

# THE MATTER OF THE CHILD'S ACCESS TO JUSTICE: A PANORAMA OF BRAZILIAN LAW

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**Abstract:** The answer to procedural questions involving the exercise of child's right to access justice demands thorough examinations of each country's domestic law. This article is intended as an informative as well as a critical introduction to the matter of the child's access to justice in Brazil. By unraveling the matter from the Brazilian procedural framework, the article examines if the country's domestic law is consistent with the best international practices in terms of offering consistent and straightforward solutions to counteract the obstacles that normally prevents children victim of domestic violence from obtaining an equitable, expeditious and fair solution that secure them from new violations.

**Keywords:** Human Rights – International Human Rights – Convention on the Rights of the Child - Child Protection – Access to justice – Due process of law - Brazilian law of procedures – Brazilian Constitution – Domestic Violence.

## INTRODUCTION



deally, every child has the right to foster his or her capabilities in a harmonical and respectful environment, free of violence and abuse and capable of stimulating an ever-growing spirit of peace, dignity, freedom, understanding and solidarity in

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society.<sup>2</sup> Children are entitled to access primary and higher education, to engage in recreational activities, to enjoy their culture and profess their religion, to have access to the highest attainable standard of health and enjoy many other rights enshrined on the 1989 Convention on the Rights of the Child (“CRC”)<sup>3</sup> and reinforced in other International Treaties. Any attempt to interfere with the enjoyment of those liberties must be combated thoroughly and unceasingly by society, family and the international community.

Nonetheless, how are the laws supposed to proceed in cases where rights related to matters such as health, education, religion and culture are not automatically provided by the State or enabled by family and society? In other words, in a worst-case scenario (which happens to be the norm nowadays) where a child is deprived of fundamental rights and forced into a reality of violence, ignorance and illiteracy, poverty and economic exploitation, what are the first steps that must be taken to reintroduce the above-mentioned values and principles into practice and guarantee that this individual will be safeguarded from living in such dire conditions?

In case everything goes against plans and society fails to secure children from perilous situations to their welfare, the Judiciary is summoned to recover and redress the impacts of unlawful acts committed against them, reintegrating these traumatized victims to a life in a society capable of restoring their health, self-respect and dignity. In any feasible democratic country that cherish and promotes civil, political, economic, social and cultural rights, the Judiciary act as a measure of last resort to deliver justice and ensure the child’s protection, reinstating those principles that should have been enforced in the first place.

*“Child rights standards in international instruments do not mean much for the lived reality of children if they are not implemented. In particular, if the fundamental rights of children*

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<sup>2</sup> UNICEF. Behind Closed Doors: The Impact of Domestic Violence on Children.

<sup>3</sup> The CRC was incorporated in 1990 (Decree n. Decree No. 99,710/1990).

*are violated, it is critical that children or those acting on their behalf have the recourse, both in law and in practice, to obtain a remedy to cease, prohibit and/or compensate for the violation. Failing to deliver redress to a child for a human rights violation is a particularly telling sign that a legal system or a society is falling short of regarding children as rights-bearers”.*<sup>4</sup>

These judicial protections are not solely destined to secure a child from grave violations such as taking part in hostilities, forced labor or sexual abuse for economic purposes. As stated previously, children also have the right to gain access to social structures (such as health and educational institutions) capable of providing physical, mental, spiritual and moral growth, without which it is virtually impossible to prepare for a responsible life in a free and equal society. However, the means by which a child obtains judicial protection against wrongdoings that menaces his best interests depends on procedural rules prescribed by national law, which may vary from party to party of the CRC.

For instance, the right of the child to be cared for by his parents in a manner consistent with the promotion of his interests encompasses the right to be assisted in judicial proceedings. However, one may ask if the only *persona* charged with this procedural encumbrance are always the child’s parents or there may be others depending on the situation. In this sense, are the child’s claims subject to any statute of limitations by the sole fact that he or she is being represented by an elder or the personal conditions of those in charge of the procedural assistance are unimportant during the litigation? Furthermore, how can the law protect the child whose interests are conflicting with those upheld by his or her parents? In this scenario, is the child allowed to stand before Court by himself or there must be a court-nominated legal representative acting on his or her behalf? Is there

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<sup>4</sup> Childs Rights International Network. Rights, Remedies & Representation: Global Report on Access to Justice for Children – January, 2016.

any remedy provided by law to avoid legal representatives from acting against the child's best interest?

In summary, the answer to simple as well as complex procedural questions involving the exercise of the child's access to justice (e.g., standing requirements, right to petition, right to be heard and the right to produce evidence) demands thorough examinations of the national law. Considering that the CRC does not provide State parties with all directives to challenge these issues, the means by which each country develops its procedural rules is paramount to confirm and monitor whether or not domestic laws and jurisprudence are being effectively conducted in implementing the best practices to fulfill children's right to access justice.

#### THE MATTER OF PRECEDENCE OF INTERNATIONAL HUMAN RIGHTS LAW IN BRAZIL AND THE CHOICE OF LAW OVER CHILD MANDATORY REPRESENTATION FROM A HUMAN RIGHTS' STANDPOINT.

The procedural law of each country must offer solutions to counteract the obstacles preventing the judge from rendering an equitable, expeditious and fair solution to any child's pleas. Even though articles 27 and 46 of the Vienna Convention on the Law of Treaties<sup>5</sup> forbids a State party from refusing to enforce an already ratified international treaty (such as the CRC) by invoking the existence of a domestic law,<sup>6</sup> supervision must be put in place by the international community to prevent countries from breaching the International Law – which may give way to

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<sup>5</sup> *Article 27*) "A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty".

*Article 46*) "A State may not invoke the fact that its consent to be bound by a treaty has been expressed in violation of a provision of its internal law regarding competence to conclude treaties as invalidating its consent unless that violation was manifest and concerned a rule of its internal law of fundamental importance".

<sup>6</sup> JÚNIOR, Alberto do Amaral. *Curso de Direito Internacional Público – Atlas*, 5th edition. 2015.

human rights' violations by public authorities and institutions. The lack of supervision on the matter may lead to legal remedies becoming illusory and ineffective, failing to deliver justice to children in need of quick and impartial ruling of their claims.<sup>7</sup>

The way in which each State party incorporates ratified International Treaties<sup>8</sup> “*is of paramount importance for the effective guarantee and protection of its people*”.<sup>9</sup> According to LADEIRA (2020), the manner through which International Human Rights treaties are received by State Parties must be duly oversight in order to guarantee a bigger effectiveness in their enforcement by local authorities.

Tackling the issue of potential conflicts between domestic law and International Human Rights Law, the 1988 Brazilian Constitution (“*Constitution*”) provides a rule of hierarchy (article 5, paragraph 3),<sup>10</sup> by which norms provided in Treaties related to Human Rights whose application conflicts with provisions of a domestic law will take precedence over the latter one, due to its nature of constitutional norm. However, the treaty will only be deemed a constitutional amendment if incorporated by the Brazilian Parliament with the vote of three fifths of its congressmen, in two rounds of voting. This rule, amended to the Constitution in 2004, leaves the interpreter a couple of broader questionings regarding the matter. After the ruling of the Appeal

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<sup>7</sup> MAUÉS, Antonio Moreira. *Supralegalidade dos Tratados Internacionais de Direitos Humanos e Interpretação Constitucional – Sur Revista Internacional de Direitos Humanos*, v. 10, n. 18. 2013.

<sup>8</sup> According to article 2 of the Vienna Convention, “‘Treaty’ means an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation”.

<sup>9</sup> LADEIRA, Natália Lopez. *The reception of International Human Rights treaties: a compared study between the Constitutions of Brazil and Colombia – Thomson Reuters*, vol. 120/2020. August, 2020.

<sup>10</sup> Article 5, paragraph 3) “International human rights treaties and conventions which are approved in each House of the National Congress, in two rounds of voting, by three fifths of the votes of the respective members shall be equivalent to constitutional amendments”.

n. 466.343/SP, the Brazilian Supreme Federal Court set the following limits and clarifications regarding the issue of International Human Rights treaties' application:

- (a) Firstly, Human Rights treaties that are not incorporated according to the quorum of article 5, paragraph 3 of the Constitution take on a *sui generis* position, becoming more important than Federal Laws (*supra* legality condition)<sup>11</sup> but inferior to constitutional norms (*infra* constitutional condition). This means that, in case of interpretative conflict with a constitutional norm, the former one shall prevail; on the other hand, in a conflict with any Federal Law, the treaty takes precedence, derogating the domestic law in the concrete case.
- (b) Secondly, in relation to Human Rights treaties incorporated to domestic law prior to the rule of article 5, paragraph 3 (that is, ratified and incorporated before 2004), the same *ratio* above-indicated applies (the treaty shall give place to constitutional norms in case of conflict in its interpretation).<sup>12</sup>

The same rule of hierarchy is adopted in other Constitutions, such as in France and Greece:

*Article 55 of the French Constitution: "Les traités ou accords régulièrement ratifiés ou approuvés ont, dès leur publication, une autorité supérieure à celle des lois, sous réserve, pour chaque accord ou traité, de son application par l'autre partie."*

*Article 28 of the Greek Constitution: "The generally recognized rules of international law and the international conventions after their ratification by law and their having been put into effect in accordance with their respective terms, shall constitute an integral part of Greek law and override any law provision to the contrary."*

In the context of the access to justice of children, one

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<sup>11</sup> NETO, José Alvez Tomaz Neto and LIRA, Daniel Ferreira de. A posição hierárquica dos tratados e convenções internacionais que versam sobre direitos humanos recepcionados pelo sistema normativo brasileiro após o julgamento do Recurso Extraordinário 466.343-1/São Paulo – Revista Âmbito Jurídico. 2012.

<sup>12</sup> MENDES, Gilmar. Curso de Direito Constitucional – Saraiva, 2th edition. 2008.

must add to the debate the analysis of the precedence of International Law on Child Protection in the Brazilian domestic law, in order to correctly situate the application of the relevant dispositions and guarantee its plain enforcement by domestic courts.

As stated previously, every child has the right to be cared for by his or her parents (article 7 of the CRC).<sup>13</sup> According to this provision, to each and every right enshrined in the CRC corresponds the parents' (or other legal guardian, also known as "*tutor*", if applied) obligation to provide the tutored with the basic means and resources necessary for its enjoyment. However, the CRC does not explicitly state that those duty-bearers must also act on the child's behalf before Court, leaving the States parties to decide over the matter. According to article 12 of the CRC,<sup>14</sup> State parties are only obliged to assure that children have the right to express their views freely in all matters affecting their interests, including those claimed in judicial and administrative proceedings, in a manner consistent with the procedural rules of their national law.

*"Blanket provisions requiring all people under a certain age to approach the courts through a litigation guardian or similar person are common, while more nuanced rules that take into account the capacity of any particular child approaching the courts are much rarer".<sup>15</sup>*

Apart from that, whether or not this *right to be heard* in Court means that children have standing to bring legal

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<sup>13</sup> Article 7) 1. "The child shall be registered immediately after birth and shall have the right from birth to a name, the right to acquire a nationality and, as far as possible, the right to know and be cared for by his or her parents".

<sup>14</sup> Article 12) 1. "States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child".

2. "For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law".

<sup>15</sup> Childs Rights International Network. Rights, Remedies & Representation: Global Report on Access to Justice for Children – January, 2016.

proceedings by themselves and in their own name or still entails the duty-bearers with the obligation to assist them in Court is a matter left to each State party to decide over. For instance, while in Barbados the legislators have put in place a provision allowing children to plea before Court on their own behalf in exceptional circumstances,<sup>16</sup> the Brazilian Code of Procedures (“BCP”) and the Brazilian Federal Law n. 8.069/1.990 (“*Child’s Act*”), requires children to act through legal guardians in Court (in what is called *mandatory representation*).<sup>17</sup> This is so because the little degree of social experience and self-awareness children have in society due to their age and immaturity menace their self-reliance in standing adequately by themselves before Court to protect their interests.

*“The States Parties to the present Convention, [...] Bearing in mind that, as indicated in the Declaration of the Rights of the Child, “the child, by reason of his physical and mental immaturity, needs special safeguards and care, including appropriate legal protection, before as well as after birth [...] have agreed as follows [...]”.*

In general, both the child’s mother and father are vested with the equal authority to ply as legal representative before Court on his pupil’s behalf, as the Constitution prohibits any kind of discriminatory gender limit with regards to the child’s judicial representation.<sup>18</sup> <sup>19</sup>Therefore, as predicts the BCP in accordance with the CRC’s preamble, children can only bring a case before Court with the assistance of their parents, guardians, tutors or procedural substitutes in exceptional circumstances

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<sup>16</sup> Ibid.

<sup>17</sup> *Article 71*) “The minor or legally incapacitated person shall be represented or assisted by the parents, by a guardian or curator, under the law”.

*Article 142*) “Children with age inferior to sixteen years shall be represented and children between sixteen and twenty-one years shall be assisted by his or her parents, legal guardians, or other individuals legally responsible for him, in a manner consistent with the civil and procedural law”.

<sup>18</sup> *Article 226, paragraph 5*) “The rights and the duties of marital society shall be exercised equally by the man and the woman”.

<sup>19</sup> PELUSO, Cezar. Código Civil Comentado – Manole, 8th edition. 2014.

(e.g., Prosecutor) – but they can never plea alone, no matter if they play the role of a defendant or plaintiff.

Many countries still resist to insert children in the center of judicial matters involving their interests. According to a research conducted by the Childs Rights International Network, by 2016, a fifth of the world's children could not speak in Court in legal proceedings that concern them.<sup>20</sup> However, in Brazil, the existence of child *mandatory representation* does not mean the claimant is deprived of the right to be heard by the judge. As stated on article 100, XII and 28, paragraph of the Child's Act,<sup>21</sup> in accordance with article 12 of the CRC, children are allowed to speak in Court and voice their opinion and views in all matters affecting their claims and the judge shall give them due weight in a manner consistent with their personal and evolving capacities, because the best interest for a child is always to be heard by a judge.

*“The starting point must be respect for rights and children’s evolving capacities. It is true, of course, that adults caring for very young children have to make many decisions about children’s lives. But, as children grow, it is important that adults take every opportunity to encourage children to discuss, share and then take over decision-making for themselves. Involving children is essential for encouraging and preparing them to exercise their own rights.”*<sup>22</sup>

*“The [...] CRC provides a framework that recognises the right*

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<sup>20</sup> Childs Rights International Network. Rights, Remedies & Representation: Global Report on Access to Justice for Children – January, 2016.

<sup>21</sup> *Article 28, paragraph* “When possible, the child or adolescent shall be heard by a interprofessional team, in accordance with his/her stage of development and capacity to understand the effects of the measure [of custody, tutelage or adoption], and shall have his/her opinion duly noted”.

*Article 100, XII* “The principles that rules Child Protection are the following: ‘mandatory testimony and participation: the child and the adolescent, either directly or in the company of his or her parents, legal guardians, or other individuals legally responsible for him, has the right to be heard and take part in every action pertaining the safeguard and promotion of his or her rights, and his or her opinion shall be duly noted by the judicial authority [...]’”.

<sup>22</sup> Child Rights Information Network. Measuring Maturity: Understanding children’s ‘evolving capacities’ – Editorial, n. 23. 2009.

*of every child to such protection. Article 5 states that parents or legal guardians “shall respect the responsibilities, rights and duties ... to provide, in a manner consistent with the evolving capacities of the child, appropriate direction and guidance in the exercise by the child of the rights recognised in the present Convention”. This requires that guidance provided by parents or legal guardians must be directed towards promoting respect for the rights of the child, and must respect the extent to which the child is capable of exercising their rights on his or her own behalf. For example, every child has a right to a name from birth. Clearly, a newborn baby lacks the capacity to determine their own name, so this right is exercised on their behalf by their parents. However, if the divorced mother of a 14-year-old child wishes to re-marry, the child will have the competence, and therefore the right, to decide for themselves if they want to adopt the name of the prospective stepfather. Respect for children’s evolving capacities to take responsibility for their own decision-making needs to be balanced against their relative lack of experience. But it is also important not to undermine children’s own capacities for contributing to their own protection”.*<sup>23</sup>

The fact that Brazilian judicial proceedings demand child representation does not imply any violation to the CRC in relation to articles 27 and 46 of the Vienna Convention on the Law of Treaties. Even though the CRC consists of an International Human Rights treaty that theoretically outweighs the domestic law (the CRC was not incorporated according to the quorum of article 5, paragraph 3 of the Constitution, and, therefore does not constitute a constitutional norm), Brazil is not obliged by its terms to set up any judicial structure to enable children to stand by themselves in Court. In this sense, any theoretical conflict between its provisions and the BCP and Child’s Act over the matter of *mandatory representation* is non-existent and, thus, does not affect the manner by which the Brazilian law sets the child’s standing on Court.

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<sup>23</sup> LANSDOWN, Gerison. “Evolving capacities explained” - Child Rights Information Network. Measuring Maturity: Understanding children’s ‘evolving capacities’ – n. 23. 2009.

The same happens to be the case with other International Human Rights dispositions. Neither the Geneva Declaration of the Rights of the Child of 1924 or the Declaration of the Rights of the Child of 1959, the International Covenant on Civil and Political Rights, the American Convention on Human Rights (“*American Convention*”) and the Universal Declaration of Human Rights<sup>24</sup> forbids State parties from disallowing children to plea before Court on their own behalf, but only demands that every person can rely upon an effective judicial remedy for protection against acts that violate his or her fundamental rights<sup>25</sup>.

These simple acknowledgments by any means precludes the fact that the Brazilian law successfully provides a wide set of legal provisions amplifying children’s liberties to seek justice to their claims. In other words, the existence of mandatory representation in Brazil does not violate children’s procedural rights, because its national law is well equipped with legislative provisions ensuring their access to justice.<sup>26</sup> For instance, articles 8 and 25 of the American Convention state that every person

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<sup>24</sup> The preamble of the *Declaration of the Rights of the Child of 1959* claims that “whereas the child, by reason of his physical and mental immaturity, needs special safeguards and care, including appropriate legal protection, before as well as after birth”; the *International Covenant on Civil and Political Rights* states that “each State Party [...] undertakes to ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity” (article 2.3); the *American Convention* states that “everyone has the right to simple and prompt recourse, or any other effective recourse, to a competent court or tribunal for protection against acts that violate his fundamental rights recognized by the constitution or laws of the state concerned or by this Convention, even though such violation may have been committed by persons acting in the course of their official duties” (article 25, a) and the *Universal Declaration of Human Rights* states that “everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law” (article 8).

<sup>25</sup> None of these International Treaties was incorporated according to the quorum of article 5, paragraph 3 of the Constitution, therefore are not constitutional norms, according to the Brazilian government’s website: <http://www4.planalto.gov.br/legislacao/portal-legis/internacional/tratados-equivalentes-a-emendas-constitucionais-1>

<sup>26</sup> GRINOVER, Ada Pellegrini; CINTRA, Antonio Carlos de Araújo; DINAMARCO, Cândido Rangel. *Teoria Geral do Processo – Malheiros*, 31th edition. 2015.

has the right to a simple and prompt remedy to file before an impartial and competent court or tribunal against wrongdoings that infringes his or her fundamental rights. In the matter of children, this provision is reinforced by article 19, according to which “*every minor child has the right to the measures of protection required by his condition as a minor on the part of his family, society, and the state*”. According to the Inter American Human Rights Commission in the ruling of the case *Niños de la Calle vs. Guatemala*, “*the reason for Article 19 of the Convention arose from the vulnerability of children and their incapacity to personally ensure the respect of their rights*”. From a procedural perspective (that is, regarding article 25 in relation to article 19), the Inter American Human Rights Court (“*Inter American Court*”) asserted that judicial remedies must be duly applied by judicial authorities, with impartiality and swiftness, bearing in mind the basic principles of devotion to the best interest of the child and absolute priority to matters related to their interests:<sup>27</sup>

*“Both the American Convention and the Convention on the Rights of the Child form part of a very comprehensive international corpus juris for the protection of the child that should help this Court establish the content and scope of the general provision established in Article 19 of the American Convention”.*

*“[...] in order to consider if a proceeding has been conducted fairly, various elements must be analyzed, such as the way in which evidence was offered and produced, the opportunity that the victim has to take part in the proceeding, and the failure of the judge to justify his decisions when he makes pronouncements on evidence [...]”.*

*“[...] in view of the characteristics of the case and the nature of the violations alleged by the Commission, the Court must examine all the domestic judicial proceedings in order to obtain an integrated vision of these acts and establish whether or not it is evident that they violated the norms on the obligation to investigate, and the right to be heard and to an effective*

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<sup>27</sup> CtIDH, Case of the Street Children (*Villagran-Morales et al.*) vs. Guatemala, 1999. No. 63.

*recourse, which arise from Articles 1.1, 8 and 25 of the Convention. [...] Moreover, it is evident from Article 8 of the Convention that the victims of human rights violations or their next of kin should have substantial possibilities of being heard and acting in the respective proceedings, both in order to clarify the facts and punish those responsible, and to seek due reparation’.*

*“[...] the absence of an effective remedy to violations of the rights recognized by the Convention is itself a violation of the Convention by the State Party in which the remedy is lacking. In that sense, it should be emphasized that, for such a remedy to exist, it is not sufficient that it be provided for by the Constitution or by law or that it be formally recognized, but rather it must be truly effective in establishing whether there has been a violation of human rights and in providing redress”.*

Even though it is not scope of the present article to assess if the Brazilian Courts are complying with the domestic and international rules of procedure in a daily and case-by-case basis, it can be said that the Brazilian national law, at least ideally, conform to the Inter American Human Rights bodies’ interpretation of the scope and limits of articles 8 and 25 of the American Convention.

The fact of the matter is that prior to the incorporation of the American Convention, the Brazilian law, in the form of articles 5, XXXV of the Constitution and articles 3 of the BCP and 141 of the Child’s Act,<sup>28</sup> already enshrined the right to access to justice as a fundamental and irrevocable right. The fundamental right to access a Brazilian Court or Tribunal represents the cornerstone of the Brazilian *procedural due process of law*, because it vests in any individual the right to have judicial protection against illegalities, at any moment and regardless of his or her

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<sup>28</sup> *Article 5, XXXV*) “The law shall not exclude any injury or threat to a right from the consideration of the Judicial Power”.

*Article 3*) “Neither injury nor threat to a right shall be precluded from judicial examination”.

*Article 141*) “The right to access the Courts, the Public Attorney Office and the Public Defender’s office justice is guaranteed to any child or adolescent”.

age, sex, nationality, social condition and political opinion.<sup>29</sup> From the child's legal perspective, the Brazilian law does not fall short to its duty to prioritize the protection and promotion of his or her liberties. According to articles 100, II and IV of the Child's Act,<sup>30</sup> dealing with children's needs with priority enables the fulfillment of their rights and, thus, brings the national law into agreement with article 227 of the Constitution.<sup>31 32</sup>

*"At first glance, the 1988 Brazilian Constitution differs from its predecessors in its detailed preoccupation with matters at most mentioned but never regulated by preceding constitutions. For example, it has chapters on urban policy, the National Financial System, Social Security (including sections on health, pensions, benefits and welfare), education, culture, sports, social communications, the environment, the family, the child, the adolescent [...]"*.<sup>33</sup>

Furthermore, the American Convention states that anyone shall be allowed to have a technical defense to argue its case before Court. The same provision is explicitly stated in the Brazilian domestic law (article 111, III of the Child's Act).<sup>34</sup> As a

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<sup>29</sup>During the ruling of *Niños de la Calle vs. Guatemala*, the Inter American Court stated that "article 25 of the American Convention [...] constitutes one of the basic pillars not only of the American Convention, but also of the very rule of law in a democratic society in the sense of the Convention"

<sup>30</sup> Article 100, II) "The principles that rules Child Protection are the following: 'prime and integral protection: the interpretation of each and every norm stated in the Child's Act must envisage the prime and integral protection of the rights held by children and adolescents"

Article 100, IV) "The principles that rules Child Protection are the following: 'child's and adolescents' supreme interest': the intervention must meet the fulfillment of the child and the adolescent's rights and interests with priority [...]"

<sup>31</sup> 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"

<sup>32</sup> DI MAURO, Renata Giovanoni. Os poderes do juiz nos procedimentos civis do Estatuto da Criança e do Adolescente. 2011.

<sup>33</sup> FILHO, Manoel Gonçalves Ferreira. Fundamental aspects of the 1988 Constitution – A panorama of Brazilian law. University of Miami. 1992.

<sup>34</sup> Article 111, III) "The adolescent is vested in the following rights: technical defense

general rule, in situations where the parents lack economic sufficiency to sustain a case on the tutored behalf throughout the proceeding, the judge must exempt them from paying judicial fees related to the litigation (article 5, LXXIV of the Constitution and 98 of the BCP)<sup>35</sup>. However, this general rule is given a broader sense with regards to children: any litigation brought before the Juvenile Justice (also known as *Juvenile Courts* or *Youth Courts*, comprised of state courts especially assigned to deal with child's rights and complaints in situations involving risk, such as physical abuse, neglect and abandonment;<sup>36</sup> article 145 of the Child's Act) is exempt of judicial fees, regardless of the child's economic conditions (article 141, paragraph 2 of the Child's Act).<sup>37</sup> With this provision, the law aims at eradicating any discriminatory situation in which children within wealthy families would be able to approach the Judiciary while low-income families would not – countermanding the Inter American Court's jurisprudence:

*"[...] la Corte recuerda que la población infantil puede encontrarse con barreras económicas y jurídicas a la hora de acceder a la justicia, lo cual resulta discriminatorio porque no permite el acceso en condiciones de igualdad. Todo esto incide en una obligación mayor que tiene el Estado para garantizar el acceso a la justicia de las niñas por estos casos. Una de las maneras en que se traduce el anterior deber es adaptando el sistema judicial y los procedimientos a los niños y niñas víctimas de este tipo de violencia".*<sup>38</sup>

In summary, a lack of independence from the child's

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by an attorney".

<sup>35</sup> Article 5, LXXIV) "The State shall provide full and free-of-charge legal assistance to all who prove insufficiency of funds".

<sup>36</sup> DI MAURO, Renata Giovanoni. Os poderes do juiz nos procedimentos civis do Estatuto da Criança e do Adolescente. 2011.

<sup>37</sup> Article 141, paragraph 2) "Judicial proceedings remitted to the Juvenile Justice are free-of-costs, except when the parties file a case with frivolous claims (in bad faith)".

<sup>38</sup> Corte Interamericana de Derechos Humanos y Fondo de las Naciones Unidas para la Infancia. Violencias contra niñas, niños y adolescentes en América Latina y el Caribe - Publicación Conjunta en Conmemoración del 30 Aniversario de la Convención sobre los Derechos del Niño. 2019.

legal standpoint does not prevent the access to justice, because his or her legal status of right-bearer amount to the procedural rights as well as the possibility of being attended by first responders without delay (as ruled in the *case Gonzales Lluy et al. vs. Ecuador*)<sup>39</sup> and in a consistent and capable manner to impede or redress the effects caused by wrongful acts. Assuming that the Brazilian domestic law did not provide the minimum rights able to guarantee the procedural due process of law according to international procedural rules (or even conflicted with them in a concrete case), article 13 of the BCP<sup>40</sup> explicitly states that International Treaties on judicial proceedings (such as the CRC and the American Convention) must be directly enforced by domestic courts, complementing or derogating the national law where applicable, due to its *supra* legal condition and in accordance with the *principle of vested rights* (article 5, paragraph 2 and 60, paragraph 4, IV of the of the Constitution)<sup>41</sup>.

*“Respect for vested rights is a traditional constitutional principle in Brazil. The precepts of the Imperial Constitution of 1824 and of the 1891 Constitution prohibiting the retroactivity of laws were interpreted by Brazilian doctrine of the time as recognizing vested rights. The Constitution of 1934 introduced the trilogy – respect for res judicata, perfected legal transactions and vested rights – that would be maintained intact in all subsequent Constitutions, except for that of 1937. [...] Dias da Silva reminds us that although the Constitution does not*

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<sup>39</sup> “This Court has taken into account different criteria to determine the complexity of proceedings. These include the complexity of the evidence, the number of procedural subjects or the number of victims, the time elapsed since the violation, the characteristics of the remedy under domestic law, and the context in which the violation occurred”. CtIDH, case Gonzales Lluy et al. vs. Ecuador, 2015. No. 298.

<sup>40</sup> *Article 13*) “Civil proceedings shall be governed by Brazilian procedural rules, with the exception of specific provisions set forth in international treaties, conventions and agreements to which Brazil is a signatory”.

<sup>41</sup> *Article 5, paragraph 2*) “The rights and guarantees expressed in this Constitution do not exclude others deriving from the regime and from the principles adopted by it, or from the international treaties in which the Federative Republic of Brazil is a party”. *Article 60, paragraph 4, IV*) “No proposal of amendment shall be considered which is aimed at abolishing individual rights and guarantees”.

*differentiate between rights vested in Brazil and those of foreign origin, the latter cannot countermand Brazilian public order, nor can they have been obtained with the intent of evading Brazilian legislation. He further reminds us that the rights vested by a foreign judgment have their own system of control, namely, that of the homologation process [...]”.*<sup>42</sup>

According to the BCP, the standing to approach courts by third parties remains in place until the child reaches 18 years-old (so-called age of *full legal capacity*), when the legislator assumes he enjoys enough social experience and sufficient mental capacity to discern his interests and to litigate by himself.

*“These age-based restrictions are founded on two main assumptions made by adults: first, that children lack the capacity to take responsibility for many decisions about their lives and must therefore be protected from the consequences of bad decisions; and second, that age limits are a crude but simple way to achieve that protection – even if some children might attain competence at a younger age, and others attain competence later.”*<sup>43</sup>

In Brazil, the age of 18 years-old determines the individual’s competence to stand before Court alone. Until then, the mere *age criteria* does not undermine the child’s procedural rights, which are continuously and entirely guaranteed: the child has the right to petition (article 5, XXXIV, *a* of the Constitution and 70 of the BCP),<sup>44</sup> the right to be heard (article 9 and 10 of the BCP) and the right to produce evidence (article 7 of the BCP). By its turn, the judge must render a fair and effective judgment on the merits in a reasonable period of time (articles 4 and 6 of the BCP in relation to article 5, LXXVIII)<sup>45</sup>, according

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<sup>42</sup> RODAS, João Grandino. Choice of law rules and the major principles of Brazilian private international law. A panorama of Brazilian Law. University of Miami. 1992.

<sup>43</sup> Child Rights Information Network. Measuring Maturity: Understanding children’s ‘evolving capacities’ – Editorial, n. 23. 2009.

<sup>44</sup> *Article 5, XXXIV, a*) “The following are ensured to everyone, without any payment of fees: a) the right to petition the Government in defense of rights or against illegal acts or abuse of power”.

<sup>45</sup> *Article 5, LXXVIII*) “A reasonable length of proceedings and the means to guarantee their expeditious consideration are ensured to everyone, both in the judicial and

to the principles of law above mentioned (priority and child's best interests – article 1.048 of the BCP).

*Article 4) "The parties are entitled to a full resolution of the dispute, including the enforcement of the decision, within a reasonable period of time".*

*Article 6) "All who, in any way, participate in the proceedings shall cooperate in order to obtain, within a reasonable period of time, a fair and effective judgment on the merits".*

*Article 7) "The parties are assured equal treatment in terms of the exercise of procedural rights and resources, their protection, burdens, duties and the imposition of procedural sanctions, the judge being responsible for ensuring that the principle of audi alteram partem is effectively applied".*

*Article 9) "A decision cannot be rendered against a party who has not been previously heard".*

*Article 10) "A judge cannot decide, at any instance of jurisdiction, based on grounds regarding which the parties were not given the opportunity to manifest themselves, even when it is a matter that must be decided ex officio".*

*Article 70) "Every person who enjoys rights has the capacity to institute legal proceedings".*

*Article 1.048) "The following judicial procedures shall have priority in any court or court of appeals: those regulated by Law n° 8.069, of 13 July 1990 (Children and Adolescents Act)".*

In summary, the obligation to transpose the Inter American Court's jurisprudential directives regarding the correlated interpretation of articles 8, 25 and 19 of the American Convention into national law is met by the rules provided by the Child's Act, BCP and Constitution (whose principle of access to justice enshrined in article 5, XXXV is prior to the incorporation of the American Convention).<sup>46</sup> Recalling that it is well established that childhood must be attended by all appropriate legislative measures to guarantee their well-being (articles 3.2 and 4 of the

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administrative spheres".

<sup>46</sup> The incorporation of the American Convention occurred in 1992 (Decree n. 678/1992).

CRC),<sup>47</sup> other specific rules of procedure in relation to children's access to justice are provided by the Brazilian law in order to deal with the special care and assistance to which they are entitled to in special circumstances that could undermine their right to protection.

## ADDRESSING SPECIFIC ISSUES: AN OVERVIEW OF BRAZILIAN RULES OF PROCEDURES REGARDING DOMESTIC VIOLENCE AGAINST CHILDREN.

In a democratic society, the right to seek justice represents the tool by which people can profit from the exercise of other individual, political, economic and cultural rights. This means that the right to justice must be framed as a fundamental right, because it occupies a position of permanent importance in the legal sphere without which people would lack the judicial mechanisms necessary to enforce a right, meaning denying its existence in practice. In practical terms, "*the right to judicial protection would prove illusory if the State's domestic legal system were to [impede the access to procedural mechanisms or] allow a final binding decision to remain inoperative to the detriment of one of the parties*".<sup>48</sup>

The right to access to justice means respecting and enforcing all aspects of the *due process of law*, such as the existence of an effective and swift remedy to combat an illicit

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<sup>47</sup> Article 3.2) "States Parties undertake to ensure the child such protection and care as is necessary for his or her well-being, taking into account the rights and duties of his or her parents, legal guardians, or other individuals legally responsible for him or her, and, to this end, shall take all appropriate legislative and administrative measures".

Article 4) "States Parties shall undertake all appropriate legislative, administrative, and other measures for the implementation of the rights recognized in the present Convention. With regard to economic, social and cultural rights, States Parties shall undertake such measures to the maximum extent of their available resources and, where needed, within the framework of international co-operation".

<sup>48</sup> CtiDH, Access to justice as a guarantee of economic, social, and cultural rights. A review of the standards adopted by the Inter-American System of Human Rights.

wrongdoing, the analysis and investigation of facts and evidences by effective police authorities and an impartial and competent judge, without which it becomes virtually impossible to render an equitable and fair ruling that enforces the law, imposes orders for restitution or compensation and prevents new violations.<sup>49</sup> In an overview of the case law of the inter-American system, the Inter American Court stated:

*“[...] to speak of "effective judicial remedies" it is not sufficient for final judgments to be delivered to protect the rights at issue, since the enforcement of judgments should be considered an integral part of the right to effective judicial protection. [...] The case law of the IASHR has recognized a close link between the scope of the rights embodied in Articles 8 and 25 of the American Convention. Accordingly, it has been determined that states have the obligation not only to design and adopt into law effective remedies for the comprehensive protection of human rights, but also to ensure proper implementation of said remedies by their judicial authorities in proceedings that offer the due guarantees. There is a direct connection between the suitability of available judicial remedies and the real possibility of observance of economic, social and cultural rights. Both the Inter-American Court and the IACHR have started to identify those elements that comprise the right to a fair trial enshrined in Article 8(1) of the American Convention as regards social rights proceedings, which bear certain characteristics that distinguish them from other criminal or civil proceedings, in addition to having a number of features in common.*

*“[...] The right to a trial within a reasonable time is another of the components of the guarantee of a fair trial in judicial proceedings that is particularly relevant as regards protection of social rights.*

*“[...] The fourth aspect examined by the IASHR is the right to effective judicial protection of social rights. This right creates an obligation for states to provide suitable and effective judicial remedies for the protection of social rights, in both their individual and their collective dimension.*

*“[...] Both the IACHR and the Inter-American Court have identified the need to provide procedural measures by which to*

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<sup>49</sup> CtIDH, *Caso Servellón García y otros Vs. Honduras*. n. 152. 2006.

*ensure immediate -and even precautionary or preventive- protection of social rights even though the merits of the matter in question may require more prolonged analysis.*

*“[...] such remedies should be simple, urgent, informal, accessible, and processed by independent bodies; [...] be processed on an individual basis or as collective precautionary actions to protect a particular group or one that is identifiable [and] enjoy broad, active legitimacy [...]”*<sup>50</sup>

In an article published in 2016, the Childs Rights International Network<sup>51</sup> argues that “*a lack of independence and legal status is likely to amount to a serious barrier to children accessing justice*”, because they end up being “*thrown into the shadow of their parents*” instead of empowering themselves to protect their own rights. This is partially true. The facts above-mentioned fully demonstrates the Brazilian law’s aptitude to guarantee the child’s access to justice in a manner consistent with the international best practices over the matter. Of course the general norms that rule the interpretation of human rights treaties are living instruments, and, thus, must always accommodate evolutive interpretation over time in relation to existing circumstances, but nothing in the present context seems to indicate that the Brazilian framework is ineffective and has grounds to simply afford to revoke mandatory representation from its domestic law and begin to rely upon the children’s capacity to seek justice by themselves, especially when it is well known that they do not have complete understanding of the world that surrounds them and the society in which they are inserted to direct their lives in a totally autonomous fashion.

*“La Corte reiteró que los niños, niñas y adolescentes ejercen sus derechos de manera progresiva a medida que desarrollan un mayor nivel de autonomía personal. En consecuencia, se deben tomar en consideración las condiciones específicas del menor de edad y su interés superior para acordar la*

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<sup>50</sup> CtlDH, Access to justice as a guarantee of economic, social, and cultural rights. A review of the standards adopted by the Inter-American System of Human Rights.

<sup>51</sup> Childs Rights International Network. Rights, Remedies & Representation: Global Report on Access to Justice for Children – January, 2016.

*participación de éste, según corresponda, en la determinación de sus derechos. En esta ponderación se procurará el mayor acceso del menor de edad, en la medida de lo posible, al examen de su propio caso. El derecho a ser oído además presupone que la niña o niño sea informado adecuadamente sobre sus derechos, las razones y consecuencias del proceso que se está llevando a cabo, así como que esta información sea comunicada de acuerdo a su edad y madurez. En este sentido, la Corte considera que las niñas y los niños deben ser informados de su derecho a ser oídos directamente o por medio de un representante, si así lo desean”.*<sup>52</sup>

However, it must be acknowledged that in specific circumstances, such as domestic violence, simply hearing the child’s testimony may not be enough because centering the child’s legal representation in the hands of parents could impede them from reaching the Judiciary in the first place. A study case in India revealed that family and society are constantly failing to protect children in the environment where they should feel safer: the home.<sup>53</sup> The COVID-19 pandemic has boosted many social stressors that bolsters domestic violence, such as dysfunctions on societal infrastructure (many recreational and health facilities are being shut down) and economic breakdowns, which then leads to unemployment and food insecurity.<sup>54 55</sup> When you confine family members in a small environment due to stay-at-home orders, these movement restrictions increase people’s level of stress and anger, and their first response is to irrationally

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<sup>52</sup> Corte Interamericana de Derechos Humanos y Fondo de las Naciones Unidas para la Infancia. *Violencias contra niñas, niños y adolescentes en América Latina y el Caribe - Publicación Conjunta en Conmemoración del 30 Aniversario de la Convención sobre los Derechos del Niño*. 2019.

<sup>53</sup> Centre for Children’s Rights. *Rights of Children in the time of COVID-19: A policy brief*. 2020.

<sup>54</sup> FRASER, Erika. *Impact of COVID-19 Pandemic on Violence against Women and Girls*, VAWG Helpdesk Research Report n. 284 – UK Aid Department for International Development. 2020.

<sup>55</sup> PETERMAN, Amber, POTTS, Alina, O’Donnell, Megan, THOMPSON, Kelly, SHAH, Niyati, OERTELT-PRIGIONE, Sabine, VAN GELDER, Nicole. *Pandemics and Violence Against Women and Children*, Working paper n. 528 – Center for Global Development. 2020.

alleviate their fury (sometimes for educational purposes)<sup>56</sup> on one of the weakest spot on the family chain: children. Considering that the majority of violent acts against children is perpetrated by family members, domestic violence tends to increase when these victims cannot escape their abusers and seek help, because they are forced to share these confined spaces with them. So, in the specific case of domestic violence (in which children are under constant scrutiny and threat of violence by their parents), what judicial answers should States provide to assure their protection? According to the Child's Rights International Network, many are the countries that impose a series of conditions to children bringing civil or criminal actions against their parents:

*“Such overtly discriminatory provisions clearly undermine the protection of children seeking to challenge violations of their rights, but even where the authority lies with parents and guardians more broadly these restrictions can be harmful. In Thailand, children are prohibited from bringing civil or criminal actions against their parents unless the case is taken up by the public prosecutor, while in Lao PDR, children must gain parental consent prior to lodging a complaint or seeking legal assistance. These restrictions can prevent children from accessing justice, particularly where there is a conflict of interests between the child and his or her parents, or where the parents may be involved in the violation of the child's rights. To some extent this problem is mitigated in the model adopted by Turkey, which has a general rule requiring parental consent for a child to initiate legal proceedings, but allows an exception where the parents or guardians are alleged to have violated the child's rights. This rule would still permit parents to prevent a child accessing justice when he or she is fully capable of making decisions about what is in his or her best interests”.*<sup>57</sup>

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<sup>56</sup> BRAGA, Bruno. “O uso da violência na educação de crianças: assunto público ou convenção privada?”. Revista Nacional de Direito de Família e Sucessões (Brasil) – IASP, Maio, 2021.

<sup>57</sup> Childs Rights International Network. Rights, Remedies & Representation: Global Report on Access to Justice for Children – January, 2016.

Delving into the matter from the Brazilian legal perspective, the national law of procedures is vested in a straightforward framework, which involves the engagement of two pillars of the Brazilian rule-based democracy: the Public Defender's Office and the Public's Attorney Office (or *Prosecution Office*). According to the Constitution, the Public Defender's Office are responsible "*for the judicial guidance, the promotion on human rights, and the full and free-of-charge defense, in all levels, both judicially and extrajudicially*" (article 134 of the Constitution). By its turn, the Prosecution Office's main duty comprises "*the defense of the juridical order, the democratic regime and the inalienable social and individual interests*" (article 127 of the Constitution). In this sense, both institutions carry on essential functions to the management and correct operation of justice, because they look after the protection and promotion of the rights of the needy while complying with the rule of law. Even though each of them plays specific roles in the democratic frame, both institutions are reigned by the principle of functional independence (articles 127, paragraph 1 and 2 and 134, paragraph 2 of the Constitution),<sup>58</sup> which allows them to operate solely based on the rule of law and free from financial or political influence. In the matter involving domestic violence against children, both Prosecutors and Public Defenders come together on behalf of their protection.

On the matter involving domestic violence, it is obvious

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<sup>58</sup> *Article 127, paragraph 1*) "Unity, indivisibility and functional independence are institutional principles of the Public Prosecution".

*Article 127, paragraph 2*) "The Public Prosecution is ensured of functional and administrative autonomy, and it may, observing the provisions of article 169, propose to the Legislative Power the creation and abolishment of its offices and auxiliary services, filling them through a civil service entrance examination of tests or of tests and presentation of academic and professional credentials, the remuneration policies, and the career plans; the law shall provide for its organization and operation".

*Article 134, paragraph 2*) "The Public Legal Defense of each state shall be ensured of functional and administrative autonomy, as well as the prerogative to present its budget proposal within the limits set forth in the law of budgetary directives and in due compliance with the provisions of article 99, paragraph 2".

that leaving the power of representation on the hands of the parents means the same as forcing children to breath under water with their hands tied behind their back. As recognized by the preamble of the Third Optional Protocol to the CRC, “*children’s special and dependent status may create real difficulties for them in pursuing remedies for violations of their rights*”.<sup>59</sup> This is so because in specific circumstances, if the parents are left with the legal representation, the child will be deprived from receiving judicial protection, because in this situation the usual first responders (*whistle-blowers*) to child abuse frequently happen to be the child’s aggressor. In this sense, the first and foremost provision created by the Brazilian law of procedures is to entitle the child to a curator if his or her interests collide with acts, opinions or interests of parents (article 72, I of the BCP and 148, paragraph, “f” of the Child’s Act):

*Article 72) “The judge shall appoint a curator for the: I – incompetent person, if he or she does not have a legal representative or if the interests of the latter conflict with those of the former, for the duration of the incapacity”.*

*Article 148, paragraph, “f”) “In matters related to child inserted in circumstances provided on article 98, the Juvenile Justice is also competent to: “f” – nominate curator in cases involving indictment or representation or other judicial or extrajudicial proceedings involving child’s or adolescent’s interests”.*

As a direct effect of the procedural removal, the judge shall appoint a trustworthy party (usually a family member close to the child, after hearing his/her opinion) to act as a *curator* (assisting the child in the matters affecting the ongoing judicial proceeding of parental destitution) as well as a *legal guardian*, also known as “*tutor*” in *common law*<sup>60</sup> (substituting the parents in

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<sup>59</sup> A full review of the debate about the Optional Protocol is outside the scope of this article. For example of the debate, please see: JOHANSSON, Lina. “The Third Optional Protocol to the International Convention on the Right of the Child: A Success or a Failure for the Enforcement of Children’s Rights?” - QMHRR 2(1). 2015.

<sup>60</sup> Dictionary of Law, Economics and Accounting - *Portuguese-English, English-Portuguese*. Forense – 4<sup>th</sup> edition. 2013.

the duty of assisting the child in other civil acts according to the judge's stipulations). Once this guardianship is put into place (article 33, paragraph 2 of the Child's Act),<sup>61</sup> the judge will then rely on the Public Defender's Office expertise before Court as the child's public attorney (in case the pupil or his legal guardian has no means to afford a private solicitor) in the parental destitution proceeding (article 1.638 of the Brazilian Civil Code).

*Article 1.638*) "The father or mother will be subjected to his/her family destitution by means of a judicial decision if: I – punishes his/her son immoderately; II – abandons the son; III – commits acts contrary to the morals and good manners;

Paragraph: "The father or mother will also be subjected to his/her family destitution by means of a judicial decision if: II – commits the following acts against his/her son, daughter or other descendant: a) homicide, femicide or grave physical damage which may cause the victims death in contexts involving domestic violence or hatred against women; b) rape or any other criminal offence against the victim's sexual dignity [...]".

By its turn, the Prosecution Office shall supervise the whole proceeding as the Court's *custos legis*. In other words, while under the Prosecution Office's scrutiny on the acts of the legal guardian, the procedure law grants specific attorney powers to the Public Defender to act on the child's behalf on family court proceedings in which there are conflicts with the parents' interests, such as in cases of domestic violence. One of the most common litigation that demands the Public Defender's intercession involves child abuse and maltreatment – whether in the form of physical punishment, neglect, forced labor or any other kind of economic exploitation. By allowing a Public Defender to act on the child's behalf, the Brazilian law of procedures enshrines the *principle of equality of arms*, by which one party in dispute cannot take advantage of its counterparts' lack of

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<sup>61</sup> *Article 33, paragraph 2*) "Under exceptional conditions not involving tutelage or adoption, the guardianship shall be declared to meet peculiar situations or to remedy eventual absence of parents or other legal responsible, and the judge may grant the right of legal representation for specific civil acts".

technical condition (most of the times related to the party's poor economic background) to obtain a judicial decision that would not be rendered if the procedural guarantees were equally offered to both parties.

*“The Court has found that real inequality between the parties in a proceeding engages the duty of the State to adopt all the necessary measures to lessen any deficiencies that thwart effective protection of the rights at stake [and] thereby observing the principle of equality before the law and the prohibition of [economic] discrimination”.*<sup>62</sup>

The Public Defender will then act as if he/she was a private attorney nominated by the child's parents, putting in place all of his/her legal expertise in the protection and promotion of the child's interest. This means requesting a variety of judicial orders applicable to the case, regardless if it means acting against the parents' desires. This means asking the judge to limit certain aspects of the parent's family authority in order to take steps to prevent new violations and even grant monetary compensation against the aggressor. Considering that domestic violence usually escalate rapidly, with physical punishment becoming more frequent and crueler, many of these pleas must be provided with urgency, under penalty of becoming ineffective. For instance, if the Lower Court fails to provide safety measures to secure the child's physical integrity, such as transferring the child temporarily to foster care, the aggression may produce long lasting or irreversible wounds and maybe even the child's murder.

A study conducted by the Brazilian Pediatric Society revealed that 2.083 children up to 4 years-old died over the last decade in Brazil from domestic violence.<sup>63</sup> For these reasons,

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<sup>62</sup> CtIDH, Access to justice as a guarantee of economic, social, and cultural rights. A review of the standards adopted by the Inter-American System of Human Rights.

<sup>63</sup> “In Brazil, 2083 children up to 4 years-old died victims of aggression over the last 10 years” – Folha de São Paulo. Link:

<https://www1-folha-uol-com-br.cdn.ampproject.org/c/s/www1.folha.uol.com.br/amp/cotidiano/2021/04/no-brasil-2083-criancas-de-ate-4-anos-morreram-vitimas-de-agressao-nos-ultimos-10-anos.shtml>

the second most important legal provision over the matter is to ensure that the Public Defender is entitled to request for court-ordered provisional measures to assure the child's integrity during the judicial proceeding (so-called *interlocutory relief*; article 300 of the BCP and 157 of the Child's Act).<sup>64</sup>

The matter of child protection against domestic violence is so urgent that the legislator enacted Federal Law n. 13.431 in 2017 ("*Law n. 13.431/17*") and Decree n. 9.603 in 2018 ("*Decree n. 9.603/18*") aiming to erect "*a system of rights and procedural guarantees to those children and adolescent's victim or witness of violence*". According to article 21 of the Law n. 13.431/17, the court-ordered provisional measures can be put in place even before the beginning of the judicial proceeding. This will happen during police investigations, if the authorities responsible for scrutinizing the facts find evidences that may suggest that the child remains at risk of new violence at home.<sup>65</sup> In this situation, the Juvenile Justice Court will be called forth by the police authority to place a net of social protection around the child aiming at repelling new attempts of abuse. This net of social protection comprises the following "*protection measures*":

*Article 21) "I – avoid contact between the alleged aggressor and the child or adolescent victim or witness of the violence".*

*"II – request the interlocutory removal of the suspect from the child's household or place of sociability [...]"*.

*"III – request the suspect's preventive detection, in case there are enough evidence of threat to the child or adolescent victim or witness of violence".*

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<sup>64</sup> *Article 300)* "Interlocutory relief shall be granted when there are elements that prove the probability of the alleged claim (the "smoke of good law" or *fumus boni iuris*) and the risk of loss or injury to the useful outcome of the lawsuit (*periculum in mora*)".

*Article 157)* "During the proceeding, if proven the existence of grave grounds to justify the suspension of the parent's family authority, the judicial authority, after hearing the Prosecutor's opinion over the matter, must enforce the referred suspension *inaudita altera parte*, handling the child's custody over to trustworthy third party, who must comply with the role until the final judgement of the case".

<sup>65</sup> MAZZILLI, Hugo Nigri. O Ministério Público no Estatuto da Criança e do Adolescente – Saraiva. 2011.

As mentioned previously, the Prosecution Office also acts on cases involving domestic violence, complementing the Public Defender's attorney role in two different ways. Firstly, as the matter unfolds from a *civil standpoint*, the Prosecution Office is summoned by the Court to oversee the correct enforcement of the law (so-called *custos legis* role; article 201, VIII of the Child's Act)<sup>66</sup>. The Prosecution Office must always bear in mind the principles of child protection while addressing the issue, in a way that safeguards and promotes the child's best interests. This judicial participation in matters affecting children's interests functions as a qualified legal consultation, which is also free of judicial charges and becomes so important as the lawsuit unravels that, no matter how urgent the case may be, the proceeding can be totally nullified by the Court of Appeals if the Lower Court renders a judgement on the merits against the child's best interest without hearing the Prosecutor's opinion – which, by its turn, may span in different matters, such as adoption and inheritance proceedings, *writ of mandamus* to force the government to perform duties related to access to healthcare facilities and enrolment at school<sup>67</sup> (article 279 of the BCP),<sup>68</sup> and last but not least, to assert if the parents have no adversarial interests in cases that would be against those of the child. When it

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<sup>66</sup> Article 201, VIII) “The following duties belong to the Prosecution Office: VIII – look after the respect of the rights and procedural guarantees secured to children and adolescents, promoting extrajudicial protective measures and bringing charges before Court, when applicable”.

<sup>67</sup> MAZZILLI, Hugo Nigri. O Ministério Público no Estatuto da Criança e do Adolescente – Saraiva. 2011.

<sup>68</sup> Article 279) “The case shall be null when the member of the Public Prosecutor's Office who should intervene in the lawsuit was not notified”.

*Paragraph 1)* “If the case has been prosecuted without the knowledge of the member of the Public Prosecutor's Office, the judge shall declare null and void all the acts performed after the moment at which notice should have been served upon said member”.

*Paragraph 2)* “Nullity can only be declared after the service of notice upon the Public Prosecutor's Office, who shall make a statement regarding the existence or absence of harm”.

comes to addressing judicial cases of domestic violence committed by parents, the civil matters to which the Prosecution Office is called to advise usually involves the existence of moral, physical and mental damages, the amount of indemnification due to the victim and the granting of preliminary injunctions, such as provisional remedies to distance the aggressor from the child's presence or even the removal of the parents' custody, in accordance with article 9 of the CRC.<sup>69</sup>

Finally, as the matter unfolds from a *criminal standpoint*, the Prosecution Office is invested by law to receive the contents of the police investigation and represent the child victim of abuse by bringing charges to Court against his or her offenders (article 101, paragraph 2 and 201, X of the Child's Act)<sup>70</sup>. As domestic violence usually involves the commitment of a felony, such as aggression or murder, the Brazilian law of procedures disallow the curator (eventually placed by the Court for other previous circumstances) to act as a legal guardian and bring perpetrators to justice through a private prosecution in the specific case. In the same way, the child remains disallowed to bring charges by himself against the aggressors. Only the Prosecution Office has the power to start a criminal public prosecution against a child's parents for domestic violence, without the need

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<sup>69</sup> Article 9) "A child shall not be separated from his or her parents against their will, except when competent authorities subject to judicial review determine, in accordance with applicable law and procedures, that such separation is necessary for the best interests of the child. Such determination may be necessary in a particular case such as one involving abuse or neglect of the child by the parents, or one where the parents are living separately and a decision must be made as to the child's place of residence".

<sup>70</sup> Article 101, paragraph 2) "Without prejudice of the adoption of urgent measures to protect the victims of violence or sexual abuse in accordance with article 130 of the Child's Act, the removal of the child or the adolescent from the home pertains to the judicial authority and must result in the beginning of the judicial proceeding against the aggressor against the Prosecution's Office representation [...]".

Article 201, X) "The following duties belong to the Prosecution Office: X – bring charges before Court in matters involving penalties against the rules of child and youth protection, without prejudice to the aggressor's legal liability from a penal and civil standpoint".

of the legal guardian's authorization. As mentioned previously, the main goal of the Brazilian law of procedures in the matter of child abuse is to impede the child's revictimization. Therefore, as the police investigations unravel, the Prosecutor may also request interlocutory reliefs aiming to protect the child against new forms of violence. Also, cases involving the investigation of crimes against children (article 129, VIII of the Constitution)<sup>71</sup> or the removal of parental powers (as a direct consequence of the commitment of domestic violence, for example) can also be brought to Court *ex officio* by the Prosecution Office, who will once again act as the child's sole legal representative, dismissing the need for a Public Defender (article 155 and 162, paragraph 4 of the Child's Act).<sup>72</sup>

In spite of the important role played by the Prosecution Office to bring the child's aggressors to justice to face trial for their crimes, one cannot underestimate the child's own relevance to the correct and consistent continuity of the criminal prosecution. As the person directly subjected to the violence committed, the child also becomes the main witness of the aggression and, thus, one of the most reliable sources of information to correctly ascertain the facts surrounding the crime. Of course, depending solely on the child's oral evidence does not suffice to ascertain all the facts involved in the crime, due to his or her incomplete awareness of the matter. However, the child's limited understanding of the context of the violence cannot impede him or her from being heard in Court, because by impeding his or her participation the Judiciary impairs his or her self-awareness over

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<sup>71</sup> Article 129) "The following are institutional functions of the Public Prosecution: VIII - to request investigatory procedures and the institution of police investigation, indicating the legal grounds of its procedural acts".

<sup>72</sup> Article 155) "The legal proceeding for suspension or removal of parental care will be initiated by the Prosecution Office or other parties who has legitimate interest in the case".

Article 162, paragraph 4) "When the legal proceeding of removal of parental care is initiated by the Prosecution Office, the nomination of a curatorship to act on the child's or adolescent's behalf is dismissed".

the risks existent in society, transmitting a noxious message of lack of control over his or her own bodies and conscience. Therefore, by operation of Law n. 13.431/2017, the child plays a role during the evidentiary stage. Apart from having its opinion considered and being assisted by an expert, children victim of child abuse (below seven years old) or victim of sexual abuse (regardless of the age) shall be awarded a special hearing procedure build to prevent revictimization. Firstly, the child cannot be forced to depose in any circumstances (even if the testimony is aimed to reinforce the net of social protection; article 22, paragraph 3 of Decree n. 9.603/18). In case of spontaneous testimony, the oral evidence will happen only once (article 11 of Law n. 13.431/17) and the child (a) will receive full explanations about his/her rights and the purpose of the proceeding (article 12, I of Law n. 13.431/17); (b) cannot be forced to answer delicate or complex questions incompatible with his/her maturity (article 12, V of Law n. 13.431/17); (c) cannot have any contact with the aggressor (article 9 of Law n. 13.431/17); (d) will be placed in a child-friendly environment that provides enough privacy and comfort during the entire hearing (article 10 of Law n. 13.431/17) and (e) will be subject to continuous assessment by the authorities to assert if he/she is at risk (article 5, X of Law n. 13.431/17). Finally, all information provided by the child during the special hearing must be treated in strict confidentiality and any third party who leaks pieces of information related to the judicial proceeding commits crime, according to article 24 of Law n. 13.431/17.

*Article 22, paragraph 3) “The child or adolescent will be respected in their decision not to talk about the violence suffered”.*

*Article 11) “The special testimony shall be ruled by protocols and, if possible, will happen only once, in the form of a pretrial evidence, and the suspect must be awarded all means to present his/her defense”.*

*Article 12, I) “The special testimony will be produced in accordance with the following procedure: I – the experts shall*

*explain to the child or adolescent about the special testimony, informing his/her rights, the procedure that will be adopted and the plan to count on him/her participation [...]”.*

*Article 12, V) “The expert can adapt his queries to a speech that can be better understood by the child or adolescent”.*

*Article 9) “The child or adolescent will be secured from any contact, even eye-contact, with the alleged aggressor, or with any third party that may represent threat or may cause feelings such as bullying and embarrassment”.*

*Article 10) “The special hearing and the special testimony will take place in an appropriate and welcoming environment, with enough infrastructure and space to guarantee the child’s or adolescent’s victim or witness privacy”.*

*Article 5, X) “The application of Federal Law n. 13.431/17 [...] will safeguard the child’s and adolescent’s following guarantees: X – to be secured, with continuous assessment of any risk of being subject to harassment, threat or other forms of violence”.*

*Article 24) “Violating closed proceeding with the intent to allow third parties to watch the child’s or adolescent’s testimony without judicial authorization and with the child’s and his/her legal representatives consent [constitutes a crime and subjects the criminal to the following] prison term: imprisonment between 1 and 4 years and the payment of a fine”.*

In summary, depending on the case, the child’s mandatory representative in Court can be a Prosecutor or a Public Defender and his participation in the proceeding does not undercuts the role granted to the child. If the case unfolds to a *civil litigation* (to request compensation to the child for moral and physical damages, for example), the Public Defender will be called to action if the child has no means to afford a private attorney, and the Prosecution Office shall engage in the case as the Court’s *custos legis*. By its turn, if the litigation comprises only a *criminal prosecution*, the child will be assisted by a Prosecutor, who is the only competent by the Brazilian law to press charges against the offender for the felony committed. When the Prosecutor is not acting, he is oversighting the rule of law by assisting the claimant and, in both cases, the Juvenile Justice will be

competent to rule the case, as provided by article 148, IV and paragraph of the Child's Act:

*Article 148, IV) "The Juvenile Justice is competent to: IV – rule civil proceedings involving child's individual, diffuse or collective interests, in accordance with article 209".*

Last but not least, contexts not involving domestic violence are not the only ones in which remains conflicts of interest between the child and the legal guardian. In Brazil, local authorities usually face situations in which parents refuse to perform legal duties in their child's behalf, for a number of reasons. For instance, children are sometimes deprived of means to access basic health needs (such as taking vaccine against a specific disease) due to the parent's religious beliefs. There are also those families in which the parents refuse to enroll their child at school because they believe they need to spend more time working or helping family members in domestic chores. In these types of situations, the Prosecutor also has an important role to play.

These situations commune with one another the fact that the parents are failing to provide the child with elementary public services to their development. In order to prevent this void of legal representation (which also have in common the fact that the parents' creeds conflict with the child's basic needs), the Brazilian law of procedures, in accordance with article 227 of the Constitution, allow the Prosecution Office to launch investigations, *ex officio*, or bring proceedings at his own initiative (after receiving briefings from police authorities) against the parents on behalf of the child deprived from vital public services, forcing them to cease the omission and act according to their duty and the legal net of child protection (articles 14 and 129, V, of the Child's Act)<sup>73</sup>.

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<sup>73</sup> *Article 14)* "The vaccination of children is mandatory when recommended by the Brazilian public health authorities".

*Article 129, V)* "The following measures can be enforced against parents or legal guardian: V – obligation to enroll the son/daughter or pupil at school and supervise their attendance and performance".

The procedural rules that initially prevent children from bringing complaints against their legal representatives are not absolute, due to the noxious effects that the child might face in case of misapplication of the law. For instance, in the rare occasions in which the Prosecutor decides there is no violation to the child's rights or even fails to act (which must also be investigated by the judicial authority in order to confirm any type of omission or malfeasance),<sup>74</sup> the Brazilian Civil Code also protects the child's interest, not leaving any chance of violent acts being left unpunished over time.

In general, the Brazilian law imposes *time limits* on how soon a case must be brought to the Court's attention after a right is harmed. This means that the plaintiff's claim is subject to *statutes of limitations* and will cease to produce legal effects if the claimant fails to plea before Court during the lapse of the statutory period (for example, in Brazil the 2-year limitation is applicable to an action to recover spousal support). This type of ruling does not impede children from accessing justice against their parents, because the rule of statutes of limitations applies only when a child reaches adulthood and can approach the courts by himself/herself against those individuals.

In other words, in cases where nothing is done regarding a report of child abuse by public authorities, the victim is allowed to stand in Court all by himself after the age of majority to seek redress for the acts committed during his childhood. That is so because the Brazilian law recognizes that children have no means to approach the Court by themselves if the family members on who they rely upon to act on their behalf have a direct dispute with their interests. Furthermore, a litigation between relatives can cause family disruption, forcing the parties to reconsider the possibility of litigating among themselves. Therefore, in order to protect the household (*principle of family*

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<sup>74</sup> MAZZILLI, Hugo Nigri. O Ministério Público no Estatuto da Criança e do Adolescente – Saraiva. 2011.

community) and secure the right to justice to those who cannot stand in Court during parental care, the law impedes the time limits from counting against them, in accordance with the Latin rule *contra non valentem agere non currit pasescriptios*.<sup>75</sup> Also, one must consider the fact that children may take many years to come to terms with sexual abuse and become ready to approach the courts.<sup>76</sup> Therefore, as an example, if a child aged 14 years suffers grave moral damages due to neglect from both his/her parents, the time limits to seek monetary compensation will start counting only after the victim becomes adult, by force of article 198, I of the Brazilian Civil Code.

*Article 198, I) "The statute of limitations is also suspended: I – against incompetent individuals referred in article 3".*

*Article 3, I) "The law states the following individuals as absolute incompetents to act in civil life by themselves: I – those below the age of 16".*

The law also provides protection to children between the ages of 16 and 18, by stating that time limits shall not apply between ascendants and descendants during the entire parental power, including the period of age above mentioned (article 197, II of the Brazilian Civil Code).<sup>77</sup> Therefore, in the case of a child 17-years-old (who, according to the Brazilian law, is qualified as an "adolescent"), the suspension of the statute of limitations will cease with the termination of the family authority and, after becoming 18 years-old according to the Brazilian law, the victim may choose to bring proceedings at his/her own initiative, with the aid of a Public Defender (if applicable), but without the presence of the Prosecution Office, requesting orders for monetary compensation for moral damages caused by the abuse. The same rule applies to those cases in which the child is assisted by a legal guardian who commits abuses during the custody, by stating that

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<sup>75</sup> PELUSO, Cezar. Código Civil Comentado – Manole, 8th edition. 2014.

<sup>76</sup> Childs Rights International Network. Rights, Remedies & Representation: Global Report on Access to Justice for Children – January, 2016.

<sup>77</sup> *Article 197, I) "The statute of limitation does not apply: II – between ascendants and descendants during the parental power".*

the statute of limitation does not apply between the legal guardian and the tutored (article 197, III of the Brazilian Civil Code).<sup>78</sup>

## CONCLUSION.

According to article 4 of the CRC, States parties shall undertake all appropriate legislative measures to the maximum extent of their available resources for the implementation of the rights recognized by the best practices recognized by the international community. Considering that the right to justice stands out as a fundamental liberty without which all other political, economic, social and cultural rights becomes completely fragile and, thus, vulnerable to violations by public authorities and third parties, States parties shall use the framework of international law to build a solid and protective net of judicial protection able to guarantee the safeguard and promotion of the child's access to justice.

Delving into the matter from a child's perspective, the right to access justice comprises several special features in order to accommodate the special conditions faced by children, whose lack of experience impedes them from seeking judicial redress by themselves whenever necessary. The CRC does not impede duty-bearers from acting on the child's behalf before Court, leaving the States parties to decide over the matter. Considering the children's little degree of social experience to address the Court by themselves, the Brazilian law of procedures requires them to act through their legal guardian in Court. The so-called *mandatory representation* means that the child's mother and father (or any court-appointed legal guardian) are vested with the authority to stand before Court on his pupil's behalf. Thus, while addressing the issue from the panorama of Brazilian law of

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<sup>78</sup> Article 197, III) "The statute of limitation does not apply: III – between legal guardians (tutors) or curators and tutored or wards during the custody or curatorship".

procedures, one must bear in mind that any wrongdoing committed against a child is his or her parents' responsibility and they must ensure that it will be cared for in a manner consistent with the promotion of the child's interests. By its turn, States parties shall ensure the implementation of judicial means by which parents approach the Justice to assist the child's needs.

The fact that Brazilian law demands representation to children does not imply any violation to the CRC in relation to the Vienna Convention on the Law of Treaties, because there is no legal disposition stating that Brazil must set up a judicial structure to enable children to stand by themselves in Court. In this sense, the rule of mandatory representation does not undercut the child's right to address the Court seeking protection. By the contrary, in accordance with article 12 of the CRC, Brazil assures that any children, regardless of sex, nationality, culture, religion and social condition, have the right to express their views freely in all matters affecting their interests in Court.

From a procedural standpoint (that is, regarding articles 25 and 19 of the CRC), the Inter American Court asserted that judicial remedies must be applied with impartiality and swiftness, with regards to the principles of devotion to the best interest of the child and absolute priority to matters related to their interests. The Brazilian law complies with these binding guidelines, firstly by enshrining in its Constitution the right to access justice as a fundamental and irrevocable right. Secondly, by representing the cornerstone of its *procedural due process of law*, the right to justice erects in the Brazilian law a series of procedural rights without which the right to seek judicial authorities becomes impossible (mainly to vulnerable groups such as children). The following rights applies to any child in need of judicial protection:

- (a) The right to litigate *free-of-costs*: the judge must exempt the family from paying judicial fees related to the litigation on the tutored behalf throughout the proceeding. This general

rule is given a broader sense with regards to children: any litigation brought before *Youth Courts* is exempt of judicial fees, regardless of the child's economic conditions.

- (b) The right to have a *technical defense*: children belonging to low-income families shall have the right to be assisted by a technical defense also free-of-costs to argue its case before Court.
- (c) The right to *petition*: every child has the capacity to institute legal proceedings on his/her behalf and must be assured equal treatment in Court.
- (d) The right to *be heard*: a decision cannot be rendered against a child who has not been previously heard and afforded a free-of-costs expert assistance.
- (e) The right to *produce evidence*: the child must be assured equal treatment in terms of the exercise of procedural rights and resources, including the right to produce evidence.
- (f) The right to a *fair, swift and effective judgment*: the child is entitled to a fair, effective and full resolution of the dispute, including the enforcement of the decision, within a reasonable period of time and with priority in comparison to other ongoing civil litigation not involving children.
- (g) Inexistence of time limits: the rule of time limits will take place only when a child reaches adulthood and can approach the courts by himself/herself against his/her aggressors.

The need to empower children to protect their rights in Court must not be treated as a priority, because the Brazilian law is apt to guarantee the child's access to justice in a manner consistent with the international best practices over the matter. Other matters concerning the protection of child's physical and mental integrity on a daily basis are more urgent nowadays. The COVID-19 pandemic is a good example of how domestic violence has become a serious issue that must be dealt with urgently. The pandemic's stay-at-home orders are causing family members to confine with each other in small environment, and

these factors are boosting social stressors which enhances emotional breakdowns and leads to child abuse in all sorts of manners. The response to this issue is directly related to how countries equip their law of procedures to secure children from interpersonal violence at home.

In relation to the matter, Brazil acknowledges that special circumstances, such as those involving domestic violence, demands specific rules of proceeding, because simply hearing the child's testimony is not enough when his/her legal representation is in the hands of the aggressors. Bearing in mind that limiting mandatory representation to the parents may become deleterious to the child's protection, the Brazilian law of procedures provides the following answers to assure their protection.

The first provision on the Brazilian law is to entitle the child to a trustworthy party nominated by the judge to act as his/her tutor if his/her interests collide with acts, opinions or interests of his or her parents. As the direct effect of the procedural removal, the judge will rely on the Public Defender's Office expertise to act as the child's public attorney (in case the pupil has no means to afford a private solicitor), regardless of the parent's opinion. Meanwhile, the Prosecution Office shall supervise the whole proceeding as the Court's *custos legis*. By allowing a Public Defender and a Prosecutor to act on the child's behalf, the Brazilian law of procedures prevents the child from being subjected to the parent's thoughts and actions, ministering the law solely based on the child's best interests.

The second legal provision over the matter is to ensure that both Public Defender and Prosecutor are entitled to request for court-ordered provisional measures to assure the child's integrity during the proceeding. This means asking the judge to limit certain aspects of the parent's family authority to prevent new violence (e.g., transferring the custody to other family members).

As the matter unfolds from a *criminal standpoint*, the

Prosecutor is invested by law to represent the child victim of abuse by bringing charges to Court against his or her offenders. That is so because the Brazilian law of procedures disallow the child (or even his/her curator) to stand before Court through a private prosecution to bring perpetrators to justice. In the same way, the child remains disallowed to bring charges by himself against the aggressors. Only the Prosecutor can start a prosecution against a child's parents for domestic violence, regardless of the legal guardian's authorization.

Finally, despite the relevant procedural role played by Prosecutors and Public Defenders, one cannot underestimate the child's own importance to his/her adequate protection. Children's limited understanding of the context of the violence cannot prevent them from being heard in Court. Therefore, by operation of Law n. 13.431/17, Brazilian law allows children to play a fundamental part during the evidentiary stage of the proceeding. Apart from having its opinion duly considered by the Lower Court and being assisted by a qualified expert, children victim of child abuse shall be awarded a special hearing procedure that prevents revictimization and place the right-bearer at the center of attention, which encompasses the following rights:

- (a) The child cannot be forced to depose in any circumstances (even if the testimony is aimed to reinforce the net of social protection).
- (b) In case he or she spontaneously decides to testify, the oral evidence will happen only once.
- (c) The child shall receive full explanations about his/her rights and the purpose of the proceeding.
- (d) The child cannot be forced to answer questions incompatible with his/her maturity.
- (e) The child cannot have contact with the aggressor.
- (f) The child will be placed in a child-friendly environment that provides enough privacy and comfort during the entire hearing.

- (g) The child will be subject to continuous assessment by the authorities to assert if he/she is at risk.
- (h) Finally, all information provided by the child during the special hearing must be treated in strict confidentiality and any third parties who leaks pieces of information related to the judicial proceeding commits crime, according to article 24 of Law n. 13.431/17.

Violence against children is an age-old pandemic that affects all societies,<sup>79</sup> but one can argue that this noxious practice has been reaching new proportions nowadays. From this contemporary standpoint, it is self-evident that providing a judicial-nominated curator to children victims of abuse does not suffice to assure their right to access justice. In other words, it is out of question that the possibility of nominating a substitute to carry on litigation against violent parents on the behalf of the child victim of abuse is a first and important step, but it does not seem to be enough. The concern is not whether or not the law of procedures ensures alternatives to *mandatory representation*, but also to confirm if it ensures that this representative will be vested in judicial powers to act against the aggressors in an effective way, guaranteeing the child's direct, continuous and safe access to the Judiciary.

In summary, in Brazil children are never allowed to stand before Court by themselves and the *persona* charged with the role of child representation are not always the child's parents. The child's interests are always of prime consideration, regardless of the representative's personal conditions (which are unimportant during the litigation) and the law provides several remedies to impede them from acting against the child's will. Finally, child's claims are not subjected to any statute of limitations until he/she enters adulthood.

The need to assess if the Brazilian Courts are complying

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<sup>79</sup> Institute of Medicine - National Academy of Sciences. Preventing Violence Against Women and Children. 2011

with domestic and international law in a daily and case-by-case basis shall be left to a further occasion. By now, it can be said that the Brazilian national law is well equipped with rules ensuring children's access to justice and, thus, at least ideally conform to the Inter American Human Rights bodies' interpretation of the scope and limits of articles 8 and 25 of the American Convention, because article 13 of the BCP explicitly states that International Treaties on judicial proceedings shall be directly enforced by domestic courts, complementing or derogating the national law where applicable, due to its *supra* legal condition and in accordance with the *principle of vested rights*.



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