PARTICIPANTS' PAPERS

THE CHALLENGES OF DIVERSION IN THE BRAZILIAN JUVENILE JUSTICE SYSTEM

*Alessandra Charbel Janiques Rebouças**

I. INTRODUCTION[1]

Diversion stands as one of the top best practices[2] among the international guidelines for more effective juvenile justice systems. All the international influence towards diversion did not go unnoticed in Brazil's settlement of a child rights framework. The Brazilian mechanism of diversion — the so-called 'remission' – has had a privileged theoretical and procedural placement since 1990 and has been exhaustively granted by prosecutors and judges on a daily basis. However, 27 years later, the interventions made through remission have not always been effective in achieving diversion's benefits and, hence, juvenile justice's and society's aims. What are the challenges faced? What could be of help?

Despite the existence of notorious failures from local Executive Powers in the implementation of the interventions determined through remission, there still are deficiencies in which prosecutors and judges can intervene for the improvement of the system.

The effectiveness of remission has a special importance for the Brazilian system because it targets first-time offenders and those without persistence in criminality, whose offence was committed without violence or serious threat. Interventions over these juveniles are more likely to bring positive results, since "recent research has suggested that the deeper that a young person penetrates into the youth justice system, the less likely he or she is to desist from further offending".[3] Considering the big number of cases under this situation, effective interventions over this targeted group, besides contributing for the well-rounded development of a great number of juveniles, minimizes overburdened courts and overcrowded treatment institutions, shifting the focus to more serious cases; thus, it makes the system more effective and reduces State's costs.

Drawing upon the daily experience in Brazilian juvenile courts, coupled with the study of few others international best practices in the field, this paper intends to address three of the identified challenges that put remission's effectiveness at risk: the poor assessment of the juvenile needs; the use of limited intervention methods and the delay in starting the interventions applied. Perhaps it is time to: 1) prioritize the creation of multidisciplinary team support to assist in the procedure, 2) shift the paradigm in intervening with youth and 3) fight for an articulated and collaborative action among the actors of the system.

For the sake of clarity, this paper is structured in parts, where Part 2, besides illustrating the Brazilian legal context in the 1990s, lists the consequences of international and local commitments to child rights. Part 3 briefly describes the Brazilian current social context and suggests this as the moment to reflect about what can be changed in the juvenile justice system, especially since major legislative changes are underway. Part 4 deals with the main purpose of this paper. First, it pinpoints a few specific definitions and important elements of the Brazilian juvenile justice and briefly delineates its procedure, in order to demonstrate remission's important placement in the system. Second, it provides separate topics for critically analysing three of the

*State Prosecutor (since 2003) in the area of Juvenile Justice, in the Office of the Prosecution Service of the Federal District and Territories of Brazil.

[1] This paper is based on studies done by the author for her 'Research Project' submitted to SAO/McGill University, Montreal/Canada, in December/2013, with the title: 'The MP's contribution to transforming the youth system in Brazil'. This paper, however, has a different perspective — a different focus —, building new ideas.

[2] See e.g. UNICEF Regional Office for CEE/CIS, "Good Practices and Promising Initiatives in Juvenile Justice in the CEE/CIS Region" (2010), online: UNICEF <https://www.unicef.org/ceecis/>.

[3] Nicholas Bala, Peter Carrington & Julian Roberts, "Evaluating the Youth Criminal Justice Act after Five Years: A Qualified Success" (2009) 51 Canadian J. Criminology & Crim. Just. 131, at 135 (Hein Online).

identified challenges that put remission's effectiveness at risk. Each topic initially examines the theoretical background and the limitations of the daily practices; at the end, based on the experience in juvenile courts and on a few international best practices, it brings ideas for concrete changes in the Brazilian juvenile justice system, for effective fulfilment of its role.

II. BRAZIL IN THE 1990s: SETTING A CHILD RIGHTS FRAMEWORK

The human rights commitments by States, in both international and domestic spheres, were a milestone in the second half of the twentieth century. Like other States, Brazil was not only engaged in building a social net to guarantee its population's basic needs, but also in articulating, abroad and at home, a human rights framework, to ensure the exercise and enjoyment of all types of rights.

Brazil was among the 48 members of the United Nations General Assembly in 1948 that voted in favour of adopting the Universal Declaration of Human Rights, "thereby endorsing a new international vision of the role of governments in fostering and promoting human rights as a collective value".[4] Over the years that followed, the country became signatory to all major international human rights treaties, including the United Nations Convention on the Rights of the Child[5] (hereafter, CRC).[6]

In the domestic scenario, the international influence reflected on the inauguration of a new legal system at the end of the 1980s, with the adoption of a progressive Federal Constitution in 1988 (hereinafter FC/88)[7], consolidating democracy after a long period of military dictatorship. Later on, many legal documents that comply with the international guidelines for rights in general (including child rights) were established, alongside with the creation and strengthening of institutions and specialized agencies, in order to structure the whole system of protection.[8]

More specifically, the FC/88 introduced a new perception of childhood and youth, with a new approach in dealing with them. In 1990, Brazil published the Child and Adolescent Statute (hereinafter CAS/90)[9], the landmark youth legislation in the country and one of the most advanced laws governing children in the world. Furthermore, after a few legislative changes to the Statute, the most significant complement was introduced in 2012, with the creation of the National System of Socio-educational Measures (SINASE) and the regulation to implement socio-educational measures (Law of SINASE/12).[10]

The FC/88 elevated children and adolescents as holders of autonomous legally protected interests before the family, the society and the State, which were all given the duty to ensure and protect their fundamental rights with absolute priority and attention to the peculiar condition of persons in development.[11] It determined that "[m]inors under eighteen years of age shall not be held criminally liable and shall be subject to the rules of special legislation",[12] as well as any measure that restrained freedom must comply with the principles of brevity and exceptionality.[13]

The CAS/90, following the constitutional provisions, embraces a wide range of aspects and interests of minors. The CAS/90 brings three systems of protection:[14] the Primary covers general public policies; the

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[4] Martha Jackman, "From National Standards to Justiciable Rights: Enforcing International Social and Economic Guarantees through Charter of Rights Review" (1999) 14 J. of L. and Social Policy, at 72 (Hein Online).
[5] Convention on the Rights of the Child (CRC), 20 November 1989, 1577 UNTS 3, online: United Nations Treaty Collection <http://www.treaties.un.org/>.
[6] Decree n° 99.710 of 21 November 1990, DOU 22 November 1990, Brazil, online: Planalto <http://www.planalto.gov.br>.
[7] Constitution of the Federative Republic of Brazil, 1988, DOU 05 October 1988, Brazil, online: Camara dos Deputados <http://livraria.camara.leg.br/> (see English version) [*FC/88*].
[8] See Valerio Mazzuoli, *Curso de Direito Internacional Publico*, 6 ed. (São Paulo: RT 2012), at. 836.
[9] Law n° 8.069 of 13 July 1990, DOU 16 July 1990, Brazil, Child and Adolescent Statute, online: CONANDA <http://www1.direitoshumanos.gov.br/conselho/conanda/legis/link6/>(English version) [*CAS/90*].
[10] Law 12.954 of 18 January 2012, DOU 19 January 2012, Brazil, Law of SINASE, online: planalto <http://www.planalto.gov.br>.
[11] *FC/88*, *supra* note 7, Article 227.
[12] Ibid. at Article 228.
[13] Ibid. at Article 227, 3°, V.
[14] João Batista Costa Saraiva, *Desconstruindo o Mito da Impunidade:* um ensaio de Direito (Penal) Juvenil (Brasilia: Centro de Defesa dos Direitos da Criança e do Adolescente – CEDEDICA, 2002) at 50.

Secondary covers protective measures targeted at children/adolescents at personal or social risk; the Tertiary deals with the accountability of juveniles in conflict with the law and with the so-called juvenile justice (Police/Prosecution/Defence/Judiciary/Executing Agencies and Institutions).[15] The Law of SINASE/12, though related to the implementation stage of measures applied by the juvenile justice, is an important source of principles that can be used in the whole child's system.

As for the consequences of all these international and local legal commitments, Brazil has undertaken obligations to ensure, respect, protect, promote and fulfil fundamental rights, as well as to positively implement policies and programmes, with absolute priority to the ones related to children/adolescents. This position disallows any attempt to deny or empty child rights contents, that is, to treat them as if they were not rights, but mere guidelines; rather, they impose concrete actions and policies on the Powers of the State for the achievement of their purposes.

III. 27 YEARS AFTER THE CAS/90: TIME TO RETHINK

Written law often differs from the reality of its enforcement. Twenty-seven years have passed since the CAS/90 and Brazil's reality still does not reflect the theoretical promise. A common picture in all of its large cities is children begging, selling objects at traffic lights and looking after parked vehicles, usually in exchange for very small amounts of money.[16] Poverty, hunger, illiteracy, lack of education and economic opportunities, unemployment, population density, poor hygienic condition, social discrimination, politics, the easy access to firearms and drugs, among others, are also big issues.

Alongside with the lack of family structure and childhood violence, this social and economic picture reflects, in a drastic way, on youth delinquency and, hence, on juvenile justice. Survey data from the Brazilian Ministry of Human Rights demonstrates a huge increase on juvenile incarceration between 1996 and 2014, raising from 4,245[17] to 24,628[18], also indicating a rise on the numbers of serious crimes, like drug trafficking, sexual offences, armed robbery, homicide and firearms possession.

Even with this elevated number of incarceration and despite enough evidence showing that institutional treatment does not deter juvenile offences and that rehabilitation must be the aim,[19] public opinion believes that youth delinquency is increasing because the juvenile system is too "soft", either by not 'punishing' or, when measures are applied, by being too mild, especially the non-custodial ones. As a result, there are two legislative proposals in progress to increase rigour and repression, with widespread support from the public. The first, a constitutional amendment for the reduction of the age of criminal responsibility: from 18 to 16;[20] and second, a law project to increase the maximum length of institutional treatment: from 3 to 5 years.[21]

On the other hand, for many specialists who work in the field, the CAS/90, despite its decades of existence, has never been implemented in its essence. To quote Saraiva: "There are failures, serious failures, but these failures are not of legislation."[22] So, what went wrong?

According to the UN Interagency Panel on Juvenile Justice, despite on-going reform efforts over the past 20 years, "globally, there has been only modest and uneven progress ..., [t]he social and institutional responses to juvenile crime ... are not always resolutely focused on the rehabilitation and reintegration of young offenders ... [and] have not always been very effective in preventing crime and contributing to public safety."[23]

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[15] See *CAS/90*, *supra* note 9, e.g Articles 4, 101, 103–128 and 171–190; see FC/88, *supra* note 7, Article 227.
[16] See e.g UNICEF, "Report on Children in an Urban World: the state of the world children 2012" (2012), online: UNICEF <http://www.unicef.org>.
[17] Brazil, National Human Rights Secretariat, *Levantamento Nacional do Atendimento Socioeducativo ao Adolescente* (2011), at 7, online: SDH <www.sdh.gov.br/assuntos/criancas-e-adolescentes/pdf/SinaseLevantamento2010.pdf>.
[18] Brazil, Ministry of Human Rights, *Levantamento Anual SINASE 2014* (2017), at 19, online: SDH <www.sdh.gov.br/noticias/pdf/levantamento-sinase-2014>.
[19] see e.g Ariel de Castro Alves, "Reduçao da idade penal e criminalidade no Brasil" (2007), online: MPPR <http://www.crianca.mppr.mp.br/>.
[20] Brazil, Proposal for constitutional amendment n. 20/1999, online: Senado <http://www.senado.gov.br>.
[21] Brazil, Law project n. 7.008/2010, online: Câmara dos Deputados <http://www.camara.gov.br>.
[22] "falhas há e são graves, mas não são falhas de legislação" (free translation by the author). João Batista Costa Saraiva, "Medidas Socioeducativas e o Adolescente Infrator" (2000), Revista da Ajuris n. 78, at 129, online: MPSP <http://www.mpsp.mp.br>.

Undoubtedly, Brazil has not been different.

In fact, no legislative change — although very welcome in a few aspects — will have the magic power to make urgent social problems (such as juvenile delinquency) disappear in Brazil. So, finding ways to turn the system more effective must be a greater concern for the entire network of services/protection of children and youth, as constitutional and legal provisions cannot be understood as merely rhetorical or intentional. It is time to carefully rethink, to reflect about what can be changed in the system, including the juvenile justice.

Even though legal, social and economic realities are very peculiar from country to country, finding ideas for reforms based on comparative law and international guidelines is an important part of this process. In addition, international law on criminal and juvenile justice is very rich, allowing critical analysis regarding procedures and methodologies currently performed.

Through this process, one can see that diversion stands as one of the top best practices extracted from the international standards and norms in juvenile justice. So, how is diversion inserted in the Brazilian legal framework? What are its main aspects? What are the challenges? What are the few possible solutions? These are the questions this paper intends to answer.

IV. DIVERSION IN BRAZIL: A FEW CHALLENGES AND SOLUTIONS[24]

The focus of this paper on the challenges the Brazilian diversionary mechanism in juvenile justice ('remission') faces and on a few solutions for its effectiveness lies not only on the international recognition of its importance for any juvenile justice system, but also because of the dimension it has within the Brazilian procedure.

Diversion, the process of channelling children away from formal judicial proceedings and court convictions at any stage of criminal procedures, is "an integral part of an effective child rights-based child justice system".[25] This differentiated treatment in juvenile justice is, first, based on the respect for a sound development of the child and on the assumption that investing in alternatives to traditional proceedings will effectively help prevent recidivism, positively contributing to the system's objectives. Promisingly, children are more capable of long-term changes than adults.[26]

In addition, diversion, by its very nature, minimizes overburdened courts and overcrowded treatment institutions, giving them space to focus on more serious cases; hence, it makes the system more effective and reduces State's costs. The high rate of offenders brought to court, under the classical interventions, raises the chances of inappropriate use of custody, increasing the cost of the system without increasing public safety.[27]

The CRC makes diversion a binding feature for States: "...[w]henever appropriate and desirable, measures for dealing with such children without resorting to judicial proceedings, providing that human rights and legal safeguards are fully respected."[28] As for what is referred to as the 'UN standards and norms in juvenile justice'[29], first, the 'Beijing Rules' (1985)[30] explicitly state that "[c]onsideration shall be given, wherever appropriate, to dealing with juvenile offenders without resorting to formal trial by the competent authority",[31]

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[23] UNODC, IPJJ – Interagency Panel on Juvenile Justice, "Criteria for the Design and Evaluation of Juvenile Justice Reform Programmes" (2010), at 4, online: IPJJ <http://www.ipjj.org/>.
[24] For more information related to this theme see the author's 'Research Project', *supra* note 1.
[25] UNICEF, "UNICEF Toolkit on Diversion and Alternatives to Detention 2009 — International human rights instruments relevant to diversion and alternatives to detention – summary of provisions and commentary" (2009), at 2, online: UNICEF <http://www.unicef.org>.
[26] See Heather Hojnacki, "*Graham v. Florida*: How the Supreme Court's Rationale Encourages Reform of the Juvenile Justice System Through Alternative Dispute Resolution Strategies" (2012) 12 Pepp. Disp. Resol. L.J. 135 at 145.
[27] Bala, Carrington & Roberts, *supra* note 03, at 160.
[28] CRC, *supra* note 5, Article 40(3) (b).
[29] The Beijing Rules, the Riyadh Guidelines and the JDL Rules, together, are referred to as the UN standards and norms in juvenile justice. See *supra* note 25, at 10.
[30] *United Nations Standard Minimum Rules for the Administration of Juvenile Justice* (Beijing Rules), GA Res 40/33, GAOR, 40th Session Supp. No. 96, U.N. Doc A/RES/40/33, (1985).
[31] Ibid., Article 11.1.

given that it outlines detailed guidelines for its practice; second, the principles and provisions addressed by the 'Riyadh Guidelines'[32] (1990) and the 'JDL Rules'[33] (1991) give ideas for the promotion of diversion and alternative programmes.[34] Furthermore, among many others, the Vienna Guidelines[35] (1997) and the United Nations Common Approach to Justice for Children[36] (2008) make specific reference to diversion's importance, including for a well-functioning child justice system.

All this international influence towards diversion did not go unnoticed in the Brazilian settlement of a right's framework. By the end of the 1980s, "diversion ... became common ... in western jurisdictions, [as it] is now universally seen as an integral aspect of the rehabilitative and reintegrative parts of each and every child justice system."[37] Not differently, Brazil's system theoretical background favours diversion through principles, explicit rules, legal tools, proceedings and actors' duties.

Brazil also wants all the benefits of diversion. In fact, diversion is exhaustively granted through prosecutors and judges on a daily basis, as it has a privileged procedural placement. However, the interventions made through remission have not always been effective in achieving its goals and that of the juvenile justice's purposes. So, what are the present challenges? What could be of help to its effectiveness?

A. Specific Definitions and Important Elements of Brazilian Juvenile Justice

In order to reach a uniformity of terms and a better understanding of this paper, it is important to pinpoint a few specific definitions and important elements of the Brazilian juvenile justice:

- Specific legislation (civil law country): FC/88, CAS/90 and the Law of SINASE/12, binding to all states of the Brazilian Federation.

- 'Juvenile offence': a conduct analogous to a crime or misdemeanour – listed in the Criminal Code[38] or extravagant criminal laws[39] — committed by juveniles, as they cannot be held criminally liable.[40]

- 'Juvenile': an individual from 12 to 17 years of age, which is referred to as 'adolescent'; [41] a person 18 years and older is considered 'adult', subjected to criminal justice. Although a 'child' – an individual under the age of 12 – may commit an act similar to a crime, he/she is not held accountable in criminal matters and, hence, is not under the State's coercive power.

- Purposes: first, following the 'Beijing Rules', the promotion of the well-being of the juvenile, by the adoption of the 'doctrine of full protection' and the 'principle of the best interests of the child' as dogmas for the whole system; second, in line with the CRC, the promotion of juvenile's rehabilitation and reintegration, avoiding merely punitive sanctions.[42] In the end, another important aim is preventing crime, contributing to public safety.

- Types of measures applied: protective and socio-educational measures (hereinafter, SEM). The fact that children and adolescents cannot be criminally convicted does not imply they are exempt from

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[32] *UN Guidelines for the Prevention of Juvenile Delinquency* (Riyadh Guidelines),GA Res 45/112, GAOR, 45th, Supp. No. 68, U.N. Doc A/RES/4/112, (1990).
[33] *UN Rules for the Protection of Juveniles Deprived of Their Liberty* (JDL Rules), GA Res 45/113 GAOR, 45th Sess., Supp. No. 68, A/RES/45/113, (1991).
[34] See UNICEF, *supra* note 25, at 15.
[35] *Guidelines for Action on Children in the Criminal Justice System,* UNESCOR, 36th plenary meeting, Annex, UN Res 1997/30 – Administration of Juvenile Justice (1997) at para 15, online: UN <http://www.un.org>.
[36] *UN Common Approach to Justice for children*, UN Secretariat-General, Guidance Note (2008), guiding principle 8, online: UN <http://www.un.org>.
[37] Violet Odala, "The Spectrum for Child Justice in the International Human Rights Framework: From Reclaiming the Delinquent Child to Restorative Justice" (2011–2012) 27 Am. U. Int'l L. Rev. 543 at 555 and 563 (Hein Online).
[38] Decreto-lei n. 2.848 of 07 December 1940, DOU 13 December 1940, Criminal Code of Brazil, online: planalto <http://www.planalto.gov.br>.
[39] Such as the Brazilian Laws n. 11.343/06 (about drug use and trafficking) and 10.826/03 (about firearms).
[40] *CAS/90*, *supra* note 9, Articles 103 e 104, and *FC/88*, *supra* note 7, Article 228.
[41] Ibid., Article 2.
[42] Ibid., Articles 1 and 3.

the justice system. Children (up to 11 years of age) are only subjected to protective measures,[43] which can be applied with or without judicial interference. Adolescents (between 12 and 17 years of age) may receive protective and/or SEMs,[44] and depend on judicial proceedings. Protective measures are those without any kind of punitive character and directed to the protection from a hazardous situation caused by threat of or actual violation of rights (such as drug addiction treatment, mandatory school attendance, therapeutic care and temporary guidance, support and monitoring).[45] SEMs are accountability measures, which carry both a retributive character (disapproving the act and preventing new infraction) and, above all, a pedagogical character, "intended to interfere in their development process, aiming at better understanding of reality and effective social integration"[46] (principles of rehabilitation and reintegration). There are six types of SEMs: admonition, damage repair, community service, assisted freedom, semi-liberty and institutional treatment.[47] Only semi-liberty and institutional treatment bring constriction of freedom.

- *'Ministério Público'* (MP): for the purpose of this paper it will be referred here to as 'The Office of the Prosecution Service'. The *'Ministério Público'* is a permanent, independent and autonomous (functionally, administratively and financially) institution of the Brazilian State, essential for the jurisdictional function and responsible for the protection of the legal order, the democratic regime and inalienable social and individual interests. It has a constitutional placement and a wide range of powers that are rarely found in counterpart institutions in comparative law. The MP's members are usually referred as 'prosecutors' (despite their differences) and play an essential role in the protection of society against crimes (including the exclusive responsibility for prosecution) and in implementing and ensuring the effectiveness of fundamental rights (even of the juveniles they formally charge).[48]

B. Remission: The Brazilian Mechanism of Diversion

Similarly to the Brazilian criminal justice procedure for adults, there are three phases in the juvenile justice until sentence/disposition delivery (before the implementation stage): police, prosecutorial (ministerial) and judicial. Nevertheless, the possibility of prosecutors and judges in granting remission — the typical Brazilian mechanism of diversion in juvenile justice — is one of the major specificities that arise, among others,[49] due to the different goals of the two systems.

A brief explanation of the specific legal procedure from the moment of the juvenile's arrest or notice of infraction at the police station until the SEM is implemented is necessary to better understand remission's important placement. The following rules were extracted from the CAS/90[50], slightly complemented by a few jurisprudential developments:

> As for the police phase, when an infraction is attributed to an adolescent, the specialized police office investigates the facts, and hears the alleged offender, the victim and witnesses, among other duties. If the adolescent is apprehended while committing an infraction (known as *flagrante delicto* [caught red-handed]), the police authority informs him of his rights and notifies his family, the judge and the MP [The Office of the Prosecution Service]. As a general rule, the adolescent is immediately released to his parents/guardian, on their commitment to present him to the MP [The Office of the Prosecution Service]. If imperatively necessary,[51] the adolescent can be detained at least until the next day, "for the

[43] Ibid., Article 105.
[44] Ibid., Article 112.
[45] Ibid., Articles 98 and 101.
[46] "tendentes a interferir no seu processo de desenvolvimento, objetivando melhor compreensão da realidade e efetiva integração social" (free translation by the author). Olympio de Sá Sotto Maior Neto, "Ato infracional, medidas sócio-educativas e o papel do sistema de justiça na disciplina escolar", online: MPPR <http://www.mppr.mp.br>.
[47] *CAS/90*, *supra* note 9, Article 112.
[48] *FC/88*, *supra* note 7, Articles 127–130.
[49] For example: 1) the existence of an informal hearing of the adolescent and his parents/guardian (as well as the victims and witnesses, if needed) chaired by the prosecutor, before deciding how the case should proceed; 2) a very short term for pre-trial detention: maximum of 45 days counted from the day the adolescent is apprehended until the day the sentence/disposition is delivered, unlike the many months for adults; 3) the maximum limit of 3 years for de SEMs of internment or semi-liberty, while adults can receive a penalty of many years; 4) adolescents' records and proceedings are confidential, while public for adults.
[50] *CAS/90*, *supra* note 9, Articles 171–197.

guaranty of his personal security or the maintenance of the public order, due to the gravity of the infraction and its social repercussion."[52] After collecting evidence, the investigation file is sent to the Juvenile Court and forwarded to the MP [The Office of the Prosecution Service] (along with information on the youth's antecedents).

The ministerial [prosecutorial] phase starts when the prosecutor receives the investigation file. In cases of *flagrante delicto* [caught red-handed] when the adolescent is not released to his parents/guardian, the police authority will present him to the MP [The Office of the Prosecution Service] within 24 hours; the prosecutor will then "proceed immediately and informally to the hearing and, if possible, to the testimony of his parents or guardian, victim and witnesses";[53] he will also pronounce on the need for the adolescent's temporary internment (i.e. if the adolescent is to remain interned during the judicial phase [pre-trial detention]). In the absence of 'flagrante delicto' and in cases of 'flagrante delicto' with immediate release by the police authority, the prosecutor may call parents/guardian to present the adolescent at the MP [The Office of the Prosecution Service], in order to implement the 'informal hearing'.

Through informal hearing,[54] the prosecutor talks to the adolescent (preferably accompanied by an attorney/public defender and by his parents/guardian) about the facts. The adolescent and his parents/guardian also discuss his social and family realities [circumstances]. If necessary, the prosecutor can hear the victim and/or witnesses. Alongside other legal powers inherent in the MP [The Office of the Prosecution Service] (...), the prosecutor can return the investigation file to the police authority for implementation of additional diligences, necessary to clarify the act's dynamics. After analyzing the facts, the evidence collected, the seriousness of the infraction, the adolescent's social and family environments, his criminal antecedents etc., the prosecutor takes one of the following actions: promoting the permanent filing of the investigation file, granting remission or presenting the case to the Juvenile Court to initiate judicial proceedings. Permanent filing occurs when no evidence is found to prove an infraction has occurred or the adolescent's involvement, despite exhausting all investigative actions. Extrajudicial remission removes the case from judicial proceedings and does not imply recognition or proof of guilt, nor does it prevail for purposes of criminal history. The case is presented to the Court when deemed inadequate for remission; in this situation it is possible, as a last resort, to temporarily intern [pre-trial detention] the adolescent. In all three possibilities the whole investigation file (with all the documents produced by the police and the MP [The Office of the Prosecution Service]) will either return to the Juvenile Court for simple approval in the two first situations, or for decision in the last.

The judicial phase begins with the Judge's decision to accept the case presented by the MP [The Office of the Prosecution Service]. The Judge will decide on the need for temporary internment [pre-trial detention] (lasting up to 45 days) and schedule a hearing to interrogate the adolescent. In this first hearing, the Judge may grant judicial remission, after registering the prosecutor's opinion, or continue proceedings. In the latter case, another hearing is scheduled for the production of proofs (usually through victims and witnesses' testimony), under the principles of contradictory and full defense; once completed, based on all evidence collected and the interprofessional team support's report, the parties (MP [The Office of the Prosecution Service] and adolescent) will make their final pronouncement and the Judge will issue sentence [/disposition]. If the adolescent is proved to have committed the infraction, the Judge will apply any socio-educational or protective measures listed in the CAS.

The implementation stage is the next step after the sentence/disposition applies a SEM.[55] Similarly this stage is triggered when a SEM is combined with an extrajudicial ([by the Prosecutor in the] ministerial phase) or judicial remission (which can be granted up until the moment the sentence [/disposition] is delivered). (...)

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[51] See Cristiane Dupret, *Curso de Direito da Criança e do Adolescente* (Belo Horizonte: ius, 2012) at 286–287.
[52] *CAS/90, supra* note 9, Article 174.
[53] *CAS/90, supra* note 9, Article 179.
[54] Ibid. The informal hearing is an exclusive duty of the Prosecutor. See also MPSP, "Manual Pratico das Promotorias de Justica da Infância e Juventude" (2012), online: MPSP <http://www.mpsp.mp.br/>.
[55] Aee Law of SINASE, *supra* note 10.

> The mandatory presentation of the adolescent apprehended in *flagrante delicto* but not released by the police and the possibility of summoning the adolescent who is free before the authority that can prosecute him may sound strange to those who come from another legal system. In fact, considering the MP's constitutional profile, it is the prosecutor who, in a prominent position, must ensure adolescents' rights, taking suitable firsthand precautions for adolescents' full protection. Certainly the informal hearing may provide more elements to the prosecutor's conviction on the adolescent's committing the act and its circumstances. From another angle, the informal hearing is an opportunity (as he has the right to silence) for the adolescent to expose his version of the facts and his social and family environments to the one who will decide how the case should proceed, with the power to channel him away from formal judicial proceedings, instead of prosecuting.[56]

In summary, remission can occur in two phases of the procedure:[57] prosecutorial and judicial; i.e., before or after the juvenile is formally prosecuted. In the prosecutorial phase, the decision of not putting the case before the judge is a prosecutor's prerogative, based on legal limits; if remission is granted, the juvenile is spared from court proceedings and the case's formal file is dismissed. On the other hand, if the prosecutor decides to put the case before the court and initiate court proceedings, remission can be granted in the judicial phase (up to disposition) by the judge —also based on legal limits —, after hearing the prosecutor's opinion; if remission is granted (usually in a hearing), the juvenile is spared from continuing on court proceedings and from eventual proof of guilt; in this situation, remission will imply suspension or extinction of the case's formal file.

In many cases, non-intervention through simple remission — i. e., without its combination with any protective or SEM —will be the 'optimal response', as highlighted in the Beijing Rules.[58] But often it is appropriate to combine remission with other interventions, especially with protective measures and/or with the SEMs of admonition, damage repair, community service or assisted freedom,[59] as these may provide services that suit the juvenile's needs; in this case, remission takes the form of an 'agreement' between the prosecutor or judge, the juvenile, his parents/guardian and the defence attorney, depending only on court homologation.[60]

So, as stated elsewhere: "in addition to 1) avoiding a criminal record, 2) preventing stigmatization or contamination through contact with criminal proceedings, 3) minimizing deprivation of liberty and contact with more hardened offenders, remission provides the adolescent with the possibility of learning valuable lessons from programmes and acquiring social responsibility through community service or amendments to the victim."[61] In other words, remission's theoretical grounds and legal rules place it alongside other diversionary practices in line with the international instruments and norms/standards.

C. The Practice: The Challenges Faced by Remission and a Few Solutions

Put into practice, there have been countless remissions delivered on a daily basis, formally in line with rapid proceedings. However, a great number of these remissions have not been effective in achieving its goals, often due to the lack/deficiency of the interventions' implementation or to the way they are established. Indeed, remission's effectiveness faces many challenges. Considering that every juvenile justice system "requires a commitment to the realization of the jurisdiction's results, not satisfied, by definition, by the fulfilment of formal procedures",[62] ideas must arise to minimize these challenges.

It is not even necessary to resort to numbers to conclude that juvenile delinquency in Brazil is rising. The yearly increase of the sense of insecurity already gives the answer. This is even more visible for those who work in the field, due to the number of juveniles who return to the system, sometimes in less then one month

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[56] This citation was extracted from the author's research project, *supra* note 1, at 27-30.
[57] *CAS/90*, *supra* note 9, Article 126.
[58] Beijing Rules, *supra* note 30, commentary to Article 11.
[59] Semi-liberty and Interment can only be applied through formal court proceedings (through judicial sentence), due to the restriction of freedom both carry. *CAS/90*, *supra* note 9, Article 127.
[60] *CAS/90*, *supra* note 9, Article 127. See Leoberto Brancher, "Justiça, Responsabilidade e Coesão Social" (2006), at 20-21, online: TJRS <http://www.tjrs.jus.br>.
[61] This citation was extracted from the author's research project, McGill University, *supra* note 1, at 21.
[62] "[E] xige-se compromisso com a materialização dos resultados da jurisdição, não se satisfazendo, por definição, com o cumprimento de protocolos formais" (free translation by the author). Brancher, *supra* note 60, at 19.

of the last release done through remission.

Although recidivism is influenced by numerous factors, this situation draws attention to an urgent problem within the Brazilian juvenile justice and calls for immediate solution. Considering that first-time offenders and those without persistence in criminality (target group for remission) are the ones which are having poor response to the offence committed (usually limited to a one day contact with police officers and/or prosecutors/judges), the system, instead of preventing re-offending, ends up encouraging it by the sensation 'that nothing happens'. In fact, these juveniles are perhaps the ones who most need prompt and effective interventions. The "earlier the investment in an individual, ... the more cost effective the investment."[63]

Evidently, the effectiveness of remission is closely linked to the implementation of the interventions determined (mostly SEMs). Although the implementation stage of any SEM (including the ones applied through remission) has prosecutorial supervision and judicial decision (for changes, extinctions, among others), the administration of the institutions and bodies responsible for implementing the measures, as well as the forms and methodologies used in their work for reintegration/rehabilitation, are from the Executive Power of each state of the federation. That is, it stays out of both the Office of the Prosecution Service and the Judicial Power control.

However, despite the existence of notorious failures from the local Executive Powers — cited by the practitioners in the field as one of the major causes of the system's ineffectiveness —, there are still deficiencies in the ministerial and judicial phases of the procedure that also need improvement. So, a few deficiencies have been identified and will be analysed below as challenges, considering they are issues in which prosecutors/judges can intervene for the improvement of remission's effectiveness.

1. First Challenge: The Poor Assessment of the Juvenile's Needs[64]

(a) Theoretical background and daily practices' limitations

In the opportunities to adjust remission, through informal (prosecutorial) or judicial hearings, prosecutors and judges briefly collect information and impressions about the juvenile's personality, social and family environments, reasons for his/her actions etc., which often allow an overview of his/her needs and the identification of the adequate interventions. Nevertheless, due to limitations of time, technical approaches and familiarity with all programmes/services, in countless cases, prosecutors/judges are not able to appropriately assess the various aspects of the juvenile's life. Hence, the interventions determined may not be the most suitable, minimizing their effectiveness.

In the decision-making process, according to the law,[65] prosecutors/judges shall analyse the "circumstances and consequences of the fact, to the social context and personality of the adolescent and to his greater or lesser participation in the offence".[66] Frequently, problems involving school evasion, family violence, parental abandonment, emotional or sexual abuse, illness and drug use – commonly associated with the phenomenon of delinquency — are detected.[67]

Regardless of the course given to the case, protective measures can be applied immediately, whereas the list is merely illustrative.[68] Often it is suitable to combine remission with the juvenile's commitment to fulfil a non-custodial SEM (i.e. admonition, damage repair, community service or assisted freedom), as it may provide

[63] United Nations, "United Nations Fact Sheets on Youth", online: UN <http://www.un.org>.
[64] For more information see the author's research project, *supra* note 1.
[65] *CAS/90, supra* note 9, Articles 126 and 186.
[66] So, among other functions, the prosecutor/judge must: 1) take the adolescent's version of the facts, 2) analyse the facts and evidence gathered, 3) talk about the juvenile's social and family environments, 4) evaluate the need for protective and/or SEM, 5) take relevant extrajudicial provisions, if necessary, 6) check if any right was violated during police investigations, 7) decide on the case's course, 8) evaluate the need for pre-trial detention when the case is presented to the Court, 9) prepare petitions/decisions. When granting remission, the prosecutor/judge shall also explain its legal and social implications to the adolescent and his parents/guardian. See Maria Cristina Sanson, "Considerações teórico-práticas sobre a audiência de apresentação de adolescente autor de ato infracional perante o Ministério Público: finalidade e condução" (2009), online: MPPR <http://www.mppr.mp.br>.
[67] See Sanson, *supra* note 66.
[68] *CAS/90, supra* note 9, Articles 98 and 101.

the appropriate response/services, as stated before.

Moreover, the Brazilian playing field for juvenile justice is not limited to legal rules — even though it remains its primary source. Although the list is exhaustive in the case of SEM, the legal framework encourages diversity of methodologies/interventions within each SEM, as well as extrajudicial provisions by the Office of the Prosecution Service and the Judiciary, all in the 'best interest of the child' and for the achievement of their roles.[69] For example, often juveniles need referrals for school change, engagement in sports activities/arts/charity, internship etc., in order to remove or reduce risky behaviours.

However, informal (prosecutorial) or judicial hearings can perhaps take as little as 15 minutes,[70] depending on the jurisdiction's number of cases and administrative structure. Besides the limitation of time, the lack of specialized technical approaches from non-legal backgrounds also often prevents an adequate assessment. In addition, prosecutors/judges will rarely be aware of or familiar with all community, private sector and State's programmes/services available for referral, especially for extrajudicial provisions.

For example, if remission is to be combined with a protective or SEM, the choice of the measure, as well as of the possible referrals and other extrajudicial provisions, might not always be the most appropriate; if simple remission (without any measure) is found to be the best response, the opportunity to make suitable interventions in the juvenile's last contact with the system regarding the offence committed may be wasted. Thus, the response delivered may not best suit the juvenile's interests and, consequently, these situations put diversion's effectiveness at risk.

(b) An idea for change: insertion of multidisciplinary team support

The approximate 30 minutes[71] of informal (prosecutorial) or judicial hearings (including the ones that adjust remission) are more often insufficient for both the interrogatory about the facts related to the offence and the comprehensive assessment of juvenile's various needs. In addition, the prosecutor/judges' technical approaches used in the these hearings depend on the their personality and skills. In many cases, the limitation of time and techniques to address more complex issues will prevent an accurate and reliable diagnose of the juvenile's situation, with a chance of leading to inadequate, ineffective or unenforceable interventions. Therefore, the need for professionals from other fields, such as psychologists and social workers, in the prosecutorial and judicial phases of the procedure is intuitive, as they have technical skills and familiarity with the wide range of community and State programmes/services; in addition, they can devote more time to specific cases, all of which optimize interventions.

The relevance of this backup structure has not gone unnoticed in the Brazilian legislation: since 1990 the CAS/90 predicts not only the establishment of specialized and exclusive Child and Youth Courts in the jurisdictions, but also determines that the Judiciary must keep a multidisciplinary team within its structure.[72]

The reality on the ground, instead, is quite different. In 2014, only 159 of the 1,303 Brazilian Child and Youth Courts around the country handled, exclusively, with cases involving children and adolescents[73] and most of them had no or insufficient multidisciplinary staff.[74] Considering the compatibility with its constitutional role, the Office of the Prosecution Service of a few jurisdictions has created these teams to assist the work of prosecutors in children and youth matters, in both civil and criminal fields.[75]

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[69] See e.g. *CAS/90*, *supra* note 9, Article 201, paragraph 2.
[70] This finding is based on the experience of the author in the field.
[71] Ibid.
[72] CAS, *supra* note 9, Articles 145 and 150; See also Law of SINASE, *supra* note 10, Article 53.
[73] The law does not require all 2,643 judicial districts of Brazil to have Child/Youth Courts, as it depends on the amount of their population. However, 159 of specialized Child and Youth Courts is still a very small number. G1, "Só 12% das Varas da Infância no país são exclusivas, segundo CNJ" (24/05/2014), online: Globo <http://g1.globo.com/>.
[74] Brazil, Institute of the Rights of Child and Adolescent, "O Sistema de Justiça da Infância e da Juventude nos 18 anos do Estatuto da Criança e do Adolescente" (2008), at 15 and 41, online: ABMP <http://www.abmp.org.br/UserFiles/File/levantamento_sistema_justica_ij.pdf>. See also Dourados Agora, "MS tem número insuficiente de varas da Infância e Juventude" (2008), online: Dourados Agora <http://www.douradosagora.com.br>. See Brazil, National Council of Justice, Provimento n. 36 of 05 May 2014, online: CNJ <http://www.cnj.jus.br>. See Brazil, National Council of the Rights of Child and Adolescent, Resolução n. 113 of 19 April 2006, Article 7, I, online: Ministerio dos Direitos Humanos <http://dh.sdh.gov.br>.

As a matter of fact, due to the adoption of the 'doctrine of full protection' and the 'principle of the best interests of the child/adolescent' as dogmas, all issues related to child and adolescent in Brazil must be handled with a holistic and comprehensive approach[76] — another international good practice in juvenile justice closely linked to diversion. According to international guidelines, "an effective juvenile justice system requires that the varying needs of children be assessed, that children in conflict with the law are referred to appropriate services, and that they are offered care and assistance with reintegration into the community."[77] So, different juveniles may receive different responses to similar offences.

Thus, the implementation of this type of team support — given the relevance of its potential functions[78] to the effectiveness of the interventions determined — should not be an isolated initiative from the Judiciary and the Office of the Prosecution Service in only a few jurisdictions. Considering the primacy conferred to youth by the FC/88, it should be priority for both institutions in all jurisdictions, above all other important areas that also need it.

2. Second Challenge: The Use of Limited Intervention Methods

(a) Theoretical background and daily practices' limitations

Whether by principles or explicit rules, the Brazilian system provides openings for the introduction of various methods of interventions with juvenile offenders. The adoption of the 'doctrine of full protection' and the 'principle of the best interests of the child/adolescent' allied to the malleability given to remission is sufficient enough to reach this conclusion. Yet, in practice, the use of the traditional methods is still frequent, even though they can bring 'gaps of content'[79] in addressing problems that are daily handled in the juvenile justice.

In fact, despite the flexibility and discretion conferred to prosecutors/judges through remission, Brazil is a civil law country, with more inflexible criminal law than common law countries, due to the principles of legality and unavailability of prosecution. Naturally, prosecutors/judges have the tendency to rely on the usual legal forms of interventions even within the juvenile justice. Moreover, Brazilians still nourish a retributive culture, despite the rich legal framework towards the dogmas of protection. As example, the legislative changes in progress indicate the Legislative Power and society's predisposition to treat juvenile delinquency with increasing rigour and repression.

Besides that, the Brazilian justice system is still attached to consider the State as the biggest victim of the offence, though a few legal changes have emerged in this aspect.[80] In practice, victims usually still remain secondary in the judicial procedures and their participation is basically restricted to testifying as witnesses in court. That is, the victim is "used" in the gathering of evidence to alleviate or to harden the judicial consequences for the offender, rather than in a healing process of his/her suffering or loss.

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[75] For example, the Federal District and Pará. See the Office of the Prosecution Service of the Federal District and Territories, *Regimento Interno Estrutura Administrativa*, Anexo da Portaria Normativa n. 476 (20 December 2016) at Article 217, online: MPDFT <http://www.mpdft.mp.br>. See Alexandre Theo de Almeida Cruz, "O adolescente autor de ato infracional: um cidadao", online: MPPA <https://www.mppa.mp.br>. See also Brazil, National Council of the Prosecution Service, Recomendação n. 33, 05 April 2016, Diário Eletrônico CNMP, Caderno Processual, 04 May 2016, at 1/3, online: CNMP < http://www.cnmp.mp.br>.

[76] For more information see the author's research project, *supra* note 1.

[77] United Nations Office on Drugs and Crime, "Manual for the measurement of juvenile justice indicators" (2006), at 1, online: UNODC <http://www.unodc.org>.

[78] "This team may subsidize the prosecutor's informal hearing by, for example: 1) interviewing the adolescent and those responsible for him — perhaps using different approaches and clinical tools — to suggest the most appropriate measures based on personal skills and the assessment of psychosocial and family environments; 2) diagnosing cases of psychological/mental problems and drug abuse, to determine if the adolescent requires specialized treatment; 3) contacting the victim about theharm caused, the possibility of mediation, expectations etc.; 4) guiding adolescents' family members, to make them aware of their responsibility in education and resocialization; 5) identifying the need for extrajudicial provisions, to send adolescents and their families to public or private programmes related to arts, education, sports, charities etc.. This team may also: 1) keep track of and intimate connection with social networking services regarding all programmes for referral; 2) develop, implement, coordinate and evaluate internal and external projects of interest to the MP; 3) analyze plans, projects, programmes, and operate public and private entities for the referral of adolescents etc." This citation was extracted from the author's 'Research Project', *supra* note 1, at 43.

[79] See Brancher, *supra* note 60, at 4.

As a consequence, in the daily practice of juvenile justice, whenever remission is agreed with SEM, the option is often limited to community service or assisted freedom, under their traditional approaches. Damage repair — the measure that could come closest to these legal changes — is rarely used. Indeed, even though almost 50% of the infractions are property offences,[81] the SEM of damage repair is rarely applied. In addition, extrajudicial provisions and referrals, such as to State and community programmes, to educational and artistic projects, sports activities, charity etc. are often not of big focus. So, this Brazilian practice moves away from the 'best interest of the child', minimizing, again, diversion's potentials.

(b) An idea for change: shift of the paradigm in intervening with youth

Alongside with the lack of State resources, other objective factors, such as the number of cases within the jurisdiction, technical training, conditions stipulated for referrals, procedural flow between the Office of the Prosecution Service and the Judiciary, organizational structure and management, influence the types and quantities of methodologies/interventions chosen in the prosecutorial and judicial phases. Nevertheless, subjective factors are also important obstacles, within prosecutors/judges, for the adoption of new methods of interventions with youth through remission, for better rehabilitation and reintegration.

Indeed, a big challenge for diversity in this field is the cultural change, minimizing the retributive culture, to allowing new openings in the interventions determined. There is space for creativity, especially if a multidisciplinary team is involved.

In order to make a real shift in paradigm, first, there is a growing need for increased awareness of the importance in improving existing practices and of how even small changes can positively contribute to transforming the system. Fortunately, a few initiatives, such as seminars, workshops and group discussions through social networks, as well as the social pressure for legislative changes in youth legislation, are a few ways of expanding this awareness.

Second, there is a growing need to involve professionals with non-legal background in the decision-making process, such as specialized internal or external teams/bodies, victim, offender, community, social assistants, psychologists etc.. For example, it will not do any good to have a multidisciplinary unit and not make use of it. Encouragingly, there is growing recognition that juvenile justice depends more and more on other areas of knowledge for effective decisions.

Third, there is a need for undergoing training and educational programmes etc. More importantly, the exchange of information with other States and empirical experiences in a comparative law perspective, as well as a deep analysis of the current international framework in juvenile justice, may shed light on what can be created or modified. Luckily, since most prosecutors and judges studied and experienced the Brazilian juvenile justice law from the new legal order's perspective (over 27 years old), many of them are already receptive to accept and promote ways to insert new tools for action.

Fourth, there is a need for expanding the types of interventions applied, as the Brazilian practice of limiting interventions only to protective measures and SEMs, under their traditional compliance approaches, goes against the effectiveness of the system. For example, sometimes a new intervention can simply be the prosecutor/judge's effort of working the offence from a different perspective, allowing time to sensitize the juvenile to the consequences of the conduct, to recognition of his/her responsibility and to the importance of repairing the harm.[82] In others, it can be the referral to social projects, meetings and programmes created by the Judiciary or the Office of the Prosecution Service itself, or other extrajudicial provisions.

In fact, this practice also moves away from the tendency of using restorative justice interventions — another international best practice in juvenile justice, cited by the United Nations Committee on the Rights of the Child as "an integral part of effective, child rights-based child justice system",[83] in the same vein as

[80] See amendments to the Brazilian Code of Criminal Procedure by the Laws 11.719/08 and 11.690/08, online: Planalto <www.planalto.gov.br>. See Law of SINASE, *supra* note 10, Article 1, paragraph 2, I.
[81] Brazilian Ministry of Human Rights, *supra* note 18, at 28.
[82] See Lélio Ferraz de Siqueira Neto, "Oitiva Informal – uma perspectiva garantista e restaurativa" at 8, online: MPDFT <http://www.mpdft.mp.br>.
[83] UNICEF, *supra* note 25, at 2.

diversion. According to the United Nations, restorative justice is an approach "in which the victim and the offender, where appropriate, any other individuals or community members affected by a crime, participate together actively in the resolution of matters arising from the crime, generally with the help of a facilitator."[84] So, unlike 'retributive justice', which concentrates on the crime and punishing the offender via a two-way relationship (offender and State), restorative justice focuses on problem-solving in a three-way relationship (between the offender, victim and society), addressing needs, harm, accountability, personal development, community involvement and obligations, to 'restore' harmony as much as possible.[85]

Juveniles are expected to understand choices' implications and be accountable for actions, to repair harm, learn to respect others, tackle guilt feeling and to develop personally in order to meet the community's needs related to the offence.[86] These expectations are advantageous and highly compatible with juvenile justice's aims, as they tend to contribute to the process of reintegration and to make the young offender take responsibility for actions, in order to change behaviours and to transform him/her into an active contributor of society, and, hence, increase public safety.[87] No wonder restorative justice initiatives, despite its challenges,[88] have grown significantly worldwide, including in juvenile justice.[89]

In Brazil, although the Law of SINASE/12 expressly mentions restorative practices as one of its principles,[90] its use is still limited to very few jurisdictions.[91] Only in 2005 the development of three pilot projects with distinct proposals within the Judiciary officially began.[92] Two of these projects (Sao Caetano do Sul/SP and Porto Alegre/RS) have focused on juvenile justice.[93] From these experiments, other initiatives emerged in the country, usually in the form of restorative circles (inspired by the Canadian model[94]). Yet, considering Brazil as a whole, restorative justice in juvenile justice is still in an embryonic stage.

Diversion does not always imply the use of restorative justice approaches, as it is a complementary method, not suitable in all cases.[95] Nevertheless, restorative justice can definitely enrich remission, by adding consistency, content and reliability.[96] For example, as stated elsewhere: "depending on services rendered by the actors involved in the juvenile system in each Brazilian state, the prosecutor[/judge] can refer the juvenile and other interested parties (victim, relatives and community) to restorative programmes of the community, the State or the MP, so the set of commitments between them is taken into consideration when granting remission[97]"[98] And continues: "[i]f this referral is not possible or is inappropriate, remission can always be granted combined with a protective or SEM, putting the restorative elements in generic terms, so the commitments to be covered in compliance with the measure will be further specified in the implementation stage."[99]

3. Third Challenge: The Delay in Starting the Interventions Applied

(a) Theoretical background and daily practices' limitations

The Brazilian judicial procedure ensures celerity in establishing measures for the young offender, since

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[84] *Basic principles on the use of restorative justice programmes in criminal matters*, UNESCOR, 37th plenary meeting, 24 July 2002, Annex, Res 2002/12 at para I.2.

[85] Ibid.

[86] UNICEF, Toolkit on Diversion and Alternatives to Detention – Definitions – Restorative Justice, at 5, online: UNICEF <http://www.unicef.org>.

[87] See CRC, *supra* note 5, Article 40.1.

[88] Such as well-trained facilitators, proper case selection, immediate funding (despite its potential to reduce long-term costs), elements to ensure offenders' rights and meet victims' needs (e.g., security, respect, information, testimony, restitution), as well as to prevent secondary victimization and pressure on participants etc. See Canadian Resource Centre for Victims of Crime, " Restorative Justice in Canada: what victims should know" (2011) online: rjlillooet <http://www.rjlillooet.ca>.

[89] Nessa Lynch, "Restorative Justice through a Children's Rights Lens" (2010) 18 Int'l J. Child. Rts. 161 at 162 (Hein Online).

[90] See Law of SINASE, *supra* note 10, Article 35, III.

[91] For example, Heliopolis and Guarulhos: see Ednir Madza org, "Justiça e educação em Heliópolis e Guarulhos: parceria para a cidadania" (2007), Sao Paulo, online: MPSP <http://www.mpsp.mp.br>. For Belo Horizonte and Sao Jose de Ribamar/MA see Caio Augusto Souza Lara, "Dez anos de práticas restaurativas no Brasil: a afirmação da justiça como política pública de resolução de conflitos e acesso à justiça" online: Publica Direito <http://www.publicadireito.com.br>.

[92] Brazil, Justice Ministry and PNUD, Catherine Slakmon, Renato De Vitto & Renato Gomes Pinto, org., *Justiça Restaurativa* (2005) at 221, online: UFPE <https://www.ufpe.br>

[93] For Porto Alegre/RS, see Brancher, *supra* note 60. For Sao Caetano do Sul/SP, see Brazil, Human Rights Special Secretariat, Eduardo Rezende Melo, Mazda Ednir e Vania Curi Yazbek, *Justiça Restaurativa e Comunitária em São Caetano do Sul – Aprendendo com os conflitos a respeitar direitos e promover cidadania* (2008), online: TJSP <http://www.tjsp.jus.br>.

most cases are related to adolescents caught in *flagrante delicto* and pre-trial detention can only last up to 45 days until sentence/disposition.[100] However, after the SEM or protective measure is applied through remission or by sentence, the implementation of interventions without restriction of liberty (usually SEMs of community service, assisted freedom or damage repair) commonly takes months or even years to begin (ultimately, perhaps hindered by time-barring) in most — if not all — of the Brazilian states. Obviously, if the juvenile's convocation to initiate the measure applied takes too long, he/she will not take full advantage of the valuable educational aspects of the measure he/she has the right to comply and will feel a 'sensation of impunity'. This sensation affects, in a very negative way, rehabilitation and reintegration, encouraging, in the end, recidivism.

These consequences can be even worse in cases of measures applied through remission. Considering that, in practice, this benefit is granted to first time offenders or to those without persistence in criminality, whose offence was committed without violence or serious threat,[101] in the absence of a rapid response, the offender, in addition to not taking advantage of the educational aspects of the measure, will not have felt the weight of court proceedings and conviction (from which he/she was channelled away). So, the 'sensation of impunity' tends to be bigger, even because the hope in rehabilitation/reintegration of the juvenile will basically lie on his family (if present), which does not always achieve good results on its own, as the State's opportunities to help were squandered. In other words, the possibility of re-offending increases, putting, once again, diversion's scope at risk.

(b) An idea for change: articulated/collaborative action among the system's actors

For years, the answer to the delay in starting the implementation of the interventions determined by the juvenile justice — which, as stated before, is a local state power responsibility — has always been the same: the insufficient number of available spots in the programmes/services. Some say the reason for that is scarce resources; others understand it as the lack of political will. Regardless, the disarticulation and physical distance between the bodies involved in determining the interventions (prosecutors/judges) and in implementing them (administrative bodies of the local states) are other important factors that contribute to this time gap.

The integration of entities from public security (military/civilian polices), the Justice system (Prosecution, Public Defence and Judiciary) and social assistance (bodies from the local state) has been predicted in the CAS/90 27 years ago.[102] However, very few jurisdictions have Operational Integration Centres for the whole of the procedures.[103] A few others only provide this structure for juveniles apprehended in *flagrante delicto* and not released to their families by the police authority.[104]

According to the Beijing Rules, "[a]s time passes, the juvenile will find it increasingly difficult, if not impossible, to relate the procedure and disposition to the offence, both intellectually and psychologically".[105] So, celerity is an extremely important 'best practice' in all youth interventions for the healthy development of the juvenile and, hence, for the system's effectiveness.[106] Indeed, "by promptly addressing the causes and consequences of their behavior, and providing services or support where necessary to prevent recidivism and encouraging positive reintegration into the community, has been found to cut repeat offenses in half and incarceration rates by two-thirds as compared to a control group."[107]

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[94] In Canada, the first recognized case of restorative justice (victim-offender mediation) was documented in Kitchener/ON, in 1974. See Department of Justice of Canada, 'Restorative Justice in Canada' (2000), online: Justice <http://www.justice.gc.ca>.
[95] See UNICEF, *supra* note 86, at 10.
[96] Brazil, National Human Rights Secretariat and CEAG/UnB, *Modulo IX* - Curso SINASE, *JR no ECA e mecanismos diversórios*, at 3, online: TJMG <http://www.tjmg.jus.br>.
[97] See Brancher, *supra* note 60, at 15.
[98] This citation was extracted from the author's research project, *supra* note 1, at 33.
[99] Ibid.
[100] CAS/90, supra note 9, Article 108.
[101] Ibid, Article 178.
[102] Ibid, Article 88, V.
[103] For example, Belo Horizonte/MG.
[104] For example, the Federal District and Recife/PE.
[105] Beijing Rules, *supra* note 30, Commentary to rule 20.1.
[106] See Sanson, *supra* note 66.

Since the dilemma between scare resources and political will tends to never end, as a start, it seems that the Office of the Prosecution Service and the Judiciary, besides pressing for government's investments in the filed, must direct strong efforts in bringing the local state agencies responsible for the implementation stage to the surroundings of the prosecutorial and judicial phases, as active daily partners. In this way, whenever interventions are established (e.g., a remission agreed with a SEM), the juvenile is immediately directed to the state's agency, to decide the starting date of the services/programmes and other important details and orientations.

This physical articulation between the institutions and agencies that work in the system as a whole brings, at least, the following advantages: 1) the disruption of the compartmentalization of the actors, allowing approximation;[108] 2) the creation of collaborative relations between these actors; 3) the exchange of knowledge and experiences concerning different variables of the system; 4) the de-bureaucratization of procedures; 5) the opening for new methodologies of intervening with youth; 6) cost division. As for the juvenile, this coordination reduces the 'sensation of impunity' (whereas at least there was a kick-off on the implementation of the interventions determined) and increases the chances of being notified to start to comply with the measure, as all actors will be working together in that direction. At the very end, perhaps all these actors together might be able to better pressure the local state power to positively implement policies and programmes.

V. CONCLUSION

The 254th meeting of the Committee on the Rights of the Child noted: "what was in the best interests of the child was in the best interests of society, hence a juvenile justice system that did not function well failed not only the children, but society as a whole, for, far from protecting society, it merely generated criminals to prey upon it."[109] Indeed, juvenile justice needs to focus on concrete results, as it is a strategic field for action in preventing the spread of violence and crime for current and future generations.

Considering the large number of cases with first-time offenders and those without persistence in criminality (whose offence was committed without violence or serious threat), effective interventions over this target group through remission not only contributes for the well-rounded development of a great number of juveniles, but also minimizes overburdened courts and overcrowded treatment institutions, shifting the focus to more serious cases. Thus, it makes the system more effective and also reduces State's costs.

Attacking criminality's root causes seems to be a better tactic than responding only to its symptoms. However, Brazil has been mostly attacking the symptoms, as this type of offender more often doesn't receive any response, while it focuses on increasing rigour and repression, especially through institutional treatment.

The poor assessment of the juvenile needs, the use of limited intervention methods and the delay in starting the interventions applied are constantly putting remission's benefits at risk. Drawing upon a few other international best practices, juvenile justice must use a holistic and comprehensive approach to the aspects of the offender life, must be open to different types and methods of approaches, including restorative justice, and must be fast and prompt in the response. Yes, indeed juvenile justice shall assist juveniles with services in other sectors of society, such as education, health care, social assistance etc., if those are needed for their sound development.

Lastly, "the biggest challenge is not on the law but on the need to overcome cultural barriers that deplete their interpretation and application."[110] Only after overcoming this barrier, it will be possible to see the importance of a multidisciplinary team support, to shift the paradigm in intervening with youth and to fight for an articulated/collaborative action among the actors of the system, towards its effectiveness.

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[107] Hojnacki, *supra* note 26, at 155.
[108] See Vera Lucia Deboni, "Centro Integrado de Atendimento à Criança e Adolescente" (2010), 'Prêmio Innovare – Edição VII', online : Premio Innovare <http://www.premioinnovare.com.br>.
[109] Odala, *supra* note 37, at 573.
[110] 'O maior desafio nao esta na lei, mas na necessidade de superar barreiras culturais que empobrecem a sua interpretacao e aplicacao.' (free translation by the author). Brazil, National Human Rights Secretariat and CEAG/UnB, *supra* note 96.