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# PUNISHMENT STANDARDS FOR JUVENILES IN THE CASE LAW OF CONSTITUTIONAL COURTS AND INTERNATIONAL HUMAN RIGHTS TRIBUNALS. TRENDS AND CURRENT ISSUES.

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**Abstract**

The article analyzes the standards and constraints that Constitutional Courts and International Courts of Human Rights have imposed on juvenile sentencing. It is argued that although the rulings of these tribunals tend to limit the punishment that may be imposed on juveniles on the basis of the acknowledgment that their developmental differences reduce their culpability, the limiting effectiveness of this argument is compromised, falling quite short of the requirements raised by the universal system for children's rights, due to the inclusion of "dangerousness" criteria in these rulings, which are relatively immune to the reasons based on diminished culpability. In contrast with this, the demands concerning the humanity of punishments and the requirement that their execution shall make reintegration into society possible, when evaluated on the basis of the special developmental needs of juveniles, seem to translate into more effective limits.

**Palabras clave:** *children's rights; juvenile's criminal liability; diminished culpability; juvenile sentencing; constitutional standards.*

## I. INTRODUCTION

In the last lustrums, the constitutional courts and international human rights tribunals[1] that are most influential in the contemporary constitutional debate, on

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1 The pronouncements of international human rights tribunals on the scope of the rights that are recognized by international instruments, can have constitutional relevance, either directly or indirectly, for the domestic legal systems that either accord constitutional rank to those instruments,

several occasions have had to address the constitutional or international law standards applicable to penalties imposed on persons under the age of eighteen (henceforth, also "juveniles").

The picture that emerges from their decisions, except for the increased recognition that juveniles, in light of their maturity and development, "are different" (*kids are different*),[2] is quite diverse and reveals diverging conceptions – sometimes opposing – about the purposes of penalties for juveniles as well as regarding some of their intended normative limitations, assumed as essential in some jurisdictions and unknown in others.

This picture reproduces visions already present in the discussion on the constitutional limits to the state power to punish anyone, but also reveals the special features of the case of minors.

This paper shall focus on some of the most relevant decisions of the United States Supreme Court, the German Federal Constitutional Court (henceforth, BVerfG), the Inter-American Court of Human Rights (henceforth, I/A Court H.R.) and the European Court of Human Rights (henceforth, ECHR), concerning the standards of proportionality, legality and humanity of punishments, as well as the purpose of resocialization or social integration of convicted persons.

The guiding thesis of the present work can be stated as follows: although the rulings of these tribunals tend to limit the punishment that may be imposed on juveniles on the basis of the acknowledgment that their evolutionary differences (*kids are different*) reduce their culpability, the limiting effectiveness of this argument is diminished, falling quite short of the requirements that tend to be raised on the part of the universal system for children's rights protection (United Nations Convention and Committee on the Rights of the Child), due to the inclusion of "dangerousness" criteria in these rulings, which are relatively immune to the reasons based on reduced culpability. In contrast with this, the demands concerning the humanity of punishments and the requirement that their execution shall make reintegration into society possible, when evaluated on the basis of the special developmental needs of minors, seem to translate into more effective limits. A *test-case* for this effectiveness deficit, as well as for the benefits of these other considerations, can be found in the issue regarding the admissibility of sentencing juveniles to life imprisonment or deprivation of liberty of indeterminate duration.

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or accept the standards established by those instruments as interpretation criteria regarding the scope of the fundamental rights recognized by their constitutions. The latter is, for example, the case of the German constitutional system, according to the German Federal Constitutional Court (henceforth, BverfG), at least concerning the rights recognized by the European Convention on Human Rights, including the jurisprudence of the European Court of Human Rights (henceforth, ECHR); v. BVerfGE 111, 307, 317 (*Görgülü* case) and, related to one of the issues addressed in this work (preventive detention), BVerfGE 131, 286, 295 (the *Sicherungsverwahrung II* case).

2 In the words of the Supreme Court of the United States: "children are constitutionally different from adults for purposes of sentencing. Because juveniles have diminished culpability and greater prospects for reform, we explained, 'they are less deserving of the most severe punishments'…". See *Miller v. Alabama* (2012), quoting *Graham v. Florida* (2010).

## II. PROPORTIONALITY, BETWEEN CULPABILITY AND DANGEROUSNESS

The constitutional standard of proportionality of criminal punishments can be understood at least from two different conceptual perspectives. According to a conception, which is more characteristic of the public rather than of the criminal law, rooted on a utilitarian justification of the exercise of state power that is quite widespread both in the constitutional doctrine and in that of international human rights tribunals,[3] the proportionality standard requires that punishment, as a restrictive measure of fundamental rights, shall be suitable and necessary for achieving a constitutionally legitimate aim and not to entail an excessive restriction to said rights in consideration of the relative importance of the aim pursued.[4] On the other part, under a conception that seems more rooted on the retributivist criminal law tradition, the proportionality standard of punishment requires that the penalty shall correspond to the blameworthiness of the offender's conduct, his or her "desert", which is, in turn, a function of the degree of culpability for the perpetrated offense.[5] Even though this is the notion that seems to have been used as main argument for limiting penalties that, according to international standards, may be imposed on juveniles, the fundamental decisions often seek to rely upon hybrid arguments that indirectly refer to reasons of social necessity (in light of the dangerousness of the offender).

In the jurisprudence of the United States Supreme Court, various judgements delivered over the past fifteen years have asserted and developed the principle pursuant to which minors have lesser culpability and deserve milder punishments than adults.

In *Roper v. Simmons*[6] the United States Supreme Court determined the unconstitutionality of the imposition of the death penalty to offenders that committed crimes while they were under age eighteen, deeming it "so disproportionate as to be cruel and unusual". To this effect, the Court relied upon the evidence provided by developmental psychology, according to which crimes committed by adolescents could not be classified among the "worst" offences, as to deserve the capital punishment, since they lack the necessary maturity and sense of responsibility – what makes them more

3 See Jackson (2016); Schlink (2012); in Chile, and containing references to the I/A Court H.R., Nogueira Alcala, (2011); Arnold *et al.* (2012).

4 The BVerfG has applied this principle when examining the proportionality of punishments, albeit largely foregoing an empirical examination of suitabiliy and neccesity of the penalty, as well as a balance of the colliding goods. The outcome is largely a substitution of the kind of scrutiny corresponding to that version of proportionality, for an analysis of the just relation between the criminal unlawful act and the punitive reaction, that is, a scrutiny closer to the second version of proportionality (v., main text, down below), for which the proportionality test of the public law does not seem to be well suited; v. the commentary, containing references to the most relevant decisions, by Noltenius (2009).

5 For a summary overview of the possible arguments, and adhering to one based on the notion of desert grounded on an expressive conception of punishment, v. von Hirsch (1992).

6 *Roper v. Simmons* (2005).

impetuous and prone to risky behavior–, are more susceptible to negative influences and external pressures, especially from their peers, and they are yet to develop a well formed character, so that several of their behavioral traits are transitory. All that makes them more prone to engage in immature and irresponsible behaviors, which are for that very reason less morally reprehensible than those of an adult.

Nevertheless, already in this first decision,[7] this reason predicated on the diminished culpability of minors as ground for their lessened desert of punishment, is combined, almost without distinction (above all, because it is covered by the veil of a moral rationale), with a more utilitarian reason, namely that minors can still change, whereof the Court nonetheless derives a moral duty of offering them the chance to "reform" and reintegrate into society:

> From a moral standpoint it would be misguided to equate the failings of a minor with those of an adult, for a greater possibility exists that a minor's character deficiencies will be reformed.
>
> […] [i]t is difficult even for expert psychologists to differentiate between the juvenile offender whose crime reflects unfortunate yet transient immaturity, and the rare juvenile offender whose crime reflects irreparable corruption […].[8]

In *Graham v. Florida*, the same Supreme Court considered unconstitutional to impose a life sentence without the possibility of parole to minors that have not been convicted of homicide. To this effect, the Court based its decision on the one pronounced in *Roper*, concluding that all minors (not convicted of homicide) should be accorded "a chance to demonstrate maturity and reform […] The juvenile should not be deprived of the opportunity to achieve maturity of judgment and self-recognition of human worth and potential."[9]

Finally, in *Miller v. Alabama*,[10] the Court extended the aforementioned considerations to homicide cases. Thus, it asserted that, except for "rare cases", the peculiar psychological characteristics of children, which are transient in nature, as well as their vulnerability to negative influences and outside pressures, are not crime-specific: they are also applicable to those convicted of homicide. In accordance with the foregoing, and emphasizing that "kids are different", the Court asserted a general principle of diminished culpability, applicable to any type of offence.[11] Nevertheless, it also recognizes an exception, which once again combines a reason based on the lesser culpability of adolescents with one relative to the possibility of reforming their character, namely for individuals that manifest "irreparable corruption"; a possibility

7 Which actually had been anticipated by *Thompson v. Oklahoma* (1988), occasion in which the Supreme Court declared the unconstitutionality of the death penalty for offenders who were under age sixteen at the time of committing the crime.

8 *Roper v. Simmons* (2005).

9 *Graham v. Florida* (2010).

10 *Miller v. Alabama* (2012).

11 See Scott *et al.* (2015), p. 5.

that the Court regards, however, as a rarity and that would be extraordinarily difficult to distinguish from the cases – which would constitute the overwhelmingly general rule – in which crime is the product of transient immaturity.[12]

Thus, in the rulings of the United States Supreme Court, the doctrine of the lessened desert of punishment of minors – in light of their reduced culpability– remains tied to, and to a certain extent conditioned by, the circumstance that the offender is not an incorrigible minor, endowed with an irreparably corrupt personality, which (very) exceptionally – but in that case, regardless of the degree of culpability of the minor– could allow the imposition of a life sentence without parole. A hybrid reasoning, which clouds the moral nature of the main argument, and relativizes its effectiveness for limiting punishments directed to minors.

Nevertheless, on the state level, the doctrine of diminished culpability has been gaining some ground. The decision of the Court in *Miller* led to the repeal by several state legislatures of life imprisonment without parole for minors, and to the assertion of its unconstitutionality in all cases by some state supreme court.[13] In yet another decision taken by a state supreme court, it even served as a basis for questioning the constitutionality of imposing mandatory minimum sentences on juveniles (compulsory minimal duration of a penalty established by ordinary criminal legislation for certain criminal offences), since they preclude considering the immaturity of juvenile offenders, thus allowing for the imposition of disproportionate punishments.[14] Under this logic, an individualized sentencing hearing should be offered to every person convicted as a minor, in which specific criteria for persons of that age are to be considered, allowing them to produce evidence regarding their lower degree of maturity, unless the law itself specifies minimal durations applicable to adolescent offenders that are lower than those established by common criminal legislation.[15] On the federal level, in contrast, even though the rationale of the decisions taken by the Supreme Court in *Roper*, *Graham* and *Miller* could be used as a basis for asserting a non crime-specific right to a reduced sentence – in comparison to the one that would be imposed on an adult for the same offence –[16] that conclusion has not been explicitly accepted by the aforementioned tribunal.

12 Scott *et al.* (2015), p. 5.

13 Scott *et al.* (2015), p. 11: "In at least one state, Massachusetts, the state's highest court relied heavily on Miller in abolishing LWOP under its state constitution as a disproportionate sentence for juveniles, due to their reduced culpability."

14 *State v. Lyle* (2014), p. 400.

15 Scott *et al.* (2015), p. 26.

16 That is precisely a reason taken into account by the minority when grounding its dissenting vote in *Miller*; in fact, according to Justice Roberts (substantiating the minority vote), if the fact that "juveniles are different from adults" implies that "they must be sentenced differently" then "[t] here is no clear reason that principle would not bar all mandatory sentences for juveniles, or any juvenile sentence as harsh as what a similarly situated adult would receive"; see *Miller v. Alabama* (2012), p. 2482. In the same vein, an authoritative doctrine in the US tends to conclude that juveniles actually have a constitutional right to a less severe sentence than adults, even involving sanctions other than the death penalty and life imprisonment without parole; see Gardner (2016), pp. 497-498, although warning that "[i]t is, of course, impossible to predict whether the Court will impose the full array of reforms entailed in Graham /Miller as spelled out above".

## III. FROM THE PROPORTIONALITY OF PUNISHMENTS TO THEIR LEGALITY

The human rights courts belonging to the European and Inter-American systems have also examined the proportionality of prison sentences, in light of the ban on inhuman or degrading treatment or punishment. Thus, the ECHR has asserted that a gross disproportionality can constitute an inhuman or degrading treatment or punishment.[17] The I/A Court H.R., explicitly following the doctrine set forth by the ECHR, when adjudicating a case involving juvenile convicts,[18] also decided that "radically disproportionate" penalties constitute inhuman and degrading treatment, concluding that the penalty of life imprisonment for minors, even under a regime that allows the opportunity of opting for parole (*libertad condicional*) after serving twenty years of a prison sentence, due to its disproportion (and serious psychological effects, as will be seen) is to be regarded as an inhuman or degrading punishment.[19]

Moreover, beyond the above-mentioned disproportion, these international human rights courts have developed other highly relevant standards regarding the limits of prison sentences.

The ECHR, initially addressing the issue of life imprisonment sentences imposed on adults, has set its focus on the guarantee of legality of liberty deprivation established in Art. 5(1) of the European Convention on Human Rights (CEDH), according to which it has been concluded that any decision entailing the extension of a person's imprisonment when based on reasons different than those that originally substantiated said imprisonment, must be predicated on legally established proceedings before a court-like body. Thus, for example, in the case of life imprisonment, particularly under the approach employed under English law, which considers a minimal period of effective service of the custodial sentence, established in view of retributivist and general deterrence aims, and thereupon an additional period of eventual service of said sentence, in consideration of public safety needs, the ECHR has argued that this second period requires a new decision based on judicial proceedings; therefore, the claim that the original judgement of conviction may support an automatic extension of the deprivation of liberty after completing the minimal mandatory period of effective service, would not meet the indicated standard.[20]

This same standard, applied now to persons convicted for crimes committed as minors, built the base upon which the ECHR examined the conformity with the European Convention, of the imposition of "preventive detention" (*Sicherungsverwahrung*) upon completion of sentence, first within the framework of

17 *Harkins and Edwards v. The United Kingdom* (2012).

18 *Mendoza y otros v. Argentina* (2013).

19 Apart from the considerations contained in the decision that regard proportionality as a (just) relation between punishment and the juvenile offenders' culpability, the Court also examined proportionality under the concept developed by the public law, evaluating if the penalty imposed on the juveniles constitutes an adequate means for the end assigned to juvenile penalties by the I/A Court H.R., namely: their "social reintegration"; *Mendoza y otros v. Argentina* (2013), par. 166.

20 See van Zyl Smit (2010).

German legislation in general, and also specifically in the context of the German Juvenile Court Act (*Jugendgerichtsgesetz*). Preventive detention is a measure that consists in deprivation of liberty of indefinite duration, based on the individual's dangerousness, and may be imposed either in conjunction with the penalty – in order to be executed upon its completion – or after its completion, whether the tribunal "reserved" this possibility on sentencing (*vorbehaltene Sicherungsverwahrung*), or retrospectively adopted it at a later time (*nachträgliche Sicherungsverwahrung*), on the basis of new events that take place during the execution of the sentence. From 2008 onwards this measure may be imposed on persons convicted as minors.[21]

The ECHR decided in *Haidn v. Germany*,[22] that the retrospective preventive detention violated the European Convention, since it was a measure involving deprivation of liberty that was not based on a "conviction by a competent court" (in the sense of Art. 5(a), 1 of the Convention). In fact, inasmuch as its imposition was founded on the dangerousness evidenced by the convicted person after sentencing, the measure lost any "causal connection" with the judgement of culpability contained in the decision that imposed the original sentence (which had already been completed before the preventive detention measure begins to be executed).[23]

The decision taken by the ECHR served as the basis, a few months afterwards, for an important pronouncement of the BverfG[24] imposing on the legislator the requirements concerning a future legal regime of preventive detention that could be regarded as compatible with the Constitution (and with the European Convention): retrospective preventive detention could only be imposed on "*persons of unsound mind*", in the sense of Art. 5(1), e) of the Convention, provided that they manifest a high danger of perpetrating serious sexual or violent crimes due to their mental disorder, danger which has to be founded on concrete circumstances regarding the committed person or his behavior,[25] under a standard of proof that – according to a doctrine asserted some years ago by the Tribunal itself – becomes much more strict once ten years of execution of the measure have passed.[26] Moreover, the BVerfG declared unconstitutional the then current regime in its entirety, because it barely differed from the execution conditions of a custodial sentence, imposing on the German state a clear "separation imperative" (*Abstandsgebot*) between preventive detention and imprisonment (as criminal punishment), situating the former entirely among the therapeutic measures of psychiatric nature.[27]

21 Jehle (2016), p. 170.

22 *Haidn v. Germany* (2011).

23 Jehle (2016), p. 172.

24 BVerfG 128, pp. 326 ff.

25 Jehle (2016), p. 173.

26 See Dünkel & van Zyl Smit (2004), p. 624, underscoring that this is evidenced by the fact that, after ten years of applying the measure, the relation between the rule and the exception is reversed, according to § 67d(3) of the German Penal Code, in favor of the decision of releasing the affected person.

27 Jehle (2016), pp. 172-174.

Five years after that decision from the ECHR, following the implementation by Germany of the reform to its preventive detention regime in compliance with the mandate issued by the BVerfG, establishing it as a tendentially therapeutic measure, in the hands of the health administration instead of the criminal justice system,[28] in *Ilnseher v. Germany* the ECHR once again had to decide upon the conformity of the imposition of a retrospective preventive detention measure with the European Convention on Human Rights, now regarding a person convicted as a minor under the Juvenile Court Act, to whom the regime established in 2008 (which made that measure applicable to adolescents) was retroactively applied.[29] On this occasion the ECHR considered that the German state had proven the affected person suffered from a mental abnormality that qualified him as "a person of unsound mind", and that preventive detention was ordered due to his mental condition, so it could not be considered as a "punishment" with regard to which the principle "no punishment without law" could be infringed (or the principle of non-retroactivity of penalties), an assertion that contrasts with the doctrine set forth by the BVerfG, according to which the competence of the federal states for regulating preventive detention was rejected, stating that due to the criminal-law nature of the measure, its legal regulation was a federal matter.

## IV. RIGHT TO PERIODIC REVIEW. PROHIBITION OF PENALTIES INVOLVING DEPRIVATION OF LIBERTY FOR AN (ABSOLUTELY) UNDETERMINED PERIOD, AND UNCERTAINTY AS INHUMAN TREATMENT

As can be noted in the previous section, the ECHR decision in *Ilnseher*, which ultimately accepts the possibility of keeping a person convicted as a minor deprived of liberty for an indefinite period of time, also shows – like the above examined jurisprudence of the United States Supreme Court – how the capacity of limiting punishment that can, at first, be attributed to the principle of proportionality – recognized by the Tribunal as an aspect of the prohibition of cruel punishments – is diminished under the dangerousness-centered rationale underlying preventive detention.

Notwithstanding the above, the regulative framework of preventive detention in Germany that resulted as a consequence of the decisions taken by the ECHR and the BVerfG – and of the reform to the regulation of said measure, introduced by the German legislator – is different from the one that allows the United States Supreme Court to reserve the possibility of imposing (admittedly in very exceptional cases) life imprisonment without parole, considering that the incorrigibility judgement is, in this case, final, as well as made at a very early stage in the life of the convicted adolescent, whereas according to the regulation of preventive detention the aforementioned judgement is to be made only after the complete execution of the punishment suited

28 Jehle (2016), p. 175.

29 *Ilnseher v. Germany* (2017), following the doctrine set forth in *Bergmann v. Germany* (2016).

to the degree of culpability (which can last up to ten years in prison), and it is never final, but remains subject to periodic review.

This is coherent with the doctrine developed by the ECHR, when interpreting the limits that the European Convention on Human Rights establishes for penalties imposed on minors, according to which the possibility to review the measure and release the person sentenced (to imprisonment) as an adolescent is a requirement derived from the right of arrested or detained persons to take proceedings, recognized by Art. 5(4) of the Convention. Under this standard, in fact, the ECHR has stated that, with regard to minors, life sentences are only compatible with the European Convention if a realistic possibility of release is offered, whereas life sentences without the possibility of parole are proscribed.[30] Furthermore, it has emphasized the importance of according adolescents effective proceedings for requesting their release, as well as contemplating a relatively brief term after which such a request can be considered.[31]

Nonetheless, under the ECHR jurisprudence, the combined effect of a requirement of proportionality between the imposed punishment and the (reduced) culpability of the adolescent, with another requirement concerning the legality and jurisdictional character of any temporal extension of the deprivation of liberty beyond the measure adequate to the culpability of the convicted person, fails to prevent the imposition on minors of absolutely indeterminate sentences; an effect that the Inter-American System has tried to prevent by resorting to other principles of the criminal law aimed at limiting state punishment.

Indeed, the I/A Court H.R., in *Mendoza et. al v. Argentina*,[32] besides the proportionality requirement, also identified other standards to which custodial penalties imposed on juveniles are subject, in order not to be regarded as forms of arbitrary imprisonment: the requirements of *ultima ratio* and shortest duration, the ban on liberty deprivation for an indeterminate period of time, and the requirement of periodic review.

The Court ruled that from the principles of *ultima ratio* and *shortest duration*, established by the Convention on the Rights of the Child (CRC) concerning measures involving the deprivation of liberty of juveniles, derives a principle of "temporal determination from the moment they are imposed", which can be explained as a requirement to contemplate in the sentence a maximum duration for the imposed punishment, since penalties involving liberty deprivation of an absolutely indeterminate duration (those that do not include a maximum duration period) by definition do not satisfy the shortest duration standard.[33]

30 *Hussain v. The United Kingdom* (1996).

31 See *v. The United Kingdom* (1999).

32 *Mendoza y otros v. Argentina* (2013).

33 *Mendoza y otros v. Argentina* (2013), par. 162. On the contrary, the relation between exceptionality and the prohibition of indeterminate duration is not at all clear.

Additionally, the Court extracted from the CRC itself a principle of "periodic review of the measures of deprivation of liberty of children", thus enabling "the analysis of the specific circumstances of each child and his or her progress, which could eventually allow for early release at any time", adding that said possibility should be realistic[34] and – as it implicitly follows from its decision – timely, requirement that is not fulfilled if the first revision can only take place after serving twenty years of the sentence: "for all these minors, the expectations of liberty were minimal".[35]

Finally, the Court examined whether these breaches also entailed an infringement of a standard common to all persons, but whose application to minors presents some differences: the prohibition of cruel, inhuman or degrading treatment or punishment. To this effect, the Court took into consideration the opinion of experts concerning the psychological impact and the degree of suffering experienced by adolescents (or young adults) upon learning about their life sentence and experiencing the pass of time under uncertainty about its duration, which could last their entire lives, impact that was also dramatically reflected by the suicide in prison of one of the petitioners, and by another one, who felt (in his own words) that he "was being killed in life" ("*muerto en vida*"), and unsuccessfully requested "euthanasia" from the state.[36]

The Court concluded that the (extreme) disproportion of the imposed penalties and the elevated psychological impact caused by them, constitute cruel and inhuman treatment.[37]

This conclusion allows us to specify the scope of the standard prohibiting indeterminate penalties: according to the *ratio* of the Court in *Mendoza*, indetermination by itself does not seem to be neither a necessary nor a sufficient condition for turning the penalty into an arbitrary confinement or a cruel or inhuman treatment: because, on one side, a determined penalty of, say, thirty years, whose revision would only be possible after twenty years of service, would surely violate the requirement of offering the convicted juvenile a real possibility of periodic and timely review; whereas, on the other hand, a sentence of, say, ten years subject to revision upon three years of service, although indeterminate to a relevant extent (the juvenile ignores if the duration of the sentence is going to end up being of three, five, seven or ten years), would not be regarded as arbitrary, since that degree of indetermination serves its periodic review, as well as probably the aim of social reintegration. Then, the indetermination that the Court considers to be arbitrary and inhuman is the one that leaves the minor (or a young person who committed a crime as an underaged) devoid of a realistic hope of returning to society, for either an indefinite time period or for one so long, that the convicted person cannot rely on that possibility in order

34 Thus, adhering to the standard proposed by the United Nations Committee on the Rights of the Child (commenting on Art. 25 of the Convention on the Rights of the Child), according to which "the possibility of release should be realistic and regularly considered".

35 *Mendoza y otros v. Argentina* (2013), par. 176.

36 *Mendoza y otros v. Argentina* (2013), par. 182.

37 *Mendoza y otros v. Argentina* (2013), par. 183.

to guide his or her life. This, notwithstanding that an "absolute" indetermination, that is, the absence of a maximum duration (which is of the essence of any sentence to life imprisonment, even with the possibility of parole), also constitutes an arbitrary conviction, according to the Court.

## V. END OF RESOCIALIZATION OR SOCIAL (RE)INTEGRATION

In *Mendoza*, the I/A Court H.R. itself applied as a conventional standard the requirement that the penalties imposed on persons who committed a crime as minors would be compatible with the objective of "reform and social readaptation" of convicted persons – established by Art. 5.6 of the American Convention – or the aims of "child's reintegration" and that the child "assumes a constructive role in society" – referred to by Art. 40.1 of the CRC –, reasoning that "owing to their characteristics, life imprisonment and reclusion for life do not achieve the objective of the social reintegration of juveniles" and that "the expectations of re-socialization are annulled to their highest degree", thus violating their right to personal security and individual liberty.[38]

The United States Supreme Court, in turn, when deciding to proscribe the death penalty and (with the exception allowed in *Miller*) the penalty of life imprisonment without *parole*, combines the reasons based on the proportionality of punishment (according to the culpability of the agent) and the "reformability" of juveniles, with references to a certain "aspiration" or "hope" of counting with the opportunity to reform.[39] And even though it does not seem to have openly recognized a "right to redeem themselves"[40] or a "right to rehabilitation"[41] as a limit to penalties for

38 *Mendoza y otros v. Argentina* (2013), par. 166.

39 Federle (2016), p. 71: "the Court seemed to imply that a deeper and more meaningful right might exist. In discussing the application of the death penalty and life without the possibility of parole to offenders who committed their crimes before the age of 18, the Court's language suggests that minors are not beyond redemption. The Court argued that 'juveniles have a greater claim than adults to be forgiven for failing to escape negative influences in their whole environment' and that '[f]rom a moral standpoint it would be misguided to equate the failings of a minor with those of an adult, for a greater possibility exists that a minor's character deficiencies will be reformed.' The Court rejected the argument that juveniles are 'irretrievably depraved' and noted that these penalties are a 'denial of hope.' Finally, the Court expressly stated that 'juvenile[s] should not be deprived of the opportunity to achieve maturity of judgment and self-recognition of human worth and potential.'"

40 According to Federle (2016), p. 69, "[the] jurisprudential narrative thus begins and ends with punishment".

41 Although this matter is a disputed subject in the specialized legal doctrine in the US, it is clear that the Court has not yet asserted the only conclusion that seems compatible with the recognition of a constitutional right of minors to rehabilitation, namely: the prohibition of deprivation of liberty for life; v. Gardner (2016), pp. 486-487 and fn. 156. In cases of crimes other than homicide, according to the Court's decision in Graham, a weak version of that right is affirmed, requiring that every person sentenced to life imprisonment for a crime committed as an underaged is provided with "some meaningful, ['realistic'] opportunity to obtain release based on demonstrated maturity and rehabilitation"; *Graham v. Florida* (2010), pp. 75 and 82, which precisely entails forbidding the

juvenile offenders, it explicitly referred to the objective of rehabilitation as a reason for restricting – albeit not for proscribing – the application of life imprisonment without parole.[42]

The ECHR has addressed this standard in cases concerning convicted adults, apparently without specifically affirming its applicability to juveniles, indicating that, although the Convention does not contemplate a "right to rehabilitation", Art. 3 has been developed by the case law, stating that this article also encompasses the right of every convicted person to rehabilitation, which, in the case of a person sentenced to life imprisonment, includes the right to an improvement leading to the "hope" of opting for parole at some point,[43] and referring to the instruments of the Council of Europe regarding the purpose of rehabilitation to which the penalty of imprisonment must aim, explicitly linking it to the need of clear review proceedings that eventually allow the convicted to return to live in a free society.[44] To minors, said possibility must be accorded through an effective proceeding, which is to take place within a relatively brief time; but according to the ECHR doctrine, this standard of mandatory (and early) review of the deprivation of liberty is consistent with the existence and imposition of the penalty of life imprisonment, without the purpose of rehabilitation acting as a reason for proscribing it, even taking into account the special significance of this end for the above mentioned group of individuals.[45]

The BVerfG, on its part,[46] considering whether the measures aimed at easing the execution of custodial penalties for juveniles (*Lockerungsmaßnahme*) can be restricted in the interest of protecting the safety and security of the community, acknowledged "social integration" (*Integrationsziel*) – that is, that the convicted juvenile achieves "a future life without crime, in freedom" – as the *sole* end of the execution, thus categorizing collective security as an ancillary task which can only be accomplished

imposition of a life sentence without parole. In homicide cases, in contrast, as previously stated, not even this weak version of the right to rehabilitation is assured, since the possibility of imposing that kind of penalty is accepted, although in very exceptional cases V. Gardner (2016).

42 See *Graham v. Florida* (2010): "Finally there is rehabilitation, a penological goal that forms the basis of parole systems […]. A sentence of life imprisonment without parole, however, cannot be justified by the goal of rehabilitation".

43 *Murray v. The Netherlands* (2016); v. Cabrera Martín (2016), p. 709.

44 *Kafkaris v. Cyprus* (2008).

45 Domestically, on the other hand, on occasion, the unconstitutionality of the imposition of life sentences on minors has been drawn from this special preventive orientation of criminal punishment, which acquires special significance regarding underaged minors; cfr., in this vein, in the Judgement of the Italian Constitutional Court 168/94, of April 27th-28th, 1994, 4th and 5th legal grounds, it is argued that the constitutional duty of special protection of infancy and youth (as stated in Art. 31 of the Italian Constitution) turns the re-educational purpose of penalties (established in Art. 27 of the Constitution) into an overriding consideration, so that life sentences imposed on minors are no longer compatible with such constitutional requirements. I became aware of this important judgement of the Italian Constitutional Court thanks to a reference provided to me by Professor Francesco Viganò, who is currently a justice on that tribunal.

46 BVerfG, Judgement of the Second Senate of May 31st, 2006.

by consistently seeking social integration for the convicted juvenile, even though it did not draw consequences for limiting neither the imposition nor the length of custodial sentences.

## VI. IN CONCLUSION: TENSIONS, COINCIDENCES AND GAPS IN CONSTITUTIONAL STANDARDS FOR JUVENILE PENALTIES

The pictures that emerges from the foregoing analysis of the different standards that the compared and international case law has recognized and developed as limits of the penalties which can be imposed on persons that committed a crime as juveniles, reveals some significant coincidences, but also tensions or – depending on the adopted perspective – gaps in protection. As a conclusion, this last section provides, as interpretative hypothesis, a brief analysis of both the former and the latter.

1. The requirement of proportionality between the punishment and the culpability of the juvenile offender is coherent with (and demands) the imposition of a milder sanction than the one that would be applied against an adult. However, in the examined jurisdictions, that has been explicitly recognized only with regard to the harshest penalties existing in the respective legal system (death penalty and life imprisonment – with or without parole, correspondingly –);[47] reflecting therefore only a "cardinal" proportionality standard, but not one of "ordinal" proportionality, which is an essential aspect of the principle of proportionality of penalties,[48] according to which a punitive

47 Regarding the United States Constitutional Court, v. *supra* n. 16 and associated main text. On its part, the BverfG does not seem to have asserted a juveniles' right to get a milder punishment than the one imposed on adults under comparable circumstances; in fact, the doctrine is critic of the circumstance that the "educative principle" (*Erziehungsgedanken*) allows for the imposition of a harsher penalty than the one that adults would get in similar cases, specially concerning minor offences, so that, it has been asserted, at the most, a principle prohibiting to put juveniles at a disadvantage (*Schlechterstellung*), without going so far as affirming– at least as a constitutional imperative – a requirement to favor them through a less severe sentence; Eisenberg (2017), § 18 nm 23, 30. Lastly, with regard to the ECHR and the I/A Court H.R., as far as I have been able to observe, there are not judgements asserting a right of juveniles to get – or a general requirement for states to impose – less severe sanctions than the ones deserved by adults for a similar crime, questioning only (as reflected in the judgements analyzed in this work) the disproportion – among other flaws – of life imprisonment (with or without the possibility of opting for parole). In any case, it is interesting to mention that the Inter-American Commission on Human Rights does seem to affirm a more general requirement of imposing less severe sanctions on minors; v. rapporteurship IACHR (2011), par. 42: "In Argentina, although Decree Law 22,278 provides that a child or adolescent under the age of 16 cannot be held criminally responsible, the Commission notes that under the same law children between the ages of 16 and 18 who commit crimes can be tried as adults. Although the judicial authority is empowered either not to impose any sentence at all, or to reduce the sentence to one that an attempt to commit the crime of which the child was convicted would carry, the law allows a judge, at his or her discretion, to impose the same penalties prescribed under the regular criminal justice system. The same is true of the system for enforcement of a sentence. This treatment, which draws no distinction between adult and child, may be incompatible with the principle of the proportionality of the sentence and the lesser culpability of children in light of the best interests of the child"

48 Indeed, according to the requirement of ordinal proportionality, the grade of severity of the penalties to be imposed for each crime according to their place in a ranking of criminal severity,

"reduction" should be granted to every juvenile offender, since their lesser culpability is a general feature and not crime-specific[49].

2. Nonetheless, even with regard to some of the most severe penalties, such as life imprisonment without parole, the standard of mitigated desert of punishment due to diminished culpability is blurred, since the exclusion of said penalties is not applicable to (extraordinary cases of) "irreparably corrupt" minors, as declared in the decision taken by the United States Supreme Court in *Miller*, applying the *rationale* set forth in *Roper*.[50] A functional equivalent of that exception can be found in the rulings of the BverfG regarding retrospective preventive detention: an "incorrigible" juvenile offender is liable to lose the privilege of a milder punitive treatment than the one received by an adult, in which the offender's reduced culpability is recognized, if upon the complete execution of the penalty his or her criminal dangerousness is determined (even though the new preventive custody regime tends to restrict said exception to "pathological"[51] cases, and the refocus towards a therapeutic configuration of the measure, in compliance with the *Abstandgebot*, tempers its security dimension).

3. According to the requirement of a timely periodic review of life sentences – exigency applicable on the same grounds to other very lengthy sentences – it is enough to offer the possibility of considering the eventual release of the convicted person; that is, to provide a hope which, in turn, alleviates the uncertainty, destructive for a young person, about his or her perspectives of someday being released from prison. And although the purpose of social integration is recognized in the examined jurisdictions, in none of them a right to social reintegration has been properly asserted (except for the I/A Court H.R.), right that, if taken seriously, would be incompatible

does not depend only on the harm caused by each offence (their objective harmfulness), but also on the different degrees of culpability that the harmful act entails; v. Duff, (2001), pp. 133 ff, 137 ff. Thus, if it is accepted that underage minors have, due to their developmental and maturity deficits, lesser culpability than adults, then the culpability-aspect of ordinal proportionality must always lead to a milder penalty than the one an adult would get for the same crime.

49 In this sense, explicitly, von Hirsch (2001), pp. 226-227.

50 In fact, if this rationale is thoroughly examined, it is worrying that, in order to prohibit the imposition of the death penalty on minors, The US Supreme Court did not consider enough to verify the diminished culpability of juveniles, but deemed necessary to assert, as an additional (and decisive?) argument, that it would not be scientifically possible to detect an "irreparable corruption" in such a young person, thus suggesting that, if such determination were possible (perhaps in the future), the conclusion might be different.

51 It is not entirely clear whether this notion is more restrictive than the one that refers to the "irreparably incorrigibles", indicated by the jurisprudence of the Supreme Court. In the German jurisprudence, the requirement that the juvenile's dangerousness arises from a mental disorder (*psychische Störung*) is to some extent softened by the openness to apply the measure to mixed personality disorders (*kombinierte Persönlichkeitsstörung*) as well, meaning, to cases different to those typically considered pathological (such as psychotic patients, or patients that present severe physical damages, etc.); v. Eisenberg (2017), § 7 nm 32.

with life imprisonment, even if the possibility of parole is available. In fact, that release from prison is a mere possibility means that returning to social life is not a right, but only an eventuality, contingent on the future decision regarding the degree of rehabilitation achieved by the convicted person. The apparently radical assertion by the BverfG of the precedence of the end of social integration over the task of protecting the safety and security of the community, could be understood as the recognition of a right; but the declaration of constitutionality of preventive detention for an indefinite time, also regarding juveniles, even considering its restricted scope of application, precludes us from categorically affirming the existence of a right entitling every convicted juvenile to integrate into society.

4. The standard of determination of sentences, strictly speaking, is neither constitutionally nor conventionally guaranteed. The I/A Court H.R. established a standard of "temporal determination", which logically translates into a requirement of a maximum duration for sentences, that is, the prohibition of absolutely indeterminate sentences. The idea of "determination", then, is restricted to the definition of a time frame or a maximum limit, not a determinate length, unless the standard of periodic review is abandoned. In fact, if the "temporal determination" standard were understood as a standard of "precise determination" of sentences (even if it not an "absolute" determination, but one allowing for a small flexibility margin), it would be incompatible with the requirement of periodic (and early) review with the possibility of release. Then, relative determination seems to be a sufficient standard, if it is accompanied by a requirement of cardinal (temporal determination) as well as ordinal proportionality, and by the recognition of a right to reintegrate into society.

5. In turn, the temporal determination standard is incompatible with any form of life imprisonment, including one that ensures a very early judicial review. The United States Supreme Court, in fact, has not recognized said standard: its recognition would demand going to an even further place than the one reached with the prohibition of life sentences without parole: it would entail banning every form of life imprisonment. The BverfG has not recognized a temporal determination standard for juvenile penalties as well, and although it has not formally rejected one, and the temporal determination established in the Juvenile Court Act (those penalties can have a ten year maximum duration) would make the recognition of this standard in the constitutional case law unnecessary, the treatment of retrospective preventive detention effectively supposes a rejection of said standard, since a juvenile sentenced to a ten year juvenile penalty cannot be completely sure of his or her release upon expiry of this period: the convicted juvenile could be subject to preventive detention for an indefinite time even after the sentence is completed. The doctrine according to which a new proceeding and a new judicial decision are required (like the doctrine set forth by the ECHR, referred to the life sentences that have a minimum mandatory duration based on culpability and an eventual one based on dangerousness), solves the problem of the lack of connection between the

culpability-based conviction and the extension of the juvenile's confinement, but it can hardly claim to respect a standard of temporal determination for the deprivation of liberty.

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