

The best interest

OF THE CHILD IN THE COLOMBIAN CONSTITUTIONAL JURISPRUDENCE

ABSTRACT

The article is an advance of an investigation that is being developed on the Best Interest of the Child in the Colombian Constitutional Court. Its objective is to characterize the development of Universal Principle of the Best Interest of the children in the Colombian constitutional jurisprudence. This type of qualitative research is implemented, from a legal point, which will define, describe and analyze the constitutional jurisprudence against this principle. It also makes a definition of the conceptual issues that develop.

Keywords: Universal Principle of Best Interest, Child, Adolescent, Jurisprudence.

RESUMEN

El artículo constituye un avance de una investigación que se viene desarrollando acerca del Interés Superior del Niño en la Jurisprudencia Constitucional Colombiana. Su objetivo es caracterizar el desarrollo del Principio Universal del Interés Superior de los Niños y Niñas en la jurisprudencia de nuestro país. Para ello se implementa un tipo de investigación cualitativa, con un enfoque jurídico, que permitirá precisar, describir y analizar la jurisprudencia constitucional frente a este principio. Se realiza, además, una definición conceptual de los aspectos que lo desarrollan.

Palabras clave: Principio Universal de Interés Superior, Infancia, Adolescencia, Jurisprudencia.

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INTRODUCTION

In Colombia, the Juvenile Code, Decree 2737 of 1989, issued in response to the need to define and solve agile, effective and timely manner the legal status of minors, only possible at the time, if they were in irregular situations that the 1989 legislature defined for this purpose, also pointing to the competent official, his procedure, penalties and procedure. Penalties as those responsible and protective measures applicable in each case for minors and their families were defined.

Only since the Constitution of 1991, Colombia was proclaimed as a rule of law, recognizing human dignity as the primary purpose of the new law, defining children as subjects of special constitutional protection, noting and defining their rights and raising their status as public order, its imperative prevalent, urgent and interdependent.

Children, proclaimed in the Universal Declaration of Human Rights of the United Nations in 1924, entitled to special care and assistance, and recognizing the child, for the full and harmonious development of his personality, stating that it must grow within family, in an atmosphere of happiness, love and understanding, and you should be fully prepared to live an individual life in society and brought up in the spirit of the ideals proclaimed in the Charter of the United Nations and its development into a spirit of peace, dignity, tolerance, freedom, equality and solidarity.

For the development of this research initiative

approach legal research under the framework of an analytical, descriptive and qualitative study, based on the search for the Colombian constitutional jurisprudence against the universal principle of the best interests of children and girls will be adopted. Uncover hidden realities, comparing the situation of yesterday with today and see the progress in ensuring the well-being of children, figures, data, indicators children in Colombia that can help are discussed.

METHODS

To describe and analyze the most significant constitutional jurisprudence to consider the principle of the best interests of children, girls and adolescents is necessary to develop a qualitative research because it allows “identify the underlying nature of reality, its structure dynamic, one that gives full account of their behavior and manifestations”. It is intended that the research problem is addressed comprehensively by the importance of the topic.

It has a primarily legal approach, which aims at the legal standard of knowledge, case law and legal doctrine. So as to facilitate make visible the contradictions, gaps and omissions between the standards or the legal system, the case law developed based on solving concrete cases and doctrine.

The collection of data and production of new information is made on the basis of literature review and inspection or assembly document issued by the Honorable Constitutional Court, the rules of the Republic and interna-

tional treaties ratified by the country in connection with judgments this research topic.

Was constructed for this case a record or bank statements specifying a set of categories that favors comprehensive study of the problem analysis, the discussion of the results in light of the background and related research, and the issue of reasonable conclusions.

RESULTS

After critical-analytical jurisprudence of the Constitutional Court study regarding the UNIVERSAL PRINCIPLE OF THE BEST INTERESTS OF CHILDREN, is observed to Colombia as a country that makes the person prevail over the rules and procedures and thus is a country that really advances the recognition of the importance of personality and human dignity, and that you know that not only requires the right to be better, to do good and achieve a fairer way coexistence for achieving peace. Advance is considered to have a Constitution that promotes and recognizes the rights of the difference, respect for human dignity, the prevalence of those rights to regulate the importance of social harmony and defined as constitutional duty of all citizens.

The Bank of judgments of the Constitutional Court, on the principle of superior interest, can be a tool according to what they need judges, litigants, students, lawyers and citizens of a nation to support a more humane and effective implementation of the right as necessary for growth and social development mechanism.

It is therefore the duty of the academia, the media, private business, government, family and community in general, recognize and promote the rights and duties enshrined in the rules constitutions, but also know its implementation and how to enforce them and prevail. Only thus sufficient legal and social conditions have to contribute and fulfill the constitutional duty of Colombians to promote respect, solidarity and live in peace.

For the development of this research, no need to start with the definition of the child category, junior, childhood, from the semantic point of view: The CHILDREN means “period of life extending from birth to puberty, comprising the first 12 or 13 years of life”. Regional definition in the dictionary of the Spanish language RETAIL term, which is defined as the comparative adjective small, having less quantity, size, length, etc. which has not yet come of age.

As for the CHILD, the *Dictionary of the Royal Spanish Academy* concept, defined as: “A person who has little old, and is still living in the stage from birth to the age of adolescence, which is defined as step happens to children and can be seen at the first 4 signs of puberty. Considering stage to become an adult”.

With the above notes from a semantic view, the concept of a minor, child, childhood, are not the same: the word denotes less discrimination, since such a small thing compared against other species, then we speak of children to understand stage goes from birth to puberty, and finally the word to mean child

birth through adolescence, with a closer look at what that implies gender perspective is employed.

Similarly, is reviewed from the science of biology, the concept of the word DESIGN, according to the teacher researcher Ricardo Cruz-Coke (Professor of Medicine and Genetics, Faculty of Medicine, Headquarters North. Universidad de Chile), says: “The idea that conception is an act that gives birth to a being is very old and is clearly defined in the *Dictionaries of the Academy of Language* in the eighteenth century. “Union of the materials supplied by both sexes in the generative act for procreation of a new being”. In 1868 the word as defined conception. The result of this concept is called fetus, and its definition in dictionaries in 1790 and 1803 is: “What the female of any animal and has conceived in her womb.” At that time it is considered that the verb conceives is. “Becoming pregnant female”.

He adds that “the most recent Anglo definitions (Webster) define the concept in three biological meanings: 1) The act of being pregnant, 2) Formation of a viable zygote and 3) state of being conceived. Thus the idea of non-biological conception of a human being is directly and unequivocally related to the beginning of his life. The conception is an act. A moment where a biological process called fertilization made effective. Fertilization is defined as the fertilization of an egg by a sperm. Is the union of a male gamete with another female”.

Yet it is essential to define the prevalence in childhood, which is the First Children, according to UNICEF, is the stage of life from birth to 6 years of age. Comprehensive care in early childhood is the key to creating a world where rule of hope and change instead of deprivation and despair, and to promote the existence of prosperous and free countries.

It is necessary to distinguish it from the Second Child, concerning the ages between 8 and 10 years, and appropriately, in accordance with Act 115, to basic education in grades 3-5. Basic education is considered mandatory minimum education for all citizens Colombian and as a free, offered by state schools, this being a fundamental concern of the government in education policy coverage and quality. Basic education allows children aged 6 to 10 years to develop their potentialities inherited or acquired and enables them to integrate into the community constructively for themselves and respect others, through a process of secondary socialization of cultural contents and a responsible attitude to society.

Furthermore WHO defines “Adolescence is the period of time between 10 and 19 years, considering two phases, early adolescence 10 to 14 years and late adolescence 15 to 19 years”. In parallel with this there is also the YOUTH that “covers the period between 15 and 24 years old, is a psychological category that matches the post-pubertal stage of adolescence, linked to processes of social interaction, definition of identity and taking responsibility, which is why the condition of youth is not uniform, varies according to the social group that feels”.

The biological aspect of note is that at present, and after a long, slow rise of special legislation for the benefit of children, takes a major role as it speaks of the need to work at that stage of human life, as mean your starting point for all their emotional, cognitive, and social life.

If analyzed from international legal field, is observed only until the year 1989, the Convention on the Rights of the Child was adopted as a legal instrument for social and cultural definition and recognition of their civil rights, political, economic. Except USA, all countries in the world approved and ratified. The Convention on the Rights of the Children is an international treaty that has 41 essential items and offers on the remaining 10 items, the obligations on States parties to guarantee them without any discrimination, defines the purpose of the same, its passage and effect.

This, bearing in mind that the need to provide children with special protection has been stated in the Geneva Declaration of 1924 on the Rights of the Child and the Declaration on the Rights of the Child adopted by the General Assembly on 20 November 1959 and recognized in the Universal Declaration of Human Rights (in particular in articles 23 and 24), International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights (in particular in article 10) and in the statutes and relevant instruments of specialized agencies and international organizations concerned with the welfare of the child (Preamble International Convention on the Rights of Children).

For the purposes of this Convention, a child means “every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier age” (Article 1).

In Colombia, from the issuance of the Children Act, Act 1098 of 2006, universal principles, which aim to recognize children as subjects of rights consecrated. Thus, in its Section 8 says: “The best interests of children, girls and adolescents. Means interest of the child or adolescent, the requirement that forces everyone to ensure comprehensive and simultaneous satisfaction of all their human rights, which are universal, prevalent and interdependent”. This research requires the philosophical aspect, as regards the definition of the child, and as told by the French humanist philosopher André Comte Sponville (2005), in his book *The life*.

“Before the child is no man before the woman. Definitely... Everyone carries his childhood that heaviness, that lightness, never cease to accompany us.”

“Children are chaste, almost all, almost always. They are less naive than you think, or what they do see they are. You know, even vaguely, where the danger comes. Prepare for it, can be protected as against others, against themselves.”

“Our society bombards them with sex and violence, does not facilitate the task. All the more reason to protect them.”

“Children, for everyone, are the starting point.”

“One does not recover from his childhood because it is one. Happy? Unhappy? We cannot console ourselves having lost or lived. We only have the choice between homesickness (what was) and worth (so it was not).”

In this sense the philosopher André Comte reflects the need for attention and recognition of humans from infancy stage that marks us forever, for better or for worse. This then allows us to understand that it is an important contribution that gives philosophy to law enforcement. Since the effectiveness solution with the legal rules of complex cases.

And as one of its universal foundations, provides the BEGINNING OF THE BEST INTERESTS OF THE CHILD, for it must define WHAT IS A BEGINNING? For which the definition to Dworkin, who is the subject of the principles from observing that lawyers argue not only from rules, but also from other standards that are definitely not rules was taken. These other types of standards, Dworkin identifies two (though reveals that there may be others): principles and policies. Here only the first concern, which this author loosely defined as: “I call a ‘principle’ that is a standard to be observed, because will not advance or secure an economic, political, or social situation deemed desirable, because is a requirement of justice or fairness or some other dimension of morality”.

Dworkin defined principles as a standard for legal solution. Send Ricardo Arrieta believes that the principles are «a standard that must be observed, not because it favors or secure a political social economic status, or deemed desirable, but because it is a requirement of justice, equity or other dimension of morality». For some like Mauro Barberis, Dworkin would be a more natural law because fall into the trap of imperialism ‘Mulberry’.

As tools of this new culture of awareness to children, such as issuing “Colombia Public Policy, Early Childhood” from 2007, is intended, therefore:

“The improvement of living conditions, the realization of social justice, as well as expanding opportunities are key in building more just societies, guided by a development model that favors the well-being of persons, in which social and public policy, particularly early childhood, have a privileged role.”

Regional Public Policy provides that: «In addition, the Early Childhood Policy, incorporating the perspective of comprehensive protection, which, among other things, (I) Provides a framework to analyze the situation of children (II) Puts in a taxable rights holder, (III) Provides the best interests of the child and the child as the fundamental parameter or criteria for decision making, (IV) Considers the family, society and the State are jointly responsible for the enforcement of such rights, (V) Consider the child participating subject, doing his own life and person not

subject, (VI) Allows to leave sectoral based on looks or irregular circumstances, (VII) Requires action on materials and environmental conditions, cultural and social contexts and social relations that determine the quality of life for children, girls, and not just on isolated factors».

Gonzalo Aguilar Cavallo, “the best interests of the child or the child’s welfare or best interests of the child or adolescent is initially composed of multiple factors that result in relevant criteria that must necessarily be taken into account by the bound by the principle, parents, society and the state. Items that considers the best interests of the child are different, namely, the dignity of the human being’s own children or ponder the particular characteristics of the situation in which the child is features, the need to foster development of children, with full use of their potential, and considering that this principle is the basis for the effective realization of all human rights of children”.

In the latter vein, to finalize its findings, noted that “judicial –like function of the state– structure must take into account these criteria given by the jurisprudence of the IACHR especially to resolve conflicts where a child or young person” is involved.

It is also observed embedded in the Best Interest of the Court of International Courts, Aguilar it refers to the following cases:

- Bulacio v/s Argentina. The Court sanctions the State “to pay compensation for

the family of the victim Walter David Bulacio, 17 years old, who as a result of a massive detention Im staying in police custody 35th city Buenos Aires. Multiple violations of children’s rights such as assaults by police officers, which was not notified of the detention correctional juvenile court turn and worst of all was reported in this vicinity is that the young Walter Bulacio product having I vomited had to be rushed to a hospital where the child serious injury denounced by the police and died 6 days after.

- Later, in 2004, the case re-education Institute of Minor v/s Paraguay, the Court sanctioned the State of Paraguay for the violation of the right to life and personal integrity of the 12 deceased and the other children who were with lesions in the Institute for Rehabilitation of the Minor. Further, the State violated the right to judicial protection and the obligation to adopt domestic legislation in order to guarantee children the fundamental rights that have been enshrined in the American Convention on Human Rights.
- Also in 2004, in the case of the brothers Gomez Paquiyauri, the IACHR had the opportunity to rule on child rights and the best interests of the child or adolescent. As stated in the judgment, “the morning of June 21, 1991, between two police operations, the brothers Emilio Moises and Rafael Samuel Gomez Paquiyauri of 14 and 17 respectively, were arrested by police officers national and put into the trunk of a police car. Supposedly were executed during the journey that followed the police after his arrest”.

- In 2005, the case of *Yean and Bosico v/s Dominican Republic girls* the petition was presented to the Court by the State, through its civil registry authorities, have denied the right to Dominican nationality of girls, keeping them in the situation of stateless until September 25, 2001. The Court held that the Dominican Republic had violated the rights to citizenship, equality before the law, the right to the name and recognition of legal personality and the right to humane treatment of the girls in question.

Nationally Colombia hosts the Best Interests at the Constitutional Court, setting «clearly the general legal standards to which reference should be made to determine the best interests of the child and to realize the prevailing character of their fundamental rights in order to take the appropriate decision in each case. (I) Ensuring the overall development of the child, (II) Guarantee the full exercise of fundamental rights of the child. The rights of children must always be interpreted by applying the rule favorable to their interests, (III) Protection of children against risks prohibited. It must protect the child from all forms of abuse and arbitrariness, and protect against extreme conditions threatening harmonic, such as alcoholism, drug addiction, prostitution, physical or moral violence, economic or labor exploitation, development and general disrespect for human dignity in all its forms, (IV) Balance between the rights of children and the rights of their biological relatives or in fact, on the basis of prevailing rights of the child. When the balance between the rights

of children and their (biological or indeed) relatives break, the solution should be the one that best meets the interests of the child. In relation to the interests of parents, they can be prefixed to the child when it suits your prevailing interest and ensure the realization of their interests, (v) The need to prevent adverse changes in the present conditions of the child involved”. Constitutional Court Decision T-580A/11.

And the host of the principle of the best interests of the child, according to constitutional rulings requires that «for it can really limit the right of parents and children to maintain personal relations and direct contact on behalf of the interests of the child, you need to meet, at least the following four conditions: (1) First, the interests of the child must be real, ie, must be based on their real needs and their particular physical and psychological abilities, (2) Second, must be independent of the criterion arbitrary of others and, therefore, its existence and protection not dependent on mere opinion or opinion of the mere will of the parents or to protect officials, (3) Thirdly, because the interests of the child are preached against the existence of conflicting interests of another person, his defense should have a balancing exercise guided by the preference of this principle, (4) Finally, it must be shown that the protection of the alleged interest necessarily tends to achieve real benefit for the minor, consisting of the full and harmonious development».

There really is not sufficiently demarcated true Jurisprudential Consolidation of a line

on the Principle of the Best Interests of the Child, the first sentence refers to the principle of best interests in Colombia, is the T-412-95, where the Court had stated:

“Even though the fundamental motive for government intervention is the protection of interests of the child, the public authorities cannot forget that every decision must be the result of a procedure which respects to each trial (C. Part 29) forms. In the process of unsuspecting defenders of family processes is imperative subject to the general principles of procedural law, including respect for the right of defense and the maintenance of equal parts (CPC Article 4).

The declaration of this situation has the effect of termination of parental rights (art. 60 M C). The gravity of this decision requires that parents enjoy the fullness of the process laid down in the Constitution and the law.

The law provides various safeguards for the protection of the rights of the parties in the process of declaration of abandonment processes.

In order to open the investigation, the Ombudsman family must order that evidence and proceedings to establish the existence of the abandonment and also the summons, by notice personally to the people according to the law are called upon to assume the upbringing

and education of the child (C. del M. arts. 37 and 38) should people be present and request evidence cited, the same official must declare their practice, for which you can extend the term of the research. The above provisions are designed to ensure parents the opportunity to present evidence and to contest the evidence brought against him.”

In turn, as expressed by the Court in the Judgment T-510 of 2003. The determination of the best interests of the child must be made in response to the specific circumstances of each case, because this principle “is not an abstract entity, devoid of ties to concrete reality, on which to formulate mechanical application of general rules. On the contrary, the content of that interest is real and relational nature, can only be established with due consideration to each child unrepeatable individual circumstances, and only that as a subject worthy, must be addressed by family, society and the state with all the care required by his personal situation”.

Therefore it is the duty of the academy, the media, private business, government, family and community, publicize and promote our rights and duties enshrined in constitutions standards but also meet implementation and how to enforce them and prevail. Only then we will have sufficient legal and social conditions contribute to and comply with the constitutional duty of Colombians to promote respect, solidarity and live in peace.

DISCUSSION

In the documents reviewed can be seen that much progress has been made in developing the recognition of a new culture to children, considering him as the subject internationally from the International Convention on the Rights of the Child in 1989, and thus developing the concept of Universal Principle and Subject of Rights, deserving of basic rights, human rights considered as the decent living and quality of life.

In development, from conceptual, as defined more rigorously their needs, lists and describes their basic rights and obligations to the child from the family, society, the state, the industry established the education and even the media, have rules governing their duties with children as subjects of preemptive rights.

In many legal changes since 1989 gives to the issuance of the Convention on the Rights of the Child on the international level, and from the national level to the issuance of the Constitution, and the judiciary in the decisions handed down from 1991.

The regulatory progress is undeniable and cannot be denied that a date has not been enough this regulatory policy momentum of substantive and procedural rights to protect their laws and solve their problems, it requires adequate awareness operator and citizen generally to promote its dissemination and acceptance, to promote compliance and effective implementation.

Is considered an error to consider that the law is justice, not justice possible without a human operator, knowledgeable, sensitive and committed to universal principles, above the rules, which effectively solves complex cases that the family requires.

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