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BRAZIL

**THE SOCIAL FOOD BANK
AND THE STATE’S DUTY TO THE CHILD
IN THE FACE OF THE NON-FULFILLMENT
OF CHILD SUPPORT EXECUTIONS**

Antonio Jorge PEREIRA JÚNIOR* and Kelly COELHO SILVA**

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Résumé

Les problèmes liés au non paiement des pensions alimentaires pour enfants sont aujourd’hui courants dans nos sociétés. Au Brésil, cela conduit à la nécessité de fournir des crédits alimentaires lorsque l’obligation alimentaire envers les enfants inscrite dans une décision de justice n’est pas exécutée par le débiteur. L’exécution (qui être certaine, exigible et exécutoire) est souvent entravée, même après une procédure judiciaire, laissant le créancier d’aliments en danger, sans avoir au moins le minimum nécessaire pour assurer la subsistance de l’enfant. C’est dans ce contexte que cette étude propose que l’État, à l’aide du Fonds pour les droits de l’enfant et de l’adolescent, crée une banque alimentaire sociale (BAS), compte tenu de la responsabilité constitutionnelle qui lui est attribuée, et qu’il protège ainsi l’enfant et l’adolescent de tout risque. La SFB paierait le montant indiqué dans la décision, se subrogeant ainsi dans les droits du créancier.

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La création d'une banque alimentaire sociale (BSF) s'avère d'autant plus viable qu'il existe déjà une structure organisée et pleinement opérationnelle. De plus, l'examen des différents éléments révèle l'extrême nécessité pour l'État d'assumer sa responsabilité envers les enfants et les jeunes lorsqu'il n'y a pas de versement d'aliments par les personnes qui y sont légalement tenues.

1. INTRODUCTION

In the Brazilian Federal Constitution, the duty of the family, society and the state with regard to children, adolescents and young people has been enshrined in Article 227. This ensures, with absolute priority, the right to life, health, food and education, among others. This is one of the foundations that underlines the entitlement to food. On the other hand, it is the duty of the eldest children to assist their elderly parents, according to Article 229 of the fundamental law. With respect to alimentary obligations, the Civil Code of 2002 extends this beyond the parents, also affecting relatives, spouses and companions. This provision is not, however, the object of this chapter.

Once a debt is legally established, the debtor of child support cannot fail to fulfil this obligation under penalty of seizure of his assets, according to Article 528, §8 of the Code of Civil Procedure (hereinafter CCP). He may also suffer civil arrest, according to Article 5, LXVII, following the procedure contained in Article 528 of the CCP.

Formally speaking, the child support debtor can be, at the same time, an active subject of the crime of material abandonment. This could occur continuously, if the lack of provision of the subsistence of food is unjustified. It would not be strictly necessary for the once-defaulting debtor to fail again with the duty to provide maintenance.

Civil imprisonment is therefore recognised as a form of coercion of the debtor, so as to encourage him or her to pay the owed support. Even if the food provider does not pay, he will be released when the set deadline expires. This also raises questions about its efficiency, bearing in mind that food is still not available for sustenance, even after exhausting the measures used to enforce the action.

The arrest of the active subject of the crime of material abandonment, as will be seen in the following lines, is punitive when the debtor also fits the crime described in Article 244 of the Criminal Code (hereinafter CC). In such cases, the debtor/defendant must then be arrested, not to pay his debt, but to fulfil the sentence given for the crime of material abandonment. In the definition of the crime, the Criminal Code extends the possibilities of who the offender may be. Unlike what happens in civil imprisonment of a debtor in default of child support, under Article 244 of the CC, defendants might also include the spouse, the father, the mother, the ascendant, or the descendant as well as the debtor of the child support.

In the praxis of the family court of Fortaleza, a city located in the northeastern region of Brazil, such criminal actions against support debtors are not taken frequently. Although the public prosecution service is mandatory in alimentary actions, typically it has not been offered against unexcused defaulters of food obligations. Thus, it is necessary to differentiate between the two figures – the child support debtor and the active defendant of the crime of material abandonment – in order to clarify their place and consequences, for a better result in terms of the child's right to food.

The purpose of the chapter was to clarify situations that are still unclear in the legal system regarding the possibility of recognising a child support debtor who deliberately fails to comply with the obligation as an active subject of the crime of material abandonment, while also presenting an alternative means for the provision of the food, in view of the priority of the child. It is also aimed, in a more specific way, from the perspective of contemporary constitutionalism and constitutional guarantees, to consider the factual situations other than the debtor who is *unable* to pay the child support payment and the debtor who voluntarily *decides to become a defaulter*. This is in order to establish fair criteria for making the debtor a criminal, as well as discussing the civil imprisonment and the criminal arrest of the child support debtor.

In order to reach the investigative goals of the present study, field, doctrinal and jurisprudential research was used in order to obtain a better perception of the facts, an understanding of the theoretical ideas and the scope of the practical measures applied by the magistrates, with the purpose of offering an understanding of how best to supply the need for food.

The third section of this chapter is aimed at analysing the state's responsibility towards the child and the adolescent, as described by the Federal Constitution in Articles 226 and 227, proposing a new use for the resources collected in the little-known Fund for the Rights of the Child and the Adolescent. The third section ends with the analysis of the possibility of replacing the state in the absence of food provision with those who have an immediate judicial duty, an opportunity in which the creation of a social food bank is suggested, in order to meet the need for the provision of food for those who, due to hunger, cannot wait. The state, therefore, in presenting the food to those who are in need, would subrogate itself in the position of the creditor of foods, to exercise as such when faced with the defaulter.

2. THE STATE'S RESPONSIBILITY TO THE CHILD AND THE ADOLESCENT ALIMENTARY CREDITOR: ARTICLES 226 AND 227 DA/88

The duty to provide basic support has a wide variety of meanings in the understanding of Brazilian law. It is considered a true obligation, and a legal

imposition, to include provisions to feed and to ensure subsistence, encompassing the values of not only the physical aspect but also the moral and social life of the individual who depends on them.¹

Since food is required to attain the principle of the dignity of the human person, the obligation to feed a dependent has a constitutional foundation established in Article 227 of the Brazilian Federal Constitution. Confirming its establishment in the Higher Law, one's first obligation is to the family, which, regardless of legal demands, has a moral duty to assist its members. With this fulfilment, the state, protected by solidarity among members of the family, establishes the obligation of reciprocal assistance, transforming the moral duty of the contribution to the family's support into a legal norm, as instructed by Silvio Rodrigues:²

The modern tendency is to impose on the State the obligation of helping the needy, a task that is carried out, or should be performed through its assistance activities. But, in order to relieve itself of this burden, or in the impossibility of complying with it, the State transfers it by legal determination to relatives, spouses, or companions of the needy, whenever they may attend to such an assignment.

In accordance with this understanding, the state discharges its duty to the child and the adolescent by transferring such a duty to the relatives specified by law. Thus, the absence of spontaneous provision by a relative is cause for filing a lawsuit for securing food and, when payment is not made and after judicial determination, gives the right to payment for food and to enforcement of any instalments owed, by the various methods already mentioned here.

However, it is necessary to think about what happens after, when this enforcement phase is over and the food obligation is not met, and thus it is suggested that there is a need to advance the state's duty to provide assistance to those who cannot otherwise provide their own subsistence.

This is because the understanding of complete protection emphasises the duty of everyone – family, society and the state – to respect the rights of children and adolescents, protected by all means necessary to prevent these rights from being threatened or infringed. Notably because minors do not have the means themselves, by reason of their minority, others must claim or defend such rights.³

In this sense, it is necessary that, after exhausting all the possible channels for providing food support to the family, according to constitutional provision

¹ ORLANDO GOMES, *Direito de família*, 11th edn., Forense, Rio de Janeiro 1999, p. 429.

² SILVIO RODRIGUES, *Direito civil 6 – direito de família*, 28th edn, Revised and current. Saraiva, São Paulo 2007, p. 373.

³ MURILO JOSÉ DIGIÁCOMO, *Estatuto da Criança e do Adolescente: direitos e deveres*. available at: <<http://www.crianca.mppr.mp.br/modules/conteudo/conteudo.php?conteudo=824>>, last accessed 04.11.2017.

the state must assume responsibility for feeding the needy child or adolescent. For this reason, there is a need for the creation of a social food bank (SFB), promoted by the Fund for the Rights of Child and Adolescents, so that the state can replace the debtor and remove the beneficiary from a risky situation. The state will pay only the food debt that is lacking, and subrogate itself to the rights of the creditor, all of which will be detailed later in this chapter.

Therefore, there is a need to describe the Fund for the Rights of Children and Adolescents, its management, resources and enforcement of child and adolescent care policies, in order to assess the possibility of allocating these resources to the suggested Social Food Bank.

2.1. REPLACEMENT BY THE STATE IN THE ABSENCE OF MAINTENANCE OF FEEDING

In order to achieve the aim of this work, the importance of the mechanisms of coercion that existed prior to the Civil Procedure Code of 2015 and those that came with the advent of this new procedural law, such as the imposition of credit restrictions on the defaulter, is reviewed. There is no denying that this is a time when credit is a strong presence in the life of every citizen, even for carrying out basic daily operations. Enforcement in many situations is still frustrated, not effecting the coercion expected upon the debtor, who may not feel obliged to pay the food debt. In such situations, the child and adolescent individuals, who are the beneficiaries of judicially ordered food support, are at risk because they do not have the necessary resources to provide for their own livelihood.

It is in this context that the effective and direct action of the state is urged, and this is its responsibility, especially when there are no material resources for the support of children and adolescents.⁴

This is not merely an indication or attribution of a new responsibility. In the case of children and adolescents, it is fundamental that the public authorities offer programs and services specifically designed for the guidance, assistance and social promotion of families, as part of a public policy aimed at guaranteeing the right to family life.⁵ This duty has a constitutional seat and is corroborated by federal legislation. The state generally provides for the child and the adolescent, as it does with national health care (SUS) and education (through public schools), with the exception being food, missing due to the non-compliance with the debtor's legal obligation.

⁴ In regard to this see Art. 23 of the Child and Adolescent Statute.

⁵ MURILO JOSÉ DIGIÁCOMO and ILDEARA DE AMORIM DIGIÁCOMO, *Estatuto da Criança e do Adolescente anotado e interpretado*, available at: <http://www.mpdft.mp.br/portal/pdf/unidades/promotorias/pdij/Legislacao%20e%20Jurisprudencia/ECA_comentado.pdf>, last accessed 16.11.2017.

At this point, it should be noted that sometimes, even in the face of the total fulfilment of the food obligation, the child and adolescent still lack what is necessary for their sustenance. This is because child support should also consider the possibility of what is required, which, given debtor resources, does not always meet the needs of the beneficiary. Some remain at risk of food shortage even with full compliance of court orders. Brazil generally provides for subsistence payments under Federal Law 10,836.⁶

The state has a duty to act in a direct way to reintegrate children and adolescents who are at risk, in a dignified context under the umbrella of subsidiarity. While both are at risk, the child and adolescent subject to court orders are given differential treatment, justifying the creation of a Social Food Bank to meet their most urgent needs.

This supposed substitution by the state, however, will respect the family's performance, without losing sight of the fact that responsibility for the child and the adolescent is not exclusive to the family, but rather to solidarity. Thus, as explained by Antonio Jorge Pereira Júnior:

The subsidiarity will be exercised in an extraordinary way when it is a matter of seriously interfering with the exercise or even the same title of exclusive or private competences of another entity.⁷

In this case, the state action is aimed at satisfying food credit in the absence of compliance by the debtor, even after the attempts of forced execution, has not been successful.

This is because the duty to prioritise absolutely the child and the adolescent is not exclusive to the family but is also the responsibility of the state. Nevertheless, it is incumbent upon the state to intervene to the extent that such intervention is necessary in accordance with the circumstances that justify it, while continually allowing the full development of intermediary societies, such as the family.⁸

The model suggested in this chapter resembles that as created in Portugal, where since 1998 there has been a food guarantee fund for minors, functioning

⁶ The Brazilian state has some political assistance programs to assist poor people who need food. This service is taken care of by an instance of the Public Power. There is a secretariat and laws to carry out this task. The most famous welfare program in Brazil is the so-called Family Support, to help families where per capita income is very low. It was launched as a unification of four other social programs in October 2003, then regulated by Federal Law 10,836, dated 9 January 2004. Its function is to transfer income to people living in poverty or extreme poverty, that is, those with a monthly income of up to R\$89 per person (\$23). In cases where there are pregnant women, children or adolescents in the family, the monthly income limit rises to R\$178 per member (\$46).

⁷ ANTONIO JORGE PEREIRA JUNIOR, *Poder familiar contemporâneo. O dever dos pais, da sociedade e do Estado em face da criança e do adolescente. O papel do conselho tutelar*, Boulesis Editora, 2016, p. 168.

⁸ ANTONIO JORGE PEREIRA JUNIOR, *Poder familiar contemporâneo*. above n. 7, p. 163.

when the person legally obliged to pay child support is not in a position to comply with their obligation, whereby the state assures the payment of the food, subrogating itself to the rights of the minor's creditor, at which time the execution begins in favour of the state.⁹ The same happened in Spain in 2007 by Royal Decree 1618/2007, called *Fondo de garantía del pago de alimentos*, which is intended to cover child support, established by agreement or judicial decision, owed to underage children.¹⁰

In addition to Portugal and Spain, a number of other countries have also been adept for a long time at the use of a fund or public aid in this respect such as Denmark (since 1888), Sweden (since 1937), Austria (since 1976) and Germany (since 1979).¹¹

As can be seen, the establishment of this type of public aid for the protection of children and adolescents is a measure that is possible and applicable, especially since it already operates in several countries. This exposes a true reflection of the state's duty, which is characteristic of the welfare state, and positions public authorities as the ultimate guarantee of the most basic needs of those who are on their territory, especially children and adolescents.

This method also fulfils the obligation to take necessary measures to ensure the reintegration of every child who is a victim of any form of abandonment, as provided by Article 39 of the Convention on the Rights of the Child (the Convention), ratified by Brazil, Spain, Portugal and another 100 countries.

With this in mind, it is perceived that the foreign legislatures have tried to comply with the Convention's mandate more effectively, using an alternative to the executions of frustrated attempts at providing food. In Brazil, the alternatives available to the food creditors are linked to civil expropriation and prison actions, established by the Code of Civil Procedure, which have not proved to be fully effective measures for the satisfaction of food credit. For this reason, it is suggested here that the creation of the SFB which, in spite of being similar to the foreign legislation exemplified in this chapter, counts on state action in a more limited way.

The example of the European countries mentioned here includes much more active state action than the one suggested here. This is because the legislation of these countries provides that the state, through the guaranteed fund for food owed to minors, pays the child benefit to children and adolescents, replacing any judicial obligation. In these countries, it is necessary to demonstrate that the debtor cannot afford the food. The payments preclude persons benefiting

⁹ SOCIAL SECURITY OF PORTUGAL, *Fundo de garantia de alimentos devidos a menores*, available at: <<http://www.seg-social.pt/fundo-de-garantia-de-alimentos-devidos-a-menores>>, last accessed 14.04.2019.

¹⁰ ALBERT AZAFRA MALO, *El fondo de garantía del pago de alimentos*, University of Chicago Law School, available at: <http://www.indret.com/pdf/584_es.pdf> last accessed 12.11. 2017.

¹¹ Ibid.

from other social programs and are paid until the creditor minor turns 18 years of age.

In the proposal presented in this chapter, the state's action is more directed, and will be given only for the discharge of unpaid food debt for the last three months. Thus, the state will not be responsible for child support, as this will remain the responsibility of the debtor. The state, through the SFB, will pay the family creditor the value of the debt, which will be limited, and cannot exceed a certain amount.

In the foreign model, the food creditor is required to file an action, postulating for the benefit, what is called a 'default incident', and the beneficiary must notify the state when the lien is satisfied. In the case of the proposal presented herein, the benefit will be requested in the records of the execution of maintenance, but only after attempts to satisfy the credit have been frustrated.

The aim is to remove the child and the adolescent from the situation of urgent risk imposed by the lack of payment of child support. The SFB will not be responsible for assuming the monthly payment of food, but only attends to the debt accrued over the last three months, and which does not burden the state too much. Neither will it generate a lawsuit, overcrowding the judicial machine, but making sure that the request will be made in the same case, as a stage after the frustrated execution. Of course, the need for feeding the child and the adolescent may extend for longer. In this case, the request would be reiterated in the same judicial process, with guaranteed renewal after due proof of its continued necessity. This second request would also be made in parallel with the registration of the food order in other social welfare programs of the state, so as to guarantee the use of the Social Bank of Foods for emergency situations.

Once the value has been received, the creditor can no longer demand from the debtor the credit received, and might even deduct any such payments from the active debt.

State responsibility for children and adolescents, constitutionally foreseen, reaches the proposed measure, revealing yet another facet of this responsibility, though without creating a new one. The state's responsibility for the realisation of the rights of the child and adolescent population is shown in a primary and solidarity order, namely by the express provision contained in the Statute of the Child and Adolescent.¹²

¹² Art. 100. In the application of the measures, pedagogical needs will be taken into account, with preference being given to those aimed at strengthening family and community ties. Single paragraph. They are also principles that govern the application of the measures: (Included by Law n° 12.010, of 2009): (...) III – primary and joint responsibility of the public power: the full realization of the rights granted to children and adolescents by this Law and by the Federal Constitution, except in the cases expressly excluded, is the primary and joint responsibility of the three (3) without prejudice to the municipalization of care and the possibility of implementing programs by non-governmental entities; IV – the best interest of the child and the adolescent: the intervention must give priority to the interests and rights of

It is now up to the state to act more effectively in the absence of the possibility of these families to take on the maintenance of a child and adolescent without the cooperation of those who are obliged, which is suggested to be done through the SFB, instigated by the Fund for the Rights of Children and Adolescents.

2.2. FROM THE SOCIAL FOOD BANK

The SFB would be a way of guaranteeing the payment of overdue food, due to minors residing in the national territory, in the amount of the execution, after the expiry of the enforceable measures. Thus, when the court-ordered debtor fails to pay the amounts, even after the execution procedures provided for in the Code of Civil Procedure, the state, through the Fund for the Rights of the Child and the Adolescent, will pay the amounts owed. The state will then be subrogated to all claims of the child support creditor, in order to guarantee the respective reimbursement, and it will be responsible for promoting the competent judicial enforcement.

The benefit would be used exclusively for the maintenance of legal expenses, due to the children and adolescents, with the purpose of ensuring the child's livelihood. It is also suggested that payment be made in money for precisely this reason.

The amount to be paid by the SFB could be in instalments, depending on the amount executed, whose percentage would be fixed by the Family Court in which the execution is processed, in individual cases, after attempts to satisfy food payments have been frustrated.

The instalments due and not paid by the debtor must be those referring to the last three months and before the dependent reaches the age of majority (18 years).

With a view to delimiting its scope, it is suggested that certain requirements be met in order to gain access to the SFB's support, which are suggested, for example, as follows: a) The food debtor must necessarily have the support payments judicially fixed, in accordance with Law 5,478/68 (Food Law); b) the debts of the judicially fixed support payments must be for the last three months and cannot exceed 'x' times a certain indexer that can be properly applied, such as Brazil's 'legal minimum wage' (\$250); c) the food debts have been the object of execution and the attempts to satisfy the credit have been exhausted; d) the minor and his or her legal representative must reside in the national territory.

These rules correspond to the participation of the state and establish the necessary budgetary moderation. In order to receive the support of the SFB,

the child and the adolescent, without prejudice to the consideration due to other legitimate interests within the scope of the plurality of interests present in the specific case; (...); VI – early intervention: the intervention of the competent authorities must be carried out as soon as the situation of danger is known.

it will only be necessary to file the incidental request after the exhaustion of the enforcement procedures, not to file a new action. What is idealised is the request being made by the caretaker party through its legal representative or the Public Prosecutor, who always acts in support enforcement actions within the Family Court.

When activating the need for access to the SFB, the judge will assess the fulfilment of the necessary requirements. After this analysis, when the request is granted, the release of the amount due will be allowed through the Fund for the Rights of the Child and Adolescent.

For the granting of the request, the judge may request the collaboration of other services and public or private entities to discover the needs and the socioeconomic situation of the food creditor and the guardian. This is an important measure to avoid the undue perception of the support of the SFB, since it is not uncommon in Brazil for people to evade or illicitly receive state aid that should be prioritised for poor people. This support will be given in money, to the guardian of the minor or the caretaker, residing under the same roof as the child food creditor.

The amount to be paid cannot exceed 'x' minimum wages, which, if it occurs, will be paid in instalments as a percentage on the amount owed to the creditor. Thus, if the debt ranges from '1x' minimum wage to '2x' minimum wages ($2 \times \$250$), the maximum amount plus the percentage of 'x percent' on the difference will be paid. This depends on the analysis of the child's specific needs and economic situation of the legal representative, always taking into account legislative changes.

The granting of an advance implies the subrogation of the state to the rights of the beneficiary child against any person responsible for child support up to the total amount of the debt paid. The amount to be reimbursed by the state will be considered as a public right and, as a consequence, its later collection will be made through administrative and judicial procedure.

The creditor shall waive the right to charge the debtor for the payment of any maintenance by the Fund. On the other hand, the creditor will not waive requests for amounts exceeding any maximum limit.

The exclusive concern is to provide children and adolescents with a minimum necessary for their subsistence. It is not the intention, under any circumstances, for the state alone to assume responsibility, which also belongs to the family. Neither is an overhead suggested to the current system, imposing yet another obligation on the state. What is sought is, finally, to remedy the complex consequences of the absence of family cooperation, that is to say, from the lack of compliance with the constitutionally provided duty of assistance.

In these terms, the entitled SFB would be a 'lifeline' for those who, after facing the difficult process of execution, remain without the satisfaction of their credit, and continue to be at risk from the lack of food provision. The SFB's action, at this time, is created with the noble purpose of removing the child and adolescent

population from these extreme situations, using its own fund as well as with an active structure and means to manage and administer the funds through the Fund for the Protection of Rights of the Child and Adolescent and the Councils on the Rights of Children and Adolescents.

As a consequence, at least in a minimal manner, the minors who are unassisted by their family would have the support of the state to provide their food, in a direct way, thus being able to execute the debtor with the means that best serve them, without compromising the life and physical integrity of those who suffer from the absence of the benefit.

3. CONCLUSION

The relevance and importance attached to the right to food in the country's legal system is undeniable, which is justified by the fact that, unlike other obligations, the food payment appears to ensure the survival of its creditor. Food is a priority of social interest, especially in respect to the guardianship and protection of the life of minors. The right to food has a constitutional grounding, considered, in this case, as a right of public order.

The food execution, as seen here, has interesting paths and has been expanded from the Code of Civil Procedure (CCP) of 2015. This recent CCP comprehensively carries the responsibility of giving greater efficiency and effectiveness to the enforcement process, counting on important modifications, namely the possibility of salary payroll deduction for food debts for the satisfaction of food credit.

Nor should it be denied that the new CCP makes very important enforceable associations for credit satisfaction, using coercive mechanisms, such as protest, progressing significantly towards the effectiveness of food benefits. The intention of the new decree was to force the jurisdictional provision to happen more quickly. However, such means of execution are not always effective, in that they have only the discomfort of the debtor in mind, maintaining the provision of food in the background.

Dealing with the problem of the inefficiency of the execution of food payment requires seeking methods beyond the purely civil issue, and there are other issues related to the subject that must be pursued. These include the possible configuration of a crime of material abandonment and the effective payment of the benefit through the state, ultimately responsible for the child and adolescent with the highest priority.

There is a need to question the differences (or similarities) between the child support debtor and the active subject of the crime of material abandonment, to clarify and establish the limitations for the configuration of the criminal type, in order not to confuse a debtor with a criminal, as well as to identify when one is faced with a situation that effectively demonstrates criminality.

Despite the difference between civil and criminal imprisonment, and the fact that they are important tools, both may be ineffective in practice. Criminal penalties may restrict the debtor's rights but do not result in gain to the maintenance creditor. The civil prison cannot keep the debtor incarcerated, even if the debtor does not pay. Despite the forms of coercion that are available, from the least incisive to the most serious one, it is noticed that sometimes the debtor, however, does not necessarily make the payment, which exposes the minor to a situation of serious risk, without regard for his or her livelihood.

In this scenario, it is seen that the state, acting in a responsible manner, must act directly for the immediate withdrawal of these children and adolescents from the situation of risk.

In looking for answers to the questions pursued since the beginning of this chapter, the legislature must safeguard the rights of the child and the adolescent, spontaneously observed in the family. However, it is clear that there was no failure to attribute to the state the duty to act, in the absence of the parents, for whatever reason.

It must be observed which fundamental right has been harmed and in relation to which this will be compared, so that one can choose which is the most important in that particular situation, which will be considered in the execution phase. After that, it is necessary to analyse, necessarily, the incidence or not of Criminal Law, a moment from which the possibility of more direct action of the state will be considered.

In regard to the maintenance debtor becoming a criminal, a priori, it is understood that proportionality must reign supreme, especially since the recognition of the debated crime should not be exaggerated, and it is always necessary to see Criminal Law as *ultima ratio*, carefully analysing each specific situation.

Excessive strictness can lead to distortions, especially in respect to the recognition of the crime of material abandonment, which under any hypothesis should not neglect the food creditor who, especially while he is under 18 years of age, has the especial constitutional protection of their rights.

Finally, it is understood that in order to gauge, minimally, which right should prevail in each specific case, it is necessary to weigh up the options. That is, before deciding to recognise the conviction for the crime defined in Article 244, to verify not only the absence of payment, but also the reasons for this absence and the implications regarding the child.

Therefore, after discussions about whether or not there is a crime, and after what is considered to be a necessary analysis, overcoming the issues related to the means of execution and the coercive methods used for the constraint of payment, it is suggested that access to the SFB is required in order to remove the children and adolescents from the extreme risk to which they are exposed, fulfilling the role as the responsible entity for the obligation to the child and adolescent population, without compromising their right to life.