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"Relevant decisions of the Chilean Constitutional Court on children´s rights"

REPORT BY

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Firstly, I would like to thank the Constitutional Justice Division of Venice Commission for this opportunity, such as last year, to present in front of my colleagues relevant decisions of the Tribunal I represent, in this occasion about the topic children´s rights.

It has to be mentioned, that our Constitution does not explicit recognize children's rights per se, but they are guaranteed implicitly in all fundamental rights, as long as they are applicable to children. That is the reason why all of our decisions have been based on other fundamental rights, such as right to education or the principle of equal treatment.

Before entering directly into that subject, it is necessary to remember that our Tribunal has the attribution, among others, to control *ex ante* the constitutionality of constitutional organic laws and *ex post* an eventual application of legal precepts on a concrete issue, which could have unconstitutional effects.

Exercising the first of them, the Chilean Constitutional Court has treated children's rights through the inclusion of preschool education under the mandate of the Constitution. Although our Fundamental Law enforces the State to promote education, in the sense of taking responsibility to collaborate actively in the development of education in society, it has no explicit mention to the preschool education. That affirmation does not mean that State is able to do nothing on this regard; on the contrary, the Legislative has the duty to involve actively the State in order to assume its responsibility and engagement to develop actions and economical resources to guarantee the existence of the best possible level of preschool education, providing integral care to children from birth to entry into primary education, promoting relevant learning, and supporting families in their role as primary educators.

Regarding the inapplicability action, the Constitutional Tribunal reviewed the application of the legal disposition (article 365 of Penal Code), which criminalizes the consented carnal knowledge – sodomy - of a male minor between 14 and 17 years by a male adult. The allegations of the applicants were based on the following violations:

1) Equal treatment and therefore no discrimination principle in three ways:
    a. Sexual intercourse between males is punished, only if the minor is penetrated, but no other way round.
    b. Only sexual relations between males are sanctioned, but no those between females –consented sexual relations between female adolescent and female adult are not punished-, and
    c. Heterosexual relations between an adolescent (14 or more) and an adult of different sex are allowed, but male homosexual relations remain illegal.

2) Sexual self-determination as a projection of the right to freedom, because there always is consent and no coaction between partners.

3) Right to private life, then State intrudes or intervenes severely into aspects of life that are not of public interest.

By majority the Tribunal dismissed all allegations. The first one, based on that the legally protected interest is the sexual indemnity, the undisturbed adolescence in terms of sexual self-determination and the child's best interest, understood the latter under article 1 of Convention on the Rights of the Child (child is any human under the age of eighteen, unless the age of

majority is attained earlier under a state´s own domestic legislation). The legislator considered the sexual acts described in article 365 of the Chilean Penal Code to be the cause for damage of the male minor with regard to his psychosocial development. The Constitutional Court recognizes in this context the margin of appreciation of the legislature, in which it cannot intervene.
The second argument was rejected for biological reasons. Only men can penetrate, therefore, the conduct cannot be applicable to women. The purpose of the legislator was the penalization of anal penetration, considering the impact that such action produces in the psychosocial development of a male minor, which cannot be stated in the same terms regarding the relation between two women. Therefore, the legal precept does not implement an arbitrary discrimination between men and women.

Concerning the protection of private life, the Court stated that it is a right which is available to be restricted legitimately by the law and has to become subordinate to the important purpose of safeguarding the male minor's physical, psychic and spiritual integrity.
Neither did the Constitution define the 'Right to Freedom' as a right to free development of personality, nor as a right to freedom in terms of sexual self-determination. In spite of this, the Court stated that the right to free development of personality is based on human dignity in particular. Though, it does not constitute a legitimate basis to tread the rights of other human being – equal in dignity – by acting against socially desirable standards, because it would affect the minor's indemnity regarding his psychosocial development.

Another interesting case involves the filiation of children. In our legislation is still valid a norm regulating filiation paternity claims of children, when their father dies before his or her birth or within hundred and eighty days after delivery. In this case, the child could claim this filiation against the heirs of the dead parent within three years. It was conceived as an exception to an imprescriptible action in other cases.
The applicants argued that this distinction is not justified and established an unequal treatment before the law between children whose father died before delivery or within hundred and eighty days after it, and those whose father died in a different time.

According to the solicitors this distinction constitutes an arbitrary difference since no reasonable arguments exist to establish a difference in the treatment between two people who are in the same situation of bringing the claim in order to know their origin and identity. That would be contrary to the constitutional guarantee which ensures to all person equality before the law and the prohibition that neither the law nor any authority may make arbitrary differences, in addition to the duty imposed upon the authorities to respect and promote the rights guaranteed by the Constitution and those contained in ratified international treaties. In this case the right to identity is guaranteed and recognized in the American Convention on Human Rights which states that everyone has the right to recognition as a juridical personality, to respect their physical, mental and moral integrity, to respect their honor and recognition of their dignity, to a name and to surnames of their parents or one of them.

The Constitutional Court has pointed out that the children have to know about their filiation, which has direct relation to their right to identity. This right should be understood as very personal and is one of many rights that are directly related to the dignity and essence of human being, so that cannot be restricted.

The right to the child´s identity includes the right to be registered immediately after birth, to own a name, and as far as possible, to know at that moment who are their parents and to be taken care by them.

It is under those fundaments that the Court established a violation of equal treatment principle and the right of identity in relation of human dignity. It has to be mentioned that many decisions have been pronounced by the Court regarding this legal precept and only at the first one was

accepted a breach of the right to identity as it is known under international treaties. The jurisprudence is now well seated at the violation of arbitrary unequal treatment.

The last relevant case, seen also by the Court after an inapplicability action, was based on the unconstitutionality in a concrete case of the rule that prefers the mother regarding the custody of children if the parents are separated and the following precept that makes harder to the father to obtain the custody, because it restricts the causes when the judge can order the change of custody – indispensability to the best interest to the child, like physical or psychological abuse, maltreatment, carelessness and other qualified cause.
Recently the Constitucional Tribunal reached a decision that the last rule violates the unequal treatment principle, based on the high and qualified causes required by the law, which impedes the judge to consider the best interest of the child conveniently. This restriction to the judge action in order to guarantee the best interest of the child is discriminatory against the father, who has to deliver qualified proofs to the judge.
In the meantime, Congress was on discussions to reform those legal precepts, giving both parents similar prerogatives and therefore abolishing the unequal legal treatment between father and mother regarding custody of children. Middle of June of this year was promulgated and published the modification, which establishes the following rules:

a) If parents live separated, they are free to agree how to regulate the personal care of common children (mother, father or both)
b) If no agreement is possible, the children will live with the parent they live at that moment.
c) The judge can always modify the personal care or custody of the children, if the circumstances require that change and it achieves and fulfills the principle of the best interest of the child.

As you see, the mother is no longer in possession of a legal advantage over the father regarding the personal care of common children. Now the most important parameter is the best interest of the child. I am not able to give right now a conclusion about the benefits of that new rule, given its recent publication, but I hope family judges will apply that law without differences between parents; just adopting the best solution under the most relevant issue on discussion, that is, the children.

Thank you for your attention!