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Early childhood education as a right: a dimension of materialization of policies for children

A educação infantil como direito: uma dimensão da materialização das políticas para a infância

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Abstract

This article discusses childhood education as a legal right, by defending it as a result of historical struggles in which the legal guarantee does not mean the achievement of those. We realized an analysis of the legal frame work that supports early childhood education, the 1988 Brazilian Federal Constitution, Statute of Children and Adolescents and the Law of Guidelines and Bases of National Education and concluded

that, it is a social and political struggle and not just legal-juridical despite considerable progress, much remains to be done for early childhood education to materialize.

Keywords: Childhood education. Right. Educational policy.

Resumo

O presente artigo discute a educação infantil como direito, defendendo-a como resultado de lutas históricas, embates, correlação de forças, em que a garantia legal não significa a efetivação destes. Realizamos uma análise dos documentos nacionais que reconhecem a educação infantil como direito que são: a Constituição Federal de 1988, o Estatuto da Criança e do Adolescente e a Lei de Diretrizes e Bases da Educação Nacional, conclui-se que se trata de um embate social e político e não apenas jurídico-legal e, apesar de avanços consideráveis, muito há que ser feito para que a educação da primeira infância se materialize.

Palavras-chave: Educação infantil. Direito. Política educacional.

Defending the child education as a legal right means, in the present text, to understand it as a social phenomenon, result of historical struggles and pressures of the work class, which involves contradictory processes since the legal guarantee does not mean, necessarily, the effectiveness of these rights. For neither being something given, according to what the Universal Declaration of the Human Rights defines, nor naturally inherent to the subjects, it results in social disputes from the great tensions manage to establish those demands.

The generalization of the political rights is the result of the worker class struggle and, if it could not manage to institute a new social order, it contributed mainly to widen the social rights in order to intend and change the role of the State in the scope of the capitalism from the end of the nineteenth century and beginning of the twentieth century (BEHRING; BOSCHETTI, 2008, p. 64).

According to Abreu (2008), there is a tendency in learning the citizenship as a “way of pertaining and of participation in the existing order [...], from the rights and duties of the individuals before the present juridical superstructure”. This form that sends to the common sense, the theories of rights and social thought prevailing, empty the disputes of the historical subjects that, in search for breaking off with the processes of social jettison in which they meet, they build new ways of social and political participation.

The discussion about rights is usually achieved in the perspective of the citizenship theory of T. H. Marshall¹ (1967), which through that it establishes three dimensions of rights below enumerated:

- 1) The civil element about rights is composed of necessary rights to the individual freedom – freedom of going and coming, freedom of the press, thought and faith, right to the possession and to conclude valid contracts and right to justice. For it, the justice courts are the institutions that are more closely associated with the civil rights – established in the eighteenth century, being democratic and universal character originating naturally the status of freedom: “When the freedom becomes universal, the citizenship changed from a local institution to a national one” (MARSHALL, 1967, p. 69).
- 2) The political element that is understood as the right of participating in the exercise of the political power as a member of a coated organism of the political austerly or a voter of the members of such organism. The correspondent institutions are the parliament and the counsels of the local government. They appears in the beginning of the nineteenth century, according to Marshall (1967) when the civil rights linked to the status of freedom had already generalized in such a way that could receive “general status of citizenship. And, when it begins, it consisted not of the creation of

¹ His is considered by Abreu (2008, p. 303), as entailed the “economic, juridical and political of the liberalism, that conceives the individual as ‘naturally free’ and rationally capable of working and appropriating privately of the nature and of the values socially produced”; and by Barbalet (1989, p. 162), as having “very little to tell about the role of the conflict of class or the conflict of social movement in the expansion of the citizenship”.

the new rights to enrich the status already enjoyed by everybody, but in the donation of old rights and new sectors of the population” (MARSHALL, 1967, p. 69). The right to vote inserts in this moment, it was already a monopoly of the owners.

- 3) The social element refers to everything that goes since the right to a minimum of economic well-being and security of rights of participating completely in the social heritage and living the life of a civilized being according to the standards that prevail in society. The institutions more closely linked are the educational system and the social services. In the intertwine with political rights constitute the social rights between the nineteenth and twentieth centuries, having as an original source the “participation of the local communities and functional associations, besides the Poor Law” (MARSHALL, 1967, p. 70).

The concept of status employed by Marshall — formulation considered by several as original — qualifies and measures the pertaining and participation of the individual in a society. According to Abreu (2008, p. 278), the citizenship in the marshalliana perspective is considered “status of equality, extensive to all individuals in a society divided into classes and with several other forms of inequality”:

There is a species of basic human equality associated with the concept of integral participation in the community, - or as I would say of citizenship – which is not inconsistent with the inequalities that differ the several economic levels in society. In other words, the inequality of the system of classes can be accepted since the equality of the citizenship be recognized (MARSHALL, 1967, p. 62).

In other words, for the author, the inequality of classes is understanding, acceptable as long as the civil, political and social rights of citizenship – be guaranteed. For Abreu (2008, p. 282-283) the citizenship in Marshall means “it overlaps the inequalities of the ‘society of market’, the social and economic division of the societies in classes [...] and his worry resides in the establishment and legitimation of the society of classes from the dominant social order”.

In this unequal society there would be a “status of citizenship” that Marshall conceives as “status of equality” extending to everybody while individuals legally recognized and with similar opportunities.

The term *status* was originally used by the ancient Romans to designate a situation (a state) that involves the life of a person or even of people (*populous* or *civitas*). It was a term narrowly linked to the idea of destiny (auspices of the gods or *augur*) and the qualities of acting as men or people (that the Romans called of coming). From that combination between *augur* and *coming* constituted the *status* of men or a people. The good auspices of the gods allowed the fortune, but only the men and the endowed people of coming could reach the *status* of *luxus*, that is, material and spiritual greatness (ABREU, 2008, p. 279).

According to Abreu (2008, p. 279), when the Christian became the official religion of Rome, *augur* comes to be incorporated as a divine grace and coming as an “unequal nature graciously inherited by men — ideas that combined to legitimate the imperium and the seigniorial power as a neutral and divine virtue”. In the modern, capitalist society, another meaning is attributed to the status, that passes to be interpreted as a life style, position that the individuals occupy in society. That concept, Weberian according to Abreu (2008), is incorporated by Marshall to his theory of citizenship.

According to Barbalet (1989, p. 165), “the Marshall’s contribution to the theory of citizenship is the fact that he puts the conventional issue of participation of the political community in a main context of the institutions and the social processes”. Therefore, despite the reviews³ to the limitations of his approach, we cannot deny the importance of his production.

The social rights are materialized through the social policies. However, the processes of the constitution and materialization of the policies are not continuous, after all there is still a “*distance between intention and gesture*”.

Such as the case of the civil and political rights, but in a way still more intense, what it is had as a fundamental task in what it refers to the social

rights is not, many times, the simple legal-positive recognition of them, but the struggle to turn them into effective. The presence of such rights in the Constitutions, its legal recognition, does not guarantee automatically the effective materialization of them (COUTINHO, 2008, p. 64-65).

Turning effective the rights solely declared both in the discourse of the United Nations as national laws as the Statute of Children and Adolescent (ECA), that will be discussed further, it is a political and social challenge, in spite of 22 years of existence, there are still constraints in the guarantee of the right.

The Universal Declaration of the Human Rights in its article 1 states that: "All people are born free and equal in dignity and rights. They are plenty of reason and consciousness and must act with each other with the fraternity spirit". The referred declaration has been receiving lots of criticisms in what it refers to the "legalist-formal character and, in the last resource, without contents" (MÉSZÁROS, 1993, p. 205). The author calls attention to the formal character of the human rights, that since Hobbes, passing by Locke and even Rousseau, "the most radical of the predecessors of Marx", do not conceive the rights out of the right to the private property that ensures the domain of the bourgeoisie.

The human rights of 'liberty', 'fraternity' and 'equality' are therefore problematic according to Marx, not only by themselves, but in relation with the context in which they originate, while postulated abstract ideals and not achievable, opposed to the reality disconcerting of the society of egoistic individuals (MÉSZÁROS, 1993, p. 207).

The defense of the ownership as inalienable to man, in a society where some retain the possession of the land, whereas the majority is rid of this possession, it changes men into abstractly equal — only by the power of the law. However, this concept of right with something natural has in a determined moment of the history the fundamental importance, since the current idea was that these were entailed the possession of land, "as far as it was stated the individual freedom against the despotic pretensions of the Absolutism and in which it was denied the inequality of

the rights sanctioned by the hierarchic and establishment organization peculiar of the Feudalism” (COUTINHO, 2008, p. 53).

Beyond this context, the conception of the rights as acknowledged as something natural disregards the historical fights and pressures of the worker class in the construction of the demand that generate/could generate those rights. “The rights have always their first expression in a way of expectations of right, that is, of demands that are formulated in a given historic moment by the classes or social groups” (COUTINHO, 2008, p. 54).

The feminist fights of the 1970s² and the claim for day care are good examples of this movement of formulation of demands that generate guarantees of rights (less in legal terms). The historical character of the right to the child education explains what was materialized in the following decades is the result of this collective effort.

The historical struggle for the rights of the children

The childhood and its education got, at the end of the 20th century, social and political evidence, be in the academic discussions, or in the national or international forums of policy decisions. The search for the universalization of the right to the child education, commanded for social struggles of the feminist, political and popular movements, have been put in list, the emergency of this guarantee and at the same type obtained considerable efforts. And, in this scenario, two decades in special marked the happenings related to the children’s rights: the decades of the 1980 and 1990.

The 1980s is a mark in the discussion of the social policies for its configuration as a period of neoliberal triumph on one hand and on the

² In the 1970s with the reaction of the Military Coup of 1964, it appears in Brazil several organizations in the civil society. The women participate actively through the mother’s groups, associations of districts, among others. From 1975, in which UN proclaims the International Year of the Woman, several feminist organizations emerge, although they diverged in relation to the words of order of the feminist movement — women’s movement and/or feminist movement, converge in the claiming for day cares (ROSEMBERG, 1984).

other, the organization of the civil society. In the so called “lost decade”, besides the fall of the Military Dictatorship, occurred the strengthening of the popular organizations, including with the creation of the union centers, revealing the capacity of the society to react the neoliberal attacks.

This contradiction is very well represented in the capitalist scenario by the figures of Ronald Reagan, in the United States, and Margareth Thatcher, in England, which started a new format of the advanced capitalism, the neoliberalism, consolidated by Bóron (1999, p. 8-12), with success effective, much more “ideological and cultural than economic”, in four dimensions: (1) Rights and prerogatives conquered by the popular classes, transformed into in merchandises to be acquired in a relation between provider and buyer; (2) Satanization of the State as a responsible for the whole badness and exaltation of the market virtues; (3) Construction of the “unique thought” with a wide support and direction of the mass media; (4) Convincing of the capitalism as a unique alternative viable.

In the scenario of the social movements, the struggles against the military dictatorship, the mobilization of the forces with the inclusion of the worker and popular movement and the widespread debates promoted in the sense of the democracy construction interfered in the political agenda.

And listed some axes in the Constitution, the example of reaffirmation of the democratic freedoms; impugnation of the colossal inequality and affirmation of the social rights; reaffirmation of a national willingness and the sovereignty with rejection of interventions of the IMF; worker rights; and agrarian reform (BEHRING; BOSCHETTI, 2008, p. 141).

The 1988 Brazilian Federal Constitution reflected this correlation of forces, contemplating progresses in some social rights, among them, the children and adolescent rights to education, protection, priority (which will be discussed later). But Constitution kept conservative in some others like the legal guarantee of the participation of the private sector in the State actions, the defeat of the amendments of the agrarian reform among others, in a “species of hybrid between the old and the new”, as a tendency of the Brazilian political practices since a long time (BEHRING; BOSCHETTI, 2008).

The 1980s ended, in the worldwide context, with a phenomenon of fall of the Communism in the East Germany and the Soviet Union, representing a victory of the capitalism; for Anderson (1995, p. 18), not “of any capitalism, but the specified type led and symbolized by Reagan and Thatcher”. In Brazil, the 1980s ended with the presidential elections — first time a direct form — in which two distinct projects represented by the candidatures of Luis Inácio Lula da Silva and Fernando Collor de Mello, respectively, representative of workers and elites, winning the candidate of the second group, in a neat expression of what came in the following decade.

Collor’s winning — and his short mandate³ — in the 1990s started a process of neoliberal reforms — sequenced with diligence by Fernando Henrique Cardoso (FHC) — marked by the State dilapidation, redirecting by the market, with several privatizations, besides the attacks to the social conquests in the last decade, above all guaranteed in the Constitution which has been considered overdue and mistaken, for stated “corporative privileges and incompatible patrimony with ethos bureaucratic” in the assertion of the intellectual and minister of reform of the State, Bresser Pereira (1998, p. 248).

This process of reforms of the Brazilian State was in consonance with the movement that was occurring in the international scenario, and was an attempt of “placing Brazil in the first world” (discourse widely diffused by FHC and his partisans). But, in order to occur it, the country would need to adjust in the neoliberal prescription with policies of cuts of social expenditures, fiscal reforms, confronting with unions, precariousness of the relations of work with the responsibility of the State by the crisis faced. In this process of political, economic and cultural adjustment to the exigencies of the global market, the social policies were strictly stricken, among those the education policies.

³ Fernando Collor de Mello, “The Hunter of Maharajas”, was elected president in the second term of the 1989 election, assuming in March 15, 1990, surging from the time denounces of his involvement in a big net of corruption, ending with his resignation in 1992, in an attempt of impeding his cassation

For a better explicitness of the meaning of these two decades, in the perspective of the present study, opted to achieve an analysis of the main legal documents elaborated for the infancy and its education which are: the 1988 Brazilian Federal Constitution; the Statute of the Children and Adolescents (ECA), and the Law of Directives and Bases of National Education (LDBEN 9394/96). Those documents revealed to be valuable for being considered the period in question, for constituting with confronted results, disputes of projects and historical conquests.

The 1988 Brazilian Federal Constitution: a legal mark of the conception change about infancy and its rights

The historical politics of the country marks the importance of the end of the 1980s when it was promulgated the 1988 Federal Constitution, law that also granted to the infancy the statute of the category of rights. The Constitutional process – period of elaboration of the referred Constitution – was marked by wide debate, arguments, in which the correlation of forces was made present, defining what would be in the Magna Carta, which rights would be assured by it.

The 1988 Brazilian Federal Constitution is the first to treat education more detailed as it were a fundamental right stating that

The social rights to education, health, food, work, accommodation, entertainment, social security, protection to maternity and infancy, assistance to the abandoned in the form of this Constitution (BRASIL, 1988).

This article establishes the recognition of the education as a social right which can better visualized in the Article 205 which defines “the education, right of everybody and a State and family duty will be promoted and stimulated with the collaboration of the society, aiming the full development of the individual, his preparation for the citizenship exercise and his qualification to work” (BRASIL, 1988).

In the Magna Carta, the child also appears the first time as a subject of rights according to what is defined in the Article 227.

It is family's, society's and State's duty to assure children and adolescents **with absolute priority**, the right to life, food, **education**, entertainment, professionalization, culture, dignity, respect, freedom, familiar and community convivial, besides providing them every free form of negligence, discrimination, exploration, violence cruelty and oppression (BRASIL, 1988, our bold types).

This article recommends that the child, with absolute priority, has its rights assured, defining that the families, institutions of attendance or others do not act in a disrespectful, negligent, discriminatory way. However, we believe that the organization of the legal text sets an order of responsible people for the children's rights, beginning with the family and inserting later the State, in a strict sense the public power. Such order by itself does not qualify the responsibilities, but looking at the text of the guided reforms by the neoliberal conceptions, it insinuates the responsibility of the State and of the minimum way and posteriori to the action of the family and/or society.

The Magna Carta still assures in its Article 208 that:

The State duty with education will be effective by means of the guarantee of:

I – Compulsory basic education and free from the age four to seventeen, assuring including its free offer to all that do not have access to it in the given age;

[...]

IV – Children's education, in a day care and pre-school, to children up to five years (BRASIL, 1998).

Children and Adolescents' Statutes: rupture with logical of the minor

The Children and Adolescents Statute (ECA) — Law 8.069/90 — was promulgated in July 13, 1990 in a context of a wide fight between the

conservative aligned to the 1979 Minor Code and the social movements that fought for the infancy's condition as subject to rights.

The ECA "revokes the 1979 Minor Code and the law of the creation of the FUNABEM, bringing children and adolescents rights already in general guidelines form for a policy in this area" (FALEIROS, 2009, p. 81); it is constituted of two books. The book I that deals with the general part and, according to Fajardo (2002, p. 53-54), "it is a declaration of the children and adolescents rights, detailing the article 227 of the Federal Constitution". The book II that deals with the special part "is composed of mechanisms of the viability of those rights, that is, of its guarantees" (IDEM).

According to Bazilio (2003), the logic that permeates the ECA is non-judiciousness of the issues referred to the childhood, that is, to reduce the "role and the interference of the Judiciary Power that with the Minor Code of 1979⁴, has increased its intervention and power" (BAZÍLIO 2003, p. 24), in the sense of the actions which were before the Judge's competence⁵ comes to be conducted in the space of the guardianship counsels.

It is considered that the children for effect of this Law, the person up to the age of 12 incomplete and adolescents who are between 12 and between 18 years old (BRASIL, 1990).

The 2nd Article, that has as a base the Convention about the Children's rights⁶ and distinguishes the age they are considered children and adolescents (SOLARI, 1992), has been caused a big social disagreement, so the penal imputability determines until 18 years is refuted, criticized, fought by most part of the conservative society that has the media as its main spokesman.

⁴ Before the ECA, two codes regulated the action of the state referred to the Childhood: Code of Minors of 1927 and Code of Minors of 1979, legislation that understands the poor childhood, mainly, as a category in "irregular situation". This concept justified and still defended the discriminatory logic of the "poor child = infringer minor", conception still well present in our days

⁵ The protective measures in the Article 101 like: forwarding for the parents or guardians; obliged inscription and frequency at the school; orientation, support and follow-up among other measures.

⁶ For the effect of this current Convention, it is considered that as a child all human beings under eighteen years old unless in accordance with the law applied to the child, the full age be reached before" (BRASIL, Article 1, Decree n. 99.710, November 21, 1990).

For Faleiros (2009), ECA incorporates the doctrine of integral protection, treating the children and adolescents as subjects of rights, priorities as citizenships of all rights and beings in development.

The children and adolescents enjoy of all fundamental rights inherent to the human person, without harm of the integral protection of what this law treats, assuring them by law or by other ways all the opportunities and facilities to grant them the physical, mental, moral, spiritual and social development, in conditions of freedom and dignity (BRASIL, 1990, our bold type).

The 3rd Article deals with the fundamental rights is susceptible of criticism, for it attributed to the enjoyment of the rights as something inherent to the universal human person as it existed a human essence above the fights and history. This conception of rights is very well defended in the liberal logic in which the discourse of freedom and equality imposes as a “spontaneous product of civilization” (ARCE, 2001, p. 253).

The ECA can be analyzed having the Article 227 of the Brazilian Federal Constitution as a parameter of identity of this neoliberal conception of guarantees of rights in accordance with previously discussed; for Füllgraf (2001, p. 40), it reveals “the ideological positions in relation with the education when it dominates in the legal text the inversion of roles harmonized with the liberal discourse”.

The child and adolescent have the right to the education, aiming the plenty development of their person, preparing for the exercise of citizenship and qualification for the work [...] (BRASIL, 1990).

The logic of education as a guarantee of access to the work world is an axiom of the capitalism. So, the more investment in the human capital⁷ — poor — the more chances of these individuals ascend socially,

⁷ The theory of capital “postulates a linear link between development and social inequality overcoming by means of the qualification because it would lead to an increased productivity” (FRIGOTTO, 1984, p. 19)

disrupting with the condition in which they live. That defense disregards the changes in the world of work, considering “natural” the access of these future young people in the precariousness and subcontract.

This article proposes a valuable change in politics for the infancy education, so it establishes as a State’s duty assures institutional spaces to the children between 0 and 6 years old. However, it is one of the biggest challenges for who militates in the defense field of the infancy rights, so the reality still does not contemplate the totality of children and it is still big the difference between children from this group of age and the other groups⁸ of age that attend educational institutions. These are data of Instituto Brasileiro de Geografia e Estatística (IBGE) (2008) which point to only 44.5% of them are enrolled (the Institute, inclusive calls attention to the Law 11.274⁹, that according to them has engrossed the statistics).

For Fajardo (2002), the ECA expresses in its content some conceptual ambiguities, which bring consequences to the interpretation e implementation that not invalidate the law, but it calls the attention to the possibilities of the use of it. So, for Bazílio (2003), it can be considered the ECA as a breakthrough for not treating of a legal text elaborated by experts, but it is still distant from what was thought of by the social movements.

The Law of Directives and Bases of National Education: children’s education as the first step of the basic education

The Law of Directives and Bases of National Education (LDBEN 9394/96) was promulgated in 1996, after fights between different forces that reaffirmed how diversified and divergent can be the interests for the education.

⁸ “It alters the text of the articles 29, 30, 32 and 87 of the Law n° 9.394, of December 20, 1996, that establishes the guidelines and bases of the national education, disposing about the lasting of 9 (nine) years for the fundamental teaching, with compulsory enrollment from the age of 6 (six) years old”.

⁹ Cf. MACHADO (1991); SOUZA; KRAMER, (1991).

After alternations of reporters and the course of the bill was promulgated in December 17, 1996, disregarding a lot of discussions achieved by the several democratic and popular sectors, revealing harmony with the neoliberal project now in expansion.

According to Cury (1988), to guarantee the “free attendance in day cares and pre-schools, the children from 0 to 6 years old” (BRASIL, 1996) as a State duty with public school education has a significance of rupture (not absolute for the author) with the logic of protection and assistance in the attendance to children.

The children education, the first step to the basic education, have as an aim the integral development of children up to six years old, in their physical, psychological, intellectual and social aspects, complementing the action of the family and community (BRASIL, 1996).

This article stresses the necessity of considering the children as an integral individual in which a binomial care-educate be inseparable. It is because, historically, there was a break between these two moments of the same work. This article also calls attention to the necessity of the formation of the professionals that will act with children, that will not be discussed in this text by us.

The children education will be offered in: Day cares, or equivalent entities for children up to three years old. Pre-schools for children from four to six years old (BRASIL, 1996, Article 30).

To define the structure of the children education, establishing where it begins and where it ends, it can be considered a breakthrough, for it breaks with a historical tendency of conceptualizing that level of teaching is under the power of the fundamental teaching. Several studies of the 1980s denounce the risk of that understanding. Nevertheless, in spite of this breakthrough, there is an ambiguity in the term of pre-school, for according to the cited studies; there is an implicit idea of what is not still a school, keeping it up to now dependent on this equivoque.

The day cares and existing pre-schools or the ones that may be created should, in a period of three years, from the publication of his Law, be integrated to the respective system of teaching (BRASIL, 1996).

This is the consecration of the children education as a step of basic education, for it transfers to the day cares the system of social assistance for the educational system. That change means rupture with the conception of this level that is only a space of assistance, guard and guardianship, placing in evidence the necessity of educational attendance to the part of the population that uses it.

However, according to Füllgraf (2001), there is a paradox, for at the same type in which it consecrates the day care as an element of basic education, it does not specify the form of financing for it occurs. This omission allows the existence of community/philanthropic) day cares, that according to the author results of the precepts of the international organisms in which non-formal spaces for which the alternative attendance to the small children, with the participation of the community stimulated by the State, is something desirable and stimulated.

Final considerations

The issue of the citizenship of the children and adolescents is a social and political fight and not a juridical-legal one. The capitalist State configures itself contradictory, but in a structure way it registers itself as a condensation of forces with hegemony of the bourgeois-industrial-agrarian export block. These conservative forces domain the Parliament and have hegemony in the Executive. In a process of counter-hegemony, Guardianship Counsels were implanted even precarious, the access to education, even without inadequate quality, and the system of guarantee of rights even fragmented.

The movement of the children and adolescents' rights try to put in the public agenda and effectiveness of their rights in the daily practice of the budget and institutions, what is done with the direct opposition or

twisted and indirect of the conservative forces, that prioritize the defense of property and security.

It is understood of the exposed, the relevance that the infancy acquired in the public policies in the period in question, this as an answer to the society action organized and the pressure of the social movements, generating with this an imperative for changes in the understanding of children. However, it perceives that there is a lot to be done to guarantee the rights legally achieved concretely, even when it is thought in the children that belong to the social groups destitute of survival conditions. It is at least frightening to know that in a society of classes, according to the IBGE datum (2008), a considerable percentage of families with children (45%) survive with less than a half of minimum salary. How to deal with this reality of millions of children in the outskirts of the capitalist system if their existence is most of the time denied?

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