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AN ASSESSMENT OF THE CHILD AS AN OBJECTIFIED SUBJECT IN THE JUDICIAL PROCESS

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ABSTRACT

More than three decades after the enactment of guaranteeing children's rights, it is remarkable that the distance between what is said, especially based on the law, and what is done, by the Brazilian State, may jeopardize the effectiveness of guaranteeing their rights. Analyzing the content of these laws, there is an expectation concerning the hearing of children, however, their voices remain silent, so that despite the change of terms and names, the old ideological and distinctive practices continue, following a historical and dialectical process of inclusion-exclusion. In this qualitative study, based on the theoretical assumptions of the Socio-Historical Psychology of Vygotsky, bibliographical and empirical research was carried out. The analysis of semi-structured interviews with legal professionals who work with lawsuits involving children, showed an objectification of the children and the distance between the positivation and the effective fulfillment of the children's rights.

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INTRODUCTION

This paper is the result of an excerpt from the research entitled "Listening to children in court: an analysis of the meanings attributed by Law professionals in the light of Socio-Historical Psychology" (Pinheiro, 2018), supported by Lev Vygotsky's theoretical constructions. For this article, one of the emerging reflections of the research was highlighted: the perception of the child as an objectified subject within the judicial process. Motivated by the concern with the place occupied by the child in the judicial process, especially with the participation of the one to whom the process is intended or should be aimed, this research started from the proposal to deepen the problematization and contribute to the construction of the necessary knowledge to learn and scientifically understand the psychosocial phenomenon of the relations between society, justice, families and children. In order to highlight the perceived distance between the legal provisions and the practices of the courts, in this article, it was chosen to report the legislative construction aimed at protecting the rights of children and adolescents, and only then to present some of the results obtained from the analysis of the speeches of the interviewed subjects during the research.

Although the children were elevated to the condition of subjects of rights for legal purposes, in the transition between the 1980s and 1990s, it is observed that there is still a severe distance that separates them from effective public policies and the full guarantee of their rights. Thus, their subjectivitiesare revealed for those who dedicate themselves to a critical analysis of their social place. In Latin America, the 1980s and 1990s were decisive for the paradigm shift in relation to the understanding of the child's social place, following a movement that was already taking place globally. Even before the enactment of the Child and Adolescent Statute in 1990 (Brazil, 1990b), the period was fertile in transformations and legal frameworks. In Brazil, the Constitution, enacted in 1988 and still in force (Brazil, 2001), was idealized. At the same time, in 1989, the United Nations Convention on the Rights of the Child was promulgated in New York (Brazil, 1990a). This text was approved by the National Congress of Brazil the following year, when the Child and Adolescent Statute, enacted by brazilian law no. 8.069. The modification of the constitutional paradigm, not only from a formal point of view, but especially due to the change in the guiding principles of the Federal Constitution of 1988, has influenced the transition from minorist doctrine and codification, until then responsible for guiding the Law of Childhood, to the doctrine of a comprehensive protection. Its fundamental pillars are the principles of

the best interest of the child and the absolute priority of the child, structuring of the legislation after the constitutional framework. Regarding this paradigm shift, Contini (2009) observes that the doctrine of integral protection made the children come to be citizens of rights, in a citizenship founded by a tripod that involves man's historical conquests about the guarantees of their civil, political and social rights. The issue of the child's voice historically silenced, and the guarantee of his social participation, has attracted the attention of childhood scholars around the world, especially after the promulgation of the Convention, a fundamental milestone in the international legal system regarding the rights of the children. Its revolutionary text, before exposing the agreements signed by the states parties to the Convention, expressly stated, in a preamble, to recognize the inherent dignity and equal and inalienable rights of all members of the human family, proclaiming rights to special protection, care and assistance in childhood and affirming that, for the full and harmonious development of his personality, the children should grow up in their family, being prepared for an independent life in society (Brazil, 1990a). At that moment, the now called "integral protection" was born, which sought to ensure guarantees for the defense and protection of children and adolescents, taking care of their integral development.

Regarding the tripod formed by civil, political and social rights, the United Nations Convention on the Rights of the Child recognized them as equals, inalienable and belonging to all members of the family, including children. The BrazilianChild and Adolescent Statute, which can be understood as a catalyst for the paradigm shift already mentioned, abandoned, at least from the point of view of the norm, the idea of a minor, replacing it with the ideas of children and adolescents. In the new paradigm proposed by the Statute, the focus is on a concept of society that is organized through social mechanisms, to include children and adolescents in a system that encompasses social coexistence and access to public policies (Contini, 2009). Amin (2015), giving a constitutional focus to the material right expressed in the new legislation for children and adolescents, considers the nominated term for the set of fundamental rights indispensable to their integral formation to be correct. This is because, by the term statute, it is possible to understand the entire microsystem of effecting the constitutional dictate of broad protection of the public to which it is directed. With such important achievements, a new period was inaugurated in brazilian society, of social transformation and the search for guarantee of rights, based on the principles of citizenship, equality and human dignity. This phase, in addition to constituting a new normative framework for the rights of the child, was also remarkable for the development of Social Psychology. In this context, Socio-Historical Psychology was inserted, aimed at understanding social phenomena from a comprehension of "man as a social and historical asset" (Bock, 2001, p. 17), as well as "society as historical production of men". Just as the understanding of society involves understanding of childhood, the construction of this new society, democratic and citizen, involves the construction of new paradigms for childhood, socially discerned.

This time, childhood, as a social construction that it is, has the active participation of the children themselves. In addition to being part of a social category, they operate as true social actors, who therefore participate, or should participate, actively in social life. For Prout and James (1990, pp. 8-9), "children are and must be actors in the construction and determination of their own social lives, the lives of those around them and the societies in which they live. Children are not the passive subjects of social structures and processes". However, ahuge contradiction is still observed. That is because, 24 years after the publication of "The Lost Century: historical roots of public policies for childhood in Brazil", in 1997, a book in which Irene Rizzini, based on her doctoral thesis, elaborates "a claim so that another century is not lost between discourses and promises that fade and rhetoric that is not in tune with actions" (Rizzini, 2011, p. 16),there is still a huge gap between what is placed, especially in the law, and what is done, in the daily practices perpetrated by the power structures of the Brazilian State.

This contradiction prevents the effective guarantee of rights for children and adolescents, historically forgotten in Brazil, a country marked by a perverse culture with strong minorist roots. Repeating Rizzini's (2011, p. 71) questions, elaborated in her preface to the second edition, it is still possible to ask whether today's children live in better conditions than those of yesterday. From this understanding, it is stated that the search for the children of the legitimate place of subjects of speech, rights and action (Sousa, 2012), is still under construction. Despite the recognition that had already been granted to them by the cold letter of the law, thus showing the first and great contradiction of the dialectic observed between the law and society.
From the careful analysis of the social reality in which the children are inserted, the questions grow: have all the letters, conventions and statutes promulgated in the decades of hope had an effect? Has the standardization been sufficient to guarantee the desired advances? Has the rule of law fulfilled its mission in the realization of children's rights? Is today the doctrine of comprehensive protection, inaugurated at the end of the 1980s, a perceptible reality?. The answers seem disheartening. There is, in the text of the Convention on the Rights of the Child (article 12) and the Statute of the Child and Adolescent (article 47, §6, article 100, XII, article 101, §5, article 161, § 3, article 179, article 186), expectation of hearing from children and adolescents. However, their voices remain silent, so it is possible to notice that the terms and names are changed, but the old ideological and distinctive practices of people and classes are maintained.

When dealing with the dialectic constituted between the historical process of exclusion and perverse inclusion, Sawaia (2014, p. 8) seeks "to understand the nuances of the configurations of the different qualities and dimensions of exclusion, emphasizing the objective dimension of social inequality, the ethical dimension of injustice and the subjective dimension of suffering". Regarding the dialectical process of social exclusion and inclusion, the author continues to highlight the contradiction that constitutes it: it includes itself to exclude and, thus recursively, so that a real illusory character of the inclusion expressed in law is perceived. Understanding it as perverse, the author states that this transmutation is a condition of the unequal social order in which children, too, are inserted (Sawaia, 2014). In this recognition, it is noted that, despite being positively affirmed, children's rights continue to be neglected, ignored, superseded. The most diverse rights and, especially, those that interest this work, related to what is conventionally called the right of participation. This translates immanent rights of the children and their haughty existence, such as: the right to be real subjects, not objects, the right to be heard and understood, the right to speak and be listened to attentively, the right to actively participate, to express opinions, to express what they think, or how they would do if they could share the moment of making decisions about themselves.

Regarding the recognition of the child's participation by the State, in the context of judicial or administrative proceedings, as provided for in Article 12 of the Convention on the Rights of the Child, Santos, Costa and Faleiros (2016) contextualize its protectionist character, based on the doctrine of comprehensive protection. That right to participate would be a real opportunity to be heard. The law, although it is correct to express in its codes the guarantee of rights (to the effective participation in the process, for example), is not, in fact, able to guarantee them. It cannot be denied that this is a contradictory movement that is of great interest to Socio-Historical Psychology: once there is a right, there is its expression, without, however, glimpsing its real effectiveness. It is in this context of evident contradiction that Sousa and Tavares (2012) question: "can a public policy with a broad guarantee of social rights (right to freedom, humanized treatment, education and citizenship) - which historically uses punitive and coercive practices - take effect"(p. 95)? When seeking to delineate what "contributions Social-Historical Psychology can bring to the effectiveness of these policies" (pp. 95-96), especially for policies aimed at children, they highlight this Psychology that, when recognizing the child as a concrete subject, actively inserted in a social context that helps to produce in addition to being produced by, it leads to the understanding of the position of this child in a broader reality, thus apprehending his formation

process. In seeking to understand the child's position in his social context, Charlot's (2013) contribution on the ideological meanings conveyed by the idea of childhood should be emphasized. He affirms that "socially, the child is, above all, a being dependent on the adult, to the authority to which he is constantly submitted" (p. 194). For the author, whatever the social organization observed, the dependence of the child in relation to the adult is perceived, not least because the child is born and develops in a universe of adults, modeled by them, whose structures, organizations and ways of life pre-exists. In this context, children only gradually and progressively gain their autonomy, even though doctrinally, the specific dignity of child psychism is postulated (Charlot, 2013). Regarding this unavoidable dependence of the child on the adult, according to Charlot (2013), it is necessary to think about childhood in the form of a reciprocal social relationship, or social partnership, between the child and the adult. For him, "the child is, for the adult, a certain type of social partner and vice versa. It is therefore necessary to think of childhood in terms of social relations between adults and children". (Charlot, 2013, p. 195).

Concerning this relationship that must be built socially, not admitting that it is naturally put, Sawaia (2014) analyzes and reinforces the perverse trait of the exclusion/inclusion dialectic that, at times, intoxicates everyone when it appears that the right exists, when it is nothing more than rhetoric. This phenomenon occurs to the extent that, in view of the existence of legislation, the State and social forces are not responsible for the suffering that they impose on the excluded, among them children. In this context, one can consider the silencing inflicted on children who have their lives discussed in court as a kind of social suffering. In this regard, there is no possibility of intimate or intersubjective formulation, requiring them to wait for the emancipation of their voices on a social scale. "It is the individual who suffers; however, this suffering does not have its genesis, but in socially delineated intersubjectivities. In this way, if the cries of suffering show the hidden domination [...] of the dominant social issues in each historical era, in other words, of the experience of evil that exists in society"(Sawaia, 2014, pp. 100-101). Thus, when thinking about the socially constructed relationship between the child and the adult, the hidden domination, named by Sawaia (2014), present in the relationships between children and the Judiciary, is evident. Now, this understanding of the child's dependence on the adult certainly impacts children's rights to social participation, taken broadly, and their participation in the sphere of Justice, which is strictly considered. Concerning the scope of Justice, it is relevant do quote Santos et al. (2016), when they state, in the same vein as Charlot's reasoning, that there is "an articulation of male and adult-centric domination of the family and the Judiciary" (p. 47). They also call attention to the "positivist perspective of legal action" (p. 45), which certainly intensifies the conflict even more.

Regarding the construction of psychological knowledge in the sphere of the Judiciary, Bernardi (2015) warns of the demarcation of the place of children in forensic environments. It is a place for those subjects without a voice, "who, as infants, do not speak in the procedural records, and are thus said by others, remaining hidden in the processes referred to them" (p. 31). Thus, from the social and legal practices, it is seen that the minorist perspective returns, daily, in the form of its historical dimension, not supplanted by the notion of justice built in the courts. Therefore, the contradiction between the path taken by the law and the reality of the observed facts is explicit. In this way, it is said that Brazil abandoned the minorist doctrine only from a formal point of view, because "it is useless for the Constitution to grant them the most special protection, with absolute priority, if neither society nor the laws, nor judges, prosecutors, defenders and lawyers give them deserved attention". (Dias, 2017, p. 11). The concern about how the judicial issues involving children are constituent and constitutive of the subjects involved in the processing and judgment of such demands, led to the search, in this research, of the social and historical dimensions that guide the judicial practices that are now multiplied. Although historically located in the place of the speechless, being conceptualized in the negativity of what they lack, logical speech, thus considered from the point of view of adults, children, and child studies, have much more to reveal. In addition to simplifications and reductionisms, the research that aims to give a voice to the child imposes reflection on the meaning that he and childhood have in the unveiling of the world, society and history. From the attempted analysis, a strong category emerged, as already outlined in the initial lines: that of the child as an objectified subject in the judicial process, in the sense that, although the child is a subject, thus recognized by law, especially the Federal Constitution, the Convention and the Statute, since the end of the 1980s, has remained in objectification, in a position analogous to which we sought to break with the transition from the minorist doctrine to the guarantor doctrine (Amin, 2015; Bernardi, 2015). In order to present the results obtained by conducting the bibliographic and empirical survey, it was chosen, in this article, the account of the paths, legal and social, historically followed by the child and the understanding that one has from childhood. After that, it was sought to confirm the distance between the legal provisions and the harsh reality of the national courts based on the speech of the subjects who make up a child and adolescent protection network, interviewed in the empirical phase of the research.

METHODS

Empirical researchwas preceded and supported by bibliographic research and took place through individual interviews with eight legal professionals. To select the participating subjects, letters of invitation were sent to professionals working in Family and Child Law in a specific judicial district in the Midwest Region of Brazil, with a detailed presentation of the research. The following professionals welcomed the invitation: two judges (Anthony and Deborah), two prosecutors (Mary and Paula), two public defenders (John and Gustavo) and two lawyers (Melissa and Victoria). In this article, some of their speeches were transcribed, although it is important to note that the names used in this text are all fictitious, with respect to the participation of the identity of the participating subjects. To interview them, a non-closed interview script was developed, which allowed the subjects to express themselves freely and access their understanding repertoires regarding the topics proposed for discussion: meanings of childhood and children, their social participation and their listening in the process, difficulties in achieving this listening and reasons why it does not happen. The delicacy of the topic discussed in this research, which involves, at the same time, subjects socially considered as fragile, children, and socially strong, powerful and prestigious subjects, the professionals of Law who lead the relationships within the courts, imposed the same delicacy in the its analysis and treatment. At this point, it is important to highpoint that, only with a dialectical reading of the objects of study and theoretical references, it was possible to hold the views of an interdisciplinary study, built from an interface between Law and Psychology, which ended up adding the knowledge of several other sciences, such as History and Sociology focused on the study of childhood.

Therefore, it should be noted that, in the Vygotskian perspective (Vygotsky, 1989; 2000), it is through language that man is constituted and a constituent of other individuals, with the registration, as well as analysis, of spoken language being fundamental. So that not only what is said, but how it is said, with what emphasis it is said and what is left unsaid matter. It was in listening to the interviewed subjects, concretely taken, with all their singularities, that they sought to listen, also, to what they most represented: the very system of guarantees of rights, their advances and setbacks, their successes and their mistakes, theirachievements and their failures. This analysis proposal was strengthened through the adoption of the concept of the representative subject, so that the subject does not express itself, but expresses the entire network of protection and attention it represents (Sousa, 2001). The choice, on this path, and, more than that, the requirement of the path itself, was to face the contradictions, the tensions between objectivity and subjectivity, between particularity and universality (Sawaia, 2014, 2015), between the concrete and the dialectically constituting the subject and the world (Sousa & Tavares, 2012).

RESULTS

Asked about children and their participation in the judicial process, the interviewees presented the meanings of objectified child and invisible child. These sub-nuclei were brought together into a nucleus of greater significance, which gives the name to this article, that of a child as an objectified subject in the judicial process. Melissa and John emphasized the objectification character with which children figure in the processes. Presenting a double understanding of the objectification of the child, taken in the micro (by the family) and in the macro (by the State), they showed "a child very treated as an object by the parents" and "a culture of the child as an object of law that is ingrained" in the society, in the juridical scope and, even, in the Guardianship Council. In addition to objectification, Johnemphasized the antagonism of objectified children and the provisions of the Convention and the Statute. "I still see it as an object, even though the Child and Adolescent Statute is turning 31 years old. Still, the culture of the child as an object of law is ingrained. [...] It is very difficult for you to work with the subject of rights as you only impose, you do not argue, and you do not negotiate. This, in relation to children and adolescents, in society, is still very ingrained as an idea that children and adolescents are objects". In the same sense, of practical non-compliance with the provisions of the law and the doctrine of integral protection, was the speech of Alex. "Despite the evolution, in the sense of overcoming the doctrine of the irregular situation, even today the child, in the judicial process, is not seen as a subject of this process. In a process in which it is decided about the child's future or the guarantee of the protection of his fundamental rights, many times his own opinion is not heard and, even when heard, it is not considered the way it should be, the way it advocates Article 12 of the International Convention on the Rights of the Child and as advocated by the Statute itself".

Different from explicit objectification, another, more veiled, covered, hidden, was observed, in which the child is believed to be the subject of rights, which, however, does not have objective conditions to exercise them. This understanding could be seen in the speech of Anthony, for whom the child is understood "[...] as a subject of rights, but whose rights have to be exercised by someone else". "Well, then we have to do the following analysis. People participate in a process as holders that they are, so we say that, for the world of law, a person is the subject of rights, the one who may have rights. The child is a subject of law, but a subject of special law, because he cannot exercise his right in his name, he must have someone to exercise his right."

Regarding the child's invisibility, Deborah stated that she saw the child "with very little voice [...] little heard. It is heard not only verbally, [...] but little seen. Very little considered", relating multiple facets of invisibility. This was also the finding of Paula and Victoria:
"Little noticed. Even though I work in the family area, the processes in which I work are those in which, necessarily, there must be a child or adolescent. Even in these, the child, mainly, that is, the one who is up to 12 years old, is little heard in the process. No doubt. Very little heard. Even though the child is the subject for whom that process exists. So I see the child in anguish. And, at the same time, invisible. Because it is not respected in its particularities and needs that are unique, for that moment that she goes through, for those experiences that she has and, above all, for those people with whom the child lives." This invisible child could also be understood as inaudible, since, according to seven of the eight respondents, is not seen, is not heard, is not perceived and is not considered in the judicial process. It is not taken, or as if to say: it is notand it does not exist. Therefore, the child is an object and not a subject, since the child does not speak, does not hear and is not understood as a person who is subject by the family to the judicial process and by the State, who is responsible for processing and judging that process. Regarding the true focus of the process, Mary pointed out as follows: "In the course of the process, we clearly see that it begins in the eagerness to protect the child and slowly the change is revealed, in the process, this clash of the parties, whatever they may be.

And the child starts to occupy another space. If the child starts out as a protagonist, at the end the child moves on to a very secondary role. It is only called when the situation loses control a little bit.Then the child is called again, for the focus of attention. not in the child itself. But onthe fact that the child is the object of that dispute." From the analysis of the results, it was observed, therefore, that, in the professional practice, the so-called Law operators decide not to listen to the children in the heart of the judicial processes that discuss them. There is, of course, a social discourse, built and in force, which supports the practice of these operators or professionals of Law, so that the paradigms of Law are not followed by the system, which should promote the guarantee and protection of these rights. This analysis was well summarized by Alex: "In this performance, I still see a very strong rancidity of the doctrine of the irregular situation, of the minorist doctrine, the non-introjection of this much talked issue, of the treatment of children and adolescents as subjects of rights ... The courts should give space to solutions that are not so imposing, with a restorative or a consensual nature".

There is a certain anguish present in this speech, from a professional who wants to listen to children without, however, having a system that allows him to do so. This is not a local issue, but an expressive one of how slow the changes are and how classic forms tend to always return, making it difficult to abandon the old practices. The classic ways of understanding and dealing with issues related to childhood and children are maintained over time, even though the legal system, which formally supports the rights guarantee system, has advanced in the last three decades. As Rizzini, Rizzini, Naiff and Baptista (2007) teach, the process of changing paradigms occurs slowly, despite the emergence of new laws and guidelines for family and community policy. It is important, at this point, to understand how the cores of meaning permeate the subjects, maintaining in their understanding the strong minorist roots that, formally, already have, or should have, a reserved place in the past. Historically, in Brazil, children have never occupied, and still do not occupy, a social place of true respect for their rights. The current speech is strongly ingrained, and the subjects involved in making decisions that involve children are blinded to certainties that, at times, no longer fit. From conducting empirical research and analyzing the nuclei of meanings attributed by legal professionals regarding children in the judicial process, it was possible to see concretely what, in the abstract, was perceived: the existence of a great distance between the legal and social transitions of the place occupied by the child. Consequently, the research brought some answers and elucidated some questions: a) the reason they do not listen is not due to ignorance of the law, but due to the lack of mechanisms that require the hearing, of a system that allows it, and, also, due to the lack of articulation of knowledge. different shades or the absence of a technical team to do this; b) the hearing is necessary, but even so, they insist on reserving the child the place of the speechless; c) there is a clear and evident meaning that the child still occupies a disadvantaged and weakened position in Brazilian society, an understanding that is practically naturalized; d) there is not, in fact, an efficient and effective system, which excels for the child and the family, although there is provision in national and international legislation. It is impossible to ignore the fact that much has changed with the transition from minorist legislation to the doctrine of comprehensive protection. However, the perception that still prevails is that children whose lives are discussed in court are seldom or almost never given the right to speak, participate and express their opinions. In this way, a wide gap is widened between the provisions of the brazilian legal protectionsystem and the professional and institutional practices perpetrated by law operators and institutions responsible for observing the legal order.

DISCUSSION

Although delicate and contradictory, the theme and the conduct of the research are pressing and relevant. The theme because, in fact, children have had their lives discussed in court, occupying, in the judicial system, a place that is still uncertain and conflictive, a place of those without a place.

Conducting the research because the subject, although important, remains little explored academically, leaving not only the academic environment in need of new proposals regarding the hearing of children in court, but also the professionals who work with it or should act with it (since they are devoid of theoretical resources, new techniques and possibilities, without knowing how to understand, proceed and decide the issues that involve children). Only by the dialectical reading of the objects studied is it possible to analyze such complexity, since historical and dialectical materialism works with antitheses to produce a synthesis, exposing and countering the tensions between objective and subjective constitutions. In the search for reaching such complexity, it is necessary to face the contradictions, the tensions between objectivity and subjectivity, between particularity and universality, between the concrete and the abstract that dialectically constitute the subject and the world, in the search for the principle of totality, which Sawaia (2015) mentions. Therefore, this challenge can be faced through the choice of an interdisciplinary approach, which allows the articulation of the constructions of the sciences that are concerned with the study of the child, always in the light of the dialectic. In addition to interdisciplinarity as a form of academic achievement, it is believed that legal professionals need to borrow the constructions of other sciences, to expand their understandings, broaden their judgments, doubt their certainties, strengthen their techniques and improve themselves in the daily treatment of children who are introduced to them to know, give their opinion, process and judge. Without an interdisciplinary approach, what you see are frightened professionals, who are not sure how to understand childhood, in the abstract, and what to do with the child that appears to them to process and judge in concrete.

In this sense, once again, there is a need to advance. It is of utmost importance that legal professionals in charge of processing and deciding on cases dealing with children become aware that the Law and its postulates, alone, do not provide all the ways and answers. Just as Legal Psychology, alone, does not do so. There are, of course, distances and approximations between the Sciences. However, in addition to divisions, flaps, cuts and distances, approximations, convergences, interlocutions and dialogues that are necessary in the daily lives of those who study and work with children. The theme requires a dense articulation of understandings that work, in cooperation, for better outcomes, more humane, more affectionate and more dignified for the children and their families. It is imperative that we understand and comply, not in the future, but in the present, the status of subject of rights that children have, especially judicialized children, in order to stop the perpetration of injustices and to promote the dignity of their treatment. It is necessary to consider the enormous contingent of lawsuits that discuss the lives of children and are being processed in the family and childhood courts. It is relevant to recognize the pressing need to materialize, on practical-theoretical, professional and institutional levels, the legislation for the integral protection of children, which enshrines them as a subject of rights, and no longer an object, in force for over 30 years and so unknown to the daily life of the courts.

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