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RESEARCH ARTICLE

Analysis of the prohibition of consensus justice in the criminal process of children and adolescence

Análisis de la prohibición de la justicia consensuada en el proceso penal de infancia y adolescencia

Análise da proibição da justiça consensual no processo penal de crianças e adolescentes

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Abstract

Introduction: The present research makes a study about the interference that the prohibition given by Law 1098 of 2006 to enter into pre-agreements has on the human rights of children and adolescents, not only from the constitutional recognition, but also from the rights enshrined in international instruments that recognize human rights. **Objective:** to identify to what extent the legal configuration given by Law 1098 of 2006 in its article 157 configures a violation of the fundamental rights and constitutional precepts of the accused in matters of consensual justice in the criminal system for minors. **Methodology:** It is descriptive and explanatory, so that the main results allow to expose that, although Law 1098 of 2006 allows a level of guarantee in matters of minors, it is necessary to rethink how the prohibition as it configures a limit to consensual justice. **Conclusion:** such prohibition affects rights such as due process, equality, judicial guarantees and the prevalence of the best interest of the minor, therefore, according to the Constitutional Court, it is necessary for Colombia to make a normative adjustment to review the feasibility of adapting the figure of pre-agreements within the system of criminal responsibility for minors.

Keywords: Criminal law; Children's rights; Human rights; Social justice; Freedom.

Resumen

Introducción: La presente investigación hace un estudio acerca de la injerencia que tiene la prohibición dada por la Ley 1098 de 2006 para celebrar preacuerdos respecto de los derechos humanos de los niños, niñas y adolescentes, no solo desde el reconocimiento constitucional, sino también de los derechos consagrados en los instrumentos internacionales que reconocen derechos humanos. **Objetivo:** identificar en qué medida la configuración jurídica dada por la Ley 1098 de 2006 en su artículo 157 configura una violación a los derechos fundamentales y preceptos constitucionales de los procesados en temas de justicia consensuada en el sistema penal para menores. **Metodología:** Es descriptiva y explicativa, por lo que los principales resultados permiten exponer que, si bien lo dado por la Ley 1098 de 2006 permite un nivel de garantía en materia de menores, resulta necesario replantear como la prohibición en tanto que configura un límite a la justicia consensuada. **Conclusión:** dicha prohibición afecta derechos como el debido proceso, la igualdad, las garantías judiciales y la prevalencia del interés superior del menor, por ello, conforme a la Corte Constitucional, se visualiza la necesidad de que Colombia realice una adecuación normativa en la que se revise la viabilidad de adecuar la figura de los preacuerdos dentro del sistema de responsabilidad penal para menores.

Palabras clave: Derecho penal; Derechos del niño; Derechos humanos; Justicia social; Libertad.

Resumo

Introdução: A presente pesquisa faz um estudo sobre a interferência que a vedação dada pela Lei 1098 de 2006 à celebração de pré-acordos tem sobre os direitos humanos de crianças e adolescentes, não só a partir do reconhecimento constitucional, mas também dos direitos consagrados em instrumentos internacionais que reconhecem os direitos humanos. **Objetivo:** identificar em que medida a configuração jurídica dada pela Lei 1098 de 2006 no artigo 157 constitui uma violação aos direitos fundamentais e aos preceitos constitucionais do acusado em matéria de justiça consensual no sistema penal para menores. **Metodologia:** é descritiva e explicativa, de modo que os principais resultados nos permitem expor que, embora as disposições da Lei 1098 de 2006 permitam um nível de garantia em termos de menores, é necessário repensar a proibição na medida em que constitui um limite à justiça consensual. **Conclusão:** essa proibição afeta direitos como o devido processo legal, a igualdade, as garantias judiciais e a prevalência do interesse superior do menor. Portanto, de acordo com a Corte Constitucional, é necessário que a Colômbia realize uma adaptação normativa na qual seja revisada a viabilidade de adaptar a figura dos pré-acordos dentro do sistema de responsabilidade penal para menores.

Palavras-chave: Direito penal; Direitos da criança; Direitos humanos; Justiça social; Liberdade.

Introduction

In the Colombian State, both the 1991 Political Constitution (hereinafter Const.) and the jurisprudence of the Constitutional Court (hereinafter C.C.) have provided a fundamental basis for guaranteeing the rights of minors, including children and adolescents (hereinafter CA). According to Article 44 of the Constitution, the rights of CA take precedence in the legal order over all others, in line with the duty of society, the family, and the State to attend to their needs and protect them from any risks they may face.

In this context, the importance of protecting children and adolescents' human rights (from now on HR) in the domestic and international legal frameworks is evident, ensuring their special protection in all circumstances. This protection extends even to situations where the minor is an accused party, not just a victim, requiring the State to enact special legislation regulating their responsibility.

Thus, the Code of Childhood and Adolescence (CIA by its Spanish acronym) was established, primarily aimed at guaranteeing the protection of the HR of CA, creating an environment that safeguards and materializes their fundamental rights concerning family and society, in recognition of their right to human dignity and equality (Ley 1098, 2006, art.1).

To establish procedural and substantive norms for the comprehensive protection of this group's rights (Ley 1098, 2006, art.2), particularly in the punitive sphere, the Adolescent Criminal Responsibility System (SRPA by its Spanish acronym) was created. This system sought to establish a set of suitable provisions, principles, authorities, and procedures to investigate and judge crimes committed by individuals between fourteen (14) and eighteen (18) years of age (Ley 1098, 2006, art.139). This law was a significant starting point for realizing the best interest of the minors, requiring them to be judged differently from the adult penal system due to their special protection status.

This system and the ordinary criminal justice system introduced a new component that significantly changed Colombian punitive law: restorative justice (hereinafter RJ). According to Law 1098 of 2006, any process involving the rights of CA must ensure truth, reparation for the harm caused by the crime, and the guarantee of RJ (Ley 1098, 2006, art.140). This implies applying a mechanism capable of fulfilling the purpose of the criminal process related to resolving the social conflict generated by the punishable act, serving the community, and achieving the goals intended by the criminal law (Daza, 2012).

In consonance with Daza et al. (2020), considering the limits imposed by International Human Rights Law (IHRL), International Humanitarian Law (IHL), and International Criminal Law (ICL), the principle of opportunity, plea bargains, and negotiations should be understood as a rule to be applied in criminal proceedings, including Juvenile Justice. Thus, the application of punitive reductions for the acceptance of charges can be easily applicable when exercising the ius puniendi, without sufficient arguments in national, transnational, or international crimes to impede their application.

However, despite this law establishing a series of important prerogatives to guarantee the rights of CA, it faces various challenges regarding the guarantees for those being prosecuted, i.e., minors subject to this responsibility regime. Concerning the previous section, although there is a common agreement on the possibility of applying prerogatives for the acceptance of charges, this specific law prevents agreements from being made between the prosecution and the defendant or accused, which complica-

tes the protection and realization of the procedural guarantees and rights of the accused, in this case, CA between the ages of 14 and 18.

This raises the central question of this article: to what extent does the legal configuration given by Law 1098 of 2006 in Article 157 violate the fundamental rights and constitutional principles of the defendants by limiting consensual justice in the juvenile criminal system?

To formally develop this discussion, three key points will be addressed: first, the legal nature of the law concerning plea bargains within SRPA; second, the position of the C.C. regarding the norm under study; and finally, an analysis of the constitutional provisions that are violated due to the limitation of consensual justice in the SRPA.

1.1. METHODOLOGY

This research adopts a descriptive and explanatory methodological approach. The descriptive approach sought to characterize the reality and identify the different elements that make up consensual justice within the criminal process, with special attention to aspects related to children and adolescents. This explanatory approach also makes it possible to establish the causes and effects of the application of the figure under study, recognizing the reasons, motivations and even the reality of how the prohibition of pre-agreements in certain cases of juvenile criminal justice can be burdensome for the process and for the fulfillment of the purposes of the sentence.

The research has a qualitative design, which implies that the analysis of the data is subjected to a logical treatment of value judgments. For this purpose, approaches based on regulations, jurisprudence and doctrine are used, contrasting the theoretical foundations of consensual justice with the legal framework that establishes its prohibition in criminal proceedings involving minors.

For the preparation of the paper, various academic and scientific databases were used, such as Google Scholar, ResearchGate, ORCID and Scopus. Through keywords, indexed articles, books and graduate works related to the topic were identified. A pre-selection of thirty (30) documents was made, which were analyzed to identify arguments and ideas that contrasted and strengthened the position stated in the research problem.

2. RESULTS

1.1. Legal position of plea agreements for the CIA

According to Medina (2023), plea agreements, as recognized by current criminal law, are instruments that facilitate the creation of consensus between individuals subject to State prosecution—suspects, defendants—and the authorities responsible for prosecuting these individuals—the Public Prosecutor's Office. This mechanism not only aims at the ultimate goal of sanctioning crime but also seeks the participation of the defendants in determining their criminal responsibility, thereby fostering an

environment of cooperation and prompt administration of justice.

A pre agreement should be understood as a guarantee afforded to defendants, allowing them, in cases of acceptance of charges or cooperation with the justice system, to be offered certain procedural guarantees regarding the final determination of the sentence. This arrangement creates a win-win scenario where the Public Prosecutor's Office benefits from obtaining the truth and evidence or elements for prosecution, and the defendant may benefit from prerogatives that could reduce the penalty initially faced, hence the importance of harmonious collaboration between the parties.

This prerogative implies: i) that the defendant acknowledges their criminal responsibility, ii) that there is a real evidentiary and factual basis upon which the negotiation is conducted; iii) the waiver of the oral, public, and adversarial trial by the defendant, provided that such waiver is made voluntarily, knowingly, freely, and duly informed; and iv) that the appropriate punitive reduction is applied following what was agreed upon in the plea deal (Quintero Vivas, 2012). Thus, two essential points arise regarding the agreement: on the one hand, the acceptance of charges by the defendant and, on the other, the reduction of the initial penalty by the terms agreed upon in the plea deal. This leads to the final hearing where the respective judgment is rendered.

However, despite its acceptance within the ordinary criminal justice system, an adverse situation arises in the SRPA. According to Article 157 of the SRPA, plea agreements between the defendant and the prosecution are not permissible (Ley 1098, 2006, art.157, para.1). This means that the judicial guarantee allowing defendants in criminal proceedings to accept charges in exchange for a reduced sentence does not apply to minors prosecuted under this system, which ultimately can call into question the protection of due process and the procedural guarantees of minors in the SRPA.

This situation presents a doctrinal dilemma, as while it may be thought prima facie that this prohibition aligns with the protection of minors' human rights, another perspective considers that its limitation in this penal responsibility system causes serious harm to the procedural rights of the defendants. According to Daza et al. (2020), it is absurd to think that 100% of the cases entering the SRPA result in criminal trials. In their view, this not only affects the goals of the Social Rule of Law [hereinafter SRL] in resolving the social conflict generated by criminal conduct but also causes a severe imbalance between the efficiency of criminal law structures and the respect for human rights of those being prosecuted.

Therefore, despite the law and jurisprudence supporting the existence of this normative provision, it faces a palpable test of unconstitutionality, as it may endanger the rights of the defendants, who in these cases are not just any individuals, but minors who enjoy special protection from the State. From this perspective, although the plea bargain mechanism exists and is constantly applied in the ordinary criminal justice system, minors cannot benefit from this mechanism, which prevents them from enjoying a guarantee for sentence reduction. This leaves them with no other option but acquiescence—besides the Juvenile Justice mechanisms—which places them at a disadvantage compared to the adult criminal system, where there are more prerogatives for obtaining sentence reductions.

For all these reasons, the legal nature of this mechanism within Law 1098 of 2006 faces significant inconsistencies, as the prohibition of plea bargains could end up violating the rights of minors compared to adults. Even though the Constitution, jurisprudence, and national and international laws recognize the superior and prevailing interest of the minor, as well as the basic principle that all individuals

should have the same freedoms, rights, and opportunities—without any form of discrimination—these rights are absolutely at risk under the article in question. This violates the right to defense, due process, and the ability of minors to enjoy a prerogative that allows for a less severe decision in line with the mechanisms applicable to the ordinary criminal justice system (Serrano & Alfonso, 2013).

1.2. The Right to Enter into Plea Bargains in Criminal Proceedings

Plea bargains in the Colombian criminal process refer to the consensus reached between the prosecution and the defense, which, once satisfactory, will allow for the reduction of the sentence in exchange for the defendant's confession and cooperation with justice. These plea bargains typically occur during the criminal investigation, provided the case has not reached trial.

This mechanism became a fundamental support for the new accusatory criminal system in Colombia introduced by Legislative Act 03 of 2002, which allowed for the paradigm shift from the previous orthodox and inquisitive procedural criminal conception prevailing in Colombia, to innovate the State with the accusatory procedural system (Villanueva & Montenegro, 2019).

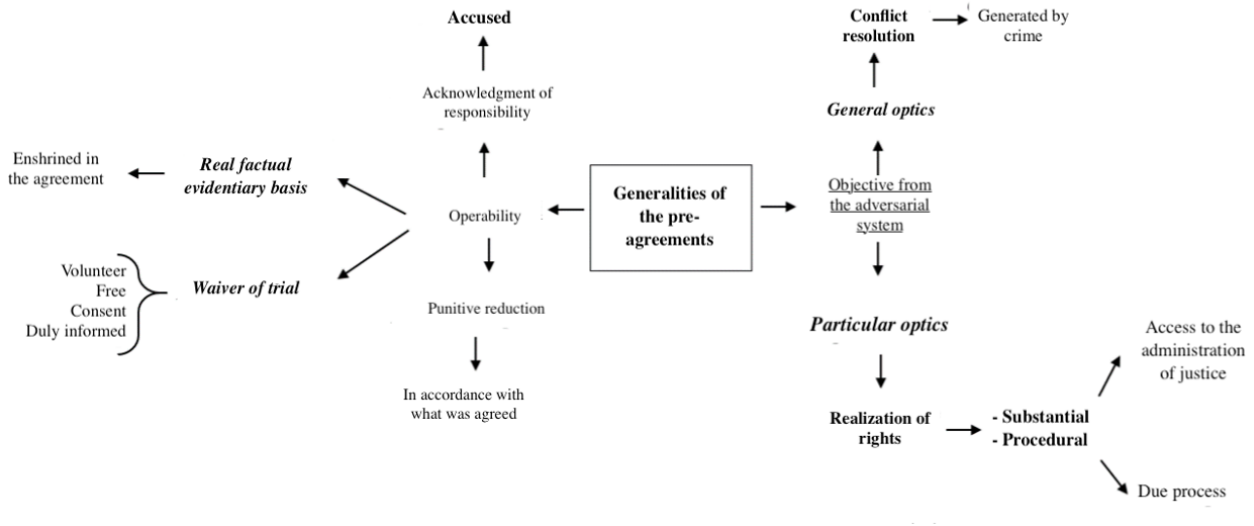
With this system, a humanized criminal justice was implemented, allowing for a shift from viewing the suspect as the object of the criminal action to recognizing them as a crucial element within the process—a procedural subject—and thereby prioritizing their constitutional rights and procedural guarantees, aiming to transform the process into a scene of equality promoting real and effective justice (Villanueva & Montenegro, 2019).

This gave rise to Law 906 of 2004, which established the Code of Criminal Procedure [CPP by its Spanish acronym]. This new regulation brought significant changes to Colombian criminal law, especially in light of the objectives of the new Social Rule of Law (ESD by its Spanish Acronym) that emerged after the 1991 Constituent Assembly. An example of this is the bi-dimensional approach to its purposes: i) a general perspective, aiming to resolve the conflict generated by the crime, and ii) a particular perspective, aiming to materialize the human rights and guarantees of the parties, such as the approach to the truth, the realization of justice, respect for the rights of the parties, and the reasonable and motivated flexibility of substantive or procedural norms (Urbano, 2018).

These objectives gained principal relevance with the entry into force of the CPP, which came to consider respect for human dignity as a fundamental pillar of the criminal process, establishing in its first article that all participants in the criminal process must be treated with due respect for human dignity (Ley 906, 2004, art. 1). Additionally, it stipulated that, under Article 4, judicial operators must strive for the effectiveness of equality of the parties in the process, granting special protection to those who, due to various conditions, find themselves in circumstances of manifest weakness, without this implying discriminatory treatment against any of the participants (Ley 906, 2004, art. 4).

Due to this human scope, the new criminal legislation sought to include various mechanisms and tools necessary to humanize the process and guarantee the rights of all participants, with the Juvenile Justice mechanisms standing out in particular. Furthermore, plea agreements and negotiations were established to ensure truth in the process, alleviate court congestion, and conclude cases early with the defendant's cooperation, providing certain benefits when they voluntarily assist in uncovering the truth.

Figure 1.
Generalities of the pre-agreements in Law 906 of 2004



Note: own creation

Plea agreements thus emerged as a form of justice capable of promptly terminating criminal proceedings—representing a significant advancement in reducing the judicial backlog. From the moment the defendant accepts charges due to a prior agreement with the Prosecutor's Office, the trial judge legitimates the agreement and the factual situation of the case becomes res judicata, thereby concluding the process early without the need for an oral trial and adjudication (Bohórquez & Magurno, 2020).

As a result of the CPP, plea agreements appeared, which, under Article 350, can be made with the formulation of the indictment and before the accusation is presented—with the caveat that they may even be presented after the accusation is filed—to allow the defense and the prosecution to reach an agreement on the terms of the indictment. This achieves: i) the elimination of a specific charge or an aggravating factor from the accusation, and ii) the classification of the conduct in a specific manner to achieve a reduction in the penalty (Ley 906, 2004, art. 350).

It is thus that within the Colombian criminal process, the possibility of entering into plea agreements with the Public Prosecutor's Office is established, aiming to: i) humanize criminal proceedings and penalties; ii) achieve justice swiftly and effectively; iii) resolve social conflicts generated by crime; iv) seek to fully repair the damages caused by crime; v) ensure that the defendant participates in the resolution of their case; and vi) increase public confidence in the administration of justice (Ley 906, 2004, art. 348).

Nevertheless, for these objectives to be met and to establish a genuine culture of plea agreements within the criminal process, these purposes must be reflected in the scope, terms, and application of the mechanism, as merely mentioning them in the content of the agreement is not sufficient to guarantee the fulfillment of that duty.

However, despite the recognition of plea agreements as a primary right enjoyed by defendants or accused individuals within a criminal process, their implementation has been surrounded by significant

controversy due to the limitations they have encountered on various occasions, particularly within the SRPA. Consequently, it is essential to highlight why the prohibition on entering into plea agreements under Law 1098 of 2006 can lead to a disregard of the rights of the participants, as well as the objectives of the penalties pursued by the new humanized accusatory criminal justice system.

1.3. Objectives of Penalties regarding the Protection of the Rights of the Accused

Initially, criminal law was governed by a strict, retributive, and punitive system, whose sole purpose was to punish those who broke the law, without considering the role of the victim. The focus of criminal law was not on the passive subject of the crime but solely on the perpetrator, to condemn the offender and thereby set an example for society through the imposed punishment.

However, the recognition of HR in international and national legal frameworks, along with new protective and guarantee-based systems with a primarily reparative focus, led Colombia to adopt a different path for its criminal justice system. The procedural dynamics and the objectives of the criminal process shifted towards ensuring and respecting truth and justice.

According to the C.C., the current criminal law aims to fulfill substantive legal norms, seeking not only to sanction the guilty and absolve the innocent but also to repair the damages caused by the punishable act. As a result, the criminal justice system has adopted a predominantly guarantee-based approach, striving to ensure the human rights of all participants, whether victims or defendants (Sentencia T-556, 2002).

In the words of Amado & Peña (2014), Colombia, being an SRL, primarily focuses on the individual, which implies the realization of human dignity to concretize all rights within the legal framework. This means that the Rule of Law, or legality, should take a secondary role. Thus, it is understood that the objectives of the law revolve around satisfying the interests of the individual, as mere legality is insufficient to adequately protect the rights and freedoms of the participants. Hence, the discussion is not only about the sanctioning of the responsible party but also about crime prevention, fair retribution, and the resocialization of the accused.

Nevertheless, criminal law still heavily gives priority to legality in practice. Despite the existence of various specialized mechanisms aimed at guaranteeing and realizing the rights and freedoms of individuals, these mechanisms have not been adequately used by judicial officials, rendering them more theoretical than practical.

Therefore, it is crucial to remember that the criminal process seeks three specific objectives: i) to obtain a decision regarding the culpability of the defendant or accused, which involves the state's duty to ascertain whether the defendant is responsible for the alleged conduct and thereby establish the appropriate legal consequences; ii) to protect the fundamental rights of the defendant, as a means to limit the state's punitive power and ensure the human rights of all participants; and iii) to guarantee the rights of the victim, which pertains to recognizing the rights of those harmed by the typical conduct, ensuring the truth of what happened, and providing the respective reparations (Daza et al., 2020).

1.4. Jurisprudential Criteria Regarding the Constitutional Court's Position on Article 157

The C.C., through Judgment C-281 of 2023, examined the public action of unconstitutionality filed against Article 157 of the CIA, as the plaintiff considered it incompatible with the constitutional provisions outlined in Articles 29 and 44 of the Const.

According to the filed complaint, the prohibition of entering into plea agreements and negotiations between the defense and the prosecution within the framework of the SRPA contradicts the principle of preserving and protecting the prevailing and superior interest of the minor. This prohibition places minors at a disadvantage in terms of plea bargaining justice, as it prevents them from accessing the benefits provided by such agreements, which are permitted within the adult criminal justice system (Sentencia C-281, 2023).

Therefore, according to the complaint, this provision contradicts the best interests of the minor, as it prevents them from properly exercising their right to defense and, consequently, due process. It also prevents minors acting as defendants in a criminal responsibility process from resolving their cases without having to exhaust all procedural stages, thereby avoiding judicial wear and tear. Finally, this prohibition is considered to disregard RJ, which has become an integral and important part of criminal law, serving as an alternative and complementary means to ordinary justice (Sentencia C-281, 2023).

However, despite the aforementioned, when the C.C. analyzed the unconstitutionality of the norm, it ultimately decided that the article should be considered constitutional, as it does not violate constitutional provisions or the rights of CA. Therefore, the Court determines that Article 157 remains in effect.

According to the C.C.'s analysis, at first glance, it could be said that allowing juvenile offenders to plead guilty to the charges, as they have the necessary and sufficient capacity to do so, while not permitting it concerning charge acceptance—plea agreements—represents an evident inconsistency. Nevertheless, the C.C. points out that there are two specific situations to consider: i), according to Article 178, which regulates the Adolescent Criminal Responsibility System (SRPA), the judicial operator has the authority to modify the measures to be imposed on the minor, taking into account individual circumstances and the special needs of the defendant. This situation, for the Court, is contrary to the nature of plea agreements, as it considers that such flexibility is incompatible with the excessive rigidity inherent to this mechanism of penal justice, a rigidity that affects the paramount best interest of the minor; and ii) regardless of the type of plea agreement, the parties negotiating the sanction to be imposed would be the minor and the prosecution. In such a case, once approved by the judge, the judge cannot deviate from what was agreed upon, unlike when the minor simply accepts responsibility (Sentencia C-281, 2023).

Under this understanding, the C.C. finds it incompatible to recognize the provision that empowers the judge to apply a certain level of flexibility in specific cases to ensure a pedagogical, specific, and differentiated penalty for the minor, with the one that allows plea agreements to achieve a penalty reduction. It is inferred that, since the plea agreement binds the judge to its terms—except in cases where there is an unjust violation of either party's rights—the judge cannot deviate from its content, meaning that in the event of considering a flexible penalty, the judge would no longer be able to do so due to the rigidity of the plea agreement.

For this reason, the constitutional tribunal concludes that the nature of the plea agreement, which allows for a consensus on the penalty or accusation, is incompatible with the discretionary powers of

judges concerning the SRPA. These powers aim to be a flexible burden that would enable the judge to effectively guarantee the best interest of the minor and, thereby, the need for their education, rehabilitation, and eventual social reintegration (Sentencia C-281, 2023).

1.5. Applicability of diffuse control of constitutionality

In simple terms, diffuse control of constitutionality is carried out by judges and public authorities of a State, who, when applying a law, can choose to exclude its application if they consider that there are violations of constitutional precepts in the specific case. This does not imply arbitrariness on the part of the judicial or administrative official in interpreting the laws, as it should be clarified that to deviate from their enforcement, judges and authorities must motivate and expressly state the reasons for not applying a certain law, based on constitutional interpretation.

According to the jurisprudential development of this concept, the application of this type of control is not limited to judges alone, but can also be applied by any public authority or even any individual who has among their functions the application and interpretation of legal norms. It can be carried out *ex officio* or at the request of a party, as long as it is evidenced that a provision of domestic law contradicts the content of the Constitution (Sentencia C-122, 2011).

However, refraining from applying a law using this control does not imply that it disappears from the domestic legal order—since this corresponds to concentrated control of constitutionality—but rather that it remains valid, as its non-application only occurs when, in a specific case, its application may affect the constitutional rights of individuals (Sentencia C-122, 2011). This control therefore arises as a way to guarantee the supremacy of the Const., which, according to Article 4 of the Const., must be recognized as the norm of norms, implying that in the event of a conflict between it and a law, administrative act, decree, or any other legal provision, the Const. must prevail.

For this reason, in the face of the specific case, given the lack of success in the control of constitutionality, it is necessary to consider the feasibility of applying diffuse control of constitutionality to that norm, in such a way that the criminal judge and even the prosecutor, before deciding on the accusation of the defendant, may allow the minor to enter into plea agreements under their constitutional fundamental rights.

As Caballero et al. (2023) considers, the judicial operator could refrain from complying with said provision alleging that it violates: i) constitutional Article 1, which establishes respect for human dignity as one of the pillars of the State; ii) Article 2, which states as a state purpose the guarantee of the effectiveness of human rights, duties, and principles recognized by the Const.; iii) Article 4, which establishes the supremacy of the Const. and, as a consequence, the possibility of not applying a norm considered incompatible with the Const.; iv) Article 13, which establishes that all persons have the right to equality—which is violated by the aforementioned provision given the imbalance of prerogatives between the adult criminal system and the SRPA —and; v) constitutional Article 29, which outlines the rights and principles enjoyed by the parties in judicial processes, such as the right to due process, the presumption of innocence, and the principle of favorability.

Now, for the judicial operator to not apply the norm that prohibits the celebration of plea agreements in the SRPA, it is necessary to reiterate that the exercise of this control requires a certain rigor

on the part of the operator, as it is not sufficient to simply not apply a norm because it is considered superficially contrary to the Const, but rather it is required that this be a serious, reasoned, and motivated exposition of why it is considered contrary to constitutional provisions.

This situation is extremely important, as the operator could fall into a gross and arbitrary interpretation and, thus, incur in prevarication. For this reason, in these cases, the duty to provide reasons becomes a fundamental tool available to the judicial operator, as the control cannot be carried out without sufficient reasons to fail to comply with the principle of legality that still prevails to this day.

1.6. Vicissitudes of Article 157 regarding human rights

According to the CCA, the purpose of this law is to establish procedural and substantive rules suitable for guaranteeing the comprehensive protection of children and adolescents in the exercise of their human rights and freedoms, recognized and protected by the Constitution, laws, and **international human rights instruments** (Ley 1098, 2006, art.2). For this reason, it is understandable that in matters of the SRPA, as with the criminal process for adults, the recognition of international provisions on human rights plays an elemental role in the application and interpretation of rules applicable in cases where the rights of children and adolescents are involved, especially regarding issues of criminal responsibility.

Given the express prohibition made by the law under study in its article 157 regarding the celebration of plea agreements with the prosecution in cases where the accused is a minor, the compatibility of this provision not only with constitutional provisions but also with norms, conventions, and treaties on human rights is called into question. Hence, it may be thought that there is a dichotomy between this provision and conventional norms, under the understanding that such prohibition not only affects constitutional rights and freedoms but also those of International Human Rights Law.

In line with the American Convention on Human Rights [hereinafter ACHR], minors have the right to have the State, family, and society take all pertinent and required protection measures that their status as minors requires (Convención Americana sobre Derechos Humanos, 1969, art.19). This implies providing mechanisms and prerogatives to minors in all social and legal spheres, by the supremacy of the best interests of the child, especially in the field of criminal law whose human rights are exposed to the possibility of being affected. Hence the importance of taking into account all relevant strategies to guarantee their rights in the criminal process, which includes procedural benefits that allow them to reduce their sentence and conclude a process prematurely without having to take it to its conclusion.

Likewise, the ACHR mentions in its article 8 related to judicial guarantees, that all persons have the right to be heard within a process, and these can enjoy the same guarantees in terms of equality before all persons -in turn, article 24 of the Convention states that all persons are equal before the law and, therefore, have the right to equal protection without discrimination-. This implies that children should be treated equally to adults, therefore, allowing the adult criminal system to retain and apply the justice system such as plea agreements and, instead, prohibiting it in the SRPA, is a clear example, not only of ignorance of equality within judicial processes, but also of discrimination between different penal systems.

Similarly, the International Covenant on Civil and Political Rights Convention on the Rights of the

Child [hereinafter ICCPR] recognizes that children have the right to be treated with respect for their inherent dignity, even if they have infringed the penal law or are accused of doing so. States must strengthen respect for the human rights of children; therefore, the importance of the reintegration of the child and their constructive participation in society should be taken into account in these scenarios (ICCPR, 1989, art. 40).

Children must be allowed all the necessary tools to guarantee their human rights within criminal processes, which includes the need to eliminate the prohibition on using plea bargaining mechanisms capable of allowing the child's participation in the process and, at the same time, granting them penal benefits to protect their human rights and ensure a faster integration into society.

Furthermore, the child has the right to have their case decided without delay by a competent, independent, and impartial judicial authority through a fair hearing according to legal provisions (ICCPR, 1989, art. 40, 1989, art. 40, para. 2, subparagraph. iii). This implies providing the SRPA with all the suitable means to resolve cases more expeditiously, not only compared to the ordinary procedural performance of the criminal process but also, due to the existence of tools that allow for the early termination of processes, in terms of equality not only with the adult criminal system but also equitably according to the needs and circumstances of the child.

Finally, the International Covenant on Civil and Political Rights [hereinafter ICCPR] states that in cases of criminal justice where the accused is a minor, full equality in access to minimum guarantees must be ensured. Likewise, according to the circumstances and particularities of the case, stimulation for their social reintegration should always be taken into account (ICCPR, 1966, art. 14, para. 4).

In this regard, article 157 not only presents vicissitudes regarding constitutional precepts but its validity may also entail affectations from the interpretation of international norms. Therefore, judges could even, in exercising a *diffuse control of conventionality,* not apply a provision of domestic law considering it contrary to the provisions of the Convention. However, this situation should be studied more thoroughly and under other inter-American instruments on which it is possible to exercise control -including the jurisprudence of the IACHR-.

1.7. Violation of constitutional precepts

According to Martínez & Ruíz (2020), it would be more logical and appropriate to apply plea agreements to achieve the justice goals pursued by Law 1098 of 2006, instead of an admission of guilt that could not provide the process with the same level of guarantees and ease in resolving a case. Therefore, they point out that the prohibition on using plea agreements in the SRPA is unacceptable, as reaching agreements between the defense and the prosecution is a crucial tool to fulfill the purposes established in the CPP, since if there is sufficient factual and evidentiary material to apply a plea agreement, then this will be the healthiest and most guaranteed way to resolve the process.

For this reason, attempting to apply a differential treatment within a process, in which certain benefits for the application of the rules in the case of the SRPA are limited, causes an affectation to the national and international duty of States to preserve and protect the superior and prevailing interest of children, as well as the rights to equality and due process (García & González, 2023).

Although the Constitutional Court has considered that allowing this benefit in the juvenile justice system constitutes a violation of the best interest of these children, since it is a strict figure that prevents the judge from applying their discretion to soften the sentence, this does not imply that in practice it occurs in this way. Due to this judicial power, the judge can depart from agreements when they consider that they violate the rights of the accused or that a more flexible and guaranteed solution for the minor could exist.

The common nature of the plea agreement in the criminal system implies that, once approved by the judge, its content must be mandatory when imposing the sanction. That is, if the defense and the prosecution agreed on how the accusation and sanction should be carried out, the judge cannot exceed the terms described there. However, based on the authority granted to judges by the CCA regarding the possibility of modifying the sanction according to the circumstances and needs of the minor, it could be inferred that, if the judge considers that there should be a lesser sanction for the minor, then they could, in a reasoned manner, depart from the agreement or allow for a modification of what was agreed upon.

In this regard, preventing the celebration of plea agreements and negotiations in the SRPA would seriously undermine the flexibility of the system to take into account the specific circumstances of each case and make decisions that are truly beneficial for minors, thus affecting the best interest of the minors.

In conformity with the CCA, the prevailing interest of children must be understood as the obligation of everyone to help guarantee the realization and satisfaction of their human rights, understanding that these have a prevalent character, in addition to being universal and interdependent (Ley 1098, 2006, art.8). Therefore, it is the duty of all social spheres - family, society, and the State - to ensure that suitable instruments are provided to guarantee the realization and protection of the human rights of this group, hence denying the benefit to figures such as the plea agreement in criminal proceedings not only violates the best interest that must prevail but also their rights to equality and due process.

The purpose of the plea agreement recognized by the Constitution and Legislative Act 03 of 2002 has been nothing more than to allow a multiplicity of options whose application can be given according to the specific case and in favor of the accused (Martínez & Ruiz, 2020). Therefore, it should not be ignored that the prosecuted child, in addition to being the subject of criminal action, is still a minor, hence, all measures taken at the procedural, legislative, or judicial level must be taken into account in conformity with their human rights and the prevalence granted to them by national and international law.

For this reason, Colombia must adapt its procedural regulations, in the sense of allowing the celebration of plea agreements between the defense and the prosecution in the case of the SRPA. Despite there being a special rule aimed at minors, this does not mean that it must be applied unrestrictedly, even when its content generates arbitrary and unfavorable decisions for the procedural guarantees of minors. Since the application of plea agreements and negotiations, having as their main characteristic the humanization of criminal processes, are an essential ally to allow the participation of minors in the resolution of their cases, following the national and international provisions that establish it (García & González, 2023).

1.8. Violation of the principle of best interest of the child

According to the CRC, the measures adopted by family welfare institutions, administrative and legislative authorities, as well as judicial operators involving the rights of children, must prioritize the best interests of the child (CRC, 1989, art.3). Likewise, clarified by the IACHR regarding the prevalence of

the best interests of the child, the Convention mentions that when it comes to children, it is necessary to take certain special care according to their needs and particularities, which, according to article 19, translates into *special protection measures.* Therefore, it is understood that it is the responsibility of States to consider the measures or care necessary to guarantee the integrity of children, taking into account their immaturity, weakness, or inexperience (IACHR, 2002).

In other words, the IACHR recognizes that the best interest must be understood as the search to ensure the satisfaction of the human rights of children, which not only obliges States to adopt relevant measures for their protection but also radiates hermeneutical effects regarding the interpretation of all rights of the CADH when it comes to their application concerning children. Therefore, the States Parties to the Convention must pay special attention to the needs and rights they have, starting primarily from their vulnerable condition (IACHR, Case of the Xákmok Kásek Indigenous Community vs. Paraguay, 2010).

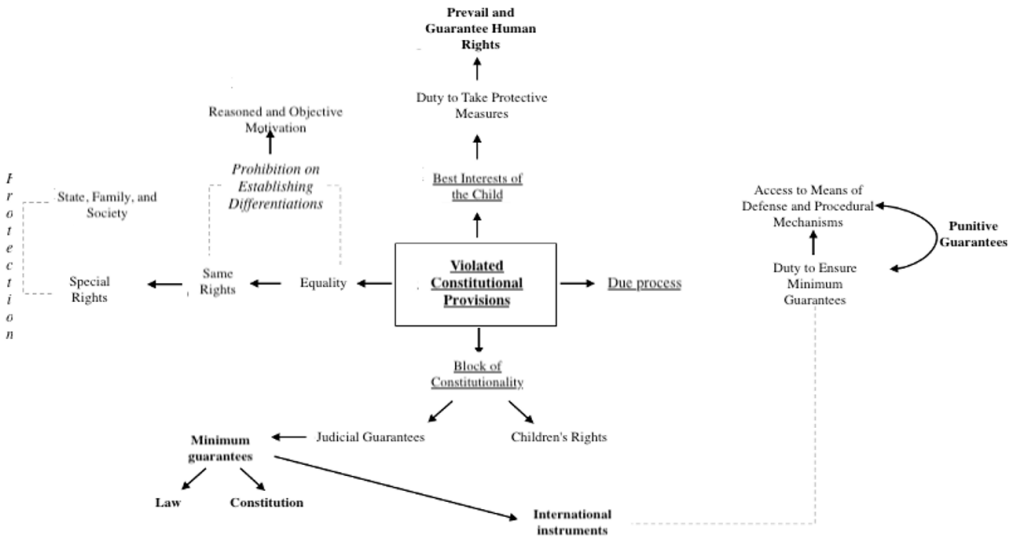
Thus, in cases involving the interests and freedoms of minors, States must adopt and guarantee the following guiding principles: i) non-discrimination; ii) the prevalence of the best interests; iii) the right to participate and be heard; and iv) the right to development, survival, and life. To guarantee these principles, State, social, or family decisions cannot **restrict or limit the exercise of any rights of children,** and instead, they must always take into account the best interest of the child, strictly adhering to the provisions regulating this matter.

In this regard, it is the responsibility of basic institutions that are tasked with the care and promotion of the human rights of children to take adequate measures to guarantee their rights, and they are also prevented from issuing arbitrary limitations that would hinder the full exercise of these rights. Therefore, there is an antinomian conflict between Article 157 of the CIA and national and international norms that seek to guarantee the best interests of children, because it deprives them of benefits that could be suitable and necessary to guarantee their rights in a criminal process when imposing a sanction.

According to the C.C., the best interest of the child requires judicial authorities deciding cases involving the human rights of minors to take the necessary care and protection measures to adapt the evidence obtained to decide what is most convenient for the child, as well as to have special diligence and care in the process, adopting decisions and actions that prevent affecting or endangering their rights. In this regard, judges must make decisions that can be adjusted to the parameters of proportionality and reasonableness, in compliance with the particularities of the case (Sentencia T-051, 2022).

For this reason, to guarantee this principle, judicial authorities must take into account the following parameters: i) contrast the unique, unrepeatable, and individual circumstances with the general criteria that promote the welfare of children; ii) judicial operators have a certain margin of discretion to decide which measures are pertinent to satisfy the best interests of the child; iii) decisions must be adjusted to the evidence collected in the process to decide what is most convenient for the child; iv) convenience must be analyzed from the relevant legal criteria recognized by the CC jurisprudence; v) judicial officials must act with due diligence and care; and vi) decisions must be adjusted to parameters of reasonableness and proportionality (Sentencia T-033, 2020).

Figure 2.
Principles and rights violated by the normative configuration of the article 157



Note: own creation

In this understanding, the prohibition of entering into plea agreements in the SRPA is incompatible with the best interest of the child, not only because it is considered so in compliance with the tenets of the Constitution, but also because it contradicts the jurisprudential and normative criteria contained in international instruments. Therefore, it is necessary to make a normative adaptation that allows the application of plea agreements when it is considered that they are the most viable way to guarantee the human rights of minors prosecuted in a criminal process and, thus, interpret in which cases this is applicable or in which its rigidity could endanger their rights and freedoms.

1.9. Right to Equality and Due Process

The prohibition imposed by the CIA regarding the celebration of plea agreements with the prosecution in the SRPA has led to questioning the protection of the legal system towards the best interests of the child. Denying legal prerogatives to minors, which could significantly benefit the reduction of their sentences, suggests a lack of protection by the legislature and the State towards the interests of children and adolescents, as it deprives them of reward justice mechanisms that are a fundamental element in the current accusatory system for the guarantees of the accused.

As previously indicated, according to Caballero et al. (2023), this provision, which prohibits benefits to minors as in Article 199 of Law 1098 of 2006, could cause significant impacts on Article 1 of the Constitution concerning respect for human dignity, Article 2 regarding the preservation of the rights and freedoms of individuals, Article 4 which enshrines constitutional supremacy, Article 13 concerning equality before the law, and Article 29 related to due process.

Furthermore, the prohibition on entering plea agreements also severely affects Article 93 of the Const, by which the constitutional block is enshrined. Under this norm, human rights treaties and agreements ratified and approved by the State take precedence in the domestic corpus iuris. Hence, those international norms that have become part of the legal system by this provision must be conside-

red when deciding cases involving HR, especially regarding minors, concerning those aiming to protect rights to equality and non-discrimination, due process, and judicial guarantees.

It is essential to understand that the differential treatment received by children, in contrast to adults, does not imply that it is per se discriminatory. On the contrary, the objective of this differentiated treatment is to enable the full exercise of children's human rights. For this reason, States cannot establish distinctions without a reasonable and objective motivation concerning the protection of minors, demonstrating instead a lack of intention to guarantee the exercise of the rights contained therein (Inter-American Court of Human Rights, Advisory Opinion 17/02, 2002).

That is, neither the legislature nor the judges can withhold or impede rights and mechanisms from children without sufficient and objective reasons justifying their decision. In such a case, it is not enough for the legislature to arbitrarily think that plea agreements violate the rights of minors in the criminal responsibility system. The reason for their prohibition must be justified not only by constitutional provisions but also by international norms.

This is based on Article 151 of the CIA, which establishes that adolescents have the right to all their minimum procedural guarantees, such as the presumption of innocence, the right to defense and contradiction, the right to remain silent, the right to counsel, etc., in addition to other minimum guarantees accepted and enshrined in the Const., the law, and **international treaties** (Ley 1098, 2006, Article 151). Therefore, it is necessary to consider not only the Constitution when determining if this provision violates the rights of minors but also all those conventions, norms, procedures, provisions, jurisprudence, and international treaties that protect human rights.

For this reason, in addition to the right to equality, minors must also be guaranteed the right to due process and judicial guarantees. This means that the State can introduce and adopt differentiated guarantees and components based on recognizing their participation in processes, even if their treatment differs from that of adults. The Inter-American Court of Human Rights clarifies that, although due process and all its guarantees apply to human beings in general, when it comes to minors, specific measures must be taken according to the minor's special needs and conditions to ensure access to justice that guarantees each of the rights and freedoms of minors in judicial processes (Inter-American Court of Human Rights, Case V.R.P., V.P.C. and others v. Nicaragua, 2018).

2. DISCUSSION

According to what has been previously mentioned, there is an extensive discussion regarding the prohibitions imposed by Law 1098 of 2006 concerning access to certain benefits in criminal proceedings where the accused is a minor. For instance, Article 199 not only eliminates the benefits of sentence substitution for the commission of specific crimes but also prevents access to a sentence reduction when plea agreements and negotiations with the prosecution are made for the same reasons, thereby preventing the accused from accessing all the appropriate procedural mechanisms to secure a more reduced and favorable sentence.

Regarding this, Caballero et al. (2023) state that Article 199 of this law is a mandatory legal rule, and

thus violates the prohibition of excess for being considered general and indiscriminate. Since it is a mandatory provision, it requires judges to apply it in all cases without exception, which may result in the fundamental rights of the accused being compromised, as not all cases are of such urgency and severity that warrant the unrestricted imposition of a measure that restricts freedom.

A similar situation occurs with Article 157 of the same law, which explicitly states that in the SRPA, plea agreements between the prosecution and the accused are not allowed. According to the legislator, the intent behind this provision is to ensure the best interest of the child, since the sanctions imposed on them have a pedagogical and restorative characteristic, making it easier for them to plead guilty and for the judge to decide openly on the sanction, rather than having them agree on it beforehand with the prosecution.

Although this situation, as discussed by Hernández (2021), may have full theoretical support, in practice and legal reality, its applicability is inconvenient, as it palpably affects the rights of the accused, such as the right to equality and due process recognized not only at the domestic level but also by international norms acknowledged by the body of Constitutional law.

Therefore, the author believes that this imposition severely affects the rights of minors, as it not only prohibits them from accessing these benefits of consensual justice but also leaves them with a reduced option such as pleading guilty, which is contrary to the goal of ensuring the best interest of the child, which involves providing a variety of options that help guarantee and protect the rights of minors (Hernández, 2021).

According to the C.C., allowing adolescents to reach a consensus on the penalty or sanction is incompatible with the primacy of the best interest, as it prevents the judge from using their discretionary powers to ensure the human rights of minors within the SRPA framework. These powers, in addition to preserving this principle, also aim to ensure a decision focused on resocialization, education, and social reintegration (Sentencia C-281, 2023).

However, the Court's refusal in the cited judgment to declare the provision under review unconstitutional was mainly because it was considered that the rights claimed by the plaintiff were not violated, but this did not imply denying the possibility of plea agreements in these cases. According to the Court, despite declaring the norm constitutional, it encouraged the legislator to consider the possibility of regulating the figure of plea agreements in line with the principles of the SRPA, to adapt a figure that can be applied, such as the plea agreement, with purposes and contours different from those contained in the adult criminal system (Sentencia C-281, 2023).

It is not unreasonable to consider the guarantee of consensual justice for minors, as even the C.C. has not seen it as an absurd idea. The current prohibition on plea agreements in the SRPA constitutes an infringement on the constitutional and conventional rights recognized for minors, and therefore, the legislators and judges must contemplate a solution to stop depriving minors of these guarantees.

3. CONCLUSIONS

A In summary, seeking to answer the core question, it is concluded that the legal configuration established in Article 157 of the CIA constitutes a violation of the human rights of children and adolescents,

not only concerning constitutional precepts but also with the conventional corpus recognized in the constitutional block.

According to the studies conducted, the Constitutional Court (C.C) has already ruled on the constitutionality of this article through Judgment C-281 of 2023. Although the Court deemed the article to be in line with the constitutional precepts argued, this did not fully negate the inappropriateness of this figure. While the Court noted that prohibiting this figure could allow judges greater opportunities to make decisions based on a focus on reinsertion, reintegration, and pedagogy, it also suggested that rethinking the nature of the plea agreement in the SRPA could provide greater access to guarantees of consensual justice.

In light of the above, the C.C. indicated that the rigidity of the plea agreement prevents judges from exercising their discretionary powers to mitigate the penalty or sanction in cases heard under the SRPA, which contradicts the guarantee of children's human rights. However, this does not preclude the possibility of adjusting the nature of this figure to ensure its practice within the juvenile responsibility system, in which case the feasibility of making the use of this figure more flexible should be studied, particularly with the judges' authority to mitigate the sanction according to the specific needs and special and individual circumstances of the accused minor.

The prohibition of plea agreements in the SRPA violates the principle of the best interests and paramountcy of the child recognized in both domestic and international legal orders. This principle compels States to adopt appropriate and special measures to guarantee the human rights of minors; hence, preventing them from accessing procedural benefits that could render a penalty more just and bearable contradicts this principle.

This normative configuration also results in a violation of the right to equality and non-discrimination, as it creates a differential treatment regarding the application of plea agreements. Although this is done with the duty to adopt special measures to guarantee the rights of children and adolescents, the lack of sufficient reasoned and objective argumentation leads to an inequality scenario between the adult and juvenile criminal responsibility systems concerning access to consensual justice guarantees. It also infringes upon due process and the procedural guarantees recognized by law, the Const., and international treaties, as it prevents minors from accessing mechanisms of protection and guarantees concerning the penalty to be imposed and the expeditious termination of proceedings.

For all these reasons, one could move beyond constitutional control and instead shift to conventional control in any of its forms. While diffuse control may be complex due to the burden it places on the judicial operator, who must justify the risk of incurring prevarication, it is currently the most suitable means to access this figure. However, despite being a topic to consider, the true solution is for Colombia to make a normative adjustment—as the C.C. invites—and reconsider the nature of the plea agreement so that it is used especially and uniquely within the SRPA.

Conflicts of interest

The authors have no conflicts of interest regarding the content of this article.

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