Instituto Interamericano del Niño, la Niña y Adolescentes

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SPECIAL MEETING OF THE DIRECTING COUNCIL OF THE IIN

"Analysis of the Implementation of New Laws on Child Issues, Public Policies, and Institutional Reforms within the Framework of the Convention on the Rights of the Child"

1927 – 80th Anniversary – 2007

November 29 and 30, 2007
Quito, Ecuador

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Legislative tendencies and concerns regarding the administration of juvenile criminal justice in the Americas[1]

1. Introduction

The Inter-American Children's Institute has played an important part in the evolution of juvenile criminal justice, in particular with regard to Latin America. In 1963, this was the main theme of the XII Pan-American Child Congress held in Mar del Plata (Argentina). Between 1970 and 1980, the Inter-American Children's Institute organized no less than 35 courses for children's magistrates and the situation of adolescents in conflict with the law was the dominant theme in most of them. Two international courses about adolescents in conflict with the law were also held in Mexico City in 1975 and 1976, as were a seminar about parole held in Santiago de Chile in 1976 and a seminar about "children and young people deprived of their freedom" in Salto (Argentina) in 1993, organized jointly with the International Catholic Child Bureau (ICCB). More recently, between 1991 and 1994, a comparative study of legislation in the Americas was carried out, as well as an analysis of jurisprudence in Uruguay (jointly with the Supreme Court of Justice). Online courses and regulatory model texts were also developed for the region. In 2004, studies were carried out on the adolescent criminal responsibility systems in Argentina, Brazil, Peru and Venezuela[2].

These activities were carried out in step with the evolution of legislative changes and the approval of international instruments. The subject has been present since the Declaration of Geneva, approved by the League of Nations in 1924, the Declaration of the Rights of the Child of 1959, the United Nations Standard Minimum Rules for the Administration of Juvenile Justice (the Beijing Rules) of 1984, the Riyadh Directives (1988) and the Tokyo Rules (1990). The Convention on the Rights of the Child of 1989

[1] Preliminary document prepared by Carlos G. Gregorio (Inter-American Children's Institute consultant) to be debated during the Special Meeting of the Directing Council, to be held in Quito on 29 and 30 November 2007.

[2] See *Criminal Systems for Adolescents in Conflict with Criminal Law*; Series: The Rights of Adolescents and Criminal Responsibility Systems, Book 1, Inter-American Children's Institute, 2004.

is the most significant milestone in the evolution of the system of juvenile criminal responsibility.

The American Continent has also made significant contributions, the most important being the Table of the Rights of the Child (Uruguay, 1927), the Rights of the Child approved at the First International Teachers' Convention held in Buenos Aires in 1928, The Children's Charter of the United States of America, in 1930 and the Caracas Declaration approved at the IX Pan-American Child Congress of 1948. In 1927, Gabriela Mistral wrote an outstanding work entitled 'The Rights of the Child'. Within this context, the present authorities of the IIN have decided to participate firmly in the process of reform of the administration of juvenile justice. During the 82nd meeting of the IIN's Directing Council the Action Plan 2007-2011 for the General Directorate of the Inter-American Children's Institute, containing significant chapters regarding the administration of justice, was approved. For this reason, the General Directorate ordered this work to be carried out, in order to—in the light of the facts—confirm strategies and define courses of action more precisely. The work consists in a review of legislative tendencies regarding the administration of juvenile criminal justice, of the most significant jurisprudence and other relevant facts (statistics, public policies, opinions) which will help to define the tasks to be undertaken during the coming years.

The short time available and the limitation imposed by having to carry out this study only with the information available on the Internet, means that only preliminary results can be submitted for confirmation to the forthcoming 83rd Special Meeting of the Directing Council to be held in Quito in November of this year.

1. The age of criminal responsibility and the jurisdiction of juvenile courts

The way in which criminal responsibility is established and the jurisdiction of magistrates specialized in dealing with juveniles in conflict with the law varies significantly between Common Law countries and those ruled by continental civil tradition.

In Common Law countries for more than 670 years children have been protected against judicial process by the doctrine of *doli incapax*, a process which is obviously incomprehensible to them and whose only purpose was penalization[3]. This protection is based on judicial tradition, not on legislation, even though in recent years it has been incorporated into the legislation of various countries within the region (Antigua and Barbuda, Barbados, Canada, Guyana, Jamaica) as it is "conclusively presumed that no child can be guilty of a crime". Whereas legal tradition regarded any child of less than seven years of age to be *doli incapax*, laws vary with regard to age (from 8 in Antigua & Barbuda to 12 in Canada). In the USA this supposition is in force and is considered to be extendable (in some cases) but refutable for children over seven.

In countries ruled by the continental civil tradition, exclusion from criminal responsibility took the form of inimputability. Nonetheless, reforms introduced after the *Convention* tend to create systems of "criminal responsibility for adolescents"[4].

Most current legislation in Latin America states that Criminal Codes are applicable to adults and then goes on to establish age groups (adolescents) which are liable to a

[3] William Blackstone, in his *Commentaries on the Laws of England*, Book 4 (1769), refers to the fact that this law existed at least as far back as during the reign of King Edward III (1327-1377). See *Doli Incapax: Why Children Deserve its Protection*, Thomas Crofts, eLaw Murdoch University Electronic Journal of Law, Volume 10, Number 3 (2003).

[4] Almost all of the countries in the region which have ratified the Convention have modified their legislation and established a lower age limit for adolescent criminal responsibility (perhaps with the exception of Argentina and Haiti, where this age could be assumed to be 16).

special set of rules. Children (younger than the adolescent age groups) are absolutely excluded from any criminal process.

The predominant legal framework can be exemplified by the following laws:

Colombia (2000) modified its Criminal Code (Article 33) and established that "children under 18 years of age are subject to the System of Juvenile Criminal Responsibility"[5].

In Costa Rica (1994) Article 17 of the Criminal Code states that "this Code will be applied to persons over eighteen years of age".

Whereas in Chile the Code said "they are exempt from criminal responsibility" (article 10, paragraphs 2 and 3); law 20,084 modified this wording, replacing it with "the responsibility of persons under eighteen and over fourteen years of age will be governed by the law of juvenile criminal responsibility".

El Salvador, Criminal Code, article 17: "the criminal code will be applied equally to all persons who are over eighteen years of age when the act occurs. Persons below this age will be subject to special rules".

Two of the modified laws also establish special rules of responsibility for adolescents, but under different assumptions of criminal responsibility:

In Paraguay, in accordance with Law 1,680 of 2001 (article 193) "Criminal responsibility is acquired with adolescence… An adolescent is only criminally responsible if, when performing the act he has sufficient psycho-social maturity to be aware of the unlawful nature of what he has done and is capable of acting accordingly".

In Brazil the *Estatuto da Criança e do Adolescente* ("Statute for Children and Adolescents") (1990) article 104, states: "Persons under eighteen years of age are criminally inimputable, subject to the provisions of this law".

Article 40.3 (a) of the *Convention on the Rights of the Child* establishes "a minimum age below which it is assumed that children do not have the capacity to infringe criminal laws" and leaves this open to interpretation, allowing that this may be by legislative or jurisprudential means, but limited to a simple presumption (in other words, refutable). The Committee on the Rights of the Child has recommended (General Observation Nº 10) that "the establishment of a minimum age of criminal responsibility below 12 years is not internationally acceptable to the Committee", and adds that "the establishment of an age of criminal responsibility at a higher level, say 14 or 16 years, enables the system of justice for children, in compliance with clause b) of paragraph 3, of article 40 of the Convention, to treat children who are in conflict with the law without appealing to the judicial process, on the understanding that human rights and legal guarantees are fully respected"[6]. Beyond the region certain recent changes are disturbing, as in the case of the United Kingdom where the doctrine of *doli incapax* has been abolished by law[7].

Furthermore, with the generalization of the criminal prosecution system, it makes more sense to establish this protection in terms of a limitation of the State's punitive intentions, by establishing by law that the State may not initiate criminal proceedings when a child is involved in an act or an omission which is qualified as an offence. This is the case of recent legislation in Canada, where a limit of 12 years has been established, based not on considerations of capacity, but by establishing a limit to criminal prosecution[8].

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[5] The constitutionality of this regulation was brought into question and Ruling C-839/01 of the Constitutional Court declared it enforceable.

[6] www.redlamyc.info/Seguim_Convenc_Derech_ninio/Comité derechos del ninio/0741354.doc

[7] Crime and Disorder Act 1998. §34. Abolition of rebuttable presumption that a child is *doli incapax* The rebuttable presumption of criminal law that a child aged 10 or over is incapable of committing an offence is hereby abolished.

[8] See Skunk v. Criminal Injuries Compensation Board, 2006 CanLII 11440 (ON S.C.D.C.). — 2006-03-07

There are discussions and different opinions regarding the age which should be fixed in this matter and they will surely continue in the coming years[9]. The immediate problem, which persists, is what type of process should be applied to a *doli incapax* child who is involved in a criminal offence. Many legal systems expressly prohibit confinement (e.g. Bahamas, Belize, Nicaragua). Others attempt to ensure that a family magistrate or a penal magistrate for adolescents should become a supervisory judge who can supervise any administrative measures that are taken in the case (e.g. Chile). Others attempt to ensure due process, even in administrative courts (e.g. Colombia).

That children should be subjected to a legal process is, therefore, widely rejected. Their limited capacity to understand the rigmarole and technicalities of legal proceedings must affect their rights of defence, as well as their emotional, mental and intellectual development. On the other hand, it is worrying that these children should be subjected, without sufficient guarantees, to administrative or legal proceedings. This concern has been expressed publicly by Canada's Minister of Justice when presenting the *Youth Criminal Justice Act* to the House of Commons, "The Government is also working with the provinces and territories, child welfare, mental health, law enforcement and other professionals to develop a new approach to dealing with children under 12, the age of criminal responsibility, who commit crimes".

To summarize, there are two predominant systems in the Americas: (1) in the Commmon Law countries the age of criminal responsibility coincides with the lower limit (see Table 1) but adolescents are subject to a system of specialized justice; and (2) in the Latin American countries the age of full criminal responsibility coincides with the upper limit (in most countries adolescent criminal responsibility is defined) and adolescents are subject to a specialized system of justice. Apparently the differences are only of style, but in fact each system has its advantages and disadvantages. In the Common Law countries the fact that they are responsible albeit subject to special jurisdiction, means that there are various ways for them to avoid this jurisdiction: transfers (requested by the prosecuting attorney or decreed by the magistrate, generally in the light of the gravity of the offence or precedents); on the other hand, the guarantees of due process are fully respected. In Latin America, adolescents are not fully criminally responsible until the upper age limit, which inhibits any judicial process as adults; on the other hand the inheritance of a discretional process and certain procedural details (such informalities which—for example—make a definitive sentence unnecessary) may result in a due process which is not totally effective.

Table 1. **Predominant Juvenile Justice Systems**

	Lower age limit 12—16		Upper age limit 18
Common Law	*doli incapax*	With criminal responsibility but subject to specialized justice and attenuated measures or sentences. Can be transferred to the adult system; tried or punished as adults.	As adults; juvenile jurisdiction can be extended
Latin America	inimputability	With adolescent criminal responsibility, subject to specialized justice and with socio-educational measures or punishment.	As adults

Table 2 summarizes the specific characteristics of each system in the administration of juvenile justice in the Americas.

[9] The basis for establishing a numerical lower limit is grounded on psychological arguments (mainly CRC Guideline Nº 10), educational arguments (e.g. the opinion of Juan Bustos) as well as statistical arguments; that is, that the age would be established at the point of inflexion of the frequency curve for criminal acts according to the age of the perpetrator.

Table 2. **Comparative analysis of criminal justice systems for adolescents in the Americas**

<table>
<tr><th></th><th>4</th><th>5</th><th>6</th><th>7</th><th>8</th><th>9</th><th>10</th><th>11</th><th>12</th><th>13</th><th>14</th><th>15</th><th>16</th><th>17</th><th>18</th><th>19</th><th>20</th></tr>
<tr><td>Antigua and Barbuda

Juvenile Act (1951)</td><td colspan="4">§3. conclusively presumed not guilty</td><td colspan="8">Juvenile Court
Juvenile Court Act (1948)</td><td></td><td></td><td></td><td></td><td></td></tr>
<tr><td rowspan="3">Argentina

Law 22,803 (1983)</td><td colspan="12">federal crimes [*]</td><td colspan="2">punishable §2. other crimes [1]</td><td rowspan="3"></td><td rowspan="3"></td><td rowspan="3"></td></tr>
<tr><td colspan="12">unimputable (specialized judge) provincial jurisdictions:
Buenos Aires · Catamarca · Córdoba · Ciudad de Buenos Aires · Corrientes · Chaco · Entre Ríos · Formosa · Jujuy · La Pampa · La Rioja Río Negro · Santa Cruz · Santa Fé · Santiago del Estero · Tucumán</td><td colspan="2">punishable §2. other crimes [1]</td></tr>
<tr><td colspan="12">unimputable (specialized judge), the laws include due process guarantees
Chubut · Mendoza · Misiones · Neuquén · Salta
San Juan · San Luis · Tierra del Fuego [2]</td><td colspan="2">punishable §2. other crimes [1]</td></tr>
<tr><td rowspan="2">Bahamas

Children and young persons (Administration of Justice) (1987)</td><td rowspan="2" colspan="3">doli incapax</td><td colspan="6">child</td><td colspan="6">young person</td><td rowspan="2"></td><td rowspan="2"></td><td rowspan="2"></td></tr>
<tr><td colspan="12">§§3-16. Juvenile Court</td></tr>
<tr><td rowspan="2">Barbados

Juvenile Offenders Act (1998)</td><td rowspan="2" colspan="7">§7 Sections 8 and 9 shall not render punishable for an offence any child who is not, in the opinion of the court, above the age of 11 years and of sufficient capacity to commit crime.</td><td colspan="3">child</td><td colspan="3">young person</td><td rowspan="2"></td><td rowspan="2"></td><td rowspan="2"></td><td rowspan="2"></td><td rowspan="2"></td></tr>
<tr><td colspan="6">§§3,8-10. Juvenile Court</td></tr>
<tr><td rowspan="2">Belize

Ch. 119 - Juvenile Offenders Act (2003)</td><td rowspan="2" colspan="3">doli incapax</td><td colspan="8">child</td><td colspan="2">young person</td><td rowspan="2"></td><td rowspan="2"></td><td rowspan="2"></td></tr>
<tr><td colspan="10">§§3 & 8. Juvenile Court</td></tr>
<tr><td>Bolivia

Law 2026 (1999)</td><td colspan="8">§223 Exempt from social responsibility, but not from civil responsibility. in no case will deprival of liberty measures be taken</td><td colspan="3">§222. Social responsibility</td><td colspan="6">§225. subject to regular legislation, with special protection</td></tr>
</table>

	4	5	6	7	8	9	10	11	12	13	14	15	16	17	18	19	20
Brazil Law 8069 ECA (1990)	§2 and 105. Offences committed by children are covered by the measures established in article 101								§2 and 104. are criminally unimputable								
Canada *Youth Criminal Justice Act* (2002)	child The *Criminal Code of Canada*, §13, states "No person shall be convicted of an offence in respect of an act or omission on his part while that person was under the age of twelve years"								young *YCJA* allow an adult sentence for any youth 14 years old or more								
Colombia Law 1098 (2006)	§142. Without prejudice to the civil responsibility of parents or legal representatives, and the criminal responsibility established in paragraph 2 of article 25 of the Criminal Code, persons under the age of fourteen (14) will not be tried or declared criminally responsible, deprived of liberty, under accusation or charge of having committed a punishable act. A person who is under fourteen (14) will be immediately delivered by the child and adolescence police officers, to the relevant authorities, in compliance with the guarantees provided for by their rights, in accordance with what this law establishes. The police will proceed to identify the person and collect data regarding the punishable conduct. §143. When a person under fourteen (14) commits a crime, only measures confirming his or her rights guarantees will be applied, or re-established, and the person must be connected to processes of education and protection within the National Family Welfare System. These processes will observe all the guarantees of due process and the right to defence. [1]										Adolescent criminal responsibility						
Costa Rica Law 7,576 (1996)	Article 6. *Under twelve years of age.* Acts committed by a person under the age of twelve, which constitute crimes or offences, will not be subject to this law. Civil responsibility is excepted and will be exercised before the relevant jurisdictional courts. However, criminal juvenile courts will refer the case to the National Childhood Board, so that the necessary care and monitoring may be provided. If administrative measures involve the restriction of the ambulatory freedom of the minor, the Juvenile Criminal Executive magistrate, who will also control these measures, must be consulted.								Article 106 juvenile criminal responsibility								
Chile Law 20,084 (2005) [1]	Article 58. Restrictions to liberty for under fourteen-year-olds. If a person under the age of fourteen should be apprehended during the execution of conduct which, if committed by an adolescent would constitute a crime, the police officers will exercise all legal measures in order to re-establish public order and protect the victim in accordance with the victim's rights. Once this is accomplished, the appropriate authorities must place the child at the disposal of the family court so that his/her adequate protection is procured. In any case, when less serious offences are in question, the child can be immediately and directly handed over to his/her parents who will take charge of him/her. If this should not be possible, the child will be delivered to an adult who will assume responsibility for him/her, preferably an adult with whom there is a family link, and the relevant family court will be informed. In the event that the public prosecutor should need to question the child as a witness, the general regulations in the matter will be complied with.										Juvenile criminal responsibility [2]						

	4	5	6	7	8	9	10	11	12	13	14	15	16	17	18	19	20
Dominica *Children and Young Persons Act*	Section 3 "it shall be conclusively presumed that no child under the age of twelve years can be guilty of an offence".																
Ecuador Law 100 (2002) 305-388	**Art. 307.** The unimputability and freedom from responsibility of children. Children are absolutely unimputable; nor are they responsible; therefore, they are not subject to the trials or to the socio-educational measures provided for in this Code. If a child is apprehended in cases which may be considered flagrant according to article 326, he/she will be delivered to his/her legal representatives and, should they not exist, to a care entity. Preventive detention and confinement is prohibited. When the circumstances of the case dictate the need for protective measures, these will be taken respecting the conditions and requirements of this Code.								Art. 306. The responsibility of adolescents. Adolescents who commit offences described in criminal law will be subject to the socio-educational measures for their responsibility, according to the precepts of this Code.								
El Salvador Juvenile Criminal Law (1994)	Article 2. Children under the age of twelve who show evidence of anti-social conduct will not be subject to this special juridical system, nor to the common system; they are exempt from responsibility and, in that case, the Salvadoran Institute for the Protection of Minors must immediately be notified, for their comprehensive protection.								§2. anti-social conduct				§2. responsible				
Grenada	A child is presumed unable to infringe the penal law below the age 7 years (section 50 (1), chapter 76, *Criminal Code*).																
Guatemala Decree N° 27 (2003)	138. *Under thirteen years of age.* Acts committed by a child under the age of thirteen, which constitute a crime or an offence, will not be the object of this heading; civil responsibility is excepted and will be exercised before the relevant jurisdictional courts. These children will be subjected to medical, psychological and pedagogical care, as necessary, under the care and custody of their parents or guardians, and they must be brought before Childhood and Adolescence Courts.								Art. 133 Adolescents in conflict with criminal law								
Guyana *Juvenile Offenders Act* Ch 10:03 (1972)	§3. conclusively presumed not guilty						child		young								
							§4. Juvenile Court										

	4	5	6	7	8	9	10	11	12	13	14	15	16	17	18	19	20
Haiti Criminal Code (1961)										The child will be, depending on the circumstances, simply admonished or handed over to his/her parents, or guardian, or to the person who has responsibility for the child, or to a person worthy of trust, or remitted to a private or public medical-educational institution, or placed in a shelter centre. [1]							
Honduras Childhood and Adolescence Code (1996)180-268	§180. children under the age of twelve (12) do not commit crimes. If they should commit a criminal offence, they will only be afforded the special protection that their case should require and it will be attempted to provide them with comprehensive training.								Children who break the law								
Jamaica *Child Care Protection Act* (2004) §§63-84	63. It shall be conclusively presumed that no child under the age of twelve years can be guilty of any offence.								§§72-75. Children's Court								
Mexico Federal Constitution (2005) [1]	18. Persons under the age of twelve who have incurred in conducts considered criminal by law, will only be subject to rehabilitation and social welfare programmes.								(adolescent responsability) [2]								
Nicaragua Law 287 (1998)	95. Children who are not yet thirteen years of age… …are exempt from criminal responsibility… It is forbidden to apply, for any reason, any measures which imply deprival of liberty.									Adolescent criminal responsibility							
Panama Law 40 (1999)	8.Under-age persons who are not yet fourteen years of age, are not criminally responsible for offences against criminal law in which they may have incurred.									Adolescent criminal responsibility							
Paraguay Law 1,680 (2001)	236. If [the person] should be under the age of fourteen, proceedings will cease.										194. Criminal responsibility is acquired at adolescence.						

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Peru Law 27,337 (2000) modified by Legislative Decree 990 (2007)	Article IV. In cases of violations of criminal law, the child and adolescent who is under fourteen (14) years of age will be subject to protective measures, and the adolescent who is older than fourteen (14), to socio-educational measures. 184. The child and adolescent offender who is under fourteen (14) years of age will be subject to the protective measures provided for in this code.										Offending adolescent 184. The adolescent offender who is older than fourteen (14) years of age will be subject to socio-educational measures provided for in this code.						
Dominican Republic Law 136-03 (2003)	223. Children under thirteen (13) years of age are in no case criminally responsible; therefore, they cannot be detained, nor deprived of their liberty, nor punished by any authority whatsoever.									Adolescent criminal responsibility							
Saint Kitts and Nevis *Juvenile Act*	Section 3. "It shall be conclusively presumed that no child under the age of eight years can be guilty of any offence"																
Saint Lucia	age of criminal accountability *Children and Young Persons Act*																
St Vincent and the Grenadines	*Juveniles Act*, cap. 168, sect. 3 and the Criminal Code, cap. 124, sect. 12																
Suriname	A child who has committed a criminal offence before he has become 10 years of age shall not be prosecuted (art. 56, para. 1, of the *Code of Criminal Procedure*).																
Trinidad and Tobago *Children Act* Chap. 46:01	*doli incapax*			§87 Juvenile Courts [1]													
United States of America see State Juvenile Justice Profiles	*doli incapax*			federal offences [*]													
				Connecticut													
				Georgia · Illinois · Michigan · Missouri · New Hampshire South Carolina													
				Alabama · Alaska · California · Delaware · DC · Florida · Hawaii · Idaho Indiana · Iowa · Kentucky · Maine · Montana · Nebraska · Nevada New Jersey · New Mexico · North Dakota · Ohio · Oklahoma · Oregon Tennessee · Utah · Washington · West Virginia · Wyoming												
				North Carolina													
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				Arizona													
				Louisiana · Texas · Wisconsin													
				Arkansas · Colorado · Mississippi Pennsylvania · Vermont													

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Puerto Rico	Criminal Code (2004) §38. Minority. A person will not be prosecuted or criminally convicted for an act committed when said person was under the age of eighteen (18), except in cases provided for in special legislation for minors.																
	Puerto Rico: Minors' Law (1986) §4. Deliberate and pre-meditated murder in the first degree.																
Uruguay Law 17,823 (2004)	74.B. If children under thirteen years of age are involved, the authorities will proceed in accordance with the rulings of Chapter XI, articles 117 and following, of this Code.									74.B. Only adolescents over thirteen and under eighteen years of age, accused of violations to criminal law, can be submitted to the special procedures regulated by this Code.							
Venezuela Law 5,266 LOPNA (2000) [1]	532. When a child is involved in a punishable act, only protective measures will be applied.								531. Adolescent criminal responsibility 528. Adolescents who commit punishable acts will answer for the fact to the extent of their guilt, differently than in the case of an adult. The difference consists in the specialized jurisdiction and in the punishment imposed.								
	4	5	6	7	8	9	10	11	12	13	14	15	16	17	18	19	20

NOTES (Table 2)

***** In **Argentina** and the **United States of America** if an adolescent is connected to a federal offence, the original jurisdiction is the responsibility of the federal courts (there are no federal courts specializing in adolescents). Nonetheless, it is common practice in Argentina and statutory in the United States of America for adolescents to be transferred to a provincial or state judge specialized in adolescents.

Argentina 1. They are unimputable in the case of (article 1) "crimes of private action or those punishable by a prison sentence of less than 2 years".

Argentina 2. The provincial laws of Chubut (4347/97), Mendoza (6354/95), Misiones (3820/05), Neuquén (2302/99), Salta (7039/99), San Juan (7338/02), San Luis (5573/04), Tierra del Fuego (521/00), establish systems of criminal responsibility for adolescents within the limitations set by national law 22,803 (1983).

Colombia 1. Article 143 (continued). If a child or adolescent of less than 14 years of age is surprised *in fraganti* by the police authorities, these will immediately or within a reasonable period place him/her at the disposal of the authorities responsible for protection and the re-establishment of rights. If it is a private person who surprises him/her, he/she should be placed immediately in the hands of the police authorities for and they will proceed in a similar manner. (1st) When as the result of an investigation or trial serious evidence arises of the participation of a child under 14 years of age in the perpetration of a crime, copies of the relevant documents will be sent to the authorities responsible for protection and the re-establishment of rights. (2nd) The Colombian Institute for Family Welfare (ICBF for its acronym in Spanish) will establish the technical criteria for the special programmes for the protection and re-establishment of rights for the care of children under 14 years of age who have committed offences.

Chile 1. Law 20,084 was modified by Law 20,191 of 2007. The modification introduced by this law to article 21 was found to be constitutional by the Constitutional Court (Ruling of 13th June,2007). This law was regulated by Decree 1378 of 2006. The date of enforcement of Law 20,084 was extended by Law 20,110.

Chile 2. Article 3. …In the case of an offence committed between the ages of fourteen and eighteen whose perpetration is prolonged in time beyond the age of eighteen, the laws applicable to adults will be enforced. Article 4. Special ruling for sexual offences. No criminal process shall be undertaken with regard to the offenses covered by articles 362,365,366b and 366 *quater* of the Criminal Code, when the act was committed with a person under 14 years of age and none of the circumstances covered by articles 361 and 363 of the Code apply, as may be the case, unless the difference in age between that person and the accused is, at least, two years, in the case of conduct described in article 362, or three years in all other cases.

Haiti 1. Criminal Code 50. When the accused or charged person is over 13 years of age and under 16, and unless a criminal sentence is decided in his/her regard, in accordance with article 51 of this Code, he/she will be, depending on the circumstances, simply admonished or handed over to his/her parents, or guardian, or to the person who has responsibility for the child, or to a person worthy of trust, or remitted to a private or public medical-educational institution, or placed in the "Duval-Duvalier" shelter centre, or any other correctional education institution, so that he/she may be provided with moral, civic and professional training for the number of years fixed by the magistrate, and which may not exceed the year in which he/she reaches the age of 21.

Mexico 1. State laws emitted after the reform of article 18 of the Federal Constitution contain differences among them which do not affect the contents of this table.

Mexico 2. Article 18 of the Federal Constitution says: "The Federation, the States and the Federal District will establish, within their respective areas of jurisdiction, a comprehensive system of justice which will be applicable to those who are considered to have engaged in conduct classified as an offence under criminal law and who are between twelve and eighteen years of age, and will guarantee the fundamental rights of the individual recognized by this Constitution, as well as those specific rights which have been recognized due to their condition as people in the process of growth". No term is used for this comprehensive system of justice. The state laws which have been developed refer, for example, to "adolescent responsibility" (Nuevo León) or "Adolescents may indulge, intentionally or unintentionally, in classified conduct. Conduct which is classified as an offence may have legal consequences". (Article 14 of the law of Tabasco).

Trinidad and Tobago 1. This Act is due to be repealed and replaced. The replacement Bill was laid in Parliament but has lapsed because Parliament was prorogued for elections. It is expected to be re-laid, but there may be further changes in the new text. The Bill would define the juvenile court as: "juvenile

court" means a criminal court where charges against a youthful offender who has attained the age of thirteen years but under eighteen years of age are heard;"

Uruguay 1. Criminal Code Article 34. Minority. A person who commits an act before the age of 18 is not imputable.

Venezuela 1. See the Projected Partial Reform of the Constitutional Law for the Protection of the Child and the Adolescent (2005).

3. The deprival of liberty

The *Convention on the Rights of the Child* (article 37) establishes guiding principles: the deprival of a child's liberty should only be possible by means of a court ruling, should constitute a last resort measure and should be for the shortest possible time.

From this (fundamentally in Latin America) it is possible to identify various legislative tendencies:

- the prohibition of the deprival of liberty below a certain age (e.g. Belize).
- the limitation in time of the deprival of liberty (e.g.Bolivia).
- an automatic appeal if the deprival of liberty exceeds a given time (e.g. Uruguay).
- the obligatory deprival of liberty for certain offences (e.g. Chile).

Table 3. **The deprival of liberty, examples of its regulation in some legislation**

Country	The deprival of liberty
Argentina Law 22,803 *(1983)*	**Article 3.** Deprival of liberty in specialized estalishments (children between 16 and 17 years of age).
Bahamas	**21**. No child under the age of ten years shall be received into an industrial school or a place of detention and no person shall be retained in an industrial school after he has attained the age of sixteen years. **40**. (1) No child shall be sentenced to imprisonment or be committed to prison in default of payment of a fine, damages or costs. (2) No young person shall be sentenced to imprisonment if he can be suitably dealt with in any other way, whether by probation, fine, committal to a place of detention or industrial school, or otherwise. (3) A young person sentenced to imprisonment shall not be allowed to associate with adult prisoners. 41. Sentence of death shall not be pronounced on or recorded against a person convicted of an offence if, in the opinion of the court, he was, at the time when the offence was committed, under the age of eighteen years; but in lieu thereof the court shall sentence him to be detained during Her Majesty's pleasure
Belize Ch. 119 - Juvenile Offenders Act (2003)	**§11**. (1) Subject to section 12, no child shall be sentenced to imprisonment. (2) No young person shall be sentenced to imprisonment if he can be suitably dealt with in any other way whether by probation, fine, committal to a place of detention, certified institution or otherwise. (3) A young person sentenced to imprisonment shall not be allowed to associate with adult prisoners.

Bolivia Law 2026 *(1999)*	**§251**. Deprival of liberty for a maximum term of five years
Colombia	**Article 160.** *Concept of deprival of liberty.* Deprival of liberty is understood to be any form of confinement, in a public or private establishment, ordered by judicial authorities, which the adolescent is not allowed to leave freely. **Article 161.** *Exceptional nature of deprival of liberty* **Article 162.** *Separation of adolescents deprived of their liberty* **Article 181.** *Preventive confinement* At any moment during the process and before the trial audience, the supervisory judge may, as a last resort, determine preventive detention when there is: 1. Reasonable risk that the adolescent will evade the process. 2. Grounded fear of destruction or hindering of evidence. 3. Serious danger for the victim, the accuser, the witness or the community. **Article 187.** *the deprival of liberty.* The deprival of liberty in a specialized centre will be applied to adolescents over sixteen (16) and under eighteen (18) who are found guilty of committing crimes whose minimum sentence, established by the Criminal Code, is at least six years' imprisonment. In those cases, the deprival of liberty in a specialized care centre will have a duration of between one (1) and five (5) years. In cases where adolescents over fourteen (14) and under eighteen (18) are found guilty of murder, kidnapping or extortion, in all of its forms, the deprival of liberty in the specialized care centre will have a duration of between two (2) to eight (8) years. Part of the punishment imposed can be substituted by a system of regular reports, community service, the undertaking not to violate the law and observe good behaviour; for a period of time determined by the judge. Not fulfilling these commitments will imply the loss of the benefits acquired and serving the rest of the punishment initially imposed under deprival of liberty. *Paragraph.* If during the term of deprival of liberty the adolescent should turn eighteen (18), the punishment may continue (in the same establishment) until the person is twenty-one (21) years of age. In no case may the sentence be served in establishments intended for adult offenders.
Costa Rica Law 7,576 (1996)	**Article 27.** *Confinement in specialized centres.* **Article 58.** Provisional detention. The Criminal Juvenile Judge can determine, from the moment of receiving the accusation, provisional detention as a cautionary measure, in the following circumstances: a) Reasonable risk that the minor will evade justice. b) Danger of destruction or hindering of evidence. c) Danger for the victim, the accuser or the witness. The term of detention will be carried out in specialized confinement centres, in which these minors must be separated from those who have been sentenced. **Article 59.** *Exceptional nature of provisional detention*
Chile	**Article 18.** *Maximum terms for deprival of liberty sentences* Confinement sentences in closed and semi-closed systems, both including social reinsertion programmes, which are imposed on adolescents, may not exceed five years if the offender is under sixteen, or ten years if the offender is over sixteen. **Article 23.1.** If the length of the sentence is greater than five years of deprival of liberty, the court should apply the confinement sentence in a closed system, with a social reinsertion programme. [1] **Article 32.** The procedure's cautionary measures. Provisional confinement in a closed centre will only be applicable in the case of conducts which if they had been committed by an adult, would constitute crimes, and must be applied when the objectives indicated in the first paragraph of article 155 of the Criminal Procedural

	Code cannot be reached by means of the application of any of the other personal cautionary measures. **Article 58.** *Restrictions to liberty for under fourteen-year-olds.* If a person under the age of fourteen should be apprehended during the execution of conduct which, if committed by an adolescent would constitute a crime, the police officers will exercise all legal measures in order to re-establish public order and protect the victim in accordance with the victim's rights. Once this is accomplished, the appropriate authorities must place the child at the disposal of the family court so that his/her adequate protection is procured. In any case, when less serious offences are in question, the child can be immediately and directly handed over to his/her parents and persons who have him/her in their charge. If this should not be possible, the child will be delivered to an adult who will assume responsibility for him/her, preferably an adult with whom there is a family link, and the relevant family court will be informed. In the event that the public prosecutor should need to question the child as a witness, the general regulations in the matter will be complied with.
Nicaragua	**Article 95.** Adolescents aged between thirteen and fifteen who are accused of committing a crime or offence,... ...the relevant Judge will decide, applying any of the special protective measures established in Book Two of this Code, or the measures provided for in this Book, except the application of any measure which implies the deprival of liberty. Children who are under thirteen years of age are not subject to the Adolescent's Special Criminal Justice; they are exempt from criminal responsibility, save for civil responsibility, which will be exercised before the relevant jurisdictional courts. However, the Judge will refer the case to the corresponding administrative organization in order that comprehensive protection may be provided; the child will be watched over and protected in every case in order to ensure that his/her rights, freedom and guarantees are respected, It is forbidden to apply, for any reason, any measures which imply deprival of liberty.
Uruguay	**Article 76.** *Procedures.* (14) *Appeal system* … appeal will be automatic when the measure imposed exceeds a year of deprival of liberty. For children under 13 years of age: Article 121. (Confinement without the child's or adolescent's consent). The Judge may only determine compulsive confinement in the following cases: a) Children or adolescents with psychiatric pathologies detected. b) Children or adolescents who suffer from severe problems connected to drug consumption. c) Children or adolescents who need urgent medical treatment to protect them from serious risks threatening their lives or health. In every case, a medical practitioner must determine the risk. The maximum confinement term is thirty days, extendable to periods of the same length by medical indication, until release. The National Children's Institute can apply these measures directly, if medical indication exists, and when the intervention is due to the situation of a child or adolescent which involves serious risk to his/her life or the physical integrity of other persons. All of which will be notified to the Family Judge on call.
Venezuela	**Article 548.** *Exceptional nature of deprival of liberty* Save in flagrant cases, the deprival of liberty only derives from a Court order, in the cases, under the conditions and for the terms established in this law. Preventive prison may be reviewed at any time at the request of the adolescent.

In order to provide examples of legal debate, some reflections will be provided regarding Chile's Law 20.191 (2007). This law modified Law 20,084 (2005) even before its application, making deprival of liberty compulsory in a closed system, for crimes which incur a sentence of over five years.

> Article 23.1. If the length of the sentence is greater than five years of deprival of liberty, the court must apply the confinement sentence in a closed system, with a social reinsertion programme. [Law 20,191 T. Complement Nº 2 Official Gazette 16 June 2007]

On 19 May 2007, thirty-three congressmen, which constitutes over a quarter of the active members of Congress, submitted an appeal to the Constitutional Court, requesting that the part of the article modifying Law 20,084, which affects article 23 Nº1, be declared unconstitutional. The appellants contend that the rule is unconstitutional in view of the fact that it contradicts article 5, paragraph 2, of the Political Constitution, which refers to article 37, paragraph b), of the Convention on the Rights of the Child, as well as the principle of no retreat in the issue of human rights, and that it has other formal defects arising from parliamentary procedures. The Constitutional Court, in its Ruling of 13 June 2007, rejected the appeal (with the dissenting vote of Minister Jorge Correa Sutil).

For a comparative analysis it is of interest to consider the ruling of the Supreme Federal Court of Brazil (23 February 2006) which questioned the constitutionality of Article 2 of Law 8,072 (1990), a law which states that for "foul crimes, the practice of torture, or the illegal traffic of narcotics and related drugs, and terrorism… *…the sentence for the crime considered in this article will be wholly served in a closed system*."

The Supreme Federal Court understood that the law was unconstitutional *incidenter tantum*, as it violated the constitutional principle of "individualization of the sentence" (see ruling *Habeas corpus* 82959), a guarantee consecrated in article 5, paragraph XLVI of the Federal Constitution[10].

What reading could be made of this situation, apart from the existing dissent? If the following are put into context: the deprival of liberty prohibitions—in force in most legislation—together with the obligation for judges to include closed system confinement in their sentence in certain cases (Chile); automatic appeal (legislated) if deprival of liberty is for over a year (Uruguay), and the ruling of the Supreme Federal Court of Brazil upholding constitutional guarantees for the individualization of the sentence, it is possible to conclude that legislators in some countries deeply distrust the capacity of judges (in all probability as a result of memories of a discretionary past). In fact, what lies beneath the whole of this issue is legislators questioning the 'separation of powers' since, like it or not, it is the judges who must decide in all specific cases, and all legislators can do is establish the general rules.

The responsibility for a discretionary past (or present) cannot all be placed on the judges' shoulders; neither will everything change by establishing rules which restrict their power of decision, nor with further training. It must be underlined that judges lack any real alternatives when making their decisions, and in many cases, the only choice is between depriving an adolescent of his/her freedom, or handing him/her over to the parents or responsible adult, without very many other options. It will, therefore, be necessary to somehow make it possible for children and adolescents' magistrates to rationalize their performance and the procedures for current legal regulations—in harmony with corresponding international instruments—together with the expectations of society, and at the same time contribute to the availability of a range of real possibilities or alternatives for application, rather than having to resort to deprival of liberty.

[10] In order to appreciate the contrast, it must be borne in mind that the unconstitutionality referred to in Brazil, refers to a case of sexual abuse in which the victim was a boy (a foul crime according to Brazilian legislation) and that it was conceded with a minimum margin of votes from the ministers of the Supreme Federal Court.

4. The judicial process

4.1. Due process

Due process comprises procedural guarantees which are intended to ensure a fair and equitable result within the process. It includes legality, presumption of innocence, impartiality, the right to defence and legal aid, formal charges, the right to avoid self-incrimination and the possibility of appeal before a higher court. These principles are the focal point of article 40.2 of the *Convention*.

Most of the legislation in the Americas confirms due process for adolescents (punishable, within the adolescent criminal responsibility system, or when they come under the jurisdiction of juvenile courts). So what is the problem?

Basically, in recent Latin American legislative history, proceedings in the case of a child in conflict with criminal law were highly discretionary; there was no charge, no evidence of the facts, no defence and in many cases, no sentence (and therefore, no chance for appeal). Any child could be taken before the Court of Minors only because he/she had been found in a criminal context, but his/her participation or responsibility was not established. Therefore, there is very little tradition in due process guarantees in juvenile criminal jurisdiction, and although current legislation now includes these guarantees, defence is still very weak, as is the judges' conviction that they are obliged to an evidential, contradictory and reviewable phase, which can lead to the establishment of juvenile criminal responsibility.

Very often laws end up being mere declarations; so it is necessary to contrast the effectiveness of legislation—in this case, of due process—which implies observing (and measuring) what occurs in practice; that is, observing whether legislation is reflected in judicial statistics. It is possible to infer that there is a strong numerical correlation between acquittals or stay of proceedings (embodied in a sentence) and the guarantees of due process.

Judicial statistics are very poor in the region, but when they do exist, or when isolated data is available, it is possible to see that the number of acquittals or stays (depending on the country) is inexistent or very low. There are, however, exceptions: the Judicial Power of Costa Rica is paradigmatic; over 50% of all the cases conclude in acquittals or stays (Table 4).

The statistical figures which it has been possible to observe in other countries do not even approach those in Costa Rica, and there is a further detail. Upon reviewing statistics prior to the Law of Juvenile Justice of 1996, a significant number of acquittals are also to be found (Table 5). In fact, 36.4% of acquittal rulings during the time of enforcement of Constitutional Law 3,260 of the Tutelary Jurisdiction of Minors (1963) is a surprising number[11].

[11] Article 59 of Law 3,260 is the only article which contains an approximation to due process. "At the moment of initiating the file containing the facts, or within the next eight days, the accuser can provide the evidence which supports the action. Evidence for the defence may be provided at the moment of the first interview with the minor, held in order to establish his/her participation in the event, or within the eight days following. At any time, the Judge can order that evidence judged indispensable for a better understanding of the facts, be provided. Unless the Judge should order otherwise, evidence will be submitted after the parties have been summoned, with at least three days' notice".

Table 4. **Costa Rica – decisions taken by Criminal Courts for Children and Adolescent**
after the approval of Law 7,576 (1996)

	1995	1996	1997	1998	1999	2000	2001	2002	2003	2004	2005	2006
reprimand	927	429	95	61	39	31	36	25	19	26	26	23
dismissal	---	1,051	2,554	3,353	3,460	4,699	5,011	5,558	6,856	6,684	6,128	6,111
opportunity criterion dismissed	---	1,014	1,473	---	---	---	---	---	---	---	---	---
definitive stay	---	486	1,045	2,844	3,815	5,461	4,768	4,704	4,106	4,832	2,520	3,045
provisional stay	---	226	281	148	75	52	22	209	118	137	54	62
default	---	185	817	784	871	975	1,398	1,247	1,515	1,916	1,688	1,324
accumulation	---	85	229	236	288	201	179	293	314	249	196	193
conviction	---	126	302	246	297	226	262	303	269	302	252	236
acquittal	996	782	211	114	153	137	180	170	245	369	350	408
conviction acquittal	---	---	---	---	---	---	---	---	11	7	---	---
assisted freedom	119	82	90	71	136	102	126	157	119	179	146	149
confinement	96	56	60	57	58	40	51	68	82	52	35	30
abstention from proceeding	---	---	---	---	---	---	---	---	---	---	---	---
conciliation	---	---	1	180	299	237	201	316	202	474	672	572
incompetence	353	131	163	241	199	198	226	192	173	194	242	258
statute of limitation	---	383	440	806	523	567	420	993	1,340	800	1,565	1,310
trial suspension of proceedings	---	212	660	653	490	430	376	402	315	363	459	560
others	---	555	851	714	971	798	788	844	791	534	343	396

Source: Department of Statistics, Supreme Court of Justice

Table 5. **Costa Rica — decisions taken by Courts of Minors in San José**
(in percentages)

	1985	1986	1987	1988	1989	1990
reprimand	45.6	40.5	36.9	39.7	37.6	28.8
sentence of acquittal	28.3	30.9	35.0	31.4	32.1	36.4
assisted freedom	3.9	4.3	4.2	7.1	6.4	5.2
confinement	8.1	10.0	9.0	10.7	8.1	7.7
abstention from proceeding	11.5	10.8	6.5	4.2	3.2	1.6
suspension of proceedings			2.3	2.2	3.0	4.8
statute of limitation			3.5	0.5	1.5	1.6
others	2.4	3.3	2.3	4.0	8.0	13.8

Source: Department of Statistics, Supreme Court of Justice

Table 6. **USA – Judicial decisions regarding whether an adolescent is, or is not, responsible for an offence of which he/she is accused**

age	Adjudicated	Not Adjudicated	Total
<12	37,926	299,101	337,026
12	48,307	284,242	332,549
13	104,104	517,172	621,277
14	178,324	778,117	956,441
15	250,398	994,606	1,245,004
16	301,072	1,117,144	1,418,216
17	280,531	787,529	1,068,060
>17	37,576	128,181	165,757
Total	1,238,238	4,906,092	6,144,330

Source: Easy Access to Juvenile Court Statistics: 1985-2004 — National Center for Juvenile Justice[12].

On the basis of the fact that the number of acquittals is a reasonable indicator of due process guarantees (it is doubtless the case that if there are no acquittals, there is no due process: a perfect police department that only arrests guilty parties does not exist; the opposite is only probable); it is possible to conjecture from these data that it is not enough to pass laws which guarantee due process; further action is needed. Without doubt, Costa Rica's Judicial Power has a tradition of great respect towards human rights, compliance of due process guarantees in adult cases, and a vigorous and coherent judicial policy (it is not surprising that in this context, Costa Rica has one of the best judicial statistical results in Latin America). To achieve effective due process calls for appropriate regulation, but it is basically a question of a strong legal tradition, the commitment of judges and a solid public defence system.

The proposed objective of making due process guarantees (principally in Latin America) really effective, is, therefore, a truly difficult one. It will be necessary to provide training for the judges, but it will also be necessary to work with the Judicial Powers in order to develop judicial policies which agree with these objectives. There is an additional and at the same time, essential element which cannot be ignored. If there is no efficient and trained public defence service, an appropriate number of defence attorneys and a sufficient budget, it will be very difficult to achieve procedural guarantees[13].

4.2. A specialized magistrate, the possibility of adult trial, punishment or jurisdiction

That an adult criminal judge may be competent to rule in cases of children in conflict with criminal law constitutes an additional problem. In general, this arises in the case of common pleas judges, or with multiple jurisdictions, but it can also occur in certain crimes (e.g. homicide), in some Common Law countries, when an adult is tried for crimes connected with the same fact or through transfers to adult criminal courts. This situation is also possible in Argentina and in the USA, with federal crimes (e.g. those involving drug traffic in Argentina, or those committed by members of native American communities in the USA).

[12] http://www.ojjdp.ncjrs.gov/ojstatbb/ezajcs/

[13] See Patricia Puritz et al. *A Call for Justice—an assessment of access to counsel and quality of representation in delinquency proceedings*, American Bar Association. www.njdc.info/pdf/cfjfull.pdf

Table 7. **Examples of possible transfers or jurisdiction of an adult criminal judge**

Country	
Antigua and Barbuda *Juvenile Act (1951)*	§§18,19. juvenile charged with an adult or with an indictable offence, the charge shall be heard by a Magistrate's court
Bahamas	7.(1) (a) a charge made jointly against a child or young person and a person who has attained the age of eighteen years shall be heard by a magistrate; and (b) where a child or young person is charged with an offence the charge may be heard by a magistrate if a person who has attained the age of eighteen years is charged at the same time with aiding, abetting, causing, procuring, allowing or permitting that offence; 8.(3) Where a child is brought before a juvenile court charged with any offence other than homicide the case shall be finally disposed of in the juvenile court. (4) Where a young person is brought before a juvenile court charged with any indictable offence other than homicide and the court considers that it is expedient, in the interests of the young person, to deal summarily with the case, the court shall put to the young person the following question, telling him that he may consult his parent or guardian before replying: "Do you wish to be tried by the court or by a jury?" and the court shall explain the meaning of being so tried and the place where the trial would be held. (5) Where a child or young person is brought before a juvenile court charged with homicide, or where a young person is brought before a juvenile court charged with any other indictable offence and either the court does not consider it expedient to deal with the case summarily or the person charged does not agree to be tried by the juvenile court, the court shall remit the case to a magistrate to be dealt with in accordance with the provisions of the Magistrates Act, the Criminal Procedure Code Act and the Penal Code.
Belize	**§8**.(2) Where a child is brought before a juvenile court for any offence other than homicide, the case shall be finally disposed of in such court, and it shall not be necessary to ask the parent whether he consents that the child shall be dealt with in the juvenile court. (3) Where a young person is brought before a juvenile court for an indictable offence other than homicide and the court becomes satisfied at any time during the hearing of the case that it is expedient to deal with it summarily, the court shall put to the young person the following or a similar question, telling him that he may consult his parent, guardian or attorney before replying: "Do you wish to be tried by this court or by a jury?" and the court shall explain to the young person and to his parent, guardian or attorney the meaning of being so tried and the place where the trial would be held.
Canada	The transfer process is eliminated. Instead, the youth court first determines whether or not the young person is guilty of the offence and then, under certain circumstances, the youth court may impose an adult sentence. A pattern of repeated, serious violent offences is added to the list of offences that give rise to the presumption of an adult sentence. The age at which the presumption of an adult sentence applies is lowered to 14. However, provinces have the authority to set the age at 15 or 16.The effect is that if a province chooses to set the age at 16, there would be no change from the YOA. If the Crown notifies the youth court that it will not be seeking an adult sentence for a presumptive offence, the court may not impose an adult sentence. The test for an adult sentence requires the court to determine whether a youth sentence would be of sufficient length to hold the young person accountable. The accountability of the young person must be consistent with the greater dependency of young persons and their reduced level of maturity. If a youth sentence would be of sufficient length to hold the young person accountable, the court must impose a youth sentence. A young person under age 18 who receives an adult sentence is to be placed in a youth facility unless it would not be in the best interests of the young person or would jeopardize the safety of others. **61.** The lieutenant governor in council of a province may by order fix an age greater than fourteen years but not more than sixteen years for the purpose of the application of the provisions of this Act relating to presumptive offences.

	62. An adult sentence shall be imposed on a young person who is found guilty of an indictable offence for which an adult is liable to imprisonment for a term of more than two years in the following cases: (*a*) in the case of a presumptive offence, if the youth justice court makes an order under subsection 70(2) or paragraph 72(1)(*b*); or (*b*) in any other case, if the youth justice court makes an order under subsection 64(5) or paragraph 72(1)(*b*) in relation to an offence committed after the young person attained the age of fourteen years.
Costa Rica	**Article 49.** *Participation of minors with adults.* When in the same crime one or more minors are involved together with one or several adults, the cases will be separated and the files of the adults will be referred to the adults criminial jurisdiction. In order to maintain connectivity between the cases, the various courts will be obliged to reciprocally remit copies of evidence and relevant proceedings, signed by the secretary.
Haiti	Art. 51. When the circumstances of the cause and the personality of the charged or accused person of under 13 years of age, should demand a criminal conviction, judgement will be pronounced so that, in confidence, the case may fall under the jurisdiction of the relevant Judge dismissing the attenuating excuse of minority. a) If the sentence of penal servitude for life has been incurred, the person will be subjected to eight years treatment in a state correctional education centre (so modified by law of 7 September 1961). b) If a sentence consisting of a term of penal servitude, confinement or imprisonment has been incurred, the person will be subjected to a term of three years or more, in a state specialized professional centre. Art. 52. In every case, it may be determined that the minor should be placed, up to a certain age, under the supervised freedom régime which will be determined below (so modified by law of 7 September 1961).
Honduras	**Article 184.** When in the proceedings against one or several children, persons over the age of eighteen (18) also appear involved, testimony will be taken with regard to their part in the case and the corresponding testimony will be remitted to the respective court. If children are involved in a case against persons over the age of eighteen (18), they will be placed at the disposal of the corresponding Childhood Court, or its representative.
Jamaica	§72.4. Where a child is charged with an offence, the charge may be heard by a court of summary jurisdiction which is not a Children's Court if a person who has attained the age of eighteen years is charged at the same time with aiding, abetting, causing, procuring, allowing or permitting the offence.

The possibility of an adolescent being tried as an adult is an option in the juvenile justice system of the USA, and may occur through transfer or waiver of juvenile jurisdiction[14]. It is of interest to analyze the fact that in Canada, for almost 100 years, both through the *Juvenile Delinquents Act* and through the *Young Offenders Act*, it was possible for an adolescent over 14 years of age to be transferred to an adult court under certain circumstances. Reforms introduced by the *Youth Criminal Justice Act* of 2004 (with the express aim of adapting to the Convention on the Rights of the Child, article 40.3) have achieved a very intelligent balance between the Convention and judicial tradition. In effect, the YCJA, in certain cases, allows the juvenile court to impose a punishment on an adolescent as if he/she were an adult. There is a procedure in the USA which is similar to that option: 'blended' decisions, in which, as an incentive for the adolescent, two punishments are decided, one in his condition as an adolescent, and another as if he/she were an adult. If the adolescent does not fulfil the measures imposed, then the adult punishment is applied. It should be understood at this point that judges and programme administrators demand a certain degree of flexibility in order to be creative. This implies a measure of experimentation as a way of discovering more

[14] The transfer may be requested by the prosecutor, may be denied by the juvenile court magistrate and, if granted, may also be denied by the criminal court judge. See: *Trying and Sentencing Juveniles as Adults: An Analysis of State Transfer and Blended Sentencing Laws*. http://ncjj.servehttp.com/NCJJWebsite/pdf/transferbulletin.pdf

effective proceedings; the limit in this area is that the proposal should be compatible with the Rights of the Child.

Table 8. **Canada - Types of cases that are transferred**

	1998-99		1997-98		1996-97	
	Total cases	Transferred	Total cases	Transferred	Total cases	Transferred
Violence	22,284	54	23,711	41	21,737	52
Property	45,336	27	49,602	19	51,687	27
Other CC/YOA	34,290	9	33,021	13	31,399	11
Drugs	4,755	1	4,549	6	5,242	2
Total cases	**106,665**	**91**	**110,883**	**79**	**110,065**	**92**

Source: Statistics Canada (1997 through 2000). Youth Court Statistics. Ottawa: Canadian Centre for Justice Statistics.

Table 9. **Canada - Provincial variation in the use of Transfers**

	1998-99		1997-98		1996-97	
	Total cases brought to court	Total transfers	Total cases brought to court	Total transfers	Total cases brought to court	Total transfers
Canada	106,665	91	110,883	79	110,065	92
NFLD	2,142	1	2,197	1	2,853	0
PEI	324	0	376	0	458	0
Nova Scotia	3,158	0	3,472	2	3,549	0
New Brunswick	1,999	0	2,303	0	2,382	0
Quebec	11,297	23	10,881	23	11,427	26
Ontario	40,697	6	44,185	9	46,409	12
Manitoba	8,477	29	7,615	23	6,816	32
Saskatchewan	8,127	1	9,115	1	8,540	0
Alberta	17,510	20	16,579	14	15,863	10
British Columbia	11,764	11	13,059	5	10,642	11
Yukon	438	0	506	0	508	0
NWT	732	0	595	1	618	1

Source: Statistics Canada (1997 through 2000). Youth Court Statistics. Ottawa: Canadian Centre for Justice Statistics.

Source: The *Youth Criminal Justice Act:* Summary and Background, Department of Justice, Canada.

5. The right to privacy and a private life for adolescents. The inclusion or not of criminal records

The protection of the right of children and adolescents to a private life is expressed in the following situations:

- Respect of privacy during the proceedings (including victims and witnesses)
- Restricted access to judicial records
- Prohibition of publication of names and pictures in the media
- Anonymous publication of sentences, or use of pseudonyms
- That measures or punishments applied to children or adolescents should not constitute a criminal record
- Restrictions to the possibility of generating police records or prohibition of private records of children and adolescents in conflict with criminal law

- Generation of databases on measures and punishments with safety regulations and restricted use.

Table 10. **Some legislative examples of the protection of the privacy of children and adolescents**

country	
Argentina Law 22,803 (1983)	Resolution nº 1674/04 of the Supreme Court of Justice, establishing the General Database on minors involved in judicial proceedings.
Bahamas *Children and young persons (Administration of Justice)* (1987)	**12.** No person shall publish the name, address, school, photograph or anything likely to lead to the identification of a child or young person appearing in any juvenile court save with the permission of the Court. Any person who acts in contravention of this section shall be guilty of an offence and liable on summary conviction to a fine of two hundred dollars.
Barbados Ch. 138 *Juvenile Offenders* (1998)	**§3.(5)** *Bona fide* representatives of a newspaper or news agency shall not be excluded from a juvenile court in pursuance of subsection (4) except by special order of the court. (6) No person shall publish the name, address, school, photograph or anything likely to lead to the identification of the child or young person before the juvenile court, save with the permission of the court or in so far as required by this Act.
Belize Ch. 119 *Juvenile Offenders* (2003)	**§3.(5)** *Bona fide* representatives of a newspaper or news agency shall not be excluded, except by special order of the court. (6) No person shall publish the name, address, school, photograph or anything likely to lead to the identification of the child or young person before the juvenile court, except with the permission of the court or in so far as required by the provisions of this Act, and every person who acts in contravention of this subsection shall be liable to a fine not exceeding one hundred dollars.
Canada *Youth Criminal Justice Act (2002)*	**12.** If a young person is dealt with by an extrajudicial sanction, a police officer, the Attorney General, the provincial director or any organization established by a province to provide assistance to victims shall, on request, inform the victim of the identity of the young person and how the offence has been dealt with. **110.** (1) Subject to this section, no person shall publish the name of a young person, or any other information related to a young person, if it would identify the young person as a young person dealt with under this Act. (2) Subsection (1) does not apply (a) in a case where the information relates to a young person who has received an adult sentence; (c) in a case where the publication of information is made in the course of the administration of justice, if it is not the purpose of the publication to make the information known in the community. **111.** Identity of victim or witness not to be published [*fingerprints and photographs*] 113. Identification of Criminals Act applies [*records that may be kept*] 114. Youth justice court, review board and other courts **115.** (1) A record relating to any offence alleged to have been committed by a young person, including the original or a copy of any fingerprints or photographs of the young person, may be kept by any police force responsible for or participating in the investigation of the offence. 116. Government records [*access to records*] 117. Exception — adult sentence 118. No access unless authorized 119. Persons having access to records 120. Access to R.C.M.P. records 121. Deemed election 122. Disclosure of information and copies of record 123. Where records may be made available 124. Access to record by young person [*disclosure of information in a record*] 125. Disclosure by peace officer during investigation 126. Records in the custody, etc., of archivists 127. Disclosure with court order [*disposition or destruction of records and prohibition on use and disclosure*] 128. Effect of end of access periods 129. No subsequent disclosure
Colombia Law 1098 of 2006	**Article 153.** *Confidentiality of the proceedings* Only the parties, their legal representatives and control organizations may be privy to procedural activities in the adolescent criminal responsibility system. The identity of the person charged, except in the case of the persons

	mentioned above, is confidential. It is forbidden to reveal the identity or an image which will enable identification of the persons charged. **Article 159.** *Criminal records prohibition.* Sentences in adolescent criminal responsibility proceedings will not constitute legal criminal records. These records are confidential and may be used by the relevant judicial authorities in order to determine the measures to apply in the attempt to establish the nature and seriousness of the conducts and the proportionality and appropriateness of the measure. The relevant bodies should make information systems used for the records of adolescents who have committed crimes, compatible with the objective of defining guidelines regarding criminal policy for adolescents and young people.
Costa Rica	**Article 20.** *The right to privacy.* Minors have the right to respect for their and their families' private lives. In consequence, it is forbidden to divulge the identity of a minor who is the subject of judicial proceedings. **Article 21.** *Principle of confidentiality* Information regarding acts committed by minors subject to this law, is confidential. The identity and image of a minor must be respected at all times. Juvenile Criminal Magistrates must attempt that the information they provide for judicial statistics, is not in contravention with the principle of confidentiality or the right to privacy, as consecrated in this law. **Article 99.** *Orality and privacy* The hearing must be oral and private, under pain of nullity. It will be carried out with the presence of the minor, his/her defending counsel, the offended party and the prosecutor. Furthermore, the parents or the minor's representatives may also be present, if possible, as well as witnesses, experts, interpreters and other persons deemed appropriate by the magistrate.
Paraguay Law 1,680 (2001)	**Article 203.** Correctional measures will not have the effect of a sentence conviction, as regards the criminal record of the person concerned. They may, however, be entered in a record intended to collect information for state, educational and preventive activities. **Article 235.** Confidentiality. Administrative and judicial activities will be confidential. No certificates or records of the proceedings carried out during the judicial process will be issued, except those which are requested by the parties in accordance with their legal rights. The oral trial will not be public, nor will the rulings be published. Together with the parties and their legal and conventional representatives, if appropriate and if the case may so require, the supervisory agent and a representative of the body in which the adolescent is lodged, may be present. Under special circumstances, the Adolescence Criminal Court may also admit other persons. The persons taking part in the proceedings or attending the oral trial, will respect the confidential nature of the investigations and activities carried out and maintain due discretion. Supreme Court of Justice - Decree 258/02 Article 1. Only the rulings which, with respect to adolescents who violate criminal law, involve firm and executed sentences which call for deprival of liberty measures, can be recorded in the Bureau of Criminal Records, in accordance with Article 206 of Law 1680/01. Article 2. The Bureau of Criminal Statistics may only provide information regarding definitive sentences which impose correctional measures, to the interested party, and to Magistrates, Judges, Prosecutors and Defenders of Children and Adolescents.
Uruguay	Decree n° 7564 on the handling of information in judicial contexts Circular 115-06 suspension of Decree Nº7564, Regarding handling data in the JP.
Venezuela	**Article 545**. *Confidentiality.* The publication of information regarding the investigation or the trial, which direct or indirectly, make it possible to identify the adolescent, is forbidden. Statistical data and the transfer of evidence are excepted, as established in article 535 of this Law.

Upon analysis, it is possible to state that legislation in the Americas contains adequate and sufficient protection for the privacy of children and adolescents. However, in practice a number of problems have been detected.

The publication on the official Internet websites of the Judicial Powers of the names of children and adolescents who have been the subject of measures or punishments, or of children or adolescents who have been victims or witnesses,

constitutes a problem in some countries. Recent laws regarding access to government information and transparency policies have led many judicial powers to make sentences accessible, and even to make access to procedural information possible through the use of online search tools. In the USA there is a judicial tradition allowing the use of pseudonyms in litigation and the publication of sentences; this has been the way to protect the identity of children and adolescents who are part of the procedure. In Latin America the publishers of jurisprudence have always been very careful, replacing the names of children, victims and witnesses with initials.

The recent proliferation of official websites on the Internet of the Judicial Powers and the conjunction of transparency policies with the high cost of removing names from sentences, have led to their automatic and complete publication. This is more a problem of carelessness than a deliberate policy of the Judicial Powers. In fact, a number of complaints and some self-questioning have caught the attention of various Judicial Powers which (together with academics and civil society) in 2003 agreed on a collection of recommendations called the 'Rules of Heredia'[15].

A number of Judicial Powers in Latin America have shown a will to act. The first of them was probably El Salvador which made the names of children and adolescents anonymous in court sentences. This was followed by others, such as the Judicial Power of Nayarit and the Supreme Federal Court (Mexico), those of Córdoba and Mendoza (Argentina), and those of Minas Gerais, Paraná and Bahia in Brazil.

Even so, there are many sentences which have been published and are accessible on Internet which contain the names and details of the private lives of children and adolescents; some of them refer to children and adolescents who have been the victims of sexual violence. In some cases sentences in the first instance are anonymous, but not so on appeal. Or names become available by accessing judicial records.

The world tendency (much weaker in Europe) is to give citizens increased access to criminal records. This forms part of the delicate balance between individual rights and citizen security[16]. This tendency has been particularly strong in the Americas.

The situation regarding criminal records must be analyzed and questioned: should measures and sanctions be registered? Should they be accessible to judges, defence lawyers and attorneys? And should criminal record certificates be issued for children and adolescents? Situations have been detected in which certificates have not been issued, but the information has been available internally (in other words, it is not sealed). Restrictions to the access of procedures within the juvenile judiciary must be extremely strict. For example, in the U.S.A. this information consists of a closed file (absolutely inaccessible) but which can be opened if the person concerned dies in supposedly violent circumstances[17].

Another relevant aspect is the creation of information systems regarding measures and sanctions which are only available to judges. The foundation for these systems is that an adolescent may have lawsuits in two different courts, or at different times; it is argued that knowledge of these previous or simultaneous cases makes it

[15] See www.iijlac.org

[16] In general, the first criminal records which were open to the public were those of sexual offenders, when the victim is a child (for example, in Argentina—provinces of Mendoza and Neuquén; in Chile, in Canada and in the USA.

[17] In some cases, a court order to open the juvenile criminal records of a person deceased in apparently violent circumstances, has made it possible to shed light on the facts and identify the persons responsible.

possible to take much more effective socio-educational measures (see Argentina: General Database regarding minors involved in legal proceedings). The problem is that the security surrounding the maintenance and generation of these databases is not always a sufficient guarantee for the Rights of the Child.

All information containing personal data, particularly that which links people to offences or crimes, is used by employment agencies or credit firms, sometimes illegally, or because of a legal vacuum. The laws and punishments for those who create this type of database or who trade with this information, are very weak.

6. Punishment, socio-educational measures and restorative justice

The measures or punishments which can be applied in the context of adolescent criminal responsibility or under the jurisdiction of juvenile criminal courts, range in all systems from the deprival of liberty to other ways of helping the adolescent to mature. With the exception of the deprival of liberty which we have already mentioned, care programmes in an open environment become singularly important.

Juan Bustos sums up in a phrase what these programmes should be like: "In this context the judge should not have only one possible punishment at his disposal; he should be able to resort to a battery of measures which will allow him to impose the measure which is best suited to the case in question and to the characteristics of the child. This may be entrusting the child to a tutor or guardian, house arrest, community work, or other possible measures"[18].

The idea of a "battery of measures" seems very appropriate, since there cannot be only one answer. To attend to the needs of an adolescent who has become involved in an offence, account must be taken of all of the nuances of his personality, his family background, his current relationships, etc. This places the judge in a role which is totally different from that of other judges. Firstly, the judge must act as a supervisory judge and determine whether juvenile criminal responsibility existed, or not (at this stage, due process must be strictly adhered to). Having completed that stage, the judge ceases to rule according to law and must decide on the basis of knowledge. If the judge has at his disposal a battery of alternative programmes, he must decide which is the best and the most appropriate for the adolescent in question. He must have the support of a technical team which can advise him, but his needs go far beyond that.

It is necessary for the battery of programmes to be available and it should be sufficiently diverse and creative.

Adequate coordination is necessary between the people who administer these programmes and the judge, who must ultimately ensure that they are effective.

Sufficient financial resources must be available if these programmes are to be more than a declaration of good intentions and international cooperation.

Permanent evaluation is needed of the different programmes on offer (official programmes and those available from civil society), in order to choose the programme which is most effective for each adolescent. This information will constitute the "knowledge" which the judge will need for his decisions.

[18] Interview with Juan Bustos (Chilean congressman) "Saviours of the Child and Retributionists at Opposing Poles of the Debate" (Juridical Newsletter, Ministry of Justice).

The satisfaction of this chain of needs would appear to be the most pressing objective for the system of adolescent criminal justice, and even if legislative reforms provide a framework for their existence, the solutions call for a creative and professional coordinated effort.

From all the possible alternatives within this "battery"[19], those known as restorative justice approaches stand out[20]. The restorative model implies abandoning the alternative of a sentence as the only model of social control and focuses on the need for the adolescent to accept his responsibility, and the need to make reparation to the victim, and creates the opportunity for the social rehabilitation of the adolescent. It has been possible to analyze three programmes in the region which to some extent include features of restorative justice. These programmes are:

Argentina. Province of Neuquén. The **Juvenile Criminal Mediation Programme**. This programme started as a result of provincial law 2302 (Law of Comprehensive Protection for Childhood and Adolescence). The programme was created and developed by the Public Prosecutor's Office in 2002; it is voluntary for the victim and the adolescent, pre-judicial, with a multi-disciplinarian focus and wholly financed by the provincial government. Cases are selected by the Public Prosecutor (although the tendency is towards minor offences, agreements have been reached in cases of bodily damage and threats, in more than half of the cases). Later, meetings are arranged between the victim, the adolescent and his parents. The process aims at an interview between the victim and the adolescent, leading to a *record of commitment*[21]. No NGOs are involved, but a network is set up involving schools, public health, social action, neighbourhood committees, etc., depending on the nature of the case. In the province there is an Official Criminal Defence Office for Children and a Specialized Prosecuting Agency which operates by means of the accusatory system; investigations are conducted by the Prosecutor, a supervisory judge and circuit trial judges. There is statistical follow-up of provincial justice and of the programme (see Table 11); between 2004 and 2005, 766 cases were sent to mediation, of which 438 concluded in agreements.

Table 11. **Juvenile Criminal Justice Data , Neuquén (Argentina)**

Type of ruling	2005	2006
Cases initiated	1783	1412
Acquittals	10	47
Stays	208	172
Cases referred to mediation	579	419

[19] Alternatives are as many as human creativity and innovation allow; some have been well-received (sport activities, community service), others have not (such as, for example, the 'boot camp' programme). However, advantage should be taken of the variety of approaches arising from civil society and—unless a proposal is in contradiction to the Rights of the Child—all should be given a chance to be debated and possibly, attempted.

[20] According to the E/CN.15/2002/5/Add.1 document of the United Nations Economic and Social Council, a "restorative justice programme" is understood to be any programme that uses restorative processes and seeks to achieve restorative outcomes. A "restorative process" is understood to be any process in which the victim, the offender and/or any other individuals or community members affected by a crime actively participate together in the resolution of matters arising from the crime, often with the help of a fair and impartial third party. Examples of restorative process include mediation, conciliation, conferencing and sentencing circles. A "restorative outcome" means an agreement reached as the result of a restorative process. Examples of restorative outcomes can include responses and programmes such as reparation, restitution and community service, designed to fulfil the individual and collective needs and responsibilities of the parties and achieve the reintegration of the victim and the offender. See www.unodc.org/pdf/crime/commissions/11comm/5add1s.pdf

[21] See María Dolores Finochietti; "Mediation, Conciliation and the Criminal System", Review of Criminal Law Thinking — Criminal Law Reviews, Institute of Criminal Law, College of Lawyers, Neuquén, Argentina. (2004) www.pensamientopenal.com.ar/42mediacion.doc.

Declarations of responsibility	180	115
Acquittals from sentence	22	47
Impositions of sentence	8	4

Paraguay - The **Programme for the Care of Adolescent Offenders** (PAI for its acronym in Spanish) arises from the cooperation agreement (signed on 29 June 2004) between the Supreme Court of Justice, UNICEF and German Technical Cooperation, GTZ. Decree 329 dated 30 September 2004 regulates its execution. The programme is carried out by the Supreme Court of Justice of Paraguay, in San Lorenzo (on the outskirts of Asunción) with the support of the NGO Rumbos. The project basically supports the preparation and training of the members of the Technical Teams in the Criminal Court for Adolescents of San Lorenzo. The variables which are most frequently considered range from family surroundings outwards, until a point of containment is found. Possible safety nets, such as young people's associations, employers who provide internships and schools are sought out. One of the figures which the technical team can propose is the Youth Guide (a member of the community who voluntarily takes on the supervision of the adolescent). In many cases members of youth groups in parishes have volunteered. In some cases reconciliation with the victim has been achieved. In principle, judges retain the role of conciliators. Specialized mediators do not exist and have not been trained. Monetary reparations for damages are not sought, only some service which the victim considers appropriate. Generally conciliation is sought with the support and cooperation of defending counsel. Article 224 of the Code stipulates that the judge may "procure and substantiate conciliation, if called for". A great deal of importance is generally given to statistical facts, and these are being used to evaluate and improve the programme.

Peru – **Justice for Growth** is a restorative juvenile justice programme promoted and carried out by the *Terre des Hommes* Foundation of Lausanne (Switzerland) and the association *Encounters Youth Home* (an NGO supported by the Jesuits in Peru). There are a number of agreements of cooperation signed, amongst others, with the Judicial Power, the Public Prosecutor, the Ministries of the Interior, of Justice, of Women and of Social Development of Peru. The project covers a number of adolescent needs, such as the provision of immediate legal counsel and at a later stage, the intervention of social workers who interview the adolescent, his family group and the person who has been wronged. Present criteria for admission to the programme are: a minor or medium grade offence, generally against property (sexual offences are not accepted, except in the case of sexual relations between adolescents, which are classified as rape), and a family connection is also called for, with someone who is willing to assume responsibility for the adolescent's participation in the programme. Remission of charges by the prosecution is sought in order to avoid a sentence (which is generally confinement), whereupon the stage of educational support is initiated. During this stage psychologists and social workers intervene. At a third stage the victim is approached, if he/she and the adolescent agree to meet, and an attempt is made to reach a restorative agreement through a process of mediation. The programme has two executive objectives: (1) the design of a system of indicators in order to decide what type of measure suits each adolescent (a prototype already exists); (2) a monitoring system for the provisional measures which are adopted. The programme is being carried out in the Municipality of El Agustino (Lima) and José Leonardo Ortiz (Province of Chiclayo).

The three programmes have different characteristics, which show beyond a doubt that the solutions may be very diverse. They all lead to the conclusion that the restorative model of mediation or conciliation is successful. However, the three programmes indicate that they are not universally applicable (either because

restorative justice is not applied to all types of offences, or because the victim is not disposed or prepared to accept it). Another variable is the person who conducts the process (sometimes the judge is the conciliator, in other cases professional mediators participate). Financing is also diverse (it ranges from total coverage by the State to total financing by international cooperation). They all have their own means of monitoring, basically in order to find out if they are successful. Nonetheless, the idea of correlating situations which are characteristically adolescent, to the outcomes, is still incipient. They can all be reasonably placed within current legislation, so it does not appear necessary to legislate beyond their existence and financing.

7. Statistics

There are various justifications for surrounding juvenile criminal justice with a sophisticated system of statistics:

In the first place, it is a subject in which there are too many suppositions, either because of the influence of the press or because of the disagreement between those who emphasize citizen security and those who defend children's and adolescent's rights. To have at one's disposal a numerical representation of reality would lead to far more reasonable opinions and attitudes.

As has been argued, juvenile criminal justice calls for a significant measure of knowledge. We have also seen that it is a very experimental field and that ideas swing from one extreme to the other. Neither ideas nor innovation can be based on conjecture or suppositions. Up-to-date and detailed information is necessary.

Monitoring institutions is fundamental, particularly when one comes from a past which was not very compatible with children's rights, and which needs to be reformed. In this respect, a collection of sensitive and comparable indicators should show the degree of compliance with the law and the performance of its operators.

8. Analysis; discussion of tendencies and conclusions

Whereas other subjects related to children's rights—such as actions to fight the commercial sexual exploitation of children and adolescents—achieve a broad and sustained consensus amongst citizens, government, academics and defenders of children's rights, it is worrying to note that proposals and legislative tendencies regarding the administration of juvenile criminal justice constitute a scenario of conflicting opinions, and that this is probably associated with the advances and setbacks observed within the region.

The promotion of the Rights of the Child and the administration of juvenile criminal justice (as expressed in the *Convention* and other international instruments) does not necessarily mean that citizen security should be forgotten or jeopardized. It is true that certain people fear for their safety, and in their fear they point to due process or the alternatives provided to adolescents for their social reinsertion, as factors of risk. In reality, this scenario arises within the context of incoherent public policies and a lack of coordination and adequate resources.

Tougher sentences, a reduction in the age of imputability and a more extensive use of prison sentences constitute false solutions—they have never proved to be effective in the reduction of the level of insecurity.

The solution to these predicaments calls for research, creativity and commitment, in particular with regard to certain areas, amongst which is the inescapable need to create multiple care programmes for adolescents. These should be preventive, educational and restorative, based on the hypothesis that most adolescents in conflict with the law can be reinserted in society and abandon their rebellious and defiant attitudes, which are characteristic of their age, and leave any offence they may have committed in the past, as an event which has been overcome. It is essential that these programmes should be coordinated with other policies, such as: the promotion of a commitment by the media, as informants of the community (including their share of responsibility in the promotion of violence), the participation of civil society, the production of reliable and independent data regarding the participation of children and adolescents in criminal acts, and in particular an evaluation of the efficiency of innovative projects. These would appear to be the vacuums which result in confusion and dissent, and not the evolution of legislation in recent years.

Legislation in the region displays two distinct tendencies which nonetheless are progressively compatible with the Rights of the Child: (1) in Common Law countries the jurisdiction of juvenile criminal courts appears to be more flexible, allowing transfers or punishment as adults. On the other hand, they have a richer history with regard to the guarantees of due process and also a certain advantage in the creation and diversification of care programmes; (2) in Latin America a tendency has been observed towards the model of juvenile criminal responsibility, fundamentally as a way to apply the *Convention* (without ignoring the considerable impact that the *Convention* has had on legislation in the English-speaking Caribbean and Canada)[22]. In some countries the system of adolescent responsibility has not been fully implemented (either in all of the country or in all cases or jurisdictions). The financing of care programmes, due process, and the coordination between all of the institutes involved and the quality of statistics, would appear to be the most pressing problems in Latin America.

In all of these policies doubts persist regarding what to do when an unimputable or *doli incapax* child is involved in an offence. Present solutions appear to be weak or tainted by recent history.

The effectiveness of any reform—in addition to the policies which have been mentioned—requires active participation by judges, and these in turn need adequate and permanent training. It is fundamental for judges to regain leadership and the confidence of society.

The Action Plan 2007-2011 of the Inter-American Children's Institute basically shares the concerns which have been expressed here, but a continental form of execution would appear to be impossible. Concern is visible in all of the governments in the region; they seek solutions and innovation regarding juvenile criminal justice and hope for significant progress, but it is highly probable that the appropriate tools for the Inter-American Children's Institute will consist of

[22] It cannot be held that article 40 of the Convention has influenced USA legislation; rather, the reverse has been the case. In 1899, the first courts specializing in juvenile criminal justice were set up in Chicago, Illinois. Several USA Supreme Court rulings (*In re Kent*, 1996; *In re Gault*, 1967 and *In re Winship*, 1970) gave shape to the right to due process in juvenile courts. In the USA, in the literature of 1976, it was already habitual to refer to the need for coordination, knowledge based on the analysis of information, the use of statistical indicators and a great variety of care programmes. See: *Report of the task force on Juvenile Justice and Delinquency Prevention*, National Advisory Committee on Criminal Justice, standards and goals, 1976. These ideas were cornerstones for the evolution of juvenile justice throughout the world. In this sense—whose influence came first—in 2005 the Supreme Court debated, in *Roper v. Simmons*, 543 U.S. 551 the value of international trends, in particular, of the Convention on the Rights of the Child, and used this context to guide its declaration of unconstitutionality of the application of the death sentence for crimes committed before the age of 18.

intelligent handling and sharing of information and knowledge, together with a training model for judges and coordination between institutes.