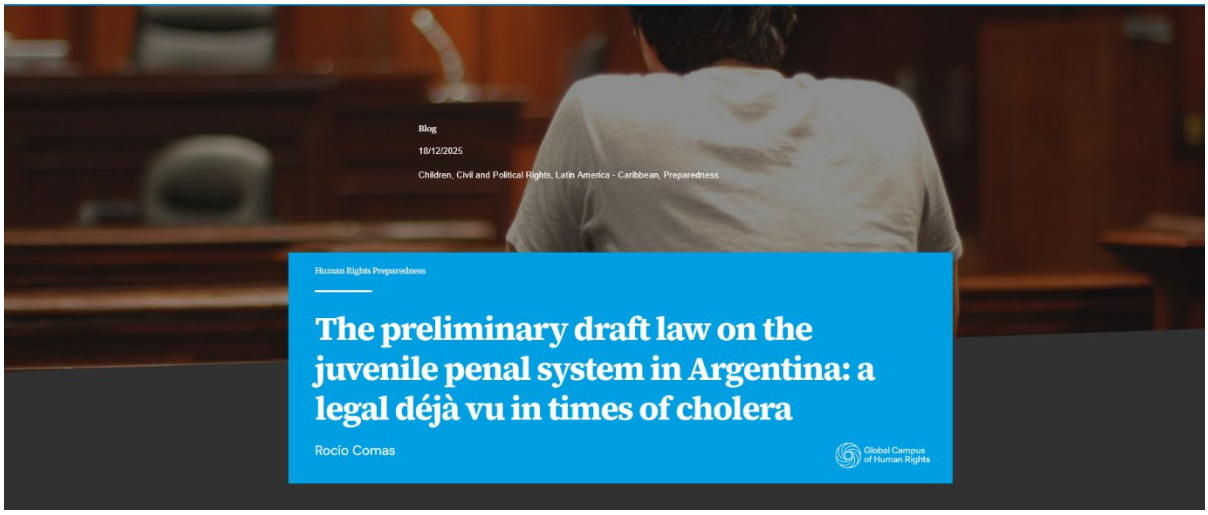

The preliminary draft law on the juvenile penal system in Argentina: a legal déjà vu in times of cholera

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Abstract: The Bill promoted by Argentina's Minister of Justice and Minister of Security aims at reforming the juvenile penal system and would reduce the age of criminal responsibility from 16 to 14 years. This has resumed the debate on the pending repeal of the current system. Instead of adapting it in line with human rights norms, the Bill responds to a punitivist logic reinstating the criminalization of adolescence in a situation of vulnerability.

Article 1 of the Juvenile Penal Regime, whose decree-law 22,278 was promulgated under a civic-military dictatorship in 1980, provides that adolescents under the age of 16 are not punishable. Since 1994, article 75, paragraph 22, of the Constitution recognizes the constitutional hierarchy of human rights treaties, such as the Convention on the Rights of the Child (CRC). This hierarchy makes the exercise of all public authority and responsibility for children conditional on the application of four guiding principles (ie, the rights to life, survival, development; to non-discrimination; to be heard; and the best interests of the child). Moreover, as Beloff points out, three articles lay the foundations for juvenile justice construction: Articles 12, 37 and 40 of the CRC. In particular, Article 12 CRC refers

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to the right to be heard, and Article 40 deals with the guarantee of defense at trial and its material defense. On the other hand, under Article 37 deprivation of liberty must be used by states as a measure of last resort, that is, by exception, and for the shortest possible time.

Numerous studies by WHO and UNICEF agree that the restrictive measure of freedom has profoundly negative effects on the mental, physical and emotional health of adolescents. Based on statistics on adolescents in contact with the law, they have a marginal impact on citizen security. Mary Beloff has well stated that there is no direct link between the criminal age and the number of crimes committed by adolescents 'in the same way that the increase in penalties does not reduce the commission of crimes'. In this sense, the figures do not support a measure as restrictive as deprivation of liberty.

From a regional perspective, Article 19 of the American Convention on Human Rights (ACHR) establishes special measures for the protection and assistance of children under its jurisdiction, which are the responsibility of the state, society and the family. The Inter-American Court of Human Rights (IACtHR) has established that any state decision that affects the exercise of a child's right must take into account his or her best interests and be based on dignity itself. In the Mendoza case (paragraph 143), in 2013 it has ruled that the principles of best interests, progressive autonomy and participation inform and are key to the design and operation of a system of juvenile criminal responsibility.

Notably, the concept of minimal access to decent living conditions is closely related to the right to life. This right not only implies that no person is arbitrarily deprived of his life, but also that he has access to conditions that ensure a dignified life. States are obliged to create the necessary conditions to prevent any violation of this essential right. These necessary material conditions, according to Clérico and Aldao, must be guaranteed by the state so that adolescents can have effective access to the design of their life plan. Research on the situation of children and adolescents has pointed out a direct relationship between the conditions of vulnerability experienced by adolescents and their subsequent deprivation of liberty. This connection is closely linked to the selective nature of the penal system and the way in which certain areas of the country are managed.

Moreover, scholars like Pablo Gonzalez Dominguez have stressed that the legislative power through conventionality control should avoid the creation of norms that go against human rights treaties with constitutional hierarchy. This was established by the IACtHR former judge Ferrer Mac-Gregor by affirming that compliance with international law falls on all the state authorities, whether from the legislative, executive or judicial powers, and the state responds as a whole and may incur international responsibility for having breached the international instruments it has signed. That is, any legal reform must respect and consider the human rights provisions contained in the international treaties that Argentina is a party to.

The lowering of minimum age and the principle of progressivity

Based on the legislative debate, reducing the age of criminal responsibility from 16 to 14 years would imply going against the principle of non-regression. While under Article 40, paragraph 3, of the CRC states must establish a minimum age of criminal responsibility without specifying a number, Article 41 of the same Convention repeals any measure involving regression under any circumstances. Article 40 also provides that any child who has violated a law must be treated in a manner consistent with the promotion of his or her sense of dignity and worth (paragraph 3).

In addition, in its General Comment No. 24 of 2019, the UN CRC Committee recommended that states parties 'set an age limit below which children cannot lawfully be deprived of their liberty, such as 16 years of age' (para. 89). Recent scientific discoveries have shown that the brain of adolescents continues to mature even after that stage, which influences their decision-making ability. Moreover, for the Committee, states that have already set this age at 15 or 16 should under no circumstances lower it. Therefore, lowering the age of criminal responsibility from 16 to 14 years would represent a regressive legislative measure, contrary to the principle of progressiveness, the best interests of the child, the principle of proportionality and the special protection that the Argentine Constitution guarantees to children and adolescents as subjects of law.

Budget for confinement and the current context

The creation of new detention centres entails high costs, since their implementation requires significant material and human resources, ranging from the purchase of land and the construction of infrastructure to the recruitment and training of personnel, besides the provision of essential services. In addition, 'hard-handed' policies have resulted in both federal and provincial regulations, and, as a result, the prison population has tripled in the last two decades. As indicated in paragraph 34 of the report of the UN Special Rapporteur on torture, between 1996 and 2016 the prison population across Argentina tripled from 25,163 to 76,261; this increase is even greater when considering those detained in police stations.

This, in turn, requires prior knowledge of the operation of these confinement spaces, and their problems that lead to pre-existing difficulties. In addition, the National Committee for the Prevention of Torture registered serious deficits in detention centers for adolescents in contact with the law. The neglect of young people in these centers has resulted in self-harm, death, torture, among others. The Committee also noted the appalling conditions in detention centers in all provinces and recommends that they be remedied. Furthermore, during its visit in 2018, the UN CRC Committee referred to the overpopulation and precarious living conditions present in adolescent detention centers and assimilated them to torture, cruel, inhuman or degrading treatment.

Under such a scenario, the current government has dismantled public policies on human rights and particularly on children, such as the Secretariat for Children, Adolescents and the Family (SENAF). Paradoxically, the cited Bill seeks to reduce the state apparatus and, at the same time, the minimum age of criminal responsibility, which would imply an increase in public spending. In turn, the negative impact of the economic and social crisis has led to an increase in poverty, inequality, and social protection systems for adolescents. In this context, the strengthening of social policies, such as access to housing, community programmes and education policies, among others, together with an equitable redistribution of resources, appears as a more effective strategy than the proposals contained in such a critical project. In short, what is proposed is a setback and goes against the principles and standards that should govern the matter.

The need to reform in accordance with IHRL

Decree-Law 22.278 on the National Minority Criminal Regime was conceived and promulgated by the last military dictatorship in 1980. This normative body was criticised due to its origin in a dictatorial context and the lack of adaptation to international standards and current legislation on children and adolescents. Significantly, the IACtHR in the Mendoza case determined that the framework contains provisions that go against the ACHR and international standards on juvenile criminal justice. Notably, Argentina was punished by this Court for violating the rights of children and adolescents in criminal matters in the Bulacio (2003) and Mendoza (2013) cases.

Therefore, in order for a reform of the Juvenile Criminal Responsibility System to be consistent with the national Constitution and the *corpus juris* of adolescents, fundamental pillars should be ensured, including dignified treatment, a differentiated approach in relation to adults, a system focused on responsibility and not on punishment, the exceptional nature of deprivation of liberty and non-regression in relation to the minimum age on criminal responsibility, the adoption of non-judicial measures (such as mediation, parole, community work, among others), and the use of measures other than the imposition of penalties.

Looking ahead

The considered Bill proposes an apparent solution that avoids dealing with the underlying problems: poverty, inequality, reduction of social policies and criminal selectivity towards vulnerable adolescents. Argentina should adjust its legal framework on criminal responsibility in line with international human rights law, design public policies, and allocate a budget for the prevention of adolescents in contact with the law to favor their integral development.

In the last two visits to Argentina, the UN CRC Committee recommended to design and elaborate a reform of a general law on juvenile justice in accordance with human rights treaties, specifically the UN CRC and international standards in

the field of juvenile justice, to avoid falling into the temptation of rapid formulas such as that of reducing the age of criminal responsibility, currently established at 16 years. The reform must integrate comprehensive protection areas such as prevention, education, and restorative justice, among others. These measures are less costly than deprivation of liberty and are also more effective in achieving the social reintegration of adolescents.

The need for state intervention in the reform of the Juvenile Penal System should be thought from a logic of the system of protection of rights, and not as a late response for its failures or omissions through its repressive arm. It should also avoid falling into media sensationalisms that create the false expectation of having quick and magical recipes. That is, by means of a law it will be possible to solve the previous absence of the state in relation to basic rights enabling to have a dignified life. Conversely, the Bill under discussion is limited, biased, and disciplinary; it symbolizes the punitive arm of the state that, in the face of claims from a part of society, limits its actions to separating those that the state should have protected in the first instance.