THE (NON) ACCEPTANCE OF FUNDAÇÃO CASA IN SÃO PAULO'S MUNICIPALITIES: AN ANALYSIS IN THE LIGHT OF DIRECT ACTIONS OF UNCONSTITUTIONALITY

A (NÃO) ACEITAÇÃO DA FUNDAÇÃO CASA EM MUNICÍPIOS DE SÃO PAULO: UMA ANÁLISE À LUZ DE AÇÕES DIRETAS DE INCONSTITUCIONALIDADE

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ABSTRACT

The Statute of the Child and Adolescent (ECA) and the National System of Socioeducative Support Law (SINASE) establish the importance of the territorial integration of service centers in the execution of socio-educational measures, however, many municipalities are still resistant to the establishment of custody and semi-liberty facilities in their territories. This article seeks to study this movement aimed to prevent or limit the establishment of such facilities, based on the analysis of Direct Actions of Unconstitutionality sought by the states. The results of the research note the movement of the municipalities in order to prevent these facilities at the beginning of the decentralization process, as carried out, at first in the late 1990s and, secondly, from 2005 on. Jurisprudence from the Brazilian Judicial Power was found, in the sense that such practices consist of usurpation of competence belonging to the states and the Union, under the terms of the Constitution of the State of São Paulo and the Federal Constitution.

Keywords: Socioeducation. Territory. Smart cities. Adolescents.

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RESUMO

O Estatuto da Criança e do Adolescente (ECA) e a Lei do Sistema Nacional de Atendimento Socioeducativo (SINASE) consagram a importância da integração territorial dos centros de atendimento na execução na medida socioeducativa, no entanto, muitos municípios ainda são refratários à instalação de equipamentos de internação e semiliberdade em seus territórios. O presente artigo busca estudar, a partir da análise de Ações Diretas de Inconstitucionalidade estaduais, esse movimento que visa impedir ou limitar a instalação de tais equipamentos. O resultado da pesquisa indica o movimento dos municípios no intuito de impedir essas instalações no início do processo de descentralização realizado, num primeiro momento no final da década de 1990 e, num segundo momento, a partir de 2005. Constatou-se o entendimento do Poder Judiciário no sentido de que tais práticas consistem em usurpação de competências do Estado e da União, nos termos das Constituições do Estado de São Paulo e Federal.

Palavras-chave: Socioeducação. Território. Cidades inteligentes. Adolescente.

INTRODUCTION

The first policies aimed at social distancing were of sanitary or assistance nature, as the treatment or basic care of those who needed fostering was sought, alongside the protection of healthy individuals in society. Norms that foresaw the distancing of those who were affected by contagious diseases existed before the Common Era – as described in the Jewish Law (6th and 5th centuries BC[1]) – and were continued throughout the Roman Empire and the Middle Ages.

Over time, the sanitary perspective started to have a segregationist and hygienist character, in which its objective was simply to make the undesirable individuals invisible to the eyes of society. Lepers, mentally alienated ones or with other diseases were taken to places far from the social centers and were to remain isolated until the end of their lives.

In Brazil, the psychiatric asylum policy allowed, indiscriminately, the compulsory confinement of people considered insane. Other policies of this nature were based on assistance arguments. However, the institutions that housed these people functioned as "storage", designed to keep society's undesirable at a comfortable distance.

Hygienist norms related to sanatoriums and psychiatric asylums were in force throughout the 20th century. In Brazil, for example, the Anti-asylum Law –

[1] *BIBLIA SAGRADA – Edição Pastoral*. São Paulo: Paulus, 1990.

Law n. 10,216, of April 6, 2001 (Brazil, 2001)[2] – creating considerable obstacles to the compulsory hospitalization of people with mental disorders, a consequence of the fight carried out by organized groups since the late 1970s that opposed these types of severe treatment[3].

Social hygienist policies were not limited to sanatoriums, but to various types of social facilities designed to shelter society's undesirable individuals, that is, those that did not fit the parameters of a utilitarian society. In Brazil, the Criminal Execution Law – Law n. 7,210, of July 11, 1984 (Brazil, 1984)[4] – establishes that prisons for men must be built away from the urban center, as determined by article 90.

The historical process of the development of cities followed this logic of separating the undesirable or unwanted ones in some way. In the Middle Ages, those who met certain requirements were located within the walled limits of the city, while the part of the less affluent population occupied the spaces outside the walls, being subject to the will of usurpers and all kinds of exploiters, therefore, without State protection[5].

In this context of historical construction of the cities, the forms of exclusion are diversified and the influential part of the population pressures the local powers in order to keep the undesirable ones away from certain regions[6]. In the present work, one of the many existing forms of exclusion will be approached, highlighting a specific group: the teenagers who committed offenses, a group formed by young people and teenagers who engaged in conducts typified in the Brazilian Penal Code and in other laws on this matter.

Disciplinary centers for children and adolescents, especially from the 1990s to the mid-2000s, gained negative notoriety in the press due to major rebellions, mass escapes and episodes of violence and torture, which caused the local communities regarding to refrain from supporting this type of facilities in their regions.

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2 Lei n. 10.216 de 06 de abril de 2001. Brasil. Disponível em: http://www.planalto.gov.br/ccivil_03/leis/leis_2001/l10216.htm.

3 SANT'ANNA, T. C., BRITO, V. C. A lei antimanicomial e o trabalho de psicólogos em instituições de saúde mental. Psicologia: ciência e profissão, 2006, v. 26, p. 368-83. doi: 10.1590/S1414-98932006000300004. Acesso em 01 de maio de 2020.

4 Lei n. 7.210 de 11 de julho de 1984. Brasil. Disponpivel em: http://www.planalto.gov.br/ccivil_03/leis/l7210.htm.

5 TENÓRIO FILHO, J. R., LIMA, S. F. Construções penais e o diálogo com a cidade: a (não) política de implantação de equipamentos penais no meio urbano. Urbe. Revista Brasileira de Gestão Urbana, 19 de fevereiro de 2018, p. 371-86. doi: https://doi.org/10.1590/2175-3369.010.002.ao08.

6 VILLAÇA, F. São Paulo: segregação urbana e desigualdade. *Estudos avançados*, 2011, p. 37-58. doi: 10.1590/S0103-40142011000100004.

Thus, the installation of a FEBEM (acronym for São Paulo's State Child Welfare Foundation) facility in any municipality represented great political strain for the local government, motivating the municipal legislative powers to create laws aiming to prohibit, limit and hinder the implementation or expansion of FEBEM units and prisons in their territories.

Several of these laws were the object of Direct Actions for the Declaration of Unconstitutionality, with the argument that it is not up to the municipalities to legislate on matters related to the protection of children and adolescents and public safety. Such competence would belong to the Federal Union, states and the Federal District. Such actions were deemed legitimate, enabling the settlement of these centers.

The purpose of this article, in this sense, is to identify and understand the gap between the advanced protective legislation for the rights of children and adolescents and its conflicting reception by civil society and subnational entities, thus expressing the low social adherence to what the Federal Constitution of 1988 stands for and the infra-constitutional legislation in this regard.

THE REFUSAL OF MUNICIPALITIES TO WELCOME SOCIO-EDUCATIONAL FACILITIES FOR PERMANENT RESIDENTS AND SEMI-LIBERTY RESIDENTS

The historical process of hygienist segregation gained strength in the middle of the 19th century, when the poorest and most disadvantaged classes came to be seen as potential agents that caused contagious diseases to spread, given the precarious sanitary conditions to which this population was subjected. From this to being considered a chronic social hazard was not a big stretch. The Ideology of Hygiene is born in this context, as Chalhoub explains:

> "The lower classes did not come to be seen as dangerous just because they could pose problems for the organization of work and the maintenance of public order. The poor also offered danger of spreading diseases. On the one hand, the very social danger represented by the poor appeared in the Brazilian political imagination at the end of the 19th century, through the metaphor of contagious disease: the dangerous classes would continue to reproduce as long as the poor children remained exposed to their parents' vices. Thus, the very discussion about the repression of idleness, which we have mentioned, the strategy to combat the problem is generally presented as consisting of two stages: more immediately, it was necessary to repress the supposed non-work habits of the adults; in the longer term it was necessary to take care of the education of the minors.
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> [...]

> Such an order of ideas would saturate the country's intellectual environment in the following decades, and lend ideological support to the 'sanitizing' action of engineers and doctors who would start to rise and accumulate power in the public administration, especially after the republican military coup of 1889"[7].

In addition to the entire historical process of hygienist segregation, there are several factors that give rise to the refraction of society in relation to socio-educational assistance facilities for adolescents. We can highlight the history of segregation of these populations in the development of cities, alongside the number of rebellions that occurred over the years – some of these were considerably violent and reported widely by the press – and the creation of a center that generates the traffic of people considered undesirable, those being the relatives and the visitors of the teenagers under custody.

Although the territoriality of care has been provided for in the Statute of the Child and Adolescent since the year of 1990, in 2005, 70.24% of the care centers were located in the Capital of the State of São Paulo, in large complexes of facilities, concentrating a large number of adolescents. The Tatuapé complex, in the East Zone of São Paulo, was able to house more than 1800 teenagers. In this period, the number of rebellions reached the number of 80 in a single year and the rate of infraction recidivism was of 29% across the state, with a total population of just over 4,000 residents (Fundação CASA/SP, 2010), which somehow justifies the fear and resistance of local public authorities towards such facilities. Thus, several Municipalities started to legislate in order to prevent the construction or expansion of such centers.

The Federal Constitution, when granting legislative powers to the federal entities, did so while granting them exclusive, concurrent or residual powers, as established in articles 21 to 24 and 29 and 30 of the Constitution, among other provisions scattered throughout the constitutional text. In this sense, the Brazilian federative system determines that the entities of the Federation are: the Union, the States and the Municipalities. The latter were attributed with specific competence, of which it is possible to highlight that of legislating on matters of local interest (article 30, I, of the Constitution) and promoting territorial planning, control of the use and occupation of urban land (article 30, VIII, CF).

When dealing with protection related to children and adolescents, article 227 of the Constitution attributes to society and all federal entities the duty to give absolute priority to children, however, the direct legislative competence is concurring between the Union, the States and the Federal District, without

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[7] CHALHOUB, Sidney. *Cidade febril:* cortiços e epidemias na Corte imperial. 2. ed. São Paulo: Companhia das Letras, 2017, p. 26.

granting competence on this matter to the Municipalities (art. 24, XVI, of the Constitution). Such an omission does not mean that it is not up to the latter to legislate on this issue, but rather that it may do so on a residual basis, in cases of local interest or in supplementation to federal or municipal legislation, as appropriate, under the terms of article 30, I and II, of the Constitution.

In this sense, Bastos[8] affirms that "the key concept used by the Constitution to define the area in which the Municipality operates is that of local interest". Thus, hermeneutics is eligible to fulfill the mission of analyzing the intensity of the local interest, this because, the decision of a certain municipality, although it might be about the interest of that municipality, may directly affect the interests of other municipalities in a direct and powerful way, thus, although local, the interest is also regional, given the degree of coverage of the given matter.

In attention to the specific competences attributed to the States, State Law n. 185, of December 12, 1973[9], is, indeed, compatible with the Federal Constitution and the Constitution of the State of São Paulo. Said Law created the FEBEM (São Paulo's State Child Welfare Foundation), assigning it the role of applying socio-educational measures to adolescents who committed offenses and basic care for vulnerable children and adolescents, the latter role ceasing to be of responsibility of FEBEM when the Statute of the Child and Adolescent came into force, when the attention to vulnerable children became responsibility of the municipalities, and FEBEM remained only with the responsibility of applying socio-educational measures.

In 1998, the first decentralization program started in the State, but only in 2005 this process gained strength and expanded to inland São Paulo and coastal area of the state. In 2006, FEBEM was renamed Fundação CASA/SP (Fundação Centro de Atendimento Socioeducativo ao Adolescente, Foundation-Center for Social and Educational Assistance to Adolescents) and, in continuity with the process of decentralization of care, the application of socio-educational measures for the accommodation of residents and semi-liberty residents was kept under the competence of the states, as the other measures provided for in the Statute of the Child of Adolescent were passed onto the municipalities, namely the provision of services to the community and assisted freedom (art. 112, ECA) (Fundação CASA/SP, 2020).

Notwithstanding the legislative and executive attribution for the application of socio-educational measures to adolescents who have committed infractions, whether from the Union or the states, several municipalities – in reaction to the

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[8] BASTOS, Celso R. *Curso de direito constitucional*. São Paulo: Celso Bastos Editor, 2002, p. 513.

[9] Lei n. 185 de 12 de dezembro de 1973. Autoriza o Poder Executivo a instituir a "Fundação Paulista de Promoção Social ao Menor – PRO-MENOR". São Paulo. Brasil. Disponível em: https://www.al.sp.gov.br/repositorio/legislacao/lei/1973/lei-185-12.12.1973.html.

decentralization process – started to legislate in order to prevent the construction of service centers in their territories, based on the constitutional competence of legislating on matters of local interest and the use and distribution of urban land.

In the present work, research was carried out on the website of the Justice Court of the State of São Paulo aiming to visualize the behavior of the Judiciary in view of the intention of the Government of the State of São Paulo to build centers in different locations in the state territory and the legislative conduct of the Municipalities.

From the result obtained in this research, it is analyzed, from a constitutional point of view, the legislative behavior of some municipalities in the State of São Paulo related to the establishment of such facilities, especially the provisions of Municipal Laws n. 1,712, of April 15, 1997 – Municipality of Peruíbe; Complementary Law n. 48, of December 14, 1999 – Municipality of Guarujá; Law n. 2,739, of November 4, 2005 – Municipality of Casa Branca; and Complementary Law n. 487, of January 9, 2006 – Municipality of Bragança Paulista, which were the subject of a judicial dispute between the municipalities and the State of São Paulo[10].

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[10] The Laws described here were extracted from the texts of the respective state Direct Actions of Unconstitutionality:

Municipal Law 1.712/1997 of Peruíbe establishes:

Article 1. The construction of a prison and public jail in the urban area of the city is strictly prohibited.

Complementary Law n. 48/1999, of Guarujá, provides:

Article 1. The use of land, city blocks, lots and buildings for the establishment of Prisons, Jails and Units of FEBEM (São Paulo's State Child Welfare Foundation) is prohibited in the residential area of the Municipality of Guarujá, and the existing Prison must be deactivated within the period of 360 (three hundred and sixty) days.

Law n. 2,739/2005, of Casa Branca, provides:

Article 1. The construction, expansion or establishment of new facilities for prisons, custody houses, FEBEM or facilities for the execution of sentences liberty deprivation are prohibited in the urban and rural area of the municipality of Casa Branca.

Finally, article 79, I, b, of Complementary Law n. 487/2006, of the Municipality of Bragança Paulista determines:

Article 79. For the purposes of this Complementary Law, the territory of the municipality is subdivided into 07 (seven) macro-regions: Urban Region, Urban Expansion Region, Targeted Expansion Region, Social Interest Region, Controlled Expansion Region, Permanent Preservation Region, and Agriculture Region, understood as follows:

I – Urban macro-region is that destined to:

b. Priority establishment of urban and community facilities, with the exception of penal facilities, re-socialization centers, adolescent care centers or any other similar facilities that aim to maintain people under measures of deprivation of liberty, which cannot be built or established within the limits of the Urban macro-region.

All of these laws aim to prohibit the construction of socio-educational service centers or prison units in their territories or in urban areas, as if such facilities were not part of the necessary apparatus for the functioning of cities. Aiming to choose which social groups are wanted in the territory of the municipality, or at least making such facilities remain invisible in the urban fabric. Such laws make it impossible or difficult to integrate socio-educational service centers into urban territories.

In view of these rules, the following Direct Actions of Unconstitutionality were filed:

> ADIn Estadual, 154 726-0 / 2-00 (TJ/SP, June 18, 2008).
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> ADIn Estadual, 47.977-0 / 1 (TJ/SP, November 4, 1998).
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> ADIn Estadual, 73.011-0 / 0-00 (TJ/SP, June 11, 2003).

What all the aforementioned actions have in common is that the unconstitutionality of the rules was recognized in view of the Constitution of the State of São Paulo, due to the violation of the competence to legislate in matters of public security and protection of children and youth, especially with the combination of articles 24, I and XV, and 25, paragraph 1, of the Federal Constitution, and articles 1, 111, 139, caption of the article, 144 and 278, VI of the Constitution of the State of São Paulo. ADIn 47.977-0/1 and 154.726-0/2-00, from the Municipalities of Peruíbe and Casa Branca, respectively, were filed by the State Governor, and ADIn 73.011-0/0-00, from the Municipality of Guarujá, was filed by the General Attorney of the State of São Paulo.

The magistrates, as the foundation for their decision, although citing the jurisdiction of the states for the promotion of public policies related to urban law and the protection of children and adolescents, bring light to the attribution of competence, essentially with regard to public security, that place the prisons and units of the former FEBEM on equal grounds, which, however it is recognized that both are intended for the custody of people who have practiced conducts described in the Brazilian Penal Code, have completely different nature. Thus, it is important to delve deeper into the arguments concerning the matter.

Article 227[11] of the Federal Constitution provides that it is the duty of the family, society and the State to ensure priority attention to children and adolescents. As described before, the Brazilian Federal State is constituted by the Union,

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[11] 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.

states and Municipalities, so that none of these entities is entitled to waive or neglect this duty (a similar provision is found in the Constitution of the State of São Paulo, in its article 277). And, with such laws, we can affirm that the Municipalities want to exempt themselves from the constitutional duty (art. 277 of the Constitution of the State of São Paulo and 227 of the Federal Constitution) to participate in resocialization, mainly of adolescents who come to practice infractions.

Each fundamental right corresponds to a fundamental duty, a commandment which can be assigned to an individual or the State. The rules related to children and adolescents are constitutional in nature, detailed in the Statute of the Child and Adolescent (ECA) – Law 8.069/1990. The right to experience family and community life, as provided for in article 227 of the Federal Constitution, advocates a corresponding state duty. In such a way that the Union, States and Municipalities are set to fulfill the duty to guarantee children and adolescents the enjoyment of this right[12].

The right to experience family and community life is regulated in several provisions of the Statute of the Child and Adolescent (ECA) and SINASE (National System of Socioeducative Support Law, Law n. 12,594, of January 18, 2012). With regard to the subject under analysis, article 124, VI, of the ECA establishes that it is the right of the adolescent deprived of liberty to comply with the socio-educational measure in an establishment in the same location or close to the residence of the parents or legal guardians, as well as article 35, IX, of the SINASE establishes that the implementation of socio-educational measures must follow the principles of strengthening family and community bonds. It is a group of rights related to the guarantee of maintaining such family and community ties, demonstrating the importance of the territory in the proper application of the measures[13].

In this way, there is a distancing between the lack of support from the Municipalities and the guaranteed provisions of the constitutions of the Republic and the State of São Paulo. These laws become even more serious when they prohibit the establishment of any adolescent care center. Some inhibit the construction across the whole territory, others in certain macro-regions, an extremely discriminating element, insofar as it imposes on the adolescent and their family members, the need to travel to places far from their homes to receive adequate care, depriving them from local community life, in the socio-educational process.

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12 SILVA, J. A. Inovações municipais na Constituição de 1988 (homenagem póstuma a Hely Lopes Meirelles). *Revista dos Tribunais*, 2011 maio, v. 13, p. 1107-122. Acesso em 15 de maio de 2020.

13 COSTA, A. C. *Estatuto da criança e do adolescente comentado*. São Paulo: Malheiros, 2008.

The segregationist process of city formation is perpetuated, even if in a different way, notwithstanding the constitutional provision of the absolute priority to care for children and adolescents. It is an intense sociological process, difficult to solve. The objective of the referred laws to prevent, limit, hinder the fulfillment of the State's duty to create and implement public policies for the assistance of adolescents who committed infractions is clear.

The constitutions of the Republic and of the State of São Paulo established concurring and exclusive competences for each federative entity, with regard to care for children and adolescents. Roughly speaking, the State is responsible for the application of socio-educational measures for residents and semi-liberty residents and the municipalities are responsible for the application of measures for non-residents (Constituição do Estado de São Paulo, 1989).

It is undeniable that the Federal Constitution has given municipalities the power to legislate on the sharing and use of urban land, as provided for in article 30, VIII, however, it is also undeniable that the same provision determines that this competence applies where appropriate, that is, it is not an absolute attribution. The Municipality cannot, under article 30, VIII, usurp the competence assigned to the other federal entities.

Let us proceed with the analysis, therefore, of what the constitutions of the Republic and the State of São Paulo establish.

Article 1 of the Constitution of São Paulo assigns residual competence to the State, and not to the Municipality, to legislate on matters that are not prohibited by the Federal Constitution: "Article 1. The State of São Paulo, a member of the Federative Republic of Brazil, exercises the powers that are not prohibited by the Constitution".

Article 5, paragraph 1, of São Paulo's Constitution[14] expressly forbids all State powers to delegate attributions not inscribed in the Constitutional text. Now, if such delegation is forbidden, as it must be considered that this is something that would happen at the will of the manager of a power, the usurpation practiced by the Municipality that tries to prevent the pursuit of state ends is of even more concern.

Article 111 of São Paulo's Constitution[15], on the other hand, reaffirms the provisions of article 37 of the Federal Constitution, establishing the fundamental principles of Public Administration, in particular, the principles of legality

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[14] Article 5. The Legislative, the Executive and the Judicial, independent and harmonious among themselves, are the powers of the Union.

§1 – It is forbidden for any of the Powers to delegate duties;

[15] Article 111. The Public Administration, in the Direct, Indirect or Foundational attributions, among any of the State Powers, will obey to the principles of legality, morality, publicity, reasonableness, purpose, motivation, public interest and efficiency.

and purpose. It should be noted that the principle of legality is understood as the submission of administrative activity to the Law, and before that, it is submitted to the Constitutions (both Federal and State), as it is true for all powers, submitted to the observance of the constitutional rule[16].

Likewise, article 139 of the Constitution of the State of São Paulo attributes to the said state the duty to act in the area of Public Security, giving it, therefore, the competence to legislate and execute the laws enacted in this matter[17].

When legislating, the Municipality must abide by the principles and rules recommended by the Constitutions of the state and the Republic, as a result of the principle of legality and the express text of article 144[18].

Furthermore, it should be highlighted:

> Article 277. It is the responsibility of the Public Power, as well as the family, to ensure that children, adolescents, the elderly and the disabled have absolute priority in the access to the right to life, health, food, education, leisure, professionalization, culture, dignity, respect, freedom and to experience family and community life, in addition to keeping them safe from all forms of negligence, discrimination, exploitation, violence, cruelty and aggression.
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> (...)
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> Art. 278. The Government will promote special programs, admitting the participation of non-governmental entities and having as purpose:
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> (...)
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> VI – the establishment and maintenance of special care centers and housing for the temporary welcoming of children and adolescents, the elderly, the disabled and victims of violence, including the creation of support services for victims, integrated with psychological and social assistance.

The Federal Constitution establishes in its articles 18; 24, XV; 25 and 227:

> Art. 18. A article 18. The political and administrative organization of the Federative Republic of Brazil comprises the Union, the states, the Federal District and the municipalities, all of them autonomous, as this Constitution provides;
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> (…)

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16 BANDEIRA DE MELLO, C. A. *Curso de direito administrativo*. São Paulo: Malheiros, 2003.

17 Article 139. Public Security, as a duty of the State, a right and responsibility of all, is exercised for the preservation of public order and the safety of people and property.

18 Article 144. Municipalities, with political, legislative, administrative and financial autonomy, will organize themselves by organic law, in compliance with the principles established in the Federal Constitution and in this Constitution.

> Article 24. The Union, the states and the Federal District have the power to legislate concurrently on:
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> XV – protection of childhood and youth;
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> (…)
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> Article 25. The states are organized and governed by the Constitutions and laws they may adopt, in accordance with the principles of this Constitution.
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> Paragraph 1. All powers that this Constitution does not prohibit the states from exercising shall be conferred upon them.
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> (…)
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> Article 227. It is the duty of the family, society, and the State to ensure children, ado lescents, 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.

Thus, the Constitutions of the state of São Paulo and the Republic determine specific powers and attributions for the state, in addition to giving it residual competence to legislate and execute the laws created, observing the principle of purpose. It is important to point out that the competence to legislate on matters dealing with the protection of children and youth belongs to the state (1988 Constitution), and it is up to the state to determine where and how public facilities are established, for the application of this attribution. Based on the legislative competence provided for in article 24, XV, of the Federal Constitution, State Law n. 185/1973 (compatible with the Constitutional text) attributed the competence to the Fundação CASA/SP for the application of socio-educational measures to adolescents who committed infractions.

Analyzing this normative framework, we can clearly identify the constitutional competence attributed to the state over policies related to adolescents who commit crimes, either from the perspective of public security or from an educational perspective. Any interference by the administration of the Municipality, which may hinder the application of state public policies, represents a real usurpation of competence. The Municipality cannot, even if indirectly, interfere in the exercise of the powers constitutionally attributed to the state. The Organic Law, the Municipality's Development Plan or the Urban Occupation Law cannot restrict the performance of the state, especially in the establishment of public facilities essential to achieve its objectives.

Sundfeld[19], in his book 'Direito Administrativo Ordenador', teaches:

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[19] SUNDFELD, C. *Direito administrativo ordenador*. São Paulo: Malheiros, 1993.

> (...) "If the Federal Union decides to establish a nuclear plant or the state to build a prison, they do not need to comply with the Municipality's urban occupation plan and building plan. Neither the nuclear plant nor the prison establishment are common constructions, subject to municipal competence; only federal and state laws, respectively, can regulate them, including regarding location and building standards, since it is only deferred to the states and the Federation to discipline such services. In these cases, the imposition of Municipality law on the Union and states would imply an intolerable range of power of the Municipality to dispose, from a hierarchically advantageous position, over public services reserved exclusively for those above it".

Thus, the Municipality's legislation cannot isolate public buildings in areas of their exclusive interest. With regard to detention units for adolescents who commit offenses – as well as in prisons -, private interests sometimes seek to override the public interest, as they either try to avoid the establishment of such facilities in the municipality, or in the vicinity of urban centers, or in areas of great real estate value, causing such establishments to be built in remote regions, with obstacles to accessibility, to the detriment of public interest, especially of adolescents themselves, since they have the right to be housed in the vicinity of their homes, making it difficult for family members to visit them and the community to participate in the re-socialization process.

Accepting that said laws are constitutional would mean that it is up to the Municipality to determine where and how the public facilities of other political entities, namely the Union and the state, will be built in the Municipality's territory, insofar as the municipality's legislation will discipline the use of the land by other federative entities.

These normative diplomas materialize what Nascimento[20] classifies as the phenomenon of the emergence of the "exclusion of the unnecessary individuals",

> Finally, I can announce the central and ultimate hypothesis: our development process tends to produce a new type of social exclusion, whose result will be the transformation of the annoyance in the social fabric, the poor ones who reached the status of voters, but still figures as the 'dangerous excluded ones', unnecessary from the economic standpoint (no longer belonging to a 'suplying army' for the market, as they are no longer able to enter the labor market, while prisoners) and threatening, from a social point of view, as a transgressor of laws. With this shift, which occurs simultaneously with the separation between the 'working class' and the 'dangerous class', the action taken towards these individuals will no

[20] NASCIMENTO, E. P. Hipóteses sobre a nova exclusão social: dos excluídos necessários aos desnecessários. *CRH*, 1994 dez, v. 21, p. 29-47.

> longer be that of educational repression, to absorb this potential new labor force, but that of pure and simple repression to eliminate these individuals with little possibilities, as the society does not have an interest in transforming them into labor force. The modern excluded ones are, therefore, a social group that becomes economically unnecessary, politically annoying and socially threatening, and can therefore be physically eliminated. It is this latter aspect that underlies the new social exclusion pattern.

As it is reaffirmed, article 139, of the Constitution of the State of São Paulo, attributes to the state the competence for Public Security, and article 24, XV, of the Federal Constitution attributes to the state the competence to legislate on matters related to childhood and youth. Thus, if both constitutions assign specific competences, the infra-constitutional legislation, in particular, that of the Municipality, cannot create restrictions on the exercise of these competences. It must be said, that even the state could not legislate in such a way as to delegate these attribution to other entities, as mentioned.

Article 277 of the Constitution of the state of São Paulo and article 227 of the Federal Constitution, both determine that it is the duty and power of the State, here understood, with the capital letter, in a broad sense, that is, the Union, States and Municipalities – to give absolute priority to children and adolescents. And what do some municipalities try to do, while prioritizing urban planing to the detriment of the interests of adolescents in State custody?

Article 278, VI, of the Constitution of the State of São Paulo, expressly states that it is the duty of the Public Administration to establish and maintain centers of care, among others, for children and adolescents. The fulfillment of this constitutional duty becomes impossible in the aforementioned Municipalities, since these laws do not allow the construction and creation of this public facilities in the Municipality. Its unconstitutionality is evident. The Justice Court of the State of São Paulo has already ruled on this matter, when required to do so. In the decision on the Direct Action of Unconstitutionality n. 47.977-0, the Court decided:

> Direct Action of Unconstitutionality – Municipal Law that prohibits the construction of prisons and public jails in the urban area of the City – Violation of articles 1; 5, paragraph 1; 111; 139; 143, caption; and 144, of the Constitution of the State of São Paulo – Pleading granted.
>
> (...)
>
> 'In fact, undue interference within the State's jurisdiction by the Municipality is well characterized, which is offensive to article 1 of the Constitution of São Paulo (...)
>
> The Municipality of Peruíbe cannot, under the excuse of acting within the autonomy limits expressly enshrined in the Federal Constitution

> (article 30, item I), interfere in matters that are not within its competence, in this case, of Public Security, which belongs to the competence of the State of São Paulo, in the exact terms of articles 139, caption, and 143, of the São Paulo Charter'. (JTJ 212/272).

In this sense, also:

> Unconstitutionality – Municipal Law – Approval of a municipal law that prohibits the Executive Power's technical bodies from approving the construction of prisons in the territorial area of the municipality – Law Project of Councilman's initiative, vetoed by the Chief of the Executive, but promulgated by the City Council – Violation of article 139, caption, and article 5, of São Paulo's Constitution – Pleading granted. (Direct Action of Unconstitutionality n. 38.419-0 – São Paulo – Special Organ of the Court – Rapporteur: Álvaro Lazzarini – March 18, 1998 – V.U.).
>
> Direct Action of Unconstitutionality – Proposed by the General Attorney of São Paulo, aiming at the exclusion of Complementary Law n. 48, of December 14, 1999, of the Municipality of Guarujá, which prohibits the establishment of prisons, jails and units of FEBEM (São Paulo's State Child Welfare Foundation) in the residential area of the Municipality of Guarujá, and also determines the deactivation of the existing prison, within the assigned term – Usurpation of concurring competence of the Union, the States and the Federal District, to legislate on penitentiary matters, technical urban-planning parameters, and child and youth protection rights, as well as the residual competence of States in matters of public security – Arbitrary restrictions against the state in the area of public security and child and youth protection, which should not be confused with administrative limitations, on the excuse of legislating on urban planning – THE AUTONOMY OF THE MUNICIPALITY IS LIMITED, BEFORE THE SUPREMACY OF THE STATE AND, ABOVE ALL, OF THE FEDERAL UNION – Formal and material incompatibility with articles 24, I and XV, and 25, paragraph 1, both of the Federal Constitution, and, still, material incompatibility with Articles 1, 111, 139, caption, 144 and 278, VI, all of the São Paulo's Constitution – Precedents of this Court of Justice – Pleading granted (TJ/SP – São Paulo – Special Organ of the Court – Rapporteur: Mohamed Amaro – 06/11/2003 – V.U.).

Let us see that in these judgments the concurring competence of the Union, States and the Federal District, to legislate on penitentiary matters, technical urban-planning parameters and protection of children and youth, as well as the residual competence of states in matters of public security are clear, excluding the municipalities of this list.

There is, also:

> "Interlocutory Appeal – Insurgency against a decision that revoked preliminary injunction on a construction embargo related to a temporary detention center – The alleged absence of a project and permit to build is related to the prohibition on the construction of this penal facility in residential areas and commercial venues by municipal legislation, and even if it such absence was resolved, the Municipality would not approve the project in view of the aforementioned local legislation – In addition, the revocation of preliminary injunction on a construction embargo proves to be legal, since the jurisprudence has understood that it is up to the State to legislate on the matter – Decision maintained – Interlocutory appeal not granted." (JTC 263/363).
>
> "Civil Appeal – Land donated by the Municipality for the construction of a prison – construction started within the donation period – Municipal Law that prohibits construction was approved after it – Impossibility of the demand – exercise, by the State, of the sphere of competence provided for by the sovereignty of the Nation – definition of competences – Municipal portion of territory that is not exclusive to the use of the Municipality – State has reserved competence to take care of public security – unviability to dwell on the Municipality's sovereignty – potential construction of a prison, whose location is in an area with rural characteristics, distanced from the urban perimeter – sentence maintained – unprovided appeal" (TJSP – Ap.Civ. N. 18.173-5 – 8th Chamber of Public Law – Rapporteur: Walter Theodósio – 20/02/1998 – V.U.).

This decision shows an important affirmation of the judge, when stating that the "Municipal portion of territory that is not exclusive to the use of the Municipality", so that there is no sovereignty of this political entity over the state in these matters.

In this way, we can verify that all the municipal laws here studied are in conflict, in some way, with the body of guarantees for the rights of children and adolescents enshrined in the current Constitutional order. Such provisions are in disagreement with the general duty of the family, the society and the State to guarantee absolute priority to policies related to children and adolescents, besides violating specific constitutional competences of other federal entities.

SOCIETY FEARS AND RESEARCH RESULTS

As explained above, it can be seen that among the reasons that led the municipalities to try to prevent the installation of service centers from the former FEBEM, currently the Fundação CASA, in their territories were the hygienist history of the formation of cities and the fear of the consequences of such facilities, among which rebellions, mass escape and creating flows of people in the region where the facility is established.

Even with all the resistance from the municipalities, the process of decentralization of such facilities was carried out in the State of São Paulo, especially from 2005 on, when a major restructuring of the state's socio-educational service began, with the construction of decentralized facilities, with small units, with capacity to welcome 56 teenagers. For choosing the construction sites for the centers, the possibility of greater capillarity throughout the state was taken into account, so that adolescents could fulfill the socio-educational measure close to their homes, preferably in their own city of origin and neighborhood (Fundação CASA/SP, 2014).

However, the indicators obtained after the peak of the decentralization process, between 2005 and 2009, show that the choices made by the Fundação CASA were correct in several aspects. From the analysis of the data that follows, it appears that there was a sharp decrease in the indicators of recidivism, rebellions and mass escape in the period and a stabilization from 2010 on. Thus, the percentage of adolescents fulfilling their service time in the capital of the State of São Paulo went from 82% in 2005 to 39.5% in 2013, with 41.6% in the inland area, 6% on the coastal area and 13% in the Metropolitan complex of São Paulo. The total number of centers in the inland area and coastal area of the state now correspond to 50.7% of the centers in the state, surpassing the number of centers in the capital[21].

In 2006, the rate of recidivism at the Fundação CASA was around 29%, dropping to 19% the following year, reaching around 13% in 2009, and maintained this number until 2013. Regarding this index, it is important to clarify that what is considered as recidivism is a young person's new entry in the Fundação CASA to comply with a socio-educational measure, and not just the practice of a new infraction. This is because the adolescent considered a first-time offender was not necessarily a first-time offender in the practice of infraction acts, but only in compliance with the socio-educational measures as resident or semi-resident, given the exceptional character of these measures and, normally, the young person who arrives at the institution has already been subject to other kinds of measures before, such as warnings, supervised liberty or community service.

Regarding the possibility of escape of the residents, one of the main concerns of populations and local governments, the indicators are expressive. In 2005, FEBEM recorded the flight of 775 residents. In the following year, the first year after the start of the decentralization process, the number registered was 186 and in 2013, only 64 residents have fled the facilities. These numbers

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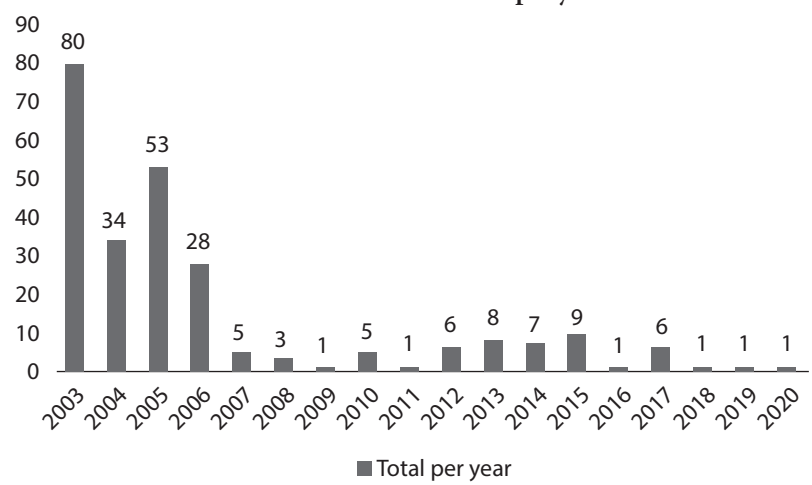
21 GIANELLA, B. *Encontro Estadual de Diretores da Fundação CASA*. Lindoia, 2013.

become more relevant when considering the populations of residents from both periods. In 2005, FEBEM had 6,641 inmates, and 775 of them have fled the facilities, while in 2013, the number of inmates was 8,645, when only 64 have done the same.

When it comes to what is commonly known as rebellion, that is, actions of the adolescents to challenge the established order, the Fundação CASA separated such acts into two distinct categories, according to the proportion and danger in question: (i) Rebellion: "it is an occurrence that involves all or almost all adolescents in a service facility. We consider an occurrence as a rebellion when there are hostages, fire in the facility, aggression against employees or among teenagers themselves, and great property damage (rendering the place severely damaged). Displays of indiscipline: "events held by a minority of adolescents in a service facility. Usually promoted to contest the rules of the center. Small and medium-sized property damage can be identified. There may be violence against employees and even hostages, but the severity of the situation is of minor concern, because such events can be quickly repressed solely with the help of the employees of the Fundação CASA"[22].

The number of rebellions and displays of indiscipline dropped considerably after the decentralization process began. Taking this classification into account, the evolution of these events can be seen in the following tables:

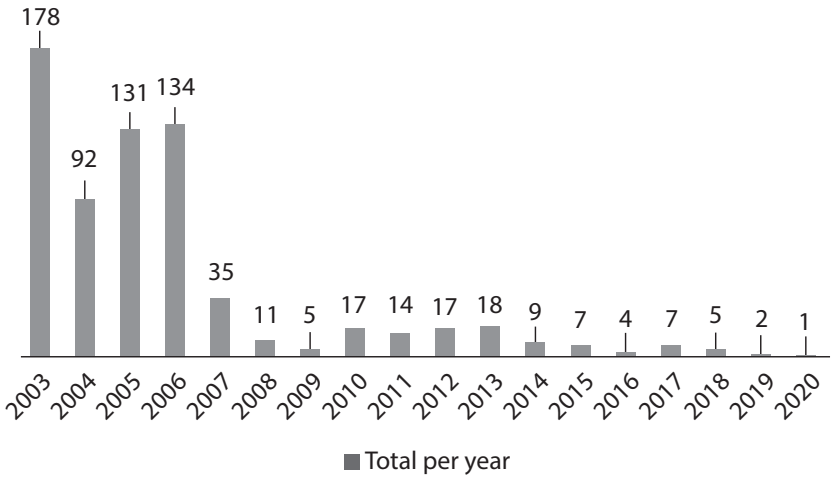
Table 1 – Rebellions – total per year.



Source: Fundação CASA/SP, 2020.

[22] GIANELLA, *op. cit*.

Table 2 – Displays of Indiscipline – total per year.



Source: Fundação CASA/SP, 2020.

In this sense, after the beginning of the decentralization process and the consequent construction of the centers with reduced capacity and proximity to the place where the socio-educational measure was set to be fulfilled, it was possible to verify an important shift in the efficiency of enforcement of the socio-educational measures. In addition, the fear of local populations and public authorities that there could be a large number of occurrences in the service facilities has still not happened. Decentralization also provided adolescents with the opportunity to comply with the measures close to their homes, strengthening ties with the community, enabling the integration of these facilities into the territories.

CONCLUSION

The process of urban formation, whether expressly or tacitly, is invariably composed of a strong process of exclusion of unwanted minorities. Sometimes, the reasons presented for the establishment of segregationist policies can be considered noble, however, once in practice, we can see the excluding pattern, demonstrating its real purpose, that is, of secluding certain groups from society.

The flow of history shows that the methods used can vary from the elimination of these groups to making them invisible to the eyes of organized society by allocating them in regions far from urban centers, separated by physical barriers or compulsory detention in closed institutions. Likewise, with regard to adolescent perpetrators of offenses or prisoners in general, incarceration is not enough, it is necessary to keep the facilities aimed at this purpose out of the eyes of the society.

In spite of the advance of civilization that occurred during the 20th century, especially after the Second World War, the segregationist process of formation and management of cities persists. In Brazil, the 1988 Federal Constitution, also known as the "Citizen Constitution", aimed to promote various rights and guarantees once vilified by the different dictatorial regimes established in the short and brief Brazilian republican period. However, we verified that the mere normative inclusion of such rights was not enough to make real changes in the established praxis.

There is a need for constant vigilance over established fundamental rights, under the danger of seeing them only as dead legal charters. In this work, we sought to verify the mechanisms used to segregate groups of unwanted individuals, from those who hold society's power, causing the city's emancipatory function to lose its purpose, reaching only the portion of the more fortunate members of the social group, eligible to such privileges. As we have seen, segregation can take place through the law or through established customs. Usually one stems from the other, with the purpose of legitimizing desires and interest that are not always republican. The category of "exclusion of the unnecessary individuals" presented by Nascimento, in 1994, still exists and a considerable and important part of society insists on maintaining this sad pattern of exclusion.

Among the several fundamental duties prioritized in the Constitution of the Federative Republic of Brazil, is that of giving absolute priority to children and adolescents, guaranteeing the full enjoyment of the rights provided for in the same constitution and in the infra-constitutional rules, among which we can highlight the right to experience family and community life and, for adolescents who commit infractions, the right to comply with the socio-educational measure in the location where their parents or legal guardians live. This provision aims not only to assign a duty to the local public administration, so that it contributes to the reintegration of these young people in society, but also of holding the society of that microsystem as co-responsible for this task, as stipulated in article 227, of the Federal Constitution.

The mere existence of the norms exposed in this paper demonstrate the resistance of local communities in welcoming or being co-responsible for that portion of the population that is a result from the social dynamics of the territory itself. Such norms constitute unconstitutional rules that violate the guarantees system, as enshrined in the Constitution.

Notwithstanding the efforts made by the local public authorities in order to prevent the establishment of socio-educational assistance facilities in their territories, the Judiciary recognizes the State's competence in promoting these public policies, removing the interference of the Municipalities in this area. It recognizes the competence of Municipalities to legislate on the use and distribution

of land, but limits this action in a way that it does not prevent the enjoyment of the constitutional duties of the State and the right of children and adolescents to enjoy the territory.

Furthermore, it is possible to conclude that the process of decentralization of care was successful, reflected in the considerable drop in the index of violence and recidivism in the Fundação CASA centers, although it cannot be concluded that this was the only factor responsible for this reduction.

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