of judgment equivalent to adult criminal law is the standard-setting for deciding juvenile delinquency cases. I also discussed the emergence of the so-called analogy procedure, which magistrates employ expressly to treat juvenile cases in a manner equivalent to those under adult criminal law. However, this procedure means that juvenile offenders are not seen as young individuals needing rehabilitation but as criminals who need to be neutralized or punished with affliction through incarceration, as suggested by the MPR idea systems. The statement highlights the need for a more comprehensive and safeguarding approach

towards handling juvenile delinquency cases. Additionally, it highlights that problematic situations are not adequately appreciated under the guidance of legal provisions provided for the Doctrine of Integral Protection.

Upon analyzing the cases, we have noticed that judges tend to resort to internment due to the supposed severity of the offense described in the accusation. This connection between the sanction and the disposition of the Penal Code is established using terms such as "necessary" and "sufficient," precisely the same employed in Adult Criminal Law.

In this Chapter we saw that the application of custodial measures for juveniles is often based on the same criteria as that of adult offenders. For instance, the jurisprudence studied refers to “heinous crime” to automatically justify the imposition of a custodial measure. This approach fails to consider the unique circumstances and considerations provided for in Juvenile Justice legislation, resulting in a lack of individualization in the imposition of sanctions.

We learned also that the Court of Appeal faces challenges in complying with the legislation that mandates a maximum of sixty days for the judgment of appeals. This is due to a lack of a structured system and insufficient resources dedicated to Juvenile Justice compared to those related to Adult Criminal Law. The current situation also makes it challenging to address the specific needs of teenagers in late judgments, as outlined in the DIP.

The data reveals that traces of tutelary thinking remain in the memories of juvenile justice operators. This line of thinking resembles the essential features of the theory of social disapproval, which is a part of the idea system of Modern Penal Rationality. Both theories rely on moral reasoning, often taken for granted as a justification for custodial punishment. It is crucial to reiterate that the idea systems of MPR exist in perfect harmony with the tutelary reasoning of DIS. This, in turn, strengthens the argument that the primary antinomy of MPR is with DIP. Therefore, to allow the identity evolution of the juvenile justice rules of sanctioning, Juvenile Justice should not adopt the same approach as Adult Criminal Law.

Conclusions

I can present my conclusions by following the same style I have developed this dissertation, i.e., by interweaving empirical data with a descriptive theory about the Juvenile Justice System - the approach herein used to observe, understand, and, finally, discuss my research problem. I guess I can describe a “cognizable” product of my reflections and not a mere “intelligible” text. Also, I believe I have obtained the necessary clarifications to help me answer the central question of this research. I indicate the contemporary primacy of “punitive” socio-legal semantics and idea systems of “old philosophies of Criminal Law” and how judges’ decisions mobilize them to sanctioning criminal cases involving young people. I enlist the conclusions reached as follows.

The impact of the Court of Appeal's social organization on the meaning of the case-law is intuitive. The samples studied show that the Court of Appeals was organized to evaluate cases of juvenile and adult delinquency without distinction. I could not observe, among the analyzed samples, any previous institutional organization of the legal discourse to differentiate files of juvenile delinquency from those of Ordinary Criminal Law. There is no clear distinction between the subsystems of criminal law (adult or adolescent). This lack of specialization favors a porosity leading to the prevalence of a "punitive" meaning, not allowing the emergence of reasoning submitted to the philosophy of intervention by the Juvenile Justice System.

In addition, my readings from the research samples reveal the reasoning style adopted and the way in which appellate judges organized the legal argument to make sense of the propositions formulated by them. I noticed the use of logic based on the prestige of penitentiary rehabilitation and social segregation of young people in conflict with the law, which includes separating juvenile delinquents even from their families, so as to achieve a type of recovery that may be considered more efficient.

Thus, I begin my conclusions by saying that maintaining internal mechanisms for the functioning of Juvenile Criminal Justice operations linked to theories of punishment that constitute the idea system called Modern Penal Rationality means and corroborates with the current epistemological obstacle implementing the Brazilian 1990 Statute. According to my empirical research, this first conclusion confirms the central thesis of the Canadian Chair in Legal Traditions and Penal Rationality.

I add that the judicial decision of not creating specialized cognitive justice to deal with adolescents can also be interpreted as the option to maintain the influence of old punishment theories. The judges decided not to get to know the new paradigm and to follow the ancient goals prescribed by the Systemic Theory of Modern Penal Rationality. Thus, their decision revealed a lack of confidence in the 1990 Statute rules of adjudication.

Besides, the studies developed by the Department of Sociology of the Federal University of Minas Gerais are corroborated as well, in my opinion. The way law enforcement agencies use legal language to routinely frame the issue of “adolescents in conflict with the law” exercises substantial dominion over the ultimate sanctioning meaning of juvenile sanctions. It follows that the study of the usual approach Law enforcement agency should play in an argumentative chain of reasoning is crucial whether an autocratic style should shift an intervention philosophy framed by the Restorative Justice movement.

The social practice of legal "juvenile imprisonment" language among various state institutions, charged with dealing with juvenile delinquency, not only does not contribute to avoiding the constitution of repressive meaning but also does not help to the emergence of the new paradigm provided by the 1990 Statute. So, studying the discursive structures of jurisprudence reveals that the punitive approach matters in determining the socio-educational measures. Appeal judges did not bother to maintain precise distance from a given repressive system and to establish diversionary means to deal with youth delinquency.

However, to become vigorous, the Doctrine of Integral Protection also requires massive investments in social services focused on the needs of young people. At least in selecting professionals to write reports made to give judges the content of the social work necessary to discursively change the identity of the sanctioning rules, by permitting their inclusion in the social systems that already exist in Brazil, instead of including them in prison. Moreover, the successful implementation of sophisticated and internationally accepted reasoning depends on the inter-agency work of various professionals, such as police officers, teachers, educators, social workers, psychologists, prosecutors, public lawyers, juvenile judges, etc.

As a consequence, I strongly disagree with the "juridical common sense" reasoning, including the question of "young offenders" only in the claim of "lack of public policy" or an "unresolved problem," mainly because arresting them, as a rule, is not the solution provided by law. Such a reductionist argument does not draw attention to the need to efficiently integrate the discursive structures of judicial decisions into the new legal paradigm instituted by the 1990

Statute, which will probably help to effectively construct types and qualities of interventions made in adolescents' lives. The existence or the mere absence of public policies cannot be a condition for the possibility of describing, argumentatively, problematic situations and the consequent intervention to be carried out in the life of the young people. The way to comply with collective agreements and institutional decisions on juvenile crime can also be a problem that requires action by the political system. But this does not immunize judges from their jurisdictional duty, let alone exempt them from making decisions by criteria specifically designed to govern the Juvenile Justice System..

I could not notice appellate judges' assessments of why social and educational measures that do not deprive of liberty would not result in the removal of crimes by adolescents. There were also some comments on how the joint responsibility of families, the community and the three government spheres could benefit adolescents. Moreover, I did not observe how the current and real conditions of internment centers would contribute to the social reintegration of the youth and the fulfillment of the purposes ordained by the Doctrine of Integral Protection.

Another important conclusion is that the legislative amendment is not sufficient, by itself, to have an impact on the judges' willingness to act argumentatively in the way the legislator thought. So, perhaps it is necessary to develop an action to favor the widespread of socio-educational law that is, at least in theory, capable of impacting the judges' animus to validate change and efficiently alter the discursive structure of decisions. In this way, one could focus on shifting the old theories of punishment for the new paradigm represented by the 1990 Statute.

The implementation of a legal communication system guided by the Doctrine of Integral Protection requires discursive structures conforming to the most recent legislative program, regardless of their severity or degree of intervention. Even when freedom restriction is practiced, by imposing the socio-educational measure of internment, this sanction ought to obey the idea system that influenced the 1990 Statute, enshrined in the 1988 Constitution and the 1989 Convention on the Rights of the Child.

The analysis of the obtained data supports the conclusion that appellate judges have not observed the 1990 Statute, as amended in 2009, in the way intended by its legislator. Empirical investigation reveals that the discursive structure of the language used to give a sense of socio-educational sanctions carries either the same meaning of the old theories of Adult Criminal Law or that linked to the so-called tutelary justice of childhood and youth. Some Criminal appeal judges continue to observe Juvenile Criminal Justice through the clouding lens of ancient

Criminal Law judgment mechanisms, or by “Tutelary Justice”, despite the fact that both are not characterized by looking for malleable decisions to meet desirable justice in each case according to the 1990 Statute. When judges grant the prevalence of punitive thinking and do not ensure the discursive structure under the aegis of the most recent legislative program, the Doctrine of Integral Protection does not appear legally validated by Legal System’s ordinary operations. Consequently, it will be difficult to observe the desired rehabilitation effects.

Furthermore, I have not seen enough evidence that appeal judges are familiarized with the peculiar dispositions of the 1990 Statute, and it may be said that traditional ideas influence the reproduction of repressive discursive structures attached to the rationale used by the Judge of Appeals, and then preclude the usage of socio-educational Law (Juvenile Criminal Law) in the decision-making process.

For example, affirming that a young person will be rehabilitated and subjected to pedagogical intervention, guided by non-custodial rehabilitation theories and restorative justice practices, within a police station that most resembles a warehouse of “excluded people”, (*sic*), reveals the contradiction between a so-called “pedagogical goal” and its concrete employment.

It is interesting to note that, during the present study, I observed how judges indicated the behaviours they consider legal or illegal, separating one from the other by operating the Legal System code and having as parameter the procedures provided for in Brazilian Criminal Statutes. Initially, judges analyze the conducts of juveniles, and their subsequent actions during the decision-making process consist in observing whether the requirements established by Law exist, so that they are equivalent to crime, in case juveniles were over eighteen years old at the moment of practicing the behaviour under critical analysis.

Furthermore, after the first judicial action, understood as an initial evaluation of the Legal System code incidence, the kind of social reaction deemed adequate by appellate judges is decided. The tension point may be more evident in this phase of the discursive structure, because, to the best of my empirical data analysis, Adult Criminal Law theories have grounded the indications of social reactions to be imposed on young offenders.

Indeed, the research findings reveal that the legal program designed to function in order to trigger a judicially orderly intervention, promoting actions towards out of prison rehabilitation, whenever possible, is being used to develop a social reaction on the basis of the meanings established by the oldest theories of punishment, such as retribution, deterrence, denunciation, and rehabilitation by incarcerating. Again, the decisions show that appellate judges receive the

information synthesized by the Trial Court sentence, which was pronounced as a logical corollary of the evidence brought to the proceedings, with manifestations by other actors, such as prosecutors, public defenders and social workers. However, in addition to not receiving the information provided in art. 100 of the Child and Adolescent Statute in most cases, appeal judges fail to guide their logical reasoning by implementing the legal consequence provided in the adjudicatory conditional program that should function in the case of juvenile delinquency. I believe that judges do not make the cleavage between the behaviour labelled as criminal and the meaning of the social reaction to being affected, regarding juvenile offenders' dossiers.

Moreover, my research findings allow me to say that the dominant meaning I observed follows a systematic pattern among the analyzed decisions. It does not stem either from alleged misinterpretations of Statutes or from divergences in the juridical position of appeal judges, which is inherent in the professional environment of decision-making organization. On the contrary, I argue that the social practice of legal language in the Court of Appeal defines differentiated formatting stages that continuously update a complex rational decision-making process, which is institutionally directed for framing juvenile criminal sanctions, generically, in a sense quite like the punishment of adult criminals.

Thus, decision-making activity is constituted of distinct phases, socially and successively organized, aiming at the mobilization of legal knowledge onto discursive structures that communicate senses tied to old theories of punishment. Furthermore, the empirical material obtained also reveals the progressive trajectory of the decision-making activity that opts not to validate the International Human Rights Law rationale, once the distinction between crime and juvenile offence is not necessarily observed throughout the process, regarding the social reaction ordained. So, I found the origins of a lack of consistency problem regarding the logical application of the Law.

Such a way of institutionally dealing with juvenile delinquency reflects the generalization of meanings accepted by institutions as good "common legal sense", and "judicial practices", conventionally adopted to employ values that are not yet well clarified by jurists and Law sociologists. This type of thinking, together with the mobilization of idea systems identified with old theories of punishment, provides the non-acceptance of a Juvenile Justice System guided by the Restorative Justice philosophy. Rather, it has been based upon offenders' social exclusion, through the imposition of suffering, even when dealing with juveniles' offences.

The “combined” formatting of decisions by the Court of Appeals shall not create an institutional identity for implementing the Juvenile Justice System. Discursive structure practices do not foster the creation of stable internal references within Legal System operations, which should recognize the logic of the 1990 Statute as intended to govern complex situations of joint responsibility, having as focus the field of juvenile delinquency. Thus, it helps to corrupt idea systems that should work or influence the dysfunctional application of Juvenile Criminal Law, aggravated by the lack of adopting specialized rationality by appeal judges while elaborating discursive structures of legal language.

The way in which peculiar juridical language is structured causes functional corruption of the most recent legislative program, in the sense described by the Systemic Theory of Modern Penal Rationality. The absence of legal operations distinguishing between Juvenile Justice System and Adult Criminal Law amounts to ignore differences between subsystems and does not contribute to stabilize normative expectations. Currently, both legislative programs assimilate punitive meanings, but they have the possibility of producing opposing social reactions, provided the typical discursive structures are observed. So, having as basis the way of writing the studied decisions, I only see “rationality gaps”. The lack of accurate explanation reveals the colonization exerted by old theories of punishment on the decision-making process, thus reducing the manner of seeing juvenile delinquency. That does not allow rigorous scrutiny of the given case nor contributes to the individualization of punishment, under the terms prescribed by the 1990 Statute. Other criteria for consideration would be substantial for the court’s decision to observe positive system values. Thus, the failure to establish a prestigious identity for the Juvenile Justice System during argumentative activity does not contribute to immunize the Court’s decisions against the punitive or tutelary rationality already existing in the professional environment of appeal judges.

It is important for the Criminal Law System to elaborate and/or adopts, for its own operations, a new theory of intervention and criminal sanction, which is not merely a mixture, or a patchwork of the preceding theories. This dissertation is “deduced” from the preceding one or formulated from what was immediately observed empirically, but it is not itself immediately falsifiable. Rather, it indicates a “task to be accomplished” or a “path that needs to be opened and constructed” so that a “reconstruction of the right to punish” (Foucault) can be updated. Since it is a dissertation aimed at reconstruction, it cannot be falsified in the present. However, even if it is not immediately falsifiable, it may be falsifiable in the future or by the course of events.

Restorative Justice, then, for the conclusion of this dissertation, could be understood more broadly as an official intervention philosophy in juvenile delinquency cases, to help to change the identity of the sanctioning rules and to turn them to discursive structures more according to reasons for deciding established in the 1990 Statute. Grounded on the need to carry out social rehabilitation of juvenile offenders, as well as institutionally oriented to reduce their degree of isolation, that type of institutional reaction can increase youngsters' capacity to interact within society successfully. To Walgrave (2004, p. 575) offending, and particularly serious offending, must meet with public reaction if dominion is to be restored, and such response may include coercion. In his view, these coercive interventions should be primarily imposed for restoration, rather than for making offenders suffer.

Such social practice of legal language can be governed and measured when we observe efforts by the family, society, and the three government spheres, in order to recognize young offenders under the enjoyment of their human and fundamental rights, with the ultimate goal of increasing social protection by reducing violence. This type of intervention would even admit the restriction of adolescents' freedom if the need to do so as *ultima ratio* had been objectively proven. However, conditions would be indispensably concrete instead of mere formalizations of those adolescents' rights, recognizing the primary purpose of ensuring common life in a society of peaceful features, guided by the ability to include different individuals.

There are affinities between the above-mentioned intervention philosophy and the non-custodial rehabilitation theory of young offenders, which should enjoy primacy, whenever possible, when there are no reasons to discredit it. Additionally, I do not see any reason to affirm that discursive structures of the language adopted in the elaboration of second instance judicial decisions could not accommodate the logic of a "maximalist" Restorative Justice. Such social practice of legal language, as we saw in previous chapters, could result in the elaboration of a Legal System guided by a non-punitive intervention philosophy, gradually reducing the influence of the idea systems that integrate Modern Penal Rationality. Thus, the evolution of juvenile criminal law may have to undergo some change in recognizing the need to modify the ways in which judges make their decisions.

In the case of adolescents, the argumentative structure of legal discourse would have to refer to the Juvenile Criminal Justice program, according to the Brazilian Legal System. However, this is not the logical framework perceived in the judgments under consideration, which reflect the current interpretation of the Law by the Court of Appeal. It may be seen in the

database that old theories of adult criminal law, aimed at promoting social exclusion of those suspected of being criminals, preponderate in incarceration sentences, burdened with suffering, grounded on the argumentative structure for judicially communicating juvenile criminal sanctions.

Idea selection operations made by judges and their applied distinctions indicate discursive structures that will command predominant thoughts, in addition to propagating punitive rationality, transcending the judicial scene. Moreover, the punitive way judges use language makes a peculiar sense that corrupts the rehabilitation purpose intended by legislators, focusing on abstract society protection by socially excluding adolescents rather than investing in the assurance of their fundamental rights.

Further, I do not want to ignore the socioeconomic inequalities that characterize Brazil and the high level of criminality in force and, finally, the Irregular Situation Doctrine's existence in the memory of many law professionals. A prior and generic "popular-sense" considers public policies to enforce the Child's Rights as ineffectively lenient, and probably influences Criminal Appeal Judges' argumentative activity. The database does not allow me to affirm that appeal judges have had any biased disposition against the Juvenile Justice System's philosophy. But that does not mean that I am blaming current political conditions, but recognizing that *context matters* when analyzing the outcomes resulting from the applicable law. Perhaps in an environment more conducive to the United Nations Children's Integral Protection Doctrine, which was less attached to criminal or tutelary generic reasoning, an argumentative activity could be different.

The sense of the legal language employed in documents consists of empirical data for identifying the sense made for the problem situation. In this way, legal discourse portrays, in a written form, the juridical knowledge that confirms the general meaning ascribed to the subject, as well as demonstrates how it drives judges' rationale, during the argumentative activity of writing their sentences. That, in fact, reflects both the non-acceptance of the newer legislation and the legal significance that it intends to convey, having the Legal System perform conventional operations based on the premise that "old ends may be achieved by new means".

Moreover, we may begin to think about a contemporary criminal rationality to replace the Modern Penal one. It will be relevant to change juvenile justice sanctions beyond "juvenile" versus "adult" punishments and develop interventions consistently with the juvenile law program, focusing on empirically investigating the individualized sense of punishment. Thus, one hypothesis would be to redesign the breadth of the juvenile justice sanction concept, gradually

abandoning traditional punishment definitions. In addition, one can investigate whether Restorative Justice and its sense of sanction could contribute as a critique of Modern Penal Rationality.

A coherent self-reference to the Juvenile Justice Law appears when the decision-making process executes the validity of the normative that best suits each case submitted to judges. Otherwise, the prevalence of the current Juvenile Criminal Law program is barely perceptible when court decisions neglect the specially edited legislative commands to govern juvenile delinquency.

The Juvenile Criminal Justice subsystem is a legal alternative to reduce the adverse effects of prisons and labels caused by old Adult Criminal Law theories, which were indifferent to the social inclusion of offenders and the current conditions of Brazilian prisons. If Modern Penal Rationality has acted as an obstacle to the full implementation of the 1990 Statute, and if we can predict a new thinking on Criminal Law, it may be possible to make new practices. From then on, new distinctions, descriptions and foundations will be put into practice to stabilize legal reasoning. Thus, we can transpose Juvenile Criminal Law based on adult rehabilitation theory, not the other way around. It might be interesting to say that the certainty of punishment is important to avoid extreme abuses and punishment, but this could not be enough to correctly create a statement that contributes to the construction of a legal utopia in criminal matters, mainly in relation to juvenile delinquency. (Pires, 2005).

Here I want to truly adopt Walgrave's (2004, p.585-586) position. According to him, if restorative justice became predominant, would there be any fundamental reason for maintaining a separate juvenile justice system? After all, restorative justice focuses on the harm and suffering to be repaired, not on offenders' treatment or punishment. Thus, does it make logical sense to retain separate criminal justice models for both adults and minors? Victims do not seem to mind whether they have been burglarized or beaten up by a sixteen-year-old boy or a by twenty-one-year-old young adult. The harm must be repaired, and the offender must contribute to the reparation. The "reasonableness" may be different in degree, but not intrinsically different. Accepting a separate justice system for juveniles, apart from adults', is never a self-evident option. If intrinsic qualities of a given category of offenders justify the maintenance of a separate system, there are no fundamental reasons not to invent other systems for the elderly, for females compared with males, or for immigrants compared with natives. Such categories of people also show some systematic differences in life experiences and prospects, in their interpretation needs

and deeds. Like adults, children are entitled to legal safeguards and, therefore, need a system that focuses on the offence or its consequences. Conversely, adults' criminality is an expression of specific life circumstances, and adults should also be treated with respect, in a way that is as little destructive as possible of their future life chances. Guilt and culpability are not linked to a specific age threshold but develop gradually. Age is only one indicator of differences and often not the decisive one. Keeping a separate juvenile justice system may be a provisional strategic option for the present, because it will prevent youthful offenders from being subjected to the harsher punitive measures of adult criminal justice, and because the public generally favors restorative experiments for juveniles rather than for adults. That is why I reject the current proposals to abolish juvenile justice (as in Feld 1993). But if restorative justice became predominant, this strategic argument would disappear. Both juvenile and adult offenders would have to contribute to reparation and would be treated respectfully, respecting, as much as possible, their dominion as well (Walgrave, 2004, p.585-586).

Thus, racial and social segregation, coupled with suffering imposition, rather than guaranteeing access to public services, denotes racism and the evil face of applying Modern Penal Rationality theories in a country characterized by enormous problems of social inequality. In Brazil, it is common knowledge that the majority of the prison population is poor, black and mulatto, revealing an excess of representation among people who are subject to freedom restriction as social reaction to the practice of conducts defined as crimes.

Again, the development of a way to observe juvenile delinquency differently from that conventionally prescribed by the Systemic Theory of Modern Penal Rationality has inspired the argumentative activity of this dissertation. Thus, International Human Rights Law and, especially, the Convention on the Rights of the Child, provide judgment rules already assimilated in Brazilian Law. In fact, the new decision-making process may not yet be widely used to bridge interpretative gaps regarding the logical coherence of the Juvenile Justice System. The rehabilitation logic underlying the 1990 Statute may not yet be fully accepted because of "an argumentative controversy" with the ultra-activity of intervention philosophies from old theories of punishment, showing the difficulty of institutionally taking a sub-system of Criminal Law Juvenile as inclusive.

Thus, the social construction of a less punitive and cognitively more occupied sense of discursive structures, in favor of Human Rights, may depend on a qualified change in the way of perceiving delinquency in youth. But attempting to reduce lenses only to criminal or tutelary

spheres oversimplifies and also obliterates understanding. I contend it allows an observation grounded only on behavior rules and disregards institutionalized punishment rules, revealing an enormous “blind spot” in its discursive omission, not yet perceived by most Legal System operations I have read about.

The complexity of the rule of sanction may not be solved in a coherent way, for the benefit of protecting society, by not observing all its logical elements. Inconsistencies resulting from non-realization of a complex social language practice will make it difficult to build a legal rehabilitation system and will not have enough sophistication to prevent the prevalence of the types of punishment mainly characterized by primitive retributive features.

The possibility of a Legal System based on non-prison rehabilitation, or on the intervention philosophy called Restorative Justice, requires elaborating complex discursive structures, sufficient to support the transcendent effects of stabilized normative expectations. The absence of judicial activity to individualize sanctions would contribute to further diminishing popular confidence in the legitimacy of the Judiciary, fostering accusations of undue interference by the Judiciary Power towards the development of public policies for augmenting incarceration rates, with clear orientation grounded on “criminal populism”.

It is true that judicial activities that enforce the principle of sanction individualization can never disregard the behaviors indicated by Criminal Law to be socially disapproved. Such conclusion assumes that the limits of official reaction must be given by Law and effectively followed by judges in the social practice of legal discourse. But this has not been empirically proved as enough to raise the level of society protection.

It is, therefore, important to continuously reduce “paraphernalia of hostile procedures” (Mead, 1918) to a minimum, creating a trend for its future elimination or its slightest possible occurrence. This requires refining the social rehabilitation thinking in Legal System operations, thus bringing current conditions of Brazilian social inequality closer to future ideals of inclusion in the Social Systems. It may contribute to creating an environment that is conducive to respect for the dignity of all and guaranteeing the prevalence of intellect over brute force, which reinforces social exclusion by making use of coercive legal language.

In Shecaira’s words, if the end of Criminal Law as we know it could be a dream in the future, in the current moment of Brazilian society it is certainly a nightmare. However, my hope does not relate to my total lack of trust in institutionalizing the violence of social exclusion. So, to shift the rationale, I believe in the fundamental rights granted by the Constitution, in the primary

values of society understood as communication, and in the force of the Law (Bourdieu). For this reason, I position myself among those who think that problematic situations involving young people can be often solved by endorsing a rational self-referential Legal System, which does not accept Criminal Law and its general operations as panacea. But it runs the risk of being defined as contingently incomplete and requires partnerships to complement the indispensable social environment and produce the transcendent effects of the Law System.

Therefore, the reasoning described by Modern Penal Rationality may not be enough to solve many logical problems arising from the application of ordinary Criminal Law within the framework of Brazilian Juvenile Justice. There is a perceived need to qualify its conventional thinking. It may be necessary to have stubborn curiosity and pursue continuous epistemological sophistication if we are to contribute to improving Legal System performance and increasing the satisfaction of the jurisdictional ones. Future research on the impact of changing discursive structures of legal language would lead us to a better response.

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Annex 1 (model)

RESEARCH TECHNICAL DATA SHEET

File number:

FIRST PART

Process number:

Main articles concerning:

Summary of main accusations:

Severity () high () average () minimum ( ) undetermined

Sanction applied:

Co-authorship punishment () yes () no ( ) undetermined

Unanimous decision ( ) yes ( ) no

Psychosocial report mentioned () yes () no

Explicit factors related to sexual orientation or race influenced: () yes () no

SECOND PART

The problem situation falls within the concept of crime: () yes () no ( ) undetermined

If not, doctrine of irregular situation () yes () no

THIRD PART

Rationale observed in applying the rules of sanctioning

Modern Penalty Rationale: () yes () no

Dissuasion () yes () no Blended in the core zone () yes () no

Retribution () yes () no

Denunciation () yes () no

Rehabilitation in prison () yes () no

Doctrine of Irregular Situation: () yes () no

If yes, supplement:

Did the teen receive intervention? ( ) Yes ( ) No

Or sanction? ( ) Yes ( ) No

Parent or guardian omission () yes () no

If yes

a) deprived of conditions essential to their subsistence () yes () no

b) health () yes () no

c) mandatory instruction () yes () no

Manifest impossibility of parents or guardian to provide () yes () no

If yes

a) essential conditions for their subsistence () yes () no

b) health () yes () no

c) mandatory instruction () yes () no

Victim of ill-treatment or immoderate punishment imposed by parents / guardian () yes () no

Deprived of representation or legal assistance, due to lack of parents / guardians () yes () no

In moral danger due to () yes () no

If so

a) to be, in a habitual way, in an environment contrary to the good manners () yes () no

b) exploitation in contravention of good morals () yes () no

With misconduct due to non-adaptation () yes () no

If yes, supplement

a) familiar () yes () no

b) Community () yes () no

Doctrine of Integral Protection: () yes () no

If yes, supplement

It is possible to affirm that the following principles were observed in fixing the sanction:

Pedagogical needs () yes () no

Family and community ties () yes () no

Protection of rights () yes () no

Primary and joint responsibility of the public authority () yes () no

Priority of the interests of adolescents () yes () no

Respect for privacy () yes () no

Early intervention () yes () no

Minimal intervention () yes () no

Proportionality and actuality () yes () no

Parental responsibility () yes () no

Family prevalence: () yes () no

Obligatory information () yes () no

Mandatory and participation of the adolescent () yes () no

Note on the ability to comply with the sanction () yes () no () does not apply

Explanation

Observation on the circumstances of the infringement () yes () no

Explanation.

FOURTH PART

Themes highlighted in the decision