


On confession, repentance, and responsibility in the Uruguayan juvenile justice system

Sobre la confesión, el arrepentimiento y la responsabilidad en el sistema penal juvenil uruguayo

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Abstract

The article debates the notion of responsibility regarding the Judeo-Christian ideas of confession and repentance used by professionals of the Uruguayan juvenile justice system. The study follows a critical model of qualitative studies through an empirical and contextualized research process, based on discourse analysis of a sample of case files and interviews. Results show the coexistence of different theoretical-methodological conceptions among the technicians, in which parental blame for the adolescent offense prevails, search for responsibility for the act committed associated with confession and repentance, opposed to an attitude of patient listening of a person going through adolescence, promoting reflexivity without adult impositions. The conclusion is that, in an early secularized country like Uruguay, the conception of responsibility is used as a synonym of the religious idea of guilt, with its correlates of confession and repentance with consequences on the judicially imposed forms of punishment, perceived as expiatory of the adolescent infraction to penal law.

Keywords: Adolescent Offense; Responsibility; Repentance; Confession; Punishment.

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Resumen

Este artículo propone debatir la noción de responsabilidad respecto a las ideas judeocristianas de confesión y arrepentimiento utilizadas por los profesionales del sistema penal juvenil uruguayo. Se trata de un estudio cualitativo mediante un proceso de investigación empírico y contextualizado, sustentado en el análisis de discurso de una muestra de expedientes judiciales y de entrevistas. Los resultados muestran la coexistencia de distintas concepciones teórico-metodológicas entre los técnicos, en los que prima la culpabilización parental por la infracción adolescente, la búsqueda de la responsabilización por el acto cometido que se asocia a la confesión tanto como al arrepentimiento, en contraposición a un modelo que promueve la reflexividad sin imposiciones adultas y actitud de escucha paciente de los tiempos adolescentes. Se concluye que, en un país tempranamente secularizado como Uruguay, la concepción de responsabilidad es empleada como sinónimo de la idea religiosa de culpa, con sus correlatos de confesión y arrepentimiento con consecuencias sobre las formas de castigo judicialmente impuestas, percibidas como expiatorias de la infracción adolescente a la ley penal.

Palabras clave: Infracción adolescente; Responsabilidad; Arrepentimiento; Confesión; Castigo.

Introduction

This article proposes to consider the conceptualizations of expert practices under the influence of religious and moralizing conceptions, such as confession and repentance, in the Uruguayan juvenile justice system, enunciated under the concept of responsibility that the doctrine of integral protection introduced to replace the notion of guilt (Uruguay, 1990, 2004). The study is based on the persistence of the tutelary doctrine of poor childhood, which socio-historical studies on the origin of medicine revealed its premature association with law and morality, building strong alliances in the creation of the Criminal Code (Uruguay, 1933) and the Children's Code (Uruguay, 1933) (Uruguay, 1934). This was possible due to hygienist practices that had social work as an ally in the sanitary correction of workers and the poor people at the beginning of the 20th century, in a secularized country like Uruguay, where the origin of social service is not linked to the ecclesiastical tradition, but to the positivist currents that marked the process of medicalization and juridification of social life (Ortega, 2008).

The unity of the medical and the legal expresses, in Foucauldian genealogical language, a response to criminality that has «two faces»: an «expiatory» one and a «therapeutic» one that is no longer centered on health institutions but is dispersed in a network of institutions associated with the «diffuse idea of danger» (Foucault, 2000, p. 41). In this medical-legal dynamic, the judge modifies the conception of punishment by means of a therapeutic attribution in the discourse of social rehabilitation seeking the individual's reprogramming for social coexistence. Punishment is thus transmuted into «healing». The intention is to reform the individual, who becomes «treatable». The expert discourse allows, then, the transformation of the punitive action of the State into a series of technologies appropriate to the quest for the «transformation of individuals» (Foucault, 2000, p. 31). It is interesting to inquire about the idea of «redemption» of the offender that the theories of rehabilitation and resocialization bring with them as moralizing characteristics that continue to act, in an eternal return in which the rhetoric does not seem to be subject to modification.

Social and health practices reflect the old association between morality and law, instrumentalized through what Crewe (2011) calls «the power of the pen» which works as a «soft control» in contexts of confinement, using systems of rewards and punishments, made effective in the expert reports addressed to the criminal justice system. As Douglas (1996) suggests, institutions place a limit on the possibility of thought by introducing a set of expectations about the practices of their personnel and the rationalities at work within them. These limitations on action and thought create institutional cultures that are difficult for those who are part of them to avoid.

In order to contextualize the research, it is necessary to consider that the population in the Uruguayan juvenile criminal justice system is mainly composed of male adolescents between 14 and 18 years old, with socially undervalued ethnic-racial characteristics, made invisible by processes of spatial and residential segregation (Kessler; Dimarco, 2013) in the context of the selectivity of the juvenile justice system (Daroqui; López; García, 2012; García-Méndez; Vázquez-Giménez; Otero, 2019; Leal; Macedo, 2019), which does not operate in adolescents who practice other social transgressions protected by the family and society in a context of social class differentiation.

Methodology

This is a qualitative research (Denzin, 2018) conducted using an empirical and contextualized case study in the Uruguayan juvenile justice system in the period 2015-2019.

The empirical domain is based on documentary analysis and interviews. In the first case, a random sample of twenty-eight judicial files archived in the four Juvenile Court of Montevideo was selected, which were accessed by express authorization of the Supreme Court of Justice. The sample selection criterion considered cases with guilty verdicts, both in first and second instance. It should be pointed out that in Uruguay, specialized justice for adolescents is centralized in the four courts analyzed operating in Montevideo. In the countryside, the issue receives an indiscriminate institutional treatment from the adult criminal justice system.

To complete the data collection, seventeen interviews were conducted with technicians of the juvenile justice system in the judicial and socioeducational segments, developed in their areas of work insertion within the system.

Despite the legislative modifications that imposed the doctrine of comprehensive protection (Uruguay, 1990, 2004), only at the end of 2015 the separation of the institutionality that takes care of children in abandonment from the one that regulates transgressor adolescents took place in the country. After several changes, in 2016 it was decided that the *Instituto Nacional de Inclusión Social Adolescente* (Inisa - National Institute for Adolescent Social Inclusion), a decentralized agency under the Ministry of Social Development, would manage the compliance of judicial measures involving deprivation of liberty and under open system through the *Programa de Medidas Socioeducativas y Mediación* (Promesem - Socioeducational Measures and Mediation Program) or through agreements with civil society organizations.

Studies of the juvenile penal system in Uruguay indicate that, despite the conceptual changes that modified the irregular doctrine by means of the rhetoric of comprehensive protection of the rights of children and adolescents, it is not possible to recognize changes in professional or institutional practices in the country, where the reforms appeal to tried and failed resources, in which contradictions between protection and repression persist (González-Laurino; Leopold-Costáble, 2013).

The analysis of the documentary material and the interviews were developed based on Enrique Martín-Criado's (1991) sociological analysis of discourse, inserting discursive productions in symbolic frameworks that regulate the interpretation of meanings in their contexts of enunciation.

The research was approved by the Ethics Committee of the *Facultad de Psicología de la Universidad de la República* and had the corresponding authorizations to carry out the study in the institutions involved. The procedure follows the deontological requirements for the use of information, preserving the confidentiality, privacy and anonymity of the participants. The interviews were conducted with signed informed consent form, respecting the

autonomy and willingness of the participants to be included in the study (APA, 2017).

On confession and repentance as prolegomena to responsibility

As Carlos Uriarte (2013) points out, the notion of «guilt» is part of criminal law, procedural justice and of the juvenile criminal enforcement. Its replacement by the concept of «responsibility» is associated with the notion of progressive autonomy that no longer conceives minors as incapable, but as subjects of law, with the counterpart of having to assume responsibility for intentional crimes. Article 79 of the Code for Children and Adolescents (Uruguay, 2004) establishes the objectives of socioeducational measures «seeking the assumption of responsibility by the adolescent», a situation linked to the idea of education, related to the theories of rehabilitation or resocialization (Uriarte, 2013).

The commitment to juvenile criminal responsibility is associated with confession as a mitigating factor in juvenile justice proceedings. However, confession can also undermine the system of guarantees if it is not used as a prerogative of the adolescent in the judicial process.

The adolescent in the hearing has all the guarantees not to testify, to give a different version of the facts [...] or to confess [...]. In general, one perceives that both the prosecutor and the judge in their interrogation, although they announce their rights, [...] consider the confession as very important. The confession - at some point - was the mother of all evidence, but, over the years, technical elements and other types of evidence have been replacing it; that is, at least in theory. In practice, there is a lot of insistence on the adolescent's reflection when they say: «Well, if you confess, it is foreseen as a mitigating factor... ». (Public Defender of the Juvenile Court).

Thus, despite the legal establishment of «the presumption of innocence and the exoneration from declaring responsibility for the offending acts of which they are accused» (Uruguay, 2004), «in practice», in juvenile criminal proceedings, the concept of

confession and declaration of responsibility are imposed. In the framework of the protective system of comprehensive protection of the rights of children and adolescents (Uruguay, 1990; 2004), the judicial discourse that takes the confession, framed in the executive system, as if it had occurred in the judicial procedure, is worrisome.

It can happen that an adolescent doesn't confess, but confession is a mitigating factor that works in his favor and reduces the sentence, then he does it [during the precautionary measure]. The report will state that the juvenile reflected, and admitted his responsibility. This is considered as a confession at the time of sentencing. (Juvenile Judge).

In the judicial system and in the system of execution of measures, confession is intrinsically associated with «repentance», which is considered an achievement of both the adolescent and the acting technician. In the interviews, as well as in the reports that emerge from the sample of court files analyzed, the dilemma arises between the anguish generated by «repentance», which acts as a «mitigating factor», the «coldness» associated with the «lack of empathy», and the absence of confession acting as «aggravating factors».

I tell them. There are boys that I report the issue of repentance, the issue of the anguish it causes them. Others, completely cold, I also report it because it is also my responsibility, because I don't want them to go out and kill another person (Psychiatrist. Deprivation of liberty. Inisa).

You can work very well with them if you can achieve some kind of repentance. [...] There are many cases in which there is repentance - but because of the harm they did to the family, to themselves and their family - not because they are able to empathize with the other people. But, if there is a degree of empathy with their own family it is easier to work further (Psychologist. Promesem. Inisa).

There are some children with many psychopathic characteristics who really have no capacity for empathy, and never will. So, maybe you can appeal

to some mechanisms of their personality so that they can live in society: work, study, comply with social norms, but they cannot regret what happened. Maybe they cannot repeat what they did - if you give them rules to integrate socially - but you do not achieve repentance (Psychologist. Deprivation of liberty. Inisa).

The adolescent's coldness is reflected in the narration of the facts in court, minimizing them by not admitting participation in the offense, saying «I don't know anything» (Argument of the Public Prosecutor's Office in lodging an appeal against the decision of the Juvenile Court in the First Instance).

Yes, they are informed, and so is the educator. And in the cases in which they specifically do not leave the discourse of "I did not do it" - which also happens - obviously, we also inform the court (Psychologist. Promesem. Inisa).

The report states that the adolescent, suddenly, made a reflection, there is a repentance (or not) (Social Worker. Promesem. Inisa).

We work with empathy with the victim, in case there is one. Whether they assume the authorship or not... Because we have seen children who come and do not end up assuming the degree of participation (Social educator. Promesem. Inisa).

As mentioned above, the confession of Judeo-Christian origin (Foucault, 2006; Uriarte, 2013) is still today the paradigm that regulates juvenile criminal justice. It is about assuming responsibility for the acts, as the operators of the juvenile penal system say. This is the aim of the socioeducational measure imposed as a criminal sanction, arguing in accordance with national legislation (Uruguay, 1990, 2004).

Infringement and responsibility are what we work on [in] the first interview with the adolescent, the legal referent and the home visit. (Social Worker. Promesem. Inisa).

With regard to the word "responsibility", well, this is precisely what we work on with adolescents,

so that they can visualize the responsibility they have for their own actions and the consequences [for] third parties (Technical coordinator. Civil society organization).

The hypothesis linking the denial of the act charged to the extension of the deprivation of liberty is plausible, as well as its opposite, the greater the repentance, the greater the benefits of the legal institutions, and the greater the possibilities of substituting imprisonment for the compliance of the sentence employing a non-custodial measure. It is appropriate to consider the responsibility of the technicians and their opinions on the biography of this imputable subject. The moralizing reading is imposed on the process of reflexivity in the technicians who do not go beyond the phenomenal description of adolescent behavior, pointing out, in their reports, the inability of the subject to repent with severe consequences in the penal process and the imposition of punishment (González-Laurino, 2014).

Likewise, it emerges from the speeches the absence of a shared vision of what «working on responsibility» means, while at the same time recognizing the lack of protocolization in its approach, which appears to be left to the discretion of the officer or the personal mark of each worker.

In the team [...] there is a lot of talk about reflection on the offense [...] The measure is supposedly based on that, on the possibility that the adolescent comes here to reflect, to work, to go deeper into the offense. [...] It seems to me that it is based on the personality, the knowledge, the experience and the accumulation of each officer. There is no protocol; there is no consideration «well, we have to work on the offense in this or that way». That is good, because it appeals to the diversity of things. But it is also dangerous, because suddenly one can put a more moralistic question, of blaming, of taking responsibility; others can work from empathy, saying «we are peers, I work with good vibes», and this is not a good thing either. (Social educator. Promesem. Inisa).

As indicated in the report, the absence of protocolization seems to be positively valued in terms of the individual freedom and creativity that

would grant autonomy to the interventions. However, the problems of the absence of institutional regulation are pointed out: the risk of imposing a moralizing perspective on the intervention, which leads to culpability, as well as its opposite, the uncritical identification of the seduction and affability of the operators to gain the trust of the adolescent with whom they work without clear purposes, concrete objectives or specific methodology (Uriarte, 2013).

In the judicial files analyzed and in the reports of the officers interviewed, it is possible to identify arguments that place the emphasis on family responsibility as the background for the transgressive behaviors of their adolescent children. Apparently, the focus would not be exclusively on the actions of the youths, but on the responsibility of the adults – especially the mothers¹ – who are described as «negligent»; «incapable of setting limits», «of supervising their children in their educational or work tasks or in the interaction groups they attend», with severe statements in the technical reports printed in the judicial file² (Uriarte, 2006). Thus, the expert report classifies the adolescent as being at social risk based on the family's socioeconomic characteristics, the difficulties faced by the adolescents in integrating into the educational system, the neighborhood where they live, the friends they have, the activities they carry out and the interpersonal conflicts they showed in their short biography (González-Laurino, 2014). Therefore, what prosecutors and judges have before them in a judicial proceeding is not only a fact of transgression of the criminal law, but a subject in a situation of helplessness who is judged for the minor faults committed during the course of his life (Foucault, 2000). In the discourse of judicial technicians, the adolescent is a subject under «state protection» who would require provide protection against abandonment to prevent the

probable offense, an argumentative residue of the tutelary doctrine of poor childhood.

The bond with parental figures is poor both affectively and formatively. Psychological report (Center for deprivation of liberty. File of Juvenile Court, 1st Turn).

It should be clarified that this family is already known, given that a sister of the girl has already been hospitalized here and the mother of the girl presents some problems in terms of adequately setting limits to her daughter, which places her in a risky situation. (Social report. Assisted Freedom implemented by the State. File of Juvenile Court, 1st Turn).

The bond with the maternal figure is correct on the affective level, although lacking in the normative level. (Psychological report. Center of deprivation of liberty. File of Juvenile Court, 3rd Turn).

In general, the difficulties of the mother with her other children and of the parental figures in setting appropriate limits continue. The mother is not currently working. Two weeks ago she stopped working for a companion agency. (Report of non-compliance with probation. File of Juvenile Court, 3rd Turn).

In short, based on the above arguments, we consider that the adolescent has failed to comply with the socioeducational measure imposed, demonstrating irresponsibility on his part and on the part of his family (Social educator's report. File of Juvenile Court, 4th Turn).

The mother's difficulty in setting limits is notorious. (Social report. File of Juvenile Court, 4th Turn).

1 According to the studies of Karina Batthyány (2008), poor mothers are the main accused of the lack of care for children and adolescents, on whom falls the weight of the moralizing culpability of experts and the practices of state intervention.

2 As Uriarte pointed out in 2006, it is still possible to trace the tutelary conceptualization of abandonment and infringement of the 1934 Children's Code in the contemporary practices of social officers. "The *moral* neglect that prevailed in the Children's Code and made it possible to condemn the *addiction* and *idleness* of poverty, changed over the 20th century, remaining only discreetly — more or less deeply — hidden in *scientific* discourse. [...] These were filled with new meanings: abandonment was the lack of socialization, sometimes particularized in the lack of education and learning, sometimes in the family, sometimes with psychiatric features when talking about families that shows symptoms caused by an abandonment situation (*abandónicas*), as a general rule, usually resulted in internal problems of the *minors*, in deficiencies inherent to them and that could be treated independently of the social or family matrix in which they were generated" (2006, p. 23, underlined in original).

The young person finds himself on the street with a group without adult control. In this context, he begins to consume, to return home in the early hours of the morning, without adult control or activities that provide a framework for his daily life. The bond with the maternal figure is adequate in the affective aspect but lacking in the normative aspect. The bond with the father is poor and sporadic. (Psychological report. File of Juvenile Court, 4th Turn).

These expressions in the technical reports associated with the judicial files are reiterated in the interviews.

This is the problem, to say that the adolescents who committed an offense did not have the proper controls, either because some of their parents were deprived of their liberty, or because some of their parents are working and [that is why] they are alone for many hours, because the great majority of the adolescents we support dropped out of high school. [...] and there is no will on the part of the parents to try to keep them in school. [...] Then they start to have a lot of free time and get involved in the neighborhood with other adolescents who are in the same position. This can lead them to drug use which, sometimes, in excess, can harm them, start to go down a path of heavier consumption due to the lack of activities and then, at some point, they end up committing a crime (Public Defender. Juvenile Court).

The worst thing these adolescents have is their families; this is the reality. We are seeing adolescents whose mothers are addicted to cocaine paste and crack. So how can you work with a juvenile whose mother consumes, and he consumes? We are living a complicated reality. Or the grandmother is in jail because she sells drugs. What can you say to this kid? Don't use drugs? I am very pessimistic about what we are seeing. Maybe I am not good for any report because the truth is that there is a failure of the family; the family brings them problems, they bring them drugs, instead of bringing them tranquility. There are always exceptions, but the vast majority... (Psychiatrist. Deprivation of liberty. Inisa).

As it is possible to observe, these discourses refer to school dropout, psychoactive substance use and the absence of clear adult restrictions, appear both in the judicial sphere and in the execution of socioeducational measures, regardless of the institution to which the officer belongs, which seems not to consider the contexts of origin of these families that refer to generational processes of social disaffiliation.

On the other hand, although there are few records in this regard, in the accounts of some officials, there is a questioning of working with the concept of individual responsibility in the offense without association with the concept of social responsibility or co-responsibility. Uriarte (2013, p. 149) introduces the legal debate about the ways of «weighing criminal reproachability» in the face of «the unequal availability of behavioral alternatives» in situations of vulnerability and social exclusion, which does not constitute the conceptual position that prevails in the doctrine of contemporary law.

Nor can we forget that this adolescent has been subject to multiple lacks of rights, there has not been respected or granted, so this is a problematic point because this adolescent, who obviously committed a crime and infringed the rights of a third party, had his own rights systematically denied [...]. For the construction of citizenship, I understand that if you do not restore rights it is difficult to work on responsibility (Lawyer. Promesem. Inisa).

Likewise, there are isolated expressions by operators of the juvenile penal system questioning the imposition of work on responsibility at the adolescent stage.

From my position, I can say that responsibility and adolescence are two things that sometimes do not go hand in hand. In all cases, I would say; it applies to any adolescent. [...] I would say that the process of problematization has to do with thinking, thinking about oneself, before working with responsibility. If - a priori - we start talking about responsibility, I think we already set specific formal standards that put us in place more as someone who gives clues than as vehicles, as a catalyst for other things (Psychologist. Civil society organization).

It emerges from the interviews that some agents act in the promotion of critical awareness among adolescents by stimulating reflective thinking, pointing out that the assumption of responsibility is a costly exercise for adults, especially for adolescents.

In this sense, the interviewee warns that «we do not have the same time to achieve the same things» (Psychologist. Civil society organization), and the construction of the self as an autonomous, thinking and critical subject transcends possible reflective processes in the context, a socioeducational measure imposed by the judicial system. In these terms, the conceptualization of the process of internal elaboration required for the self-knowledge of which this officer of the system of execution of judicial measures – who seems to develop a different practice from the rest of the interviewees – refers to the last stage of Foucauldian thought as «construction of the self» and «care of self» developed in the years 1983-1984. (Foucault, 2009, 2010).

This finding leads to Eugenio Zaffaroni's (2011, p. 337) interpretation of the Lacanian theories that differentiated delinquency from pathology, indicating that the attribution of responsibility for one's own acts is a task proper to psychoanalytic practice, but cannot be transferred to criminal law. For this reason, it is necessary to be extremely careful when using the Foucauldian concept of *parrhesia*, as well as the psychoanalytic conception of self-constitution of the self via the practices of tell the true in the context of juvenile criminal justice, confusing criminal law with psychoanalysis in which the subject thinks of himself voluntarily without judicial imposition.

As already pointed out by Norbert Elias (1990) in his description of the self-constraints that the individual imposes on himself in the passage from childhood to adult socialization, the process of civilization requires a greater social moratorium as the social division of labor increases and social differentiation becomes more complex. According to Elias, this phenomenon constitutes the flipside of the popular argument that children mature faster in late modern societies. It seems the opposite, as Freud (1973) argued and Elias takes up, necessarily implies a longer waiting time for the adolescent to assume the pains generated by

impulse control and to internalize social coercions. This reasoning would also seem to be validated to support the necessary and costly process of psychic and social maturation in response to the demand for reflection on one's own actions during the adolescent stage.

Final considerations

As the specialized bibliography points out, neither incapacitating confinement nor resocializing treatment have produced the promised results, despite being tested in different times and geographical locations. However, although these forms of intervention in the juvenile penal issue have proven to be unsuccessful, they are still on the agenda of Uruguayan penal policy.

These adolescent lives deteriorated by poverty, territorial segmentation, social and police rejection require forms of understanding mediated by thought and words that, by enabling a reflection on themselves, allow them to visualize the restrictions they face from their social origin to lead a dignified, socially appreciated and recognized life. It is not possible to enable processes of change based on mistreatment or the imposition of rigorous routines, even if these have been loaded with good intentions of resocialization by means of proposals for the acquisition of habits of hygiene, work and study, as shown in the studies of the Uruguayan juvenile penal system (González-Laurino; Leopold-Costáble, 2013).

The findings of the research indicate that, with few exceptions of reflexivity production in expert practice, it is not possible to find in the analyzed discourses the conditions that generate attentive listening with self-knowledge objectives in adolescents criminally investigated, with the restrictions mentioned above to avoid confusion between psychoanalytic practices or Foucauldian *parrhesia* in interventions developed during the adolescent criminal process.

The novel conception of responsibility implemented by the doctrine of integral protection in Latin American countries, which is linked to the notions of confession and repentance for the offenses committed, deserves attention. Considering the iatrogenic nature of stigmatizing shame,

Maruna and Mann (2006) analyze the problems of guilt in punishment contexts. Similarly, Maruna and Copes (2004) point out the risks of depression in people with a tendency to take the blame for mistakes made, indicating that the propensity to assume one's own responsibilities is an ego-protection resource commonly used by the general population without pathological or criminal correlates.

It could be hypothesized that, in the Uruguayan case, where the State replaced the church in the period of early *Batllismo*, the secular question of positivist hygienism would have taken precedence over the religious question in a sort of secularization of Christian morality, transmuting the notion of guilt into the ideas of individual and family responsibility. However, what lies beneath the expert words would seem to be constitutive of a religious conception that implicitly carries the ideas of confession and repentance, whose reparation process is indissolubly managed by the intentional infliction of pain (Christie, 1988). The question about the responsibility of the specialists of the juvenile penal system in the different formulations of the judicial practices of punishment cannot be elucidated. It is also not possible to ignore the social responsibility in the lives of adolescents damaged in historical socioeconomic processes of exclusion, which does not seem to be considered in the judicial files, and which, with one exception recorded in the presentation of results, does not arise in the framework of the interviews.

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