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The best interest of the child, the need for a concept for the public prosecutor's office

Jonatha Rojas Martínez[1,a]

[1] Fiscalía Provincial Artemisa, Artemisa, Cuba.
[a] Lawyer.

ABSTRACT

The principle of the best interests of the child is a fundamental pillar in the protection of children's rights and should be considered an essential guide for decision-making in judicial processes involving minors. Its correct implementation requires a commitment, both from judicial systems and from public policies and society in general. Inconsistent decisions in the context of the implementation of this principle demonstrate the need for an adequate interpretation and argumentation of its content. Moreover, since its promulgation in the Convention on the Rights of the Child, ratified by several countries, it has not been possible to determine a conceptual framework to help guide judicial decisions in favor of the child, where the Prosecutor General's Officeof the Republic of Cuba, invested by constitutional mandate as defender of the principle of legality in force, plays a fundamental role.

Keywords: *protection; jurisprudence; human rights; integral welfare; guarantor state.*

El interés superior del niño, necesidad de un concepto para la fiscalía

RESUMEN

El principio del interés superior del niño es un pilar fundamental en la protección de los derechos infantiles y debe ser considerado una guía esencial para la toma de decisiones en los procesos judiciales en los cuales se involucran menores de edad. Su correcta implementación requiere un compromiso, tanto de los sistemas judiciales como de las políticas públicas y la sociedad en general. Las decisiones inconsistentes en el contexto de la puesta en práctica de este principio demuestran la necesidad de una adecuada interpretación y argumentación de su contenido. Más aún, desde su promulgación en la Convención de los Derechos del Niño, ratificada por varios países, no ha sido posible determinar un marco conceptual que permita contribuir a orientar las decisiones judiciales en favor del niño, donde juega un papel fundamental la Fiscalía General de la República de Cuba, investida por mandato constitucional como defensora del principio de la legalidad vigente.

Palabras clave: *protección; jurisprudencia; derechos humanos; bienestar integral; estado garante.*

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INTRODUCTION

The best interests of the child is a principle that was crystallized, in its maximum expression, in the Convention on the Rights of the Child of 1989, later developed by General Comment No. 14 of the Committee on the Rights of the Child, without prejudice to finding its first normative antecedents in French, Italian, and English law. However, its understanding has been discussed, since it is not a concept that generates consensus, due to its indeterminacy and breadth, according to some authors.

In this sense, Ravetllat and Pinochet (2015) have synthesized its development as follows: it is inferred that the interest of the minor has undergone a process of profound transformation, moving from being a nonexistent and unimaginable principle, to later becoming an implicit principle in a good number of norms and judicial decisions; and finally, at the current stage, becoming a reality expressly contemplated in our normative system and based on a teleological conception of law.

Now then, in international law properly speaking, several authors, as in the case of Cillero Bruñol (1997), state that there is an incipient recognition of the best interests of the child in the Geneva Declaration of 1924, which is expressed in its wording, using imperative phrases that are related to "giving children the best."

Subsequently, the Declaration of the Rights of the Child establishes that:

> The child shall enjoy special protection and shall be given opportunities and services, provided by law and by other means, to enable him or her to develop physically, mentally, morally, spiritually, and socially in a healthy and normal manner and in conditions of freedom and dignity. In the enactment of laws for this purpose, the fundamental consideration to which attention shall be given shall be the best interests of the child. (United Nations, 1959, p. 2).

However, the wording of this Declaration has been criticized by several authors, among them Ravetllat and Pinochet (2015), who consider that it limited the notion of the principle solely to legislative bodies, indicating that it must be taken as a fundamental consideration in the enactment of laws for the protection of girls, boys, and adolescents, but no mention is made of other areas in which it should be taken into account, such as cases in which some type of measure is developed that directly or indirectly affects persons under the age of majority.

This principle establishes that in all decisions and actions that affect children, priority must be given to their comprehensive development; now then, what are the patterns to follow to comply with this purpose?, how many interpretations can be given to this principle, based on its axiological content, legal argumentation, and judicial practice? All of these are issues that are considered must be substantiated in order to establish guidelines to create a conceptual framework that allows its implementation, in the exercise of legality control carried out by the Office of the Attorney General of the Republic of Cuba in matters in which it intervenes in defense of minors, for which reason it plays a fundamental role in the defense of the rights of children and the promotion of their best interests.

The Office of the Attorney General has the responsibility to investigate and act in cases of violations of the rights of children, for which reason it plays a fundamental role in the promotion of their best interests, thus contributing to the construction of a more just and supportive society. For the development of this sensitive work, the Office of the Attorney General maintains close working links with the Ministries of Education, Interior, Public Health, among other institutions, such as the Federation of Cuban Women, with which a cooperation agreement has been signed. In order to continue improving care for children and adolescents, new structures have been created to support prosecutorial management, with

specialists from other sciences, such as psychologists and communicators, who are linked to the execution of these activities throughout the national territory.

In view of the foundations set forth, the inexistence of a conceptual framework of the principle of the "best interests of the child" as a constitutional right in current legislation produces an inconsistency in the decisions adopted by the prosecutor, as promoter of the principle of legality; a problem that stems from the fact that principles, like rules, do not regulate their application by themselves. To respond to the scientific problem, the following scientific hypothesis is proposed: the definition of a concept of the principle of the best interests of the child as a constitutional right in the different legal systems will guarantee adequate recognition and defense of the rights of persons under the age of majority. Based on this panorama, the general objective of the present study was to substantiate the theoretical premises for the configuration of a concept of the principle of the "best interests of the child," in order to contribute to its defense as a constitutional right, thus safeguarding the principle of legality that emerges from the Prosecutor's Office in the protection of persons under the age of majority.

It is necessary to achieve an adequate model of the legal system; therefore, it is necessary to add to these two levels, which are expressed in relation to the question of the correctness of the decision, on the positive side of the legal system, another active side referred to this question. The two levels of rules and principles must, certainly, be complemented with a third, namely, a theory of legal argumentation, which indicates how, based on both levels, it is possible to reach a rationally grounded decision, even when reference can be made to the Guidelines for the Assessment and Determination of the Best Interests of Children and Adolescents (UN, 2013), as a practical tool for judges or magistrates, prosecutors, lawyers, and other participants in proceedings involving persons under the age of majority, and this does not fully respond to the theoretical-practical needs of the different legal systems.

DEVELOPMENT

The Law of the Office of the Attorney General of the Republic, Law 160/23 (2023), improves the functions of prosecutors and increases the actions of professional development of all those involved, prosecutors and support personnel, in functions of prevention and control of legality as the guiding principle of the work of the Office of the Attorney General of the Republic, with protection in the constitutional norm, especially in Article 156 of the Constitution of the Republic of Cuba (2019). In this sense, it corresponds to the Office of the Attorney General the function of guaranteeing compliance with the Constitution and the laws.

Since 1976, the Office of the Attorney General has addressed complaints from the population in claims for injury to rights, and has intervened in the solution of cases before the Public Administration, before natural persons, as well as in family situations. It even holds the representation of minors and persons with disabilities when they do not have legal representation; all of this as a result of the verification of compliance with the laws and with resolutions of a mandatory nature, which it issues to ensure the restoration of legality as the guiding principle of the activity it carries out.

For the representation and defense of minors who lack legal representation or when the interests of both are opposed, a function that the Constitution has entrusted to the Office of the Attorney General, the necessary judicial or administrative actions are carried out, in accordance with current legislation and the implementation of internal resolutions for the effective exercise of the function of the Office of the Attorney General in the protection and defense of minors.

The fulfillment and control of these activities are in the hands of the Directorate for Family Protection and Jurisdictional Affairs of the Office of the Attorney General of the Republic of Cuba, specialized, among other tasks, in the defense of persons in situations of vulnerability,

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particularly minors, with the objective of monitoring that their rights are protected, in compliance with the provisions established in the procedure for the work of the prosecutor in family protection and jurisdictional affairs proceedings. In accordance with Resolution No. 3 of the Office of the Attorney General of the Republic (2022), the actions of the prosecution service are established in proceedings in which minors are involved, emphasizing the best interests of the child, not only as a guiding principle but also as a constitutional right recognized in the Constitution. Likewise, the scope of the prosecutor's action in each of these proceedings is recognized, making reference to the principle without reaching a definition of what could be interpreted as the best interests of the child, which could affect the reliable development of the prosecution service as guardian of legality.

Similarly, the Families Code, Law No. 156 (2022), recognizes, in Article 3, the principle of the best interests of children and adolescents as one of the guiding principles in the family sphere; likewise, in Article 7 it is recognized as a general principle that informs family law, of mandatory and paramount observance in all actions and decisions that concern them, both in the private and public spheres, as well as the manner of determining its implementation, but its content is not defined based on its interpretation.

In national legislation, although the best interests of the child are mentioned in numerous articles of the Family Code, the Constitution, the Civil Code, and other regulatory provisions, there is no definition of what should be understood by this principle, nor are guidelines established regarding its application.

In Cuba, the Constitution of the Republic establishes in Article 86 the obligation of the State, society, and families to provide special protection to children and adolescents, as well as to guarantee their harmonious and comprehensive development, recognizing this principle as a constitutional right. They are therefore considered full subjects of rights and enjoy those that are protected against all forms of violence, a multiple effort carried out by the Cuban State to guarantee compliance with this purpose. As part of the will of the State to continue strengthening guarantees for minors, thus recognizing the principle of the best interests of the child in the defense of their rights, Prieto Valdés (2020) states that the 2019 Constitution has a broad axiological framework, which implies the configuration of constitutional norms of open texture that adopt the typology of principles, which requires exhaustive analysis; hence the author considers the importance of their axiological content, by incorporating principles as constitutionally recognized norms.

The entry into force of the 2019 Constitution of the Republic of Cuba entails, among many other issues, a significance of legal principles exponentially greater than that exhibited by its predecessor of 1976. Villabella Armengol (2021) has referred to it as a principled document, aligning it with one of the theses of neoconstitutionalism and the new Latin American constitutionalism.

Although the introduction of this lex fundamentalis within the contours of the neoconstitutional canon, and even within the synergy of the derivations of the new Latin American constitutionalism, may prove controversial, the truth is that its broad axiological apparatus and the technique followed for the regulation of the catalogue of fundamental rights lead García Figueroa (2016) to propose that the theory of principles and their practical concretizations become tools to be taken into account in the processes of interpretation, application, and argumentation of constitutional norms.

Given this axiological panorama, it will not be sufficient for the Cuban judge to carry out a syllogistic operation that resolves the case through reasoning by subsumption. The motivation of the judgment cannot be based exclusively on reasons of authority, justified solely in positive law. Professor González Monzón (2023) considers it necessary to introduce elements of axiological justification, as well as the weighing and balancing of arguments; in this way, principled non-positivism affirms that principles constitute an element unattainable

for legal positivism, which leads, once their presence in law is verified, to a non-positivist conception and to the conceptual linkage between law and morality.

This conceptual linkage between law and morality makes possible, within the contours of the constitutional State, the protection of its fundamental principles, insofar as it generates guarantees that foster their normative force and their direct application by the courts. A judicial practice based on principles, grounded in criteria of axiological linkage generally expressed in the constitutional text, constitutes a practical expression of the theoretical insufficiency of positivist legalism in the processes of interpretation, application, and argumentation of law.

This constitutional cycle opened by the text in question is presented as suitable for rethinking, in its dynamics, the restricted readings that have so far been made of principles. With special emphasis, the 2019 constitutional text enables the fulfillment of the discourse on principles beyond the ontological perspective and the sources of law, in order to insert it into issues related to the structure and forms of application of legal norms (González Monzón, 2023).

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On the other hand, it is quite important to note that in our country there is no effective regulation of the principle referred to, since our regulations are limited only to stating the importance of taking it into consideration in certain matters, but do not provide a definition or criteria for determination for its application that may serve as guidelines. For this reason, its development is due mainly to jurisprudence in which many errors have been committed, given that currently in our family courts decisions have not been substantiated, being limited only to naming this principle within the judgment, which has perpetuated the idea that it constitutes an indeterminate concept.

In order to have a comparative analysis of the reality of child law in Cuba, and particularly with respect to the best interests of the child in relation to international law, it is necessary to analyze the guidelines that have been proposed and enshrined in Latin America through regulatory systems quite close and similar to ours, in order to have references and a clear starting point from which our country should position itself to continue advancing in these matters, for which we take Bolivia and Ecuador as examples for their analysis.

Bolivia was the eighth country in the world to ratify the Convention on the Rights of the Child, on June 26, 1990, and has incorporated it into its internal regulations. Thus, through Law No. 548, enacted on July 17, 2014, the Code of Girls, Boys, and Adolescents was created in Bolivia (2014) with the objective of guaranteeing the full exercise of the rights of childhood and adolescence, which had its latest update in 2018. This constitutes an instrument that broadly systematizes the regulation of all aspects of child law in the country, which also explicitly establishes the superiority of the principle of the best interests of the child, even providing a definition. In this way, it is stated that the rules of said Code must be interpreted safeguarding the best interests of the girl, boy, and adolescents, in accordance with the Political Constitution of the State and international treaties on human rights, when these are more favorable as provided in Article 9, making a direct reference to the Convention.

On the other hand, the principles that frame this normative text are defined, establishing that the best interest is understood as:

> That by which is understood any situation that favors the integral development of the girl, boy, and adolescent in the enjoyment of their rights and guarantees. To determine

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> the best interests of girls, boys, and adolescents in a specific situation, their opinion and that of the mother, father, or both parents, guardian or custodian, tutor or guardian must be considered; the need for balance between their rights, guarantees, and duties; their specific condition as persons in development; the need for balance between their rights and guarantees, and the rights of other persons. (Plurinational State of Bolivia, 2014, art. 12)

Subsequently, reference is again made to the relevance of considering this principle within certain matters: in the institution of adoption, with respect to the salaried work of minors, the obligations of the care entities of the protection system for effective attention, in relation to the assessment and appraisal of evidence by the competent judicial authority, and finally, to the obligation of the different entities that participate within the criminal process of girls, boys, and adolescents, which must comply with a series of basic parameters, such as medical care or access to education and food.

According to Supreme Decree No. 2377 (2015), which regulates the Code of Girls, Boys, and Adolescents, guidelines are established for the effective application of the rights and guarantees of childhood and adolescence, the Regulation that determines the application of Law No. 548, in which a matter of special relevance is made visible in light of the best interests of the child: the intermediation and disposition of State bodies in international adoptions, by establishing as a requirement the application of this principle to carry them out, as provided for in Article 24.

With regard to the Political Constitution of the Plurinational State of Bolivia (2009), it establishes a specific section for child law, called Rights of Childhood, Adolescence, and Youth, where it stipulates, in the presumption of filiation of girls, boys, and adolescents, the application of the right to identity and the best interests of the child, which is directly related to the configuration of the right to integral development in the constitutional order. And finally, at the constitutional level, the principle of the best interests of the child is also defined and delimited, establishing that:

> It is the duty of the State, society, and the family to guarantee the priority of the best interests of the girl, boy, and adolescent, which includes the preeminence of their rights, the primacy in receiving protection and assistance in any circumstance, the priority in the attention of public and private services, and access to prompt and timely administration of justice with the assistance of specialized personnel. (Political Constitution of the Plurinational State of Bolivia, 2009, art. 60).

For its part, Ecuador also has a Code of Childhood and Adolescence, which entered into force on July 3, 2003, under Law No. 2002, and whose latest reform was on May 31, 2017. In this text, reference is made to the fact that the purpose of the law is to regulate the enjoyment and exercise of the rights, duties, and responsibilities of children and adolescents (NNA), and that the means to guarantee them will consist of the principle of the best interests of the child and the doctrine of comprehensive protection.

On the other hand, said normative instrument provides the following definition:

> The best interests of the child is a principle that is aimed at satisfying the effective exercise of the set of rights of children and adolescents; and it imposes on all administrative and judicial authorities and on public and private institutions the duty to adjust their decisions and actions for its fulfillment. In order to assess the best interests, the need to maintain a fair balance between the rights and duties of children and adolescents shall be considered, in the manner that best suits the realization of their rights and guarantees. This principle prevails over the principle of ethnic and cultural diversity. The best interests of the child is a principle of interpretation of this Law. No one may invoke it against an express rule and without previously hearing the opinion of the child

> or adolescent involved, who is in a position to express it. (National Congress of Ecuador, 2003/2017)

Subsequently, the importance of the use of the principle of the best interests of the child is configured by virtue of a series of key aspects in the development of child law, such as the right to have a family, the regulations relating to the exercise and limitation of parental authority, and with respect to the testimony of children and adolescents in judicial or administrative proceedings. With regard to its constitutional incorporation, the Constitution of the Republic of Ecuador of 2008 establishes a single section for child law, called "Fifth Section: Girls, boys, and adolescents," where constitutional recognition is granted to the best interests of the child, stating that:

> The State, society, and the family shall promote, as a priority, the integral development of girls, boys, and adolescents, and shall ensure the full exercise of their rights; the principle of their best interests shall be observed, and their rights shall prevail over those of other persons (Constitution of the Republic of Ecuador, 2008, art. 44).

As can well be stated, there are countries that, in order to achieve effective recognition of this principle as a right, incorporate a definition within the constitutional framework, which gives rise to a wide range of provisions aimed at preserving this right, from which the need for a conceptual framework in national legislation is grounded; a tool to be taken into account in our research in the face of this problem.

In practice, the application of the best interests of the child requires detailed assessments of the specific circumstances of each case, where on occasions various rights are weighed, which influences the decisions adopted. Through rational argumentation, judges must be capable of identifying the space of application and the corresponding general principle, in order to participate in this way in the projection of the integrality and coherence of the legal system; an aspect for which González Monzón (2023) considers that its scope of action goes not only beyond the praxis of judges, but also of prosecutors who intervene in family matters.

From this angle of reasoning, national legal practice should tend, from the implementation of the theory of principles, toward the incorporation of axiological, economic, political, and social variables in all its spaces of development. In attention to these criteria, it is possible to generate an interpretative practice that responds to an ontological vision of law as a complex social practice (González Monzón, 2023).

From the theory of the case, with multiple practical derivations, a coherent conception of principles allows a differentiation between easy cases and hard cases. This differentiation, in the Cuban legal context, beyond being limited to theoretical speculation, will allow legal operators a better classification of cases that, due to their particularities, require for their understanding and resolution the explicit use of differentiated methods of interpretation, application, and argumentation, which transcend the deductive or syllogistic scheme.

The classification of a case as "hard" may be related to reasons of a factual nature or of a normative nature. From the factual perspective, hard cases may present evidentiary problems, problems of qualification; the latter referring to doubts as to whether a given fact is included or not within the scope of application of a given concept contained in the factual assumption or in the legal consequence of a rule.

From the normative perspective, hard cases raise problems of relevance; that is, when there are doubts about the existence of a rule or rules applicable to the case, and problems of interpretation, that is, when the doubts fall on how one of the terms contained in the applicable rule is to be understood. The hard case may revolve around the application of a principle or be configured on the occasion of a collision of principles. The practical incidence of these issues is centered, fundamentally, on matters of legal argumentation.

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Upon the identification of a hard case, legal operators in a general sense, especially judges, and in proceedings in which the prosecution intervenes, must construct argumentative discourses that, both from the factual and the normative perspectives, offer reasons that are not limited to the purely formal, which at the same time partake of criteria of rationality and coherence tending to generate consensus. It is possible that there is no rule provided for the facts of a hard case; however, analogous rules or general principles of the legal system may always be applied. Although a system made up of rules has gaps, the inclusion of principles guarantees its completeness (Rodríguez Garavito, 1997).

It defines, in the lines set out above, the main foundations of the problem that, from the legal sciences, this research seeks to resolve; an aspect that today enjoys extreme importance and currency in correspondence with the current process of legislative reforms. Which, in turn, is expected to be useful in the updating of the rules governing the working procedures of the Office of the Attorney General of the Republic.

In Cuba, this mandate is reflected in legislation, particularly through the recognition of this principle as a key element in judicial and administrative proceedings; hence its importance as a right recognized in the Constitution.

Now, without prejudice to the reception of the best interests of the child as a fundamental principle for childhood and its expression in different specific situations where it must be applied, this tells us nothing about its detailed content and much less provides a definition of the concept as such. The reason underlying these questions is related to the category of the principle, which is one of those understood as "legally indeterminate concepts," since, as Torrecuadrada García-Lozano (2016) points out, it is very difficult to provide a single concrete and useful definition applicable to all cases in which the best interests of the child must be applied, due to the heterogeneity of its holders, which, in turn, is explained by noting that no child, as an individual subject and much less as a collective subject, is the same as another, and there are even different needs depending on the particular circumstance of affectation and protection of the rights of each one.

From the work carried out by the Office of the Attorney General of the Republic as guarantor of legality in proceedings in which minors intervene, it is useful and necessary to form a conceptual framework of the principle of the best interests of the child for its application in hard cases, where the rights of children and adolescents are affected, which has not yet been managed to be instituted in foreign and national legislation.

In this sense, it may be stated that the best interests of the child could be understood as a philosophical concept that invites a profound reflection on our responsibility toward younger generations. By recognizing the dignity, autonomy, and rights of persons under the age of majority, this principle challenges us to build more just and equitable societies, where each child can reach his or her maximum potential. The philosophy behind this principle should not only guide policies by its axiological and deontological content with its implementation, but also give rise to behavior in the defense of their rights.

On the other hand, it must be understood that the best interests of the child, as a constitutional right, must be understood in its maximum expression, as a triple concept: as a substantive right, a fundamental interpretative legal principle, and as a procedural rule, still to be resolved. It corresponds to the Office of the Attorney General of the Republic, as guardian of legality in proceedings in which minors intervene, to safeguard their rights in response to their best interests.

Meanwhile, it could be understood that the best interests of the child should not be appreciated as a static concept, but as an evolving paradigm, and may be understood in its maximum expression as that legal and ethical mandate, of axiological content, in which it is established that in all decisions and actions related to minors, their general well-being prevails

over the rights of others, regardless of the legal consequences of the acts in which they are involved, achieving effective protection of their rights, so that fair, technical decisions centered on the dignity of the child are materialized (Committee on the Rights of the Child, 2013).

CONCLUSIONS

From the foregoing, it can be inferred that the principle of the best interests of the child stands as a fundamental norm in the protection of the rights of children and adolescents; however, its incorporation and interpretation are not uniform. This is mainly due to the vagueness and abstraction of the concept which, although it may generate conflicts due to the discretion granted in the application to a specific case, is, in turn, its strongest point, since it allows its adaptation, being transversal both to the time of its application and to the social, cultural, and political context.

Evidence of this indeterminacy is precisely the way in which Latin American legislation incorporates the principle in question, where it is possible to glimpse that, given the free interpretation of the principle as a constitutional right, it is necessary to establish a conceptual framework based on good judicial and administrative practices. It corresponds to the Office of the Attorney General of the Republic, as guardian of legality in proceedings in which minors intervene, to safeguard their rights in response to their best interests.

On the other hand, it must be understood that the best interests of the child, as a constitutional right, must be understood in its maximum expression, as a triple concept: as a substantive right, a fundamental interpretative legal principle, and as a procedural rule.

The principle of the best interests of the child must be applied as a practical tool, being determined as that legal and ethical mandate of axiological content in which it is established that in all decisions and actions related to minors, their general well-being prevails over the rights of others, regardless of the legal consequences of the acts in which they are involved, achieving effective protection of their rights, so that fair, technical decisions centered on the dignity of the child are materialized. These are elements to be taken into account in judicial practice in view of the need to provide special protection to children and adolescents, especially in Latin America due to the particular characteristics of forms of government, legal systems, and socio-economic conditions.

Normative updating is necessary, based on the challenges of the 21st century, specialized training of judges and prosecutors in childhood and adolescence, as well as the creation of innovative mechanisms to listen to children and achieve their integral development.

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Correspondence

Jonatha Rojas Martinez
j52587866@gmail.com