This summary contains the cover page, the synthesis and the extract of a decision of Mexico's Supreme Court of Justice. Changes were made to its original text to facilitate the reading of the extract. This document has informative purposes, and therefore it is not binding.

CHILD MARRIAGE: VIOLATION OF THE RIGHTS OF CHILDREN AND ADOLESCENTS (*MATRIMONIO INFANTIL: VULNERACIÓN A LOS DERECHOS DE LOS NIÑOS, NIÑAS Y ADOLESCENTES*)

CASE: *Acción de Inconstitucionalidad* 22/2016

REPORTING JUDGE: José Fernando Franco González Salas

DECISION ISSUED BY: Plenary of Mexico's Supreme Court of Justice

DATE OF DECISION: March 26, 2019

KEY WORDS: right of minors to the free development of personality, right to marriage, gender violence, rights of children and adolescents, best interest of the child, principle of progressivity of human rights, proportionality test, child marriage.

CITATION OF THE DECISION: Supreme Court of Justice of the Nation, *Acción de Inconstitucionalidad* 22/2016, Plenary, José Fernando Franco González Salas, J., decision of March 26, 2019, Mexico.

The full text of the decision can be consulted at the following link: https://www.scjn.gob.mx/derechos-humanos/sites/default/files/sentencias-emblematicas/sentencia/2020-12/AI%2022-2016_0.pdf

SUGGESTED CITATION FOR THIS DOCUMENT: Human Rights Office of Mexico's Supreme Court of Justice, *Extract of the Acción de Inconstitucionalidad 22/2016*, Mexico.

SUMMARY OF THE *ACCIÓN DE INCONSTITUCIONALIDAD* 22/2016

BACKGROUND: The Human Rights Commission of the State of Aguascalientes [Comisión de Derechos Humanos del Estado de Aguascalientes] (the CDHEA) filed an *acción de inconstitucionalidad* against the decrees of 309 and 310, issued by the Aguascalientes Congress. The purpose of those decrees was to reform and derogate various provisions of the Aguascalientes Civil Code [Código Civil de Aguascalientes] (CCA), so that minors could be granted waivers to marry. The CDHEA argued that the elimination of this possibility was contrary to articles 1, 4, 14 and 133 of the Federal Constitution; 16 of the Universal Declaration of Human Rights; 23 and 24 of the International Covenant on Civil and Political Rights; 17 and 19 of the American Convention on Human Rights (ACHR); 8.1 of the Convention on the Rights of the Child (CRC) and 2 of the Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages (Consent Convention), instruments protecting the rights to legal security, marriage, the protection of the family and childhood, the free development of personality and non-discrimination.

ISSUE PRESENTED TO THE COURT: To determine whether eliminating the possibility of granting waivers to minors under 18 so they can marry for serious and justifiable causes, in Aguascalientes, violates the human rights of children and adolescents.

HOLDING: The challenged reform was declared valid essentially for the following reasons. This Court concluded that the reform was not contrary to the Federal Constitution or to the international treaties that Mexico is party to. In particular, it was determined that the Consent Convention was not violated since it establishes that the State parties have the power to implement waivers, which does not constitute an obligation to implement them. Furthermore, it was considered that the reform constitutes a reasonable measure in relation the purpose sought, since the measure complies -eliminate the waivers- with a constitutional and conventional purpose -the protection of children and adolescents from a harmful practice- and this does not disproportionately affect other rights. Regarding the free development of personality, the

conclusion was reached that the reform, rather than violating this right, strengthens it, since before the reform it could not be considered that the minors who were able to marry exercised this freedom fully, because their will was substituted by the will of their parents and/or a judge. Furthermore, it was emphasized that the rights derived from filiation are not affected since they are recognized regardless of whether or not they are married. Finally, this Court determined that the rights and benefits accessed through marriage are not violated since the purpose of the reform was to protect the rights of minors that are considered broader than any other right derived from the marriage.

VOTE: The claim that the Aguascalientes Congress has violated article 2 of the Consent Convention by eliminating the waivers so minors could marry was dismissed by a majority of 9 votes of the judges Norma Lucía Piña Hernández, Yasmín Esquivel Mossa, Juan Luis González Alcántara Carrancá, José Fernando Franco González Salas, Luis María Aguilar Morales, Eduardo Medina Mora I. (reserved the right to a concurring opinion), Alfredo Gutiérrez Ortiz Mena, Javier Laynez Potisek, Arturo Zaldívar Lelo de Larrea. The judges Jorge Mario Pardo Rebolledo, and Alberto Pérez Dayán voted against.

The claim that the reform constitutes a constitutionally valid restriction was approved by a majority of 5 votes of the judges Norma Lucía Piña Hernandez, Alfredo Gutiérrez Ortiz Mena, José Fernando Franco González Salas, Javier Laynez Potisek, Arturo Zaldívar Lelo de Larrea. The judges Juan Luis González Alcántara Carrancá, Luis María Aguilar Morales, Jorge Mario Pardo Rebolledo, Eduardo Medina Mora I., and Alberto Pérez Dayán voted against.

It was determined that the reform does not violate the free development of personality of minors by a majority of 5 votes of the judges Norma Lucía Piña Hernandez, Alfredo Gutiérrez Ortiz Mena, José Fernando Franco González Salas, Jorge Mario Pardo Rebolledo, and Javier Laynez Potisek. The judges Juan Luis González Alcántara Carrancá, Luis María Aguilar Morales, Eduardo Medina Mora I., Alberto Pérez Dayán, and Arturo Zaldívar Lelo de Larrea voted against.

It was determined that the reform by the Aguascalientes Congress does not violate the principle of progressivity of human rights by a majority of 5 votes of the judges Norma Piña Hernández, Alfredo Gutiérrez Ortiz Mena, José Fernando Franco González Salas, Jorge Mario Pardo Rebolledo, and Javier Laynez Potisek. The judges Juan Luis González Alcántara Carrancá, Luis María Aguilar Morales, Eduardo Medina Mora I., Alberto Pérez Dayán, and Arturo Zaldívar Lelo de Larrea voted against.

It was determined that this reform does not violate the rights of children born out of wedlock, nor violates the rights they have access to through marriage by a unanimous 10 votes of the judges Norma Piña Hernández, Alfredo Gutiérrez Ortiz Mena, Juan Luis González Alcántara Carrancá, José Fernando Franco González Salas, Luis María Aguilar Morales, Jorge Mario Pardo Rebolledo, Eduardo Medina Mora I., Javier Laynez Potisek, Alberto Pérez Dayán and Arturo Zaldívar Lelo de Larrea.

The votes cast may be consulted at the following link:
http://www2.scjn.gob.mx/ConsultaTematica/PaginasPub/DetallePub.aspx?AsuntoID=196149

EXTRACT OF THE *ACCIÓN DE INCONSTITUCIONALIDAD* 22/2016

p. 1 Mexico City. The Plenary of Mexico's Supreme Court of Justice (this Court), in session of March 26, 2019, issues the following decision.

BACKGROUND

p.1-2 By brief received March 22, 2016, the President of the Human Rights Commission of the State of Aguascalientes [Comisión de Derechos Humanos del Estado de Aguascalientes] (CDHEA), filed an *acción de inconstitucionalidad* against the reform of article 145 of the Civil Code of Aguascalientes [Código Civil de Aguascalientes] (CCA) and consequently, the derogation of articles 85, 86, 87, 88, 90 section II, 95 sections II and IV, 146, 148, 149, 150, 151, 152, 153 section II, 169, 184, 465 section II, 473, 521, 647 section II, 660, 665 and 667, and the reforms of articles 28 section I, 90 section V, 92, 153 section I, 168, 179, 231, 287, 435, 457, 460, 464, 495, 663 and 775 (sic) section I, of the CCA, issued through Decree Number 309 issued by the LXII Legislature of the Congress of the State of Aguascalientes, and also as a consequence of the derogation of articles 138, 260, 261, 262, 263 and the reform of article 137 of the CCA issued through Decree number 310 issued by the LXII Legislature of the Congress of the State of Aguascalientes, both published in the Official Gazette of the State of Aguascalientes on February 22, 2016 in the first section.

p.7 The CDHEA specified as violated constitutional and conventional concepts articles 1, 4, 14 and 133 of the Federal Constitution; 16 of the Universal Declaration of Human Rights; 23 and 24 of the International Covenant on Civil and Political Rights; 17 and 19 of the American Convention on Human Rights and 2 of the Consent Convention.

p.7-8 By order of March 29, 2016, the President of this Court ordered the case file be formed and recorded. Judge José Fernando Franco González Salas was designated and he, through ruling of March 30, 2016, admitted the action.

STUDY OF THE MERITS

p.86-87 An analysis is done of the group of reforms made to the normative system related to the exceptional possibility that, until before February 22, 2016, youth over fourteen and under eighteen years of age had, in serious and justified cases, according to the judicial authority, to exercise the right to marry in the State of Aguascalientes, as well as all the provisions that the recognition or permission for marriage of minors might imply.

p.87 Furthermore, those violations must be analyzed taking into consideration the principles of best interest of the child and under a perspective of gender, emphasizing the impact suffered by girls (under eighteen years of age) who marry through the granting of waivers.

p.88-91 When deciding the *Acción de Inconstitucionalidad* 39/2015, this Court considered that the best interest of the child is an expression of the principle of personal autonomy and it has an important connection to the free development of personality. According to this principle, since the free individual choice of life plans and ideals of human excellence is valuable in itself, the State is prohibited from unduly interfering with that choice and their materialization, and must be limited to designing institutions that facilitate the individual pursuit of those life plans and the satisfaction of the ideals of virtue each person chooses, and to preventing the unjustified interference of other persons in pursuit thereof.

p.92 Notwithstanding that rights of minors are involved, their exercise, under certain conditions, may be restricted based on their conditions of immaturity. In effect, as a general rule, minors have not reached the conditions of sufficient maturity to rationally weigh their own interests, and therefore certain decisions they make, under those conditions, could have the effect of harming their future autonomy and their own interests. Thus, while the progressive participation of minors in all the decisions that affect them must be procured, under certain conditions it is justified to impose on them the exercise of certain rights, including against or without their consent; these types of measures are justified if and only if and to the extent that their purpose is, precisely, to preserve the autonomy of the minor.

p.93,95 This Court has established that the best interest is a guiding principle of all normative production, understood broadly and related to the rights of the minor, which includes not only

the interpretation and application of the law by the judges, but also all the measures undertaken by the lawmaker. When it involves legislative measures that affect rights of minors, the best interest of the child requires that judicial bodies engage in a much stricter scrutiny in relation to the constitutional legitimacy of the measure, since it involves the impact on a principle that compiles the fundamental rights of minors and, therefore, which can have a very important impact on their future autonomy. This means that every normative production directed towards minors that does not give priority to their protection or seek the most benefit will be contrary*, prima facie*, to the best interest of the child.

p.99 It is important to emphasize that child marriage in our country is more common in and mainly affects girls, and with greater emphasis on those that live in poverty and have a lower level of education, and are concentrated primarily in rural and indigenous communities.

In effect, according to General Recommendation number 31 of the Committee for the Elimination of Discrimination against Women, child marriage is often accompanied by early and frequent pregnancies and births that provoke maternal mortality and morbidity rates higher than average; in these types of marriages, in particular when the husband is considerably older than the wife, and in which the girls have a low level of education, the girls often have restricted decision-making power with respect to their own lives; in addition, child marriage leads to higher rates of school dropout, especially among girls, and to expulsion from school and a greater risk of domestic violence, in addition to limiting the enjoyment of the right to freedom of circulation.

Thus in this case it is considered necessary to take into consideration not only the best interest of the child, but also the vision of gender perspective, since only thereby can the consequences of child marriages –achieved through the granting of waivers to minors under eighteen years of age– be clearly seen with respect to girls (including adolescents).

I. Conventionality of the reform of the Civil Code of Aguascalientes

p.100 Human rights are not static; rather they are dynamic in that they develop based on changes in society and they try to satisfy, with the greatest scope possible, its needs.

p.101-102 In the case of the right to marry, article 2 of the Consent Convention established, on the one hand, that persons who have not reached the minimum age adopted by each State for marriage could not marry, and on the other hand that the States could establish exceptions to that rule when the competent authority, for justified causes and in the interest of the couple, waive the age requirement.

p.104 Since the issuance of that international instrument, it was recognized that the practice of child marriages should be restricted until its abolishment could be achieved; therefore, the authorization established in article 2 should not be understood as an obligation on the part of the States to establish that type of waiver, nor as a right in favor of minors to obtain them, but as a mere power granted to the States so that, based on the circumstances and realities of the period in which the cited agreement was signed, in certain cases, if they considered it necessary, they could provide for and regulate these types of waivers. In this regard, while the Mexican State has the power to recognize age waivers for marriage, this does not imply that these types of exceptions should necessarily be established.

p.104-105 Furthermore, the interpretation of the norms related to the waivers that permit child marriage must consider not only the terms of the Consent Convention, but also the terms of the CRC, the Convention on the Elimination of all forms of Discrimination against Women, and the Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women.

p.106-107 This makes it possible to corroborate that, while article 2 of the Consent Convention is still in force and therefore the possibility of States providing waivers such as the one in question still exists, such provision, interpreted systematically, leads to the conclusion that the international trend is to gradually eradicate child marriages. This interpretation is strengthened if it is taken into consideration that both the Committee on the Rights of the Child and the Committee for the Elimination of Discrimination against Women have recommended to various countries that they eliminate from their internal laws the possibility of granting waivers to minors under 18 to marry; and with respect to Mexico, they have

recommended that the age limit of 18 be effectively applied in all the States and that practice be respected throughout the country, which provoked a series of internal reforms.

p.109 Given this scenario, it cannot be asserted categorically that the state lawmaker violated article 2 of the Consent Convention, upon eliminating from the CCA all the norms related to the exceptional possibility that minors under eighteen years of age can marry, since the elimination of these types of waivers constitutes a legislative act that is a foothold in the framework of conventional powers the local lawmaker had, in accordance with the normative-conventional framework.

II. Reasonability of the measure in relation to the purpose pursued by the lawmaker

p. 110-111 This Court has applied a reasonability test as a methodological recourse that allows it to elucidate whether the lawmaker, in exercise of its configurative power, issued a reasonable law or made reasonable reforms. Regarding this case, the following questions must be raised: a. Does the measure adopted by the lawmaker comply with a constitutional, conventional or important purpose for the State?, b. If the response to the above question is affirmative, then it would have to be elucidated whether the legislative reform is related to the purpose pursued?

p.111-115 The legislative process that resulted in the reform and derogation of the provisions challenged here shows that the restriction established by the lawmaker meets a valid purpose from the constitutional point of view, consisting of protecting children and adolescents from a practice that has been considered harmful for that sector of society both in the national and international sphere; which, it must be said, also has constitutional and conventional support in the best interest of the child. This is so given that the following problems have been seen in a large number of marriages in which one or both parties are under eighteen years of age, and more so in the case of girls: it is hard for them to have access to education and information; they remain at the margin of social activities; they are considered adults legally, and therefore they are deprived of all the special protective measures they are entitled to; they must assume the obligations corresponding to marriage, also being more likely to acquire responsibilities resulting from paternity or maternity, as

applicable; serious harm to health is eventually generated as a result of carnal compliance and other practices that have been associated with marriage; economic autonomy is restricted; and the development of skills and independence is limited and employment opportunities reduced, which also harms the family and the community.

p.115 Regarding the second question, this Court considers that the legislative restriction is linked to the constitutional purpose sought, since as said, the objective of the reforms was precisely to protect minors, and especially girls, from the harmful and pernicious consequences that, given their special situation, they suffer when they submit or “agree to” marriage.

p.116 It should also be said that in our country, and specifically in the State of Aguascalientes, it has been shown that when attempting to legislate waivers for marriage, there is a risk that the lawmaker will issue regulations such as those in force until the reforms challenged here, where it was established that the waivers would be granted only for “serious and justified” causes and following the consent of the parents of the minor, making secondary the free consent of the couple.

Before the reforms challenged here, for minors under eighteen years of age to be able to marry, they had to have the consent of the father and the mother, if both were alive, or their substitute, and in the absence of one or the other, of the judge; which evidenced the intention of making the consent, preference and interests of the minors secondary, so that it could be substituted by that of their parents.

In this respect it must be said that the repercussions that girls and adolescents suffer in their development, health, education, independence and economic autonomy, among other aspects, as a result of child marriage, are not remedied nor cease to affect them by the fact of having obtained the consent of their parents.

p.116-117 On the contrary, such consent, which does not even involve the minors’ wishes, compounds the possibility of harm to their development and violates the right they have to be heard and taken into account in the matters of their interest, since by supplanting their consent they are restricted in their autonomy and in the rights to freedom they have as minors.

p.117-118 The fact that the waiver of marriage for minors under eighteen years of age is submitted to judicial control, which is to say to the authorization of a judge, with the prior consent of the parents of the minor, as was permitted, does not necessarily guarantee the security and wellbeing of the children and adolescents involved; on the contrary, it has generated situations that affect a large number of rights. In this regard, when the existence of "serious and justified causes" is established as a condition for granting the waiver, it is shown that the intention was not to protect the rights of the respective children or adolescents; on the contrary, it was intended to "resolve", through marriage with a girl or boy, a problem derived from "serious and justified causes", such as the pregnancy or the violation of some local "custom" or of the gender roles that still survive in some societies, overlooking the free will of the minor and the real purpose of marriage, which should not be a consequence of a serious cause, but on the contrary, must be the result of the free and informed consent of the parties.

p. 118 It does not go unnoticed that the percentage of mothers under nineteen increased from two thousand thirteen to two thousand fourteen; however, this cannot be considered sufficient reason to justify the existence of the waivers, since premature pregnancies are not "solved" marrying minor mothers, but rather by providing them with all the help and protection that the State, their parents, guardians or custodians are obligated to provide to all children and adolescents.

p. 118-119 Until 2017, they followed existing practices such as arrangements for economic, social and cultural reasons, to marry minors, boys and girls (more often in the case of the latter) with persons even much older than them; which evidences that these practices have not been eradicated and, therefore, it is justified that measures be taken to contribute to eliminating them, in protection of the interests of the youth. It also does not go unnoticed that there may be girls and adolescents with sufficient mental capacity and development to fully understand the consequences of marriage and that even, in exceptional circumstances, there may be persons who, notwithstanding having married before turning eighteen, do not suffer all the harmful consequences referred to. However, this Court notes that even in those cases, to a greater or lesser extent, the children and adolescents that marry are impacted in one or more

of the rights or aspects that involve their healthy development, or at least expose them to risk.

p.119-120 This justifies the measure adopted by the Lawmaker, which does not deprive or imply the absolute denial of the right to marriage, but only establishes a reasonable minimum age to access that right, based on all the implications that its exercise may have. In this regard, it should be considered that it is justified constitutionally and conventionally and is reasonable with respect to the end sought.

III. Protection of free development of personality of minors

p. 120 Contrary to the argument of the plaintiff, with the elimination of the concept of the waiver for marriage the free development of personality of minors is not restricted; on the contrary, it contributes to guaranteeing this right with greater security. This is so since the reform challenged safeguards the best interest of children and adolescents by impeding them from being submitted to customs such as child marriage, as well as social pressures that, because of the special situation of vulnerability of this sector of society, especially girls, because of their age, as well as their economic, social and cultural situation, only generate harmful consequences for them.

p.120-121 This Court notes that the presumed need to permit the existence of waivers is based on cases such as when girls or adolescents become pregnant, or when boys or adolescents impregnate their partner; in other words, cases in which due to circumstances unrelated to the free consent of the minors, they are obligated to get married, whether due to social, family or even their own internal pressures, that somehow justify the necessity that they be permitted to marry.

p.121 In these cases it is obvious that we cannot speak of the existence of free consent of minors to assume the commitments that marriage implies, and much less that there is a physical, mental and/or economic preparation to face the obligations derived from the marriage; which is even greater justification for avoiding that waivers be granted in relation to the minimum age for marrying in these situations.

p.121-122 In this regard, the establishing of a minimum age limit for exercising the right to marry, without the possibility of any waiver, does not definitively limit the right people have to marry, nor the freedom they have to decide to form a family, nor the right minors have to be heard; it only constitutes a temporary protection so that children and adolescents can enjoy, in that stage of their lives, the rights of childhood and adolescence, and have the opportunity to fully develop and prepare themselves so that, once majority age is reached, they can face the burdens imposed by marriage and at the same time enjoy its benefits.

p. 122 While the measure adopted does not have the scope of preventing two minors from living together as a couple, this does not constitute a valid or related reason for considering that the reform of the challenged provisions is unconstitutional, since the purpose was to protect children and adolescents from the harmful consequences of premature marriages, not regulate other types of relationships or social problems that involve minors.

It should be mentioned that the elimination of waivers could result in relieving those minors from social, family and even internal pressures, that in many cases are exercised against them; and thereby reduce the number of cases of premature unions. Therefore, this measure does not threaten the right to free development of personality; on the contrary, it strengthens it.

IV. Principle of progressivity

p.122-123 The limitation on the exercise of a human right is not necessarily synonymous with violation of the mentioned principle.

p.123 The evolution of the right to marriage in relation to children and adolescents has the essential purpose of increasing the degree of protection of various human rights, among which are the best interests of the minor and the right to free development of the personality of minors. In addition, the elimination of the waivers generates a reasonable balance between the fundamental rights at play, without overly affecting the efficacy of the right to marriage that originally had been considered accessible for children and adolescents.

p.126-127 If the essential purpose of the group of reforms challenged, and especially the elimination of the waivers, is to increase the degree of protection of rights and general protection of children

and adolescents, and the impact is only temporary, not definitive, it cannot be argued in this case that the principle of progressivity of human rights was infringed, given that there are sufficiently solid reasons for justifying the elimination of the waivers.

V. Possible impact on the rights of children born out of wedlock

p.127 The rights of minors to obtain food, to have a family life, to enjoy measures of protection by their family, to an identity, to obtain their own name, to nationality, to enjoy parental authority and care and custody, to inherit, among others, do not result, either directly or indirectly, from marriage, but simply from being a person.

p.130 To follow the arguments that minors born out of wedlock will be unprotected or lose the mentioned rights would lead to discriminating against those born out of wedlock, without any legally objective reasons for doing so.

p.131 All children, regardless of the circumstances or civil status of their parents (whether they are married or not), have the same rights, and their fathers, mothers or whoever has the parental authority, guardianship or custody, are obligated to provide them, within their possibilities and economic means, sufficient conditions of life for their healthy development.

VI. Impact on other rights that are accessed through marriage

p.131-132 This Court considers that while it is true that the right to marriage brings certain benefits and rights for the couple –such as tax benefits; solidarity benefits; benefits for cause of death of one of the spouses; property benefits; benefits in the subrogated making of medical decisions; and migratory benefits for foreign spouses; it is also true that premature marriage has repercussions so serious in the development of minors that the mere fact of being able to obtain the cited benefits is insufficient to justify permitting children to marry.

p.132-133 In this regard, the possibility of obtaining one or more of the cited benefits cannot be considered sufficient to justify and/or permit exposing a minor to the harmful and prejudicial consequences; especially since children and adolescents, for the simple fact of that status, have access to many more rights and social and family benefits than those the CDHEA refers to, since based on the best interest of the child, this sector of the population enjoys reinforced

protection by the State and those who are responsible for their care, which involves guaranteeing the full satisfaction of all their needs in order to achieve their optimum complete development.

DECISION

p.133 This *acción de inconstitucionalidad* is valid but unfounded.

The validity is recognized of the decrees 309 and 310, issued by the local Congress, reforming articles 28, section I; 90 section V; 92; 137; 145; 153, section I; 168; 179; 231; 287; 435; 457; 460; 464; 495; 663 and 755, section I, and derogating the numbers 85; 86; 87; 88; 90, section II; 95, sections II and IV; 138; 146; 148; 149; 150; 151; 152; 153, section II; 169; 184; 260; 261; 262; 263; 465, section II; 473; 521; 647, section II; 660; 665 and 667, all of the CCA, published in the Official Gazette of that state on February 22, 2016.